NORTH CAROLINA REPORTS

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SUPREME COURT OF NORTH CAROLINA

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OF
NORTH CAROLINA

Chief Justice
I. BEVERLY LAKE, JR.

Associate Justices

SARAH PARKER
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GEORGE L. WAINWRIGHT, JR.
ROBERT H. EDMUNDS, JR.
EDWARD THOMAS BRADY

Former Chief Justices

RHODA B. BILLINGS
JAMES G. EXUM, JR.
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Former Justices

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ROBERT R. BROWNING
J. PHIL CARLTON
FRANCIS I. PARKER
HARRY C. MARTIN
JOHN WEBB
WILLIS P. WHICHARD
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G. K. BUTTERFIELD, JR.

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*Appointed by Chief Justice I. Beverly Lake, Jr. effective 2 August 2004 to replace John Kennedy who retired.

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

DISTRICT	JUDGES	ADDRESS
	First Division	
1	J. RICHARD PARKER	Manteo
	JERRY R. TILLETT	Manteo
2	WILLIAM C. GRIFFIN, JR.	Williamston
3A	W. RUSSELL DUKE, JR.	Greenville
	CLIFTON W. EVERETT, JR.	Greenville
6A	ALMA L. HINTON	Halifax
6B	CY A. GRANT, SR.	Windsor
7A	QUENTIN T. SUMNER	Rocky Mount
7B	MILTON F. (TOBY) FITCH, JR.	Wilson
7BC	FRANK R. BROWN	Tarboro
	Second Division	
3B	BENJAMIN G. ALFORD	New Bern
	KENNETH F. CROW	New Bern
	JOHN E. NOBLES, JR.[1]	Greenville
4A	RUSSELL J. LANIER, JR.	Kenansville
4B	CHARLES H. HENRY	Jacksonville
5	ERNEST B. FULLWOOD	Wilmington
	W. ALLEN COBB, JR.	Wilmington
	JAY D. HOCKENBURY	Wilmington
8A	PAUL L. JONES	Kinston
8B	JERRY BRASWELL	Goldsboro
	Third Division	
9	ROBERT H. HOBGOOD	Louisburg
	HENRY W. HIGHT, JR.	Henderson
9A	W. OSMOND SMITH III	Yanceyville
10	DONALD W. STEPHENS	Raleigh
	NARLEY L. CASHWELL	Raleigh
	ABRAHAM P. JONES	Raleigh
	HOWARD E. MANNING, JR.	Raleigh
	MICHAEL R. MORGAN	Raleigh
	RIPLEY EAGLES RAND[2]	Raleigh
14	ORLANDO F. HUDSON, JR.	Durham
	A. LEON STANBACK, JR.	Durham
	RONALD L. STEPHENS	Durham
	KENNETH C. TITUS	Durham
15A	J. B. ALLEN, JR.	Burlington
	JAMES CLIFFORD SPENCER, JR.	Burlington
15B	WADE BARBER[3]	Chapel Hill
	CARL FOX[4]	Chapel Hill

DISTRICT	JUDGES	ADDRESS
	Fourth Division	
11A	FRANKLIN F. LANIER	Buies Creek
11B	KNOX V. JENKINS, JR.	Smithfield
12	E. LYNN JOHNSON	Fayetteville
	GREGORY A. WEEKS	Fayetteville
	JACK A. THOMPSON	Fayetteville
	JAMES F. AMMONS, JR.	Fayetteville
13	WILLIAM C. GORE, JR.	Whiteville
	OLA M. LEWIS	Southport
16A	B. CRAIG ELLIS	Laurinburg
16B	ROBERT F. FLOYD, JR.	Lumberton
	GARY L. LOCKLEAR	Pembroke
	Fifth Division	
17A	EDWIN GRAVES WILSON, JR.	Eden
	RICHARD W. STONE[5]	Wentworth
17B	A. MOSES MASSEY	Mt. Airy
	ANDY CROMER	King
18	CATHERINE C. EAGLES	Greensboro
	HENRY E. FRYE, JR.	Greensboro
	LINDSAY R. DAVIS, JR.	Greensboro
	JOHN O. CRAIG III	Greensboro
	R. STUART ALBRIGHT[6]	Greensboro
19B	VANCE BRADFORD LONG[7]	Asheboro
21	JUDSON D. DERAMUS, JR.	Winston-Salem
	WILLIAM Z. WOOD, JR.	Winston-Salem
	L. TODD BURKE	Winston-Salem
	RONALD E. SPIVEY	Winston-Salem
23	MICHAEL E. HELMS	North Wilkesboro
	Sixth Division	
19A	W. ERWIN SPAINHOUR	Concord
19C	LARRY G. FORD	Salisbury
19D	JAMES M. WEBB	Whispering Pines
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
	Seventh Division	
25A	BEVERLY T. BEAL	Lenoir
	ROBERT C. ERVIN	Lenoir
25B	TIMOTHY S. KINCAID	Hickory
	NATHANIEL J. POOVEY	Hickory
26	ROBERT P. JOHNSTON	Charlotte
	W. ROBERT BELL	Charlotte
	RICHARD D. BONER	Charlotte
	J. GENTRY CAUDILL	Charlotte

DISTRICT	JUDGES	ADDRESS
	DAVID S. CAYER	Charlotte
	YVONNE EVANS	Charlotte
	LINWOOD O. FOUST	Charlotte
27A	JESSE B. CALDWELL III	Gastonia
	TIMOTHY L. PATTI	Gastonia
27B	FORREST DONALD BRIDGES	Shelby
	JAMES W. MORGAN	Shelby
	Eighth Division	
24	JAMES L. BAKER, JR.	Marshall
	CHARLES PHILLIP GINN	Marshall
28	DENNIS JAY WINNER	Asheville
	RONALD K. PAYNE	Asheville
29	ZORO J. GUICE, JR.	Rutherfordton
	LAURA J. BRIDGES	Marion
30A	JAMES U. DOWNS	Franklin
30B	JANET MARLENE HYATT	Waynesville

SPECIAL JUDGES

KARL ADKINS[8]	Charlotte
STEVE A. BALOG	Burlington
ALBERT DIAZ	Charlotte
RICHARD L. DOUGHTON	Sparta
THOMAS D. HAIGWOOD	Greenville
JAMES E. HARDIN, JR.[9]	Durham
D. JACK HOOKS	Whiteville
JACK W. JENKINS	Morehead City
JOHN R. JOLLY, JR.[10]	Raleigh
RIPLEY E. RAND	Raleigh
JOHN W. SMITH	Wilmington
BEN F. TENNILLE	Greensboro
GARY TRAWICK, JR.	Burgaw

EMERGENCY JUDGES

W. DOUGLAS ALBRIGHT[11]	Greensboro
HENRY V. BARNETTE, JR.	Raleigh
ANTHONY M. BRANNON	Durham
STAFFORD G. BULLOCK	Raleigh
C. PRESTON CORNELIUS	Mooresville
HOWARD R. GREESON, JR.	High Point
CLARENCE H. HORTON, JR.	Kannapolis
DONALD M. JACOBS	Goldsboro
JOSEPH R. JOHN, SR.	Raleigh
CHARLES C. LAMM, JR.	Boone
JAMES E. LANNING	Charlotte
JOHN B. LEWIS, JR.	Farmville
JERRY CASH MARTIN	King

DISTRICT	JUDGES	ADDRESS
	PETER M. MCHUGH	Reidsville
	JAMES E. RAGAN III	Oriental
	DONALD L. SMITH	Raleigh
	RUSSELL G. WALKER, JR.	Asheboro

RETIRED/RECALLED JUDGES

GILES R. CLARK	Elizabethtown
JAMES C. DAVIS	Concord
MARVIN K. GRAY	Charlotte
ROBERT D. LEWIS	Asheville
F. FETZER MILLS	Wadesboro
HERBERT O. PHILLIPS, III	Morehead City
JULIUS ROUSSEAU, JR.	North Wilkesboro
THOMAS W. SEAY	Spencer

1. Appointed and sworn in 18 May 2005.
2. Appointed and sworn in 17 February 2006 to replace Evelyn W. Hill who resigned 31 January 2006.
3. Resigned 1 January 2006.
4. Appointed and sworn in 23 March 2005.
5. Appointed and sworn in 13 October 2005 to replace Melzer A. Morgan, Jr. who retired 31 March 2005.
6. Appointed and sworn in 1 January 2006 to replace W. Douglas Albright who retired 31 December 2005.
7. Appointed and sworn in 20 April 2005 to replace Russell G. Walker, Jr., who retired 31 December 2004.
8. Appointed and sworn in 28 January 2005.
9. Appointed and sworn in 27 April 2005.
10. Reappointed and sworn in 31 January 2006.
11. Appointed and sworn in 4 January 2006.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	GRAFTON G. BEAMAN (Chief)	Elizabeth City
	C. CHRISTOPHER BEAN	Edenton
	J. CARLTON COLE	Hertford
	EDGAR L. BARNES	Manteo
	AMBER MALARNEY	Wanchese
2	JAMES W. HARDISON (Chief)	Williamston
	SAMUEL G. GRIMES	Washington
	MICHAEL A. PAUL	Washington
	REGINA ROGERS PARKER	Washington
3A	DAVID A. LEECH (Chief)	Greenville
	PATRICIA GWYNETT HILBURN	Greenville
	JOSEPH A. BLICK, JR.	Greenville
	G. GALEN BRADDY	Greenville
	CHARLES M. VINCENT	Greenville
3B	JERRY F. WADDELL (Chief)	New Bern
	CHERYL LYNN SPENCER	New Bern
	PAUL M. QUINN	New Bern
	KAREN A. ALEXANDER	New Bern
	PETER MACK, JR.	New Bern
4	LEONARD W. THAGARD (Chief)	Clinton
	WAYNE G. KIMBLE, JR.	Jacksonville
	PAUL A. HARDISON	Jacksonville
	WILLIAM M. CAMERON III	Richlands
	LOUIS F. FOY, JR.	Pollocksville
	SARAH COWEN SEATON	Jacksonville
	CAROL A. JONES	Kenansville
	HENRY L. STEVENS IV	Kenansville
5	JOHN J. CARROLL III (Chief)	Wilmington
	J. H. CORPENING II (Interim Chief)[1]	Wilmington
	SHELLY S. HOLT	Wilmington
	REBECCA W. BLACKMORE	Wilmington
	JAMES H. FAISON III	Wilmington
	SANDRA J. CRINER	Wilmington
	PHYLLIS M. GORHAM[2]	Wilmington
	RICHARD RUSSELL DAVIS[3]	Wilmington
6A	HAROLD PAUL MCCOY, JR. (Chief)	Halifax
	W. TURNER STEPHENSON III	Halifax
6B	ALFRED W. KWASIKPUI (Chief)	Jackson
	THOMAS R. J. NEWBERN	Aulander
	WILLIAM ROBERT LEWIS II	Winton
7	WILLIAM CHARLES FARRIS (Chief)[4]	Wilson
	JOSEPH JOHN HARPER, JR.	Tarboro
	JOHN M. BRITT	Tarboro
	PELL C. COOPER	Nashville
	ROBERT A. EVANS	Rocky Mount
	WILLIAM G. STEWART	Wilson
	JOHN J. COVOLO[5]	Rocky Mount
8	JOSEPH E. SETZER, JR. (Chief)	Goldsboro
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	LONNIE W. CARRAWAY	Goldsboro
	R. LESLIE TURNER	Kinston
	ROSE VAUGHN WILLIAMS	Goldsboro

DISTRICT	JUDGES	ADDRESS
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	J. HENRY BANKS	Henderson
	JOHN W. DAVIS	Franklinton
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9A	MARK E. GALLOWAY (Chief)	Roxboro
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10	JOYCE A. HAMILTON (Chief)	Raleigh
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	ANNE B. SALISBURY	Raleigh
	ROBERT BLACKWELL RADER	Raleigh
	PAUL G. GESSNER	Raleigh
	KRISTIN H. RUTH	Raleigh
	CRAIG CROOM	Raleigh
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	MONICA M. BOUSMAN	Raleigh
	JANE POWELL GRAY	Raleigh
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	DONNA S. STROUD	Raleigh
	DEBRA ANN SMITH SASSER	Raleigh
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11	ALBERT A. CORBETT, JR. (Chief)	Smithfield
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	GEORGE R. MURPHY	Smithfield
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	JAMES B. ETHRIDGE	Lillington
	ROBERT W. BRYANT, JR.[9]	Lillington
12	A. ELIZABETH KEEVER (Chief)	Fayetteville
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	CHERI BEASLEY	Fayetteville
	DOUGALD CLARK, JR.	Fayetteville
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	THOMAS V. ALDRIDGE, JR.	Whiteville
	NANCY C. PHILLIPS	Elizabethtown
	DOUGLAS B. SASSER	Whiteville
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	RICHARD G. CHANEY	Durham
	CRAIG B. BROWN	Durham
	ANN E. MCKOWN	Durham
	MARCIA H. MOREY	Durham
	JAMES T. HILL	Durham
15A	JAMES K. ROBERSON (Chief)	Graham

DISTRICT	JUDGES	ADDRESS
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	G. WAYNE ABERNATHY	Graham
15B	JOSEPH M. BUCKNER (Chief)	Hillsborough
	ALONZO BROWN COLEMAN, JR.	Hillsborough
	CHARLES T. L. ANDERSON	Hillsborough
	M. PATRICIA DEVINE	Hillsborough
16A	WARREN L. PATE (Chief)	Raeford
	WILLIAM G. MCILWAIN	Wagram
	RICHARD T. BROWN	Laurinburg
16B	J. STANLEY CARMICAL (Chief)	Lumberton
	HERBERT L. RICHARDSON	Lumberton
	JOHN B. CARTER, JR.	Lumberton
	WILLIAM JEFFREY MOORE	Pembroke
	JAMES GREGORY BELL	Lumberton
17A	FREDRICK B. WILKINS, JR. (Chief)[10]	Wentworth
	STANLEY L. ALLEN[11]	Wentworth
17B	OTIS M. OLIVER (Chief)	Dobson
	CHARLES MITCHELL NEAVES, JR.	Elkin
	SPENCER GRAY KEY, JR.	Elkin
	MARK HAUSER BADGET	Elkin
18	JOSEPH E. TURNER (Chief)	Greensboro
	LAWRENCE MCSWAIN	Greensboro
	WENDY M. ENOCHS	Greensboro
	SUSAN ELIZABETH BRAY	Greensboro
	PATRICE A. HINNANT	Greensboro
	A. ROBINSON HASSELL	Greensboro
	H. THOMAS JARRELL, JR.	High Point
	SUSAN R. BURCH	Greensboro
	THERESA H. VINCENT	Greensboro
	WILLIAM K. HUNTER	Greensboro
	LINDA VALERIE LEE FALLS	Greensboro
	SHERRY FOWLER ALLOWAY	Greensboro
19A	WILLIAM G. HAMBY, JR. (Chief)	Concord
	DONNA G. HEDGEPETH JOHNSON	Concord
	MICHAEL KNOX	Concord
	MARTIN B. MCGEE	Concord
19B	WILLIAM M. NEELY (Chief)	Asheboro
	MICHAEL A. SABISTON	Troy
	JAYRENE RUSSELL MANESS	Carthage
	LEE W. GAVIN	Asheboro
	SCOTT C. ETHERIDGE	Asheboro
	JAMES P. HILL, JR.[12]	Asheboro
19C	CHARLES E. BROWN (Chief)	Salisbury
	WILLIAM C. KLUTTZ, JR.	Salisbury
	BETH SPENCER DIXON	Salisbury
	KEVIN G. EDDINGER	Salisbury
20	TANYA T. WALLACE (Chief)	Rockingham
	JOSEPH J. WILLIAMS	Monroe
	CHRISTOPHER W. BRAGG	Monroe
	KEVIN M. BRIDGES	Albemarle
	LISA D. THACKER	Wadesboro
	HUNT GWYN	Monroe
	SCOTT T. BREWER	Albemarle

DISTRICT	JUDGES	ADDRESS
21	WILLIAM B. REINGOLD (Chief)	Winston-Salem
	CHESTER C. DAVIS	Winston-Salem
	WILLIAM THOMAS GRAHAM, JR.	Winston-Salem
	VICTORIA LANE ROEMER	Winston-Salem
	LAURIE L. HUTCHINS	Winston-Salem
	LISA V. L. MENEFEE	Winston-Salem
	LAWRENCE J. FINE	Winston-Salem
	DENISE S. HARTSFIELD	Winston-Salem
	GEORGE BEDSWORTH	Winston-Salem
22	WAYNE L. MICHAEL (Chief)	Lexington
	JAMES M. HONEYCUTT	Lexington
	JIMMY L. MYERS	Mocksville
	L. DALE GRAHAM	Taylorsville
	JULIA SHUPING GULLETT	Mooresville
	THEODORE S. ROYSTER, JR.	Lexington
	APRIL C. WOOD	Statesville
	MARY F. COVINGTON	Mocksville
	H. THOMAS CHURCH[13]	Statesville
23	EDGAR B. GREGORY (Chief)	Wilkesboro
	DAVID V. BYRD	Wilkesboro
	JEANIE REAVIS HOUSTON	Wilkesboro
	MITCHELL L. MCLEAN	Wilkesboro
24	ALEXANDER LYERLY (Chief)	Banner Elk
	WILLIAM A. LEAVELL III	Bakersville
	KYLE D. AUSTIN	Pineola
	R. GREGORY HORNE	Mars Hill
25	ROBERT M. BRADY (Chief)	Lenoir
	GREGORY R. HAYES	Hickory
	L. SUZANNE OWSLEY	Hickory
	C. THOMAS EDWARDS	Morganton
	BUFORD A. CHERRY	Hickory
	SHERRIE WATSON ELLIOTT	Hickory
	JOHN R. MULL	Hickory
	AMY R. SIGMON	Hickory
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	H. WILLIAM CONSTANGY	Charlotte
	JANE V. HARPER	Charlotte
	PHILLIP F. HOWERTON, JR.	Charlotte
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	LISA C. BELL	Charlotte
	LOUIS A. TROSCH, JR.	Charlotte
	REGAN A. MILLER	Charlotte
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	NATHANIEL P. PROCTOR	Charlotte
	BECKY THORNE TIN	Charlotte
	BEN S. THALHEIMER	Charlotte
	HUGH B. CAMPBELL, JR.	Charlotte
	THOMAS MOORE, JR.	Charlotte
	N. TODD OWENS	Charlotte
	CHRISTY TOWNLEY MANN[14]	Gastonia
27A	DENNIS J. REDWING (Chief)	Gastonia
	JOYCE A. BROWN	Belmont

DISTRICT	JUDGES	ADDRESS
	ANGELA G. HOYLE	Gastonia
	JOHN K. GREENLEE	Gastonia
	JAMES A. JACKSON	Gastonia
	RALPH C. GINGLES, JR.	Gastonia
	THOMAS GREGORY TAYLOR	Belmont
27B	LARRY JAMES WILSON (Chief)	Shelby
	ANNA F. FOSTER	Shelby
	K. DEAN BLACK	Denver
	ALI B. PAKSOY, JR.[15]	Shelby
28	GARY S. CASH (Chief)	Asheville
	SHIRLEY H. BROWN	Asheville
	REBECCA B. KNIGHT	Asheville
	MARVIN P. POPE, JR.	Asheville
	PATRICIA A. KAUFMANN	Asheville
	SHARON TRACEY BARRETT[16]	Asheville
29A	C. RANDY POOL (Chief)	Marion
	ATHENA F. BROOKS	Cedar Mountain
	LAURA ANNE POWELL[17]	Rutherfordton
	J. THOMAS DAVIS[18]	Rutherfordton
29B	ROBERT S. CILLEY (Chief)	Pisgah Forest
	MARK E. POWELL	Hendersonville
	DAVID KENNEDY FOX	Hendersonville
30	DANNY E. DAVIS (Chief)	Waynesville
	STEVEN J. BRYANT	Bryson City
	RICHLYN D. HOLT	Waynesville
	BRADLEY B. LETTS	Sylva
	MONICA HAYES LESLIE	Waynesville

EMERGENCY JUDGES

PHILIP W. ALLEN	Reidsville
E. BURT AYCOCK, JR.	Greenville
SARAH P. BAILEY	Rocky Mount
RONALD E. BOGLE	Raleigh
DONALD L. BOONE	High Point
JAMES THOMAS BOWEN III	Lincolnton
SAMUEL CATHEY	Charlotte
WILLIAM A. CHRISTIAN	Sanford
J. PATRICK EXUM	Kinston
J. KEATON FONVIELLE	Shelby
THOMAS G. FOSTER, JR.	Greensboro
EARL J. FOWLER, JR.	Asheville
RODNEY R. GOODMAN	Kinston
LAWRENCE HAMMOND, JR.	Asheboro
ROBERT L. HARRELL[19]	Asheville
JAMES A. HARRILL, JR.	Winston-Salem
PATTIE S. HARRISON[20]	Roxboro
RESA HARRIS	Charlotte
ROBERT E. HODGES	Morganton
ROBERT W. JOHNSON	Statesville
WILLIAM G. JONES	Charlotte
LILLIAN B. JORDAN	Asheboro
ROBERT K. KEIGER	Winston-Salem
DAVID Q. LABARRE	Durham

DISTRICT	JUDGES	ADDRESS
	WILLIAM C. LAWTON	Raleigh
	C. JEROME LEONARD, JR.	Charlotte
	JAMES E. MARTIN	Ayden
	EDWARD H. MCCORMICK	Lillington
	DONALD W. OVERBY	Raleigh
	J. LARRY SENTER[21]	Raleigh
	MARGARET L. SHARPE	Winston-Salem
	RUSSELL SHERRILL III	Raleigh
	CATHERINE C. STEVENS	Gastonia
	J. KENT WASHBURN	Graham

RETIRED/RECALLED JUDGES

ABNER ALEXANDER	Winston-Salem
CLAUDE W. ALLEN, JR.	Oxford
JOYCE A. BROWN	Otto
DAPHENE L. CANTRELL	Charlotte
SOL G. CHERRY	Boone
WILLIAM A. CREECH	Raleigh
T. YATES DOBSON, JR.	Smithfield
SPENCER B. ENNIS	Graham
ROBERT T. GASH	Brevard
HARLEY B. GASTON, JR.	Gastonia
ROLAND H. HAYES	Gastonia
WALTER P. HENDERSON	Trenton
CHARLES A. HORN, SR.	Shelby
JACK E. KLASS	Lexington
EDMUND LOWE	High Point
J. BRUCE MORTON	Greensboro
STANLEY PEELE	Hillsborough
ELTON C. PRIDGEN	Smithfield
SAMUEL M. TATE	Morganton
JOHN L. WHITLEY[22]	Wilson

1. Appointed as interim Chief Judge effective 6 August 2005 while Chief Judge John J. Carroll III is serving active military duty.
2. Appointed and sworn in 2 March 2005.
3. Appointed and sworn in 7 March 2005 to replace John W. Smith who was appointed as Superior Court Special Judge.
4. Appointed Chief Judge effective 1 December 2005 to replace John L. Whitley who retired 30 November 2005.
5. Appointed and sworn in 15 February 2006.
6. Appointed and sworn in 20 January 2006 to replace Garey M. Ballance who resigned 14 October 2005.
7. Appointed and sworn in 7 March 2003 and elected and sworn in 6 December 2004.
8. Appointed and sworn in 24 February 2006 to replace Alice Stubbs who resigned 2 January 2006.
9. Appointed and sworn in 2 March 2006 to replace Marcia K. Stewart who resigned 31 December 2005.
10. Appointed Chief Judge 13 October 2005 to replace Richard W. Stone who was appointed to Superior Court.
11. Appointed and sworn in 28 December 2005.
12. Appointed and sworn in 1 September 2005 to replace Vance B. Long who was appointed to the Superior Court.
13. Appointed and sworn in 15 April 2005.
14. Appointed and sworn in 21 December 2005 to replace Elizabeth M. Kelligrew who resigned 14 October 2005.
15. Appointed and sworn in 20 July 2005 to replace Charles A. Horn, Sr. who retired 30 April 2005.
16. Appointed and sworn in 29 December 2005 to replace Peter L. Roda who retired 31 October 2005.
17. Appointed and sworn in 31 March 2005 to replace Laura J. Bridges who was elected to Superior Court.
18. Appointed and sworn in 5 December 2005.
19. Deceased 15 February 2003.
20. Resigned 4 October 2004.
21. Appointed and sworn in 29 October 2005.
22. Effective 1 December 2005.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General
ROY COOPER

Chief of Staff
KRISTI HYMAN

Deputy Chief of Staff
NELS ROSELAND

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

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PETITIONS TO REHEAR

GENERAL STATUTES CITED

CONSTITUTION OF NORTH CAROLINA CITED

RULES OF EVIDENCE CITED

RULES OF CIVIL PROCEDURE CITED

RULES OF APPELLATE PROCEDURE CITED

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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

WHITACRE PARTNERSHIP, AN ILLINOIS LIMITED PARTNERSHIP v. BIOSIGNIA, INC., CORPORATE SUCCESSOR TO BIOMAR INTERNATIONAL, INC. AND FUTURE HEALTH TECHNOLOGIES COMPANY; T. NELSON CAMPBELL; AND T. COLIN CAMPBELL

No. 617PA02

(Filed 6 February 2004)

1. Estoppel— judicial—recognized

The doctrine of judicial estoppel is part of the common law of North Carolina. This recognition of the doctrine is a natural step in the evolution of North Carolina jurisprudence, consistent with settled precedent, and not a point of departure.

2. Collateral Estoppel and Res Judicata— doctrines distinguished

Res judicata estops a party or its privy from bringing a subsequent action based on the same claim, while collateral estoppel precludes the subsequent adjudication of a previously determined issue, even if the subsequent action is based on a different claim.

3. Estoppel— judicial—distinguished from collateral estoppel

Judicial estoppel and collateral estoppel are closely related, but differ in that judicial estoppel protects the integrity of the judicial process rather than the parties. Judicial estoppel does not require that an issue have been litigated in the prior proceeding and does not require mutuality of the parties.

4. Estoppel— equitable—detrimental reliance

Under equitable estoppel, a party whose words or conduct induce another's detrimental reliance may be estopped to deny the truth of his earlier representations.

5. Estoppel— judicial—distinguished from equitable estoppel

Judicial estoppel and equitable estoppel may be distinguished in that judicial estoppel does not require mutuality of parties, does not require detrimental reliance, and protects the integrity of judicial proceedings rather than fairness between parties.

6. Estoppel— quasi—defined

Quasi-estoppel prohibits a party who has accepted a transaction and its benefits from taking a later, inconsistent position.

7. Estoppel— judicial—distinguished from quasi-estoppel

Judicial estoppel, unlike quasi-estoppel, does not require mutuality of parties. Neither requires detrimental reliance.

8. Damages and Remedies— election of—defined

Election of remedies compels that a choice must be made between remedies that proceed upon opposite and irreconcilable claims of right.

9. Estoppel— judicial—distinguished from election of remedies

Judicial estoppel and election of remedies overlap, but not perfectly. Judicial estoppel exists to protect the integrity of the judicial process rather than the redress of a single wrong, and it is based upon an inconsistency of position rather than a selection of means of enforcing a right.

10. Estoppel— judicial—theory without label

North Carolina courts have estopped parties from asserting inconsistent positions in the same or subsequent judicial proceedings without specifying the precise legal theory at work.

11. Estoppel— judicial—reasoning behind N.C. doctrine

The North Carolina Supreme Court follows the reasoning of the United States Supreme Court in *New Hampshire v. Maine*, 532 U.S. 742, in recognizing the rule of judicial estoppel.

12. Estoppel— judicial—factors—flexible

The doctrine of judicial estoppel is applied in North Carolina with a weighing of discretionary factors rather than a rote application of inflexible prerequisites. The only essential factor is that the party's subsequent position must be clearly inconsistent with its earlier position. Courts also look at whether the earlier court accepted the earlier position and whether the party asserting the inconsistent position would derive an unfair advantage. It may be appropriate to resist application of judicial estoppel when the prior position was based on inadvertence or mistake.

13. Estoppel— judicial—criminal proceedings—no application

Judicial estoppel should not ordinarily be applied against defendants or the government in a criminal proceeding.

14. Estoppel— judicial—inconsistent legal theories—no application

Judicial estoppel is limited to inconsistent factual assertions and should not be applied to prevent the assertion of inconsistent legal theories.

15. Estoppel— judicial—intent to deceive—not required—permitted as a factor

A court applying judicial estoppel is not required to specifically determine that the party to be estopped intended to mislead the court. While intent to deceive would weigh heavily in favor of invoking the doctrine, courts should carefully balance the equities and it is possible that a reasonable justification for a change in position may militate against its application.

16. Estoppel— judicial—privity of parties—not required

A rigid judicial estoppel rule requiring the party to be estopped to be identical with the party in the earlier proceeding would necessarily diminish the protective function of the doctrine of judicial estoppel. So long as the party to be judicially estopped is a privy of the party who made the prior inconsistent statement before a tribunal, due process is not offended.

17. Estoppel— judicial—privity of partners and partnership—not determined

Whether general partners were in privity with the partnership for judicial estoppel purposes was for the trial court to determine on remand where the Supreme Court could not discern whether the trial court had made the privity determination.

18. Estoppel— judicial—version of doctrine used by trial court—undeterminable—remand

A judicial estoppel case was remanded because the Supreme Court could not determine the formulation of judicial estoppel used by the trial court, and because the Supreme Court articulated a different version of the doctrine.

19. Estoppel— judicial—review—abuse of discretion standard

A trial court's application of judicial estoppel is reviewed for abuse of discretion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 153 N.C. App. 608, 574 S.E.2d 475 (2002), reversing and remanding an order for summary judgment entered 13 July 2001 by Judge David Q. LaBarre in Superior Court, Orange County. Heard in the Supreme Court 8 September 2003.

Farmer & Watlington, L.L.P., by R. Lee Farmer; and Bill T. Walker, pro hac vice, for plaintiff-appellee.

Parker, Poe, Adams & Bernstein, L.L.P., by Robert W. Spearman; and Steptoe & Johnson, L.L.P., by J. William Koegel, Jr., pro hac vice, for defendant-appellants.

MARTIN, Justice.

Plaintiff Whitacre Partnership, an Illinois limited partnership (plaintiff or Whitacre Partnership), seeks a declaration establishing its ownership of 1,000,000 shares of common stock in defendant Biosignia, Inc. (defendant or Biosignia). In the alternative, plaintiff seeks damages for the wrongful conversion of the stock. On 28 June 2001, defendants moved for summary judgment on the ground that the doctrine of judicial estoppel precluded plaintiff from asserting a factual position contrary to earlier representations made by plaintiff's general partners before a bankruptcy tribunal. The trial court concluded there was no genuine issue of material fact and granted defendant's motion for summary judgment. The Court of Appeals determined that judicial estoppel did not apply on the facts of the present case and remanded to the trial court. We modify and affirm.

I.

The facts of the instant case may be summarized as follows. Whitacre Partnership is an Illinois limited partnership. Its general

partners are Mark E. Whitacre and Ginger L. Whitacre (collectively "the Whitacres"), and its limited partners are the Whitacres' three children, Alexander R. Whitacre, William A. Whitacre, and Tanya M. Whitacre (collectively "the Whitacre children"). The Whitacres, as general partners, each hold a one percent interest in the family partnership. The Whitacre children collectively own a ninety-eight percent interest as limited partners. According to the deposition testimony of Mark E. Whitacre (Whitacre), "[t]he Whitacre Partnership was meant to be a trust fund" for the benefit of the Whitacre children. At all times since the partnership was formed, its sole asset has been whatever right or title it may have had in the stock at issue in the present case.

Biosignia is a closely held Delaware biotech corporation registered as a foreign corporation doing business in North Carolina. Its principal place of business is Orange County, North Carolina. Biosignia's corporate predecessors include Advocacy Communications, Inc. (Advocacy), also known by its trade name, Future Health Technologies, Inc. (FHT),[1] and Biomar International, Inc. (Biomar). Defendants T. Nelson Campbell and T. Colin Campbell (the Campbell defendants) are officers and directors of Biosignia and its predecessor companies.

On 1 October 1995, Whitacre was appointed director, President, and Chief Executive Officer of FHT, and Advocacy issued 250 shares of common stock to Whitacre in his name. The employment agreement reached between Whitacre and FHT on or prior to 1 October 1995 was memorialized in a letter dated 12 October 1995 and signed by both Whitacre and defendant T. Colin Campbell. The letter provided that Whitacre would receive, in addition to his salary, "20% of the outstanding shares of FHT by the date of FHT's first private placement," conditioned on Whitacre's contribution of $150,000 to FHT and his "not [having] voluntarily retired from [his] position of CEO or

1. The Court of Appeals concluded that a genuine issue of material fact existed as to whether FHT was a "predecessor corporation to Advocacy" and stated that "[n]othing in the corporate documents in the record reflects FHT's relationship, if any, to Advocacy, Biomar, Biosignia, or Clintech." We disagree. The record is unequivocal on the question of Biosignia's corporate lineage. Plaintiff's own complaint specifically alleges that Biosignia is a "corporate successor" to FHT. Biosignia, in its answer, admits this factual allegation. In an affidavit attached to its summary judgment motion, Biosignia outlined its corporate history, explaining that FHT was "also known as" Advocacy and that Advocacy and Biomar were corporate predecessors of Biosignia. At no point has plaintiff denied any of this history. Finally, Whitacre expressly acknowledged in his deposition testimony that "Future Health Technologies, Biomar, and Biosignia all are one."

otherwise terminated [his] continuing relationship to FHT" as of the date of the first private placement. By the terms of the letter, the shares would be issued to Whitacre "and/or any trust established on behalf of [his] children." On 1 January 1996, Whitacre transferred his 250 shares in Advocacy to Whitacre Partnership.

On 26 April 1996, Advocacy's Board of Directors and shareholders executed a "Unanimous Written Consent in Lieu of a Joint Special Meeting" (Unanimous Written Consent). Whitacre signed as a director and on behalf of Whitacre Partnership as a shareholder of Advocacy. The Campbell defendants signed as directors and individually as shareholders. The Unanimous Written Consent (1) ratified Advocacy's hiring of Whitacre as President and CEO of the corporation and the issuance of 250 shares of Advocacy stock to Whitacre; (2) acknowledged that the value of those shares as of 1 October 1995 was $150,000, and that they "represent[ed] 20% of total ownership" of Advocacy and were issued for reimbursable expenses incurred on behalf of the corporation and as compensation for Whitacre's services; and (3) authorized a share exchange for officers and counsel of the corporation at a rate of 8,000 "New Shares" for each "Old Share."

On 29 April 1996, Advocacy filed a certificate of amendment with the Delaware Secretary of State to change its corporate name to "Biomar, International, Inc." The following day Biomar issued stock certificate number 8 to Whitacre Partnership for 2,000,000 shares. No restrictive legend or other limiting indication appears on the face of the stock certificate. In a letter enclosing the certificate dated 25 September 1996, counsel for Biomar informed Whitacre that the new certificate "replace[d] the stock certificate of the original corporation, Advocacy Communications, Inc." and that the "original of those certificates were marked cancelled and placed in the corporate book of Advocacy Communications, Inc."[2]

In early 1997, a federal grand jury indicted Whitacre on forty-five counts of tax fraud, wire fraud, money laundering, conspiracy, and other charges in connection with Whitacre's embezzlement of several million dollars from his former employer, Archer-Daniels-Midland (ADM). Pursuant to a plea agreement, Whitacre pled guilty in October 1997 to thirty-seven counts of wire fraud, interstate transportation of stolen property, conspiracy to defraud, money laun-

2. We note that the issuance of 2,000,000 shares to "replace[]" the original 250 shares issued by Advocacy is consistent with the share exchange ratio of 8,000 to 1 referred to in the Unanimous Written Consent.

dering, and filing false tax returns in the United States District Court for the Central District of Illinois. On 4 March 1998, Whitacre was ordered to serve an active sentence of 108 months in a federal correctional facility and to pay over $11,000,000 in restitution. Shortly thereafter, in a separate federal proceeding, Whitacre was sentenced to an active term of thirty months for his participation in a price-fixing scheme during his tenure at ADM. In at least the former of the two criminal proceedings, as well as a bankruptcy proceeding initiated in September 1997, Whitacre was represented by Attorneys Bill T. Walker and Richard F. Kurth.

In January or February of 1997, upon Whitacre's request, Biomar reissued 250,000 of the 2,000,000 shares held by Whitacre Partnership in the names of Whitacre's attorneys, Walker and Kurth. Certificate number 18 was issued to Bill T. Walker and his spouse Susan P. Walker as joint tenants with a right of survivorship in the amount of 100,000 shares. Certificate number 19 was issued to Richard Kurth and his spouse Diane Kurth for 150,000 shares. Both certificates were issued sometime in 1997 and backdated to 3 September 1996, and both are listed in Biomar's stock ledger as "transfer[s]" from Whitacre Partnership. The record also reveals that a third stock certificate—certificate number 17, issued to Whitacre Partnership in the amount of 1,750,000 shares—was also dated 3 September 1996. The record is silent as to whether this certificate was also backdated, and the stock ledger entry describes certificate number 17 as a new issue for "shares retained" after a transfer of 250,000 shares. Taken together, certificates 17, 18, and 19 are consistent with T. Nelson Campbell and Whitacre's contentions that Whitacre Partnership transferred 250,000 of its 2,000,000 shares in Biosignia to compensate Whitacre's attorneys. Cumulatively, they reflect a 250,000-share reduction in Whitacre Partnership's holding in Biosignia, an amount equivalent to the number of shares transferred to Whitacre's attorneys as compensation for their services. All three certificates were signed by T. Nelson Campbell as Secretary/Treasurer of Biomar and by Mark E. Whitacre as President of Biomar.

On 11 February 1997, following his indictment by a federal grand jury and a brief period of hospitalization for what he characterized as "suicidal thoughts and erratic behavior," Whitacre resigned as President and Chief Executive Officer of Biomar. In connection with his resignation, Whitacre accepted a position as an officer of Clintech, a new subsidiary of Biomar. In his letter of resignation to T. Nelson Campbell, Whitacre referred to a "previous understanding"

between Campbell and Whitacre whereby Whitacre's resignation would "result in the forfeiture of 500,000 unearned shares of Biomar's common stock." The letter also expressed Whitacre's understanding "that a new certificate will be issued in the amount of 1,250,000 shares," and stated that a "copy of [Whitacre's original] stock certificate" was attached. The letter requested that the new certificate be "issued to [Whitacre's] children" in the name of W.F.P. Management Company (WFP), which Whitacre described as "the company holding my children's estate (via a Family Limited Partnership)." W.F.P. Management, it appears, is simply another name for the Whitacre Family Partnership.

In a letter accepting Whitacre's resignation dated 20 February 1997, T. Colin Campbell invited Whitacre's approval to an expression of the "agreement between [Whitacre] and Biomar concerning [Whitacre's] resignation." The letter stated that "the total number of shares owned by [Whitacre's] family partnership (prior to any share distributions to [Whitacre's] attorneys) is 1,250,000 shares" and requested Whitacre to "indicate [his] approval by signing below." Whitacre did sign the letter, just below Campbell's signature, under the caption "AGREED TO." The date "20 February 1997" also appears on the face of two separate stock certificates issued by Biomar to Whitacre Partnership. Stock certificate number 21, signed by T. Nelson Campbell as Secretary and T. Colin Campbell as President, was issued in the name of "W.F.P. Management Co., Inc." in the amount of 1,000,000 shares. The ledger entry for certificate number 21 indicates that its issuance coincided with the purported surrender of 750,000 shares from certificate number 17, which was originally issued in the amount of 1,750,000 shares in the name of Whitacre Partnership. It is listed as a transfer from "Whitaker [sic] Partnership." Stock certificate number 27, also signed by the Campbell defendants, was issued in the name of "Whitacre Partnership, a family partnership" in the amount of 1,000,000 shares. The stock ledger indicates that this was a transfer from WFP. In his 10 May 2001 deposition, Whitacre acknowledged that the date on certificate 21 was written in his own handwriting, and that the certificate "resulted from the discussions that [T. Nelson Campbell] and I had at my termination of employment with Biomar in February '97." Whitacre also acknowledged that he had signed a "contract" on 20 February 1997, under the terms of which he was to "forfeit 750,000 of those shares out of the 2,000,000."[3]

3. We note that there is a discrepancy in Whitacre's representations as to how many shares he agreed to forfeit. While his resignation letter refers to the forfeiture of

In early 1997, Whitacre and T. Nelson Campbell executed a Restricted Stock Agreement (RSA), the scope and effect of which is crucial to a determination of the ownership of the stock at issue here. Although the agreement is dated 23 October 1995, the parties agree that the RSA was backdated to be given retroactive effect, and was not actually executed on 23 October 1995. The record is unclear, however, as to the actual date of execution.

The RSA purports to be a fully integrated agreement between Whitacre and T. Nelson Campbell, as an officer of FHT "or any other future name" of FHT, concerning the 2,000,000 shares issued to Whitacre. By its terms, the agreement is binding on the "parties . . . themselves, their successors and their assigns." The RSA states that the company "hereby provides [Whitacre] 2,000,000 shares of its common stock . . . upon [Whitacre's] joining the company . . . and for his continued employment as an officer of the Company or one of its subsidiaries/or joint ventures subject to the options and restrictions as specified below." After expressing the parties' desire to "restrict[] the sale, disposition, or other transfer" of Whitacre's shares, it defines "Restricted Shares" to include "all outstanding Provided Shares" and defines "Provided Shares" as "the 2,000,000 Shares provided to [Whitacre] upon joining the Company . . . and for his continued employment as an officer of the Company or one of its subsidiaries/or joint ventures for a period of five years in order to be fully vested."

On 4 March 1997, thirteen days after Biomar had accepted Whitacre's resignation from FHT, T. Nelson Campbell and Whitacre executed an addendum to the 23 October 1995 RSA. In its entirety, the addendum provides as follows:

> On March 4, 1997 this agreement was reached among the Principals of Biomar International, Inc. that Dr. Mark E. Whitacre would become the CEO/President of a subsidiary of Biomar to establish a joint venture company that will provide biostatistical services to pharmaceutical companies and HMOs. In this position, 1.25 million shares of stock (including the shares used to pay attorneys) will be maintained in the Whitacre Limited Partnership. 50% of the 1.25 million shares will be

500,000 shares, Whitacre's deposition testimony corroborates Biosignia's stock ledger and reflects a forfeiture of 750,000 shares. The latter figure is more consistent with plaintiff's assertion that it owns 1,000,000, not 1,250,000, shares of Biosignia stock. Plaintiff's original 2,000,000 share holding, less 250,000 shares to pay Whitacre's attorneys and a forfeiture of 750,000 shares, leaves 1,000,000 shares remaining.

> vested in 1.5 years from the above date (3/4/97), and 100% within four years.

Defendants claim that this addendum to the vesting schedule originally laid out in the October 1995 RSA controls the disposition of this case.

On 11 September 1997, the Whitacres filed a voluntary petition for discharge of their debts under Chapter 7 of the United States Bankruptcy Code. In the course of their bankruptcy filings and statements before the bankruptcy trustee, the Whitacres made the following factual representations, which defendant maintains plaintiff is now estopped to contradict.

First, on the statutorily mandated "Schedule B" disclosure of their personal property, the Whitacres appeared to acknowledge that the stock in question was subject to the 23 October 1995 RSA. Under the heading "Stock and interest in incorporated and unincorporated businesses," the Whitacres listed "1.25 million shares of Biomar Stock maintained in Whitacre Limited Partnership conditioned on October 23, 1995 restricted stock agreement." There is no corresponding entry for this stock in the "value" column. In the subsequent paragraph, titled "Interest in partnerships or joint ventures," the Whitacres stated, "Debtors are general partners in Whitacre Limited Partnership with right to receive 1% each for administration. Management Company known as W.P. Management Company. Currently not funded." The market value of this asset is listed as "UNKNOWN."

Second, during the statutorily mandated "341 Meeting"[4] between debtors, creditors, and the bankruptcy trustee, Whitacre made additional statements, under oath, that appeared to acknowledge that the stock was subject to the 4 March 1997 Addendum to the RSA and that, given Whitacre's resignation from the company, it could never vest in interest. The relevant portion of the transcript from that meeting reads as follows:

> Mr. Yaeger [bankruptcy trustee]: You had a restricted stock agreement—and have provided me a copy of that—related to your employment as a chief executive officer where you were to receive 1.25 million shares of BioMar?

4. Under section 341 of the Bankruptcy Code, the bankruptcy trustee must convene and preside over a meeting between the debtor, his or her creditors, and any equity security holders. During this meeting, the trustee must orally examine the debtor concerning the effects of a discharge in bankruptcy, the debtor's ability to file a petition under a different chapter, and other matters. 11 U.S.C. § 341 (2000). The debtor must testify under oath at this examination. 11 U.S.C. § 343 (2000).

Dr. Whitacre: Right.

Mr. Yaeger: What's the status of that? Is that an asset your creditors can look to?

Dr. Whitacre: It's an asset I won't have because of a vesting schedule that is required—two and a half years to receive fifty percent of that, which would have been spring of next year, and five years to receive a hundred percent of that on a vesting schedule, so I will not receive that at this point.

Mr. Craven [counsel for Whitacre]: As a result of resigning 1, October.

Dr. Whitacre: Right. Resigning—the October 1 resignation.

Mr. Yaeger: Does that stock have any present value?

Dr. Whitacre: It does not.

. . . .

Mr. Yaeger: Are you owed anything by BioMar as a result of your employment or other contributions?

Dr. Whitacre: No, I received my last paycheck, and that's it.

Eventually, the Whitacres' bankruptcy petition was voluntarily dismissed.[5]

Whitacre resigned from Clintech in October 1997, permanently ending his professional relationship with Biosignia, its predecessors, and its subsidiaries. Handwritten entries in the "transfer" columns of the stock ledger dated 1 October 1997 describe certificates 18, 19, and 27—issued to Attorney Bill Walker, Attorney Richard Kurth, and Whitacre Partnership, respectively—as "VOID: Reverted to Biosignia, Inc."

On 8 May 2000, Whitacre Partnership instituted the instant civil action against Biosignia, alleging wrongful cancellation of and, in the alternative, conversion of, 1,000,000 shares of stock, and seeking damages in excess of twenty million dollars. On 28 June 2001, after the close of discovery, Biosignia filed a motion for summary judgment, arguing that Whitacre Partnership was judicially estopped

5. Under the Bankruptcy Code, a voluntary dismissal is not at the debtor's discretion. Upon motion by the debtor, the bankruptcy trustee may order dismissal only "for cause" following notice to creditors and a hearing. 11 U.S.C. § 707(a) (2000); 11 U.S.C. app., R. Bankr. P. 1017(a) (2000).

to deny the earlier assertions of its general partners before a bankruptcy tribunal that the stock was subject to the RSA and its Addendum and, by the terms of those agreements, could never vest in plaintiff. On 13 July 2001, the trial court granted defendants' motion for summary judgment. On 5 November 2002, the Court of Appeals reversed the trial court and remanded for adjudication on the merits. On 27 February 2003, this Court allowed discretionary review.

II.

[1] The dispositive issue before this Court is whether the doctrine of judicial estoppel bars Whitacre Partnership from asserting ownership of the stock in question based on the Whitacres' earlier representations before a bankruptcy tribunal. This case thus requires us to determine whether the doctrine of judicial estoppel is a part of the common law of North Carolina. We hold that it is, and hereby join at least thirty-five other states and the United States Supreme Court in recognizing the doctrine. *See New Hampshire v. Maine*, 532 U.S. 742, 749, 149 L. Ed. 2d 968, 977 (2001); *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251-52, 489 S.E.2d 472, 477 (1997); *Fay v. Fed. Nat'l Mortgage Ass'n*, 419 Mass. 782, 787-88, 647 N.E.2d 422, 426 (1995); Douglas W. Henkin, Comment, *Judicial Estoppel—Beating Shields into Swords and Back Again*, 139 U. Pa. L. Rev. 1711, 1756-60 (1991) (appendix listing thirty-three states as having accepted judicial estoppel).

Before we describe the contours of the doctrine, we pause to consider the evolution of judicial estoppel, tracing its roots in the legal landscape of this Court and the United States Supreme Court. As this discussion will show, our recognition of judicial estoppel is not a point of departure, but a natural step in the evolution of our jurisprudence, consistent with well-established legal principles and settled precedent. Although we have not previously considered whether judicial estoppel is a viable doctrine in North Carolina, we have long applied several of its companion estoppel doctrines and have consistently recognized the importance of protecting the integrity of the judicial process from the vagaries of litigants who may seek to manipulate it. *See, e.g.*, *Kannan v. Assad*, 182 N.C. 77, 78, 108 S.E. 383, 384 (1921) ("It is well understood that, except in proper instances, a party to a suit should not be allowed to change his position with respect to a material matter, during the course of litigation, nor should he be allowed to 'blow hot and cold in the same breath.' " (citations omitted)). In addition, although the Court of Appeals has

recognized the doctrine, it has struggled with its precise formulation. *See, e.g., Medicare Rentals, Inc. v. Advanced Servs.*, 119 N.C. App. 767, 769-71, 460 S.E.2d 361, 363-64 (1995) (defining judicial estoppel); *State v. Taylor*, 128 N.C. App. 394, 400, 496 S.E.2d 811, 815 (1998) (using the term "judicial estoppel" interchangeably with "equitable estoppel"), *disc. rev. denied*, 348 N.C. 76, 505 S.E.2d 884 (1998), *appeal dismissed in part*, 348 N.C. 76, 505 S.E.2d 884 (1998), *aff'd*, 349 N.C. 219, 504 S.E.2d 785 (1998). Our discussion of the historical roots of judicial estoppel seeks to avoid further confusion by carefully situating judicial estoppel in the broader analytical framework of estoppel and preclusion doctrines.

Broadly speaking, "estoppel is a bar which precludes a person from denying or asserting anything to the contrary of that which has, in contemplation of law, been established as the truth." 28 Am. Jur. 2d *Estoppel and Waiver* § 1 (2000). As we noted over 150 years ago, it is a principle which "lies at the foundation of all fair dealing between [persons], and without which, it would be impossible to administer law as a system." *Armfield v. Moore*, 44 N.C. 157, 161 (1852). "Estoppel" is not a single coherent doctrine, but a complex body of interrelated rules, including estoppel by record, estoppel by deed, collateral estoppel, equitable estoppel, promissory estoppel, and judicial estoppel. 28 Am. Jur. 2d *Estoppel and Waiver* § 2 (2000). Viewed in its proper theoretical context, judicial estoppel is best understood as a specific branch of a broader spectrum of estoppel and preclusion doctrines customarily used to promote the fairness and integrity of judicial proceedings.

While estoppel in its broadest sense predates the American colonial experience, *see Armfield*, 44 N.C. at 161, legal scholars generally agree that the concept of judicial estoppel was first applied in *Hamilton v. Zimmerman*, 37 Tenn. 39 (1857). *See* William Houston Brown, *Debtor's Counsel Beware: Use of the Doctrine of Judicial Estoppel in Nonbankruptcy Forums*, 75 Am. Bankr. L.J. 197, 200 (2001) [hereinafter Brown]. Describing the doctrine as a device to protect the sanctity of the oath, the Tennessee Supreme Court applied judicial estoppel on an absolute basis, holding that a factual assertion in a judicial proceeding estopped any contradictory factual assertion by the same party in a later proceeding, except where the original representation was made "inconsiderately or by mistake." *Hamilton*, 37 Tenn. at 48. Although the Tennessee courts continue to apply this narrow version of the doctrine, most modern authorities agree that the purpose of judicial estoppel is to " 'protect

the integrity of the judicial process,' " *New Hampshire*, 532 U.S. at 749, 149 L. Ed. 2d at 977 (quoting *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982)), not just the sanctity of the oath, and that "a hallmark of the doctrine is its flexible application." *Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 59, 81 L. Ed. 2d 42, 51 (1984) (discussing estoppel generally); *see also* 18 James Wm. Moore et al., Moore's Federal Practice § 134.31, at 134-71 (3d ed. 1997).

Scholars have noted that the doctrine "has its roots in nineteenth century American law," a period when preclusion law formed an "inconsistent patchwork," and the phrase "judicial estoppel" was often used to refer to the emerging doctrines of res judicata and collateral estoppel. Lawrence B. Solum, *Caution! Estoppel Ahead: Cleveland v. Policy Management Systems Corporation*, 32 Loy. L.A. L. Rev. 461, 475-76, 483 (1999) [hereinafter Solum]. By the early part of the twentieth century, the phrase was used loosely to refer to a variety of legal doctrines, including res judicata, collateral estoppel, equitable estoppel, quasi-estoppel, and election of remedies. *See, e.g.*, *Aycock v. O'Brien*, 28 F.2d 817, 819 (9th Cir. 1928) (using the phrase "judicial estoppel" to refer to collateral estoppel); *Van Norden v. Charles R. McCormick Lumber Co.*, 27 F.2d 881, 881 (9th Cir. 1928) (using "judicial estoppel" to refer to res judicata or claim preclusion); *Parkerson v. Borst*, 264 F. 761, 766-67 (5th Cir. 1920) (using "judicial estoppel" to refer to an election of remedies doctrine); *United States Fid. & Guar. Co. v. Porter*, 3 F.2d 57, 59 (D. Idaho 1924) (using "judicial estoppel" to refer to res judicata and collateral estoppel). Although these doctrines are technically distinguishable from judicial estoppel, they reflect a shared and longstanding judicial reluctance to permit the assertion of inconsistent positions before a judicial or administrative tribunal. *See* Eugene R. Anderson & Nadia V. Holober, *Preventing Inconsistencies in Litigation with a Spotlight on Insurance Coverage Litigation: The Doctrines of Judicial Estoppel, Equitable Estoppel, Quasi-Estoppel, Collateral Estoppel, "Mend the Hold," "Fraud on the Court" and Judicial and Evidentiary Admissions*, 4 Conn. Ins. L.J. 589, 591-97 (1998) [hereinafter Anderson & Holober]. It is therefore useful to consider judicial estoppel in connection with these related doctrines.

North Carolina courts have recognized many of the doctrinal precursors of judicial estoppel in an evolving jurisprudence that has consistently disfavored reversals of position on factual matters to suit the exigencies of the moment. Our recognition of judicial estoppel is a natural extension of these doctrines, one which paral-

lels the development of a line of cases from the United States Supreme Court that culminated in *New Hampshire v. Maine*, 532 U.S. 742, 149 L. Ed. 2d 968.

We begin our survey of the historical roots of judicial estoppel with a discussion of res judicata and collateral estoppel. North Carolina recognizes both doctrines as traditionally formulated, although we have followed the modern trend in abandoning the strict "mutuality of estoppel" requirement for defensive uses of collateral estoppel. *Thomas M. McInnis & Assocs. v. Hall*, 318 N.C. 421, 434, 349 S.E.2d 552, 560 (1986). Recognizing the close relationship between the two doctrines, we have sometimes referred to both res judicata and collateral estoppel as species of a broader category of "estoppel by judgment." *See, e.g., Bockweg v. Anderson*, 333 N.C. 486, 491-92, 428 S.E.2d 157, 161 (1993). More often, however, we have used the term "estoppel by judgment" to refer specifically to collateral estoppel. *See, e.g., State v. Summers*, 351 N.C. 620, 622, 528 S.E.2d 17, 20 (2000); *State v. Brooks*, 337 N.C. 132, 147, 446 S.E.2d 579, 589 (1994) (referring to "collateral estoppel by judgment").

[2] Under the doctrine of res judicata or "claim preclusion," a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies. *State ex rel. Tucker v. Frinzi*, 344 N.C. 411, 413, 474 S.E.2d 127, 128 (1996); *Hales v. North Carolina Ins. Guar. Ass'n*, 337 N.C. 329, 333, 445 S.E.2d 590, 594 (1994). The doctrine prevents the relitigation of "all matters . . . that were or should have been adjudicated in the prior action." *McInnis*, 318 N.C. at 428, 349 S.E.2d at 556. Under the companion doctrine of collateral estoppel, also known as "estoppel by judgment" or "issue preclusion," the determination of an issue in a prior judicial or administrative proceeding precludes the relitigation of that issue in a later action, provided the party against whom the estoppel is asserted enjoyed a full and fair opportunity to litigate that issue in the earlier proceeding. *McInnis*, 318 N.C. at 433-34, 349 S.E.2d at 560; *Bradley v. Hidden Valley Transp., Inc.*, 148 N.C. App. 163, 166, 557 S.E.2d 610, 613 (2001), *aff'd per curiam*, 355 N.C. 485, 562 S.E.2d 422 (2002). Whereas res judicata estops a party or its privy from bringing a subsequent action based on the "same claim" as that litigated in an earlier action, collateral estoppel precludes the subsequent adjudication of a previously determined issue, even if the subsequent action is based on an entirely different claim. *Hales*, 337 N.C. at 333, 445 S.E.2d at 594. The two doctrines are complementary in that each may apply in situations where the other would not and both

advance the twin policy goals of "protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation." *Bockweg*, 333 N.C. at 491, 428 S.E.2d at 161.

[3] Many authorities have noted that judicial estoppel is "closely related" to collateral estoppel, although "dissimilar in critical respects." *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982); *see also* 18 James Wm. Moore et al., Moore's Federal Practice § 134.30, at 134-69 (3d ed. 1997) (stating that the doctrines are "similar" but have "substantial differences"). The doctrines are similar not just in their preclusive effect, but also in their shared requirement of an identity of issues. Just as a party may not be collaterally estopped to argue an issue unless that same issue has been litigated and determined in a prior action, *Summers*, 351 N.C. at 623, 528 S.E.2d at 20, a party may not be judicially estopped to assert "inconsistent positions with respect to issues that are only superficially similar." 18 James Wm. Moore et al., Moore's Federal Practice § 134.30, at 134-69 (3d ed. 1997). The doctrines are distinguishable, on the other hand, in three principle respects. First, judicial estoppel seeks to protect the integrity of the judicial process itself, whereas collateral estoppel and res judicata seek to protect the rights and interests of the parties to an action. Rand G. Boyers, Comment, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw. U.L. Rev. 1244, 1248 (1986). Second, unlike collateral estoppel, judicial estoppel has no requirement that an issue have been actually litigated in a prior proceeding. *See Lowery v. Stovall*, 92 F.3d 219, 223 n.3 (4th Cir. 1996), *cert. denied*, 519 U.S. 1113, 136 L. Ed. 2d 841 (1997). Third, unlike collateral estoppel, judicial estoppel has no requirement of "mutuality" of the parties in either its offensive or defensive applications. *Id.* at 223 n.3; *see also Sartain v. Dixie Coal & Iron Co.*, 150 Tenn. 633, 650, 266 S.W. 313, 317 (1924) (judicial estoppel has no mutuality requirement because the doctrine "has nothing to do with other parties to the suit"). Because of these distinctions, judicial estoppel may apply in situations where collateral estoppel would not. *Zurich Ins. Co.*, 667 F.2d at 1166-67. Thus, although the doctrines may overlap depending on the facts of any given case, they maintain independent spheres of operation.

[4] North Carolina courts have also long recognized the doctrine of equitable estoppel, otherwise known as estoppel *in pais*. *In re Will of Covington*, 252 N.C. 546, 548, 114 S.E.2d 257, 259 (1960) (discussing the common law origins of equitable estoppel and summariz-

ing the "multitude of cases" where the doctrine has been applied in this state). Generally speaking, the doctrine applies

> "when any one, by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts exist, and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts."

State Highway Comm'n. v. Thornton, 271 N.C. 227, 240, 156 S.E.2d 248, 258 (1967) (quoting *Boddie v. Bond*, 154 N.C. 359, 365, 70 S.E. 824, 826 (1911)). In such a situation, the party whose words or conduct induced another's detrimental reliance may be estopped to deny the truth of his earlier representations in the interests of fairness to the other party. *Id.* In applying the doctrine, a court must consider the conduct of both parties to determine whether each has "conformed to strict standards of equity with regard to the matter at issue." *Creech v. Melnik*, 347 N.C. 520, 529, 495 S.E.2d 907, 913 (1998).

[5] Equitable estoppel is closely related to judicial estoppel. Indeed, some authorities have described the latter as a subset or variation of the former. *See, e.g., Eads Hide & Wool Co. v. Merrill*, 252 F.2d 80, 84 (10th Cir. 1958) (describing judicial estoppel as a "phase of equitable estoppel"). In some jurisdictions, the close connection between the doctrines has led to substantial confusion. *See, e.g., Guinness PLC v. Ward*, 955 F.2d 875, 899 (4th Cir. 1992) (noting that judicial estoppel "is frequently expressed in language sounding of estoppel in pais" but "operates independently of equitable estoppel" (quoting 1B Moore, Federal Practice, § 0.405[8], at 765-68 (2d ed. 1971))). Most authorities, however, have consistently distinguished the doctrines on the following grounds. First, equitable estoppel is designed to promote fairness between the parties, whereas judicial estoppel seeks primarily to protect the integrity of judicial proceedings. *See Edwards*, 690 F.2d at 598; *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 419 (3d Cir. 1988), *cert. denied*, 488 U.S. 967, 102 L. Ed. 2d 532 (1988). Second, as a natural consequence of this distinction in purpose, mutuality of the parties and detrimental reliance on the part of the party invoking estoppel—both elements of equitable estoppel—are not required for judicial estoppel. *See Patriot Cinemas v. Gen. Cinema Corp.*, 834 F.2d 208, 214 (1st Cir. 1987); *Konstantinidis v. Chen*, 626 F.2d 933, 937 (D.C. Cir. 1980).

[6] This Court has also recognized that branch of equitable estoppel known as "quasi-estoppel" or "estoppel by benefit." *Brooks v. Hackney*, 329 N.C. 166, 172 n.3, 173, 404 S.E.2d 854, 858 n.3, 859 (1991); *see also Shuford v. Asheville Oil Co.*, 243 N.C. 636, 646-47, 91 S.E.2d 903, 911 (1956); *Allen v. Allen*, 213 N.C. 264, 271, 195 S.E. 801, 805 (1938). Under a quasi-estoppel theory, a party who accepts a transaction or instrument and then accepts benefits under it may be estopped to take a later position inconsistent with the prior acceptance of that same transaction or instrument. *Brooks*, 329 N.C. at 173, 404 S.E.2d at 859; *see also Pure Oil Co. v. Baars*, 224 N.C. 612, 615, 31 S.E.2d 854, 856 (1944); 11A Strong's North Carolina Index 4th *Estoppel* § 13 (2001). The key distinction between quasi-estoppel and equitable estoppel is that the former may operate without detrimental reliance on the part of the party invoking the estoppel. *See Chance v. Henderson*, 134 N.C. App. 657, 665, 518 S.E.2d 780, 785 (1999); 11A Strong's North Carolina Index 4th *Estoppel* § 13 (2001); *cf.* Restatement (Second) of Conflict of Laws § 74 cmt. b (1971) (stating that under a "true" estoppel, "one party induces another to rely to his damage upon certain representations"). In comparison to equitable estoppel, quasi-estoppel is inherently flexible and cannot be reduced to any rigid formulation. *See Taylor v. Taylor*, 321 N.C. 244, 249 n.1, 362 S.E.2d 542, 546 n.1 (1987).

In light of these distinctions, quasi-estoppel may be more closely related to judicial estoppel than any other equitable doctrine. *See* Anderson & Holober, 4 Conn. Ins. L.J. at 666-69 (comparing judicial estoppel, equitable estoppel, and quasi-estoppel). Indeed, the doctrines are so similar in function and purpose that courts in other jurisdictions have occasionally used the terms interchangeably, and some commentators have classified judicial estoppel as a subset of quasi-estoppel. *See, e.g., Union Oil Co. v. State*, 804 P.2d 62, 66 n.7 (Alaska 1990) (discussing the doctrine of "judicial quasi-estoppel"); 28 Am. Jur. 2d *Estoppel and Waiver* § 74 (2000) ("Judicial estoppel is a subset of the doctrine of quasi-estoppel, which has its basis in election, waiver, acquiescence, or an acceptance of benefits.").

[7] Despite this close connection, however, there are substantial differences between the doctrines, with quasi-estoppel appearing to occupy an intermediary position between judicial estoppel and equitable estoppel. *See* Anderson & Holober, 4 Conn. Ins. L.J. at 666-69 (comparing judicial estoppel, equitable estoppel, and quasi-estoppel). As our Court of Appeals has noted, "the essential purpose of quasi-estoppel . . . is to prevent a party from benefitting by taking two

clearly inconsistent positions." *B & F Slosman v. Sonopress, Inc.*, 148 N.C. App. 81, 88, 557 S.E.2d 176, 181 (2001), *disc. rev. denied*, 355 N.C. 283, 560 S.E.2d 795 (2002). Like equitable estoppel, and unlike judicial estoppel, quasi-estoppel requires mutuality of parties; the doctrine may not be asserted by or against a "stranger" to the transaction that gave rise to the estoppel. *See In re Estate of Anderson*, 148 N.C. App. 501, 505, 559 S.E.2d 222, 225 (2002); 28 Am. Jur. 2d *Estoppel and Waiver* § 131 (2000). Like judicial estoppel, and unlike equitable estoppel, quasi-estoppel "does not require detrimental reliance *per se* by anyone." *Godley v. Cty. of Pitt*, 306 N.C. 357, 361, 293 S.E.2d 167, 170 (1982) (quoting 31 C.J.S. Estoppel § 107 (1964)). Instead, quasi-estoppel "is directly grounded . . . upon a party's acquiescence or acceptance of payment or benefits, by virtue of which that party is thereafter prevented from maintaining a position inconsistent with those acts." *Id.*; *see also Taylor v. Taylor*, 321 N.C. at 249, 362 S.E.2d at 546.

In sum, quasi-estoppel is similar to judicial estoppel in the absence of a requirement of detrimental reliance on the part of the party invoking the estoppel. Quasi-estoppel is similar to equitable estoppel in that it may not be invoked by a stranger to the transaction where the prior position was asserted. Thus, as with the other doctrines discussed above, quasi-estoppel overlaps judicial estoppel, but the doctrines are not redundant.

[8] Finally, North Carolina courts have long recognized and applied the election of remedies doctrine. *E.g.*, *Richardson v. Richardson*, 261 N.C. 521, 530, 135 S.E.2d 532, 539 (1964); *Adams v. Wilson*, 191 N.C. 392, 395-96, 131 S.E. 760, 762 (1926); *Field v. Eaton*, 16 N.C. 283, 286-87 (1829). "An election, in equity, is a choice which a party is compelled to make between the acceptance of a benefit under a written instrument, and the retention of some property already his own, which is attempted to be disposed of in favor of a third party by virtue of the same paper." *Elmore v. Byrd*, 180 N.C. 120, 122, 104 S.E. 162, 163 (1920). The doctrine "is founded on the principle that where by law or by contract there is a choice of two remedies which proceed upon opposite and irreconcilable claims of right, the one taken must exclude and bar the prosecution of the other." *Irvin v. Harris*, 182 N.C. 647, 653, 109 S.E. 867, 870 (1921). The doctrine precludes the assertion of inconsistent positions by confining a party to the position "which he first adopts." *In re Lloyd's Will*, 161 N.C. 557, 559-60, 77 S.E. 955, 956-57 (1913); *see also Sears v. Braswell*, 197 N.C. 515, 523, 149 S.E. 846, 850 (1929); *Chilton v. Groome*, 168 N.C. 639,

640-41, 84 S.E. 1038, 1039 (1915). Thus, a party asserting rights under a will, deed, or contract is " 'estopped, by claiming under it, to attack any of its provisions. . . . [O]ne who accepts the terms of [an instrument] must accept the same as a whole; one cannot accept part and reject the rest.' " *Braswell*, 197 N.C. at 523, 149 S.E. at 850 (quoting Bigelow on Estoppel, 6 ed., p. 744); *see also Field v. Eaton*, 16 N.C. at 286-87.

[9] Other authorities have recognized the close connection and essential differences between judicial estoppel and the doctrine of election. *See, e.g., United States v. Carrero*, 140 F.3d 327, 330 (1st Cir. 1998) (referring to judicial estoppel and election of remedies as "companion doctrines"); *Butcher v. Cessna Aircraft Co.*, 850 F.2d 247, 248 (5th Cir. 1988), *cert. denied*, 489 U.S. 1067, 103 L. Ed. 2d 812 (1989). Both are equitable doctrines that derive from the ancient common law doctrine of estoppel, and both work to preclude a party from asserting a position that is "inconsistent" with its position in a prior proceeding. *See Gens v. Resolution Trust Corp.*, 112 F.3d 569, 572 (1st Cir. 1997), *cert. denied, Gens v. Fed. Deposit Ins. Corp.*, 522 U.S. 931, 139 L. Ed. 2d 260 (1997). Neither doctrine requires the party invoking the estoppel to show that he has detrimentally relied on the prior position of the party to be estopped.[6] *See, e.g., Myers v. Ross*, 10 F. Supp. 409, 411 (S.D. Fla. 1935); *Barbe v. Villeneuve*, 505 So. 2d 1331, 1334 (Fla. 1987). Despite these similarities, however, the doctrines diverge in their purposes and scopes of application. Whereas the primary purpose of judicial estoppel is to " 'protect the integrity of the judicial process,' " *New Hampshire*, 532 U.S. at 749, 149 L. Ed. 2d at 977 (quoting *Edwards*, 690 F.2d at 598), the doctrine of election is used to "prevent double redress for a single wrong." *Smith v. Gulf Oil Corp.*, 239 N.C. 360, 368, 79 S.E.2d 880, 885 (1954). Furthermore, because it is "based upon an inconsistency of position rather than a selection of means of enforcing a right," *Eads*

6. We acknowledge that some of our older cases have articulated the doctrine of election in language sounding in estoppel *in pais*, where the facts would have supported application of either doctrine. *See, e.g., Holloman v. S. Ry. Co.*, 172 N.C. 372, 376, 90 S.E. 292, 293-94 (1916). Where equitable estoppel and the election of remedies doctrine overlap, such hybrid formulations are not problematic. We note, however, that where the facts have supported only the doctrine of election, and not equitable estoppel, our formulations of the election of remedies rule have not required the party invoking the estoppel to prove detrimental reliance on the position first asserted. *See, e.g., F. E. Lykes & Co. v. Grove*, 201 N.C. 254, 257, 159 S.E. 360, 362 (1931) ("[A]n election once made, with knowledge of the facts, between coexisting, remedial rights, which are inconsistent, is irrevocable and conclusive, irrespective of intent, and constitutes an absolute bar to any action, suit, or proceeding, based upon any remedial right inconsistent with that asserted by the election.")

Hide & Wool Co., 252 F.2d at 84, judicial estoppel has a much broader scope of application than the doctrine of election. *Cf. Zurich Ins. Co.*, 667 F.2d at 1166-67 (judicial estoppel may apply where election of remedies would not). Thus, even though the election of remedies rule substantially overlaps judicial estoppel, the doctrines are not coextensive.

[10] In addition to invoking the specific estoppel doctrines described above, we have on other occasions estopped parties to assert inconsistent positions in the same or subsequent judicial proceeding without specifying the precise legal theory at work. *See, e.g.*, *King v. Snyder*, 269 N.C. 148, 153, 152 S.E.2d 92, 96 (1967) ("A person appointed administrator and acting in that capacity in defending a wrongful death action is estopped from asserting therein the invalidity of his own asserted status as such administrator."); *Owens v. Voncannon*, 252 N.C. 461, 462, 114 S.E.2d 95, 96 (1960) (co-defendant who consistently denied the authority of an attorney to act as her attorney "for any purpose" could not rely on answer filed by that attorney "purportedly in behalf of all defendants"); *Kanupp v. Land*, 248 N.C. 203, 206-07, 102 S.E.2d 779, 782 (1958) (plaintiffs who had denied existence of road in prior action could not ask court in later action to locate boundaries of that road; "plaintiffs cannot ask for the location of something which they deny exists"); *Brown v. Vestal*, 231 N.C. 56, 58, 55 S.E.2d 797, 798 (1949) (defendants were not entitled to dismiss action based on an agreement the existence of which they denied in their pleadings and testimony); *Hill v. Dir.-Gen. of R.R.s*, 178 N.C. 607, 612, 101 S.E. 376, 379 (1919) (where Director General of Railroads had obtained stay of proceedings against defendant railroad on grounds that such suits must be conducted against him in his official capacity, "he should not be allowed to change his attitude and undertake a resistance as being in charge of the [railroad]"); *Fisher v. Toxoway Co.*, 165 N.C. 663, 670-71, 81 S.E. 925, 928 (1914) (where defendant's pleadings claimed title to property solely on the basis of a deed from plaintiff and that deed was later declared void, defendant could not change his position and assert a paramount title). In many of these cases, the rationale for the estoppel has come very close to that traditionally used to support judicial estoppel. *See, e.g.*, *Rand v. Gillette*, 199 N.C. 462, 463, 154 S.E. 746, 747 (1930) ("A party is not permitted to take a position in a subsequent judicial proceeding which conflicts with a position taken by him in a former judicial proceeding, where the latter position disadvantages his adversary. . . . [H]e cannot safely 'run with the hare and hunt with the hound.' ").

We do not propose that these cases applied the doctrine of judicial estoppel without denominating it as such. Rather, these cases evince the early stirrings of judicial estoppel in the case law of this state. The purpose and effect of the estoppels applied in these cases closely approximate the purpose and effect of judicial estoppel as it has been applied in most jurisdictions. We therefore draw upon these cases, in addition to all the others cited earlier, in recognizing that judicial estoppel is a part of the common law of this state.

[11] We now turn to a close examination of the precedents cited in *New Hampshire v. Maine* in support of the United States Supreme Court's articulation of the doctrine of judicial estoppel. Because we follow the Supreme Court's reasoning in that case in our opinion today, we explore in some detail the manner in which the United States Supreme Court derived the rule of judicial estoppel from its own precedents.

In *New Hampshire*, the United States Supreme Court implicitly recognized the doctrine's deep roots in American jurisprudence, beginning its discussion of the law of judicial estoppel with the following quotation from the 1895 case, *Davis v. Wakelee*: " 'Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken . . . .' " *New Hampshire*, 532 U.S. at 749, 149 L. Ed. 2d at 977 (quoting *Davis v. Wakelee*, 156 U.S. 680, 689, 39 L. Ed. 578, 584 (1895)). The Court stated that "[t]his rule, known as judicial estoppel, 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.' " *Id.* at 749, 149 L. Ed. 2d at 977 (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8, 147 L. Ed. 2d 164, 180 n.8 (2000)).

It is important to note that *Davis v. Wakelee*, cited in *New Hampshire v. Maine* as a statement of the law of judicial estoppel, never mentions the doctrine by name. Rather, *Davis v. Wakelee* states the rule as a "general principle" and cites two distinct lines of cases expounding the doctrine of equitable estoppel and the related doctrine of "mend the hold." 156 U.S. at 689-92, 39 L. Ed. at 584-85. We believe *Davis v. Wakelee* is properly understood as an early, prototypical formulation of judicial estoppel, one that implicitly derives a new species of estoppel from earlier strands of doctrine.

The first case cited in *Davis v. Wakelee* in support of the rule quoted above is *Philadelphia, Wilmington & Baltimore Co. R.R. v. Howard*, 54 U.S. 307, 14 L. Ed. 157 (1852). In *Howard*, the United States Supreme Court held that a corporation was estopped to deny that a written instrument was intended to be a deed of the corporation where the corporation had earlier treated the instrument as bearing the corporate seal, thereby inducing the plaintiff to bring an action upon the instrument, and had prevailed at the earlier trial by asserting that the paper was a valid deed. *Id.* at 336, 14 L. Ed. at 169-70. The Court stated that these facts brought the case "within the principle of common law, that when a party asserts what he knows is false, or does not know to be true, to another's loss, and to his own gain, he is guilty of a fraud; a fraud in fact, if he knows it to be false, a fraud in law, if he does not know it to be true." *Id.* at 336, 14 L. Ed. at 170. The Court concluded, "It does not carry the estoppel beyond what is strictly equitable, to hold that the representation which defeated one action on a point of form should sustain another on a like point." *Id.* at 337, 14 L. Ed. at 170. A fair reading of *Howard* suggests that the Court applied a species of equitable estoppel, albeit in a form close to judicial estoppel. The Court's emphasis on the plaintiff having been "induced" by defendant's representations to bring an action and on plaintiff's resulting "loss" calls to mind the doctrine of equitable estoppel, which requires a showing of detrimental reliance on the part of the party asserting the estoppel. *See Stoody Co. v. Mills Alloys, Inc.*, 67 F.2d 807, 811 (9th Cir. 1933) (noting that an essential aspect of *Howard* was the fact that the "defense in the first suit was of a character to induce the plaintiff to change his ground of action"), *cert. denied*, 292 U.S. 637, 78 L. Ed. 1489 (1934). The Court also appeared willing, however, to extend the concept of estoppel beyond the relatively strict parameters of estoppel *in pais*. *Howard*, 54 U.S. at 337, 14 L. Ed. at 170 ("It does not carry the estoppel beyond what is strictly equitable, to hold that the representation which defeated one action on a point of form should sustain another on a like point."). Moreover, the Court's reasoning that a party should not be permitted to commit a "fraud" upon the court, *id.*, evokes the central purpose of judicial estoppel: to protect the integrity of the judicial process. *New Hampshire*, 532 U.S. at 749, 149 L. Ed. 2d at 977. Thus, *Howard* appears to occupy a gray area between equitable and judicial estoppel, perhaps marking the emergence of the latter doctrine in the United States Supreme Court's jurisprudence. *Cf.* Solum, 32 Loy. L.A. L. Rev. at 461 n.2 (describing the rule stated in *Howard* as a "principle[] of law akin to judicial estoppel" that operates as both a rule of evidence and an equitable defense).

This interpretation is bolstered by the statement in *Davis v. Wakelee* that estoppel is appropriate "*especially* if [the shift in position] be to the prejudice of the party who has acquiesced in the position formerly taken by him." 156 U.S. at 689, 39 L. Ed. at 584 (emphasis added). As discussed above, equitable estoppel requires the party asserting the estoppel to have detrimentally relied on the earlier representations of the party to be estopped. *E.g.*, *Konstantinidis v. Chen*, 626 F.2d at 937. This is not, however, an element of judicial estoppel, which seeks to protect courts, not litigants, from manipulation. *Id.* By transmuting detrimental reliance from an essential element to a factor that makes an estoppel "especially" appropriate, the *Davis v. Wakelee* Court thus took a crucial analytical step in the evolution of the doctrine of judicial estoppel in the United States Supreme Court's jurisprudence. If *Howard* marked the emergence of a distinct offshoot from equitable estoppel, *Davis v. Wakelee* signaled its analytical independence.

The second case cited in *Davis v. Wakelee* in support of the rule articulated there is *Ry. Co. v. McCarthy*, 96 U.S. 258, 24 L. Ed. 693 (1877). In *McCarthy*, the defendant railroad proved at trial that it was incapable of transporting certain cattle on a Sunday solely because of a lack of cars. *Id.* at 265, 24 L. Ed. at 695. On appeal, the defendant alleged that it had failed to deliver the cattle because a Sunday shipment would have violated West Virginia's "Sunday Law." *Id.* at 267, 24 L. Ed. 2d at 696. The United States Supreme Court held that defendant was estopped to make this argument, reasoning that "[w]here a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to *mend his hold.*" *Id.* at 267-68, 24 L. Ed. at 696 (emphasis added) (citations omitted).

McCarthy is probably the earliest articulation of the "mend the hold" doctrine, an equitable doctrine that precludes the assertion of inconsistent litigation positions, usually concerning the meaning of a contract, within the context of a single lawsuit. Robert Sitkoff, Comment, *"Mend the Hold" and Erie: Why an Obscure Contracts Doctrine Should Control in Federal Diversity Cases*, 65 U. Chi. L. Rev. 1059, 1064 (1998); Anderson & Holober, 4 Conn. Ins. L.J. at 692-93. The metaphor that gives the doctrine its name derives from wrestling terminology and means "to get a better grip (hold) on your opponent." *Harbor Ins. Co. v. Cont'l Bank Corp.*, 922 F.2d 357, 362 (7th Cir. 1990). Traditionally, the "mend the hold" doctrine has been

applied only to inconsistent positions asserted within the same legal proceeding, although at least one modern case has extended the doctrine to inconsistent positions asserted in two different proceedings. Anderson & Holober, 4 Conn. Ins. L.J. at 692 n.413 (citing *Rottmund v. Cont'l Assurance Co.*, 813 F. Supp. 1104, 1111 (E.D. Pa. 1992)). It is a rule generally applied in actions on a contract, most often against insurance companies that attempt to shift positions in the course of litigation in an effort to deny policyholders' claims. *Id.* at 693-94. It is unsettled whether the doctrine is a procedural rule or a substantive rule of contract law. *See AM Int'l v. Graphic Mgmt. Assocs.*, 44 F.3d 572, 576 (7th Cir. 1995).

In *Harbor Ins. Co. v. Cont'l Bank Corp.*, the United States Court of Appeals for the Seventh Circuit closely compared the doctrines of judicial estoppel and "mend the hold" and concluded that the two are "cousin[s]." 922 F.2d at 364 (applying Illinois law). The similarities between the doctrines are clear. Both judicial estoppel and the "mend the hold" rule preclude the assertion of inconsistent factual positions before a tribunal, and both serve to preserve judicial resources, protect judicial integrity, and boost public confidence in the fairness of the judicial system. Anderson & Holober, 4 Conn. Ins. L.J. at 698. In light of these strong similarities, it is not surprising that the United States Supreme Court would cite *McCarthy*, a case applying the "mend the hold" rule, in support of its nascent formulation of judicial estoppel in *Davis v. Wakelee*. The latter doctrine is in many ways a natural extension of the former.

Returning to an analysis of our own precedents, we believe that the evolution of our estoppel jurisprudence parallels that of the United States Supreme Court. We have already explained that the doctrine of equitable estoppel has deep roots in the jurisprudence of this state. In addition, we have recognized and approved the "mend the hold" rule, as stated by the United States Supreme Court in *McCarthy*, on at least two occasions. *Standard Accident Ins. Co. v. Harrison-Wright Co.*, 207 N.C. 661, 672, 178 S.E. 235, 241 (1935) (under *McCarthy*, insurer not permitted to "mend his hold" by denying that policy covered insured, where insurer's prior representations to court had implicitly acknowledged the contrary); *McAden v. R.F. Craig*, 222 N.C. 497, 499, 24 S.E.2d. 1, 3-4 (1943) (quoting *McCarthy* and precluding defendant from reversing position asserted in his answer as an apparent "afterthought" suggested by "the pressure and exigencies of the case"). We have also applied a different formulation of the rule on at least five other occasions, stating in each case that

"[i]t is well understood that, except in proper instances, a party to a suit should not be allowed to change his position with respect to a material matter in the course of litigation." *Roberts v. Grogan*, 222 N.C. 30, 33, 21 S.E.2d 829, 830 (1942) (adding that a party "cannot swap horses in midstream"); *Kannan*, 182 N.C. at 78, 108 S.E. at 384 (adding that a party should not be permitted to "blow hot and cold in the same breath"); *Hylton v. Mount Airy*, 227 N.C. 622, 626, 44 S.E.2d 51, 54 (1947); *Clark v. Harris*, 187 N.C. 251, 251, 121 S.E. 453, 453 (1924); *Ingram v. Yadkin River Power Co.*, 181 N.C. 359, 360, 107 S.E. 209, 209 (1921).

As the United States Supreme Court did in *Wakelee*, we now draw upon our equitable estoppel and "mend the hold" precedents in support of our recognition of the doctrine of judicial estoppel. Although the doctrines are not equivalent, they substantially overlap and are motivated by a similar set of policy concerns. Anderson & Holober, 4 Conn. Ins. L.J. at 637. Together with the other doctrines previously discussed, these two doctrines demonstrate that the common law of this state has long recognized the importance of protecting the integrity of judicial proceedings, and the appropriateness, under certain circumstances, of invoking some form of estoppel to promote that salutary objective.

As the foregoing discussion demonstrates, North Carolina courts have previously recognized several doctrines that may be used, under prescribed circumstances, to preclude the assertion of inconsistent positions before a tribunal. Judicial estoppel, however, is distinguishable from its companion doctrines in two principle respects. First, judicial estoppel seeks to protect courts, not litigants, from individuals who would play "fast and loose" with the judicial system. *In re Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990), *superceded in part on other grounds by statute as stated in Meyer v. Rigdon*, 36 F.3d 1375 (7th Cir. 1994). This essential purpose necessarily limits the application of judicial estoppel relative to those doctrines that may be applied when litigants, not courts, are threatened by a party's shift in position. Second, because of its inherent flexibility as a discretionary equitable doctrine, judicial estoppel plays an important role as a gap-filler, providing courts with a means to protect the integrity of judicial proceedings where doctrines designed to protect litigants might not adequately serve that role. *See Guinness*, 955 F.2d at 898-900; *Zurich Ins. Co.*, 667 F.2d at 1166-67.

Of course, there is no need for judicial estoppel where previously established doctrines would preclude the assertion of an inconsistent

position. *See Estate of Burford v. Burford*, 935 P.2d 943, 948 (Colo. 1997). But where the technical requirements of mutuality, reliance, or prejudice might render these rules inapplicable, judicial estoppel provides courts with a discretionary tool "to protect the integrity of the courts and the judicial process." *Guinness*, 955 F.2d at 899. Thus, judicial estoppel dovetails with other well-established doctrines to substantially promote that ancient and overarching estoppel principle which "lies at the foundation of all fair dealing between [persons], and without which, it would be impossible to administer law as a system." *Armfield*, 44 N.C. at 161.

III.

[12] With this understanding of the nature and evolution of judicial estoppel in mind, we now turn to an analysis of the issues raised in this appeal. Because it is central to the disposition of this case, we begin with the question of how the doctrine of judicial estoppel should be applied in North Carolina. This is a question of first impression for this Court.

Plaintiff asks us to adopt the "narrow view" of judicial estoppel set forth in *Medicare Rentals, Inc. v. Advanced Servs.*, 119 N.C. App. 767, 460 S.E.2d 361 and applied in the instant case by the Court of Appeals. Plaintiff offers no reasons, however, why this definition of judicial estoppel is preferable to any other. We therefore structure our discussion of this issue around the Court of Appeals' analysis.

The Court of Appeals delineated two doctrinal variations of judicial estoppel in the instant proceeding. First, the Court of Appeals cited the Fourth Circuit case of *Sedlack v. Braswell Servs. Group* in formulating the "federal" test for judicial estoppel as follows: "This three-pronged test requires that (1) the estopped party assert a position that is factually inconsistent with that taken in prior litigation; (2) the estopped party intentionally misled the court to gain an unfair advantage; and (3) the prior position be accepted by the court." *Whitacre P'ship v. Biosignia, Inc.*, 153 N.C. App. 608, 614, 574 S.E.2d 475, 479-80 (2002) (citing *Sedlack v. Braswell Servs. Group*, 134 F.3d 219, 224 (4th Cir. 1998)). Second, the Court of Appeals set out and applied its own "narrower view" of judicial estoppel, a formulation announced in *Medicare Rentals*, 119 N.C. App. 767, 460 S.E.2d 361. *Whitacre P'ship*, 153 N.C. App. at 614, 574 S.E.2d at 480. In *Medicare Rentals*, the Court of Appeals stated that "[j]udicial estoppel is a harsh doctrine and requires at a minimum that the party against whom the doctrine is asserted intentionally

have changed its position in order to gain an advantage." 119 N.C. App. at 771, 460 S.E.2d at 364.

While it is true that *Sedlack* described the three prongs of its test as "three elements [that] must always be satisfied," *Sedlack*, 134 F.3d at 224, the United States Supreme Court in *New Hampshire v. Maine* emphasized that because the doctrine is a flexible, equitable one, " 'the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle.' " *New Hampshire*, 532 U.S. at 750, 149 L. Ed. 2d at 978 (quoting *Zurich Ins. Co.*, 667 F.2d at 1166). Thus, judicial estoppel requires discretionary weighing of the relevant "factors," not rote application of "inflexible prerequisites or an exhaustive formula." *Id.* at 751, 149 L. Ed. 2d at 978. Similarly, under the *Medicare Rentals* test, judicial estoppel requires "at a minimum" a showing of intentional misrepresentation to gain advantage. *Medicare Rentals*, 119 N.C. App. at 771, 460 S.E.2d at 364. Insofar as the *Medicare Rentals* test suggests that judicial estoppel can be reduced to "inflexible prerequisites or an exhaustive formula," *New Hampshire*, 532 U.S. at 751, 149 L. Ed. 2d at 978, it too fails to adequately recognize the inherently flexible nature of this discretionary equitable doctrine. Thus, we decline to accept either version of the doctrine articulated by the Court of Appeals, and instead follow the test set forth by the United States Supreme Court in *New Hampshire v. Maine.*

In *New Hampshire v. Maine*, the United States Supreme Court applied the doctrine of judicial estoppel to preclude the State of New Hampshire from asserting that a portion of the New Hampshire-Maine border ran along the Maine shore when it had successfully argued in a previous action that the same portion of that border was located at the center of the Piscataqua River's main navigable channel. 532 U.S. 742, 149 L. Ed. 2d 968. The Court stated that the purpose of the doctrine was " 'to protect the integrity of the judicial process,' " *id.* at 749, 149 L. Ed. 2d at 977 (quoting *Edwards*, 690 F.2d at 598), "by 'prohibiting parties from deliberately changing positions according to the exigencies of the moment,' " *id.* at 750, 149 L. Ed. 2d at 977 (quoting *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993), *cert. denied*, 511 U.S. 1042, 128 L. Ed. 2d 211 (1994)). Noting that " 'the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle,' " *id.* at 750, 149 L. Ed. 2d at 978 (quoting *Zurich Ins. Co.*, 667 F.2d at 1166), the Court enumerated three factors that "typically inform the decision whether to apply the doctrine in a par-

ticular case." *Id.* at 750, 149 L. Ed. 2d at 978. First, a party's subsequent position "must be 'clearly inconsistent' with its earlier position."[7] *Id.* (quoting *United States v. Hook*, 195 F.3d 299, 306 (7th Cir. 1999), *cert. denied*, 529 U.S. 1082, 146 L. Ed. 2d 510 (2000)). "Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding" might pose a "threat to judicial integrity" by leading to " 'inconsistent court determinations' " or " 'the perception that either the first or the second court was misled.' " *Id.* at 750-51, 149 L. Ed. 2d at 978 (quoting *United States v. C. I. T. Constr. Inc.*, 944 F.2d 253, 259 (5th Cir. 1991) (inconsistent court determinations) and *Edwards*, 690 F.2d at 599 (risk of either court being misled)). Third, courts consider "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 751, 149 L. Ed. 2d at 978.

Applying these factors, the United States Supreme Court concluded that they "tip[ped] the balance of equities in favor of barring New Hampshire's present complaint." *Id.* The Court emphasized, however, that these three factors "do not establish inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel" and that "[a]dditional considerations may inform the doctrine's application in specific factual contexts." *Id.*; *cf. Zurich Ins. Co.*, 667 F.2d at 1167 (stating that although judicial acceptance of a party's prior position is not an absolute prerequisite for judicial estoppel, it is "obviously more appropriate" in that situation). Finally, the Court noted that "judicial estoppel 'is an equitable doctrine invoked by a court at its discretion.' " *Id.* at 750, 149 L. Ed. 2d at 978 (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990), *cert.*

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7. We note that among the three "factors" enumerated by the United States Supreme Court, the "clearly inconsistent" requirement alone appears to be an essential element which "must be" present in order for judicial estoppel to be applicable. The Court's mandatory language ("must be") supports this conclusion, as do a multitude of federal opinions that have explored this aspect of the doctrine. *See, e.g., Wight v. BankAmerica Corp.*, 219 F.3d 79, 90 (2d Cir. 2000) (judicial estoppel requires a "true inconsistency" such that the two statements "cannot be reconciled"); *Faigin v. Kelly*, 184 F.3d 67, 82 (1st Cir. 1999) (a party's statements must be "directly inconsistent" to support application of judicial estoppel); *see also* 28 Am. Jur. 2d *Estoppel and Waiver* § 74 (2003) (judicial estoppel applies only where "the truth of one position must necessarily preclude the truth of the other position"); Brown, 75 Am. Bankr. L.J. at 223 (noting that all federal circuits are in agreement on this point). Common sense also dictates this interpretation of the first *New Hampshire* "factor." A doctrine that precludes the assertion of *inconsistent* positions obviously cannot preclude the assertion of *consistent* positions, whatever the equities of the situation might be.

denied, 501 U.S. 1260, 115 L. Ed. 2d 1078 (1991)). Thus, "it may be appropriate to resist application of judicial estoppel 'when a party's prior position was based on inadvertence or mistake.' " *Id.* at 753, 149 L. Ed. 2d at 979-80 (quoting *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 29 (4th Cir. 1995)).

We are persuaded that *New Hampshire v. Maine* best characterizes our common law doctrine of judicial estoppel and thus follow the United States Supreme Court's doctrinal formulation without hesitation. With a view toward providing appropriate guidance to our trial courts in their application of judicial estoppel, however, we pause to observe two important limitations on our holding.

[13] As an initial matter, our recognition of judicial estoppel is limited to civil proceedings. *New Hampshire v. Maine* did not squarely address the applicability of the doctrine in the criminal context, and we believe public policy considerations militate against extending the doctrine to that arena. We address this issue from two standpoints: (1) whether judicial estoppel may be applied against a criminal defendant and (2) whether judicial estoppel may be applied against the government in a criminal case.

First, judicial estoppel should not ordinarily be applied against a criminal defendant. Although the United States Supreme Court did cite three criminal cases in *New Hampshire v. Maine*, the Court took no express position on the applicability of judicial estoppel to criminal proceedings, and in none of these cases was judicial estoppel actually applied against a defendant. *See Russell*, 893 F.2d 1033; *Hook*, 195 F.3d 299; *McCaskey*, 9 F.3d 368. Moreover, in only one of those cases was judicial estoppel applied at all. *See Russell*, 893 F.2d 1033 (applying judicial estoppel against the state). It appears that "[t]he Supreme Court in *New Hampshire* was . . . simply collecting cases in which judicial estoppel was *discussed*, not where it was applied." *Beem v. McKune*, 317 F.3d 1175, 1193 (10th Cir. 2003) (McKay, J., dissenting), *cert. denied*, —— U.S. ——, 157 L. Ed. 2d 24 (2003). Hence, *New Hampshire* leaves unresolved the question of the applicability of judicial estoppel in the criminal context.

The policies undergirding judicial estoppel must sometimes yield to countervailing policy concerns. As the Ninth Circuit has noted, given the high stakes of criminal prosecutions and the special protections traditionally afforded criminal defendants, "[j]ustice would not be served by holding [a criminal] defendant to [his or her] prior false statements, because to do so would assign a higher value to the

'sanctity of the oath' than to the guilt or innocence of the accused." *Morris v. California*, 966 F.2d 448, 453 (9th Cir. 1992), *cert. denied*, 506 U.S. 831, 121 L. Ed. 2d 57 (1992). It is not surprising, then, that "[n]o circuit has ever applied the doctrine of judicial estoppel to bar a criminal defendant from asserting a claim based on innocence." *Id.* In light of these concerns, we agree with the Ninth Circuit's conclusion that "[t]he judicial process can more easily survive a rule that precludes the use of judicial estoppel to keep intact convictions of innocent persons than it can a rule that purports to preserve judicial sacrosanctity by leaving wrongful convictions in place as a sanction for lying." *Id.*

Second, judicial estoppel should not ordinarily be applied against the government in a criminal proceeding. *See, e.g., Thompson v. Calderon*, 120 F.3d 1045, 1070 (9th Cir. 1997), *rev'd and remanded on other grounds*, 523 U.S. 538, 140 L. Ed. 2d 728 (1998); *Nichols v. Scott*, 69 F.3d 1255, 1272 (5th Cir. 1995); *United States v. Kattar*, 840 F.2d 118, 129-30 n.7 (1st Cir. 1988); *Smith v. State*, 765 N.E.2d 578, 583 (Ind. 2002); *see also United States v. Simmons*, 247 F.3d 118, 124 (4th Cir. 2001). In North Carolina, such a restriction on the doctrine is necessitated by the structure of our criminal justice system. A prosecutor is under a constitutional duty to enforce the criminal law by prosecuting criminal actions on behalf of the state. N.C. Const. art. IV, § 18; *State v. Prevatte*, 356 N.C. 178, 237, 570 S.E.2d 440, 472 (2002) ("prosecutor has the duty to vigorously present the State's case"), *cert. denied*, —— U.S. ——, 155 L. Ed. 2d 681 (2003); *see also State v. Blakeney*, 352 N.C. 287, 312, 531 S.E.2d 799, 817 (2000), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001). We have frequently emphasized that prosecutors must be given "wide latitude" in framing their arguments in the pursuit of this constitutional duty. *E.g., State v. Flowers*, 347 N.C. 1, 36-37, 489 S.E.2d 391, 411-12 (1997), *cert. denied*, 522 U.S. 1135, 140 L. Ed. 2d 150 (1998); *State v. Monk*, 286 N.C. 509, 515, 212 S.E.2d 125, 131 (1975). Moreover, as the United States Supreme Court stated in *New Hampshire*, " 'When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined.' " 532 U.S. at 755, 149 L. Ed. 2d at 981 (quoting *Heckler v. Cmty. Health Servs.*, 467 U.S. at 60, 81 L. Ed. 2d at 52). Thus, in light of the state's unique status as a litigant and its interest in enforcing the criminal law, "it is well settled that the Government may not be estopped on the same terms as any other litigant." *Id.* In sum, the strong public interest in

maintaining prosecutorial independence normally precludes application of judicial estoppel against the government in criminal cases.

[14] Next, we emphasize that our recognition of judicial estoppel is limited to the context of inconsistent factual assertions and that the doctrine should not be applied to prevent the assertion of inconsistent legal theories. Although not addressed in *New Hampshire v. Maine*, this limitation on the reach of judicial estoppel has been adopted by the majority of courts to consider the matter. *See, e.g.*, *Wight v. BankAmerica Corp.*, 219 F.3d at 90; *Pittson Co. v. United States*, 199 F.3d 694, 701 n.4 (4th Cir. 1999); *Lowery*, 92 F.3d at 224; *Royal Ins. Co. v. Quinn-L Capital Corp.*, 3 F.3d 877, 885 n.6 (5th Cir. 1993), *cert. denied*, 511 U.S. 1032, 128 L. Ed. 2d 193 (1994); *Hayne Fed. Credit Union v. Bailey*, 327 S.C. at 251-52, 489 S.E.2d at 477. Moreover, such a limitation is necessary to avoid interference with our liberal pleading rules, which permit a litigant to assert inconsistent, even contradictory, legal positions within a lawsuit. N.C.G.S. § 1A-1, Rule 8 (2003); *see also Zurich Ins. Co.*, 667 F.2d at 1167; *Montrose Med. Corp. Particip. Savings Plan v. Bulger*, 243 F.3d 773, 782 (3d Cir. 2001). In sum, while other doctrines such as "mend the hold" and judicial admissions may restrict the extent to which a party may assert contradictory legal positions, the doctrine of judicial estoppel limits only inconsistent assertions of fact.

[15] Having delineated the doctrine of judicial estoppel, we now turn to an issue that concerns its application here. Plaintiff argues, and the Court of Appeals held, that judicial estoppel does not apply in this case because there was "no evidence that Dr. Whitacre intentionally misled the court" by "intentionally manipulat[ing] or hid[ing] the truth to gain an unfair advantage." *Whitacre P'ship*, 153 N.C. App. at 615-16, 574 S.E.2d at 480. This holding comports with the definition of judicial estoppel previously adopted by the Court of Appeals. *See Medicare Rentals*, 119 N.C. App. at 771, 460 S.E.2d at 364. A trial court applying judicial estoppel, however, is not obliged to specifically determine that the party to be estopped intended to mislead that court by its representations in the later action. As the United States Supreme Court emphasized in *New Hampshire v. Maine*, judicial estoppel is a "flexible equitable doctrine," and the " 'circumstances under which [it] may appropriately be invoked are probably not reducible to any general formulation of principle.' " 532 U.S. at 750, 149 L. Ed. 2d at 978 (quoting *Zurich Ins. Co.*, 667 F.2d at 1166). While it would weigh heavily in favor of invoking the doctrine, intent to deceive is not enumerated in *New Hampshire* as one of the relevant

factors. *New Hampshire,* 532 U.S. 742, 149 L. Ed. 2d 968. Moreover, *New Hampshire v. Maine* specifically provides that "it may be appropriate to resist application of judicial estoppel 'when a party's prior position was based on inadvertence or mistake.' " *Id.* at 753, 149 L. Ed. 2d at 979 (quoting *John S. Clark Co.*, 65 F.3d at 29). In stating that it "may be appropriate" to "resist" application of judicial estoppel under these circumstances, the United States Supreme Court implicitly rejected the proposition that the subsequent position *must be* intended to deceive in order for the doctrine to apply.

We are mindful that the application of judicial estoppel to preclude a party from making a *true* factual assertion in a later proceeding because it contradicts a *false* factual assertion made in an earlier one may be seen as interfering with the truth-seeking function of courts. *See Teledyne Indus., Inc. v. Nat'l Labor Relations Bd.*, 911 F.2d 1214, 1218 (6th Cir. 1990) (noting that judicial estoppel may "imping[e] on the truth-seeking function of the court because the doctrine precludes a contradictory position without examining the truth of either statement"). As we said long ago in a related context, estoppels, while valuable to help "prevent that which deals in duplicity and inconsistency," by their nature run the risk of "shut[ting] out the *real* truth" in favor of its "artificial *representative*." *Jones v. Sasser*, 18 N.C. 452, 464 (1836). Upon careful reflection, we are not dissuaded by these concerns. First, judicial estoppel is to be applied in the sound discretion of our trial courts. If a trial court believes that justice would not be served by judicially estopping a party's factual contention, it may decline to do so. *See Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 365 (3d Cir. 1996) ("[Judicial estoppel] is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims, especially when the alleged inconsistency is insignificant at best and there is no evidence of intent to manipulate or mislead the courts."). We are confident that our trial courts will apply the doctrine judiciously, and not in a reflexive or technical manner that would defeat its underlying purpose. *See id.* at 358 ("Judicial estoppel is not intended to eliminate all inconsistencies, however slight or inadvertent; rather, it is designed to prevent litigants from 'playing "fast and loose with the courts." ' ") (citations omitted). Second, the "truth-defeating" potential of judicial estoppel is somewhat counterbalanced by its prophylactic effect. In practice, the doctrine tends not to subvert the truth because it encourages litigants to tell the truth in the first place by " 'rais[ing] the cost of lying.' " *Int'l Union, UMW v. Marrowbone Dev. Co.*, 232 F.3d 383, 391 (4th Cir. 2000) (quoting *Chaveriat v.*

Williams Pipe Line Co., 11 F.3d 1420, 1427-28 (7th Cir. 1993)). Third, the doctrine expressly guides our trial courts to consider whether a party's prior position was innocently asserted. We follow the lead of the United States Supreme Court in stressing that "it may be appropriate to resist application of judicial estoppel 'when a party's prior position was based on inadvertence or mistake.' " *New Hampshire*, 532 U.S. at 753, 149 L. Ed. 2d at 979 (quoting *John S. Clark Co.*, 65 F.3d at 29); *see also Ryan Operations*, 81 F.3d at 364 (court unwilling to administer "strong medicine" of judicial estoppel "to treat careless or inadvertent nondisclosures"). Thus, while we do not impose any particular *scienter* requirement on what must remain an inherently flexible equitable doctrine, we remind our trial courts to carefully balance the equities in applying judicial estoppel, and emphasize that a reasonable justification for a party's change in position may militate against its application in a particular case. *See, e.g.*, *Morris v. California*, 966 F.2d at 453; *In re Corey*, 892 F.2d 829, 836 (9th Cir. 1989), *cert. denied sub nom. Kulalani, Ltd. v. Corey*, 498 U.S. 815, 112 L. Ed. 2d 31 (1990).

[16] Plaintiff next argues that Whitacre was acting in his individual capacity, and not as a general partner of Whitacre Partnership, when he filed his bankruptcy petition and gave testimony at the 341 meeting with the bankruptcy trustee and his creditors. According to plaintiff, North Carolina partnership law precludes an estoppel against Whitacre Partnership based on representations made by Whitacre during the bankruptcy proceeding. Because Whitacre was not "apparently carrying on in the usual way the business of the partnership of which he is a member," plaintiff argues, his representations at the bankruptcy proceeding cannot "bind[] the partnership." N.C.G.S. § 59-39(a) (2003). The Court of Appeals found this argument persuasive, holding that summary judgment was precluded because a genuine issue of material fact remained as to whether Whitacre's statements at the 341 hearing were " 'for the purposes of [the partnership's] business,' and were made for 'carrying on in the usual way the business of the partnership' so as to bind the partnership." *Whitacre P'ship*, 153 N.C. App. at 615, 574 S.E.2d at 480 (quoting N.C.G.S. § 59-39(a) (2001)).

The issue in the instant case, however, is not whether Whitacre was acting within his authority as a general partner of Whitacre Partnership when he represented to the bankruptcy court that Whitacre Partnership's shares could never vest. Rather, the issue is whether plaintiff can be judicially estopped from asserting a position

in one legal proceeding contradictory to representations made by its general partners in an earlier legal proceeding. This issue, in turn, raises two additional questions: (1) whether judicial estoppel may be applied not just to the parties to a prior action but also to their "privies" and (2) whether plaintiff and its general partners are in "privity" with one another in this case.

Plaintiff suggests that under *New Hampshire v. Maine*, judicial estoppel applies only against a "party" who asserts inconsistent positions in subsequent legal proceedings. Because Whitacre Partnership was a not a party to the Whitacres' bankruptcy proceeding, plaintiff appears to argue, Whitacre Partnership cannot be judicially estopped on the basis of the Whitacres' representations in that proceeding. Plaintiff bases this argument on its observation that the United States Supreme Court in *New Hampshire* never mentioned "privity" or "privies" and referred throughout the opinion to the application of the doctrine against a "party" or "parties." We think plaintiff makes too much of this observation. In *New Hampshire*, the United States Supreme Court did not discuss privity because it had no need to do so. In that case, the parties before the Court, the states of New Hampshire and Maine, had also been parties to the previous action in which the prior inconsistent statement was made. *New Hampshire*, 532 U.S. at 747-48, 149 L. Ed. 2d at 975-76. The Court was not called upon to consider whether the privity concept applied to judicial estoppel, and did not expressly limit judicial estoppel to "parties" as opposed to "privies."

In the present case, by contrast, we are faced with a corporation seeking to estop a partnership from contradicting prior representations made by the partnership's general partners in a Chapter 7 bankruptcy proceeding. Since Whitacre Partnership itself was not a party to the bankruptcy proceeding, there is no mutuality of estoppel, and we are forced to decide whether a privity relationship may sustain the application of judicial estoppel.

This Court has consistently applied the privity concept to a variety of estoppel doctrines. *See, e.g.*, *McInnis*, 318 N.C. at 428, 349 S.E.2d at 556 (res judicata and collateral estoppel apply to the "same parties or those in privity with them"); *Mansour v. Rabil*, 277 N.C. 364, 377, 177 S.E.2d 849, 857 (1970) (under doctrine of election, heirs and devisees of one who accepts benefits under a will are estopped to contest that will); *Smith v. Smith*, 265 N.C. 18, 28, 143 S.E.2d 300, 307 (1965) (estoppel of record binds parties and their privies); *Long v. Trantham*, 226 N.C. 510, 514, 39 S.E.2d 384, 387 (1946) (equitable

estoppel binds parties and their privies); *see also In re Estate of Anderson*, 148 N.C. App. 501, 505, 559 S.E.2d 222, 225 (2002) (privity concept extended to quasi-estoppel). *See generally* 11A Strong's North Carolina Index 4th *Estoppel* § 2 (2001) ("Where a party would be estopped, persons in privity with that party, including heirs and devisees, are estopped."). "In general, 'privity involves a person so identified in interest with another that he represents the same legal right.' " *Tucker*, 344 N.C. at 417, 474 S.E.2d at 130 (quoting 47 Am. Jur. 2d *Judgments* § 663 (1995)). Although the meaning of "privity" has proven to be elusive, and "there is no definition of the word . . . which can be applied in all cases," the prevailing definition in our cases, at least in the context of res judicata and collateral estoppel, is that privity "denotes a mutual or successive relationship to the same rights of property." *Id.* at 416-17, 474 S.E.2d at 130 (quoting *Hales*, 337 N.C. at 333-34, 445 S.E.2d at 594 (citations omitted)). In determining whether such a privity relation exists, " 'courts will look beyond the nominal party whose name appears on the record as plaintiff and consider the legal questions raised as they may affect the real party or parties in interest.' " *Summers*, 351 N.C. at 623-24, 528 S.E.2d at 21 (quoting *Davenport v. Patrick*, 227 N.C. 686, 688, 44 S.E.2d 203, 205 (1947)).

In deciding whether judicial estoppel applies not only to parties, but also to their privies, it is instructive to consider the rationale for applying the privity concept in the collateral estoppel context. Due process requires that persons be given a fair opportunity to litigate their legal rights. U.S. Const. amends. V, XIV; *Windsor v. McVeigh*, 93 U.S. 274, 277, 23 L. Ed. 914, 915-16 (1876). This right to be heard may prohibit the application of a preclusion doctrine to estop a party who never had a chance to present arguments and evidence in a prior action from doing so at a later proceeding. *Blonder-Tongue Lab., Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 328-29, 28 L. Ed. 2d 788, 799-800 (1971) (discussing due process limitations to collateral estoppel). It is well settled, however, that where there is a sufficiently close relationship, called "privity," between the party to a prior action and the party to be estopped in a later action, due process is not offended by the estoppel of the latter, provided the former had a full and fair opportunity to litigate the matter to be precluded. *See, e.g., Richards v. Jefferson Cty.*, 517 U.S. 793, 797-99, 135 L. Ed. 2d 76, 83-84 (1996) (describing the constitutional rationale for allowing preclusion doctrines to estop a "privy" to a prior action from relitigating claims and issues); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7, 58 L. Ed. 2d 552, 559 n.7 (1979) ("It is a violation of due

process for a judgment to be binding on a litigant who was not a party *or a privy* and therefore has never had an opportunity to be heard.") (emphasis added) (citations omitted); *McInnis*, 318 N.C. at 433-34, 349 S.E.2d at 559-60 (following *Blonder-Tongue* and *Parklane Hosiery* and abandoning the strict mutuality requirement for collateral estoppel in North Carolina).

We observe that other courts have applied the privity concept to the doctrine of judicial estoppel. *See, e.g., In re Johnson*, 518 F.2d 246, 252 (10th Cir. 1975); *Farmers High Line Canal & Reservoir Co. v. City of Golden*, 975 P.2d 189, 202 (Colo. 1999); *Barnett v. Develle*, 289 So. 2d 129, 138 (La. 1974); *Messler v. Simmons Gun Specialties, Inc.*, 687 P.2d 121, 128 (Okla. 1984); *Tracy Loan & Trust Co. v. Openshaw Inv. Co.*, 102 Utah 509, 515, 132 P.2d 388, 390 (1942); *see also* 28 Am. Jur. 2d § 129 *Estoppel and Waiver* (2000); Anderson & Holober, 4 Conn. Ins. L.J. at 608-09. We agree that "a rigid rule requiring the estopped party to be the identical party as in the earlier proceeding would unnecessarily diminish the protective function of the doctrine of judicial estoppel." *Capsopoulos v. Chater*, 1996 U.S. Dist. LEXIS 18330 (N.D. Ill. Dec. 9, 1996); *see also Ladd v. ITT Corp.*, 148 F.3d 753, 756 (7th Cir. 1998). Moreover, so long as the party to be judicially estopped is a privy of the party who made the prior inconsistent statement before a tribunal, due process is not offended by the lack of mutuality of the parties between the two proceedings. *See Richards v. Jefferson Cty.*, 517 U.S. at 797-99, 135 L. Ed. 2d at 83-84.

[17] We do not address whether the Whitacres, as general partners of Whitacre Partnership, were in privity with the partnership. Whether privity exists in a given case should generally be resolved by the trial court in the first instance. *See Lowell Staats Mining Co. v. Philadelphia Elec. Co.*, 878 F.2d 1271, 1276 (10th Cir. 1989); *Vulcan, Inc. v. Fordees Corp.*, 658 F.2d 1106, 1109 (6th Cir. 1981), *cert. denied*, 456 U.S. 906, 72 L. Ed. 2d 162 (1982); *Astron Indus. Assocs. v. Chrysler Motors Corp.*, 405 F.2d 958, 961 (5th Cir. 1968); *Towle v. Boeing Airplane Co.*, 364 F.2d 590, 592 (8th Cir. 1966); *see also Gerrard v. Larsen*, 517 F.2d 1127, 1135 (8th Cir. 1975) (privity is appropriately "resolved on a case by case basis by an examination of underlying facts and circumstances"). We cannot discern whether the trial court made a privity determination in the present case. The parties did not brief the issue in their summary judgment memoranda, and no published appellate decisions in this state have previously discussed the applicability of the privity concept to judicial estoppel.

Thus, rather than usurping the trial court's role by making a privity determination on the basis of a cold record, we deem it advisable to reserve this factual question for the trial court to address on remand. *Cf. Maggio v. Zeitz*, 333 U.S. 56, 77, 92 L. Ed. 476, 492 (1948) (remand to trial court appropriate where lower courts have adjudicated parties' rights "without considering essential facts in light of the controlling law"); *Gerdes v. Lustgarten*, 266 U.S. 321, 327-28, 69 L. Ed. 309, 312-13 (1924) (remand to trial court appropriate where trial court did not decide questions of fact upon which ultimate decision must rest); *Marconi Wireless Tel. Co. v. Simon*, 246 U.S. 46, 57, 62 L. Ed. 568, 573-74 (1918) (delay in ultimate disposition of case resulting from remand preferable to Court's exercising "a duty which it was the province of the court below to perform"). This disposition reflects trial courts' "institutional advantages" over appellate courts in the "application of facts to fact-dependent legal standards." *Augur v. Augur*, 356 N.C. 582, 586, 573 S.E.2d 125, 129 (2002).

[18] Moreover, we are unable to determine from the record what precise formulation of judicial estoppel the trial court applied to the facts of the instant case. Assuming that the trial court applied the law of judicial estoppel as it had been articulated by our appellate courts up to now, *see Medicare Rentals*, 119 N.C. App. at 769-71, 460 S.E.2d at 363-64, *State v. Taylor*, 128 N.C. App. at 400, 496 S.E.2d at 815, the court necessarily applied a version of the doctrine substantially different from the one we delineate today. Because the trial judge "did not have the legal standard which we articulate today to guide him in his consideration of the case, . . . it is not reasonable to expect him to have applied it without the benefit of this opinion." *State v. McDowell*, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 732 (1986), *cert. denied*, 489 U.S. 1033, 103 L. Ed. 2d 230 (1989). Accordingly, we remand to the Court of Appeals for further remand to the trial court for reconsideration of defendants' motion for summary judgment in light of our newly articulated standards concerning judicial estoppel and the applicability of the privity concept. *See id.* at 75, 310 S.E.2d at 309.

[19] We note that a trial court's application of judicial estoppel is reviewed for abuse of discretion. *See New Hampshire*, 532 U.S. at 750, 149 L. Ed. 2d at 977-78 ("[J]udicial estoppel is an equitable doctrine invoked by a court at its discretion."); *see also Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001); *Taylor v. Food World*, 133 F.3d 1419, 1422 (11th Cir. 1998); *McNemar v. Disney Store*, 91 F.3d 610, 616-17 (3d Cir. 1996), *cert. denied*, 519 U.S.

1145, 136 L. Ed. 2d 845 (1997), *overruled on other grounds by Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 143 L. Ed. 2d 966 (1999); *State v. Taylor*, 128 N.C. App. at 400, 496 S.E.2d at 815-16. Moreover, as the Court of Appeals properly recognized, "[w]hen an action pled is barred by a legal impediment, such as judicial estoppel, there are no triable issues of fact as a matter of law." *Whitacre P'ship*, 153 N.C. App. at 614, 574 S.E.2d at 479 (citing *Andrews v. Davenport*, 84 N.C. App. 675, 677, 353 S.E.2d 671, 673 (1987), *disc. review denied*, 319 N.C. 671, 356 S.E.2d 774 (1987)). Thus, when a trial court has acted within its discretion in applying judicial estoppel, leaving no triable issues of material fact, summary judgment is appropriate. *See Montrose*, 243 F.3d at 779 ("Summary judgment is appropriate when operation of judicial estoppel renders a litigant unable to state a prima facie case."); *West Delta Oil Co. v. Hof*, 2002 U.S. Dist. LEXIS 15776, at *7 (E.D. La. 2002) (application of judicial estoppel in context of summary judgment motion is reviewed for abuse of discretion); *cf. Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142-43, 139 L. Ed. 2d 508, 516 (1997) (rejecting argument that ruling on admissibility of expert testimony should be reviewed *de novo* simply because it arose in the "outcome determinative" context of a summary judgment motion, and instead reviewing for abuse of discretion).

In conclusion, the doctrine of judicial estoppel is a part of the common law of this state. In the instant case, however, the trial court did not have the benefit of the precise formulation of the doctrine we articulate in this opinion. Moreover, judicial estoppel is a discretionary doctrine, and the privity inquiry required here is a fact-intensive one. Thus, we instruct the trial judge on remand to determine whether the Whitacres and Whitacre Partnership are in privity and, if so, to exercise discretion in determining whether the doctrine of judicial estoppel is applicable in the instant case. Accordingly, we remand to the Court of Appeals for further remand to the trial court for further proceedings consistent with this opinion.

MODIFIED AND AFFIRMED.

STATE OF NORTH CAROLINA v. MICHAEL ERIC MASKE

No. 497A02

(Filed 6 February 2004)

1. Jury— voir dire—failure to disclose a crime victim

The trial court did not err in a capital first-degree murder case by denying defendant's motion for a mistrial based on alleged juror misconduct regarding a failure to disclose during voir dire that the juror was a victim of a robbery forty years earlier but thereafter sharing this experience with the other jurors, because: (1) the juror's inadvertent failure to disclose the four-decade-old information that she had forgotten did not amount to concealment; and (2) the juror demonstrated no bias.

2. Constitutional Law— right to be present at all stages of trial—juror talking to trial judge out of defendant's presence

The trial court committed harmless error in a capital first-degree murder case when it was confronted with the jury foreperson who expressed concern, out of defendant's presence, about an undefined problem which turned out to be about a juror with a potentially pertinent matter that she had not revealed during voir dire, because: (1) the trial judge promptly advised the parties of his contact with the foreperson and, with the consent of the parties, invited the foreperson into the courtroom to explain to everyone her concern; (2) no bailiffs were available, and the juror's inquiry might have involved a trivial matter; and (3) the trial court's initial inquiry and subsequent handling of the matter were entirely reasonable.

3. Evidence— victim's good character—harmless error

The trial court did not commit plain error in a capital first-degree murder case by allegedly admitting evidence of the victim's good character, because: (1) the testimony that the victim was a punctual employee who routinely advised her employer whether she would be late or absent was relevant to establish the time of the offense; (2) the testimony about the victim's catering business was relevant since the telephone number on her business card was the same as that for the cellular phone recovered from the apartment of defendant's girlfriend; and (3) there was no possibility that the jury would have returned a different verdict

had the trial court sustained defendant's objection to the testimony that the victim was a good person who would do anything for you.

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

The short-form indictment used to charge defendant with first-degree murder was sufficient and met the requirements of N.C.G.S. §§ 15-144 and 15-155.

5. Appeal and Error— preservation of issues—actions at charge conference

Defendant properly preserved for appeal issues concerning alleged errors in the trial court's capital sentencing instructions pertaining to certain aggravating and mitigating circumstances, although defendant failed to object after the instructions were given and before the jury retired, because: (1) defendant satisfied Rule of Appellate Procedure 10(b)(2) by making his objections and requests at the charge conference; and (2) defendant's actions at the charge conference sufficiently satisfied Rule 21 of the General Rules of Practice for the Superior and District Courts where the trial court did not provide counsel an opportunity to object to the charge after the charge was given and the court had already sustained defendant's objections to portions of the charge on these aggravating and mitigating circumstances and informed defendant that it would instruct in a particular way, but the court failed to give the promised instructions.

6. Sentencing— aggravating circumstances—pecuniary gain—amendment to instruction

The trial court erred in a capital sentencing proceeding by its instruction pertaining to the pecuniary gain aggravating circumstance under N.C.G.S. § 15A-2000(e)(6) and the case is remanded for a new sentencing proceeding, because: (1) the instruction omitted the requirement that defendant have the intent to obtain something of value at the time of the killing; (2) the instruction allowed the jury to apply the aggravating circumstance even if the taking had no causal relationship to the killing; and (3) there is a reasonable probability that, had the error not been committed, the jury might have reached a different result.

7. Sentencing— capital—mitigating circumstances—defendant's age—instructions—mitigating value

The trial court did not err by instructing the jury in a capital sentencing proceeding on the N.C.G.S. § 15A-2000(f)(7) mitigating circumstance that it should "consider whether the age of the defendant at the time of this murder is a mitigating factor. The mitigating effect of the age of the defendant is for you to determine from all of the facts and circumstances which you find from the evidence."

8. Criminal Law— effect of not guilty plea

Although a defendant's plea is a matter of public record and a proper subject for both questioning and argument that does not run afoul of a defendant's rights, a defendant's plea of not guilty is not necessarily a claim by defendant that he did not commit the alleged offense nor is it equivalent to testimony that defendant hopes the jury will acquit him.

Justice BRADY concurring.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge William Z. Wood, Jr., on 10 May 2002 in Superior Court, Forsyth County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 18 November 2003.

Roy Cooper, Attorney General, by Amy C. Kunstling, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Anne M. Gomez, Assistant Appellate Defender, for defendant-appellant.

EDMUNDS, Justice.

The victim in this murder case, Geneva Yarbrough (Yarbrough), lived in an apartment on Avera Avenue in Winston-Salem. She was a full-time employee of Bank of America and also worked part-time as a waitress at Darryl's Restaurant. After taking a day off from her bank job on Tuesday, 30 January 2001, for a doctor's appointment, she never returned to work.

At about 10:00 p.m. on the evening of Wednesday, 31 January 2001, Jamelle Witherspoon (Jamelle), a sixteen-year-old boy whose family lived above Yarbrough's apartment, knocked on Yarbrough's

door to warn her that the headlights of her parked automobile were illuminated. When no one answered, Jamelle went home, but when he returned from school the next afternoon, he saw that the headlights still had not been turned off. He again knocked on Yarbrough's door, and the door opened slightly. Jamelle stepped inside and saw Yarbrough lying on a hallway floor with a towel covering her face. Jamelle's grandmother and aunt called 911.

The responding officers observed that Yarbrough's body was bloody and exhibiting rigor mortis. Her eyes and mouth were open, and the blood patterns on her face and a rumpled rug under her body suggested that she had been moved at some point. Several of her fingernails were broken, and the apartment was in disarray. Although neither of the two doors into the apartment showed signs of forced entry, investigators found a chair outside that had been placed directly below a kitchen window. The screen was missing from the window and a boot print was found in the interior sink that was under the window. A screen that fit the window was later discovered about sixty to seventy-five feet away, and the State's fingerprint witness identified defendant's palm print on the screen.

Police determined that Yarbrough owned a cellular telephone. Initially, they were unable to locate the telephone itself, but records of its use maintained by the telephone company led investigators to an apartment in a neighboring building on Avera Avenue. This apartment was rented by Stephanie Wilson (Wilson), defendant Michael Eric Maske's girlfriend. Defendant had been staying with Wilson for several months. Police found Yarbrough's telephone in a dresser drawer in Wilson's apartment and seized from a closet a pair of boots that appeared to be consistent in size and tread pattern with the print found in Yarbrough's sink.

Officers went to defendant's place of employment and asked if he would voluntarily come to the police station. Defendant agreed. During his interview there, defendant first told officers that he found the cellular telephone at the apartment complex. When officers asked defendant why he kept covering his face, he said that he had been scratched by a cat. However, as the questioning continued, defendant advised the officers that he wanted to tell them something bad. He said that he and Wilson were broke and on the verge of being evicted. When he realized that most of the neighbors were gone during the day, he went to Yarbrough's apartment. After knocking to make sure that no one was home, he put a chair under a window and climbed into the apartment. While there, he heard the door being

unlocked and tried unsuccessfully to hide in the bedroom. Yarbrough came in and confronted defendant, then scratched his face with her fingernails. Defendant ran to Yarbrough's kitchen and grabbed a knife. He claimed that Yarbrough ran into the knife as they struggled through the apartment. Finally, Yarbrough fell and defendant put a towel from the bathroom over her face. He then left the apartment, taking approximately sixty compact discs, about $200 from Yarbrough's purse, some of her jewelry, and a set of keys.

Defendant said that he returned the next day and opened Yarbrough's car with the keys he had taken the day before. He took her cellular telephone from the car and used it to call several of his friends. He stated that he sold some of the compact discs for money and threw the knife into a dumpster. Other evidence presented by the State indicated that the stolen jewelry was pawned on Monday, 29 January 2001; that defendant's name had been signed on the pawn ticket; and that the Record Exchange purchased ten of the stolen compact discs on Tuesday, 30 January 2001.

An autopsy of Yarbrough revealed that she had been stabbed sixteen times in her chest, abdomen, and back. Any one of three wounds to her liver, heart, and right lung was potentially fatal. The cause of death was multiple stab wounds. Defendant presented no evidence during the guilt-innocence portion of the trial. The jury found him guilty of first-degree murder, both on the theory of premeditation and deliberation, and on the theory of felony murder.

Defendant took the stand during the sentencing proceeding. He began his testimony by describing his upbringing. He had not known his father, had been brought up in a filthy and crime-infested housing project, and had been abused by his stepfather and his mother's boyfriend. As to the offense at bar, defendant testified that he entered Yarbrough's apartment several times. The first time, he climbed through the window about 8:00 a.m., took some food, and left through the front door, leaving it unlocked. He said he returned about 11:00 the same morning and stole some compact discs, which he sold. During his third entry, about 5:30 p.m., Yarbrough came home. He stated that she scratched his face and they fought. He grabbed a knife from the kitchen and held it out as she came toward him. He did not know how many times she hit the knife, but she grappled with defendant until she fell in the hallway. He could not tell if Yarbrough was dead or alive when he left. Defendant said that he returned for a fourth time the next day and took Yarbrough's cellular telephone from her car.

In addition, defendant presented evidence that no formal disciplinary actions had been instituted against him while he had been in custody pending trial. Dr. James Hilkey was qualified as an expert in the field of forensic psychology and testified as to the results of his examination of defendant. He found that defendant's full range IQ score is 78 and it was his opinion that defendant "did suffer from a mental disorder, specifically a personality disorder not otherwise specified. And those three that I've identified have been the borderline personality disorder, a dependent personality disorder and also antisocial personality disorder." In Dr. Hilkey's opinion, defendant had the mental age of between ten and thirteen years. Dr. Hilkey testified that while defendant knew the difference between right and wrong and was capable of forming the intent to commit a crime, he believed defendant suffered from an impaired capacity to appreciate fully the consequences of his actions.

Of the three submitted aggravating circumstances, the jury found that defendant had committed the murder for pecuniary gain, N.C.G.S. § 15A-2000(e)(6) (2003), and that the murder was especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9). The jury did not find that defendant had been convicted of a previous felony involving the threat of violence to the person, N.C.G.S. § 15A-2000(e)(3). The jury also found eight of eleven submitted mitigating circumstances. It found that defendant had no significant prior criminal history, that the murder was committed while defendant was under the influence of a mental or emotional disturbance, that defendant had accepted responsibility for his conduct, that he expressed remorse for the killing, that he had shown the ability to conform his behavior to a custodial setting, that he was physically abused as a child, and that he did not have a stable home environment. The jury did not find that defendant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, that defendant's age constituted a mitigating circumstance, or that defendant voluntarily acknowledged wrongdoing in connection with the offense to a law enforcement officer. The jury also did not find the catchall mitigating circumstance. The jury then determined that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and recommended a sentence of death.

GUILT-INNOCENCE ISSUES

[1] Defendant argues that the trial court erred in denying his motion for a mistrial, which was based on a claim of juror misconduct. Prior

to the jury *voir dire*, each potential juror filled out a questionnaire that asked, among other things, whether the juror had been a victim of or a witness to a crime. Juror Walker gave a negative response. Although juror Walker was not directly asked during *voir dire* if she had been a victim of a crime, the jurors were asked collectively by defense counsel whether the alleged facts of defendant's case would make it difficult for any of them to deliberate impartially. Juror Walker did not respond. However, during deliberations in the guilt phase of the trial, juror Walker described a robbery that had occurred in her home. The foreperson advised the judge, who in turn told the attorneys what had happened. The judge then brought the foreperson into the courtroom, asked her to describe for counsel and defendant what had happened, and allowed the attorneys to ask the foreperson questions. After excusing the foreperson, the judge consulted with counsel. The parties agreed that juror Walker could not be replaced by an alternate because deliberations had already begun. *See State v. Bunning*, 346 N.C. 253, 485 S.E.2d 290 (1997). Defendant moved for a mistrial.

Before ruling on defendant's motion, the trial judge brought the entire jury into the courtroom. Juror Walker acknowledged that she had told the other jurors of the break-in at her home, reported to the court that the event had happened forty years earlier, and stated that she could not remember if she had reported the incident. When asked, she said that the break-in would not influence her deliberations in defendant's case in any way. The judge then made individual inquiry of each juror, all of whom affirmatively indicated that juror Walker's comments would not affect their deliberations. At defendant's request, the trial judge asked juror Walker why she had not disclosed this information earlier. She responded that she had not even thought of it. The trial judge then excused the jurors from the courtroom, and defendant renewed his motion for a mistrial. After observing that the event had happened decades before and that all the jurors had affirmed that the incident would have no impact on their deliberations, the judge denied the motion. Once the jury returned its verdict in the guilt phase of the trial, the judge excused juror Walker and seated an alternate juror for the sentencing proceeding.

Defendant argues that he was deprived of a trial by twelve jurors because juror Walker was not qualified to participate in his trial. He contends that her failure to reveal her pertinent experiences prior to trial and her sharing of these experiences with other jurors constituted misconduct that disqualified her as a juror. Defendant asserts

that as a result he was denied his rights under both the United States Constitution and the North Carolina Constitution to confrontation, to effective assistance of counsel, to due process, to a jury trial, and to be free from cruel and unusual punishment.

Defendant's efforts to cast this issue in constitutional terms are unavailing. The effect of a juror's failure to disclose on *voir dire* information potentially important to the case has been considered both by the United States Supreme Court and the North Carolina Court of Appeals. In *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 78 L. Ed. 2d 663 (1984), a juror in a products liability case was asked during *voir dire* whether he or any member of his family had sustained any severe injury that resulted in disability or prolonged pain or suffering. The juror did not disclose that his son had been injured by an exploding tire, explaining later that he did not believe this injury was the type of incident covered by the *voir dire* question. The Supreme Court noted that the juror's failure to respond to the question was as likely to be honest error as it was to be intentional dissembling and held that "to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause." *Id.* at 556, 78 L. Ed. 2d at 671. Our Court of Appeals later considered a similar issue in *State v. Buckom*, 126 N.C. App. 368, 485 S.E.2d 319, *cert. denied*, 522 U.S. 973, 139 L. Ed. 2d 326 (1997), where the jury foreperson incorrectly advised counsel during *voir dire* that he did not know any witnesses. The defendant claimed that he had a right "to an intelligent exercise of peremptory challenges" and that the juror's inaccurate response had denied him that right. *Id.* at 378, 485 S.E.2d at 325. After reviewing *McDonough*, the Court of Appeals rejected "defendant's assertion in his motion that the right 'to the intelligent exercise of peremptory challenges' is guaranteed by Art. I, §§ 19 and 24 (right to jury trial in criminal cases) of our North Carolina Constitution." *Id.* at 379, 485 S.E.2d at 326 (quoting *State v. Tolley*, 290 N.C. 349, 364, 226 S.E.2d 353, 365 (1976)). The Court of Appeals considered the two concurring opinions filed in *McDonough* and observed that both included language to the effect that "dishonesty of a juror was a factor to be weighed in determining whether the juror demonstrated bias." *Id.* at 380, 485 S.E.2d at 327. The Court of Appeals agreed with the concurring Justices and set out a test that differed somewhat from the formula enunciated by the Supreme Court majority, holding that

> a party moving for a new trial grounded upon misrepresentation by a juror during *voir dire* must show: (1) the juror concealed material information during *voir dire*; (2) the moving party exercised due diligence during *voir dire* to uncover the information; and (3) the juror demonstrated actual bias or bias implied as a matter of law that prejudiced the moving party.

Id. at 380-81, 485 S.E.2d at 327. The United States Supreme Court denied certiorari.

We agree with and now adopt the test set out by the Court of Appeals. Not only is an honest mistake by a potential juror less likely to undermine the fairness of a trial than a deliberate evasion, but an intentional misrepresentation is more likely to be a symptom of juror bias. The Court of Appeals' test appropriately accounts for these factors. Applying this test to the case at bar, we find no error in the trial court's denial of defendant's motion for mistrial. Juror Walker's inadvertent failure to disclose four-decade-old information that she had forgotten does not amount to "concealment," and the juror demonstrated no bias. This assignment of error is overruled.

[2] Defendant's next assignment of error arises from the inquiry into juror Walker's behavior. The juror's comments came to light when the jury foreperson advised the trial judge that juror Walker was discussing a potentially pertinent matter that she had not revealed during *voir dire*. Defendant argues that, because he has an unwaivable right to be present at every phase of his trial, the trial judge committed error by speaking with the foreperson out of the presence of defendant, defense counsel, and the court reporter. *See State v. Artis*, 325 N.C. 278, 384 S.E.2d 470 (1989), *sentence vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). The State effectively concedes that such a conversation constitutes error, but points out that the transcript of the proceedings may establish that any error is harmless. *State v. Nobles*, 350 N.C. 483, 493, 515 S.E.2d 885, 891 (1999). The transcript here reveals that the trial judge promptly advised the parties of his contact with the foreperson:

> THE COURT: . . . As I was going back to my office to put my robe up and get my coat so I could go to lunch—of course you walk down the hall because the courtroom's locked up. And Ms. Sears, the foreperson of the jury, was in the jury room and when she saw me walking by she came to the door of the jury room and asked to speak to me about something and I said I can't talk to you about anything. She said well, I need a bailiff.

> Of course the bailiffs were gone at that moment so I finally asked her what was it about. She said that during the course of deliberations one of the jurors had related a personal anecdote that she thought should have been brought out during jury selection. And I said well, we'll have to get it on the record and that's where I left it.

With the consent of the parties, the judge then invited the foreperson into the courtroom and asked her to explain to everyone her concern. Her recitation was consistent with the trial judge's description. It is apparent that any error here was harmless beyond a reasonable doubt. The trial judge was confronted with a juror who expressed concern about an undefined problem. No bailiffs were available, and the juror's inquiry might well have involved an issue as innocuous as a parking space. The trial judge's initial inquiry and subsequent handling of this matter was entirely reasonable. This assignment of error is overruled.

[3] Defendant argues that the trial court improperly admitted evidence during the guilt-innocence portion of the trial as to the victim's good character. Robin Mays, who apparently was Yarbrough's supervisor at Bank of America, testified that Yarbrough was a good employee who was punctual and did her work well. Mays also testified that Yarbrough ran her own catering company, and one of Yarbrough's business cards was introduced into evidence. Robert Boston, Yarbrough's supervisor at Darryl's Restaurant, testified that she was a conscientious employee who would call if she was going to be late. Because defendant did not object to the testimony of either of these witnesses, we review admission of this evidence for plain error. *State v. Stokes*, 319 N.C. 1, 14, 352 S.E.2d 653, 660 (1987). Here, there was no such error. Because Yarbrough was usually on time for work at Bank of America and routinely advised her employer at Darryl's when she would be late or absent, this evidence was relevant to establish the time of the offense. Similarly, Mays' testimony about Yarbrough's catering business was relevant because the telephone number on the card was the same as that for the cellular telephone recovered from Wilson's apartment. Because all this evidence was admissible, defendant's claim that his counsel was ineffective for not objecting also fails.

The State also called Patricia Clark-Harris (Clark-Harris), Yarbrough's sister, as a witness during this portion of the trial. In response to the prosecutor's question, Clark-Harris testified that she and Yarbrough had been close, that Yarbrough's murder affected her

deeply, and that Clark-Harris' children had been devastated by the loss. She added that Yarbrough had been a good person who "would do anything for you." Defendant's timely objection to this testimony was overruled.

We have observed that, unless admissible under Rule 404(a)(2), N.C.G.S. § 8C-1, Rule 404(a)(2) (2003), character evidence of a victim is usually irrelevant during the guilt-innocence portion of a capital trial, *State v. Abraham*, 338 N.C. 315, 352-53, 451 S.E.2d 131, 151 (1994), as is victim-impact evidence, *State v. Oliver*, 309 N.C. 326, 360, 307 S.E.2d 304, 326 (1983). However, even assuming that admission of this testimony was error, defendant was prejudiced only if there was "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a) (2003). As detailed above, there is ample evidence of defendant's guilt, including his confession. We do not perceive any possibility that the jury would have returned a different verdict had the trial court sustained defendant's objection. Defendant also claims that admission of Clark-Harris' testimony deprived defendant of his constitutional rights to a fair trial and due process of law. Although we are not persuaded that admission of this evidence rose to the level of a constitutional error, even if it were, we conclude that the error was harmless beyond a reasonable doubt. N.C.G.S. § 15A-1443(b). This assignment of error is overruled.

[4] Defendant argues that the short-form indictment used in this case charged only second-degree murder and, therefore, a fatal variance existed between the charge and the conviction. However, this Court has consistently held that the statutorily authorized short-form indictment is sufficient to charge first-degree murder. *State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593, *cert. denied*, —— U.S. ——, 156 L. Ed. 2d 702 (2003). The indictment in the case at bar, which expressly alleges murder in the first-degree, met the requirements of sections 15-144 and 15-155. N.C.G.S. §§ 15-144, -155 (2003). This assignment of error is overruled.

SENTENCING ISSUES

[5] Defendant assigns error to several of the trial court's instructions at the sentencing proceeding. These issues are related because they arose in the same context and under similar circumstances, so we will address them together. Defendant's first argument relates to the instruction pertaining to the pecuniary gain aggravating circum-

stance, N.C.G.S. § 15A-2000(e)(6). After conducting the charge conference with the attorneys for defendant and with the attorney for the State, the court prepared overnight a set of proposed written instructions for the sentencing jury. The next day, defendant objected to the portion of the proposed instruction that stated: "If you find from the evidence beyond a reasonable doubt that when the defendant killed the victim, the defendant took $200 from the victim's purse you would find this aggravating circumstance . . . ." Defendant argued that this instruction amounted to a peremptory instruction and was incorrect because defendant's intent at the time of the murder controlled whether or not this aggravating circumstance was applicable. According to defendant, the instruction allowed the jury to find the aggravating circumstance even if defendant had decided to take the money only after the victim died. The court suggested as substitute wording "that when the defendant did kill the victim, the defendant did so for the purpose of taking something of value." Both defendant and the prosecutor agreed to this amendment.

Defendant's next argument relates to several nonstatutory mitigating circumstances. At the initial instruction consultation, defendant orally requested peremptory instructions for each nonstatutory mitigating circumstance. The prosecutor objected, arguing that the evidence was contested as to some of the circumstances requested by defendant. The trial court finally advised the parties that it would give peremptory instructions as to five nonstatutory mitigating circumstances, namely, that defendant voluntarily acknowledged wrongdoing prior to his arrest, that defendant accepted responsibility for his conduct, that defendant expressed remorse for the killing, that defendant was abused as a child, and that defendant did not have a stable home environment.

In his brief, defendant states that he presented a written list of proposed statutory and nonstatutory mitigating circumstances. Although the parties do not refer to such a list in the trial transcript and no list is included in the record on appeal, the court's proposed written instructions pertaining to each of these five mitigating circumstances included the following peremptory language: "[A]s to this mitigating circumstance, I charge you that if one or more of you find the facts to be as all the evidence tends to show that this circumstance exists and also is deemed mitigating, you would so indicate . . . ."

Defendant's third argument relates to the instruction as to whether he committed the offense while under the influence of a

mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2). Defendant had requested such an instruction, and the proposed written instruction provided by the court included the following sentence: "You would find this mitigating circumstance if you find that the defendant suffered from Borderline Personality Disorder, Dependent Personality and Antisocial Personality Disorder and that, as a result, the defendant was under the influence of mental or emotional disturbance when he killed the victim."

As a result of the charge conference, the court's provision of proposed written instructions, the discussions over these instructions, and the court's final rulings, the parties all apparently believed they understood what instructions would be given. However, the instructions the court actually gave differed significantly from the instructions the parties expected. When the judge instructed as to the pecuniary gain aggravating circumstance, he used the language to which defense counsel had successfully objected, telling the jury: "If you find from the evidence beyond a reasonable doubt that when the defendant killed the victim, the defendant took $200 from the victim's purse, you would find this aggravating circumstance . . . ." As to the five nonstatutory mitigating circumstances listed above, the judge omitted the language that all the evidence tended to show that the circumstance existed. As to the instruction pertaining to mental or emotional disturbance, the court omitted the sentence quoted above.[1] After concluding the instructions, the trial court excused the alternate jurors and allowed the jury to begin deliberating. The court also provided to the jury written instructions that included both the peremptory language requested by defendant as to the nonstatutory mitigating circumstances and the sentence quoted in the preceding paragraph pertaining to particular mental or emotional disturbances. The court did not inquire whether either defendant or the prosecutor had any objections to the instructions, nor did defendant raise any objections.

Defendant assigns error to these discrepancies in the instructions. The State responds that defendant failed to preserve these

1. The differences between the oral and written instructions here are more than mere slips of the tongue and go beyond those set out in the assignments of error. For instance, the court's proposed instruction as to the mitigating circumstance that defendant had no significant criminal history referred to "two prior convictions for robbery." After discussion with defendant and the prosecutor, the court agreed to change this language to the more general "prior criminal activity." However, the instruction that was actually given used the original language of "two prior convictions for robbery," as did the written instruction provided the jury.

issues by not objecting after the instructions were given and before the jury began its deliberations. Rule 10(b)(2) of the Rules of Appellate Procedure states, in pertinent part, that "[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). Rule 21 of the General Rules of Practice for Superior and District Courts is more specific, requiring:

> *At the conclusion of the charge* and before the jury begins its deliberations, and out of the hearing, or upon request, out of the presence of the jury, counsel shall be given the opportunity to object on the record to any portion of the charge, or omission therefrom, stating distinctly that to which he objects and the grounds of his objection.

Gen. R. Pract. Super. and Dist. Ct. 21, para. 2, 2004 Ann. R. N.C. 18 (emphasis added). The purpose of these rules is to allow the trial court to correct any mistakes it has made before the jury begins its deliberations. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). However, this case is not one where defendant sat back and hoped weeds might grow in the garden. *People v. Ross*, 132 Ill. App. 2d 1095, 1096, 271 N.E.2d 100, 101 (1971). He identified to the court the specific areas he believed the court should address, and the court acknowledged defendant's concern. Defendant satisfied Rule of Appellate Procedure 10(b)(2) by making his objections and requests at the charge conference before the jury retired. *State v. Ross*, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988) ("[A] request for an instruction at the charge conference is sufficient compliance with . . . [R]ule [10(b)(2)] to warrant . . . full review on appeal where the requested instruction is . . . promised but not given."). As to Practice Rule 21, the transcript reveals that the trial court did not provide counsel an opportunity to object to the charge after the charge was given. Ideally, counsel who have perceived an error in the instructions should nevertheless raise an objection *sua sponte*. However, under the circumstances of this case, where not only was the opportunity not given but the court had already sustained defendant's objections at the charge conference to portions of the charge and advised defendant that it would instruct in a particular way, we believe that defendant's actions at the charge conference sufficiently satisfied the purposes of Practice Rule 21, and that these issues have been preserved. In reaching this conclusion, it is apparent to us that the discrepancies between the promised instructions and those actu-

ally given by the highly experienced trial court were the result of inadvertence. Even so, this case vividly illustrates the importance of monitoring the instructions by all parties.

The presentation to the jury of written instructions that were consistent with the parties' understanding does not cure error in the oral instructions. We have held that error arises where a court's oral instructions are correct at one point and incorrect at another. *State v. Cousins*, 289 N.C. 540, 549, 223 S.E.2d 338, 344 (1976). Because we cannot tell which version of the instructions guided the jury, we must assume that it was influenced by any portions of either instruction that were erroneous. *State v. Harris*, 289 N.C. 275, 280, 221 S.E.2d 343, 347 (1976).

[6] We now consider whether the instructions were erroneous. We begin with the instruction pertaining to pecuniary gain. Defendant argues that the oral instruction relieved the State of its burden of proving all the elements of N.C.G.S. § 15A-2000(e)(6) and amounted to a peremptory instruction to the jury to find the aggravating circumstance. He contends that the statutory aggravating circumstance focuses on a criminal's intent at the time of the killing and applies only if the State establishes that the defendant killed for the purpose of pecuniary gain. Defendant claims that, in contrast, the instruction as given presumes that purpose existed by virtue of the fact that he took money from the victim when he killed her. N.C.G.S. § 15A-2000(e) states, in pertinent part: "Aggravating circumstances which may be considered shall be limited to the following: . . . (6) The capital felony was committed for pecuniary gain." N.C.G.S. § 15A-2000(e)(6). We agree with defendant's contention that, for this aggravating circumstance to apply, there must be some causal connection between the murder and the pecuniary gain at the time the killing occurs. *State v. Moore*, 335 N.C. 567, 610, 440 S.E.2d 797, 822, *cert. denied*, 513 U.S. 898, 130 L. Ed. 2d 174 (1994) ("This aggravating circumstance considers defendant's motive and is appropriate where the impetus for the murder was the expectation of pecuniary gain."). The circumstance is not applicable where the jury finds that the taking was a mere act of opportunism committed after a murder was perpetrated for another reason.

Several of this Court's opinions have dealt with the pecuniary gain instruction. In *State v. Hunt*, 323 N.C. 407, 432, 373 S.E.2d 400, 416 (1988), we did not discuss the text of the (e)(6) instruction and found only that there was sufficient evidence to support its being given. In *State v. Jennings*, 333 N.C. 579, 620, 430 S.E.2d 188, 209,

cert. denied, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993), we held that the aggravating circumstance was not unconstitutionally overbroad. In *State v. Bishop*, 343 N.C. 518, 556, 472 S.E.2d 842, 862 (1996), *cert. denied*, 519 U.S. 1097, 136 L. Ed. 2d 723 (1997), the trial court instructed that if the jury found that the defendant took jewelry from the victim when he killed her, the jury would find the (e)(6) aggravating circumstance. Because the defendant did not raise a contemporaneous objection, we found no plain error, even "[a]ssuming *arguendo* that the trial court's instructions did not clearly state that the jury must find that murder was committed for the purpose of pecuniary gain in order to find the circumstance existed." *Id.* at 557, 472 S.E.2d at 863.

In *State v. Davis*, 353 N.C. 1, 35, 539 S.E.2d 243, 266 (2000), *cert. denied*, 534 U.S. 839, 151 L. Ed. 2d 55 (2001), the defendant argued that the trial court's (e)(6) instruction allowed the jury to find the aggravating circumstance without determining that pecuniary gain was the motive for the murder. The text of the (e)(6) instruction in *Davis* was as follows:

> A murder is committed for pecuniary gain if the defendant, when he commits it, has obtained or intends to obtain money or other things that can be valued in money as a result of the death of the victim. In order to find that this murder was committed for pecuniary gain, you do not have to find that the primary motive of the defendant was financial gain. 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 . . . .

Id. at 36, 539 S.E.2d at 266. We noted that the statement in the instruction that financial gain did not have to be the primary motive for the murder "implicitly communicated that financial gain must have been a motive," *id.* at 37, 539 S.E.2d at 267, and held that the instruction was correct as a matter of law. In *State v. Barden*, 356 N.C. 316, 572 S.E.2d 108 (2002), *cert. denied*, —— U.S. ——, 155 L. Ed. 2d 1074 (2003), the defendant was convicted of murder for beating the victim to death. The defendant gave a statement in which he said that he hit the victim after the victim had insulted and slapped him. Once the victim was incapacitated, he took $180 from the victim's wallet. The trial court's instruction as to the (e)(6) aggravating circumstance included the following language: "If you find from the

evidence beyond a reasonable doubt[] that when the defendant killed the victim, the defendant took money from the victim, you would find this aggravating circumstance . . . ." *Id.* at 383, 572 S.E.2d at 150. Because defendant did not object to the instruction, we determined that the instruction did not constitute plain error. Finally, this Court did find an (e)(6) instruction to be plain error in *State v. Jones*, 357 N.C. 409, 584 S.E.2d 751, *mandamus denied sub nom. Jones v. Polk*, — U.S. —, — L. Ed. 2d —, 2003 N.C. LEXIS 1146 (Oct. 1, 2003), where the murder occurred during an armed robbery. The trial court's instruction stated that "[i]f 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." *Id.* at 419, 584 S.E.2d at 758. Because the jury had already convicted the defendant of armed robbery by this point in Jones' trial, we held that the instruction gave the jury no discretion to determine whether to find the existence of the aggravating circumstance. Citing *Barden* with approval, we went on to observe that the trial court should describe the behavior that constituted the alleged pecuniary gain. *Id.* at 420-21, 584 S.E.2d at 758-59.

In the case at bar, the instruction that was given stated, in pertinent part:

> A murder is committed for pecuniary gain if the defendant, when he commits it, has obtained, or intends or expects to obtain, money or some other thing which can be valued in money, either as compensation for committing it, or as a result of the death of the victim. If you find from the evidence beyond a reasonable doubt that when the defendant killed the victim, the defendant took $200 from the victim's purse, you would find this aggravating circumstance . . . .

Because defendant here raised a timely objection, *Bishop* and *Barden's* reliance on plain error analysis makes them inapplicable. The most similar case is *Davis*, where we approved the instruction that was given. We believe that instruction is distinguishable from the one given here. Both the instruction in *Davis* and in the case at bar began with a sentence taken directly from the pattern jury instructions. "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." 1 N.C.P.I.—Crim. 150.10 (2003). The trial court in *Davis* went on

to explain this instruction in the context of that case by reiterating to the jury the dual requirements that it would apply this circumstance if it found that the defendant at the time of the killing both took something of value from the victim and intended to obtain something of value. By contrast, the second sentence of the instruction in the case at bar omits the requirement that defendant have the intent to obtain something of value at the time of the killing. While the general instruction contained in the first sentence is a correct statement of the law, the specific instruction in the second sentence here removed from the jury the requirement that it make a finding whether there was a connection between the killing and the taking of something of value. Because the instruction allowed the jury to apply the aggravating circumstance even if the taking had no causal relationship to the killing, the instruction was erroneous. The trial court surely realized this deficiency in the instruction when it agreed to change it once defendant called the problem to the court's attention.

Having determined that the (e)(6) instruction was erroneous, we must now consider whether that error was prejudicial. A nonconstitutional error is prejudicial "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a). Defendant testified that the killing had been unintentional and that he took the victim's purse as he was fleeing her apartment. Although the jury obviously did not accept defendant's view of the stabbing, given a proper (e)(6) instruction, it may have concluded that defendant did not stab the victim for the purpose of taking her purse. While the jury was also instructed as to the aggravating circumstance that defendant had a prior violent felony, N.C.G.S. § 15A-2000(e)(3), the jury did not find this circumstance. Therefore, if the jury had not found the (e)(6) aggravating circumstance, the only aggravating circumstance would have been that the murder was especially heinous, atrocious, and cruel. N.C.G.S. § 15A-2000(e)(9). Under these circumstances, we believe that there is a reasonable probability that, had the error not been committed, the jury might have reached a different result. N.C.G.S. § 15A-1442(4)(d) (2003). Accordingly, this case must be remanded for a new sentencing proceeding.

We next turn to the court's instructions as to the nonstatutory mitigating circumstances. Although the court agreed to give peremptory instructions to the five circumstances listed above, the oral instructions actually given did not include language to the effect that

all the evidence supported the circumstance. The issues and recommendation form returned by the sentencing jury indicated that while at least one juror had found four of the five nonstatutory mitigating circumstances existed and had mitigating value, no juror found that defendant had voluntarily acknowledged wrongdoing prior to his arrest. The relationship between the absence of the peremptory language and the failure of any juror to find this circumstance that was supported by all the evidence is uncertain because the jurors may have found the circumstance existed but had no mitigating value. Our finding of prejudicial error as to the (e)(6) instruction means that the case will be remanded for resentencing and, therefore, we do not have to determine formally the effect of the court's failure to give peremptory instructions here. Because we cannot foresee what evidence may be presented at the new sentencing proceeding, we express no opinion as to whether peremptory instructions on these issues will then be appropriate.

Finally, we consider the court's omission of a sentence in its instruction as to the statutory mitigating circumstance that the offense was committed while defendant was under the influence of a mental or emotional disturbance. N.C.G.S. § 15A-2000(f)(2). The trial court's proposed written instructions were consistent with the pattern instruction in that the proposed instruction contained a sentence both detailing the specific disorders from which defendant claimed to suffer and requiring that, for it to apply, the jury must find that defendant was under the influence of these disorders when he committed the offense. 1 N.C.P.I—Crim. 150.10. This sentence was omitted from the oral instructions. Again, we do not need to undertake a full-blown analysis as to whether this omission constituted prejudicial error, but we note that the peremptory nature of the omitted language was potentially beneficial to defendant, especially in light of the expert testimony that he suffered from these disorders. The omission of this language could have affected the jury's verdict.

[7] We now consider additional issues that may arise at the new sentencing proceeding. Defendant argues that the trial court's instruction as to N.C.G.S. § 15A-2000(f)(7) was erroneous. The court instructed that the jury should "consider whether the age of the defendant at the time of this murder is a mitigating factor. The mitigating effect of the age of the defendant is for you to determine from all of the facts and circumstances which you find from the evidence." Defendant argues that this instruction improperly allowed the jury to find that the (f)(7) circumstance existed only if defendant's age had

mitigating value, and that the instruction had the effect of making the (f)(7) circumstance equivalent to a nonstatutory mitigating circumstance. Defendant also properly acknowledges that we addressed this issue in *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). In *Rouse*, this Court held that "[u]nless a defendant's age has mitigating value as a matter of law, a juror need consider the defendant's age as mitigating only if that juror finds by a preponderance of the evidence that his age has mitigating value." *Id.* at 105, 451 S.E.2d at 569. The instruction given by the trial court was consistent with this holding. Accordingly, this assignment of error is overruled.

Defendant objects to various arguments made by the prosecuting attorney to the sentencing jury. Although we doubt that identical arguments will be made at the new sentencing proceeding, we think it appropriate to comment on several of the issues raised by defendant. First, defendant claims that the trial court erred by denying his motion for a mistrial when the prosecutor allegedly referred to defendant as an "SOB." The comment arose as the prosecutor addressed Dr. Hilkey's expert testimony that defendant suffered from Antisocial Personality Disorder. The prosecutor characterized this condition in layman's terms as meaning, "He's an SOB. He's mean. That's what antisocial means and that's what he is." At the conclusion of the State's argument, defendant moved for a mistrial and a curative instruction. The court denied the mistrial motion but correctly instructed the jury that, "Ladies and gentlemen, during closing argument, [the prosecutor] referred to the defendant as an SOB. Insults or name calling is not permitted in a closing argument. It's inappropriate so therefore you are not to consider that in any way whatsoever." Second, defendant claims that the prosecutor improperly argued that Dr. Hilkey's expert testimony had been shaped by the fact that he was paid. The record reveals that, during Dr. Hilkey's cross-examination, he testified that he was being paid an hourly rate by the State for his work. Dr. Hilkey testified that he had made an error in computing the score for defendant's IQ test, but that the error was unlikely to have made a difference in the final determination of defendant's result. He also admitted making errors in scoring defendant's Personality Assessment Screening test. During the prosecutor's sentencing argument related to Dr. Hilkey's testimony, he argued, speaking as Dr. Hilkey, "Yes, I made a mistake but I'm still right. I'm not changing my opinion because I'm getting paid $150 an hour to please these people over here." Because this case is being remanded for a new sentencing proceeding, we need not determine whether these arguments

constituted prejudicial error. However, when that sentencing proceeding occurs, we encourage counsel to review this Court's holdings in *State v. Jones*, 355 N.C. 117, 558 S.E.2d 97 (2002) and *State v. Rogers*, 355 N.C. 420, 562 S.E.2d 859 (2002).

[8] Defendant argues that the prosecutor improperly referred to defendant's exercise of his right to a jury trial both in his cross-examination of defendant during the sentencing proceeding and during the sentencing proceeding closing argument. Although defendant did not testify during the guilt-innocence portion of the trial, he took the stand during the sentencing proceeding and testified that he regretted killing Yarbrough. The following exchange occurred during defendant's cross-examination:

> [PROSECUTOR]: Well, what is your view of this crime, Mr. Maske?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> A. This crime is something that I shouldn't have even done.
>
> Q. But last week you wanted to go home, didn't you?
>
> [DEFENSE COUNSEL]: Object.
>
> A. Last week?
>
> THE COURT: Overruled.
>
> Q. Yes, sir. Last week when you pled not guilty you wanted to go home, didn't you?
>
> [DEFENSE COUNSEL]: Object.
>
> THE COURT: Sustained.
>
> [PROSECUTOR]: Well, you didn't plead guilty, did you, Mr. Maske?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Sustained.
>
> [PROSECUTOR]: You wanted this jury to turn you loose, didn't you, Mr. Maske?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.

A. Did I want them to turn me loose?

Q. Yes, sir.

A. No, because I deserved to be punished for what I did and I deserve to do my time. I did something wrong and I'm here to be judged for it.

During his closing argument, the prosecutor sought to argue that the jury should not find the nonstatutory mitigating circumstance that defendant had accepted responsibility for his conduct, but the court sustained defendant's objection and instructed the jury that defendant had a right not to testify during the first portion of the trial and the jury could not hold that decision against him.

A defendant has a constitutional right to plead not guilty to a criminal offense, U.S. Const. amend. VI; N.C. Const. art. I, § 24; *State v. Kemmerlin*, 356 N.C. 446, 482, 573 S.E.2d 870, 894 (2002), and cannot be penalized for exercising this right, *State v. Edwards*, 310 N.C. 142, 147-48, 310 S.E.2d 610, 614 (1984). Under North Carolina law, there is no such thing as a plea of "innocent." A criminal defendant may plead not guilty, guilty, or no contest. N.C.G.S. § 15A-1011(a) (2003). A plea of not guilty is the method by which a defendant requires the State to prove its case beyond a reasonable doubt. *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986). Such a plea is not necessarily a claim by defendant that he did not commit the alleged offense, nor is it equivalent to testimony that the defendant hopes the jury will acquit him. On the other hand, a defendant's plea is a matter of public record and a proper subject for both questioning and argument that does not run afoul of a defendant's rights. Because the circumstances of each case are different, we will not attempt to fashion any general rule pertaining to use of a defendant's plea, but we advise counsel to be advertent to the legal effect of a not guilty plea.

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

NO ERROR IN GUILT-INNOCENCE PHASE; DEATH SENTENCE VACATED; REMANDED FOR A NEW CAPITAL SENTENCING PROCEEDING.

Justice BRADY concurring.

I agree with the majority that defendant's sentence of death should be reversed and that his case should be remanded to the trial court for a new sentencing proceeding. I write separately to emphasize that this Court has, in the present case, been confronted with and remedied what I believe to be a serious error in a capital proceeding. This Court guards fair play and the integrity of our justice system, even amid a furor of criticism regarding purported problems with our system of capital punishment. Our decision today reflects that our judicial system is capable of correcting itself and will, in fact, do so. Even so, it is my belief that criticism regarding capital punishment, including calls for a death penalty moratorium, should not be directed to the judiciary. Rather, those discussions should be directed to the legislature, the branch of government that this Court has consistently maintained is charged with the responsibility and is better equipped to explore changes in our laws based upon evolving social norms.

Nonetheless, inadvertent mistakes requiring this Court to reverse a defendant's death sentence should rarely occur. In this case, all relevant parties literally "dropped the ball." The trial judge neither gave the requested instructions to the jury panel nor allowed the parties an opportunity to object. The State was clearly not attentive to the contents of the instructions when they were presented in open court, and the defense attorney did not, as he ideally should have, contemporaneously object to the instructions. These critical omissions are unacceptable given the gravity of the setting, the dwindling resources available to our judiciary, and the expanding caseload of the judiciary. *See* Chief Justice I. Beverly Lake, Jr., *2003 State of the Judiciary to the North Carolina General Assembly* at 2 (delivered in print to the North Carolina General Assembly, Raleigh, N.C., 7 April 2003) (noting that our judicial system is "*very severely*[] underfunded").

This case clearly demonstrates how avoidable mistakes place a substantial strain on our judicial resources. When this case is remanded to the superior court, the parties will select, and the trial court will empanel, a new jury. This process takes weeks to accomplish as the jury panel must be "death qualified." This second sentencing phase will require the court to conduct, in essence, an entirely new capital trial. Furthermore, there are a limited number of competent and experienced attorneys who are willing to accept the responsibility of these complex cases. Should the jury recommend

and the court impose a sentence of life without parole, the Court of Appeals will then review the propriety of defendant's sentencing procedure. In the alternative, should a capital sentence be imposed, this Court must conduct an exhaustive review of defendant's sentence for a second time. Defendant's retrial has the collateral consequence of imposing further stress and trauma on the victim's family and friends, as well as those of the defendant.

As in every human endeavor, error is sometimes unavoidable, and our system of appeals will continue to provide relief to defendants in the appropriate cases. However, I take this opportunity to encourage trial judges, the State, and defense attorneys to practice self-imposed quality control by becoming more diligent in avoiding costly and unnecessary mistakes at the trial court level.

STATE OF NORTH CAROLINA v. DAVID ERIC MITCHELL

No. 655PA02

(Filed 6 February 2004)

Motor Vehicles— driving while impaired—driver's license checkpoint

The Court of Appeals did not err in a driving while impaired case by concluding that a driver's license checkpoint was legal, because: (1) officers are not constitutionally mandated to conduct driver's license checkpoints pursuant to written guidelines, the officer received sufficient supervisory authority to conduct the checkpoint, and the officers stopped all oncoming traffic at the checkpoint; (2) the pertinent officer had reasonable articulable suspicion to stop defendant when defendant ignored the officer's order to stop and forced the officer to jump out of the road to avoid being struck by defendant's vehicle; and (3) the officer had reasonable articulable suspicion that defendant committed several crimes including assaulting a police officer, attempting to elude an officer who was in the lawful performance of his duties, and driving a vehicle carelessly and heedlessly in willful or wanton disregard of the rights or safety of others.

Justice BRADY dissenting.

Justices WAINWRIGHT and EDMUNDS join in the dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a decision of the Court of Appeals, 154 N.C. App. 186, 571 S.E.2d 640 (2002), reversing an order entered in open court and reduced to writing on 17 October 2001 by Judge Marcus L. Johnson in Superior Court, Gaston County. Heard in the Supreme Court 16 October 2003.

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

American Civil Liberties Union of North Carolina Legal Foundation, Inc., by Seth H. Jaffe, for the defendant.

ORR, Justice.

On 6 February 2000, defendant David Eric Mitchell was arrested and charged with driving while impaired in violation of N.C.G.S. § 20-138.1. Defendant was found guilty of the offense in District Court, Gaston County. He appealed to Superior Court and, on 17 September 2001, filed a pre-trial motion to suppress on the ground that his stop and arrest following his failure to stop at a driver's license checkpoint violated the Fourth and Fourteenth Amendments of the United States Constitution. The Superior Court granted defendant's motion to suppress defendant's stop and arrest, finding that defendant "was stopped as a direct result of a roadblock or checking station;" that "the stopping of the Defendant's vehicle at the February 6, 2000, check point was a seizure;" and that the checkpoint "violates the United States and North Carolina Constitutions" because of the "unbridled and unrestrained discretion" granted to the officers in the field. The State appealed the trial court's grant of defendant's motion to the Court of Appeals.

On appeal, the Court of Appeals concluded that the trial court needed only to address the suppression motion in the context of the legality of defendant's stop and arrest. In support of its decision, the Court of Appeals stated that the checkpoint "was not an unreasonable detention and therefore was valid under the Fourth Amendment." *State v. Mitchell*, 154 N.C. App. 186, 189-90, 571 S.E.2d 640, 643 (2002). We agree with the Court of Appeals regarding the legality of the checkpoint; however, we conclude that defendant's stop and arrest was proper without resting our decision on the constitutionality of the checkpoint. Accordingly, we affirm the decision of the Court of Appeals as modified herein.

The State's evidence showed the following: On 6 February 2000, Boyce Falls, a police officer with the Belmont Police Department, decided to set up a random driver's license check on U.S. Highway 29/74 to check westbound traffic for valid licenses and registrations. Falls testified that he had "standing permission" from Belmont Police Captain William Jonas to conduct driver's license checkpoints. Falls spoke with his shift sergeant before conducting the checkpoint to ensure that the sergeant had enough manpower for the checkpoint. Pursuant to the Belmont Police Department's requirements, three police officers were present at the checkpoint. Also, pursuant to these requirements, the officers conducted the checkpoint in a safe area, wore their traffic vests, held flashlights, which they used to direct automobiles to stop, and stopped every vehicle in the westbound lanes of U.S. 29/74. While these requirements were not stated in written form, Captain Jonas testified about them at the suppression hearing.

On the night in question, at 4:15 a.m., defendant approached the checkpoint, which was evidenced by the continuous activation of the blue lights on the patrol cars. Falls testified that as defendant approached the checkpoint, he shined his flashlight on his left hand, directing defendant to stop. Defendant did not stop. Officer Falls stated that:

> The closer [defendant] got—and he got very, very close to me—within twenty-five yards of me—I shined the flashlight in his eyes and said stop, whoa; and then I put my flashlight back down on my hand; and when I realized that he was only speeding up, I jumped out of the road and went and got in my vehicle so I could pursue after him because I knew he wasn't going to stop at that time.

Next, Falls pursued defendant with the blue lights and siren of his patrol car activated. Defendant finally stopped one and one-half miles beyond the checkpoint. We have no evidence in the record of what transpired after defendant stopped; the only evidence before us comes from the suppression hearing, and relates to events that occurred prior to the stop.

The only issue raised by defendant and addressed by the trial court at the suppression hearing was whether the stop and arrest should be suppressed. The constitutionality of the checkpoint was the rationale for defendant's argument that the stop and arrest should be suppressed because the checkpoint was unconstitutionally autho-

rized. While concluding that the checkpoint was constitutional, we also conclude that the trial court erred by analyzing defendant's stop and arrest in terms of the legality of the checkpoint. Defendant failed to stop at the checkpoint and in fact, according to Officer Falls' testimony, increased his speed and forced Falls to quickly move out of the path of the oncoming vehicle. Therefore, whether defendant's stop and arrest should be suppressed turns on whether Officer Falls had reasonable articulable suspicion to stop defendant after defendant drove through the checkpoint and nearly struck Falls with the vehicle. We conclude that Officer Falls did have reasonable articulable suspicion to stop defendant. Therefore, the trial court erred by suppressing defendant's stop and arrest.

Police officers effectuate a seizure when they stop a vehicle at a checkpoint. *City of Indianapolis v. Edmond*, 531 U.S. 32, 40, 148 L. Ed. 2d 333, 342 (2000). But, "[t]he Fourth Amendment does not treat a motorist's car as his castle." *Illinois v. Lidster*, — U.S. —, —, — L. Ed. 2d —, — (Jan. 13, 2004) (No. 02-1060). And checkpoint stops conform to the Fourth Amendment if they are reasonable. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 450, 110 L. Ed. 2d 412, 420 (1990). "[W]e must judge [the] reasonableness [of a checkpoint stop], hence, its constitutionality, on the basis of individual circumstances." *Lidster* at —, — L. Ed. 2d at —. In the case at bar, we conclude that the checkpoint is reasonable, and thus conforms to the Fourth Amendment.

Because checkpoint stops are minimally intrusive, and are not subjective stops, like those arising from roving patrols, checkpoints are viewed with less scrutiny than are roving patrols. As the U.S. Supreme Court stated in *United States v. Ortiz*, 422 U.S. 891, 894-95, 45 L. Ed. 2d 623, 628 (1975):

> [T]he circumstances surrounding a checkpoint stop and search are far less intrusive than those attending a roving-patrol stop. Roving patrols often operate at night on seldom-traveled roads, and their approach may frighten motorists. At traffic checkpoints the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion.

In the instant case, the checkpoint stop was only a minimal intrusion.

Relying on *Sitz*, 496 U.S. 444, 110 L. Ed. 2d 412, where the United States Supreme Court upheld a sobriety checkpoint conducted pursuant to written guidelines, defendant argues and the dissent agrees

that the Fourth Amendment prohibits officers from conducting checkpoints without written guidelines. We disagree. Although the Michigan State Police in *Sitz* conducted the sobriety checkpoint pursuant to written guidelines, the United States Supreme Court did not uphold the checkpoint solely because of those written guidelines. *Id.* at 453, 110 L. Ed. 2d at 422. The Court also found the checkpoint constitutional because it was a checkpoint, not a roving patrol, and because the police stopped every approaching vehicle. Similarly, in the instant case, the Belmont Police stopped every oncoming vehicle.

Defendant also claims *Delaware v. Prouse*, 440 U.S. 648, 59 L. Ed. 2d 660 (1979), prohibits police officers from conducting driver's license checkpoints without written guidelines. In *Prouse*, 440 U.S. 648, 59 L. Ed. 2d 660, the United States Supreme Court held that the Fourth Amendment prohibits police from randomly stopping motorists to check their driver's licenses and registrations. *Id.* at 663, 59 L. Ed. 2d at 673. The Court condemned the "unbridled discretion" exercised by law enforcement officers conducting these spot checks. *Id.* at 661, 59 L. Ed. 2d at 672. However, as defendant concedes, the Court in *Prouse* sanctioned checkpoints like the one at issue, stating: "Questioning of all oncoming traffic at roadblock-type stops is one possible alternative [to random stops]." *Id.* at 663, 59 L. Ed. 2d at 674. As previously noted, the officers stopped all oncoming traffic at the checkpoint.

Neither *Sitz*, 496 U.S. 444, 110 L. Ed. 2d 412, *Prouse*, 440 U.S. 648, 59 L. Ed. 2d 660, nor the Fourth Amendment requires police departments to have written guidelines before conducting driver's license checkpoints, nor do we find any such requirement under our state constitution. Therefore, we decline to conclude that checkpoints conducted without written guidelines are per se unconstitutional. Here adequate internal guidelines were testified to and implemented.

Defendant also contends the checkpoint is unconstitutional because Officer Falls, who established the checkpoint, failed to obtain supervisory permission before creating it. To support this contention, defendant relies heavily on *Prouse*, 440 U.S. 648, 59 L. Ed. 2d 660, in which the United States Supreme Court held that a police officer abused his discretion by randomly stopping a driver to check the driver's license and registration. Defendant contends that to prevent police officers from abusing their discretion, this Court should require them to obtain supervisory permission before creating driver's license checkpoints. But, in the case *sub judice*, Officer Falls

had supervisory permission to create the checkpoint. Officer Falls testified that before conducting the checkpoint, he "spoke with the shift sergeant . . . [t]o make sure [the sergeant] ha[d] the manpower" for Falls to set up the checkpoint. Additionally, Falls testified that he had "standing permission" from Captain Jonas to conduct driver's license checkpoints as long as he followed Jonas' guidelines. Captain Jonas' guidelines, as testified to at the hearing, included: requiring his police officers to conduct driver's license checkpoints in safe places that had proper lighting; requiring officers to activate their blue lights while conducting a checkpoint; requiring officers to stop all cars approaching a checkpoint; and requiring at least three officers to be present at a checkpoint.

We conclude that Falls' standing permission to set up checkpoints pursuant to Captain Jonas' oral guidelines and Officer Falls' call to his supervisor before creating the checkpoint at issue are constitutionally sufficient restraints to keep Falls from abusing his discretion. Because police officers are not constitutionally mandated to conduct driver's license checkpoints pursuant to written guidelines; because Officer Falls received sufficient supervisory authority to conduct the checkpoint; and because the officers stopped all oncoming traffic at the checkpoint, we conclude that the checkpoint was constitutional.

Finally, we note that in the United States Supreme Court's most recent decision on the constitutionality of checkpoints, the Court neither addressed the need for officers to set up checkpoints pursuant to written guidelines nor the need for officers to obtain supervisory permission before creating a checkpoint. *Lidster*. —— U.S. ——, —— L. Ed. 2d ——. That neither the parties in *Lidster*, nor the Supreme Court itself were compelled to address these issues indicates the issues are not lynchpins for determining the constitutionality of a checkpoint.

Lidster involved a roadblock set up to seek information about a prior crime, and not a roadblock set up to check drivers' licenses and registrations. But here, defendant's argument requesting this Court to impose additional constraints on police officers who set up driver's license checkpoints would arguably apply to police officers who set up information-seeking checkpoints. Thus, we conclude that the absence in *Lidster* of any focus on an issue dealing with supervisory permission and written guidelines indicates that these issues do not merit a constitutionally mandated reversal in a roadblock case such as the one *sub judice*.

Alternatively, because defendant did not stop at the checkpoint, we also consider whether Officer Falls had reasonable articulable suspicion to stop defendant after defendant ignored the officer's order to stop and forced Falls to jump out of the road to avoid being struck by defendant's vehicle. A police officer may stop a person if the officer has "reasonable articulable suspicion" that the person was engaged in criminal activity prior to the seizure. *State v. Foreman*, 351 N.C. 627, 631, 527 S.E.2d 921, 923 (2000). "When an officer observes conduct which leads him reasonably to believe that criminal conduct may be afoot, he may stop the suspicious person to make reasonable inquiries." *State v. Pearson*, 348 N.C. 272, 275, 498 S.E.2d 599, 600 (1998).

Officer Falls had reasonable articulable suspicion to stop defendant. As the United States Supreme Court recently stated: "Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Illinois v. Wardlow*, 528 U.S. 119, 124, 145 L. Ed. 2d 570, 576 (2000) (holding that a police officer had reasonable articulable suspicion to stop a defendant where defendant, without provocation, fled upon seeing police officers). In the case *sub judice*, defendant accelerated his vehicle when Falls ordered him to stop, and defendant's vehicle nearly struck Falls. Defendant's actions constituted evidence of flight. This flight and the surrounding circumstances gave Officer Falls reasonable articulable suspicion to stop defendant. We note, however, that the facts of the case do not deal with the circumstance where a driver makes a legal turn away from a checkpoint.

Furthermore, without concluding that defendant committed any crimes, we note that Falls had reasonable articulable suspicion that defendant committed several crimes: assaulting a police officer, "attempting to elude a law enforcement officer who is in the lawful performance of his duties" in violation of N.C.G.S. § 20-141.5(a) (2001), and driving a vehicle "carelessly and heedlessly in willful or wanton disregard of the rights or safety of others," in violation of the reckless driving statute, N.C.G.S. § 20-140(a) (2001).

Falls also had reasonable articulable suspicion that defendant committed an assault. "There is no statutory definition of assault in North Carolina, and the crime of assault is governed by common law rules." *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967). This Court defines assault as, " 'an overt act or an attempt, or the unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the person of another, which show

of force or menace of violence must be sufficient to put a person of reasonable firmness in fear of immediate bodily harm.' " *Id.* (quoting 1 Strong's N.C. Index, Assault and Battery, § 4, p. 182 [1957]). Because defendant accelerated his vehicle as he directly approached Officer Falls, Falls could have determined that defendant was attempting to injure him. Hence, Falls had reasonable articulable suspicion that defendant committed an assault.

Moreover, the fact that defendant accelerated when Officer Falls requested him to stop, and that defendant nearly hit Falls, provided Falls with reasonable articulable suspicion that defendant violated N.C.G.S. § 20-141.5(a) (2001), which states: "It shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties," and N.C.G.S. § 20-140(a) (2001), which states: "Any person who drives any vehicle upon a highway or any public vehicular area carelessly and heedlessly in willful or wanton disregard of the rights or safety of others shall be guilty of reckless driving." Therefore, regardless of the constitutional status of the checkpoint, Officer Falls properly stopped and seized defendant. Accordingly, the trial court erred in suppressing evidence of defendant's stop and arrest.

To follow the dissent's argument to its logical and practical conclusion under the facts of this case would result in the inability of a law enforcement officer to stop a motorist who disobeyed the officer's request to stop at a roadblock. The dissent attempts to avoid this conclusion by stating that: "Police officers may certainly develop a reasonable articulable suspicion to stop a car based upon their observations, *unrelated to the checkpoint*, that a crime has been committed." Even with this acknowledgment, under the dissent, a motorist who "guesses" correctly that a checkpoint is not validly set up would appear to have *carte blanche* to ignore the checkpoint absent circumstances unrelated to the checkpoint.

MODIFIED AND AFFIRMED.

Justice BRADY dissenting.

I acknowledge that impaired drivers seriously endanger the lives of their fellow citizens across our state and nation. I further acknowledge that North Carolina's state and local law enforcement agencies work diligently to ensure the safety of our streets and highways. However, I cannot agree with the majority's conclusion that this case

"turns on whether Officer Falls had reasonable articulable suspicion to stop defendant" after defendant proceeded through the license checkpoint; nor can I agree that the driver's license checkpoint at issue passes constitutional muster under the United States and North Carolina Constitutions. In this case, field officers were endowed with unbridled discretion to implement and operate a random license checkpoint. I would adhere to the requirements of *Delaware v. Prouse*, 440 U.S. 648, 59 L. Ed. 2d 660 (1979) and hold that the discretion granted the Belmont officers rendered the checkpoint violative of the Fourth and Fourteenth Amendments of the United States Constitution, as well as Article I, Section 20 of the North Carolina Constitution. For these reasons, I respectfully dissent.

The paramount question in this case should be the constitutionality of the driver's license checkpoint. The majority acknowledges that this was the "only issue" raised by defendant and considered by the trial court at the suppression hearing. At that hearing, Officer Falls confirmed that defendant's "vehicle was pursued and stopped *solely* as a result of this random stop—this random checkpoint." (Emphasis added.) Thereafter, the trial court found that Officer Falls stopped defendant "as a sole and direct result of the random check point or roadblock." Instead of constraining itself to the trial court's factual findings, *see State v. Braxton*, 344 N.C. 702, 709, 477 S.E.2d 172, 176 (1996) ("If supported by competent evidence, the trial court's findings of fact are conclusive on appeal."), the majority speculates as to what crimes would have justified Officer Falls' seizure of defendant, *see cf.* 2 Wayne R. LaFave, *Search and Seizure* § 3.2(d), at 44 (3rd ed. 1996) ("It is axiomatic that hindsight may not be employed in determining whether a prior arrest or search was made upon probable cause."). However, defendant was never charged with any of the crimes the majority now suggests that he committed, nor did Officer Falls testify that he formulated probable cause to believe defendant had committed any of those offenses.

Clearly, defendant's behavior was questionable in that defendant, with no knowledge of the checkpoint's unconstitutional nature, failed to stop when so directed. Motorists do not have *carte blanche* to ignore checkpoints that they suspect are invalid and to avoid responsibility if they guess correctly. Police officers may certainly develop reasonable articulable suspicion to stop a car based upon their observations, unrelated to the checkpoint, that a crime has been committed. Armed with such suspicion, the officers' seizure of the vehicle is proper regardless of the constitutionality of the checkpoint. *See State*

v. Palmquist, —— S.W.3d ——, ——, 2003 Tenn. Crim. App. LEXIS 891, at *5 (Oct. 13, 2003) (No. M2002-01047-CCA-R3-CD) (concluding that a vehicle seizure was constitutional where an officer, stationed at an unconstitutional roadblock, testified that he stopped the vehicle "*only* because Defendant was illegally operating his vehicle without its headlights on, and not because Defendant had intentionally avoided the roadblock"). However, in the instant case, there is no record evidence to support the crimes speculated to by the majority.

As the license checkpoint was the impetus for defendant's stop, the determinative issue is as follows: Did the degree of discretion afforded Belmont Police Officer Falls render the random license checkpoint unreasonable and therefore unconstitutional under the Fourth and Fourteenth Amendments of the United States Constitution and Article I, Section 20 of the North Carolina Constitution? Upon a careful analysis of the relevant United States Supreme Court jurisprudence, I believe that it did.

The Fourth Amendment of the United States Constitution, applicable to the states through the Fourteenth Amendment, protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV; *see also* N.C. Const. art. I, § 20 ("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."); *State v. Grooms*, 353 N.C. 50, 73, 540 S.E.2d 713, 728 (2000) (noting the similarity between the Fourth Amendment to the federal constitution and the General Warrants Clause of the state constitution), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001). While license checks and sobriety checks are not *per se* unconstitutional, it is well established that stopping a person at such checkpoints is a seizure within the meaning of the Fourth Amendment and therefore must be reasonable. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 450, 110 L. Ed. 2d 412, 420 (1990); *Prouse*, 440 U.S. at 653-54, 59 L. Ed. 2d at 667. Because checkpoint stops are not based on individualized suspicion, they must be carried out in a manner that avoids the exercise of "unbridled discretion" by officers in the field. *Prouse*, 440 U.S. at 663, 59 L. Ed. 2d at 674 ("[P]ersons in automobiles on public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of police officers.").

In *Prouse*, the United States Supreme Court specifically addressed the constitutionality of a practice by which a patrol officer in a police cruiser stopped vehicles and detained drivers to spot check their licenses and registrations without reasonable articulable suspicion to justify the stops. *Id.* at 650, 59 L. Ed. 2d at 665. At those stops, "[t]he patrolman was not acting pursuant to any standards, guidelines, or procedures pertaining to document spot checks, promulgated by either his department or the State Attorney General." *Id.*

The Supreme Court held in *Prouse* that the suspicionless seizure of motorists for spot checks was unreasonable under the Fourth Amendment because the practice granted the patrol officer "unbridled discretion." *Id.* at 663, 59 L. Ed. 2d at 674. The Court articulated the " 'grave danger' " inherent in the abuse of officer discretion as follows:

> When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations—or other articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered—we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver. This kind of *standardless and unconstrained discretion is the evil the Court has discerned* when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.

440 U.S. at 661-62, 59 L. Ed. 2d at 672 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 559, 49 L. Ed. 2d 1116, 1129 (1976)) (emphasis added). The Court then clarified that "[t]his holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion." *Id.* at 663, 59 L. Ed. 2d at 674. While *dicta* within *Prouse* indicated that stopping all vehicles might be one such method to eliminate the evil inherent in spot checking, *id.* at 663, 59 L. Ed. 2d at 674, United States Supreme Court jurisprudence strongly suggests that the method for conducting the type of suspicionless stop at issue in the present case would be chosen, planned, disseminated, and regulated from a supervisory level, *see, e.g.*, *Sitz*, 496 U.S. 444, 110 L. Ed. 2d 412; *Martinez-Fuerte*, 428 U.S. 543, 49 L. Ed. 2d 1116; *see also City of Indianapolis v. Edmond*, 531 U.S. 32, 148 L. Ed. 2d 333 (2000).

This concept was first voiced by the United States Supreme Court in *Martinez-Fuerte*, 428 U.S. 543, 49 L. Ed. 2d 1116, in which the Court upheld the constitutionality of suspicionless seizures at fixed immigration checkpoints. In *Martinez-Fuerte*, the Court explained,

> [t]he location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class.

Id. at 559, 49 L. Ed. 2d at 1129.

Subsequently, in *Sitz*, the Court placed great emphasis on the fact that a roadblock for detecting impaired drivers was conducted under *written* "guidelines setting forth procedures governing checkpoint operations, site selection, and publicity" that left virtually no discretion to the officer in the field. 496 U.S. at 447, 110 L. Ed. 2d at 418 (upholding the constitutionality of a roadblock for detecting impaired drivers). Further, the United States Supreme Court recently stated that a law enforcement officer cannot undertake a suspicionless seizure when the seizure's primary purpose is "to advance 'the general interest in crime control.' " *Edmond*, 531 U.S. at 44, 148 L. Ed. 2d. at 345 (quoting *Prouse*, 440 U.S. at 659, n.18, 59 L. Ed. 2d at 671, n.18) (explaining that the primary purpose of a seizure is to be ascertained at the *programmatic level*). Although *Edmond* does not address the specific issue raised by the present case, it illustrates the need for and the Court's expectation that law enforcement agencies implement standard written procedures to prevent abuses of officer discretion.

Most recently, in *Illinois v. Lidster*, the Supreme Court scrutinized a highway checkpoint set up to solicit information from motorists regarding a hit-and-run accident. *Illinois v. Lidster*, — U.S. —, —, — L. Ed. 2d —, —, 2004 LEXIS 656 (Jan. 13, 2004) (No. 02-1060). The Court, in *Lidster*, validated a new and wholly independent class of constitutional suspicionless searches, "information-seeking highway stops." *Id.* at —, — L. Ed. 2d at —, 2004 LEXIS 656, at *6, *9. The Court emphasized that these checkpoints are not designed to help police apprehend the stopped drivers but are instead intended to "ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others." *Id.* at —, — L. Ed. 2d at —, 2004 LEXIS 656,

at *9. Given the novel and limited nature of this particular Fourth Amendment distinction, *Lidster* has little precedential value with regard to the case currently before this Court.

Even so, it is instructive to note that, when determining the reasonableness of the *Lidster* seizure, the United States Supreme Court thoroughly discussed the narrow scope of the checkpoint stop. The Court reasoned that

> [t]he police *appropriately tailored* their checkpoint stops to fit important criminal investigatory needs. The stops took place about one week after the hit-and-run accident, on the same highway near the location of the accident, and at about the same time of night.

Id. at —, — L. Ed. 2d at —, 2004 LEXIS 656, at *15 (emphasis added). During the checkpoint's implementation, "as each vehicle drew up to the checkpoint, an officer would stop it for 10 to 15 seconds, ask the occupants whether they had seen anything happen there the previous weekend, and hand each driver a flyer." *Id.* at —, — L. Ed. 2d at —, 2004 LEXIS 656, at *6. Clearly, the impetus for the *Lidster* checkpoint, its date, the location, the time, and the questions asked were command directed by the Lombard Police Department, and not left to the discretion of a single officer in the field. The Court took care to weigh these factors in its determination that the checkpoint was reasonable under the Fourth Amendment.

I submit that the cases discussed *supra* mandate a significant level of supervisory authority and written standardized regulations regarding the time, place, and manner in which field officers conduct checkpoints. Standard policies and procedures are necessary for safeguarding the constitutional rights of individuals who are subjected to suspicionless seizures. Implementing written policies constitutes a manageable method for eliminating the "evil" of "standardless and unconstrained discretion." *Prouse*, 440 U.S. at 661, 59 L. Ed. 2d at 672. Indeed, the North Carolina State Highway Patrol already adheres to written guidelines that require supervision of every "preplanned, systematic stopping of vehicles to check motorists for compliance with motor vehicle laws including driving while impaired." Div. of State Highway Patrol, N.C. Dep't of Crime Control & Pub. Safety, *Policy and Procedures Manual* K.4 (2001) (mandating that "[a] daytime checking station must be approved by a district supervisor" and "[a] nighttime checking station must be approved by the First Sergeant or higher authority"). Furthermore, as

the State conceded upon questioning at oral argument, all law enforcement agencies and departments accredited by the Commission on Accreditation for Law Enforcement Agencies, Inc. must follow similarly mandated procedures.

Notwithstanding the United States Supreme Court's admonitions against unconstrained field-officer discretion and the apparent prevailing law enforcement practice in North Carolina, no supervision or written regulations guided the field officers in the case *sub judice*. Officer Falls testified that the checkpoint at issue was considered by the Belmont Police Department to be a "random" license checkpoint. Testimony at the suppression hearing also confirmed that Officer Falls was granted "standing permission" to set up such a "random" license checkpoint whenever, wherever, however, and for as long as he deemed necessary.

The majority correctly points out that Officer Falls contacted his shift sergeant before implementing the checkpoint, but the record reveals that this contact was only to ensure that he had "the manpower . . . [to] actually set up the checkpoint." At the conclusion of the suppression hearing, the trial court recognized that Officer Falls had not obtained permission to establish the checkpoint. As the court was announcing its oral order, the State pointed out that "Officer Falls did get the permission from his shift sergeant." The trial court disagreed, noting that Officer Falls "said he *told* the shift sergeant he was going to do [a checkpoint]." (Emphasis added.)

As this case illustrates, a field officer's "standing permission" to conduct "random" license checkpoints absent standard guidelines as to when, where, and how to administer the roadblocks equates to a complete lack of supervisory authority, and in fact, represents the very form of unbridled discretion that was prohibited by the Supreme Court in *Prouse*. *See Heimlich v. State*, 231 Ga. App. 662, 663, 500 S.E.2d 388, 389 (1998) (concluding checkpoint constitutional where a field officer had a "standing order" to establish checkpoints), *overruled by Baker v. State*, 252 Ga. App. 695, 701-02, 556 S.E.2d 892, 899 (2001) (overruling *Heimlich* and similar cases based upon the court's obligation to "follow the United States Supreme Court's interpretation of Fourth Amendment requirements"), *cert. denied*, —— Ga. ——, —— S.E.2d ——, 2003 Ga. LEXIS 423 (May 13, 2003) (No. S02C0539). Furthermore, the guidelines referenced by the majority—choosing a safe location, wearing reflective vests, having three officers present, using flashlights, and turning on the patrol cars' blue lights—are not

guidelines specific to checkpoints but are standard nighttime safety procedures. Neither these procedures nor the practice of stopping every car curbs a field officer's discretion to set up a roadblock when and wherever he chooses. The suppression hearing testimony of Belmont Police Captain William Jonas is indicative. Captain Jonas confirmed that under the city's present practices, Belmont field officers "could set up a road check and check one car within five minutes and then dissolve the roadblock."

This Court's decision sanctioning total field-officer discretion is not only contrary to United States Supreme Court precedent, it also stands alone among the decisions of many of our sister jurisdictions that have addressed this or similar issues regarding checkpoints and roadblocks. *See, e.g.*, *State v. Hicks*, 55 S.W.3d 515 (Tenn. 2001) (holding that there are two factors critical to a finding that officers' discretion was limited are whether the decision to set up the roadblock was made by the officers actually carrying it out and whether officers on the scene could decide for themselves the procedures to be used in operation of the checkpoint); *State v. Legg*, 536 S.E.2d 110 (W. Va. 2000) (concluding that conservation officers' stop of every car in a certain area to check for game, weapons, and hunting license was unconstitutional where the officers' only directive was to work the area); *LaFontaine v. State*, 269 Ga. 251, 497 S.E.2d 367 (concluding that the decision to implement the roadblock must be made by supervisory personnel not officers in the field), *cert. denied*, 525 U.S. 947, 142 L. Ed. 2d 307 (1998); *Commonwealth v. Bothman*, 941 S.W.2d 479 (Ky. Ct. App. 1996) (recognizing the importance of a systematic plan and supervisory control over establishment and operation of a checkpoint); *Campbell v. State*, 679 So. 2d 1168 (Fla. 1996) (per curiam) (holding that specific and detailed written guidelines are required before police can establish a constitutional roadblock); *Hagood v. Town of Town Creek*, 628 So. 2d 1057 (Ala. Crim. App. 1993) (concluding that roadblock unconstitutional where the operating officers had complete discretion to move it and did so); *Crandol v. City of Newport News*, 238 Va. 697, 386 S.E.2d 113 (1989) (acknowledging that key factors in determining the legality of a checkpoint include proof of advance decisions by superior officers as to the time and location of the roadblock, adequate training of officers, and on-site supervision of the officers conducting the roadblock). There is no indication that these states have suffered the phenomenon predicted by the majority, that is, the "endanger[ment] [of] the safety of the law enforcement officers and the public with

impunity." Rather, by providing clear direction to local law enforcement agencies as to the requirements of a constitutional checkpoint, these courts have enabled those agencies to better police the roads and highways of their communities, while safeguarding the constitutional rights of motorists.

Finally, under the majority's opinion, officers are given wide latitude in establishing license checkpoints but are greatly constrained by statutorily mandated standards in establishing similar impaired driver checkpoints, *see* N.C.G.S. § 20-16.3A (2003). Suppression hearing testimony in the present case suggests that this disparity between the standards for license checkpoints and impaired driver checkpoints can lead to abuse of field-officer discretion. According to Officer Falls' testimony, during the past two years, he had participated in only three impaired driver checkpoints but he had participated in *around forty* random license checkpoints.

Our founding fathers intended the Fourth Amendment to protect the right of ordinary individuals to be free from arbitrary invasions of their person and property by the state. Delegating *all* discretion to field officers for the purpose of implementing checkpoints necessarily invites unreasonable interference with that constitutional right. I believe that permitting field officers to choose the time, location, and manner of license checkpoints without supervision or written regulation implicitly validates unbridled field-officer discretion, an evil that the United States and North Carolina Constitutions strictly prohibit. Because Officer Falls was granted such unguided discretion to establish and conduct the license checkpoint at issue in the present case, defendant's seizure, resulting from that checkpoint, was unconstitutional. Accordingly, I would reverse the decision of the Court of Appeals.

Justices WAINWRIGHT and EDMUNDS join in this dissenting opinion.

STATE OF NORTH CAROLINA v. STEVEN MARK FINNEY

No. 258A03

(Filed 6 February 2004)

1. Evidence— hearsay—residual exception—unavailability of witness

The trial court erred in a first-degree rape case by admitting the hearsay testimony of a detective as to statements allegedly made to him by the victim under the residual exception of N.C.G.S. § 8C-1, Rule 804(b)(5) based on the erroneous conclusion that the victim was unavailable to testify, because the trial court failed to provide sufficient encouragement to the victim and failed to adequately explain to her that her testimony was essential to the constitutionality of the proceedings.

2. Evidence— hearsay—unavailable witness—testimony given under oath

The trial court erred in a first-degree rape case by refusing to allow defendant to introduce the victim's voir dire testimony in which the victim blamed her fragile emotional state on the harassment leveled at her by the district attorney rather than her alleged rape by defendant because: (1) the State relied on the victim's mental injury to support a conviction of first-degree rape; (2) the victim was deemed an unavailable witness; and (3) the testimony was admissible under Rule 804(b)(1) when the victim gave the testimony under oath during voir dire and the State was permitted an opportunity to examine the victim concerning this testimony.

3. Rape— first-degree—instruction—serious injury

The trial court did not commit plain error by its jury instruction on the serious personal injury element of first-degree rape, because: (1) the instruction comported with the instruction provided in the pattern jury instructions; (2) the instruction tracked the language provided in opinions from our Supreme Court; (3) the instruction translated the substantive requirements for the jury to conclude that the victim suffered a serious mental injury from the rape; and (4) there was no evidence that the instruction constituted a miscarriage of justice or was likely to cause the jury to reach a different verdict.

Justice EDMUNDS concurring in result.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 157 N.C. App. 267, 581 S.E.2d 764 (2003), finding no error after appeal of a judgment entered 16 October 2001 by Judge James U. Downs in Superior Court, Henderson County. Heard in the Supreme Court 8 December 2003.

Roy Cooper, Attorney General, by David N. Kirkman, Assistant Attorney General, for the State.

Miles & Montgomery, by Mark Montgomery and Lisa Miles for defendant-appellant.

WAINWRIGHT, Justice.

On 22 January 2001, Steven Mark Finney (defendant) was indicted for first-degree rape. The indictment alleged that on 23 November 2000, defendant raped his wife, Virginia Finney (victim). Defendant was tried before a jury at the 15 October 2001 Criminal Session of Superior Court, Henderson County. The evidence at trial tended to show the following: On the night in question, defendant came home late. Defendant was drunk and a quarrel occurred between defendant and his wife. After a lengthy and emotional argument, defendant forced his wife into having sex against her wishes.

On 16 October 2001, the jury found defendant guilty of first-degree rape. The trial court sentenced defendant to 307-378 months in prison. On appeal, a unanimous panel of the Court of Appeals found no error in defendant's trial and sentence. *State v. Finney*, 157 N.C. App. 267, 581 S.E.2d 764 (2003). On 15 May 2003, defendant filed a notice of appeal in this Court based on defendant's constitutional right to confrontation. We granted the State's motion to dismiss the notice of appeal, but acted *ex mero motu* to allow discretionary review of three issues presented in this case.

[1] First, defendant argues that the trial court erred in admitting the hearsay testimony of Detective W.C. Harper as to statements allegedly made to him by the victim, who the trial court deemed "unavailable" to testify. Harper's testimony was admitted under the "residual" exception to the hearsay rule. *See* N.C.G.S. § 8C-1, Rule 804(b)(5) (2003).

During the trial, the prosecutor, Corey Ellis, called the victim, Virginia Finney, to testify on behalf of the State. Finney testified as follows:

Q. Will you please tell us your name.

A. (No response)

Q. Are you able to hear my question?

A. (No response)

Q. Can you understand what I'm trying to ask you?

A. (No response)

Q. Are you Virginia Vaughn Finney?

A. (No response)

THE COURT: Sheriff, take the jury to the jury room for just a moment, please.

(JURY OUT)

THE COURT: Ms. Finney. Ms. Finney, are you able to hear me? Answer up, yes or no. The jury is out of the courtroom now, Ms. Finney. I need to know from you, are you going to testify in this case, or not.

A. I dó not wish to, to testify.

MR. ELLIS [PROSECUTOR]: May I ask a few questions in an attempt, Your Honor?

THE COURT: You may try.

VOIR DIRE EXAMINATION OF MS. FINNEY BY MR. ELLIS:

Q. Ms. Finney, do you not wish to testify because you have problems recalling what happened to you.

A. Yes.

Q. I have a—

A. I've been threatened by the D.A. (Inaudible)

THE COURT: You've been threatened by whom?

A. The D.A., Corey Ellis. (crying)

THE COURT: You've been threatened by the D.A.

A. Yes.

THE COURT: How has the D.A. threatened you, Ms. Finney?

A. I was doing good.

THE COURT: Do what?

A. I was doing a lot better.

THE COURT: You're going to have to slow down here.

A. (Crying) And I don't want to talk about it no more please. I just don't want to remember anything anymore. I don't want to go through this.

I've been informed by the D.A. if I did not then I would be arrested, and I've been arrested at my work; and I lost my job and everything (inaudible). I was trying to go on with my life until Corey Ellis started aggravating me and my family constantly. They put me in a room, closed the door and would not let me out. I don't want to know anymore. I just want to get out of here.

I do not wish to testify and I want to leave. And if I try to leave I'm arrested. I am harassed constantly. And I want out. (Crying)

THE COURT: Well, Mr. Ellis, I believe it's time to make a decision about whether or not you're going to have a witness.

A. (Crying) He's the cause of me losing my job, sir.

Q. Ms. Finney, were you served with a subpoena at your work?

A. Yes, sir, by you.

Q. And is it your belief that you lost your job because you got a subpoena at work?

A. Yes, sir, it is.

Q. Is that one of the reasons you're angry with me?

A. Part of it, because you aggravate me all the time. I don't wish to talk to you anymore.

Q. Can I ask you to look at what I've marked as State's Exhibit 10, ma'am. I marked this piece of paper as State's 10. Can you take a look at that and tell me if you've seen that before. I've laid it there on your knee, Ms. Finney, State's Exhibit 10, will you please take a look at it.

A. (No response)

Q. Is State's Exhibit 10 a written summation of what's happened to you?

A. (No response)

Q. Was State's Exhibit 10 written by you?

A. (No response)

MR. ELLIS: Well, Judge, I don't know that there's anything more I can do with this witness. I will tell the Court that without this witness's testimony I'll seek to have a medical provider testify pursuant to 803 for statements made for the purpose of medical diagnosis and treatment.

The trial court eventually concluded that Virginia Finney was an unavailable witness. The trial court subsequently permitted Detective W.C. Harper to read a statement to the jury that he took from Mrs. Finney describing the alleged rape.

The statement was admitted under Rule 804(b)(5), the "residual" hearsay exception, which states:

(b) *Hearsay exceptions.*—The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

. . . .

(5) Other Exceptions.—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

N.C.G.S. § 8C-1, Rule 804(b)(5).

The first requirement for a statement to be admitted under the residual hearsay exception is that the declarant be unavailable as a witness. N.C.G.S. § 8C-1, Rule 804(b). A declarant is unavailable if she "[p]ersists in refusing to testify concerning the subject matter of [her] statement despite an order of the court to do so." N.C.G.S. § 8C-1, Rule 804(a)(2).

In the present case, the witness never definitively refused to testify and certainly did not persist in a refusal to testify in the manner contemplated by Rule 804. Indeed, during her voir dire by the State when she was originally called as a witness, Mrs. Finney never indicated an unequivocal persistence in refusing to testify. Rather, Mrs. Finney was responsive and cooperative in answering the trial court's questions. In essence, Mrs. Finney told the trial court that she did not "wish" to testify due to her alleged harassment by the prosecutor. Even when the trial court appeared to close the voir dire by telling the prosecutor, "I believe it's time to make a decision about whether or not you're going to have a witness," Mrs. Finney provided an unprompted response that, "He's [the prosecutor] the cause of me losing my job, sir." This is further evidence that Mrs. Finney was capable of being a responsive witness. While Mrs. Finney may have been a hostile witness for the State, we cannot conclude based on the record before us that sufficient inquiry was made by the trial court to determine that Mrs. Finney would persist in refusing to testify.

We also note that the State concedes that the trial court and Court of Appeals committed various legal errors in considering the admission of Harper's hearsay testimony. Specifically, the State acknowledges that: (1) the trial court made inadequate findings as to the hearsay statement's reliability as required under the "residual" hearsay exception analysis and improperly referred to the hearsay statement's consistency with other statements and testimony rather than the particularized guarantees of trustworthiness found in the statement and circumstances at the time the statement was made; (2) the statement in the Court of Appeals' opinion that "testimony was admitted as an exception to the hearsay rule and, consequently, a right of confrontation does not apply," is in conflict with *Idaho v. Wright*, 497 U.S. 805, 111 L. Ed. 2d 638 (1990) because the "residual" hearsay exception in this case is not "firmly rooted" and only where an exception is "firmly rooted" will the rights of confrontation and cross examination be foregone; and (3) the Court of Appeals' opinion improperly referenced the hearsay statement's consistency with other statements admitted at trial where the proper analysis is whether the statement to the detective, standing alone, was inherently trustworthy.

Additionally, we note that the transcript of the trial proceedings indicates that Virginia Finney was present in the courtroom at various stages of the proceedings. Indeed, immediately after the verdict was read, Mrs. Finney asked the trial court, "Judge, may I say some-

thing as being the victim?" The court responded, "No, ma'am, not now." Mrs. Finney also testified on behalf of defendant during the sentencing proceeding as follows:

> He [defendant] needs help. I've written to him to support him with a Christian background. There's a reason why I could not testify the other day. I have worked hard this year trying to find jobs, sir. I went out—after the episode happened, I met with Mr. Harper on two occasions and I never heard from him after that. There was no police officers checked on me to see if I was okay, if I needed anything.
>
> . . . .
>
> I want to get to the reason of why I could not testify. Corey Ellis [the prosecutor] pulled me into his office and closed the door, and I felt like I was trapped in a box. His secretary put her hand up over the door and they read the article from Florida. It was nothing that was stated today. It was how the girl was tortured. And he said, "Now can you imagine your life?" And I went all hysterical.
>
> . . . .
>
> Corey Ellis has threatened to arrest me. He brought me in the other day and told me if I didn't show up, he would arrest me. Every which way I turned I'm going to be arrested if I'm not here. I did not want to testify for a lot of these reasons. I did not want this trial to go on any longer. I feel like that night happened because of Steve's drinking problem. And if he had counseling and help, he might could get through some of that, some of the problems he's had.
>
> . . . .
>
> I feel like these women that he had encounters with that's his single life. That has nothing to do with my case, or what with us. Steve was a decent person, unless he was drinking. I would just recommend—I wanted to talk and then you told me to sit down. . . .
>
> . . . .
>
> And I just feel like that Corey Ellis—I went back to my job after I was subpoenaed and I was fired from my job because of this case. And Corey Ellis caused this to happen to me. They said if I had not—And ever since that day in that office, I've had to

take medication and I've not taken any in two days now. And I just feel like this—this has been an unfair situation.

I'm the one that's being treated like a criminal. I'm the one told to shut up. I'm the one that—they have not stood by me like they should have if I was the victim. I had to go out and hire my own attorney. I do have the doctor's statements. I apologize that I don't have them for when I've been on the medication. When it started was after Corey Ellis went after me.

. . . .

I understand, sir. I understand what you're saying. I have had no deputies to come by my house to check on me or anything. Like—if you thought a rape victim had been raped or whatever, wouldn't you have deputies watching, or somebody around. They told me they can't be there 24 hours. I have heard nothing else from Walt Harper since the last time we met.

THE COURT: The person you accused was in jail at the time.

A. Yes, but that doesn't mean he could have friends or anybody around. You don't know.

THE COURT: Did you know how to get a hold of the officers?

A. I tried several times and he was always out of town or he was not there. The December 11th meeting I know that meeting did not happen, because that was my birthday, and I was out with one of my girlfriends. We had went to Greenville, South Carolina.

I could not testify the other day because I was escorted in and I was threatened. My mother is 74 years old and she doesn't know a lot of this story that happened that night and she was put on the stand to testify. And we have not even hardly talked at all about it.

I have not even discussed it all with my son. My son just got out of prison and he's petrified of the court system as much as I am. And that's why I could not talk the other day. And I feel like that Corey Ellis and his staff have done me wrong. And now I don't have a job. I'm unemployed again.

This testimony shows that Mrs. Finney had specific reasons that she did not want to testify. This Court cannot conclude that Mrs. Finney's concerns could not have been erased with ample inquiry and encouragement by the trial court.

We also note that at one point during the State's case, the prosecutor apparently realized that Mrs. Finney was present in the courtroom. At the prosecutor's request, the trial court asked Mrs. Finney to come forward. The trial court then told her, "Ms. Finney, I'm ordering you to come to the witness stand." Mrs. Finney responded, "When my lawyer is present I will come. My lawyer's not here." The trial court asked Mrs. Finney again to take the stand and she again informed the trial court that she would not testify without her lawyer. After the trial court ascertained that Mrs. Finney's lawyer had the flu, the trial court concluded that Mrs. Finney was unavailable to testify. By all appearances from the record, Mrs. Finney was at this point indicating that she *would* testify if her lawyer was present.

Here, where the trial court failed to provide sufficient encouragement to Mrs. Finney and failed to adequately explain to her that her testimony was essential to the constitutionality of the proceedings, we cannot conclude that the trial court properly found that Mrs. Finney was unavailable to testify. Where, as here, a defendant's constitutional right to confrontation is at stake, we believe that the unavailability requirement in Rule 804 contemplates more than a brief or minimal examination by the trial court.

In sum, we conclude that the trial court erred in declaring Mrs. Finney unavailable and admitting Detective Harper's hearsay testimony under the "residual" hearsay exception in Rule 804(b)(5).

[2] Defendant next argues that the trial court erred in refusing to allow defendant to introduce Mrs. Finney's voir dire testimony in which she blamed her fragile emotional state on the harassment leveled at her by the district attorney. According to defendant, the State based its case for first-degree rape on the theory that Mrs. Finney sustained serious mental injury due to her rape by defendant. While serious injury can be used to support a first-degree rape conviction, this element is not required for a conviction of second-degree rape. N.C.G.S. §§ 14-27.2, 14-27.3 (2003). Defendant sought to introduce Mrs. Finney's voir dire testimony to show that her mental injuries were caused by the district attorney's harassment in trying to get her to testify rather than her alleged rape by defendant.

During the charge conference, after the close of the evidence, the following exchange transpired:

> MR. GOLDSMITH [DEFENSE ATTORNEY]: . . . . I would ask that the Court play Ms. Finney's testimony for the jury that was outside

the jury's presence yesterday. Because that goes directly to what type of mental or physical injury she was having.

The Court will recall—the Court elicited that testimony. She was under oath on the stand, the jury didn't hear it. I would like for the jury to hear it.

THE COURT: Call her and have her testify.

MR. GOLDSMITH: She's already testified to it, Judge.

THE COURT: Not in front of the jury, she hasn't. And that's no evidence for the jury. I simply was making some determination as to whether or not she was going to say anything. I couldn't care less what it would be, yeah or nay.

MR. GOLDSMITH: My argument would be it would go to explaining the mental injury that she supposedly has had.

THE COURT: The Court takes notice that woman is right now in the courtroom. I'll let you reopen your case and call her.

MR. GOLDSMITH: I understand. Thank you, Judge, for hearing me.

THE COURT: Do you want to call her?

MR. GOLDSMITH: Judge, I do not. Thank you.

At this point in the proceedings, the trial court had already made a determination that Mrs. Finney was unavailable as a witness. As such, the opportunity for defendant to call her as a witness was of no use. Moreover, the trial court had already permitted the State to introduce hearsay testimony involving Mrs. Finney's statement to the police.

Mrs. Finney's voir dire testimony was clearly admissible under an established hearsay exception. Where a witness is deemed unavailable, hearsay testimony is admissible if based on "[t]estimony given as a witness at another hearing of the same or a different proceeding . . . if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." N.C.G.S. § 8C-1, Rule 804(b)(1). In the present case, the trial court had already declared that Mrs. Finney was an unavailable witness. Mrs. Finney had given testimony under oath during voir dire. Defendant sought to admit this sworn testimony as rebuttal evidence against the State. The State was permitted an opportunity to examine Mrs. Finney concerning this testimony.

Accordingly, Mrs. Finney's voir dire testimony was admissible under Rule 804(b)(1).

We therefore conclude that the trial court erred in failing to allow presentation of Mrs. Finney's voir dire testimony to the jury.

[3] Finally, defendant argues that the trial court erred in its jury instruction on the serious injury element of first-degree rape. The trial court gave the following instruction:

> [S]erious personal injury is any type of physical injury that causes great pain and suffering. Serious mental injury is—is that injury to the mind or to the nervous system that not only results—or it not only occurs as a result of the trauma of the alleged vaginal—forcible non-consensual vaginal intercourse, but it also is that type of mental injury that extends for some appreciable time beyond the incident surrounding the crime itself.

When the jury later asked for clarification on the difference between first-degree and second-degree rape, the trial court used a similar instruction to the one given above.

We initially note that defendant failed to make any objection to the instruction given. Accordingly, our analysis of this issue is limited to a review for plain error. *State v. Sexton*, 357 N.C. 235, 238, 581 S.E.2d 57, 59 (2003). "[T]o reach the level of 'plain error' . . . , the error in the trial court's jury instructions must be 'so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached.' " *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993) (quoting *State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988)).

The trial court's instruction in the present case comports with the instruction provided in our pattern jury instructions. N.C. P.J.I. 207.10, fn. 3 (2002). Moreover, the trial court's instruction tracks the language provided in opinions from this Court. In *State v. Boone*, we stated:

> In order to support a jury finding of serious personal injury because of injury to the mind or nervous system, the state must ordinarily offer proof that such injury was not only caused by the defendant but that the injury extended for some appreciable time beyond the incidents surrounding the crime itself. Obviously, the question of whether there was such mental injury

> as to result in "serious personal injury" must be decided upon the facts of each case.

307 N.C. 198, 205, 297 S.E.2d 585, 590 (1982), *overruled on other grounds by State v. Richmond*, 347 N.C. 412, 495 S.E.2d 677, *cert. denied*, 525 U.S. 843, 142 L. Ed. 2d 88 (1998).

We later clarified our holding in *Boone* as follows:

> *Boone* holds that in order to prove a serious personal injury based on mental or emotional harm, the State must prove that the defendant caused the harm, that it extended for some appreciable period of time beyond the incidents surrounding the crime itself, and that the harm was more than the "*res gestae*" results present in every forcible rape. *Res gestae* results are those "so closely connected to [an] occurrence or event in both time and substance as to be a part of the happening."

State v. Baker, 336 N.C. 58, 62-63, 441 S.E.2d 551, 554 (1994) (citation omitted).

The trial court's instruction fully translated the substantive requirements for the jury to conclude that the victim suffered a serious mental injury from the rape. Moreover, our thorough review of the record provides no credible evidence that the jury instruction on serious injury constituted a "miscarriage of justice" or was likely to cause the jury to reach a different verdict. *Collins*, 334 N.C. at 62, 431 S.E.2d at 193. In sum, we conclude that the trial court's instruction in the present case did not constitute plain error.

Accordingly, we find error in the present case only as to the first two issues presented.

The decision of the Court of Appeals is reversed and this case is remanded to that court for further remand to the Superior Court, Henderson County, for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

Justice EDMUNDS concurring in the result.

I respectfully disagree with the majority's analysis of the instruction pertaining to serious personal injury. The majority correctly states that this Court discussed the requirements for proving serious personal injury based on mental or emotional harm in a first-degree

rape case in *State v. Boone*, 307 N.C. 198, 297 S.E.2d 585 (1982), *overruled on other grounds by State v. Richmond*, 347 N.C. 412, 495 S.E.2d 677, *cert. denied*, 525 U.S. 843, 142 L. Ed. 2d 88 (1998), then refined that analysis in *State v. Baker*, 336 N.C. 58, 441 S.E.2d 551 (1994). In *Baker*, we set out two elements required to establish this type of serious personal injury. "What is required is that the mental injury extend for some appreciable time beyond the incidents surrounding the rape and that it is a mental injury beyond that normally experienced in every forcible rape." *Id.* at 64, 441 S.E.2d at 554. Unfortunately, the pattern jury instruction, citing *Boone* but not *Baker*, directs the trial court to instruct the jury that it need find only that defendant caused the injury and that the injury extended some appreciable time beyond the events making up the offense. 1 N.C.P.I.—Crim. 207.10 n.3 (2002). Thus, the pattern instruction has omitted the second prong required by *Baker*, that the harm exceed that found in other forcible rape cases. The Court of Appeals has perpetuated this error. *See State v. Easterling*, 119 N.C. App. 22, 40, 457 S.E.2d 913, 923, *disc. rev. denied*, 341 N.C. 422, 461 S.E.2d 762 (1995) ("We do not read *Boone* as placing an additional burden on the State to show a mental injury must be more than that normally experienced in every forcible rape in addition to showing the mental injury extended for some appreciable time, as defendant suggests.").

The instruction in the case at bar, apparently following the pattern, required the State to establish that the injury was extensive in time, but it did not require the State to prove that the injury exceeded that inherent in all forcible rapes. To the contrary, the portion of the instruction quoted in the majority opinion can be read to suggest that serious mental injury arises as a result of all non-consensual vaginal intercourse. "Having chosen forcible first-degree rape as its theory of prosecution and having brought defendant to trial, the State was bound to prove all of the material elements of that charge . . . ." *State v. Williams*, 318 N.C. 624, 628, 350 S.E.2d 353, 356 (1986). The instruction given here erroneously relieved the State of its burden of proving a material element of forcible first-degree rape. Because of our disposition of other issues in this case, it is unnecessary to determine separately whether the error was prejudicial. Nevertheless, the pattern instruction should be corrected.

STATE OF NORTH CAROLINA v. DUDLEY WEBB

No. 157PA03

(Filed 6 February 2004)

Constitutional Law— indigent defendants—court-appointed counsel—appointment fee—constitutionality

The appointment fee required by N.C.G.S. § 7A-455.1 in order for an indigent defendant to obtain court-appointed counsel regardless of the outcome of the criminal proceeding is a cost of prosecution that violates the language of Art. I, § 23 of the N.C. Constitution prohibiting the assessment of costs against acquitted defendants. However, the unconstitutional portions of the statute requiring payment of the fee "at the time of appointment" and "regardless of the outcome of the proceedings" and granting a credit to any defendant who pays the fee prior to the final determination of the action may be severed so that the rest of the statute remains enforceable and constitutionally permits the State to continue collecting the fee from indigent defendants after they have been convicted or pled guilty or nolo contendere.

On writ of certiorari issued 2 April 2003 pursuant to N.C.G.S. § 7A-32(b) to review an order entered 4 March 2003 and an amended order entered 19 March 2003 by Judge Orlando F. Hudson, Jr., in Superior Court, Durham County, 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). Heard in the Supreme Court 11 September 2003.

Roy Cooper, Attorney General, by Norma S. Harrell, Special Deputy Attorney General, for the State-appellant.

Robert Brown, Jr., Public Defender; Heather H. Freeman, Assistant Public Defender; and C. Scott Holmes, for defendant-appellee.

Seth H. Jaffe, Counsel; and Kurtz & Blum, PLLC, by Howard A. Kurtz and Paula K. McGrann, on behalf of the American Civil Liberties Union of North Carolina Legal Foundation, Inc., amicus curiae.

EDMUNDS, Justice.

On 10 December 2002, an order for the arrest of Dudley Cedrick Webb (defendant) was issued, alleging that he had violated the terms of his probation. Defendant requested and received appointed counsel as an indigent and, pursuant to N.C.G.S. § 7A-455.1, thereupon became obligated to pay a fifty dollar "appointment fee" regardless of the outcome of his criminal proceedings. Defendant filed a motion in Superior Court, Durham County, to declare the statute unconstitutional, alleging that this appointment fee violated the Fourteenth Amendment of the United States Constitution.

After conducting a hearing in which arguments for both sides were presented, the trial court found that the appointment fee violated not only the United States Constitution but also Article I, Section 23 of the North Carolina Constitution. On 19 March 2003, the trial court entered an amended order declaring N.C.G.S. § 7A-455.1 unconstitutional and enjoining the clerk of superior court from collecting the appointment fee or entering judgments for the fee. On 2 April 2003, this Court issued a writ of supersedeas staying enforcement of the trial court's order. We affirm the decision of the trial court, as modified.

Section 7A-455.1 requires any indigent defendant who requests the appointment of counsel to pay a non-refundable fifty dollar appointment fee regardless of the outcome of the criminal proceedings. N.C.G.S. § 7A-455.1(a), (b) (Supp. 2002). Forty-five dollars of the appointment fee is allocated to the Indigent Persons' Attorney Fee Fund and the remaining five dollars goes to the Court Information Technology Fund. N.C.G.S. § 7A-455.1(f). Section 7A-455.1 became effective 1 December 2002. Act of Dec. 1, 2002, ch. 126, sec. 24A.9(c), 2002 N.C. Sess. Laws 291, 495. Although the fee is payable at the time of appointment, "[i]nability, failure, or refusal to pay the appointment fee shall not be grounds for denying appointment of counsel, for withdrawal of counsel, or for contempt." N.C.G.S. § 7A-455.1(d). If this appointment fee is paid prior to the final determination of the action at the trial level, it is credited against any attorney's fees due. However, if the appointment fee is paid after final determination of the case, it is added to any attorney's fees due and is collected in the same manner as attorney's fees. N.C.G.S. § 7A-455.1(b). If no attorney's fees are owed after final determination of the action, the appointment fee is reduced to judgment and constitutes a lien. *Id.* Thus, under this statute, a defendant who

pays the appointment fee before the resolution of his or her case obtains an appreciable benefit.

"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." *Stephenson v. Bartlett*, 355 N.C. 354, 362, 562 S.E.2d 377, 384 (2002). In determining the constitutionality of N.C.G.S. § 7A-455.1 under the Constitution of North Carolina, the dispositive issue is whether the appointment fee is a "cost" imposed in violation of Article I, Section 23, which provides that "[i]n all criminal prosecutions, every person charged with [a] crime has the right . . . not [to] be compelled to . . . pay costs, jail fees, or necessary witness fees of the defense, unless found guilty." N.C. Const. art. I, § 23. We are guided by the basic principle of constitutional construction of " 'giv[ing] effect to the intent of the framers.' " *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953) (quoting 11 Am. Jur. *Constitutional Law* § 61 (1937)). "Constitutional provisions should be construed in consonance with the objects and purposes in contemplation at the time of their adoption. To ascertain the intent of those by whom the language was used, we must consider the conditions as they then existed and the purpose sought to be accomplished." *Id.* Accordingly, we review the history of this provision.

Prior to 1868, "criminal defendants in North Carolina were obliged to pay costs even if acquitted." John V. Orth, *The North Carolina State Constitution: A Reference Guide* 66 (Greenwood Press 1993) [hereinafter *Orth*] (citing *State v. Hodson*, 74 N.C. 151 (1876)). In that year, the people of North Carolina ratified a new Constitution, which provided that "[i]n all criminal prosecutions, every [person] has the right . . . not [to] be compelled . . . to pay costs, jail fees, or necessary witness fees of the defen[s]e, unless found guilty." N.C. Const. of 1868, art. I, § 11. This provision, sparing the accused some of the expenses associated with establishing his or her innocence, was included in the 1868 Constitution because no basis existed for requiring an accused to bear the costs incurred by the State in its unsuccessful prosecution. *Orth.* Thereafter, costs of prosecution "incurred in the conduct of the prosecution and making it effectual in a verdict" devolved upon the accused only upon conviction. *State v. Wallin*, 89 N.C. 578, 580 (1883). Article I, Section 11 of the 1868 Constitution was incorporated into the 1971 Constitution without material variance as Article I, Section 23.

The State contends that the appointment fee is not a cost of prosecution, but instead consists in part of an attorney's fee and in part of an administrative fee, together intended to defray the costs of providing counsel to indigents, and collectively constitutional. Under this theory, the appointment fee properly may be charged to any criminal defendant, acquitted or convicted.

We begin our analysis by considering whether a portion of the appointment fee can be considered an attorney's fee. Attorney's fees are "charge[s] to a client for services performed *for the client.*" *Black's Law Dictionary* 125 (7th ed. 1999) (emphasis added). The forty-five dollars of the appointment fee that is paid to the Indigent Persons' Attorney Fee Fund does not fall within this definition because it is not directly related to the individual defendant who is resisting prosecution or defending against a particular criminal charge. Instead, the appointment fee has a more general purpose. North Carolina, like every other jurisdiction, has a constitutional duty to provide court-appointed counsel to an indigent defendant upon request. *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799 (1963); *see also* N.C.G.S. §§ 7A-450(b), -498.1 (2003). The expense to the State of providing such counsel is an "unavoidable consequence[] of a system of government which is required to proceed against its citizens in a public trial in an adversary proceeding." *Schilb v. Kuebel*, 404 U.S. 357, 378, 30 L. Ed. 2d 502, 518 (1971) (Douglas, J., dissenting). The appointment fee helps support that part of the criminal justice system that enables the State constitutionally to prosecute indigent defendants who qualify for court-appointed counsel. Article I, Section 23 does not insulate acquitted defendants from bearing the burden of paying for their own counsel, but it does shield an acquitted defendant from having to pay for a system designed to reimburse the State for expenses necessarily "incurred in the conduct of the prosecution." *State v. Wallin*, 89 N.C. at 580. Because the appointment fee functions to reimburse the State for expenses associated with keeping its system that provides for court-appointed counsel operational, we believe that this portion of the appointment fee is a cost of prosecution. Therefore, the appointment fee cannot be characterized as being, in part, an attorney's fee.

We next consider the State's characterization of the appointment fee as, in part, an administrative fee. The State relies on *Schilb v. Kuebel*, 404 U.S. 357, 30 L. Ed. 2d 502, for the proposition that administrative fees are separate from costs of prosecution and, as such, can be imposed upon acquitted defendants. However, *Schilb* is distin-

guishable as to this issue. Under the statute in question in that case, the State of Illinois retained a small portion of bail posted by some criminal defendants, whatever the outcome of the case. In declining to nullify the statute, the United States Supreme Court noted that defendants had the choice of posting a property bond, a cash bond in the full amount, or a percentage of the cash bond, and that a portion was retained only when the defendant elected to post a percentage of the cash bond. *Schilb v. Kuebel*, 404 U.S. at 366, 30 L. Ed. 2d at 512. Thus, only those Illinois defendants who sought the benefit of posting a percentage were required to pay the administrative costs. *Schilb v. Kuebel*, 404 U.S. at 370-71, 30 L. Ed. 2d at 514. In contrast, an indigent defendant in North Carolina who seeks court-appointed counsel has no alternative that would allow him or her to avoid paying the appointment fee. Consequently, we do not believe that *Schilb* controls.

We find more useful direction by analogizing this part of the appointment fee to the "facilities fee," which is a cost imposed upon a defendant who is convicted or enters a plea of guilty or nolo contendere in a criminal action. N.C.G.S. § 7A-304(a)(2) (2003). The facilities fee reimburses counties for "providing, maintaining, and constructing adequate courtroom and related judicial facilities." *Id.* Even though the facilities fee is purely administrative in nature, because it is considered a cost of prosecution, it is not assessed unless the defendant is convicted. *Id.*

We believe that the five dollars of the appointment fee allocated to the Court Information Technology Fund is effectively indistinguishable from the facilities fee. The appointment fee operates to "supplement funds otherwise available to the Judicial Department for court information technology and office automation needs," thus defraying expenses incurred by the State in the operation and maintenance of the court system. N.C.G.S. § 7A-343.2 (2003). Accordingly, it should be assessed in the same manner as the facilities fee and any other cost of prosecution—against convicted defendants only.

We recognize that our historical consideration of this issue has some limitations because the State was not required to provide counsel to indigent defendants at the time of the 1868 Constitution. However, Article I, Section 11 of that Constitution was adopted to relieve acquitted defendants from bearing the burden of paying costs of prosecution. The subsequent United States Supreme Court decision in *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799, requiring that states provide court-appointed counsel for indigent criminal

defendants, did not affect the purposes for which that section was enacted. Inclusion thereafter of virtually identical language in Article I, Section 23 of the 1971 Constitution convincingly demonstrates North Carolina's continuing dedication to the principle that acquitted defendants should not be required to pay the costs of their prosecution. Thus, requiring acquitted defendants to pay the appointment fee, which we have determined is a cost of prosecution, would defeat the intent and purpose of either Constitution's provision.

The results yielded by our historical review is consistent with a plain meaning analysis. "Issues concerning the proper construction of the Constitution of North Carolina 'are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments.' " *State ex rel. Martin v. Preston*, 325 N.C. 438, 449, 385 S.E.2d 473, 478 (1989) (quoting *Perry v. Stancil*, 237 N.C. at 444, 75 S.E.2d at 514). "In interpreting our Constitution—as in interpreting a statute—where the meaning is clear from the words used, we will not search for a meaning elsewhere." *Id.* at 449, 385 S.E.2d at 479.

The plain meaning of words may be construed by reference to " 'standard, nonlegal dictionaries.' " *C.D. Spangler Constr. Co. v. Indus. Crankshaft & Eng'g Co.*, 326 N.C. 133, 152, 388 S.E.2d 557, 568 (1990) (quoting *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 266 N.C. 430, 438, 146 S.E.2d 410, 416 (1966)). Where appropriate, including earlier in this opinion, this Court has consulted *Black's Law Dictionary*. *See, e.g., Hieb v. Lowery*, 344 N.C. 403, 410, 474 S.E.2d 323, 327 (1996). *Black's Law Dictionary* defines "costs" as "[f]ees and charges required by law to be paid to the courts or some of their officers, the amount of which is fixed by statute or court rule; e.g.[,] filing and service fees." *Black's Law Dictionary* 346 (6th ed. 1990). The appointment fee in this case embodies all the substantive characteristics of a "cost" as used within this definition and the meaning of Article I, Section 23. It is a fixed amount, imposed by statute, required to be paid to the courts.

The State contends that the General Assembly's use of the term "fee" indicates the appointment fee is not a cost. However, merely calling the appointment fee a "fee" is not controlling where every aspect of the amount in question is one associated with a cost. *See* William Shakespeare, *Romeo and Juliet* act 2, sc. 2, 48-49. In fact, each amount listed on the Criminal Bill of Costs submitted in a criminal matter is denominated a "fee," for example, process fee, general court of justice fee, facilities fee. These fees are, like costs, imposed

only upon convicted defendants. Furthermore, *Black's Law Dictionary's* definition of "costs" includes "fees" as a synonym. *Black's Law Dictionary* 346 (6th ed. 1990). Consequently, we do not find that the use of the term "fee" determines the true nature of the appointment fee.

The plain language of Article I, Section 23 prohibiting the assessment of costs against acquitted defendants thus encompasses the appointment fee. By requiring payment of the appointment fee by acquitted defendants, the General Assembly devised a statutory framework that does not comport with the constitutional limitation prohibiting a criminal defendant from paying costs unless found guilty, and as such it may not stand. Accordingly, we hold that the appointment fee set out in N.C.G.S. § 7A-455.1 is a cost of prosecution and may not be imposed upon a defendant in a criminal matter until that defendant has been convicted or pled guilty or nolo contendere.

We next consider whether the unconstitutional portions of N.C.G.S. § 7A-455.1 can be severed so that the rest of the statute remains enforceable. These portions are those requiring payment "at the time of appointment," N.C.G.S. § 7A-455.1(a), "regardless of the outcome of the proceedings," and the relevant provisions granting a credit to any defendant who pays the appointment fee prior to the final determination of the action, N.C.G.S. § 7A-455.1(b).

The following test is used to determine whether severability is permissible:

> The test for severability is whether the remaining portion of the legislation can stand on its own and whether the General Assembly would have enacted the remainder absent the offending portion. *See, e.g., Jackson v. Guilford Cty. Bd. of Adjust.*, 275 N.C. 155, 168, 166 S.E.2d 78, 87 (1969) ("When the statute, . . . [can] be given effect had the invalid portion never been included, it will be given such effect if it is apparent that the legislative body, had it known of the invalidity of the one portion, would have enacted the remainder alone."). Additionally, the inclusion of a severability clause within legislation will be interpreted as a clear statement of legislative intent to strike an unconstitutional provision and to allow the balance to be enforced independently. *Fulton Corp. v. Faulkner*, 345 N.C. 419, 421, 481 S.E.2d 8, 9 (1997).

Pope v. Easley, 354 N.C. 544, 548, 556 S.E.2d 265, 268 (2001).

We note that Session Law 2002-126, which added the appointment fee to Chapter 7A of the North Carolina General Statutes, contains a severability clause that provides that "[i]f any section or provision of this act is declared unconstitutional or invalid by the courts, it does not affect the validity of this act as a whole or any part other than the part so declared to be unconstitutional or invalid." Ch. 126, sec. 31.6, 2002 N.C. Sess. Laws at 511. The inclusion of section 31.6 evinces an unmistakable legislative intent that the remaining portions of section N.C.G.S. § 7A-455.1 should continue in effect, if possible. *See In re Appeal of Springmoor, Inc.*, 348 N.C. 1, 13, 498 S.E.2d 177, 184-85 (1998).

First, we must consider whether the portion of N.C.G.S. § 7A-455.1(b) requiring payment of the appointment fee "regardless of the outcome of the proceedings" can be severed. Although we determined above that payment of the appointment fee by an acquitted defendant is unconstitutional under Article I, Section 23, payment of costs of prosecution, including the appointment fee, by a convicted defendant is consistent with that section. The General Assembly, by enacting this statute, intended to recoup some of the expenses incurred in providing court-appointed counsel to indigent defendants. Severing the offending portion enables the State to continue collecting the appointment fee from convicted defendants, thereby fulfilling the intent of the legislature. Accordingly, the portion of N.C.G.S. § 7A-455.1(b) requiring payment "regardless of the outcome of the proceedings" shall be severed in order to allow the State to assess the appointment fee against convicted defendants as constitutionally allowed under Article I, Section 23.

Next, we consider whether the statutory provision in N.C.G.S. § 7A-455.1(a) requiring payment "at the time of appointment" must be severed. To require payment of the appointment fee "at the time of appointment" is inconsistent with our holding today that the appointment fee is a cost. Pursuant to section 7A-304, costs in criminal actions are assessed only after a defendant is convicted or enters a plea of guilty or nolo contendere. N.C.G.S. § 7A-304(a). "[N]o costs may be assessed when a case is dismissed." *Id.* The pretrial release services fee and the State Bureau of Investigation laboratory fee, both pertaining to services rendered before a defendant is convicted, are assessed only after conviction. N.C.G.S. § 7A-304(a)(5), (7). Neither of these pre-trial costs must be paid prior to the final determination of the action.

Moreover, the General Assembly effectively acknowledged that the appointment fee would be prepaid infrequently when it provided that counsel could not be denied for failure to pay the appointment fee in advance. N.C.G.S. § 7A-455.1(d). Requiring the State to collect the appointment fee only after a final determination of guilt does not obstruct the objective of N.C.G.S. § 7A-455.1. Therefore, the portion of N.C.G.S. § 7A-455.1(a) requiring payment "at the time of appointment" shall also be severed.

Our holding today also mandates the severance of the provisions in N.C.G.S. § 7A-455.1(b) that grant a credit against any attorney's fees owed for any defendant who pays the appointment fee in advance. Because the provision requiring payment at the time of appointment has been severed, no costs are imposed, or can be imposed, until after there is a conviction. Accordingly, the provisions entitling a defendant to a pre-payment credit shall also be severed.

The purposes of N.C.G.S. § 7A-455.1 do not depend on requiring payment at the time of appointment and providing a pre-payment credit to those defendants who pay in advance. Allowing the State to collect the appointment fee from convicted indigent defendants upon final disposition permits the State to recoup a portion of its expenses associated with providing a system that enables indigent defendants to be prosecuted. Therefore, we hold that because the remaining provisions of N.C.G.S. § 7A-455.1 can be enforced independently of the unconstitutional portions of the section, the unconstitutional provisions of N.C.G.S. § 7A-455.1 shall be severed and the balance of the section enforced. In accordance with our holding, the State is still permitted to collect the appointment fee from convicted defendants.

Finally, we address the constitutionality of N.C.G.S. § 7A-455.1, as modified by the severance, under the Constitution of the United States. The State contends the appointment fee does not have an unconstitutional chilling effect on an indigent defendant's exercise of the Sixth Amendment right to counsel. Defendant responds that the appointment fee constitutes a cumbersome procedural obstacle that effectively chills the right to counsel. He also contends that the statute fails to provide adequate notice and an opportunity to be heard. We find defendant's arguments unpersuasive.

Because we held above that the appointment fee is a cost of prosecution that can be assessed only against convicted defendants, the federal constitutional issues raised with regard to acquitted indigent

defendants are now moot. Further, any federal constitutional issues raised with regard to payment of the appointment fee by convicted indigent defendants are readily resolved.

The United States Supreme Court has rejected the notion that an indigent defendant's right to counsel is unconstitutionally chilled by the imposition of the costs of attorney's fees. *Fuller v. Oregon*, 417 U.S. 40, 40 L. Ed. 2d 642 (1974). This Court has also rejected the same argument. *See State v. Cummings*, 346 N.C. 291, 318, 488 S.E.2d 550, 566 (1997) ("Informing defendant that he may be required to reimburse the State for the costs of his attorney . . . does not 'chill' his right to have counsel provided."), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998). Where a valid purpose exists for the imposition of attorney's fees, other than merely penalizing indigent defendants who choose to exercise their fundamental right to counsel, no chilling effect arises. *Fuller v. Oregon*, 417 U.S. at 54, 40 L. Ed. 2d at 655. In addition, conditionally requiring indigent defendants who received the benefit of court-appointed counsel to repay attorney's fees, as opposed to non-indigent defendants, is not invidious discrimination based on wealth because the debt arose only because counsel was provided by the State in the first place. *Id.*

While *Fuller* was concerned with the recoupment of attorney's fees from convicted defendants, we believe the reasoning in that case applies to the appointment fee at issue here. Use of a portion of the costs paid by a convicted defendant to help the State defray some of the expenses associated with providing counsel to indigent defendants is a valid purpose that does not penalize those who seek court-appointed counsel. In *Fuller*, recoupment occurred only when the defendant could pay. Somewhat similarly, under N.C.G.S. § 7A-455.1, the appointment fee is either reduced to a lien or added to other costs when the defendant cannot pay, so payment of the fee occurs only when the defendant has the means. "The fact that an indigent who accepts state-appointed legal representation knows that he might someday be required to repay the costs of these services in no way affects his eligibility to obtain counsel." *Fuller v. Oregon*, 417 U.S. at 53, 40 L. Ed. 2d at 654. Thus, requiring convicted indigent defendants to pay costs, including the appointment fee at bar, does not unconstitutionally chill the exercise of the right to counsel.

A convicted defendant is entitled to notice and an opportunity to be heard before a valid judgment for costs can be entered. *State v. Crews*, 284 N.C. 427, 201 S.E.2d 840 (1974). Costs are imposed only at sentencing, so any convicted indigent defendant is given notice of the

appointment fee at the sentencing hearing and is also given an opportunity to be heard and object to the imposition of this cost. Therefore, the constitutional requirement of notice and an opportunity to be heard are satisfied. Accordingly, the imposition of the appointment fee on convicted indigent defendants passes federal constitutional muster.

On 2 April 2003, we ordered that all superior and district court judges refrain from entering orders prohibiting the collection of the appointment fee or the entry of a judgment for the appointment fee until this Court determined the constitutionality of N.C.G.S. § 7A-455.1. *State v. Webb*, 357 N.C. 55, 579 S.E.2d 583 (2003). Therefore, the State had notice of the possibility that the appointment fee "would be declared unconstitutional and had the opportunity to plan and budget for potential refunds." *Smith v. State*, 349 N.C. 332, 342, 507 S.E.2d 28, 34 (1998) (Frye, J., concurring). In light of our holding today, any indigent defendant who paid the appointment fee between 2 April 2003 and the date of this opinion, who was acquitted or whose case was dismissed, is entitled to a refund by the State. In addition, any defendant who received the pre-payment credit by paying the appointment fee prior to the final determination and made such payment between 2 April 2003 and this opinion is entitled to retain the benefit of the credit.

The decision of the trial court is affirmed as modified.

AFFIRMED AS MODIFIED.

STATE OF NORTH CAROLINA v. PARISH LORENZO MATTHEWS

No. 654A01

(Filed 6 February 2004)

1. Constitutional Law— effective assistance of counsel—concession of guilt without defendant's consent

A defendant in a capital first-degree murder case received ineffective assistance of counsel per se based on defense counsel's concession of defendant's guilt to second-degree murder during closing arguments of the guilt-innocence phase of the trial without defendant's consent, and the case is remanded for a new

trial because: (1) *Harbison*, 315 N.C. 175 (1985), requires more than implicit consent based on an overall trial strategy and defendant's intelligence; (2) neither the trial court's order, the trial transcripts, nor the *Harbison* hearing transcripts indicate that defendant's counsel advised him they were going to concede his guilt to second-degree murder; and (3) the record does not indicate defendant knew his attorney was going to concede his guilt to second-degree murder.

2. Homicide— first-degree murder—pretrial conference required

The prosecutor violated Rule 24 of the North Carolina General Rules of Practice for Superior and District Courts by failing to hold a special pretrial conference in a capital first-degree murder case, and the prosecutor must petition a superior court judge for a Rule 24 conference before the State retries defendant in the instant case.

3. Criminal Law— prosecutor's argument—name-calling—scatological language

The prosecutor in a first-degree murder case presented an improper closing argument when he engaged in name-calling and used scatological language when referring to defendant's theory of the case.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered 26 May 2001 by Judge Clifton W. Everett, Jr., in Superior Court, Edgecombe 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 19 November 2003.

Roy Cooper, Attorney General, by Valerie B. Spalding, Special Deputy Attorney General, for the State.

William F. W. Massengale and Marilyn G. Ozer, for defendant-appellant.

ORR, Justice.

On 7 February 2000, an Edgecombe County grand jury indicted Parish Lorenzo Matthews for one count of first-degree murder, one count of larceny, and one count of financial transaction card theft. On

6 November 2000, defendant was further indicted for second-degree burglary and attempted second-degree rape.

On 21 May 2001, prior to the start of trial, defendant pled guilty to the larceny and financial transaction card theft charges. At the end of the evidence, the trial court dismissed the attempted second-degree rape charge. On 24 May 2001, the jury found defendant guilty of first-degree murder with premeditation and deliberation and under the felony murder rule. The jury further found defendant guilty of second-degree burglary. The jury recommended that defendant be sentenced to death. The trial court imposed the death sentence, and in addition imposed a sentence of between ten and twelve months for the larceny and financial card theft, and a sentence of sixteen to twenty months for the second-degree burglary, with all three sentences running consecutively.

Defendant presented no evidence at trial, but the State's evidence tended to show the following: On 7 August 1999, defendant and Jessie Pettaway watched movies at Pettaway's residence. After leaving Pettaway's home, defendant returned later that night. He entered the home through a window and took several items belonging to Pettaway, including a cellular phone, debit card, stereo equipment, and a VCR. At some point, defendant tied Pettaway's feet and arms with a robe belt and an extension cord, placed tissue paper in Pettaway's mouth and covered her mouth with duct tape. The autopsy showed Pettaway died from asphyxiation; the tissue paper obstructed her airway.

Defendant drove away from Pettaway's home in her Nissan Pathfinder. The next day he drove the Pathfinder to meet Johnny Ball. Ball changed the automobile's license plate to an Illinois license plate and then Ball and defendant drove the automobile to Illinois.

During their drive to Illinois, defendant and Ball stopped in Sunman, Indiana, where defendant used Pettaway's debit card to purchase gas. On 20 August 1999, in Illinois, Robert Myer of the Pulaski County Sheriff's Department stopped Ball for speeding. Myer discovered that the vehicle was stolen, and found the vehicle's original license plate, along with other items, including Pettaway's cellular phone, handcuffs and a knife. Myer checked the license plate inside the Pathfinder and discovered that defendant was wanted in North Carolina for Pettaway's murder. Myer then arrested defendant.

David Hawkins, a police sergeant from Rocky Mount, North Carolina, interviewed defendant in Illinois. Defendant made a volun-

tary statement to Sergeant Hawkins in which he admitted the following: Defendant watched movies with Pettaway at her home. He then left Pettaway's home and went to see "Peeknuckle." Defendant and Peeknuckle climbed through Pettaway's window and took several items from her. Defendant helped Peeknuckle tie Pettaway's arms and legs. Peeknuckle then put a sock in Pettaway's mouth and taped her mouth. Defendant stated that Pettaway was alive when he left her. After defendant made his statement, he admitted to Sergeant Hawkins that Peeknuckle did not exist. Defendant waived extradition to North Carolina, and Sergeant Hawkins and another detective transported defendant back to Rocky Mount.

We have reviewed the assignments of error brought forward by defendant and we find reversible error in defense counsel's concession of defendant's guilt without his consent during closing arguments of the guilt-innocence phase of the trial.

[1] Defendant claims he received ineffective assistance of counsel because his attorney conceded his guilt to second-degree murder, a lesser included crime, without his consent and in violation of *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986). After reviewing defendant's motion for appropriate relief on this issue filed with this Court, we determined that the record on appeal contained insufficient evidence to permit this Court to determine the issue. Therefore, on 3 January 2003, this Court entered an order remanding defendant's motion for appropriate relief to Superior Court, Edgecombe County, for an evidentiary hearing. The order directed the trial court to make findings of fact and conclusions of law as to defendant's allegations of ineffective assistance of counsel. Following the evidentiary hearing, the trial court, with Judge Frank R. Brown presiding, entered its order on 30 June 2003 with extensive findings of fact and conclusions of law concluding that defendant had not received ineffective assistance of counsel, and denying defendant's motion for appropriate relief. This order, along with a transcript of the hearing was filed in this Court on 24 July 2003 and is considered an addendum to the record on appeal in this case.

Findings of fact made by the trial court pursuant to hearings on motions for appropriate relief are "binding upon the [defendant] if they were supported by evidence." *State v. Stevens*, 305 N.C. 712, 719-20, 291 S.E.2d 585, 591 (1982). "Our inquiry therefore, is to determine whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the

conclusions of law support the order entered by the trial court." *Stevens*, 305 at 720, 291 S.E.2d at 591; *see also*, *State v. Morganherring*, 350 N.C. 701, 714, 517 S.E.2d 622, 630 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 322 (2000).

In *Harbison*, we held that "ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507-08. Therefore, we must determine whether the trial court's conclusion of law that "[d]efendant has failed to make any showing of ineffective assistance of trial counsel pursuant to Harbison" is supported by the trial court's findings of fact.

During the closing argument of the guilt-innocence phase of defendant's jury trial, one of his attorneys, Edward Simmons, stated:

> There are three possible verdicts in that case. And Mr. Graham has shown you that. You have a possible verdict of guilty of first-degree murder. And there are two theories upon which the State relies for that. And we're going to talk about that in just a minute.
>
> You have a possible verdict of guilty of second-degree murder. And then the third possibility is not guilty. I've been practicing law twenty-four years and I've been in this position many times. And this is probably the first time I've come up in front of the jury and said *you ought not to even consider that last possibility.*
>
> And I'm not up here and I'm not telling you that that's a possibility. I'm not saying you should find Mr. Matthews not guilty. That's very unusual. And it kind of cuts against the grain of a defense lawyer. But I'm telling you in this case you ought not to find him not guilty because he is guilty of something.

(Emphasis added.) Simmons later stated: "When you look at the evidence . . . you're going to find that he's guilty of second-degree murder."

In Judge Brown's 30 June 2003 order filed in Superior Court, Edgecombe County, following the *Harbison*, the trial court found the following:

> 9. The trial attorneys' theory of the case was to deny first-degree murder but acknowledge that defendant was accountable,

which is why they argued strenuously for an instruction on voluntary manslaughter . . . . Judge Everett did not give an instruction on voluntary manslaughter . . . .

. . . .

11. After the charge conference at guilt/innocence, Simmons did not ask defendant if he would concede to Simmons' arguing second-degree murder to the jury. . . .

12. . . . [Simmons] asked the jury to find the defendant guilty of second-degree murder. When it was over, defendant appeared to be angry and upset. [Defendant] said nothing to Simmons but Godwin told Simmons that defendant did not want Simmons to say or do anything else in the case.

. . . .

16. Simmons stated that the trial strategy was to try for voluntary manslaughter if the attorneys could get an instruction on it, or for second-degree murder if they could not. . . .

17. Simmons had discussed the trial strategy with Godwin and he agreed with it. Simmons had discussed the same strategy with defendant several times in depth and in great detail: i.e. trying to get a verdict of something less than first-degree murder at guilt/innocence. Defendant took part in these strategy discussions.

. . . .

19. Simmons and Godwin discussed second degree murder with defendant in the sense that anything less than first degree murder would be good. This was their trial strategy. Simmons was certain that defendant concurred with it. . . .

. . . .

26. When Simmons was giving closing argument at the guilt/innocence phase, defendant tapped Godwin on the shoulder and asked whether he heard what Simmons had just said. Prior to Simmons' return to the counsel table, defendant told Godwin to tell Simmons that he was to have nothing further to do with the case and that Godwin was to complete the case. Simmons continued to help in discussion and preparation, but Godwin did all the communicating with defendant.

27. Godwin testified that defendant never specifically said to the attorneys, "You have my permission to tell the jury that I am guilty of second-degree murder." Godwin did not recall that either he or Simmons specifically asked defendant if they could argue that he was guilty of second-degree murder. . . .

. . . .

30. The attorneys' trial strategy was to try to convince the jury that defendant was guilty of something other than first degree murder. This included pleading to the larceny charges to show that there was some culpability. Godwin did not believe that the attorneys were ever going to try to concede to second degree murder because defendant had told the officers that he did not intend to kill Pettaway, but that depended on how things turned out during the State's case.

. . . .

32. This Court finds on the basis of the sworn testimony given by [] Simmons and Godwin that defendant's consent to the trial strategy was knowing and intelligent, arrived at after much discussion, and adhered to by Simmons in closing argument as to second degree murder rather than voluntary manslaughter because voluntary manslaughter was no longer an option.

Based on these findings of fact, the trial court concluded as a matter of law that defendant "failed to make any showing of ineffective assistance of trial counsel pursuant to Harbison," and denied defendant's *Harbison* claim.

We now address whether the trial court's findings of fact support its conclusion that defendant's trial counsel did not commit *Harbison* error. The trial court found that defense counsel's trial strategy was "to convince the jury that defendant was guilty of something other than first degree murder." The trial court found that, because defendant consented to this overall strategy, and because "[d]efendant's IQ was high," defendant implicitly allowed his trial counsel to concede his guilt. However, we conclude that *Harbison* requires more than implicit consent based on an overall trial strategy and defendant's intelligence.

> [T]he gravity of the consequences demands that the decision to plead guilty remain in the defendant's hands. When counsel admits his client's guilt without first obtaining the client's con-

> sent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away. The practical effect is the same as if counsel had entered a plea of guilty without the client's consent. Counsel in such situations denies the client's right to have the issue of guilt or innocence decided by a jury.

Harbison, 315 N.C. at 180, 337 S.E.2d at 507.

Neither the trial court's order, the trial transcripts, nor the *Harbison* hearing transcripts indicate that defendant's counsel advised him they were going to concede his guilt to second-degree murder. *Harbison* requires that the decision to concede guilt to a lesser included crime "be made exclusively by the defendant." *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507. Furthermore, "[b]ecause of the gravity of the consequences, a decision to plead guilty must be made knowingly and voluntarily by the defendant after full appraisal of the consequences." *Id.* at 180, 337 S.E.2d at 507. For us to conclude that a defendant permitted his counsel to concede his guilt to a lesser-included crime, the facts must show, at a minimum, that defendant *knew* his counsel were going to make such a concession. Because the record does not indicate defendant *knew* his attorney was going to concede his guilt to second-degree murder, we must conclude defendant's attorney made this concession without defendant's consent, in violation of *Harbison*. Thus, the trial court's conclusion of law that no *Harbison* error occurred is not supported by the trial court's findings of fact. Defendant's attorney committed ineffective assistance of counsel per se, and defendant is entitled to a new trial.

Although defendant's death sentence is reversed and his case is remanded to the trial court for a new trial, we take this opportunity to address two additional issues to prevent them from recurring at defendant's second trial. *See, e.g.*, *State v. Porter*, 326 N.C. 489, 511, 391 S.E.2d 144, 158 (1990); *State v. Williams*, 317 N.C. 474, 483, 346 S.E.2d 405, 411 (1986); *State v. Stokes*, 308 N.C. 634, 652, 304 S.E.2d 184, 195 (1983).

[2] First, we conclude that the prosecutor violated Rule 24 of the North Carolina General Rules of Practice for Superior and District Courts by failing to hold a special pre-trial conference. Rule 24 states in pertinent part:

> There shall be a pretrial conference in every case in which the defendant stands charged with a crime punishable by death.

> No later than ten days after the superior court obtains jurisdiction in such case, the district attorney shall apply to the presiding superior court judge or other superior court judge holding court in the district, who shall enter an order requiring the prosecution and defense counsel to appear before the court within forty-five days thereafter for the pretrial conference. Upon request of either party at the pretrial conference the judge may for good cause shown continue the pretrial conference for a reasonable time.

R. Pretrial Conference in Capital Cases 24, 2001 N.C. R. Ct. (State) 74. Rule 24 also mandates that the trial court and the parties consider "the nature of the charges and the existence of evidence of aggravating circumstances; . . . [and] timely appointment of assistant counsel for an indigent defendant when the State is seeking the death penalty." *Id.*

Rule 24 provides a simple, bright-line rule, requiring prosecutors to petition for a special pretrial conference in *all* capital cases. "Rule 24 of the Rules of Practice is mandatory." *State v. Rorie*, 348 N.C. 266, 271, 500 S.E.2d 77, 81 (1998). In the case *sub judice*, the prosecutor violated the rule by failing to petition an Edgecombe County Superior Court judge for a pretrial conference as the rule mandates.

"Repeated violations of the rule manifesting willful disregard for the fair and expeditious prosecution of capital cases may result in citation for contempt pursuant to N.C.G.S. § 5A-11(7) or other appropriate disciplinary action against the district attorney." *Rorie*, 348 N.C. at 270-71, 500 S.E.2d at 81. Before the State retries defendant, the prosecutor *must* petition a superior court judge for a Rule 24 conference. If the prosecutor fails to petition the superior court for a pretrial conference, he risks disciplinary action.

[3] Next, we address defendant's complaint that the prosecutor presented an improper and unprofessional closing argument to the jury. Unfortunately as we have repeatedly noted[1], complaints

1. *State v. Walters*, 357 N.C. 68, 105, 588 S.E.2d 344, 366 (prosecutor improperly compared defendant to Hitler in his closing argument), *cert. denied*, — U.S. —, 157 L. Ed. 2d 320 (2003); *State v. Jones*, 355 N.C. 117, 126, 558 S.E.2d 97, 103 (2002) (vacating defendant's death sentence because the prosecutor improperly compared the victim's life to those lives lost in the Columbine Shootings and the Oklahoma City Federal Building bombing); *State v. Gell*, 351 N.C. 192, 216, 524 S.E.2d 332, 347 (prosecutors improperly made biblical arguments to the jury), *cert. denied*, 531 U.S. 867, 148 L. Ed. 2d 110, (2000); *State v. Smith*, 279 N.C. 163, 165-67, 181 S.E.2d 458, 459-60 (1971) (reversing defendant's rape conviction where the prosecutor improperly described

such as defendant's come before this Court in criminal cases far too frequently. This case is remanded for other reasons, and it is not necessary for this Court to reach the issue of improper closing argument in the case at hand. However, we feel compelled to instruct the attorneys and courts of this State, once again, on how to conduct themselves in a proper and professional manner during closing argument.

"When the prosecutor becomes abusive, injects his personal views and opinions into the argument before the jury, he violates the rules of fair debate." *State v. Jones*, 355 N.C. 117, 130, 558 S.E.2d 97, 105 (2002) (quoting *State v. Smith*, 279 N.C. 163, 166, 181 S.E.2d 458, 460 (1971)). The prosecutor's closing argument in the case at bar was improper because the prosecutor engaged in name-calling and used scatological language when referring to defendant's theory of the case. During closing argument the prosecutor characterized defendant as a "monster," "demon," "devil," "a man without morals" and as having a "monster mind." Such improper characterizations of defendant amounted to no more than name-calling and did not serve the State because the prosecutor was not arguing the evidence and the conclusions that can be inferred therefrom. *See* N.C.G.S. § 15A-1230(a) (2003).

Defendant also complains that the prosecutor's use of scatological language was inappropriate and thus improper. We agree. In his closing argument, the prosecutor attacked the defendant's theory of the case as follows:

> The defendant, I believe through Mr. Simmons, is going to be portrayed as somebody who is not a monster; as somebody who made a mistake; as somebody who probably did wrong by going in that house; as somebody who only wanted the stuff in the house; as somebody who wouldn't harm a flea; as somebody who would not kill; as somebody who regretted what they did; as somebody who was sorry for what they did; as somebody who, just resist the urge to laugh, who tried to save her.
>
> *That's bull crap.*

(Emphasis added.)

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defendant as "lower than the bone belly of a cur dog"); *State v. Miller*, 271 N.C. 646,660, 157 S.E.2d 335, 346 (1967) (granting defendant a new trial where the prosecutor expressed his personal opinion that a witness was lying).

This Court has repeatedly warned that closing arguments must be kept within the bounds of civility. *Walters*, 357 N.C. at 108, 588 S.E.2d at 368; *Jones*, 355 N.C. at 129, 558 S.E.2d at 105. Though "[g]enerally, trial counsel is allowed wide latitude in the scope of jury arguments," *State v. Hill*, 347 N.C. 275, 298, 493 S.E.2d 264, 277 (1997), *cert. denied*, 523 U.S. 1142, 140 L. Ed. 2d 1099 (1998), "a trial attorney may not make uncomplimentary comments about opposing counsel, and should 'refrain from abusive, vituperative, and opprobrious language, or from indulging in invectives.' " *State v. Sanderson*, 336 N.C. 1, 10, 442 S.E.2d 33, 39 (1994) (quoting *State v. Miller*, 271 N.C. 646, 659, 157 S.E.2d 335, 346 (1967)).

In the case *sub judice*, the prosecutor's closing argument was improper because his personal opinion about defendant's theory of the case exceeded proper boundaries and he engaged in improper name-calling.

In sum, improper closing arguments cannot be tolerated. We again admonish the attorneys and trial courts of this State to reevaluate the need for melodrama and theatrics over civil, reasoned persuasion.

> A well-reasoned, well articulated closing argument can be a critical part of winning a case. However, such argument, no matter how effective, must: (1) be devoid of counsel's personal opinion; (2) avoid name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not on appeals to passion or prejudice; and (4) be constructed from fair inferences drawn only from evidence properly admitted at trial.

Jones, 355 N.C. at 135, 558 S.E.2d at 108. We remind the prosecutor that the State's interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 1314, 1321 (1935).

Finally, while defendant assigns numerous errors to all phases of his trial, we decline to address every potential error as these errors are unlikely to recur at a new trial. We conclude as a matter of law that defense counsel's admission that defendant was guilty of second-degree murder constituted ineffective assistance of counsel per se. For the foregoing reasons, we conclude the trial court's errors were prejudicial to defendant's right to a fair trial, and thus defendant is entitled to a new trial.

NEW TRIAL.

LOCUST v. PITT CTY. MEM'L HOSP., INC.

[358 N.C. 113 (2004)]

HELEN LOCUST, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF LESTER R. TYSON v. PITT COUNTY MEMORIAL HOSPITAL, INC., JAMES M. GALLOWAY, M.D., LINDA G. MONTEITH, M.D., AND PITT FAMILY PHYSICIANS

No. 643A02

(Filed 6 February 2004)

Intestate Succession— wrongful death proceeds—proper beneficiaries—standing—renunciation

The trial court erred in a wrongful death case by granting summary judgment in favor of defendants and concluding that plaintiff sister, who was also the administratrix of decedent's estate, did not have standing to bring this action to recover any wrongful death proceeds through the Intestate Succession Act based on the existence of decedent's estranged wife notwithstanding her renunciation of any interest in decedent's estate, because: (1) decedent's surviving spouse had abandoned decedent and was living apart from him at the time of his death, thereby precluding her pursuant to N.C.G.S. § 31A-1 from inheriting from him under the Intestate Succession Act; (2) the surviving spouse's renunciation of rights to decedent's estate was unnecessary and of no effect when N.C.G.S. § 31A-1, as part of the Intestate Succession Act, took effect at the time of decedent's death; and (3) decedent's brothers and sisters are the real parties in interest and have standing to maintain this action under N.C.G.S. § 29-15(4) as the proper beneficiaries of any wrongful death recovery.

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. 103, 571 S.E.2d 668 (2002), affirming an order for summary judgment entered 22 August 2001 by Judge James R. Vosburgh in Superior Court, Pitt County. Heard in the Supreme Court 8 September 2003.

Burford & Lewis, PLLC, by Robert J. Burford, for plaintiff-appellant.

Harris, Creech, Ward and Blackerby, P.A., by R. Brittain Blackerby and Joseph E. Elder, for defendant-appellees Pitt County Memorial Hospital, Inc., and Linda G. Monteith, M.D.

Herrin & Morano, by Mickey A. Herrin, for defendant-appellees James M. Galloway, M.D., and Pitt Family Physicians.

LAKE, Chief Justice.

This appeal arises out of a unique set of circumstances bringing into question the interplay between chapter 31A, Acts Barring Property Rights and chapter 29, the Intestate Succession Act, and their effect upon the Wrongful Death Act, N.C.G.S. § 28A-18-2. The primary issue is whether chapter 31A should be considered a part of chapter 29 thereby changing the rules of intestacy, for purposes of determining standing in a wrongful death action.

In this case, Helen Locust ("plaintiff") instituted a wrongful death action, and she now appeals from a decision of the North Carolina Court of Appeals affirming the trial court's grant of summary judgment in favor of Pitt County Memorial Hospital Inc., James M. Galloway, M.D., Linda G. Monteith, M.D., and Pitt Family Physicians (collectively "defendants"). For the reasons herein set forth, we reverse the decision of the Court of Appeals and remand this case to that court for further remand to the trial court.

Lester R. Tyson ("decedent") was admitted to Pitt County Memorial Hospital's emergency room on the afternoon of 4 June 1992 for evaluation and treatment related to complaints of abdominal pain and nausea. On 5 June 1992, Pitt County Memorial Hospital admitted decedent as an in-patient and assigned him to a room. Over the next two days, decedent was evaluated and treated by physicians from Pitt County Memorial Hospital's Departments of Hematology and Quadrangle Gastroenterology, as well as East Carolina University Surgery, and decedent's primary care physician, Dr. Galloway. At approximately 8:15 p.m. on 7 June 1992, decedent experienced an onset of seizure activity. After receiving notice of the seizures, Dr. Galloway prescribed medication and ordered a computerized tomography ("CT scan") for decedent. At some point after notifying Dr. Galloway, the hospital staff discovered decedent lying on the floor in the hallway outside his room, suffering from a bleeding traumatic head injury. The nursing staff called for help from the emergency room. Dr. Monteith, an emergency room resident, responded to the call at 10:15 p.m. and sutured decedent's head wound. Decedent's medical condition continued to deteriorate, and Dr. Galloway transferred decedent to the hospital's critical care unit. A second CT scan was ordered by the critical care physicians on the morning of 8 June 1992. This scan, performed at 12:15 p.m. on 8 June 1992, revealed a large right temporal hemorrhage, a ventricular bleed, and a left scalp hematoma. At 1:30 p.m. on the same day, a neurology consult was performed by Dr. John Griffith Steele. Dr. Steele pronounced dece-

dent brain dead at 4:45 p.m. Decedent died at 8:46 p.m. on 8 June 1992. An autopsy of decedent's body disclosed that his cause of death was a traumatic blunt force injury to the head.

At the time of his death, decedent was survived by two brothers, four sisters, and an estranged wife. On 2 June 1994, decedent's sister, plaintiff Helen Locust, qualified as administratrix and filed a complaint alleging negligence against defendants and seeking to recover damages for decedent's wrongful death including: (1) damages for his care, treatment and hospitalization; (2) pain and suffering and loss of enjoyment of life; (3) mental anguish; (4) funeral expenses; (5) present and future monetary value to his family; and (6) punitive damages. The damages sought reflect the posture of the action as both a survival action wherein the complaint sought damages suffered by decedent prior to his death and a wrongful death action where the family sought compensation for damages it would suffer for the loss of decedent. On 16 November 1994, plaintiff voluntarily dismissed this complaint.

On 17 July 1995, plaintiff filed a "Statement of Renunciation and Acts Barring Property Rights," signed by decedent's estranged wife, Brenda K. Tyson ("Mrs. Tyson"). In this statement, Mrs. Tyson, pursuant to chapter 31B, purported to "renounce . . . any interest in the estate of Lester Tyson or any interest in any wrongful death action brought by reasons of his death." Mrs. Tyson stated that she voluntarily left decedent in 1989, willfully and without just cause, with the intent of abandoning him permanently.

Plaintiff refiled a substantially similar complaint on 9 November 1995. Defendants moved for summary judgment, and their motion was granted on 22 August 2001 on the ground that *Evans v. Diaz*, 333 N.C. 774, 430 S.E.2d 244 (1993) stripped plaintiff of standing. The Court of Appeals in a split decision affirmed the trial court's decision. *Locust v. Pitt Cty. Mem'l Hosp., Inc.*, 154 N.C. App. 103, 571 S.E.2d 668 (2002), *disc. rev. denied*, 356 N.C. 673, 579 S.E.2d 272 (2003). The Court of Appeals' dissenting opinion concurred with the majority opinion's decision to affirm summary judgment regarding the survival action. The dissenting opinion disagreed with the majority opinion's conclusion that decedent's siblings were barred from recovery under the Wrongful Death Act because of the existence of decedent's estranged wife notwithstanding her renunciation. This appeal therefore is before us solely on the issue raised in the dissenting opinion, namely whether plaintiff, as sister of decedent and administratrix of his estate, has standing to pursue a wrongful death action when dece-

dent was legally married but abandoned by that spouse at the time of his death.

The crux of this case revolves around the interpretation of three statutes: N.C.G.S. § 28A-18-2, Death by Wrongful Act of Another; N.C.G.S. § 31A-1, Acts Barring Rights of Spouse; and chapter 29, the Intestate Succession Act.

The Wrongful Death Act provides in part:

> (a) When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured person had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their personal representatives or collectors, shall be liable to an action for damages, to be brought by the personal representative or collector of the decedent.

N.C.G.S. § 28A-18-2(a) (2003).

Any sum recovered from a wrongful death action after certain expenses have been paid "shall be disposed of as provided in the Intestate Succession Act." *Id.*

On its face, the plain language of this statute suggests no standing problems for plaintiff in bringing the wrongful death action. Plaintiff as personal representative of decedent's estate explicitly has the right to bring an action for his wrongful death. *Id.* However, the question of identity of the potential wrongful death beneficiaries drives the standing issue. Our case law and common sense justify the conclusion that there can be no wrongful death action where there are no potential beneficiaries. In *Evans v. Diaz*, this Court stated: "In an action brought under the Wrongful Death Act[,] the real party in interest is not the estate but the beneficiary of the recovery as defined in the Act." *Evans*, 333 N.C. at 776, 430 S.E.2d at 245 (citing *Davenport v. Patrick*, 227 N.C. 686, 688, 44 S.E.2d 203, 205 (1947)).

On the basis of *Evans*, the Court of Appeals' majority held that: (1) Mrs. Tyson, as decedent's legal wife at the time of his death, is the sole beneficiary of the wrongful death proceeds under the Intestate Succession Act notwithstanding her renunciation; (2) her abandonment of decedent deprives her of any right to the property under N.C.G.S. § 31A-1; and (3) because this leaves no beneficiary for the potential proceeds, there can be no wrongful death action.

The beneficiary as defined by the Wrongful Death Act is one that would take from decedent under the Intestate Succession Act. Any wrongful death recovery "shall be disposed of as provided in the Intestate Succession Act." N.C.G.S. § 28A-18-2(a). The Intestate Succession Act in N.C.G.S. § 29-14 provides that where the decedent or intestate dies survived by a spouse but no lineal descendants or parents, the surviving spouse inherits all personal and real property of the decedent. The next section of the Act, N.C.G.S. § 29-15, provides for intestate distribution to those other than the surviving spouse.

> Those persons surviving the [decedent], other than the surviving spouse, shall take that share of the net estate *not distributable to the surviving spouse*, or the entire net estate if there is *no surviving spouse*, as follows:
>
> . . . .
>
> (4) If the intestate is not survived by such children or lineal descendants or by a parent, the brothers and sisters of the intestate, and the lineal descendants of any deceased brothers or sisters, shall take as provided in G.S. 29-16.

N.C.G.S. § 29-15 (2003) (emphasis added).

Applying the Intestate Succession Act to determine the beneficiaries in the case *sub judice*, N.C.G.S. § 29-14 directs potential wrongful death proceeds to Mrs. Tyson, the surviving spouse at the time of decedent's death. N.C.G.S. § 29-15 presupposes the current situation where a spouse cannot take part in the distribution pursuant to N.C.G.S. § 29-14 by providing for persons, other than the surviving spouse to take "that share of the net estate *not distributable to the surviving spouse*." N.C.G.S. § 29-15 (emphasis added).

In light of the overall sequence, it is evident that the legislature intended for the distribution provided in N.C.G.S. § 29-15 to be read in conjunction and accordance with N.C.G.S. § 29-14, which dictates the share of the surviving spouse, often diminished by the presence of decedent's children and parents. The critical question is whether the statutes were intended to include the situation at bar, where the spouse's share was "not distributable" to her due to her action in abandoning decedent and thus barring her from taking his property under N.C.G.S. § 31A-1.

Section 31A-1 states that "[a] spouse who wilfully and without just cause abandons and refuses to live with the other spouse and is

not living with the other spouse at the time of such spouse's death" loses the right of intestate succession in the estate of the spouse who died. N.C.G.S. § 31A-1(a)(3) (2003). Notably, under the wording of the statute, intent to abandon and abandonment even when combined, are insufficient to preclude an abandoning spouse from intestate succession. The abandoning spouse must also "not [be] living with the other spouse at the time of such spouse's death." N.C.G.S. § 31A-1. This Court has held that a spouse may abandon the other spouse without physically leaving the home, thus likely prompting the legislature to include the additional requirement in N.C.G.S. § 31A-1. *Panhorst v. Panhorst*, 277 N.C. 664, 671, 178 S.E.2d 387, 392 (1971) (citing *Bailey v. Bailey*, 243 N.C. 412, 415, 90 S.E.2d 696, 699 (1956); *McDowell v. McDowell*, 243 N.C. 286, 287, 90 S.E.2d 544, 545 (1955); *Blanchard v. Blanchard*, 226 N.C. 152, 154, 36 S.E.2d 919, 920 (1946)). Because absence from the marital home is an element under the statute, a determination of spousal preclusion from intestate succession cannot be made until the death of the other spouse.

Both the determination of spousal exclusion under N.C.G.S. § 31A-1 and the determination of beneficiaries under the Intestate Succession Act are made at the time of decedent's death. *Davenport v. Patrick*, 227 N.C. 686, 689, 44 S.E.2d 203, 205. In *Williford v. Williford*, 288 N.C. 506, 219 S.E.2d 220 (1975), this Court held that "G.S. 31A-2 . . . enacted in 1961, two years after the enactment of the Intestate Succession Act, must be deemed a part of the Intestate Succession Act and a modification of G.S. 29-15(3), as fully as if it had been written thereinto or specifically designated as an amendment thereto." *Id.* at 508-09, 219 S.E.2d at 222.

Williford involved the right of an abandoning parent to share in the proceeds received from the wrongful death of his abandoned child. *Williford*, 288 N.C. 506, 219 S.E.2d 220. This Court in *Williford*, relying in part upon the logic of *Smith v. Allied Exterminators, Inc.*, 279 N.C. 583, 184 S.E.2d 296 (1971), held:

> that when the Legislature, in G.S. 28-173, provided that the proceeds of an action for wrongful death "shall be disposed of as provided in the Intestate Succession Act," and when it provided in G.S. 97-40 that the order of priority among claimants to death benefits payable under the Workmen's Compensation Act "shall be governed by the general law applicable to the distribution of the personal estate of persons dying intestate," it had in mind the

same law; i.e., the Intestate Succession Act as modified by G.S. Ch. 31A, entitled, "Acts Barring Property Rights."

Williford, 288 N.C. at 510, 219 S.E.2d at 223.

This Court in *Williford* twice emphasized that the Intestate Succession Act was modified by chapter 31A. *Id.* at 508-10, 219 S.E.2d at 222-23. *Williford* held that the father who had abandoned the deceased as a minor child could not share in the settlement proceeds of the wrongful death suit. *Id.* at 510, 219 S.E.2d at 223. We agree with the analysis of *Williford* and hold this precedent applicable in the present case. When decedent died, his abandoning wife was not living with him. Mrs. Tyson, having thus completed her abandonment of decedent within the full requirement of N.C.G.S. § 31A-1, was thus precluded from inheriting from decedent because the Intestate Succession Act as modified by chapter 31A does not allow it. Because Mrs. Tyson could not inherit from decedent, it follows that she could not receive any wrongful death proceeds directed by the Intestate Succession Act. Thus, Mrs. Tyson's subsequent renunciation of interest in decedent's estate and in the potential wrongful death proceeds was superfluous and of no effect because she then held no interest to renounce.

The Intestate Succession Act directs distribution of the shares *"not distributable to the surviving spouse"* in accordance with N.C.G.S. § 29-15. Decedent was not survived by any lineal descendants or parents, so his brothers and sisters and the lineal descendants of any deceased brothers or sisters "take as provided in G.S. 29-16." N.C.G.S. § 29-15(4). Therefore, as the proper beneficiaries of any wrongful death recovery and thus the real parties in interest, decedent's brothers and sisters have standing to maintain the action under *Davenport.*

Defendants, the trial court, and the Court of Appeals' majority have relied solely upon the case of *Evans v. Diaz*, 333 N.C. 774, 430 S.E.2d 244 as authority for dismissal of the action. In *Evans*, this Court held that a mother who caused the death of her son could not renounce her right to inherit from her son in favor of her daughters and thereby allow the daughters to maintain a wrongful death action against her. *Id.* at 775, 430 S.E.2d at 244. In *Evans*, this Court did not once reference the slayer statute provision in N.C.G.S. § 31A-3 or any other provision in chapter 31A, in its opinion although the mother in *Evans* caused the death of her son. Rather, this Court relied solely on

case law and chapter 31B for the proposition that the daughters could not seek wrongful death recovery through their mother's renunciation of interest.

> "[I]n wrongful death actions where recovery depends on establishing the liability of a party who is also a beneficiary of the decedent's estate, the recovery obtained shall be reduced by the party-beneficiary's pro rata share and the party-beneficiary is precluded from participating in the recovery; but the action may be maintained on behalf of the other beneficiaries, if any. Further, if recovery in a wrongful death action depends on establishing the liability of a party who is the sole beneficiary of decedent's estate, the action may not be brought at all."

Id. at 777, 430 S.E.2d at 245 (quoting *Carver v. Carver*, 310 N.C. 669, 678, 314 S.E.2d 739, 744 (1984)). This Court concluded that because the decedent's mother, as sole beneficiary under the Intestate Succession Act, could not maintain the wrongful death action, she had no interest to renounce in favor of her daughters, the decedent's siblings. *Evans*, 333 N.C. at 777, 430 S.E.2d at 245. The bulk of the opinion focuses on renunciation and whether renunciation should be allowed under the Wrongful Death Act, concluding that renunciation is not proper under the Wrongful Death Act. *Id.* at 781, 430 S.E.2d at 248.

The present case is distinguishable, factually and in application of the law, from *Evans*. The situation at bar differs factually from *Evans* in several respects. First, decedent's wife did not cause or contribute to decedent's death. Her abandonment of him statutorily precludes her from inheriting from him and receiving wrongful death proceeds. Second, decedent's siblings are not attempting to succeed to the interest of the abandoning wife, as were the sisters of the decedent in *Evans* in attempting to succeed to their mother's interest. Third, although both cases involve purported renunciations, the renunciation at bar was unnecessary and of no effect because N.C.G.S. § 31A-1, as part of the Intestate Succession Act, took effect at the time of decedent's death. To the contrary, the renunciation in *Evans* was the only means by which the decedent's sisters could possibly recover.

In addition to the factual variations, the law applicable to *Evans* is not applicable at bar. *Evans* relied upon North Carolina case law prohibiting one who negligently caused the death of another from

maintaining a wrongful death action and thereby profiting from his own wrong, rather than N.C.G.S. § 31A-1 or the slayer statute provision in N.C.G.S. § 31A-3. *Evans*, 333 N.C. at 777, 430 S.E.2d at 245 (citing *In re Estate of Ives*, 248 N.C. 176, 102 S.E.2d 807 (1958)). The case law relied upon by this Court in *Evans* grounds its logic in the common law, as the slayer statute and the provisions of N.C.G.S. § 31A-1 are inapplicable where the death is caused by negligence. *See also*, Julie W. Hampton, *Comment: The Need For a New Slayer Statute in North Carolina*, 24 Campbell L. Rev. 295 (2002). The omission of discussion or analysis of the slayer statute, also known as N.C.G.S. § 31A-3, or other provisions of chapter 31A, in *Evans* is significant, as those sections would have provided a legal similarity to the present case which is governed under the same chapter, by N.C.G.S. § 31A-1.

Chapters 31A and 29 are not mutually exclusive and are to be read together to direct the proper application of the Wrongful Death Act. *See Williford*, 288 N.C. at 510, 219 S.E.2d at 223. Read together, and in light of *Williford*, these statutes clearly mandate distribution of potential wrongful death proceeds to decedent's brothers and sisters. Mrs. Tyson had abandoned decedent and was living apart from him at the time of his death, thereby precluding her pursuant to chapter 31A from inheriting from him under the Intestate Succession Act.

We therefore conclude that decedent's brothers and sisters, as decedent's closest relatives other than his wife, should share in any wrongful death proceeds, as the Wrongful Death Act directs distribution of those proceeds through the Intestate Succession Act. As an appropriate beneficiary of any potential wrongful death recovery and as administratrix of decedent's estate, we hold that plaintiff has standing to bring the wrongful death action, and we reverse the decision of the Court of Appeals. Accordingly, we remand to the Court of Appeals for remand to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. JOHN WESLEY HOOPER

No. 401A03

(Filed 6 February 2004)

1. Probation and Parole— probation violation—appeal to superior court

The Court of Appeals' decision in a probation violation case is vacated because when the district court revokes a defendant's probation, defendant's appeal is to the superior court, N.C.G.S. § 15A-1347. Defendant is permitted to refile his notice of appeal to the superior court notwithstanding time and procedural constraints resulting from this misdirected appeal.

2. Appeal and Error— contemporaneous appeals—opposing positions by same party

A party cannot argue two wholly opposing positions in contemporaneous appeals or switch positions during the course of a single appeal, and a failure to notify the court of the inconsistencies will inevitably diminish judicial confidence in a party's legal arguments.

Justice PARKER concurrs in the result only.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 158 N.C. App. 654, 582 S.E.2d 331 (2003), affirming in part and remanding in part orders and judgments entered 21 March 2002 by Judge Laura J. Bridges in District Court, Transylvania County. Heard in the Supreme Court 9 December 2003.

Roy Cooper, Attorney General, by P. Bly Hall, Assistant Attorney General, for the State.

Staples Hughes, Appellate Defender, by Katherine Jane Allen, Assistant Appellate Defender, for defendant-appellant.

BRADY, Justice.

The primary issue presented by the instant case is whether a defendant, whose probation has been revoked by order of the district court, should properly appeal his probation revocation to the superior court division or to the Court of Appeals. We hold that when the district court revokes a defendant's probation, that defendant's

appeal is to the superior court; therefore, we vacate the decision of the North Carolina Court of Appeals to the contrary.

In 1996, the General Assembly enacted N.C.G.S. § 7A-272(c), which grants the district court jurisdiction to accept pleas of guilty to Class H or I felonies where the defendant is charged in an information, the felony is pending in district court, and the defendant has not been indicted, or the defendant has been indicted but the case is transferred from superior to district court. Act of June 21, 1996, ch. 725, sec. 1, 1995 N.C. Sess. Laws (Reg. Sess. 1996) 410, 410. Although there is no evidence to suggest that section 7A-272(c) has been widely implemented, the obvious practical effect of the statute is to relieve the backlog of cases in superior court by allowing for early disposition of cases in district court upon the agreement of all parties.

On 29 August 2000, pursuant to section 7A-272(c), defendant John Wesley Hooper pled guilty in district court to multiple informations alleging eight charges of felony forgery and eight charges of uttering a forged instrument, both offenses being Class I felonies. The district court accepted defendant's negotiated plea and imposed a judgment that suspended defendant's active sentence of eight six-to-eight-month terms. The court then placed defendant on supervised probation for a period of thirty-six months.

On 22 January 2002, defendant's probation officer filed violation reports alleging that defendant had violated several conditions of his probation. Pursuant to those violation reports, the district court held a revocation hearing on 19 and 21 March 2002, at which time defendant admitted violating the conditions of his probation. The district court found defendant in willful violation of his probation, revoked his probation, and imposed an active sentence of eight consecutive six-to-eight-month terms.[1]

Following the revocation hearing, defendant filed a handwritten *pro se* notice of appeal stating only, "I wish to appeal my probation violation." The district court construed defendant's notice of appeal as one addressed to the Court of Appeals. Defendant argued before

1. At the revocation hearing, there was some question as to whether defendant's active sentence terms were to run concurrently or consecutively because the original written judgment failed to specify either option. On appeal to the Court of Appeals, defendant contended that his sentence was to run concurrently pursuant to N.C.G.S. § 15A-1354(a), which provides that if a judgment fails to specify whether multiple sentences are to run consecutively or concurrently, the sentences run concurrently. *See* N.C.G.S. § 15A-1354(a) (2003). This issue, however, is not before this Court.

the Court of Appeals that his appeal must be dismissed because the appellate court did not have jurisdiction to hear it. A divided panel of that court disagreed, retained jurisdiction of the appeal, and accordingly, resolved the substantive issues raised by defendant.

[1] We must now determine whether defendant's appeal was to the superior court or to the Court of Appeals. Our state Constitution mandates that the General Assembly prescribe by general law the scope of the jurisdiction of the Court of Appeals. N.C. Const. art. IV, § 12. Therefore, "appeal[s] can be taken only from such judgments and orders as are designated by the statute regulating the right of appeal." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950).

Appeals from probation revocations are governed by N.C.G.S. § 15A-1347, which provides as follows: "When a district court judge, as a result of a finding of a violation of probation, activates a sentence or imposes special probation, the defendant may appeal to the superior court for a de novo revocation hearing." N.C.G.S. § 15A-1347 (2003). Defendant contends that N.C.G.S. § 15A-1347 applied to the appeal of his probation revocation and, because that statute was not followed, the Court of Appeals did not have the statutory authority and therefore lacked jurisdiction to hear his appeal.

The State argues to the contrary that N.C.G.S. § 7A-272(d), another subsection within the statute that allowed the district court to accept defendant's guilty plea, creates a limited exception to the general rule provided by N.C.G.S. § 15A-1347. According to the State, this exception applies to defendant's appeal and thus, defendant's appeal was properly before the appellate division. N.C.G.S. § 7A-272 provides, in relevant part:

> (c) With the consent of the presiding district court judge, the prosecutor, and the defendant, the district court has jurisdiction to accept a defendant's plea of guilty or no contest to a Class H or I felony if:
>
> (1) The defendant is charged with a felony in an information filed pursuant to G.S. 15A-644.1, the felony is pending in district court, and the defendant has not been indicted for the offense; or
>
> (2) The defendant has been indicted for a criminal offense but the defendant's case is transferred

> from superior court to district court pursuant to G.S. 15A-1029.1.
>
> (d) Provisions in Chapter 15A of the General Statutes apply to a plea authorized under subsection (c) of this section as if the plea had been entered in superior court, so that a district court judge is authorized to act in these matters in the same manner as a superior court judge would be authorized to act if the plea had been entered in superior court, and appeals that are authorized in these matters are to the appellate division.

N.C.G.S. § 7A-272(c), (d) (2003). Resolution of the issue presented by the instant case rests squarely upon proper construction of sections 15A-1347 and 7A-272(d).

"The primary goal of statutory construction is to effectuate the purpose of the legislature in enacting the statute." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 574, 573 S.E.2d 118, 121 (2002). The first step in determining a statute's purpose is to examine the statute's plain language. *Correll v. Division of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992). "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." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990).

Applying these well-established principles, we conclude that N.C.G.S. § 15A-1347, not N.C.G.S. § 7A-272(d), governed defendant's appeal of his probation revocation. The language of section 15A-1347 is clear and unambiguous—a defendant seeking an appeal from probation revocation must appeal to the superior court. Furthermore, section 15A-1347 is consistent with the general rule governing criminal appeals from the district court. *See* N.C.G.S. § 7A-271(b) (2003) (providing that criminal appeals from the district court are to the superior court).

We cannot agree with the State that N.C.G.S. § 7A-272(d) applied to defendant's appeal. Nothing in section 7A-272(d) suggests that its contents are applicable to appeals from probation revocation orders, and in fact, section 7A-272(d) *expressly* governs a separate and distinctly different situation—an appeal from a plea to a Class H or I felony taken in district court. We decline to adopt the State's strained interpretation of section 7A-272(d) and instead conclude that section 7A-272(d) is inapplicable to defendant's case. The plain meaning of

section 15A-1347 controls the course of defendant's appeal, and we are therefore not at liberty to divine a different meaning through other methods of judicial construction. *See Burgess*, 326 N.C. at 209, 388 S.E.2d at 136. Pursuant to N.C.G.S. § 15A-1347, defendant's appeal was to the superior court, and the Court of Appeals did not have jurisdiction to hear defendant's appeal.

[2] In closing, we feel compelled to address an additional issue brought to light by the parties' briefs, that is, the State's conflicting arguments in at least two different cases regarding appeals from probation revocations. As indicated *supra*, the State argues to this Court that defendant's appeal was properly before the Court of Appeals. However, in this very case, it argued the opposite position to the Court of Appeals: Defendant's appeal should have been to the superior court. Similarly, in *State v. Harless*, 160 N.C. App. 78, 584 S.E.2d 339 (2003), the State argued in its brief to the Court of Appeals that the appeal of a probation revocation was to the superior court, not the Court of Appeals. In fact, the majority opinion in *Harless* noted the following: "Both the State and defendant agree that this Court lacks statutory authority to hear an appeal from probation revocation directly from the district court level." 160 N.C. App. at 79, 584 S.E.2d at 340. Despite having an appeal of right to this Court, *see* N.C.G.S. § 7A-30(2) (2003), the State never filed notice of appeal in *Harless*. Upon questioning at oral argument before this Court in the instant case, the State was unable to tender a satisfactory explanation as to why it has taken these inconsistent positions. Notwithstanding the State's assertion to this Court that it was couching its arguments to the Court of Appeals in conditional terms, the State's arguments in the present case, combined with its arguments and actions taken in *Harless*, were nonetheless contradictory.

We take this opportunity to remind all parties of a fundamental tenet governing appellate advocacy. Appellate briefs and oral arguments not only advance a particular position but also advise and inform a court. Candor and consistency in briefs and oral arguments are paramount to the ability of our appellate courts to preserve and interpret the law. *Compare State v. Pinch*, 306 N.C. 1, 8, 292 S.E.2d 203, 212-13 (instructing practitioners "to seek excellence first, not excessiveness, in the preparation of briefs and remind them that the ability to be direct and concise is a formidable weapon in the arsenal of appellate advocacy"), *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 by State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988). We acknowledge that when one party participates in multiple appeals regarding the same legal issue, that party's understanding of the law and arguments to the court may evolve. However, where the same party argues two wholly opposing positions in contemporaneous appeals or switches positions during the course of a single appeal, we believe that party has a responsibility to advise the affected courts and, if asked, to justify its actions. Otherwise, such reversals can frustrate not only the fair disposition of individual cases but also the effective administration of justice. Moreover, failure to notify the court will inevitably diminish judicial confidence in a party's legal arguments. These factors apply with particular force where the party in question is the State, which has the elevated responsibility to seek justice above all other ends. *See generally* Rev. R. Prof. Conduct N.C. St. B. 3.8 (Special responsibilities of a prosecutor) cmts. [1] & [2], 2004 Ann. R. N.C. 740, 741; *see also Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 1314, 1321 (1935) (noting that government attorneys are "representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done"), *quoted in State v. Jones*, 355 N.C. 117, 130, 558 S.E.2d 97, 106 (2002).

In conclusion, we hold that defendant's appeal of his probation revocation was properly to the superior court division rather than to the Court of Appeals. Accordingly, the district court should have referred defendant's *pro se* notice of appeal to the superior court. The Court of Appeals lacked jurisdiction and should have dismissed the appeal. We vacate the decision of the Court of Appeals and remand this case to that court for dismissal of defendant's appeal. Defendant should be permitted to refile his notice of appeal to the superior court, notwithstanding time and procedural constraints resulting from this misdirected appeal.

VACATED AND REMANDED.

Justice PARKER concurs in result only.

THOMAS C. ODDO v. JEFFREY L. PRESSER

No. 368A03

(Filed 6 February 2004)

Damages and Remedies— alienation of affections and criminal conversation—loss of tuition benefits for children

The decision of the Court of Appeals remanding this alienation of affections and criminal conversation case for a new trial on the issue of compensatory damages is reversed for the reasons stated in the dissenting opinion in the Court of Appeals that evidence of plaintiff's lost tuition benefits for his children when plaintiff's employment as a Davidson College wrestling coach was terminated, allegedly because he was unable to function in the workplace due to mental anguish caused by defendant's actions, was not overly speculative and was properly admitted by the trial court.

Appeal by plaintiff and defendant 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. 360, 581 S.E.2d 123 (2003), reversing in part, finding no error in part, and remanding for a new trial on the issue of compensatory damages a judgment entered 4 May 2001 by Judge Robert P. Johnston in Superior Court, Mecklenburg County. Heard in the Supreme Court 17 November 2003.

Michelle D. Reingold for plaintiff-appellant and-appellee.

Maxwell, Freeman & Bowman, P.A., by James B. Maxwell, for defendant-appellant and-appellee.

PER CURIAM.

As to the issue of compensatory damages, we reverse the decision of the Court of Appeals for the reasons stated in the dissenting opinion. We affirm the decision of the Court of Appeals as to all remaining issues.

REVERSED IN PART; AFFIRMED IN PART.

DODSON v. DUBOSE STEEL, INC.

[358 N.C. 129 (2004)]

SHELBY J. DODSON, WIDOW AND PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN E. DODSON, DECEASED, EMPLOYEE v. DUBOSE STEEL, INC., EMPLOYER, AND AMERICAN MANUFACTURERS MUTUAL, CARRIER

No. 405A03

(Filed 6 February 2004)

Workers' Compensation— truck driver—exiting truck during "road rage"—injury not arising out of and in course of employment

The decision of the Court of Appeals affirming an award of compensation for the death of a truck driver is reversed for the reasons stated in the dissenting opinion in the Court of Appeals that the truck driver's death resulting from his being struck by a vehicle after exiting his truck to confront the driver of the other vehicle in an act of "road rage" did not arise out of and in the course of his employment.

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. 1, 582 S.E.2d 389 (2003), affirming an opinion and award entered by the North Carolina Industrial Commission on 18 January 2002. Heard in the Supreme Court 9 December 2003.

R. James Lore; and Johnson & Parsons, P.A., by Dale P. Johnson, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Maura K. Gavigan and Erin D. Eveson, for defendant-appellants.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed and the case is remanded to the Court of Appeals for further remand to the North Carolina Industrial Commission for proceedings not inconsistent with the dissenting opinion.

REVERSED AND REMANDED.

JOSEPH HUMMEL v. THE UNIVERSITY OF NORTH CAROLINA AND THE UNIVERSITY OF NORTH CAROLINA D/B/A THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL

No. 131PA03

(Filed 6 February 2004)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 156 N.C. App. 108, 576 S.E.2d 124 (2003), affirming an opinion and award entered by the North Carolina Industrial Commission on 14 January 2002. Heard in the Supreme Court 8 December 2003.

Law Office of Martin A. Rosenberg, by Martin A. Rosenberg, for plaintiff-appellant.

Roy Cooper, Attorney General, by Thomas Ziko and Robert T. Hargett, Special Deputy Attorneys General, for defendant-appellees.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

DRAUGHON v. HARNETT CTY. BD. OF EDUC.

[358 N.C. 131 (2004)]

LYNETTA DRAUGHON, PERSONAL REPRESENTATIVE OF THE ESTATE OF MAX DRAUGHON, DECEASED v. HARNETT COUNTY BOARD OF EDUCATION AND BARRY HONEYCUTT, JACKIE SAMUELS, STEPHEN AUSLEY, JASON SPELL, ANTHONY BARBOUR, PERRY SAENZ, DON WILSON, JR., RAYMOND MCCALL, AND BRIAN STRICKLAND, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES

No. 358A03

(Filed 6 February 2004)

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. 208, 580 S.E.2d 732 (2003), affirming an order for summary judgment entered 17 December 2001 by Judge Wiley F. Bowen in Superior Court, Harnett County. Heard in the Supreme Court 9 December 2003.

Keith A. Bishop, PLLC, by Keith A. Bishop, for plaintiff-appellant.

Tharrington Smith, LLP, by Jonathan A. Blumberg and Lisa Lukasik, for all defendant-appellees; Cranfill, Sumner & Hartzog, LLP, by Patricia L. Holland, for defendant-appellees Honeycutt, Ausley, and McCall; and Bailey & Dixon, LLP, by Gary Parsons and Warren Savage, for defendant-appellees Honeycutt, Ausley, McCall, Spell, and Wilson.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. DAVID JEROME McCOLLUM

No. 305A03

(Filed 6 February 2004)

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. 408, 579 S.E.2d 467 (2003), finding no error in a judgment entered 26 July 2001 by Judge Jack A. Thompson in Superior Court, Robeson County. Heard in the Supreme Court 10 December 2003.

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

Staples Hughes, Appellate Defender, by Anne M. Gomez, Assistant Appellate Defender, for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. ROBERT MILLER

No. 438A03

(Filed 6 February 2004)

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. 745, 583 S.E.2d 620 (2003), vacating two first-degree sex offense convictions and remanding for resentencing a conviction for taking indecent liberties with a child, which judgments were entered 6 December 2001 by Judge B. Craig Ellis in Superior Court, Scotland County. Heard in the Supreme Court 9 December 2003.

Roy A. Cooper, Attorney General, by David Gordon, Assistant Attorney General, and Amy C. Kunstling, Assistant Attorney General, for the State-appellant.

Daniel Shatz for defendant-appellee.

Beaver, Holt, Sternlicht, Glazier, Britton & Courie, P.A., by Richard B. Glazier, on behalf of the American Civil Liberties Union of North Carolina Legal Foundation, Inc., amicus curiae.

PER CURIAM.

AFFIRMED.

ALBEMARLE MENTAL HEALTH CENTER, DEVELOPMENTAL DISABILITIES, SUBSTANCE ABUSE SERVICES, PETITIONER, AND N.C. COUNCIL OF COMMUNITY MENTAL HEALTH, DEVELOPMENTAL DISABILITIES AND SUBSTANCE ABUSE PROGRAMS, INC., PETITIONER-INTERVENOR v. N.C. DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF MEDICAL ASSISTANCE, RESPONDENT

No. 441A03

(Filed 6 February 2004)

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. 66, 582 S.E.2d 651 (2003), affirming a judgment entered 24 January 2002 by Judge Stafford Bullock in Superior Court, Wake County. Heard in the Supreme Court 10 December 2003.

The Twiford Law Firm, by John S. Morrison, for petitioner-appellee; and Poyner & Spruill LLP, by Steven Mansfield Shaber, Thomas R. West, and Pamela A. Scott, for petitioner-intervenor-appellee.

Roy Cooper, Attorney General, by Grady L. Balentine, Jr., Assistant Attorney General, for respondent-appellant.

PER CURIAM.

AFFIRMED.

STATE v. COLLINS

[358 N.C. 135 (2004)]

STATE OF NORTH CAROLINA v. DOUGLAS EARL COLLINS

No. 528A03

(Filed 6 February 2004)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 585 S.E.2d 481 (2003), finding no error in a judgment entered by Judge L. Oliver Noble in Superior Court, Mecklenburg County. Heard in the Supreme Court 8 December 2003.

Roy Cooper, Attorney General, by R. Marcus Lodge, Special Deputy Attorney General, for the State.

James M. Bell for defendant-appellant.

PER CURIAM.

AFFIRMED.

RADFORD v. KEITH

[358 N.C. 136 (2004)]

MARLENE A. RADFORD v. DONALD W. KEITH, DONALD W. KEITH & ASSOC. INC.

No. 518A03

(Filed 6 February 2004)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, —— N.C. App. ——, 584 S.E.2d 815 (2003), affirming a judgment entered 8 May 2002 by Judge John R. Jolly, Jr. in Superior Court, Brunswick County. Heard in the Supreme Court 8 December 2003.

The Del Re' Law Firm, by Benedict J. Del Re' Jr., for plaintiff-appellee.

Michael E. Mauney for defendant-appellants.

PER CURIAM.

AFFIRMED.

DRAUGHON v. HARNETT CTY. BD. OF EDUC.

[358 N.C. 137 (2004)]

LYNETTA DRAUGHON, PERSONAL REPRESENTATIVE OF THE ESTATE OF MAX DRAUGHON, DECEASED v. HARNETT COUNTY BD. OF EDUC., AND BARRY HONEYCUTT, JACKIE SAMUELS, STEPHEN AUSLEY, JASON SPELL, ANTHONY BARBOUR, PERRY SAENZ, DON WILSON, JR., RAYMOND MCCALL, AND BRIAN STRICKLAND, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES

No. 392A03

(Filed 6 February 2004)

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. 705, 582 S.E.2d 343 (2003), affirming an order granting summary judgment to defendant Brian Strickland, entered 4 March 2002 by Judge Wiley F. Bowen in Superior Court, Harnett County. Heard in the Supreme Court 9 December 2003.

Keith A. Bishop, PLLC, by Keith A. Bishop, for plaintiff-appellant.

Tharrington Smith, LLP, by Jonathan A. Blumberg and Lisa Lukasik, for defendant-appellee.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. ROMAN RUBIO

No. 154PA03

(Filed 6 February 2004)

On writ of certiorari issued 2 April 2003 pursuant to N.C.G.S. § 7A-32(b) to review an order entered 11 March 2003 by Judge Chester C. Davis in District Court, Forsyth County, 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). Heard in the Supreme Court 11 September 2003.

Roy Cooper, Attorney General, by Norma S. Harrell, Special Deputy Attorney General, for the State-appellant.

Paul James, Assistant Public Defender; and Donald Tisdale, Chris Clifton, and Mireille P. Clough for defendant-appellee.

PER CURIAM.

Pursuant to this Court's opinion in *State v. Webb*, 358 N.C. 92, —— S.E.2d —— (Feb. 6, 2004) (No. 157PA03), the decision of the trial court is affirmed as modified.

AFFIRMED AS MODIFIED.

STATE v. McNEIL

[358 N.C. 139 (2004)]

STATE OF NORTH CAROLINA v. JOHN WALTER McNEIL

No. 155PA03

(Filed 6 February 2004)

On writ of certiorari issued 2 April 2003 pursuant to N.C.G.S. § 7A-32(b) to review an order entered 7 March 2003 by Judge James Hill in District Court, Durham County, 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). Heard in the Supreme Court 11 September 2003.

Roy Cooper, Attorney General, by Norma S. Harrell, Special Deputy Attorney General, for the State-appellant.

Robert Brown, Jr., Public Defender; Heather H. Freeman, Assistant Public Defender; and C. Scott Holmes, for defendant-appellee.

PER CURIAM.

Pursuant to this Court's opinion in *State v. Webb*, — N.C. —, — S.E.2d — (2004), the decision of the trial court is affirmed as modified.

AFFIRMED AS MODIFIED.

STATE OF NORTH CAROLINA v. MARVIN JUNIOR KELLY

No. 156PA03

(Filed 6 February 2004)

On writ of certiorari issued 2 April 2003 pursuant to N.C.G.S. § 7A-32(b) to review an order entered 13 March 2003 by Judge Joseph Moody Buckner in District Court, Orange County, 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. Heard in the Supreme Court 11 September 2003.

Roy Cooper, Attorney General, by Norma S. Harrell, Special Deputy Attorney General, for the State-appellant.

James Williams, Public Defender District 15B, by Timothy C. Cole, for defendant-appellee.

PER CURIAM.

Pursuant to this Court's opinion in *State v. Webb*, —— N.C. ——, —— S.E.2d —— (Feb. 6, 2004) (No. 157PA03), the decision of the trial court is affirmed as modified.

AFFIRMED AS MODIFIED.

STATE v. DRAPER

[358 N.C. 141 (2004)]

STATE OF NORTH CAROLINA v. CLAYTON DRAPER

No. 186PA03

(Filed 6 February 2004)

On writ of certiorari issued 11 April 2003 pursuant to N.C.G.S. § 7A-32(b) to review an order entered 3 April 2003, *nunc pro tunc* 26 March 2003, by Judge William L. Daisy in District Court, Guilford County, declaring N.C.G.S. § 7A-455.1 unconstitutional. Heard in the Supreme Court 11 September 2003.

Roy Cooper, Attorney General, by Norma S. Harrell, Special Deputy Attorney General, for the State-appellant.

Smith Moore LLP, by James G. Exum, Jr., and Frances Turner Mock, for defendant-appellee.

PER CURIAM.

Pursuant to this Court's opinion in *State v. Webb*, 358 N.C. 92, 591 S.E.2d 505, the decision of the trial court is affirmed as modified.

AFFIRMED AS MODIFIED.

STATE OF NORTH CAROLINA v. DWIGHT RAYMOND PHELPS

No. 165A03

(Filed 5 March 2004)

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. 119, 575 S.E.2d 818 (2003), finding no prejudicial error in a judgment entered 11 September 2001 by Judge Richard L. Doughton in Superior Court, Forsyth County. Heard in the Supreme Court 16 February 2004.

Roy Cooper, Attorney General, by Marc Bernstein, Assistant Attorney General, for the State.

Marjorie S. Canaday, for defendant-appellant.

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

PER CURIAM.

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

REVERSED.

IN RE WILL OF BARNES

[358 N.C. 143 (2004)]

IN THE MATTER OF THE PURPORTED LAST WILL AND TESTAMENT OF FRANCIS M. BARNES, DATED NOVEMBER 22, 1989 AND IN THE MATTER OF THE PURPORTED LAST WILL AND TESTAMENT OF FRANCIS M. BARNES, DATED MAY 25, 1967

No. 262A03

(Filed 5 March 2004)

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. 144, 579 S.E.2d 585 (2003), finding no error in part and vacating in part a judgment signed 9 March 2001 by Judge John B. Lewis, Jr., in Superior Court, Edgecombe County (File No. 01-SP-15). On 16 March 2001, Judge Lewis signed an order entered in Superior Court, Edgecombe County, transferring the case back to Superior Court, Martin County (File No. 98-SP-58). Heard in the Supreme Court 16 February 2004.

Bass, Bryant & Fanney, by John Walter Bryant and Eva C. Currin; and Batts, Batts & Bell, LLP, by Jeffrey A. Batts, Joseph L. Bell, Jr., and Wendy P. Wilson, for propounder-appellee; Poyner & Spruill, LLP, by Gregory S. Camp, for propounder-appellee Church of the Advent.

Gaylord, McNally, Strickland, Snyder & Holscher, L.L.P., by Danny D. McNally and Emma S. Holscher, for intestate-appellant Riley S. Corddry; Emanuel & Dunn, by Stephen A. Dunn; and Dunn and Dunn, by Raymond E. Dunn, Jr., for intestate-appellant Lucy Tull; and Browning & Hill, L.L.P., by Myron T. Hill, Jr., for intestate-appellant Diane Barnes Graue.

Roy Cooper, Attorney General, by Charles J. Murray, Special Deputy Attorney General, for other-appellant East Carolina University Athletic Fund.

The Blount Law Firm, P.A., by Marvin Blount, Jr., Ted Mackall, Jr., and Rebecca Cameron Blount, for caveator-appellants.

PER CURIAM.

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

REVERSED.

CHERYL BASS v. DURHAM COUNTY HOSPITAL CORPORATION, AND REBECCA S. RICH, M.D.

No. 349A03

(Filed 5 March 2004)

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. 217, 580 S.E.2d 738 (2003), reversing and remanding an order entered 29 October 2001 by Judge Narley L. Cashwell in Superior Court, Durham County, granting defendants judgment on the pleadings and dismissing plaintiff's claims. Heard in the Supreme Court 16 February 2004.

Hollowell, Mitchell, Von Hagen, Eyster & Warner, P.A., by Joseph T. Copeland and Donald R. Von Hagen, for plaintiff-appellee.

Patterson, Dilthey, Clay, Bryson & Anderson L.L.P., by E. C. Bryson, Jr. and Christopher J. Derrenbacher, for defendant-appellant Rebecca S. Rich, M.D.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Timothy P. Lehan and Deanna Davis Anderson, for defendant-appellant Durham County Hospital Corporation.

PER CURIAM.

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

REVERSED.

STATE OF NORTH CAROLINA v. IVORY LAMONT MESSICK

No. 482A03

(Filed 5 March 2004)

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. 232, 585 S.E.2d 392 (2003), finding no error in the judgment entered 29 October 2001 by Judge Ernest B. Fullwood in Superior Court, Pender County. Heard in the Supreme Court 16 February 2004.

Roy Cooper, Attorney General, by Daniel P. O'Brien, Assistant Attorney General, for the State.

Rudolf Maher Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellant.

PER CURIAM.

AFFIRMED.

SLOAN FIN. GRP., INC. v. BECKETT

[358 N.C. 146 (2004)]

SLOAN FINANCIAL GROUP, INC., SLOAN FINANCIAL HOLDINGS, INC., NEW AFRICA MANAGEMENT, LLC, NEW AFRICA INVESTMENT MANAGEMENT, LLC AND NEW AFRICA ADVISERS, INC., PLAINTIFFS AND CROSS-CLAIM DEFENDANTS, NEW AFRICA OPPORTUNITY FUND, L.P., D/B/A ZM AFRICA INVESTMENT FUND, L.P., PLAINTIFF-INTERVENOR AND CROSS-CLAIMANT V. JUSTIN F. BECKETT, DORIKA MAMBOLEO, MECHAEL SUDARKASA, THERESA CLARKE, MACEO K. SLOAN, AND JOHN DOES (1-10), DEFENDANTS

No. 514A03

(Filed 5 March 2004)

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. 470, 583 S.E.2d 325 (2003), finding no error in a judgment entered 27 November 2001 by Judge Giles R. Clark in Superior Court, Durham County. Heard in the Supreme Court 18 February 2004.

Thelen Reid & Priest, LLP, by Mark Fox Evens, pro hac vice; and Brown & Bunch, PLLC, by LeAnn Nease Brown, for plaintiff-appellees and defendant-appellee Maceo K. Sloan.

Everett, Gaskins, Hancock & Stevens, LLP, by E.D. Gaskins and Michael J. Tadych; and Pillsbury Winthrop, LLP, by David R. Lagasse, pro hac vice, for defendant-appellants Justin K. Beckett and Dorika Mamboleo.

Wilmer, Cutler & Pickering, by Brigida Benitez, pro hac vice, and Anne Harkavy, pro hac vice; and Jordan Price Wall Gray Jones & Carlton, by Henry W. Jones, Jr. and Hope Derby Carmichael, for plaintiff-intervenor-appellee.

PER CURIAM.

AFFIRMED.

STATE v. INGRAM

[358 N.C. 147 (2004)]

STATE OF NORTH CAROLINA v. JAY EFRAM INGRAM

No. 545A03

(Filed 5 March 2004)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 160 N.C. App. ——, 585 S.E.2d 253 (2003), finding no error in the conviction entered 28 March 2002 by Judge Orlando F. Hudson in Superior Court, Alamance County and remanding for resentencing. Heard in the Supreme Court 16 February 2004.

Roy Cooper, Attorney General, by W. Wallace Finlator, Jr., Assistant Attorney General, for the State.

Duncan B. McCormick for defendant-appellant.

PER CURIAM.

AFFIRMED.

CECIL C. HOLCOMB	)	
	)	
v.	)	ORDER
	)	
COLONIAL ASSOCIATES, L.L.C., and JOHN OLSON	)	

NO. 581A02

The Court *ex mero motu* vacates its Order entered 21 August 2003 denying plaintiff's petition for writ of certiorari as to additional issues and hereby allows plaintiff's petition for writ of certiorari as to the additional issue of the validity of the premises liability principles of negligence upon which plaintiff prevailed at trial. Accordingly, it is ordered that the parties shall file with this Court briefs as to this issue. The appellant shall have thirty (30) days from the date of this Order to file its brief, and appellee shall have thirty (30) 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 5th day of February, 2004.

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 BALLENTINE, individually, and as Senator for the 4th District, North Carolina Senate; ART POPE, individually, and as Representative for the 61st District, North Carolina House of Representatives; and BILL COBEY, individually, and as Chairman of the North Carolina Republican Party and on behalf of themselves and all other persons similarly situated,
Plaintiffs

v.

GARY O. BARTLETT, as Executive Director of the State Board of Elections; LARRY LEAKE, ROBERT D. 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,
Defendants

ORDER

No. 94PA02-3

****

RICHARD T. MORGAN, Co-Speaker of the North Carolina House of Representatives; JAMES B. BLACK, Co-Speaker of the North Carolina House of Representatives; and MARC BASNIGHT, President Pro Tempore of the North Carolina Senate

v.

ASHLEY STEPHENSON, LEO DAUGHTRY, PATRICK BALLANTINE, ART POPE, and BILL COBEY

No. 24A04

****

The trial court having entered on 5 January 2004 its judgment in *Morgan, et al. v. Stephenson, et al.*, Supreme Court No. 24A04, and its order in *Stephenson, et al. v. Barlett, et al.*, Supreme Court No. 94PA02-3 (the orders), pertaining to sections 7 through 11 of 2003 N.C. Sess. Law (Extra Session) 434, and appellants having filed notice of appeal of the orders, the appellants' motions to suspend rules for an expedited review of the appeal of the orders prior to determination by the Court of Appeals are hereby allowed as follows:

To expedite decision in the public interest and to promote the orderly administration of justice, the Court hereby suspends application of the North Carolina Rules of Appellate Procedure as detailed below and orders the following:

1. The Record on Appeal from the orders of the Honorable Robert Hobgood relating to sections 7 through 11 of 2003 N.C. Sess. Laws (Extra Session) 434, as cited above, shall be settled and presented to this Court on or before Monday, 9 February 2004.

2. Appellants' brief shall be filed on or before Tuesday, 24 February 2004.

3. Appellees' brief shall be filed on or before Wednesday, 10 March 2004.

4. The cases shall be set for oral argument on Thursday, 18 March 2004.

By order of the Court in Conference, this the 30th day of January, 2004.

Edmunds, J.
For the Court

Justices Orr and Martin did not participate in the consideration or decision of this matter.

****

No. 94PA02-3

Upon consideration of the petition filed by Plaintiff-Appellants on the 16th day of January 2004 in this matter for a writ of mandamus, the following order was entered and is hereby certified to the Superior Court, Wake County:

"Denied by order of the Court in conference this the 30 day of January 2004.

Justices Orr and Martin Recused.

Edmunds, J
For the Court"

****

No. 94PA02-3

Upon consideration of the petition for Writ of Prohibition filed by Plaintiff-Appellants on the 16th day of January 2004 in this matter, the following order was entered and is:

"Denied by order of the Court in conference this the 30 day of January 2004.

Justices Orr and Martin Recused.

Edmunds, J.
For the Court"

****

No. 94PA02-3

The following order has been entered on the motion filed on the 16th day of January 2004 by Plaintiff-Appellants for Injunctive Relief:

"Motion Denied by order of the Court in conference this the 30 day of January 2004.

Justices Orr and Martin Recused.

Edmunds, J.
For the Court"

****

No. 94PA02-3

The following order has been entered on the motion filed on the 16th day of January 2004 by Plaintiff-Appellants to Take Judicial Notice:

"Motion Dismissed as moot by order of the Court in conference this the 30 day of January 2004.

Justices Orr and Martin Recused.

Edmunds, J.
For the Court"

****

No. 94PA02-3

The following order has been entered on the motion filed on the 28th day of January 2004 by Defendant to Dismiss Petitioners' Motion for Injunctive Relief and Petitions for Writs of Mandamus and Prohibition:

"Motion Dismissed as moot by order of the Court in conference this the 30 day of January 2004.

Justices Orr and Martin Recused.

Edmunds, J.
For the Court"

****

No. 24A04

The following order has been entered on the motion filed on the 16th day of January 2004 by Defendant to Consolidate Cases on Appeal:

"Motion Allowed for the limited purpose of briefing and oral argument as to issues raised in Judge Hobgood's order and judgment pertaining to sections 7 through 11 2003 N.C. Sess. Law (Extra Session) 434.

By order of the Court in conference this the 30th day of January 2004.

Justices Orr and Martin Recused.

Edmunds, J.
For the Court

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

Batts v. Batts Case below: 160 N.C. App. 554	No. 589P03	Third-Party Def's PDR Under N.C.G.S. § 7A-31 (COA02-1647)	Denied **2/5/04**
Brewer v. Cabarrus Plastics, Inc. Case below: 160 N.C. App. 688	No. 618P03	Plt's PDR Under N.C.G.S. § 7A-31 (COA00-364-2)	Denied **2/5/04**
Camp v. Kimberly-Clark Corp. Case below: 160 N.C. App. 595	No. 586P03	1. Def's Motion for Temporary Stay (COA01-68) 2. Def's Petition for Writ of Supersedeas 3. Def's Petition for Discretionary Review Under N.C.G.S. § 7A-31	1. Denied **11/13/03** 2. Denied **2/5/04** 3. Denied **2/5/04**
Clark v. Division of Social Servs. Case below: 160 N.C. App. 595	No. 595P03	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA02-1278)	Denied **2/5/04**
Cox v. Steffes Case below: 161 N.C. App. 237	No. 630P03	Defs' Motion for Temporary Stay (COA02-972)	Allowed **12/05/03**
Craver v. Campbell & Taylor Case below: 160 N.C. App. 708	No. 620P03	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA02-1416) 2. Plt's Motion to Amend PDR	1. Denied **2/5/04** 2. Allowed **2/5/04**
Department of Transp. v. Roymac P'ship Case below: 158 N.C. App. 403	No. 375PA03	Joint Motion to Withdraw PDR and Dismiss Appeal (COA02-441)	Allowed **2/5/04**
Dodson v. DuBose Steel, Inc. Case below: 159 N.C. App. 1	No. 405A03	Plt's Motion to Dismiss the Appeal of One of the Two Named Defendants (COA02-543)	Dismissed as moot **2/5/04**
FNB Southeast v. Lane Case below: 160 N.C. App. 535	No. 594P03	Defs' PDR Under N.C.G.S. § 7A-31 (COA02-1424)	Denied **2/5/04**

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

George v. George Case below: 160 N.C. App. 252	No. 575P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1047)	Denied **2/5/04**
Great Am. Ins. Co v. Mesh Cafe, Inc. Case below: 158 N.C. App. 312	No. 366P03	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-840)	Denied **12/15/03**
Hargrove v. Batts Temp. Serv. Case below: 159 N.C. App. 466	No. 480P03	Plt's Motion for Reconsideration of PDR (COA02-1397)	Dismissed **2/5/04**
In re Appeal of Taylor/Transylvania Tree Farms Case below: 161 N.C. App. 181	No. 638P03	Charles H. Taylor/Transylvania Tree Farm's PDR Under N.C.G.S. § 7A-31 (COA02-1411)	Denied **2/5/04** **Orr, J. and Martin, J., recused**
In re Estate of Lunsford Case below: 160 N.C. App. 125	No. 362A01-3	1. Petitioner's (Dawn Collins Bean) NOA Based Upon a Dissent (COA02-904) 2. Petitioner's PDR as to Additional Issues	1. — 2. Allowed **2/5/04**
In re Estate of Sizemore v. Kimbleton Case below: 150 N.C. App. 717	No. 368P02	Plt's PDR Under N.C.G.S. § 7A-31 (COA01-1095)	Remanded for reconsideration in light of Dawes v. Nash County, (357 N.C. 442)
In re Investigation of Death of Eric Miller Case below: Wake County Superior Court	No. 303PA02-2	Joint PDR Prior to Determination by the COA (COA03-1551)	Allowed **01/08/04**
Joines v. Anderson Case below: 161 N.C. App. 321	No. 635P03	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-1479)	Denied **2/5/04**

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

Morris Communications Corp. v. Board of Adjust. for City of Gastonia Case below: 357 N.C. 658 159 N.C. App. 598	No. 483A03	Petitioner's petition to rehear allowance of respondent's motion to dismiss appeal	Denied **2/5/04**
Murphy Family Farms v. N.C. Dep't of Env't and Natural Res. Case below: 160 N.C. App. 338	No. 558A03	1. Petitioner's NOA Based Upon a Dissent (COA02-1205) 2. Petitioners' PDR as to Additional Issues 3. Respondent's Conditional PDR as to Additional Issues	1. — 2. Allowed **2/5/04** 3. Allowed **2/5/04**
N.C. School Bds. Ass'n. v. Moore Case below: 160 N.C. App. 253	No. 569A03	1. Defs' (Lyndo Tippett and Carol Howard) NOA Based Upon a Dissent (COA02-507) 2. Plts' NOA Based Upon a Constitutional Question 3. Plts' PDR as to Additional Issues 4. Defs' (Howard and Ross) Conditional PDR as to Additional Issues	1. — 2. Dismissed ex mero motu **2/5/04** 3. Allowed **2/5/04** 4. Allowed **2/5/04**
Odom v. Lane Case below: 161 N.C. App. 534	No. 010P04	Defs' (Carolinas-Anson Healthcare, Inc. d/b/a Anson Community Hospital) Motion for Temporary Stay (COA02-1759)	Allowed **01/29/04**
Pataky v. Pataky Case below: 160 N.C. App. 289	No. 571A03	1. Plt's NOA Based Upon a Dissent (COA02-616) 2. Plt's PDR as to Additional Issues	1. — 2. Allowed **2/5/04**
Priest v. Sobeck Case below: 160 N.C. App. 230	No. 599P02-2	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA01-1476-2) 2. Plts' PWC to Review the Decision of the COA	1. Denied **2/5/04** 2. Denied
Register v. White Case below: 160 N.C. App. 657	No. 579PA03	Unnamed Defendant N.C. Farm Bureau Mutual Insurance Company's PDR Under N.C.G.S. § 7A-31 (COA02-1585)	Allowed **12/15/03**

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

Ripellino v. N. C. School Bds. Ass'n, Inc. Case below: 158 N.C. App. 423	No. 526P03	1. Plts' PDR to Review the Decision of the COA (COA02-1309) 2. Defs' Joint Motion to Dismiss Plts' Untimely PDR 3. Plts' PWC to Review the Decision of the COA	1. Denied **2/5/04** 2. Denied **2/5/04** 3. Denied **2/5/04**
Sherman v. Home Depot USA, Inc. Case below: 160 N.C. App. 404	No. 570P03	Unnamed Def's (Companion Property and Casualty Insurance Company) PDR Under N.C.G.S. § 7A-31 (COA02-1368)	Denied **2/5/04**
State v. Allen Case below: 161 N.C. App. 347	No. 628P03	Def's PDR Under N.C.G.S. § 7A-31 (COA03-13)	Denied **2/5/04**
State v. Andrews Case below: 154 N.C. App. 553	No. 622P03	Def's PWC to Review the Decision of the COA (COA01-1305)	Denied **2/5/04**
State v. Bailey Case below: 162 N.C. App. 181	No. 034P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-74)	Denied **2/5/04**
State v. Beacher Case below: 161 N.C. App. 540	No. 670P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1710)	Denied **2/5/04**
State v. Bowes Case below: 159 N.C. App. 18	No. 394A03	1. AG's Motion for Temporary Stay (COA02-323) 2. AG's Petition for Writ of Supersedeas 3. AG's NOA Based Upon a Dissent 4. AG's NOA Based Upon a Constitutional Question 5. AG's PDR as to Additional Issues 6. Def's PDR as to Additional Issues	1. Allowed **07/30/03** 2. Allowed **2/5/04** 3. — 4. Retained **2/5/04** 5. Denied **2/5/04** 6. Denied **2/5/04** **Martin, J. and Wainwright, J., recused**

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

State v. Clark Case below: 161 N.C. App. 316	No. 659P03	1. Def's NOA Based Upon a Constitutional Question (COA02-1658) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied **2/5/04** 3. Allowed **2/5/04**
State v. Gaither Case below: 161 N.C. App. 96	No. 641P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1477)	Denied **2/5/04**
State v. Gantt Case below: 161 N.C. App. 265	No. 662P03	Def's PDR Under N.C.G.S. § 7A-31 (COA03-19)	Denied **2/5/04**
State v. Golfin Case below: Cumberland County Superior Court	No. 441A98	Def's PWC to Review the Order of the Superior Court	Denied **2/5/04**
State v. Jones Case below: Duplin County Superior Court	No. 497A93-6	1. Def's Motion for Settlement of $1.12 Billion Dollars 2. Def's Petition for Writ of Habeas Corpus	1. Denied **01/12/04** 2. Denied **01/12/04**
State v. Locklear Case below: 159 N.C. App. 588	No. 504A03	1. Def's NOA Based Upon a Dissent (COA02-1409) 2. Def's PDR as to Additional Issues	1. — 2. Denied **2/5/04**
State v. Locklear Case below: 160 N.C. App. 596	No. 593P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1676)	Denied **2/5/04** **Orr, J., recused**
State v. McClain Case below: 161 N.C. App. 541	No. 003P04	1. Def's (Demetrius Shawn Hill) PDR Under N.C.G.S. § 7A-31 (COA02-1120) 2. Def's (Adrian McClain) PDR Under N.C.G.S. § 7A-31	1. Denied **2/5/04** 2. Denied **2/5/04**
State v. Nicholson Case below: Wilson County Superior Court	No. 564A99-2	1. Def's PWC to Review the Order of the Superior Court 2. Def's Motion for Inclusion of Affidavit 3. Def's Motion to Hold the Case in Abeyance Pending the Resolution of the Claim of Mental Retardation	1. — 2. Dismissed **2/5/04** 3. Allowed **2/5/04**

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

State v. Nixon Case below: 161 N.C. App. 349	No. 636P03	Def's PDR Under N.C.G.S. § 7A-31 (COA03-156)	Denied **2/5/04**
State v. O'Hanlan Case below: 153 N.C. App. 546	No. 609P03	Def's PWC to Review the Decision of the COA (COA01-1227)	Denied **2/5/04**
State v. Scott Case below: 161 N.C. App. 104	No. 621P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1527)	Denied **2/5/04**
State v. Smith Case below: 160 N.C. App. 709	No. 612A03	1. Def's NOA Based Upon a Constitutional Question (COA03-255) 2. AG's Motion to Dismiss Appeal	1. — 2. Allowed **2/5/04**
State v. Taybron Case below: 161 N.C. App. 541	No. 006P04	1. Def's NOA Based Upon a Constitutional Question (COA02-1599) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied **2/5/04** 3. Allowed **2/5/04**
State v. Terrell Case below: 160 N.C. App. 710	No. 582P03-2	Def's PWC to Review the Decision of the COA (COA03-89)	Denied **2/5/04**
State v. Townsend Case below: 161 N.C. App. 350	No. 646P03	Def's PDR Under N.C.G.S. § 7A-31 (COA03-150)	Denied **2/5/04**
State v. Travis Case below: 160 N.C. App. 252	No. 565P03	Def's PWC to Review the Decision of the COA (COA02-873)	Denied **2/5/04**
State v. Weaver Case below: 160 N.C. App. 613	No. 613A03	1. Def's Motion to Dismiss Appeal (COA02-1422) 2. Def's PWC to Review the Decision of the COA	1. Denied **2/5/04** 2. Allowed **2/5/04**

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

State v. White Case below: 161 N.C. App. 351	No. 660P03	1. Def's NOA Based Upon a Constitutional Question (COA02-1459) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied **2/5/04** 3. Allowed **2/5/04**
State ex rel. Comm'r of Ins. v. N.C. Rate Bureau Case below: 160 N.C. App. 416	No. 596A03	1. Appellant's (NC Rate Bureau) NOA Based Upon a Dissent (COA02-891) 2. Appellant's (NC Rate Bureau) PDR as to Additional Issues	1. — 2. Denied **2/5/04**
State ex rel. Utils. Comm'n v. Carolina Power & Light Co. Case below: 161 N.C. App. 199	No. 649A03	1. Appellants' (Public Staff-North Carolina Utilities Commission and Roy Cooper) Motion for Temporary Stay (COA02-1737) 2. Appellants' (Public Staff-North Carolina Utilities Commission and Roy Cooper) Petition for Writ of Supersedeas 3. Def's PDR as to Additional Issues	1. Denied **01/08/04** 2. Denied **01/08/04** 3. Denied **2/5/04**
Swinton v. La Fogata Corp. Case below: 161 N.C. App. 182	No. 632P03	Plts' PDR Under N.C.G.S. § 7A-31 (COA02-1669)	Denied **2/5/04**
Underwood v. Boyer Case below: 160 N.C. App. 710	No. 608P03	Defendant and Third-Party Defendant's (DOT) PDR Under N.C.G.S. § 7A-31 (COA02-1471)	Denied **2/5/04**

PETITIONS TO REHEAR

Lancaster v. Maple St. Homeowners Ass'n, Inc. Case below: 357 N.C. 571	No. 206A03	Def's Petition for Rehearing of COA decision	Denied **01/13/04**
Whitaker v. Town of Scotland Neck Case below: 357 N.C. 552	No. 049PA03	Plts' Petition for Rehearing	Denied **2/5/04**

DAN RHYNE AND ALICE RHYNE v. K-MART CORPORATION, SHAWN ROBERTS, AND JOSEPH HOYLE

No. 522A02

(Filed 2 April 2004)

1. Constitutional Law— North Carolina—statutory limitation on punitive damages—separation of powers

N.C.G.S. § 1D-25, which places a limitation on the award of punitive damages, is not violative of the constitutionally mandated separation of powers doctrine because: (1) under North Carolina law, a trial court's power to remit damages is not necessarily inherent as that exercise of power is specifically authorized and limited by N.C.G.S. § 1A-1, Rule 59(a)(6); (2) N.C.G.S. § 1D-25 does not operate as a legislative remittitur when it does not grant the General Assembly the authority to remit excessive awards on a case-by-case basis, but instead imposes a limit on the recovery of punitive damages in all cases; (3) N.C.G.S. § 1D-25 does not represent an impermissible interference with the judiciary's constitutionally defined authority since our Constitution neither expressly nor implicitly empowers our courts to award punitive damages or to remit excessive awards thereof; (4) N.C.G.S. § 1D-25 is a modification of the common law within the General Assembly's policy-making authority to define legally cognizable remedies; (5) if the legislative branch can abolish plaintiffs' right to recover punitive damages altogether, a right which has not vested and is not guaranteed by the state Constitution, it can surely place limitations on the recovery of punitive damages; (6) the General Assembly has similarly modified other portions of our common law without violating the North Carolina Constitution; and (7) legislatures have extremely broad discretion in defining criminal offenses, and thus, also enjoy broad discretion in authorizing and limiting permissible punitive damages awards.

2. Constitutional Law— North Carolina—statutory limitation on punitive damages—right to a trial by jury

N.C.G.S. § 1D-25, which places a limitation on the award of punitive damages, is not violative of plaintiffs' right to a trial by jury as guaranteed by the North Carolina Constitution because: (1) the right to trial by jury applies only to actions respecting property and although Article I, Section 25 appears to embody a

broad definition of the term "property," a controversy in which punitive damages are assessed is not one which enforces a plaintiff's legal rights, and therefore, does not respect property; (2) an entitlement to an award of punitive damages does not represent a right vested in a plaintiff because such damages are assessed solely as a means to punish the willful and wanton actions of defendants; and (3) plaintiffs have no independent right to or property interest in an award of punitive damages, and as such, the jury's role in awarding punitive damages can be dictated by the General Assembly without violating plaintiffs' constitutional right to a trial by jury.

3. Constitutional Law— North Carolina—statutory limitation on punitive damages—taking of property

The limitation on punitive damages under N.C.G.S. § 1D-25 does not constitute an unconstitutional taking of property even though plaintiffs contend they were denied the enjoyment of the fruits of their own labor in not receiving the amount of punitive damages as awarded by the jury, because: (1) Article I, Section 1 of our Constitution does not specifically guarantee to the citizens of North Carolina that their property will not be taken without just compensation; (2) the jury's verdict was not property in which plaintiffs enjoyed a vested right; (3) the limitation on punitive damages applies prior to the entry of judgment, a point at which it could be argued that plaintiffs obtain a vested property right in the verdict; and (4) a litigant's participation in a trial is not "labor" nor is a jury's verdict the "fruits" of that labor.

4. Constitutional Law— North Carolina—statutory limitation on punitive damages—due process—equal protection

The limitation on punitive damages under N.C.G.S. § 1D-25 does not violate due process and equal protection principles under Article I, Section 19 of the North Carolina Constitution, because: (1) the statute bears some rational relationship to several legitimate governmental interests including preserving North Carolina's economic development given the impact of punitive damages on a variety of industries, assuring public confidence in the judicial system, providing clear notice of possible penalty to defendants whose property would potentially be taken without the protection of our criminal justice system, promoting public confidence in and bringing more certainty to our system of civil redress, shielding North Carolina from problems encountered in other states, and encouraging businesses to bring much needed

employment and other economic resources to this state; and (2) the monetary limits established by N.C.G.S. § 1D-25 providing for three times the compensatory award are not arbitrary and are in line with the standards suggested by the United States Supreme Court to prevent grossly excessive awards.

5. Constitutional Law— North Carolina—statutory limitation on punitive damages—Open Courts Clause

The limitation on punitive damages under N.C.G.S. § 1D-25 does not violate the Open Courts Clause of our state Constitution under Article I, Section 18, because: (1) our Supreme Court has already concluded that the Open Courts Clause does not prevent the General Assembly from abolishing the recovery of punitive damages altogether, and thus, it follows that it does not prevent the General Assembly from limiting awards of punitive damages; and (2) the Open Courts Clause is not implicated since plaintiffs do not have a right to recover punitive damages.

6. Constitutional Law— statutory limitation on punitive damages—vagueness

The limitation on punitive damages under N.C.G.S. § 1D-25 is not void for vagueness, because rules of statutory construction can be applied to discern a meaning from N.C.G.S. § 1D-25 that can be uniformly administered.

7. Damages and Remedies— statutory limitation on punitive damages—per plaintiff

N.C.G.S. § 1D-25 applies to limit recovery of punitive damages per plaintiff, not per defendant, even where multiple plaintiffs are joined together in one suit. Therefore, the Court of Appeal properly determined that each of the two plaintiffs in the instant case should receive $250,000, requiring defendant to pay a total of $500,000 in punitive damages.

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. 672, 562 S.E.2d 82 (2002), affirming a memorandum of opinion and judgment and an order, both entered 17 May 2000 by Judge Richard D. Boner in Superior Court, Gaston County. On 27 March 2003, the Supreme Court retained plaintiffs' notice of appeal as to a substantial constitutional question pursuant to N.C.G.S. § 7A-30(1) and allowed defendant K-Mart Corporation's petition for discretionary review as to an additional issue. Heard in the Supreme Court 9 September 2003.

Center for Constitutional Litigation, P.C., by Robert S. Peck, pro hac vice; Gray, Layton, Kersh, Solomon, Sigmon, Furr & Smith, P.A., by William E. Moore, Jr.; and Arcangela M. Mazzariello, for plaintiff-appellees and -appellants.

Alston & Bird LLP, by James C. Grant, pro hac vice; and Womble Carlyle Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr. and Sean E. Andrussier, for defendant-appellees and -appellants.

Patterson, Harkavy & Lawrence, L.L.P., by Burton Craige, on behalf of the North Carolina Academy of Trial Lawyers; North Carolina Friends of Residents in Long Term Care, Inc.; American Civil Liberties Union Legal Foundation of North Carolina; and North Carolina Justice and Community Development Center, amici curiae.

Smith Moore, LLP, by J. Donald Cowan, Jr. and Lisa Frye Garrison, on behalf of the Product Liability Advisory Council, Inc., amicus curiae.

Shook, Hardy & Bacon, L.L.P., by Bruce O. Jolly, Jr., on behalf of the American Tort Reform Association and the National Association of Manufacturers, amici curiae.

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

Helms Mulliss & Wicker, PLLC, by Robert H. Tiller; and Robbins, Russell, Englert, Orseck & Untereiner, LLP, by Alan E. Untereiner, pro hac vice, on behalf of the Chamber of Commerce of the United States, amicus curiae.

Boyce & Isley, PLLC, by Philip R. Isley; and Washington Legal Foundation, by Paul D. Kamenar, pro hac vice, on behalf of the Washington Legal Foundation and the Allied Educational Foundation, amici curiae.

BRADY, Justice.

The issues presented by the instant case concern the constitutionality and applicability of N.C.G.S. § 1D-25, a statute which limits the amount of punitive damages recoverable in civil actions. We con-

clude that N.C.G.S. § 1D-25 is not violative of the North Carolina Constitution and applies to limit recovery of punitive damages per each plaintiff, even where multiple plaintiffs are joined together in one suit. Accordingly, we affirm the opinion of the North Carolina Court of Appeals.

The action underlying the issues before this Court arose out of an incident between plaintiffs Dan and Alice Rhyne and defendants Shawn Roberts and James Hoyle, security employees for defendant K-Mart Corporation (K-Mart). On or about 28 April 1998, K-Mart employees confronted plaintiffs as the couple was walking near a K-Mart retail store in Gaston County, North Carolina. Roberts, one of the employees, inquired of plaintiffs as to whether they had been rummaging through K-Mart's dumpsters. Mr. Rhyne responded that plaintiffs had not touched the dumpsters and were walking for exercise purposes only.

The following day, plaintiffs were again walking in the store's parking lot when they were approached by Roberts and Hoyle. This time, Roberts grabbed Mr. Rhyne, placed him in a choke-hold, and forced him to the ground. As Mrs. Rhyne attempted to assist her husband, who was at that time struggling to break free from Roberts, Hoyle pushed Mrs. Rhyne to the ground.

When two Gastonia police officers arrived on the scene approximately fifteen to twenty minutes later, K-Mart personnel informed the officers that the corporation would be pressing trespassing charges against both plaintiffs. However, K-Mart later pressed charges only against Mr. Rhyne for two counts of assault. Those charges were subsequently dismissed. As a result of the incident, plaintiffs sought and received medical attention for various physical and psychological ailments. Mr. Rhyne sustained a total of $5,376.12 in medical bills and lost wages, while Mrs. Rhyne sustained a total of $13,582.40 in medical bills.

On 31 December 1998, plaintiffs filed a civil action against K-Mart, Roberts, and Hoyle. Plaintiffs sought compensatory and punitive damages for assault, battery, slander, false imprisonment or unlawful detention, malicious prosecution, intentional infliction of emotional distress, and negligent infliction of emotional distress. Plaintiffs further alleged claims against K-Mart for negligence based upon premises liability and negligent supervision and training of employees.

Upon defendants' motion pursuant to N.C.G.S. § 1D-30, the trial was bifurcated. In the first phase of trial, the jury considered the issues of liability and compensatory damages. The jury found Hoyle not liable, and although the jury found Roberts liable, plaintiffs voluntarily dismissed with prejudice all claims against him. Regarding K-Mart, the jury returned a verdict finding that the corporation, through its agent Roberts, falsely imprisoned or unlawfully detained plaintiffs, inflicted intentional emotional distress on plaintiffs, maliciously prosecuted Mr. Rhyne, and negligently injured both plaintiffs. The jury awarded compensatory damages to Mr. Rhyne in the amount of $8,255.00, which included $1,790.00 in legal expenses he incurred as a result of the assault prosecutions. The jury awarded compensatory damages to Mrs. Rhyne in the amount of $10,730.00.

In the second phase of trial, the jury considered the issue of punitive damages. Upon hearing the evidence and considering those factors listed in N.C.G.S. § 1D-35, the jury found that each plaintiff was entitled to an award of punitive damages in the amount of $11.5 million. After the jury returned its verdict, the trial court reviewed the punitive damages awards and concluded that they were not grossly excessive and, therefore, did not violate K-Mart's due process rights as guaranteed by the United States Constitution. The statute at issue in the present appeal, N.C.G.S. § 1D-25, instructs trial courts to reduce awards of punitive damages to an amount that is three times the compensatory damages award or $250,000.00, whichever amount is greater. Pursuant to that statute, the trial court reduced the amount awarded each plaintiff to $250,000.00. Plaintiffs filed a motion to have N.C.G.S. § 1D-25 declared unconstitutional, and the trial court denied plaintiffs' motion.

Plaintiffs and K-Mart appealed to the North Carolina Court of Appeals. A divided panel of that court concluded that N.C.G.S. § 1D-25 was constitutional under the North Carolina Constitution and that the trial court correctly applied the statute by reducing each plaintiff's award to $250,000.00. *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 562 S.E.2d 82 (2002). The majority further concluded that awarding each plaintiff $250,000.00 was not grossly excessive and, therefore, did not violate the Due Process Clause of the United States Constitution. *Id.* at 689, 562 S.E.2d at 94. The dissent disagreed with the majority concerning the constitutionality of N.C.G.S. § 1D-25, concluding instead that N.C.G.S. § 1D-25 was constitutionally overbroad in that it infringed upon plaintiffs' right to trial by jury and that the statute violated Article I, Section 19 of the North Carolina

Constitution. *Id.* at 701, 562 S.E.2d at 101 (Greene, J., dissenting). The dissent nonetheless concluded that the amount of punitive damages awarded to plaintiffs by the jury was grossly excessive and, therefore, violated K-Mart's due process rights as guaranteed by the United States Constitution. *Id.* at 701, 562 S.E.2d at 101-02 (Greene, J., dissenting).

The case is now before this Court pursuant to plaintiffs' notice of appeal based on the dissenting opinion and substantial constitutional questions, as well as K-Mart's petition for discretionary review of an additional issue regarding the applicability of N.C.G.S. § 1D-25.

We will first address issues arising from plaintiffs' appeal. Punitive damages or exemplary damages, as they are sometimes called, hold "an established place" in North Carolina common law. *Hinson v. Dawson*, 244 N.C. 23, 27, 92 S.E.2d 393, 396 (1956); *see also Carruthers v. Tillman*, 2 N.C. 501 (1797) (reporting the first case where this Court discussed an award of exemplary damages). "Punitive damages are awarded on grounds of public policy." *Osborn v. Leach*, 135 N.C. 628, 633, 47 S.E. 811, 813 (1904). North Carolina courts have consistently awarded punitive damages "solely on the basis of [their] policy to punish intentional wrongdoing and to deter others from similar behavior." *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 113, 229 S.E.2d 297, 302 (1976); *see also Watson v. Dixon*, 352 N.C. 343, 348, 532 S.E.2d 175, 178 (2000); *Oestreicher v. American Nat'l Stores, Inc.*, 290 N.C. 118, 134, 225 S.E.2d 797, 807-08 (1976). "Punitive damages are *never* awarded as compensation. They are awarded above and beyond actual damages, as a punishment for the defendant's intentional wrong." *Overnite Transp. Co. v. International Bhd. of Teamsters*, 257 N.C. 18, 30, 125 S.E.2d 277, 286 (emphasis added), *cert. denied*, 371 U.S. 862, 9 L. Ed. 2d 100 (1962). Prior to 1996, North Carolina juries determined the amount of punitive damages constrained only by the trial court's ability to order a new trial where the award was determined to be excessive or inadequate and "given under the influence of passion or prejudice," N.C.G.S. § 1A-1, N.C. R. Civ. P. 59(a)(6) (1983), or where the award did not satisfy principles of due process as guaranteed by the United States Constitution, *see generally Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 113 L. Ed. 2d 1 (1991).

In 1995, our General Assembly modified the common law as it pertained to punitive damages by enacting Chapter 1D of the North Carolina General Statutes, the statutory scheme now governing the

standards and procedures for awarding punitive damages in this state. Act of July 29, 1995, ch. 514, sec. 1, 1995 N.C. Sess. Laws 1825, 1825-28 (codified as N.C.G.S. § 1D-1 to -50 (2003)). Chapter 1D reinforces the common-law purpose behind punitive damages by providing that they are to be awarded "to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts." N.C.G.S. § 1D-1. The statutory scheme tracks the common-law standards for awarding punitive damages by mandating that a plaintiff must prove certain aggravating factors to be entitled to an award of punitive damages, those factors being fraud, malice, or willful or wanton conduct. *See* N.C.G.S. § 1D-15(a). Section 1D-35 provides that, in determining the amount of the punitive damages award, the trier of fact "[s]hall" consider the purpose behind punitive damages and "[m]ay" consider evidence relating to an exclusive list of factors contained in N.C.G.S. § 1D-35(2). N.C.G.S. § 1D-35.

The statute at issue in the present case, N.C.G.S. § 1D-25, represents a departure from North Carolina common law by limiting the amount of punitive damages plaintiffs may recover. This limitation or ceiling operates as follows:

> (a) In all actions seeking an award of punitive damages, the trier of fact shall determine the amount of punitive damages separately from the amount of compensation for all other damages.
>
> (b) Punitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars ($250,000), whichever is greater. If a trier of fact returns a verdict for punitive damages in excess of the maximum amount specified under this subsection, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount.
>
> (c) The provisions of subsection (b) of this section shall not be made known to the trier of fact through any means, including voir dire, the introduction into evidence, argument, or instructions to the jury.

N.C.G.S. § 1D-25. Chapter 1D became effective on 1 January 1996. Ch. 514, sec. 5, 1995 N.C. Sess. Laws at 1828.

At the outset, we observe that "this Court gives acts of the General Assembly great deference, and a statute will not be declared unconstitutional under our Constitution unless the Constitution clearly prohibits that statute." *In re Spivey*, 345 N.C. 404, 413, 480

S.E.2d 693, 698 (1997). Accordingly, there is a strong presumption that the statute at issue is constitutional. *Stephenson v. Bartlett*, 355 N.C. 354, 362, 562 S.E.2d 377, 384 (2002).

[1] With these principles in mind, we turn to examine whether N.C.G.S. § 1D-25 violates the constitutionally mandated separation of powers doctrine. The Separation of Powers Clause of our state Constitution provides: "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. In tandem with Article I, Section 6, the North Carolina Constitution mandates that "[t]he General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a coordinate department of the government." N.C. Const. art. IV, § 1. Thus, our Constitution shields the judicial branch " 'from legislative interference, so far at least as its inherent rights and powers are concerned.' " *In re Alamance County Court Facilities*, 329 N.C. 84, 93, 405 S.E.2d 125, 129 (1991) (quoting *Ex parte McCown*, 139 N.C. 95, 107, 51 S.E. 957, 962 (1905)).

Plaintiffs contend that by imposing a limit on punitive damages, the General Assembly has unconstitutionally interfered with the trial court's inherent authority to reduce jury verdicts on punitive damages, where the court determines, on a case-by-case basis, that those verdicts are excessive. This trial court function is known as remittitur. The fallacy in plaintiffs' argument is twofold. First, under North Carolina law, a trial court's power to remit damages is not necessarily inherent, as the exercise of that power is specifically authorized and limited by Rule 59(a)(6) of the North Carolina Rules of Civil Procedure. *See* N.C.G.S. § 1A-1, N.C. R. Civ. P. 59(a)(6) (2003) (providing that the trial court can *order a new trial* where it determines that damages are excessive or inadequate). Our Rules of Civil Procedure are not judicially imposed rules of court. They are enacted by our General Assembly as a part of our North Carolina General Statutes. Second, N.C.G.S. § 1D-25 does not operate as a "legislative remittitur." Unlike remittitur, section 1D-25 does not grant the General Assembly the authority to remit excessive awards on a case-by-case basis. Rather, by enacting section 1D-25, the General Assembly has imposed a limit on the recovery of punitive damages *in all cases*. This function is wholly distinct from that within the trial court's authority to apply fixed laws to individual controversies. *See State ex rel. Lanier v. Vines*, 274 N.C. 486, 495, 164 S.E.2d 161, 166 (1968). With a few exceptions, the majority of courts in other states

examining this issue have determined that legislative limitations on damages do not act as a type of "legislative remittitur" or otherwise infringe on a trial court's constitutional authority. *See, e.g., Gourley ex rel. Gourley v. Nebraska Methodist Health Sys., Inc.*, 663 N.W.2d 43, 77 (Neb. 2003) (per curiam); *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1055 (Alaska 2002); *Estate of Verba v. Ghaphery*, 552 S.E.2d 406, 411 (W. Va. 2001) (per curiam); *Kirkland ex rel. Kirkland v. Blaine County Med. Ctr.*, 134 Idaho 464, 471, 4 P.3d 1115, 1122 (Idaho 2000); *Guzman v. St. Francis Hosp., Inc.*, 240 Wis. 2d 559, 579, 623 N.W.2d 776, 786 (Wis. Ct. App. 2000); *see also Etheridge v. Medical Ctr. Hosps.*, 237 Va. 87, 101, 376 S.E.2d 525, 532 (1989) (concluding that a ceiling on medical malpractice damages "was a proper exercise of legislative power" and therefore did not violate the separation of powers doctrine). *But see Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 415, 689 N.E.2d 1057, 1081 (1997) (declaring that a statutory limitation on damages was unconstitutional because it interfered with the court's inherent power to remit damages); *Sofie v. Fibreboard Corp.*, 112 Wash. 2d 636, 654, 771 P.2d 711, 721 (stating in *dicta* that "[a]lthough we do not decide the case on this basis, the [damages] limit *may*, indeed, violate the separation of powers") (emphasis added), *modified* 780 P.2d 260 (Wash. 1989).

As noted above, punitive damages hold "an established place" in North Carolina common law. *Hinson*, 244 N.C. at 27, 92 S.E.2d at 396. Nonetheless, it is well settled that North Carolina common law "may be modified or repealed by the General Assembly, except [for] any parts of the common law which are incorporated in our Constitution." *Gwathmey v. State ex rel. Dep't of Env't, Health, & Natural Res.*, 342 N.C. 287, 296, 464 S.E.2d 674, 679 (1995); *see also Pinkham v. Unborn Children of Jather Pinkham*, 227 N.C. 72, 78, 40 S.E.2d 690, 694 (1946) (noting that litigants do not have a right to the continuation of the common law).

The legislative branch of government is without question "the policy-making agency of our government, and when it elects to legislate in respect to the subject matter of any common law rule, the statute supplants the common law rule and becomes the public policy of the State in respect to that particular matter." *McMichael v. Proctor*, 243 N.C. 479, 483, 91 S.E.2d 231, 234 (1956), *quoted in Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 444, 302 S.E.2d 868, 882 (1983). The General Assembly is the "policy-making agency" because it is a far more appropriate forum than the courts for implementing policy-based changes to our laws. This Court has continually

acknowledged that, unlike the judiciary, the General Assembly is well equipped to weigh " 'all the factors surrounding a particular problem,' " *Tetterton v. Long Mfg. Co.*, 314 N.C. 44, 58, 332 S.E.2d 67, 75 (1985) (quoting *Kennedy v. Cumberland Eng'g Co.*, 471 A.2d 195, 206 (R.I. 1984) (Murray, J., dissenting)), "balanc[e] competing interests," *id.*, "provide an appropriate forum for a full and open debate," *Azzolino v. Dingfelder*, 315 N.C. 103, 116, 337 S.E.2d 528, 537 (1985), *cert. denied*, 479 U.S. 835, 93 L. Ed. 2d 75 (1986), and "address all of the issues at one time," *id. See generally State v. Warren*, 252 N.C. 690, 696, 114 S.E. 2d 660, 666 (1960) (noting that "[t]he legislative department is the judge, within reasonable limits, of what the public welfare requires, and the wisdom of its enactments is not the concern of the courts"); *see also* Victor E. Schwartz, Mark A. Behrens, & Monica G. Parham, *Fostering Mutual Respect and Cooperation Between State Courts and State Legislatures: A Sound Alternative to a Tort Tug of War*, 103 W. Va. L. Rev. 1, 11 (2000) ("[L]egislatures have certain tools that make them uniquely well situated to reach fully informed decisions about the need for broad public policy changes in the law."). Included in the General Assembly's preeminent role in modifying the common law on the basis of policy concerns is its "power to define the circumstances under which a remedy is legally cognizable and those under which it is not." *Lamb*, 308 N.C. at 444, 302 S.E.2d at 882.

Section 1D-25 does not represent an impermissible interference with the judiciary's constitutionally defined authority because our Constitution neither expressly nor implicitly empowers our courts to award punitive damages or to remit excessive awards thereof. Rather, because "[p]unitive damages are awarded on grounds of public policy," *Osborn*, 135 N.C. at 633, 47 S.E. at 813, section 1D-25 is a modification of the common law within the General Assembly's policy-making authority to define legally cognizable remedies. In fact, a century ago, this Court concluded that the General Assembly had the power to abolish the recovery of punitive damages in certain libel actions because, unlike actual or compensatory damages, plaintiffs had no right to the recovery of those damages. *Id.* Although no North Carolina case speaks directly to this issue, we are persuaded by cases from other jurisdictions holding that if the legislative branch can abolish plaintiffs' right to recover punitive damages altogether, a right which has not vested and is not guaranteed by the state Constitution, it can surely place limitations on the recovery of punitive damages. *See, e.g.*, *Gourley*, 663 N.W.2d at 75 ("If the Legislature has the constitutional power to abolish a cause of action, it also has

the power to limit recovery in a cause of action."); *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325, 1336 (D. Md. 1989) (same); *see also Dunham v. Anders*, 128 N.C. 207, 210, 38 S.E. 832, 833 (1901) (providing that the General Assembly can destroy rights until they become vested).

Furthermore, the General Assembly has similarly modified other portions of our common law without violating the North Carolina Constitution. For example, the General Assembly has created new causes of action, *see, e.g.*, N.C.G.S. § 50-20 (2003) (allowing for equitable distribution of marital property), limited liability by enacting statutes of repose, *see, e.g.*, N.C.G.S. § 1-50(a)(5), (a)(6) (2003) (providing a six-year statute of repose for causes of action regarding defective and unsafe improvements to real property and products liability); *Tetterton*, 314 N.C. 44, 332 S.E.2d 67 (holding that it was within the province of the General Assembly to pass a statute of repose as to products liability actions); *Lamb*, 308 N.C. 419, 302 S.E.2d 868 (concluding the same as to suits concerning the liability of construction industry professionals for defective and unsafe conditions of improvements to real property), and expanded available remedies by allowing for treble damages, *see, e.g.*, N.C.G.S. § 1-538 (2003) (providing for treble damages in cases of waste to land). We agree with the Nebraska and Idaho Supreme Courts:

> "Because it is properly within the power of the legislature to establish statutes of limitations, statutes of repose, create new causes of action, and otherwise modify the common law without violating separation of powers principles, it necessarily follows that the legislature also has the power to limit remedies available to plaintiffs without violating the separation of powers doctrine."

Gourley, 663 N.W.2d at 76-77 (quoting *Kirkland*, 134 Idaho at 471, 4 P.3d at 1122).

Moreover, the legislative branch is also the *only* branch of government which, within constitutional limits, defines and determines the range of punishment for crimes. *State v. Perry*, 316 N.C. 87, 101, 340 S.E.2d 450, 459 (1986) ("[T]he General Assembly and not the judiciary determines the minimum and maximum punishment which may be imposed on those convicted of crimes."); *see also Jernigan v. State*, 279 N.C. 556, 564, 184 S.E.2d 259, 265 (1971) (concluding that the General Assembly " 'alone can prescribe the punishment for crime' ") (quoting *Commonwealth ex rel. Banks v. Cain*, 345 Pa. 581, 587, 28 A.2d 897, 900 (1942)). Because punitive damages

are awarded to punish and deter defendants and "[l]egislatures have extremely broad discretion in defining criminal offenses," it necessarily follows that legislatures also "enjoy broad discretion in authorizing and limiting permissible punitive damages awards." *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432, 149 L. Ed. 2d 674, 684 (2001).

For the reasons stated above, we conclude that section 1D-25 does not violate the Separation of Powers Clause of the North Carolina Constitution.

[2] We next address plaintiffs' argument that N.C.G.S. § 1D-25 violates their right to a trial by jury as guaranteed by the North Carolina Constitution. Article I, Section 25 of the North Carolina Constitution provides as follows: "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable." N.C. Const. art. I, § 25; *see also* N.C. Const. of 1868, art. I, § 19 ("In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable."); N.C. Const. of 1776, Declaration of Rights § 14 (same). Article 1, Section 25 "addresses the substantive constitutional right to trial by jury in civil cases in almost the exact language found in the original Constitution of 1776." *Kiser v. Kiser*, 325 N.C. 502, 507, 385 S.E.2d 487, 489 (1989). The right to trial by jury now applies to actions at law and in equity. *Id.*

This Court has previously held that the right to trial by jury applies "only to actions respecting property in which the right to jury trial existed either at common law or by statute at the time of the adoption of the 1868 Constitution." *State ex rel. Rhodes v. Simpson*, 325 N.C. 514, 517, 385 S.E.2d 329, 331 (1989). Thus, the constitutional right to trial by jury does not apply "where the right and the remedy with it are thereafter created by statute." *Groves v. Ware*, 182 N.C. 553, 558, 109 S.E. 568, 571 (1921).

It is well established that North Carolina juries have been awarding punitive damages since a time prior to the ratification of the Constitution of 1868. *See, e.g., Pendleton v. Davis*, 46 N.C. 98, 99 (1853) (noting that the jury was "at liberty to give exemplary damages"); *Gilreath v. Allen*, 32 N.C. 67, 69 (1849) (stating that the jury could award exemplary damages where there existed aggravating circumstances); *Wylie v. Smitherman*, 30 N.C. 236, 239 (1848) (holding that where the tort of "trespass is committed wantonly or

maliciously, [then] the jury may, if [it] think[s] proper, give vindictive damages"). Furthermore, juries were awarding punitive damages prior to 1868 in all but one of the claims for which plaintiffs received punitive damages in the instant case, that claim being intentional infliction of emotional distress. *See Bradley v. Morris*, 44 N.C. 395, 397 (1853) (noting that exemplary damages could be awarded in a cause of action for malicious prosecution); *Sawyer v. Jarvis*, 35 N.C. 179, 181 (1851) (indicating that the jury was to increase an award in a case of false imprisonment by giving exemplary damages). *But compare Waddle v. Sparks*, 331 N.C. 73, 83, 414 S.E.2d 22, 27 (1992) ("This Court first discussed the tort of intentional infliction of emotional distress in *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979).").

Plaintiffs contend that because juries were awarding punitive damages prior to the adoption of the Constitution of 1868, the Court of Appeals erred in determining that the right did not apply to plaintiffs' action for punitive damages because an action for punitive damages is not a controversy respecting property. If this Court were to adopt plaintiffs' argument, however, the "respecting property" phrase contained in Article I, Section 25 is mere surplusage. We cannot agree with this reasoning.

As recently as last year, this Court reiterated that "[u]nder the North Carolina Constitution, a party has a right to a jury trial in 'all controversies at law respecting property.' " *Dockery v. Hocutt*, 357 N.C. 210, 217, 581 S.E.2d 431, 436 (2003) (quoting N.C. Const. art I, § 25). We acknowledge that in the majority of our cases, particularly in recent years, this Court has concluded that there was or was not a right to a trial by jury based upon whether the right did or did not exist prior to 1868. In these cases, the Court did not discuss the "respecting property" requirement outside of a simple recitation of the relevant constitutional provision. As noted by the dissenting Court of Appeals' judge, in some of these cases, the subject matter of the causes of action clearly concerned property, but the right to a trial by jury simply did not exist prior to 1868; therefore, it was unnecessary for the Court to reach the issue of whether the controversy therein respected property. *See, e.g., Simpson*, 325 N.C. 514, 385 S.E.2d 329 (concluding that litigants whose private property was subject to restrictions pursuant to certain environmental legislation were not entitled to a trial by jury in an action to enforce the restrictions because that action did not exist at common law or by statute prior to 1868); *In re Annexation Ordinance Adopted by City of*

Charlotte, 284 N.C. 442, 202 S.E.2d 143 (1974) (holding the same regarding an action as to the annexation of private property); *Kiser*, 325 N.C. 502, 385 S.E.2d 487 (concluding the same as to equitable distribution actions); *Kaperonis v. North Carolina State Highway Comm'n*, 260 N.C. 587, 133 S.E.2d 464 (1963) (holding the same regarding a statutory action allowing litigants to seek damages when their property is taken for government purposes).

Admittedly, there are other cases where the subject matter clearly did not involve property, but this Court likewise disposed of the matter by determining that the litigants did not have a constitutional right to a jury trial because that right did not exist prior to 1868. *See, e.g., In re Clark*, 303 N.C. 592, 281 S.E.2d 47 (1981) (concluding that the right to trial by jury did not exist in an action for termination of parental rights because the action did not exist prior to 1868). Despite plaintiffs' contentions to the contrary, none of these cases, or any other cases for that matter, expressly disavowed the "respecting property" language as it plainly appears in our Constitution.

More importantly, when the most recent, extensive editorial revisions to our Constitution were adopted in 1970, the language that plaintiffs now argue is arcane was not deleted from the Constitution. In previously examining the 1970 revisions, this Court noted that "the new document enacted in 1970, of which Article I, § 25 is a part, was not a fundamentally new constitution. It was an extensive editorial revision of the 1868 document. The evils sought to be remedied were obsolete language, outdated style and illogical arrangement." *North Carolina State Bar v. DuMont*, 304 N.C. 627, 636, 286 S.E.2d 89, 95 (1982). If the "respecting property" phrase was arcane and meaningless, it would logically have been deleted as a part of the 1970 editorial revisions to the North Carolina Constitution. Accordingly, we do not agree with plaintiffs' argument that the "respecting property" language of Article I, Section 25 is mere surplusage and that determining whether a right to a trial by jury exists should *only* involve an examination of whether punitive damages were awarded prior to 1868.

Plaintiffs further argue that even if the "respecting property" language has meaning, the term "property" is such a broad concept that it encompasses their right to seek punitive damages. Again, we do not agree. We recognize, as plaintiffs point out, that some of the language contained in *Smith v. Campbell*, 10 N.C. 590 (1825), the case relied upon by the Court of Appeals to conclude that an action for punitive

damages does not violate plaintiffs' jury trial right, defined the "respecting property" provision of a predecessor to Article I, Section 25 very narrowly. *See Smith*, 10 N.C. at 597 (concluding that a controversy concerning a debt was not one respecting property because, among other reasons, a person has "*property* in a *thing* only"). A review of the relevant case law and commentary suggests that much of the holding in *Smith* should be limited to the specific set of circumstances presented by that case. *See Froelich v. Southern Express Co.*, 67 N.C. 1, 7 (1872) (indicating that in *Smith*, the Court concluded that the constitutional right to trial by jury did not apply "to contracts like those embraced by the several statutes giving jurisdiction to single Justices of the Peace") (emphasis added); Atwell Campbell McIntosh, *North Carolina Practice and Procedure in Civil Cases* § 540, at 585 (1929) [hereinafter *McIntosh's Practice & Procedure*] (noting that this Court in *Smith* held that a debt was not property "to increase the jurisdiction of a justice of the peace"). Thus, some of the reasoning in *Smith* regarding the meaning of "property" does, as plaintiffs suggest, represent an exception to what has been otherwise defined as a broader concept. John V. Orth, *The North Carolina State Constitution: A Reference Guide* 68 (1993) [hereinafter *Orth's North Carolina Constitution*] (noting that " '[p]roperty,' as used in [Article I, Section 25], is defined expansively"); *McIntosh's Practice & Procedure* § 540, at 585 (indicating that "[u]nder the present practice the words [of the predecessor to Article 1, Section 25] are given a more liberal construction").

However, the Court in *Smith* was correct in inferring that the phrase "respecting property" is not "useless and vain." 10 N.C. at 597. As this Court recognized in 1872, the jury trial right guaranteed by the North Carolina Constitution has not been allowed to have a "sweeping effect." *Froelich*, 67 N.C. at 7. "The word 'property' is not such a technical one that if properly used it has everywhere the same precise and definite meaning. Its meaning varies according to the subject treated . . . and according to the context." *Wilson v. Board of Aldermen of Charlotte*, 74 N.C. 748, 755 (1876); *see also* 1 *Valuation and Distribution of Marital Property* § 18.02[1], at 18-11 (2003) (noting after review of differing definitions of the general meaning of property, that "[t]he ultimate conclusion, then, is that 'property' is elusive in definition and appears to be a set of legal rights which the courts, in consideration of public policy, have determined to protect"). "Property," as used in Article 1, Section 25, and its similarly worded predecessors, has been defined by this Court as "embrac[ing]

everything which a man may have exclusive dominion over." *Wilson*, 74 N.C. at 756; *see also Orth's North Carolina Constitution*, at 68. This Court similarly noted in 1872 that "[i]n all actions where *legal rights* are involved, and issues of fact are joined by the pleadings, the plaintiff is entitled to a trial by jury." *Andrews v. Pritchett*, 66 N.C. 387, 388 (1872) (emphasis added).

Although Article I, Section 25 appears to embody a broad definition of the term "property," a controversy in which punitive damages are assessed is not one which enforces a plaintiff's legal rights and, therefore, does not respect property. Without question, vested rights of action are property, just as tangible things are property. *Duckworth v. Mull*, 143 N.C. 461, 466-67, 55 S.E. 850, 852 (1906). " 'A right to sue for *an injury* is a right of action; it is a thing in action, and is property.' " *Id.* at 467, 55 S.E. at 852 (quoting *Chicago, Burlington & Quincy R.R. v. Dunn*, 52 Ill. 260, 264 (1869)) (emphasis added). However, an entitlement to an award of punitive damages does not represent a right vested in a plaintiff. A plaintiff's recovery of punitive damages is fortuitous, as such damages are assessed *solely* as a means to punish the willful and wanton actions of defendants and, unlike compensatory damages, do not vest in a plaintiff upon injury. *See Overnite*, 257 N.C. at 30, 125 S.E.2d at 286 (noting that punitive damages are "*never* awarded as compensation") (emphasis added).

This Court addressed the distinction between compensatory damages, which represent a type of property interest vesting in plaintiffs, and punitive damages, which do not, in *Osborn*, 135 N.C. 628, 47 S.E. 811. The Court in *Osborn* examined the constitutionality of a North Carolina act commonly known as " 'London Libel Law.' " This act restricts a plaintiff's recovery for claims of libel to actual or compensatory damages where the defendant, a newspaper or periodical, proves that the libelous information at issue was published in good faith and prints a timely retraction. *Id.* at 631, 47 S.E. at 812. Although the Court in *Osborn* was concerned with the Open Courts Clause of the state Constitution rather than the right to trial by jury, the Court's conclusions as to the nature of punitive damages provides insight into whether, under North Carolina law, punitive damages are to be considered "property." The Court in *Osborn* determined that the libel law was constitutional, even though it abolished a plaintiff's right to recover punitive damages. *Id.* at 632-33, 47 S.E. at 813 (concluding that "the act . . . can relieve a defendant only against a claim for [punitive] damages"). The Court noted, in *dicta*, that had the act restricted

the recovery of actual or compensatory damages, it would have been unconstitutional. *Id.* at 640, 47 S.E. at 815. In so doing, the Court concluded the following:

> Punitive damages are not included in what is termed actual or compensatory damages . . . . Punitive damages are awarded on grounds of public policy and not because the plaintiff has a *right* to the money, but it goes to him merely because it is assessed in his suit.
>
> The right to have punitive damages assessed is, therefore, not property. The right to recover actual or compensatory damages *is property.*
>
> . . . "The right to recover damages for an injury is a species of property and *vests* in the injured party immediately on the commission of the wrong. It is not the subsequent verdict and judgment but the commission of the wrong that gives the right. The verdict and judgment simply define its extent. Being property, it is protected by the ordinary constitutional guarantees."

Id. at 632-33, 47 S.E. at 813 (citations omitted) (quoting William B. Hale, *Handbook on the Law of Damages* § 2, at 2 (1896)).

Although this Court has not examined whether plaintiffs have a property right, or any other vested right for that matter, to an award of punitive damages since our decision in *Osborn*, other state courts have similarly concluded that plaintiffs have no property or other right in an award of punitive damages prior to judgment. *See, e.g., Cheatham v. Pohle*, 789 N.E.2d 467, 475 (Ind. 2003) (concluding that the statute allowing the state to recover part of a punitive damages award was not an unconstitutional taking under either the state or federal constitution because plaintiffs' prejudgment claim was not a property interest); *DeMendoza v. Huffman*, 334 Or. 425, 449, 51 P.3d 1232, 1246 (2002) (holding in relation to a challenge to a similar statute that the operation of the statute was not a taking because "plaintiffs do not have a vested prejudgment property right in punitive damages"); *Fust v. Attorney Gen.*, 947 S.W.2d 424, 431 (Mo. 1997) (same); *Gordon v. State*, 608 So. 2d 800, 801-02 (Fla. 1992) (" 'The right to have punitive damages assessed is not property; and it is the general rule that, until a judgment is rendered, there is no vested right in a claim for punitive damages.' ") (quoting *Ross v. Gore*, 48 So. 2d 412, 414 (Fla. 1950)), *cert. denied*, 507 U.S. 1005, 123 L. Ed. 2d 268 (1993); *Shepherd Components, Inc. v. Brice Petrides-Donohue &*

Assocs., Inc., 473 N.W.2d 612, 619 (Iowa 1991) (concluding that "a plaintiff is a fortuitous beneficiary of a punitive damage award simply because there is no one else to receive it," and plaintiff "did not have a vested right to punitive damages prior to the entry of a judgment"); *Smith v. Hill*, 12 Ill. 2d 588, 595, 147 N.E.2d 321, 325 (1958) (concluding that a plaintiff has no vested right to punitive damages); *Kelly v. Hall*, 191 Ga. 470, 472, 12 S.E.2d 881, 883 (1941) (same).

We are persuaded by *Osborn* and the above-noted decisions from other jurisdictions that plaintiffs have no independent right to, or "property" interest in, an award of punitive damages. As such, the jury's role in awarding punitive damages can be dictated by our state's policy-making body, the General Assembly, without violating plaintiffs' constitutional right to trial by jury.

Here, the incident for which plaintiffs sought punitive damages occurred in 1998, *two years after* the effective date of section 1D-25. Therefore, the rights plaintiffs possessed regarding the jury's role in awarding punitive damages were properly limited by Chapter 1D of our General Statutes. In arriving at an award in excess of the statutory maximum, the jury determined, without knowledge of N.C.G.S. § 1D-25, that plaintiffs were entitled to the maximum amount available. Prior to entry of judgment, the trial court reduced the jury awards pursuant to guidelines established by section 1D-25. The trial court did not, as plaintiffs contend, ignore the jury's decision but gave effect to it by imposing judgment in compliance with section 1D-25.[1]

1. Plaintiffs also argue in their brief that this Court should look to federal cases in determining whether a jury trial right exists in an action for punitive damages. Plaintiffs point out that in determining whether the right applies, federal courts only examine whether the right to trial by jury existed at the time the Seventh Amendment to the federal Constitution was ratified. Plaintiffs further note that other state courts examining their constitutions' jury trial right are also concerned only with whether the right existed at the time the provision guaranteeing the right was ratified. Plaintiffs' arguments do not support their position for several reasons. First, federal courts specifically examine the right to trial by jury as it exists via the Seventh Amendment, the text of which is not the same as Article I, Section 25. *Compare* U.S. Const. amend VII, *with* N.C. Const. art. I, § 25. Furthermore, the United States Supreme Court's most recent case examining the Seventh Amendment in the context of actions for punitive damages supports a position opposite to that of plaintiffs' position. *See Cooper*, 532 U.S. 424, 149 L. Ed. 2d 674. In *Cooper*, the United States Supreme Court held that an appellate court's *de novo* review of an award of punitive damages did not violate the Seventh Amendment. In so doing, the Court concluded that the amount of punitive damages was "an expression of [the jury's] moral condemnation," *id.* at 432, 149 L. Ed. 2d at 684, and " 'is not really a "fact" "tried" by the jury,' " *id.* at 437, 149 L. Ed. 2d at 687 (quoting *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 459, 135 L. Ed. 2d 659, 693 (1996) (Scalia, J., dissenting)). The Court concluded that because the amount of punitive damages awarded by the jury was not a finding of fact, *de novo*

We therefore hold that N.C.G.S. § 1D-25 in no way infringes upon plaintiffs' right to trial by jury as guaranteed by our state Constitution.

[3] We next address plaintiffs' assertion that the statutory limit on punitive damages constitutes an unconstitutional taking of property because plaintiffs were denied "the enjoyment of the fruits of their own labor" in not receiving the amount of punitive damages as awarded by the jury. N.C. Const. art. I, § 1. We note that Article I, Section 1 of our Constitution does not specifically guarantee to the citizens of North Carolina that their property will not be taken without just compensation. The North Carolina Constitution does not contain an express "taking" provision. This Court has, however, allowed taking challenges on the basis of constitutional and common-law principles, declaring that "[t]his principle is considered in North Carolina as an integral part of 'the law of the land' within the meaning of Article I, Section 19 of our State Constitution." *Long v. City of Charlotte*, 306 N.C. 187, 196, 293 S.E.2d 101, 107-08 (1982) (quoting N.C. Const. art. I, § 19).

Plaintiffs' arguments are nonetheless without merit. For the same reasons stated above, the jury's verdict was not property in which plaintiffs enjoyed a vested right. Because the limitation on punitive damages applies prior to the entry of judgment, a point at which it could be argued that plaintiffs obtain a vested property right in the verdict, *see DeMendoza*, 334 Or. at 449, 51 P.3d at 1246 (holding that "plaintiffs do not have a vested prejudgment property right in punitive damages") (emphasis added); *see also Dunham*, 128 N.C. at 213, 38 S.E. at 834 (concluding that where a plaintiff obtained a judgment, he had obtained a vested property right that could not be divested by legislative interference), the ceiling on damages does not constitute an unconstitutional taking. Also, we cannot agree with plaintiffs' argument that they were deprived of the fruits of their own labor. Clearly, a litigant's participation in a trial is not "labor" nor is a jury's verdict the "fruits" of that labor. *Cf. Poor Richard's, Inc. v. Stone*, 322 N.C. 61, 366 S.E.2d 697 (1988) (indicating that the state allegedly deprives plaintiffs of the fruits of their labor where the regulations and statutes at issue interfere with a plaintiff's business or other eco-

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appellate review of an award did not implicate the right to trial by jury as guaranteed by the Seventh Amendment. *Id.* at 437, 149 L. Ed. 2d at 687-88. Moreover, if we were to follow plaintiffs' reasoning and look to cases from other state courts, we would find that the majority of those state courts has determined that limits on damages do not violate plaintiffs' right to a trial by jury. *See Gourley*, 663 N.W.2d at 75; *see also Evans*, 56 P.3d at 1051 n.28.

nomic enterprise); *North Carolina Real Estate Licensing Bd. v. Aikens*, 31 N.C. App. 8, 228 S.E.2d 493 (1976) (noting that the constitutional right to enjoy the fruit of one's labor protects the right to pursue one's occupation). As such, plaintiffs' contentions that the legislative limitation on punitive damages represents an unconstitutional taking and that they were deprived of the fruits of their labor must fail.

[4] We next consider whether the legislative ceiling on punitive damages violates principles of due process and equal protection as guaranteed by the North Carolina Constitution. Article I, Section 19 of the North Carolina Constitution guarantees both due process rights and equal protection under the law by providing that no person shall be "deprived of his life, liberty, or property, but by the law of the land" and that "[n]o person shall be denied the equal protection of the laws." N.C. Const. art. I, § 19. "The term 'law of the land' as used in Article I, Section 19, of the Constitution of North Carolina, is synonymous with 'due process of law' as used in the Fourteenth Amendment to the Federal Constitution." *In re Moore*, 289 N.C. 95, 98, 221 S.E.2d 307, 309 (1976).

When a party challenges a particular statute as violative of the Equal Protection Clause of the North Carolina Constitution, we generally evaluate that legislation using one of two levels of review. *State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n*, 336 N.C. 657, 681, 446 S.E.2d 332, 346 (1994). If the statute at issue affects the exercise of a fundamental right or classifies a person based upon a suspect characteristic, we apply strict scrutiny. *Id.* On the other hand, if the statute impacts neither a fundamental right nor a suspect class, we employ the rational basis test. *Richardson v. North Carolina Dep't of Corr.*, 345 N.C. 128, 135, 478 S.E.2d 501, 505 (1996).

As determined above, section 1D-25 does not infringe upon plaintiffs' fundamental right to a trial by jury or to be free from an unconstitutional taking, nor does it create a suspect classification, *see Dep't of Transp. v. Rowe*, 353 N.C. 671, 675, 549 S.E.2d 203, 207 (2001) (defining suspect classifications), *cert. denied*, 534 U.S. 1130, 151 L. Ed. 2d 972 (2002). Accordingly, the rational basis test or rational basis review applies, and this Court must inquire whether "distinctions which are drawn by a challenged statute . . . bear *some* rational relationship to a conceivable legitimate governmental interest." *Texfi Indus., Inc. v. City of Fayetteville*, 301 N.C. 1, 11, 269 S.E.2d 142, 149 (1980) (emphasis added). Rational basis review is

> satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

Nordlinger v. Hahn, 505 U.S. 1, 11, 120 L. Ed. 2d 1, 13 (1992) (citations omitted); *see also Carolina Util.*, 336 N.C. at 681-82, 446 S.E.2d at 346 ("With regard to the contention that the legislation does not bear a rational relationship to the ends sought, it has been held that the relationship need not be a perfect one.").

Principles of substantive due process dictate that "the law shall not be unreasonable, arbitrary or capricious, and that the law be substantially related to the valid object sought to be obtained." *State v. Joyner*, 286 N.C. 366, 371, 211 S.E.2d 320, 323, *appeal dismissed*, 422 U.S. 1002, 45 L. Ed. 2d 666 (1975). Similar to the rational basis test for equal protection challenges, "[a]s long as there could be some rational basis for enacting [the statute at issue], this Court may not invoke [principles of due process] to disturb the statute." *Lowe v. Tarble*, 313 N.C. 460, 462, 329 S.E.2d 648, 650 (1985); *see also In re Montgomery*, 311 N.C. 101, 115, 316 S.E.2d 246, 255 (1984) (noting that a statute does not violate principles of substantive due process if it has a "rational relation" to the state's exercise of its police powers).

Plaintiffs argue that section 1D-25 bears no substantial or rational relationship to any governmental interest because the need for legislative tort reform regarding punitive damages was unsubstantiated, as there was neither a nationwide nor statewide crisis when the statute was passed in 1995. In support of their argument, plaintiffs rely upon scholars who question the necessity of legislative limitations on punitive damages. Plaintiffs also point to evidence indicating that there is a low incidence of punitive damage awards in this state.

Plaintiffs' argument misapprehends the law regarding the rational basis standard of review. As noted above, the rational basis test is the lowest tier of review, requiring a connection between the statute and "a conceivable," *Texfi*, 301 N.C. at 11, 269 S.E.2d at 149, or "any," *Rowe*, 353 N.C. at 675, 549 S.E.2d at 207, legitimate governmental interest. Given the Legislature's responsibility in dictating the policy for this state and the deference shown to that branch of government by this Court in the implementation of that policy, the

General Assembly may permissibly anticipate problematic areas of the law such as excessive punitive damages awards. *See Lanier*, 274 N.C. at 495, 164 S.E.2d at 166 (noting that the General Assembly usually acts prospectively). The rational basis test reflects this judicial deference and, as such, does not require the governmental interest at issue to reach crisis proportions before legislative action can be taken.

Moreover, despite the evidence presented by plaintiffs that the rationality of section 1D-25 is questionable, "they cannot prevail so long as 'it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable.' " *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 66 L. Ed. 2d 659, 669 (1981) (quoting *United States v. Carolene Products Co.*, 304 U.S. 144, 154, 82 L. Ed. 1234, 1243 (1938)) (alteration in original). As suggested by K-Mart and *amici*, in enacting section 1D-25, the General Assembly could have been persuaded by arguments that N.C.G.S. § 1D-25 was necessary to preserve North Carolina's economic development, given the impact of punitive damages on a variety of industries; to assure public confidence in the judicial system; and to provide clear notice of possible penalty to defendants, whose property, as the result of a punitive damages award, will potentially be taken as a punishment without the protection of our criminal justice system. The General Assembly could have believed that these considerations bear some relationship to the curtailment of punitive damages awards.

Furthermore, these are issues with which the General Assembly could have been concerned when it enacted the statute in 1995. Prior to the passage of section 1D-25, other states had already enacted or were in the process of enacting limitations on a plaintiff's recovery of punitive damages, including statutory ceilings on punitive damages and split-recovery provisions, whereby a portion of a punitive damages award is allocated to the state. *See generally BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, app. at 614-19, 134 L. Ed. 2d 809, app. at 851-54 (1996) (Ginsberg, J., dissenting) (listing in an appendix states and corresponding legislation curtailing awards of punitive damages, including those that did so prior to the effective date of section 1D-25); Brian Timothy Beasley, Recent Development, *North Carolina's New Punitive Damages Statute: Who's Being Punished, Anyway?*, 74 N.C. L. Rev. 2174, app. at 2202-13 (1996) (listing what actions other states had taken regarding punitive damages at the time N.C.G.S. § 1D-25 was enacted). Several jurists had drawn attention to

and criticized the awarding of excessive punitive damages, most notably, members of the United States Supreme Court. For example, in *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 106 L. Ed. 2d 219 (1989), Justice O'Connor stated in her concurring opinion that "[a]wards of punitive damages are skyrocketing" and that "[t]he threat of such enormous awards has a detrimental effect on the research and development of new products." 492 U.S. at 282, 106 L. Ed. 2d at 242 (O'Connor, J., concurring in part and dissenting in part); *see also Honda Motor Co. v. Oberg*, 512 U.S. 415, 433 n.11, 129 L. Ed. 2d 336, 350 n.11 (1994) (noting that "over half of punitive damages awards were appealed, and that more than half of those appealed resulted in reductions or reversals of the punitive damages"). Moreover, in delivering the opinion of the Court in *Haslip*, Justice Blackmun expressed "concern about punitive damages that 'run wild,' " concluding that "unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." 499 U.S. at 18, 113 L. Ed. 2d at 20.

The United States Supreme Court has continued to question the amount of punitive damages awards since the passage of section 1D-25, further confirming that the propriety of punitive damages awards was and continues to be debatable on a nationwide level. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 155 L. Ed. 2d 585 (2003) (concluding that a $145 million punitive damages award was excessive, where the ratio between punitive and compensatory damages was 145 to 1); *see also Philip Morris USA Inc. v. Williams*, —— U.S.——, 157 L. Ed. 2d 12 (2003) (vacating judgment and remanding for consideration in light of *State Farm*), *vacating*, 182 Or. App. 44, 48 P.3d 824 (2002) (concluding that a $79.5 million punitive damages award, which was ninety-seven times the compensatory damages award, was not excessive); *Ford Motor Co. v. Estate of Smith*, —— U.S. ——, 155 L. Ed. 2d 1056 (2003) (vacating and remanding for consideration in light of *State Farm*), *vacating sub nom. Sand Hill Energy, Inc. v. Ford Motor Co.*, 83 S.W.3d 483 (Ky. 2002) (reinstating a trial court's reduction of a $20 million punitive damages award to $15 million, where the compensatory award was $3 million). Specifically, in *Gore*, the Court concluded that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." 517 U.S. at 574, 134 L. Ed. 2d at 826.

The concerns reflected in legislation from other states and the opinions of the United States Supreme Court indicate that the perceived need for limitations on punitive damages was at least debatable when the General Assembly chose to enact section 1D-25 in 1995. In fact, a review of the legislative history regarding the enactment of section 1D-25 indeed reflects that legitimate governmental interests suggested by K-Mart and *amici* may have been on the legislators' minds at the time the statute was passed and could have prompted them to act. Those interests include promoting public confidence in and bringing more certainty to our system of civil redress, shielding North Carolina from problems encountered in other states, and encouraging businesses to bring much needed employment and other economic resources to this state. *See* Minutes, *Meeting on H.B. 729 Before the Senate Judiciary I/Const. Comm.*, 1995 Gen. Assemb., Reg. Sess. (N.C. June 21, 1995) (remarks by Phillip J. Kirk, President, N.C. Citizens for Bus. & Indus.); Minutes, *Meeting on H.B. 636, 637, 729, 730, & 731 Before the House Select Comm. on Tort Reform*, 1995 Gen. Assemb., Reg. Sess. (N.C. Apr. 5, 1995) (comments by Rep. Charles B. Neely, Jr., Member, House Select Comm. on Tort Reform).

Furthermore, the monetary limits established by N.C.G.S. § 1D-25 are not arbitrary. The statute does not create a strict monetary limit but provides for recovery of punitive damages awards not more than three times the compensatory damages award or $250,000.00, whichever is greater.

In *State Farm*, the United States Supreme Court emphasized that although punitive damages awards "serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding," thus increasing the danger of an " 'arbitrary deprivation of property.' " 538 U.S. at ——, 155 L. Ed. 2d at 601 (quoting *Honda Motor*, 512 U.S. at 432, 129 L. Ed. 2d at 349)). In balancing a defendant's punishment with the harm done to plaintiffs, the Court declined to establish a "bright-line ratio" between punitive and compensatory damages but noted that "few awards exceeding a single-digit ratio . . . will satisfy due process" and that a ratio of more than four-to-one "might be close to the line of constitutional impropriety." *Id.* at ——, 155 L. Ed. 2d at 605-06. The Court further noted that there was a long legislative history of "providing for sanctions of double, treble, or quadruple damages to deter and punish." *Id.* at ——, 155 L. Ed. 2d at 606. Thus, the scheme for limiting the punitive award con-

tained in N.C.G.S. § 1D-25, providing for three times the compensatory award, is in line with the standards suggested by the United States Supreme Court to prevent grossly excessive awards.

Because the limitation on punitive damages contained in N.C.G.S. § 1D-25 bears some rational relationship to several legitimate governmental interests, as reflected in the above-noted discussion, we conclude that section 1D-25 does not violate principles of due process and equal protection as guaranteed by our state Constitution. Plaintiffs' argument is therefore without merit.

[5] Plaintiffs next argue that North Carolina's statutory limitation on punitive damages violates the Open Courts Clause of our state Constitution. Article I, Section 18 of the North Carolina Constitution provides: "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay." N.C. Const. art. I, § 18; *accord* N.C. Const. of 1868, art. 1, § 35. Plaintiffs contend that section 1D-25 violates the above-noted constitutional provision because it does not afford them a proper and adequate remedy. We disagree.

We believe that this issue was resolved by this Court in *Osborn*, 135 N.C. 628, 47 S.E. 811. As discussed above, the Court in *Osborn* concluded that an act, known as the " 'London Libel Law,' " abolishing the recovery of punitive damages in certain libel actions, did not violate the Open Courts Clause of the North Carolina Constitution as it appeared in the Constitution of 1868. 135 N.C. at 631, 47 S.E. at 812. The Court based its holding on a plaintiff's lack of a right to recover punitive damages. *Id.* at 632-33, 47 S.E. at 813. Thus, according to *Osborn*, the Open Courts Clause does not prevent the General Assembly from abolishing the recovery of punitive damages altogether. It follows that the Open Courts Clause would not prevent the General Assembly from limiting awards of punitive damages.

Plaintiffs argue that awarding punitive damages, as dictated by section 1D-25, violates the Open Courts Clause because the remedy is meaningless in light of K-mart's ability to pay the award. In so arguing, plaintiffs rely upon a quotation from *Watson*, 352 N.C. 343, 532 S.E.2d 175, providing as follows: "[O]bviously, the function of deterrence[] will not be served if the wealth of the defendant allows him to absorb the award with little or no discomfort." *Neal v. Farmers Ins. Exch.*, 21 Cal. 3d 910, 928, 582 P.2d 980, 990 (1978) (footnote omitted), *quoted in Watson*, 352 N.C. at 349, 532 S.E.2d at 178.

Plaintiffs' reliance on *Watson* is misplaced. First, as discussed above, the Open Courts Clause is not implicated because plaintiffs do not have a right to recover punitive damages. *See Osborn*, 135 N.C. 628, 47 S.E. 811. Second, the Court in *Watson* was not concerned with a challenge to the Open Courts Clause. Rather, in *Watson*, the Court analyzed whether the punitive damages assessed against an employer should be limited to "the amount assessed against the employee whose tortious conduct the employer ratified." 352 N.C. at 348, 532 S.E.2d at 178.

Based upon this Court's decision in *Osborn*, we conclude that North Carolina's statutory limitation on punitive damages does not violate the Open Courts Clause of the North Carolina Constitution.

[6] We now address plaintiffs' final contention,[2] that N.C.G.S. § 1D-25 is unconstitutional because it is void for vagueness. In support of their contention, plaintiffs note that the trial court in the instant case recognized four possible interpretations as to the applicability of section 1D-25.

"[A] statute is unconstitutionally vague if it either: (1) fails to 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited'; or (2) fails to 'provide explicit standards for those who apply [the law].' " *State v. Green*, 348 N.C. 588, 597, 502 S.E.2d 819, 824 (1998) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108, 33 L. Ed. 2d 222, 227 (1972)) (second alteration in original), *cert. denied*, 525 U.S. 1111, 142 L. Ed. 2d 783 (1999). The Constitution requires that the statute merely prescribe "boundaries sufficiently distinct for judges and juries to interpret and administer it uniformly." *In re Burrus*, 275 N.C. 517, 531, 169 S.E.2d 879, 888 (1969), *aff'd*, 403 U.S. 528, 29 L. Ed. 2d 647 (1971). It is the plaintiffs' burden to show, in light of the circumstances of this case, that the statute is " 'incapable of uniform judicial administration.' " *In re Moore*, 306 N.C. 394, 402, 293 S.E.2d 127, 132 (1982) (quoting *In re Biggers*, 50 N.C. App. 332, 340, 274 S.E.2d 236, 241 (1981)), *appeal dismissed*, 459 U.S. 1139, 74 L. Ed. 2d 987 (1983).

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2. In their notice of appeal to this Court, plaintiffs assign error to an additional issue—that N.C.G.S. § 1D-25 violates the North Carolina Constitution's prohibition against special legislation. However, plaintiffs do not address this issue in their appellant brief, but for a short tangential reference in a footnote. Because plaintiffs' brief fails to set out the above-noted assignment of error, a question presented referencing this alleged error, or any argument in support thereof, this issue is taken as abandoned. *See* N.C. R. App. P. 28(a), (b)(6).

However, "[i]mpossible standards of statutory clarity are not required by the constitution." *Burrus*, 275 N.C. at 531, 169 S.E.2d at 888. "Statutory language should not be declared void for vagueness unless it is not susceptible to reasonable understanding and interpretation." *State v. Jones*, 305 N.C. 520, 531, 290 S.E.2d 675, 681 (1982). Mere differences of opinion as to a statute's applicability do not render it unconstitutionally vague. *See Lowe v. Tarble*, 312 N.C. 467, 469, 323 S.E.2d 19, 21 (1984) (concluding that a statute "is not constitutionally suspect merely because it must be interpreted and applied in light of particular facts in a given case"). If so, as the Court of Appeals duly recognized, every statute which we are asked to decipher should be declared unconstitutional. Because we can, in our discussion below, apply the rules of statutory construction to discern a meaning from N.C.G.S. § 1D-25 that can be uniformly administered, we conclude that the statute is not unconstitutionally vague. *See Tetterton*, 314 N.C. at 55, 332 S.E.2d at 73 (finding that a particular statute was not unconstitutionally vague after applying "the normal rules of statutory construction" to arrive at its true meaning).

[7] Finally, we address K-Mart's petition for discretionary review as to an additional issue. K-Mart argues that the Court of Appeals misinterpreted section 1D-25(b). Subsection (b) provides as follows:

> Punitive damages awarded against a defendant shall not exceed three times the amount of compensatory damages or two hundred fifty thousand dollars ($250,000), whichever is greater. If a trier of fact returns a verdict for punitive damages in excess of the maximum amount specified under this subsection, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount.

N.C.G.S. § 1D-25(b). The Court of Appeals concluded that section 1D-25(b) applied per plaintiff, such that each plaintiff should receive the greater of three times his individual compensatory damages award or $250,000.00. *Rhyne*, 149 N.C. App. at 687, 562 S.E.2d at 93. Because the trebling of each plaintiff's compensatory damages award resulted in an amount less than $250,000.00, the Court of Appeals determined that each plaintiff in the instant case should receive $250,000.00, requiring K-Mart to pay a total of $500,000.00 in punitive damages.

K-Mart argues that the punitive damages limitation should apply per defendant, such that it should be required to pay a total of $250,000.00 in punitive damages. According to K-Mart, a per-

defendant application is dictated by the plain meaning of the statute as it directs a trial court to reduce "[p]unitive damages awarded against *a defendant*." N.C.G.S. § 1D-25(b) (emphasis added). We do not agree with K-Mart's argument.

The meaning of N.C.G.S. § 1D-25(b) is easily resolved through applying the well-established rules of statutory construction. A statute that is clear and unambiguous must be construed using its plain meaning. *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). "But where a statute is ambiguous, judicial construction must be used to ascertain the legislative will." *Id.* at 209, 388 S.E.2d at 136-37.

K-Mart supports its argument that the punitive damages limitation applies per defendant by isolating one particular portion of section 1D-25(b)—that "[p]unitive damages awarded against *a defendant* shall not exceed" the amount specified therein. N.C.G.S. § 1D-25(b) (emphasis added). However, this Court does not read segments of a statute in isolation. Rather, we construe statutes *in pari materia*, giving effect, if possible, to every provision. *Dockery*, 357 N.C. at 219, 581 S.E.2d at 437.

The use of other singular terms in section 1D-25(b) suggests that the statute applies to reduce each plaintiff's individual punitive damages award. The second sentence of section 1D-25 refers to that which is to be reduced as "*a* verdict" and "*the* award." N.C.G.S. § 1D-25(b) (emphasis added). We acknowledge that when a jury returns multiple verdicts, it will, more than likely, submit one verdict sheet to the trial court. Furthermore, in our everyday parlance, we may refer to the verdict sheet as a verdict or declare that the jury has returned its verdict or a verdict. However, as the verdict sheet reflects in the case *sub judice*, the jury may actually return two separate punitive damages awards, as there are two distinct verdicts based upon causes of action for individual plaintiffs.

Here, the jury returned one verdict against K-Mart for Mr. Rhyne in the amount of $11.2 million and a separate verdict for Mrs. Rhyne in the same amount. Mr. and Mrs. Rhyne joined in one civil action to bring their claims, and K-Mart was, in essence, a separate defendant with respect to each plaintiff's action. Thus, reading N.C.G.S. 1D-25 in its entirety, as we must, the statute directs the trial court to reduce both the award for Mr. Rhyne and the award for Mrs. Rhyne and to enter judgment against K-Mart in the amount of $250,000.00 for each plaintiff.

This construction of section 1D-25(b) is further supported by the operation of other statutes within Chapter 1D. Most significantly, section 1D-15(a) directs the trier of fact to consider an exclusive list of aggravating factors when determining whether to award punitive damages. N.C.G.S. § 1D-15(a). In the absence of some legislative directive, it is assumed that the trier of fact should, as it did at common law, consider these factors as to each plaintiff's cause of action and not as to each defendant. It follows that, like section 1D-15(a), section 1D-25(b) applies to the individual jury verdict of each plaintiff.

Even if the first sentence of section 1D-25(b) renders the statute susceptible to more than one construction, the consequences of each construction are "potent factor[s] in its interpretation, and undesirable consequences will be avoided if possible." *Little v. Stevens*, 267 N.C. 328, 336, 148 S.E.2d 201, 207 (1966), *quoted in Buford v. General Motors Corp.*, 339 N.C. 396, 410, 451 S.E.2d 293, 301 (1994). "[C]ourts normally adopt an interpretation which will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense," *State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Admin. Office*, 294 N.C. 60, 68, 241 S.E.2d 324, 329 (1978), and "with full knowledge of prior and existing law," *State v. Benton*, 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1970).

K-Mart's interpretation of section 1D-25(b) would surely result in at least one absurd consequence. In contravention of this Court's history of promoting judicial economy, *see, e.g.*, *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 16, 591 S.E.2d 870, 880 (2004); *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993); *State v. Watson*, 310 N.C. 384, 388, 312 S.E.2d 448, 452 (1984), savvy plaintiffs will surely be encouraged to bring multiple lawsuits if we were to adopt K-Mart's construction of N.C.G.S. § 1D-25. Such a result would directly contradict the purpose behind the North Carolina Rules of Civil Procedure regarding joinder of parties. These rules liberally permit plaintiffs to join in a single civil action where they assert "any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all parties will arise in the action." N.C.G.S. § 1A-1, N.C. R. Civ. P. 20(a) (2003); *see also Mosley v. General Motors Corp.*, 497 F.2d 1330, 1332 (8th Cir. 1974) ("The purpose of [Rule 20(a)] is to promote trial convenience and expedite the final determination of disputes, thereby

preventing multiple lawsuits."); *Woods v. Smith*, 297 N.C. 363, 367, 255 S.E. 174, 177 (1979) (noting that with a minor exception, "N.C. R. Civ. P. 20 is a close counterpart of Fed. R. Civ. P. 20"). We assume that when the General Assembly acts, it does so in accordance with other statutory provisions and rules, including the North Carolina Rules of Civil Procedure, and with knowledge of relevant decisions by this Court. Surely, the General Assembly did not intend the passage of N.C.G.S. § 1D-25 to encourage a proliferation of multiple punitive damages lawsuits. *See Bagley v. Shortt*, 261 Ga. 762, 763, 410 S.E.2d 738, 739 (1991) (noting the same where the court concluded, based upon a similar interpretation of a statute limiting punitive damages, that such interpretation "would encourage the splitting of causes of action with sophistry and quibble").

Given the obviously absurd consequences that would result from K-Mart's interpretation of section 1D-25, we conclude that the Court of Appeals correctly interpreted section 1D-25(b). As such, the trial court properly entered judgment ordering defendant to pay $250,000.00 to Mr. Rhyne and $250,000.00 to Mrs. Rhyne, for a total of $500,000.00.

For the reasons stated above, we hold that N.C.G.S. § 1D-25 does not violate the North Carolina Constitution and applies to limit the recovery of each plaintiff. We therefore affirm the decision of the North Carolina Court of Appeals.

AFFIRMED.

PAUL E. WATKINS, D.D.S., PETITIONER v. NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, RESPONDENT

No. 301A03

(Filed 2 April 2004)

1. Dentists— orthodontist—standard of care—absence of expert testimony

The North Carolina State Board of Dental Examiners was authorized to determine the appropriate standard of care for petitioner orthodontist's treatment of a patient without expert testimony from an orthodontist, because: (1) there is no per se rule

that expert testimony is required to establish the standard of care in disciplinary hearings conducted by professional licensing boards; (2) the fact that the General Assembly did not see fit to make any special provisions for disciplinary actions involving orthodontists suggests that it deemed the standards of care governing the practice of orthodontics to be within the ken of licensed dentists; and (3) a licensee is not denied meaningful judicial review when a licensing board cannot base its findings or conclusions on facts outside the record but has a statutory obligation to reach a reasoned decision based on substantial evidence in view of the entire record.

2. Dentists— orthodontist—suspension of license—failure to follow timely treatment plan—failure to take patient photographs

A whole record review revealed that substantial evidence supported the State Board of Dental Examiners' decision to suspend the dental license of petitioner orthodontist based upon its findings and conclusions that petitioner breached the standard of care for orthodontists by failing to establish and follow a treatment plan which would address the orthodontic needs of two patients in a timely manner and by failing to take any intraoral and facial photographs of one of those patients because: (1) the Board could reasonably have concluded that petitioner's delay in initiating treatment, his decision to pursue an initial policy of therapeutic nonextraction, and his eventual decision to extract unilaterally on one side of a patient's mouth all contributed to an unreasonable delay in one patient's progress as an orthodontic patient; (2) it fell within the province of the Board to determine whether the delay in a patient's treatment was attributable to a flawed treatment plan or to patient noncompliance; (3) an expert testified that petitioner initially adopted a course of treatment for the second patient that had no chance of success and that his actual course of treatment of this patient failed to correct the patient's orthodontic problems in a timely manner; (4) assuming that intraoral and facial photographs have no value as a diagnostic tool, the Board could reasonably have concluded that the standard of care requires their use as a means to track the progress of orthodontic care; and (5) the absence of testimony concerning the relative advantages of photographs over other diagnostic tools goes only to the weight of an expert's testimony which is a matter for the Board to decide, and the fact that a

learned treatise does not list photographs among the minimum required diagnostic records is not dispositive as to the standard of care.

3. Dentists— orthodontist—refusal of treatment—outstanding balance on patient account—negligence in practice of dentistry

A de novo review revealed that the Board of Dental Examiners did not err by concluding that petitioner orthodontist's refusal to treat a patient due to nonpayment constituted negligence in the practice of dentistry under N.C.G.S. § 90-41(a)(12), because: (1) although it is not dispositive, the North Carolina State Board of Dental Examiners' construction of the statutory term "practice of dentistry" under N.C.G.S. § 90-41(a)(12) to encompass the refusal to see or treat a patient is persuasive authority for our Supreme Court; (2) it is reasonable in the present case to characterize petitioner's refusal to see or treat a patient as a facet of his management, supervision, control, or conduct of his dental practice under N.C.G.S. § 90-29(b)(11); (3) the Dental Practice Act was intended to guard against threats to public health, and a dentist's refusal to treat a patient due to nonpayment may directly and adversely affect a patient's health; and (4) a telephone call from a patient expressing a desire to discontinue treatment does not terminate the dentist-patient relationship, but instead it continues until a patient is formally released by the dentist.

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. 367, 579 S.E.2d 510 (2003), affirming a judgment signed 5 April 2002, by Judge David Q. LaBarre in Superior Court, Wake County. Heard in the Supreme Court 17 November 2003.

The Charleston Group, by Freddie Lane, Jr., for petitioner-appellee.

Ellis & Winters, L.L.P., by Paul K. Sun, Jr.; and Bailey & Dixon, L.L.P., by M. Denise Stanford, for respondent-appellant.

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

North Carolina Medical Board, by Amy Yonowitz and Marcus Jimison, amicus curiae.

Howard A. Kramer, on behalf of North Carolina Board of Nursing, amicus curiae.

Womble, Carlyle, Sandridge & Rice, P.L.L.C., by Johnny M. Loper, on behalf of North Carolina State Board of Examiners in Optometry, amicus curiae.

Young, Moore & Henderson, P.A., by John N. Fountain, on behalf of North Carolina State Board of Examiners of Electrical Contractors and North Carolina State Board of Examiners of Plumbing, Heating, and Fire Sprinkler Contractors, amici curiae.

North Carolina State Board of Examiners for Engineers and Surveyors, by David S. Tuttle, amicus curiae.

MARTIN, Justice.

Petitioner, Paul E. Watkins, is a dentist licensed to practice dentistry in North Carolina who limits his practice in this state[1] to the specialty area of orthodontics. Based on formal complaints initiated by three of petitioner's patients—John Casto, Conrad Naico, and Sabrina Wolfe—the North Carolina Board of Dental Examiners (Dental Board or the Board) held an administrative hearing to determine if petitioner had violated applicable provisions of the Dental Practice Act, N.C.G.S. § 90-22 to 90-48.3 (2003). The evidence presented at the hearing included documentary evidence as well as lay and expert testimony. On 18 July 2001, the Board issued its final agency decision, concluding that petitioner's failure to comply with the applicable standards of care in his treatment of all three patients constituted negligence in the practice of dentistry within the meaning of N.C.G.S. § 90-41(a)(12) (2003). Accordingly, the Board ordered that petitioner's license be suspended for a period of six months, with conditional restoration subject to petitioner's adherence to probationary terms.

Petitioner sought judicial review of the Board's order in Wake County Superior Court. By judgment signed 5 April 2002, the trial court reversed and remanded to the Board for reinstatement of peti-

1. Petitioner is also licensed in New York, where he practices general dentistry.

tioner's license. The trial court concluded that the Board's determination that petitioner was negligent in the practice of dentistry was unsupported by substantial, material, and competent evidence in view of the entire record and, therefore, that the suspension of petitioner's license was arbitrary and capricious. A divided panel of the Court of Appeals affirmed, and respondent appealed to this Court as a matter of right. We reverse.

I.

[1] The first issue presented is whether the Board was authorized, under *Leahy v. North Carolina Bd. of Nursing*, 346 N.C. 775, 488 S.E.2d 245 (1997), to determine the appropriate standard of care for petitioner's treatment of patient John Casto (Casto) without expert testimony from an orthodontist.

At the outset, we note that this issue does not encompass the Board's consideration of petitioner's treatment of Sabrina Wolfe (Wolfe) and Conrad Naico (Naico). With respect to Wolfe and Naico, Board experts testified as to the requisite standards of care in addition to offering their expert opinions that petitioner had breached those standards. With regard to Casto, on the other hand, the Board's expert witness, Dr. Christopher Trentini, testified that Casto's progress "was behind schedule, clearly" given the nature of Casto's orthodontic problems and the length of time he had been in treatment. Dr. Trentini did not testify that the standard of care for orthodontists practicing in North Carolina required a more timely resolution of Casto's orthodontic problems. Nevertheless, after reviewing the dental records and the expert and lay testimony presented, the Board found that the standard of care for dentists licensed to practice in North Carolina "required an orthodontist to establish and follow a treatment plan which would address the patient's orthodontic needs in a timely manner." The Board also found that petitioner "violated the standard of care . . . by failing to establish and follow a treatment plan that would address the patient's orthodontic needs in a timely manner." The Board concluded that petitioner's failure to comply with the applicable standard of care in his treatment of Casto was a "dereliction from professional duty constituting negligence in the practice of dentistry within the meaning of N.C.G.S. § 90-41(a)(12)."

Petitioner argues that given the absence of expert testimony as to the appropriate standard of care and breach thereof, the Board lacked substantial evidence to support its conclusion that petitioner's

treatment of Casto constituted negligence in the practice of dentistry. This argument, however, is foreclosed by our holding in *Leahy*, which we now reaffirm.

Leahy involved a disciplinary action by the North Carolina Board of Nursing (Nursing Board) against a registered nurse (the petitioner or Leahy) concerning her treatment of two patients. *Leahy*, 346 N.C. 775, 488 S.E.2d 245. At that hearing before the Nursing Board, four nurses presented eyewitness testimony as to the factual details of the conduct at issue. *Id.* at 776-77, 488 S.E.2d at 245-46. They did not, however, testify as to the requisite standard of care for registered nurses. *Id.* The Nursing Board found facts consistent with the eyewitnesses' testimony and concluded that Leahy's treatment of the two patients breached the requisite standard of care in violation of the Nursing Practice Act. *Id.* at 778, 448 S.E.2d at 247. Relying on our holding in *Dailey v. North Carolina State Bd. of Dental Exam'rs*, 309 N.C. 710, 309 S.E.2d 219 (1983), the Court of Appeals reversed, holding that the Board's suspension of the petitioner's license was improper because of the absence of expert testimony defining the standard of care for registered nurses in the practice of their profession. *Leahy*, 346 N.C. at 780, 488 S.E.2d at 248.

We reversed the Court of Appeals, rejecting the argument that expert testimony was required to establish the applicable standard of care. *Leahy*, 346 N.C. at 780-81, 488 S.E.2d at 248. In reaching this decision, we turned to North Carolina's Administrative Procedure Act (APA), which expressly provides that "[a]n agency may use its experience, technical competence, and specialized knowledge in the evaluation of evidence presented to it." *Id.* (quoting N.C.G.S. § 150B-41(d) (1995)). We concluded that the specialized knowledge of the Nursing Board "includes knowledge of the standard of care for nurses," and thus that the Nursing Board was entitled to use this knowledge in evaluating the evidence before it. *Id.* at 781, 488 S.E.2d at 248. In support of this conclusion, we looked to the composition and statutorily prescribed functions of the Nursing Board, noting that it (1) consisted of nine registered nurses, four licenced practical nurses, one retired doctor, and one layperson; (2) was authorized by statute to develop rules and regulations to govern medical acts by registered nurses; (3) was empowered to administer, interpret, and enforce the Nursing Practice Act; and (4) was required by statute to establish the qualifications and criteria for licensure of nurses. *Id.* Reasoning that "[t]o meet these requirements, the [Nursing] Board must know the standard of care for registered nurses in this state," we held that the

Court of Appeals had erred in requiring expert testimony to establish that standard. *Id.*

Leahy illustrates the deference that courts accord to administrative bodies in the exercise of their factfinding functions. *See, e.g., In re Berman*, 245 N.C. 612, 616-17, 97 S.E.2d 232, 236 (1957). We acknowledge that, in a medical malpractice action, the standard of care is normally established by the testimony of a qualified expert. *Jackson v. Mountain Sanitarium & Asheville Agric. Sch.*, 234 N.C. 222, 226-27, 67 S.E.2d 57, 61 (1951). This general rule is based on the recognition that in the majority of cases the standard of care for health providers concerns technical matters of "highly specialized knowledge," and a lay factfinder is "dependent on expert testimony" to fairly determine that standard. *Id.* This rationale is not necessarily controlling within the context of disciplinary proceedings conducted by professional licensing boards where, as here, the factfinding body is composed entirely or predominantly of experts charged with the regulation of the profession. *See Arlen v. State Med. Bd.*, 61 Ohio St. 2d 168, 174, 399 N.E.2d 1251, 1255 (1980). Thus, we decline to impose a *per se* rule that expert testimony is required to establish the standard of care in disciplinary hearings conducted by professional licensing boards.

Petitioner contends that *Leahy* is distinguishable in light of the relative compositions of the Dental and Nursing Boards. In *Leahy*, petitioner argues, the Nursing Board was competent to establish the standard of care for registered nurses without the benefit of expert testimony because, by statute, at least eight of its fifteen members must be registered nurses. N.C.G.S. § 90-171.21(a) (2003). In the present case, by contrast, the Dental Practice Act does not mandate that any orthodontists serve on the Board, *see* N.C.G.S. § 90-22(b) (2003), and at the time petitioner's case came on for hearing, none did. Thus, petitioner argues, the Board lacked the requisite expertise, technical training, and specialized knowledge to determine the standard of care for orthodontists. For the following reasons, we reject this argument and hold that *Leahy* controls our resolution of the present case.

The Dental Practice Act vests the Board with broad authority to regulate the practice of dentistry, including the powers to grant or revoke a license and to enact rules and regulations governing the profession. N.C.G.S. §§ 90-41(a), 90-48 (2003). Moreover, the General Assembly has clearly defined the "practice of dentistry" to encompass the practice of orthodontics. *Compare* N.C.G.S. § 90-29(b)(5)

(2003) (defining the "practice of dentistry" to include "[c]orrect[ing] the malposition or malformation of human teeth") *with* Oxford English Dictionary, Supplement and Bibliography (1961) (defining "orthodontia" as "[t]he correcting of irregular and faulty positions of the teeth"). There are no distinct licensure requirements for orthodontists in this state, and orthodontists—like all licensed dentists—are subject to the regulatory and disciplinary authority of the Dental Board as it is statutorily composed. *See* N.C.G.S. §§ 90-29(a), 90-41(a). By statute, the Board is composed of six licensed dentists, one dental hygienist, and one layperson. *See* N.C.G.S. § 90-22(a). There is no statutory requirement of orthodontic representation on the Board. *Id.* Thus, in the statutory scheme adopted by the legislature, orthodontists are regulated as dentists, by dentists. Although they practice in a specialty area within their profession, orthodontists are held accountable to the same disciplinary authority under the same statutory provisions as their peers who practice general dentistry.

Moreover, the Dental Practice Act specifically precludes the dental hygienist and lay members of the Board from participating in any matter involving the issuance, renewal, or revocation of a license to practice dentistry. N.C.G.S. § 90-22(b). This express exclusion of the two members who are not licensed dentists strongly suggests that the General Assembly gave due consideration to the competence of the Board as composed to adjudicate disciplinary matters. Under these circumstances, the fact that the General Assembly did not see fit to make any special provisions for disciplinary actions involving orthodontists suggests that it deemed the standards of care governing the practice of orthodontics to be within the ken of licensed dentists. In deference to this legislative judgment, we will not engraft a rule requiring expert testimony on the regulatory scheme devised by the General Assembly.

Petitioner asserts that liberal application of *Leahy* effectively vests professional licensing boards with "unfettered discretion" to revoke or deny a license, thereby rendering a licensee's statutory right to judicial review meaningless. We disagree. Far from undermining a licensee's right to have the merits of his or her case determined on the basis of facts in evidence, *Leahy* reaffirms that right as it was previously articulated in *Dailey*.

The APA provides that in all contested cases, an agency must base its findings of fact exclusively on evidence presented and facts officially noticed, all of which must be made a part of the offi-

cial record for purposes of judicial review. N.C.G.S. §§ 150B-41(b), 150B-42(a)-(b), 150B-47 (2003). In *Dailey*, we emphasized that the preservation of a record for judicial review was a "cornerstone of the Administrative Procedure Act" in that it enables a reviewing court to determine whether an agency, including a professional licensing board, has engaged in a "reasoned evaluation and analysis of [the] evidence presented." 309 N.C. at 724, 309 S.E.2d at 227. We further stated that while a licensing board " 'may put its expertise to use in evaluating the complexities of technical evidence,' " it " 'may not use its expertise as a substitute for evidence in the record.' " *Id.* (quoting *Arthurs v. Board of Registration in Med.*, 383 Mass. 299, 310, 418 N.E.2d 1236, 1244 (1981)).

Leahy in no way derogates from this aspect of our reasoning in *Dailey*. As we clarified in *Leahy*, "[t]he concern in *Dailey* was that the board would use its own expertise to decide the case *without any evidence to support it.*" *Leahy*, 346 N.C. at 780, 488 S.E.2d at 248 (emphasis added). In *Leahy*, however, "there [was] evidence in the record which the Board could use its expertise to interpret," including eyewitness testimony describing the petitioner's conduct. *Id.* We upheld the revocation of the petitioner's license in *Leahy* because we determined that (1) the Nursing Board was entitled to use its expertise in interpreting the evidence presented and (2) that expertise included knowledge of the standard of care for nurses. *Id.* at 780-81, 488 S.E.2d at 248. The petitioner's right to meaningful judicial review was preserved because "[f]rom the record, we [were] able to determine the validity of the Board's action." *Id.* at 780, 488 S.E.2d at 248.

Leahy overruled *Dailey* to the extent that *Dailey* implied the standard of care in licensing board cases must be established by expert testimony. *Leahy*, 346 N.C. at 781, 488 S.E.2d at 249. Under *Leahy*, where knowledge of the requisite standard of care must be within the board's specialized knowledge and expertise, the board may apply the appropriate standard even "if no evidence of it is introduced." *Id. Leahy* does not, however, empower a licensing board to base its findings or conclusions on facts outside the record. *See Sibley v. North Carolina Bd. of Therapy Exam'rs*, 151 N.C. App. 367, 378-79, 566 S.E.2d 486, 492-93 (2002) (Greene, J., dissenting) (citing *Leahy* for the proposition that board findings "must be based on the evidence and cannot merely rest on the Board's expertise with respect to the practice of physical therapy"), *rev'd per curiam for the reasons stated in the dissent*, 357 N.C. 42, 577 S.E.2d 622 (2003). Nor

does *Leahy* excuse an agency from its statutory obligation to reach a reasoned decision based on "substantial evidence . . . in view of the entire record." N.C.G.S. § 150B-51(b)(5) (2003). Accordingly, *Leahy* does not undermine a licensee's right to seek meaningful judicial review of the Board's decision.

II.

[2] The next issue presented is whether there was substantial evidence in the record to support the Board's findings of fact and conclusions of law with respect to petitioner's treatment of Casto and Naico.

Judicial review of the final decision of an administrative agency in a contested case is governed by section 150B-51(b) of the APA. N.C.G.S. § 150B-51(b). When the issue for review is whether an agency's decision was supported by substantial evidence in view of the entire record, N.C.G.S. § 150B-51(b)(5), a reviewing court must apply the "whole record" test. *Mann Media, Inc. v. Randolph Cty Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002); *In re Gordon*, 352 N.C. 349, 352, 531 S.E.2d 795, 797 (2000). A court applying the whole record test may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*. *Elliot v. North Carolina Psychology Bd.*, 348 N.C. 230, 237, 498 S.E.2d 616, 620 (1998) (citing *Thompson v. Wake Cty Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977)); *Boehm v. North Carolina Bd. of Podiatry Exam'rs*, 41 N.C. App. 567, 569, 255 S.E.2d 328, 330 (1979), *cert. denied*, 298 N.C. 294, 259 S.E.2d 298 (1979). Rather, a court must examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision. *Elliot*, 348 N.C. at 237, 498 S.E.2d at 620 (citing *Thompson*, 292 N.C. at 410, 233 S.E.2d at 541). "Substantial evidence" is defined as "relevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C.G.S. § 150B-2(8b) (2003); *State ex rel. Comm'r of Ins. v. North Carolina Fire Ins. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977).

We first examine the sufficiency of the evidence to support the Board's findings and conclusions regarding Casto. Casto, a minor child, first presented to petitioner's office on 22 April 1996. Petitioner diagnosed Casto as having a Class I malocclusion, "severely crowded locked out maxillary bicuspids, and severely crowded mandibular

anterior incisors." Dental molds revealed that Casto presented to petitioner with a "midline deviation" of two millimeters. Petitioner devised a treatment plan of "therapeutic nonextraction," which called for the initial use of orthodontic appliances with possible future extractions of the upper and lower right first bicuspids.

Petitioner did not initiate Casto's treatment until four months later, on 26 August 1996. Although petitioner's office informed Casto's mother (Ms. Casto) that it was awaiting notification of Casto's Medicaid approval during this period, petitioner admits that his office never actually submitted the case to Medicaid.

On 22 October 1997, petitioner referred Casto for the extraction of his upper and lower right first bicuspids and continued treatment with orthodontic appliances. In the spring of 1998, after nearly two years of treatment, Ms. Casto became dissatisfied with her son's progress under petitioner's care and demanded an estimate of how much additional time Casto's treatment would require. Petitioner estimated that Casto would require an additional year of treatment. After petitioner's office cancelled three consecutive appointments for various reasons in August 1998, Ms. Casto consulted her general dentist for a referral to a different orthodontist.

That orthodontist, Dr. Trentini, testified at petitioner's hearing as an expert witness for the Board. Dr. Trentini testified that based on his initial consultation and a review of Casto's records, Casto would require an additional eighteen months of treatment. He also testified that Casto's treatment was "behind schedule, clearly" at the time Casto first presented to his office and that petitioner's decision to pursue unilateral extractions on the right side only of Casto's mouth had worsened Casto's preexisting midline deviation in violation of the applicable standard of care. In a letter addressed to the Board and entered into evidence at petitioner's hearing, Dr. Trentini further stated that in his opinion "[Casto's] treatment prior to transferring was significantly delayed relative to his time in treatment."

In light of these facts, the Board found that petitioner had breached the requisite standard of care for orthodontists by failing to establish and follow a treatment plan which would address Casto's orthodontic needs "in a timely manner." The Board concluded that this breach of the requisite standard of care constituted negligence in the practice of dentistry within the meaning of N.C.G.S. § 90-41(a)(12).

Having reviewed the whole record, we cannot say that the Board's finding that petitioner failed to treat Casto "in a timely manner" was unsupported by substantial evidence. Although the Board did not receive expert testimony specifically stating that the standard of care for dentists practicing orthodontics requires "timeliness" in the treatment of patients, the Board was entitled under *Leahy* to apply its expert knowledge of this standard of care to the facts before it, even if "no evidence of [the standard of care was] introduced." *Leahy*, 346 N.C. at 781, 488 S.E.2d at 249. In the present case, the Board could reasonably have concluded that petitioner's delay in initiating treatment, his decision to pursue an initial policy of "therapeutic nonextraction," and his eventual decision to extract unilaterally on one side of the mouth all contributed to an unreasonable delay in Casto's progress as an orthodontic patient.

In his brief, petitioner suggests that any delay in Casto's treatment resulted from either patient noncompliance or appliance breakage that cannot be attributed to negligence on petitioner's part. Petitioner cites no record evidence in support of this contention. Nonetheless, the record does reflect that petitioner regularly instructed his patients not to chew on hard foods or objects to avoid breaking brackets. Moreover, Casto admits that on at least one occasion he broke a bracket by chewing on a pen in contravention of petitioner's instructions.

We agree that this evidence tends to detract from the Board's findings that any delay in Casto's treatment was attributable to petitioner's negligence, and we encompass this evidence within our review of the whole record. We note, however, that the Board was also presented with evidence that tends to undermine petitioner's "broken bracket" defense. First, Casto and his mother both testified that Casto's brackets often came loose immediately or shortly after placement, suggesting that improper placement, not patient noncompliance, was the cause of the problem. Second, Dr. Trentini testified that it was his practice to repair broken brackets at a patient's regularly scheduled appointment, in addition to completing any previously scheduled work. Petitioner, on the other hand, repaired broken brackets at a patient's regularly scheduled appointment but typically rescheduled for any previously scheduled work, thus necessarily extending the course of treatment. Finally, Dr. Trentini testified that Casto had only one "loose" bracket in nineteen months of treatment with him. By comparison, petitioner's treatment records for Casto reflect at least five broken brackets over the course of twenty-one months.

In cases appealed from an administrative tribunal, it is the responsibility of the administrative body, not a reviewing court, "to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence." *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 406, 269 S.E.2d 547, 565 (1980). Thus, it fell within the province of the Board to determine whether the delay in Casto's treatment was attributable to a flawed treatment plan, as Dr. Trentini testified, or to patient noncompliance, as petitioner alleges. To the extent the evidence diverges, we defer to the Dental Board's resolution of any conflicts. On the basis of the record before us, we cannot conclude that the Board lacked "relevant evidence a reasonable mind might accept as adequate," N.C.G.S. § 150B-2(8b), to support its conclusion that petitioner's treatment of Casto was untimely and that such untimeliness was a breach of the requisite standard of care for dentists practicing orthodontics in North Carolina.

We now turn to the sufficiency of the evidence to support the Board's findings and conclusions concerning Naico.

Naico, a minor child, first presented at petitioner's office on 5 December 1996, seeking treatment for an overbite and gaps in his teeth. Petitioner diagnosed Naico as having a class II malocclusion, one hundred percent overbite, and four to six millimeter overjet. Prior to initiating treatment, petitioner took records, including a panorex radiograph, cephalometric radiograph, and trimmed study models. Petitioner admits, however, that he did not take intraoral or facial photographs.

Petitioner's initial treatment plan called for the use of a biteplate and orthodontic braces, and a Medicaid pre-authorization form indicated a twenty-four month course of treatment. In May 1998, however, petitioner informed Naico's mother (Ms. Naico) that Naico's treatment would require extraction of the upper first premolars. On 26 May 1998, after nine months of treatment, petitioner referred Naico to a general dentist for these extractions. A year later, after twenty-one months of treatment, petitioner became concerned that Naico's case "was progressing probably in less than an ideal way" and began considering other possible treatment options, including further extractions and oral surgery. Dissatisfied with the progress her son had made in petitioner's care, and alarmed at the prospect of further extractions when the gaps in Naico's teeth were not being closed, Ms. Naico discontinued treatment with petitioner in May 1999.

At petitioner's hearing, the Board presented the expert testimony of Dr. James Kaley, an orthodontist. Dr. Kaley testified that the standard of care for dentists licensed to practice in North Carolina requires an orthodontist to take intraoral and facial photographs prior to initiating treatment and that petitioner breached this standard of care in his treatment of Naico. Dr. Kaley stated that petitioner's treatment plan was inappropriate in that it failed to correct Naico's orthodontic problems in a timely manner. Specifically, Dr. Kaley testified that petitioner's initial treatment plan would never have corrected Naico's orthodontic problems, that this should have been evident to petitioner from the beginning, and that the standard of care required petitioner to recommend either surgery or the use of a Herbst appliance as the appropriate treatment plan for Naico at the outset. Dr. Kaley also testified that petitioner's treatment plan failed to address several of Naico's orthodontic problems, including a missing lower left central incisor and angled left second molar. Dr. Kaley stated that with a proper diagnosis and treatment, Naico's treatment could have been completed within two to two-and-a-half years. With petitioner's treatment plan, however, Dr. Kaley did not believe that a satisfactory result could be reached "regardless of time."

Based on the testimony and physical evidence presented at the hearing, the Board found that petitioner breached two applicable standards of care with respect to Naico. First, the Board found that the standard of care for dentists licensed to practice in North Carolina requires an orthodontist "to take, or have available, intraoral and facial photographs prior to initiating orthodontic treatment" and that petitioner breached this standard of care by failing to include such photographs in Naico's treatment records. Second, the Board found that petitioner breached the requisite standard of care for dentists licensed to practice in North Carolina by failing "to formulate an appropriate treatment plan to remedy the problems diagnosed in a timely manner."

Petitioner disputes both of these findings. First, petitioner argues that notwithstanding Dr. Kaley's testimony, the Board lacked substantial evidence to support its finding that petitioner's failure to include intraoral or facial photographs in Naico's treatment records breached an applicable standard of care. In support of this contention, petitioner asserts that photographs are not necessary for a proper diagnosis, as they do not show anything that cannot be observed with the naked eye. Petitioner also alleges that a leading treatise on orthodontic care does not list intraoral or facial pho-

tographs as a necessary diagnostic tool. Finally, petitioner contends that because Dr. Kaley's testimony did not address the comparative value of photographs over the diagnostic tools petitioner did employ, Dr. Kaley's testimony does not constitute substantial evidence in support of the Board's findings.

After careful review of the record, we cannot say that the Board lacked a reasonable basis for its decision. Dr. Kaley testified that photographs are useful both in initial diagnosis and to record a patient's initial condition for later reference. Thus, even assuming intraoral and facial photographs have no value as a diagnostic tool, the Board could reasonably have concluded that the standard of care requires their use as a means to track the progress of orthodontic care. Moreover, the absence of testimony concerning the relative advantages of photographs over other diagnostic tools goes only to the weight of Dr. Kaley's testimony, which is a matter for the Board to decide. *See State ex rel. Comm'r of Ins.*, 300 N.C. at 406, 269 S.E.2d at 565. Similarly, the fact that a learned treatise does not list photographs among the minimum required diagnostic records is not dispositive as to the standard of care. The Board was certainly entitled to reject petitioner's allegations in light of Dr. Kaley's testimony. *See id.*

Next, petitioner contends that Dr. Kaley's testimony about the timeliness of petitioner's treatment of Naico is insufficient to establish the requisite standard of care. Petitioner argues that Dr. Kaley offered his opinion regarding the preferred treatment plans for Naico's orthodontic problems, not his understanding of what the statewide minimum level of competency requires. This argument, however, mischaracterizes Dr. Kaley's testimony. Although Dr. Kaley did testify that his "personal preference" would have been to treat Naico with a Herbst appliance, he also testified that petitioner's actual course of treatment failed to correct Naico's orthodontic problems in a timely manner in violation of the applicable standard of care. Specifically, Dr. Kaley stated that petitioner's failure to treat Naico *either* with surgery *or* with a Herbst appliance resulted in petitioner's initial adoption of a treatment plan with no chance of success. From this evidence, the Board could reasonably have concluded that petitioner failed to conform to a statewide level of minimum competency applicable to all dentists practicing orthodontics in North Carolina. Thus, the Board's findings are supported by substantial evidence in view of the entire record and are binding on appeal.

III.

[3] The final issue presented is whether the Board erred as a matter of law in concluding that petitioner's refusal to treat Wolfe due to nonpayment constituted "negligen[ce] in the practice of dentistry" within the meaning of N.C.G.S. § 90-41(a)(12).

Wolfe, a minor child, first presented to petitioner's office on 24 January 1996, complaining of crooked and crowded teeth. Petitioner diagnosed Wolfe as having a Class I malocclusion, "severely crowded with overlapping of the maxillary central incisors and mandibular anterior crowding," and proposed a treatment plan requiring the extraction of four bicuspids following the initial use of orthodontic appliances. Between August 1996 and July 1997, petitioner saw Wolfe in his office on eight occasions, during which time he took records, placed separators, and finally placed orthodontic bands and wires in Wolfe's mouth. Petitioner delayed the proposed extractions while awaiting Medicaid approval of Wolfe's case.

On 12 August 1997, eleven days after Wolfe's Medicaid claim was denied, Wolfe's mother (Ms. Wolfe) consented to pay for petitioner's orthodontic services, and Wolfe was referred to a general dentist for the extraction of four teeth. By the terms of the written guarantor contract, Ms. Wolfe agreed to make thirty-five installment payments on the first of each month. On 8 October 1997, Wolfe arrived for a scheduled appointment and was advised that she would have to reschedule due to nonpayment. Wolfe rescheduled for 30 October 1997 and was seen on that day after making her October payment. On 26 November 1997, Wolfe was again sent away from a scheduled appointment due to nonpayment. Wolfe did not return to petitioner's office after this occasion.

At petitioner's hearing, a Dental Board investigator testified that petitioner had stated it was office policy to refuse treatment to patients who owed a balance on their accounts. Petitioner denied having such a policy, but admitted that Wolfe was twice denied treatment due to nonpayment. Dr. Numa Cobb, an orthodontist, testified as an expert witness for the Board concerning the standard of care for dentists licensed to practice in North Carolina. Dr. Cobb testified that the standard of care "very clearly" requires a dentist to continue to see an orthodontic patient even though there is an outstanding balance on his or her account. According to Dr. Cobb, the standard of care requires a dentist to continue treating a patient who is not making payments unless and until the dentist (1) sends the patient a let-

ter terminating the dentist-patient relationship and (2) provides the patient with an opportunity to find another orthodontist. Dr. Cobb further testified that petitioner's office "abandoned" Wolfe as a patient when Wolfe was refused treatment due to nonpayment and that this abandonment violated the requisite standard of care.

Based on the evidence presented, the Board found that the standard of care for dentists licensed to practice in North Carolina requires that "once orthodontic treatment is initiated, the dentist must continue to treat a patient with an outstanding balance until that patient has been formally dismissed by the practice and given a period of time to find another dentist to continue treatment." The Board concluded that petitioner violated this standard of care by refusing to treat Wolfe because of an outstanding balance on her account. The Board concluded that this violation of the applicable standard of care "was a dereliction from professional duty constituting negligence in the practice of dentistry within the meaning of N.C.G.S. § 90-41(a)(12)."

Petitioner argues, and the Court of Appeals held, that an orthodontist's rescheduling practices do not involve the "practice of dentistry," and thus petitioner cannot be disciplined under section 90-41(a)(12) of the Dental Practice Act. *Watkins*, 157 N.C. App. at 374, 579 S.E.2d at 515. According to petitioner and the Court of Appeals majority, an orthodontist's questionable rescheduling practices are more appropriately viewed as "unprofessional conduct," bringing such practices within the purview of section 90-41(a)(26). *Id.* at 374-75, 579 S.E.2d at 515 (2003). Section 90-41(a)(26) of the Dental Practice Act provides that the Board may revoke or suspend the license of a dentist who "[h]as engaged in any unprofessional conduct as the same may be, from time to time, defined by the rules and regulations of the Board." N.C.G.S. § 90-41(a)(26). Because the Board's rules and regulations are silent with regard to rescheduling practices, petitioner argues, the Board lacked authority to discipline him for his refusal to treat Wolfe.

At the outset, we agree with petitioner that whether a dentist's refusal to treat a patient due to nonpayment constitutes "the practice of dentistry" or "unprofessional conduct" within the meaning of the applicable statute is a question of law subject to *de novo* review. *See Brooks v. McWhirter Grading Co.*, 303 N.C. 573, 580-81, 281 S.E. 2d 24, 29 (1981). We note, however, that the construction given to a statute by the administrative agency charged with the statute's enforcement is entitled to due consideration by a reviewing court.

Faizan v. Grain Dealers Mut. Ins. Co., 254 N.C. 47, 57, 118 S.E.2d 303, 310 (1961); *see also Gill v. Board of Comm'rs of Wake Cty*, 160 N.C. 176, 188, 76 S.E. 203, 208 (1912). In the instant case, the Dental Board expressly concluded that petitioner's refusal to treat Wolfe due to nonpayment "was a dereliction from professional duty constituting negligence in the practice of dentistry within the meaning of G.S. § 90-41(a)(12)." Although it is not dispositive, the Board's construction of the statutory term the "practice of dentistry" to encompass the refusal to see or treat a patient is persuasive authority for this Court. *See Faizan*, 254 N.C. at 57, 118 S.E.2d at 310.

We also note that our primary task in construing a statute is to effectuate the intent of the legislature. *State ex rel. Comm'r of Ins.*, 300 N.C. at 399, 269 S.E.2d at 561; *In re Beatty*, 286 N.C. 226, 229, 210 S.E.2d 193, 195 (1974). We have previously identified the "best indicia of . . . legislative purpose" to be " 'the language of the statute, the spirit of the act, and what the act seeks to accomplish.' " *State ex rel. Comm'r of Ins.*, 300 N.C. at 399, 269 S.E.2d at 561 (quoting *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972)).

Applying these principles, we turn first to the language of the Dental Practice Act. Section 90-29(b) of the Dental Practice Act enumerates thirteen "acts or things" that constitute the "practice of dentistry." N.C.G.S. § 90-29(b). These "acts or things" include not only clinical procedures such as removing stains, extracting teeth, and correcting the malposition of teeth, *see* N.C.G.S. § 90-29(b)(2),(3),(5), but also broadly defined managerial and advertising practices, *see* N.C.G.S. § 90-29(b)(11),(12),(13). Specifically, subsection 90-29(b)(11) provides that a dentist is engaged in the "practice of dentistry" when he or she "[o]wns, manages, supervises, controls or conducts . . . any enterprise wherein any one or more of the [clinical] acts or practices set forth in subdivisions (1) through (10) above are done, attempted to be done, or represented to be done." N.C.G.S. § 90-29(b)(11). In the present case, it is reasonable to characterize petitioner's refusal to see or treat a patient as a facet of his management, supervision, control, or conduct of his dental practice. Thus, the language of the Act is amenable to the construction placed upon it by the Board.

In pursuing the next two prongs of our inquiry, the spirit and legislative goals of the Dental Practice Act, we need look no farther than the Act itself. The Dental Practice Act expressly declares that "the practice of dentistry . . . affect[s] the public health, safety, and wel-

fare," and is therefore "subject to regulation and control in the public interest." N.C.G.S. § 90-22(a). The Act further provides that it "shall be liberally construed to carry out these objects and purposes." *Id.* In the instant case, we agree with the Board's assertion that a dentist's refusal to treat a patient due to nonpayment may directly and adversely affect a patient's health. This conclusion draws support from the expert testimony of Dr. Cobb, an orthodontist, who stated at petitioner's hearing that a patient in braces who does not receive follow-up treatment may experience "periodontal lesions, periodontal disease . . . loose bands, caries beneath the bands, loose brackets, loose wires, [and] wires going into the [t]issue." Because the Dental Practice Act was intended to guard against such threats to the public health, and because the Act is to be liberally construed to effectuate this purpose, a dentist's refusal to treat a patient may appropriately be characterized as the "practice of dentistry" as defined in N.C.G.S. § 90-29(b).

Petitioner also argues, however, that even if an orthodontist's refusal to see or treat a patient constitutes "the practice of dentistry," Wolfe had already "voluntarily terminated" the dentist-patient relationship. Petitioner notes that Wolfe was refused treatment on 8 October and 26 November 1997. In her complaint, however, Wolfe alleged that she "had contacted the office in August or September of '97 to tell them [she] did not want to see them anymore." Because Wolfe had terminated the dentist-patient relationship prior to the incidents complained of, petitioner contends, petitioner owed her no professional duty, and his refusal to treat her cannot constitute "negligence" in the practice of dentistry under section 90-41(a)(12).

The Court of Appeals found this argument persuasive and held that because Wolfe "was no longer a patient of record" at the time she was refused treatment, petitioner's failure to treat her could not constitute "negligence" under section 90-41(a)(12). *Watkins*, 157 N.C. App. at 375, 579 S.E.2d at 515. We disagree. Notwithstanding petitioner's allegations, the Board found as a fact that Wolfe was a patient of record at the time she was denied treatment due to nonpayment. Because this finding is supported by substantial evidence in view of the entire record, it is binding on appeal.

In her complaint, Wolfe stated that she contacted petitioner's office in August or September 1997 "to tell them [she] did not want to see them anymore because of financial reasons [and because she] wanted an office in High Point where [she] live[d]." Nevertheless,

Wolfe continued to receive orthodontic treatment from petitioner during October and November of that year. From this evidence, the Board could reasonably have concluded that Wolfe had merely expressed her desire to discontinue treatment with petitioner at some point in the future. Alternatively, the Board could reasonably have concluded that Wolfe had changed her mind about terminating the dentist-patient relationship. In any event, the Board possessed "relevant evidence a reasonable mind might accept as adequate," N.C.G.S. § 150B-2(8b), to support its conclusion that petitioner's refusal to treat Wolfe breached a duty to Wolfe and thus constituted negligence in the practice of dentistry under N.C.G.S. § 90-41(a)(12).

Moreover, Dr. Cobb testified at petitioner's hearing that a telephone call from a patient expressing a desire to discontinue treatment does not terminate the dentist-patient relationship. Instead, Dr. Cobb testified, the dentist-patient relationship continues until a patient is formally released by the dentist. The record contains no indication that petitioner formally dismissed Wolfe from his care prior to his refusal to treat her. Thus, the Board could reasonably have concluded that petitioner's professional duties to Wolfe survived any attempt on Wolfe's part to sever the professional relationship. Accordingly, the Board's determination that petitioner's refusal to treat Wolfe constituted "negligence" in the practice of dentistry is supported by substantial evidence in view of the entire record.

In conclusion, the Board acted within its authority in determining that petitioner had breached the applicable standard of care in his treatment of Casto. In addition, the Board's findings of fact and conclusions of law are supported by substantial competent evidence in view of the whole record. Finally, the Board properly concluded that petitioner's refusal to treat Wolfe because of an outstanding balance on her account constituted negligence in the practice of dentistry within the meaning of N.C.G.S. § 90-41(a)(12). Accordingly, the decision of the Court of Appeals is reversed and the case is remanded to the Court of Appeals for further remand to the trial court for entry of judgment affirming the Board's disciplinary order.

REVERSED AND REMANDED.

ALICE MONROE NELSON, LINDA L. MONROE, R.B. MONROE KELLY, JULIAN D. KELLY, JR., MOYNA MONROE, ALICE BLANC MONROE NELSON AND HUSBAND L. KENT NELSON, BUNROTHA LIMITED PARTNERSHIP, KATALANTA CORP., KATHRYN B. HEDRICKS, SUSAN B. INMAN, SAMUEL N. EVINS, JR., WALTER P. EVINS, MARGARET EARLY, MARY PRESSLEY, SIDNEY McCARTY, III, MILDRED JOHNSON, JOHN HENRY CHEATHAM, TRUSTEE OF THE LIELA BARNES CHEATHAM NORTH CAROLINA RESIDENCE TRUST v. TOWN OF HIGHLANDS, A MUNICIPAL CORPORATION

MICHAEL WENTZ v. TOWN OF HIGHLANDS, A MUNICIPAL CORPORATION

No. 478A03

(Filed 2 April 2004)

Eminent Domain— condemnation by town—owners' right to pursue injunctive relief

The decision by the Court of Appeals that plaintiff landowners had no right to institute an action for injunctive relief to prohibit defendant town from proceeding with the condemnation of their property because plaintiffs had an adequate remedy at law through the condemnation proceeding is reversed for the reason stated in the dissenting opinion that the legislature, in revising the eminent domain statutes by N.C.G.S. Ch. 40A, intended to preserve the rights of all parties to pursue injunctive relief.

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. 393, 583 S.E.2d 313 (2003), affirming orders entered 15 January 2002 by Judge James U. Downs in Superior Court, Macon County. Heard in the Supreme Court 18 February 2004.

Adams Hendon Carson Crow & Saenger, P.A., by Martin Reidinger, for plaintiff-appellants.

Coward, Hicks & Siler, P.A., by William H. Coward, for defendant-appellant.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed and this case is remanded to that court for further remand to the Superior Court, Macon County, for proceedings not inconsistent with the dissenting opinion.

REVERSED AND REMANDED.

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

JAY T. PINTACUDA AND WIFE LUCRETIA PINTACUDA v. JACK ZUCKEBERG

No. 509A03

(Filed 2 April 2004)

Motor Vehicles— car stopping in highway—skidding motorcyclist—proximate cause

The decision of the Court of Appeals that summary judgment for defendant was inappropriate on the issue of proximate cause in an action by plaintiff motorcyclist to recover for injuries received when defendant stopped his car on an interstate highway in front of plaintiff and plaintiff's motorcycle skidded when he swerved into an adjoining lane is reversed for the reason stated in the dissenting opinion that plaintiff's own deposition testimony shows that defendant's act of stopping his vehicle was merely a circumstance of the accident and not the proximate cause of plaintiff' injuries.

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. 617, 583 S.E.2d 348 (2003), reversing an order entered 17 May 2002 by Judge Robert D. Lewis, in Superior Court, Buncombe County. On 1 October 2003, the Supreme Court granted discretionary review as to additional issues. Heard in the Supreme Court 15 March 2004.

Roberts & Stevens, P.A., by Jacqueline D. Grant and Kenneth R. Hunt, for plaintiffs-appellees.

Van Winkle, Buck, Wall, Starnes, & Davis, P.A., by Dale A. Curriden and Vaughn S. Monroe, for defendant-appellant.

PER CURIAM.

As to the issue on direct appeal, we reverse the decision of the Court of Appeals for the reasons stated in the dissenting opinion.

Further, we conclude that the petition for discretionary review as to the additional issues was improvidently allowed.

REVERSED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

FANNY LEE BROWN, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR SCOTTIE NOBLES, A MINOR v. FLOYD TRAVIS MILLSAP

No. 640A03

(Filed 2 April 2004)

Costs— attorney fees—amount of judgment—costs and prejudgment interest—addition to compensatory damages

The decision of the Court of Appeals that the trial court improperly added court costs of $435 and prejudgment interest of $669.76 to the jury verdict of $9,500 in compensatory damages to find that the judgment obtained exceeded the $10,000 limit for awarding attorney fees under N.C.G.S. § 6-21.1 is reversed for the reason stated in the dissenting opinion that, although the trial court erred in adding discretionary court costs to the verdict, prejudgment interest of $669.76 should have been added because it is automatically added to the award to compensate the prevailing party, and the $10,000 limit was thus exceeded even if court costs are not added to the verdict.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 161 N.C. App. ——, 588 S.E.2d 71 (2003), reversing a judgment signed 28 September 2002 *nunc pro tunc* by Judge Wiley F. Bowen in Superior Court, Columbus County. Heard in the Supreme Court 17 March 2004.

T. Craig Wright for plaintiff-appellee.

Russ, Worth, Cheatwood & Hancox, by Philip H. Cheatwood, for defendant-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Robert H. Griffin and Jaye E. Bingham, on behalf of Nationwide Insurance Company, amicus curiae.

PER CURIAM.

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

REVERSED.

RUTH E. DOWNS, FRANK C. REYNOLDS, JR., AND MARGUERITE C. REYNOLDS v. STATE OF NORTH CAROLINA, THE NORTH CAROLINA DEPARTMENT OF REVENUE, E. NORRIS TOLSON, IN HIS CAPACITY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF REVENUE, AND THE HONORABLE ROY COOPER, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA

No. 395PA03

(Filed 2 April 2004)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 159 N.C. App. 220, 582 S.E.2d 638 (2003), reversing an order granting summary judgment for plaintiffs entered 24 April 2002 by Judge David Q. LaBarre in Superior Court, Wake County, and remanding for entry of summary judgment for defendants. Heard in the Supreme Court 16 March 2004.

Webb & Graves, PLLC, by Rick E. Graves and Heath K. Dedmond, for plaintiff-appellants.

Roy Cooper, Attorney General, by George W. Boylan, Special Deputy Attorney General, for defendant-appellees.

PER CURIAM.

AFFIRMED.

THE BOARD OF DRAINAGE COMMISSIONERS OF PITT COUNTY DRAINAGE DISTRICT NO. 3, THE BOARD OF DRAINAGE COMMISSIONERS OF EDGECOMBE COUNTY, DISTRICT NO. 2, THE BOARD OF DRAINAGE COMMISSIONERS OF CHOWAN COUNTY, DISTRICT NO. 3, THE BOARD OF DRAINAGE COMMISSIONERS OF PITT COUNTY, DISTRICT NO. 2, THE BOARD OF DRAINAGE COMMISSIONERS OF PITT COUNTY, DISTRICT NO. 4, THE BOARD OF DRAINAGE COMMISSIONERS OF PITT COUNTY, DISTRICT NO. 7, THE BOARD OF DRAINAGE COMMISSIONERS OF PITT COUNTY, DISTRICT NO. 8, THE BOARD OF DRAINAGE COMMISSIONERS OF PITT COUNTY, DISTRICT NO. 9, THE BOARD OF DRAINAGE COMMISSIONERS OF LENOIR/CRAVEN/JONES, DISTRICT NO. 1, THE BOARD OF DRAINAGE COMMISSIONERS OF PERQUIMANS COUNTY, DISTRICT NO. 4, THE BOARD OF DRAINAGE COMMISSIONERS OF WAYNE COUNTY, DISTRICT NO. 1, AND SOUTHEASTERN DRAINAGE OFFICE, INC. V. TERRY RAY DIXON, CHARLES OLIVER DOVE, PAMELA S. DOVE, MARY D. DUNN, THE HOMESTEAD OF PITT, INC. D/B/A HOMESTEAD MEMORIAL GARDENS, THE HOMESTEAD OF PITT, INC. D/B/A HOMESTEAD MEMORIAL GARDENS, AND DOVE'S MONUMENTS, INC.

No. 381PA03

(Filed 2 April 2004)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 158 N.C. App. 509, 581 S.E.2d 469 (2003), reversing an order entered 4 October 2001 by Judge Thomas D. Haigwood in Superior Court, Pitt County. On 1 October 2003, the Supreme Court allowed defendants' conditional petition for discretionary review as to additional issues. Heard in the Supreme Court 16 March 2004.

Ward & Smith, P.A., by Lance P. Martin and Michael P. Flanagan, for plaintiffs-appellants and -appellees.

Mills & Economos, LLP, by Larry C. Economos, for defendant-appellee and -appellant Charles Oliver Dove.

PER CURIAM.

The decision of the Court of Appeals is affirmed. Discretionary review improvidently allowed as to defendants' conditional petition for discretionary review.

AFFIRMED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA v. STEVEN DANIEL FISHER

No. 356A03

(Filed 2 April 2004)

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. 133, 580 S.E.2d 405 (2003), finding no error in the judgment entered 13 August 2001 by Judge Wiley F. Bowen in Superior Court, Harnett County. Heard in the Supreme Court 17 February 2004.

Roy Cooper, Attorney General, by Jonathan P. Babb, Special Deputy Attorney General, for the State.

Paul M. Green for defendant-appellant.

Kurtz & Blum, PLLC, by Stephen J. Batten, and Seth H. Jaffe, on behalf of the American Civil Liberties Union of North Carolina Legal Foundation, Inc., amicus curiae.

PER CURIAM.

AFFIRMED.

RIDGEFIELD PROPS., L.L.C. v. CITY OF ASHEVILLE

[358 N.C. 216 (2004)]

RIDGEFIELD PROPERTIES, L.L.C., RIDGEFIELD WOMEN'S CANCER CENTER PROPERTIES, L.L.C., CONTINENTAL TEVES, INC., ASHEVILLE ENDOCRINOLOGY PROPERTIES, L.L.C., RIDGEFIELD BUSINESS CENTER PROPERTY OWNERS ASSOCIATION, INC., GEORGE W. BEVERLY, JR., HIGHWOODS REALTY LIMITED PARTNERSHIP, HIGHWOODS/FORSYTH LIMITED PARTNERSHIP AP SOUTHEAST PORTFOLIO PARTNERS, L.P. v. CITY OF ASHEVILLE, A NORTH CAROLINA MUNICIPAL CORPORATION

No. 484A03

(Filed 2 April 2004)

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. 376, 583 S.E.2d 400 (2003), reversing and remanding a judgment entered 20 February 2002 by Judge Richard L. Doughton in Superior Court, Buncombe County. Heard in the Supreme Court 15 March 2004.

Adams Hendon Carson Crow & Saenger, P.A., by S.J. Crow and Martin K. Reidinger, for petitioner-appellees.

Robert W. Oast, Jr. and William F. Slawter, for respondent-appellant.

PER CURIAM.

AFFIRMED.

NATIONAL ALLIANCE FOR THE MENTALLY ILL v. COUNTY OF CUMBERLAND

[358 N.C. 217 (2004)]

NATIONAL ALLIANCE FOR THE MENTALLY ILL, CUMBERLAND COUNTY, INC. v. COUNTY OF CUMBERLAND, NORTH CAROLINA

No. 470PA03

(Filed 2 April 2004)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 159 N.C. App. 466, 583 S.E.2d 426 (2003), affirming a judgment entered 14 June 2002 by Judge James Floyd Ammons, Jr. in Superior Court, Cumberland County. Heard in the Supreme Court 18 March 2004.

Law Offices of Wade Byrd, by Gerald F. Meek, for plaintiff-appellee.

Grainger R. Barrett for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

RIFENBURG CONSTRUCTION, INC. v. BRIER CREEK ASSOCIATES LIMITED PARTNERSHIP, NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, RTP ASSEMBLAGE ASSOCIATES, LLC, ATHENA AIRPORT ASSEMBLAGE, LP, AND ATHENA AIRPORT ASSEMBLAGE CORP.

No. 583A03

(Filed 2 April 2004)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 160 N.C. App. 626, 586 S.E.2d 812 (2003), reversing and remanding an order entered 17 May 2002 by Judge Leon Stanback in Superior Court, Wake County. Heard in the Supreme Court 15 March 2004.

Safran Law Offices, by Perry R. Safran, John M. Sperati, and Brian J. Schoolman, for plaintiff-appellant.

Roy Cooper, Attorney General, by Joseph E. Herrin, Assistant Attorney General, for defendant-appellee North Carolina Department of Transportation.

PER CURIAM.

AFFIRMED.

STEPHENSON v. BARTLETT

[358 N.C. 219 (2004)]

ASHLEY STEPHENSON, INDIVIDUALLY, AND AS A RESIDENT AND REGISTERED VOTER OF BEAUFORT COUNTY, NORTH CAROLINA; LEO DAUGHTRY, INDIVIDUALLY, AND AS REPRESENTATIVE FOR THE 28TH DISTRICT, NORTH CAROLINA HOUSE OF REPRESENTATIVES; PATRICK BALLANTINE, INDIVIDUALLY, AND AS SENATOR FOR THE 9TH DISTRICT, NORTH CAROLINA SENATE; ART POPE AND BILL COBEY, INDIVIDUALLY 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

RICHARD T. MORGAN, CO-SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; JAMES B. BLACK, CO-SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; AND MARC BASNIGHT, PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE v. ASHLEY STEPHENSON, LEO DAUGHTRY, PATRICK BALLANTINE, ART POPE, AND BILL COBEY

No. 94PA02-3—Johnston, No. 24A04—Wake

(Filed 22 April 2004)

1. Venue— prior constitutional case—venue not ongoing

The plaintiffs in a previous redistricting case did not have a vested right to ongoing venue with the prior judge in the prior county for questions concerning a new redistricting plan and new provisions for judicial review. The prior case concerned the constitutionality of 2001 redistricting plans and efforts to implement a Supreme Court decision in that case. Final orders were issued, the 2002 election was held, and that case is over.

2. Declaratory Judgments— standing—constitutionality of statute—legislators as party

Legislators had standing to file a declaratory judgment action to determine the constitutionality of a statutory plan for judicial review of redistricting issues. Legislative leaders may expect to be sued in further redistricting litigation, and the parties have an ongoing interest in the constitutionality of redistricting plans.

3. Courts— redistricting cases—three-judge panel—not a new court

A statutory plan for review of redistricting issues by a three-judge panel in the Superior Court of Wake County did not unconstitutionally create a new court. Redistricting cases remain in superior court, and the three-judge requirement is a matter of

procedure within the purview of the General Assembly. N.C.G.S. § 1-267.1.

4. Jurisdiction— redistricting cases—three-judge panel in Wake County—not an unconstitutional restriction

A statute providing review of redistricting issues did not unconstitutionally restrict to Wake County the jurisdiction of the three-judge panel of the superior court hearing redistricting cases. The General Assembly did no more than establish venue for lawsuits that challenge redistricting; venue is procedural and the General Assembly has the constitutional power to establish rules of procedure. N.C.G.S. § 1-81.1.

5. Judges— assignment power of Chief Justice—redistricting panel specifications

Statutory provisions requiring judges on redistricting panels to come from different parts of the state do not infringe upon the constitutional power of the Chief Justice to assign judges. The Chief Justice has the unfettered power to select two of the three panel members from dozens of qualified judges, and the requirement that the third choice be one of the resident superior court judges in Wake County and that none of the judges be former members of the General Assembly are logical and sensible. N.C.G.S. § 1-267.1.

6. Courts— redistricting cases—statutory requirements for orders—no violation of judicial authority

The requirement that any judicial order invalidating a redistricting act specify the defects found by the court does not impermissibly limit the authority of the judicial branch. Redistricting is a legislative responsibility, and giving the General Assembly the opportunity to correct flaws allows the General Assembly to exercise its proper responsibilities and is consistent with precedent.

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

Appeal by the *Stephenson* plaintiffs and the *Morgan* defendants from an order transferring venue from Johnston County to Wake County and an order granting summary judgment to the *Morgan* plaintiffs entered 5 January 2004 in Superior Court, Wake County, by Judge Robert H. Hobgood. On 30 January 2004, the Supreme Court of

North Carolina issued an order consolidating the *Stephenson* and *Morgan* actions and allowed the *Stephenson* plaintiffs' motion to suspend the rules for an expedited review of the appeal prior to determination by the North Carolina Court of Appeals. Heard in the Supreme Court 18 March 2004.

Haynsworth Baldwin Johnson & Greaves, LLC, by Thomas A. Farr and Phillip J. Strach; and Hunter Higgins Miles Elam & Benjamin, PLLC, by Robert N. Hunter, Jr. and Jeffrey M. Davis, for plaintiff/defendant-appellants.

Roy Cooper, Attorney General, by Tiare B. Smiley and Alexander McC. Peters, Special Deputy Attorneys General, for defendant-appellees Gary O. Bartlett, Larry Leake, Robert B. Cordle, Genevieve C. Sims, Lorraine G. Shinn, Charles Winfree, Michael Easley, and Roy Cooper, and plaintiff/defendant-appellee James B. Black; Wyrick Robbins Yates & Ponton, by Roger W. Knight and K. Edward Greene, for plaintiff-appellee Richard Morgan; and Smith Moore, LLP, by J. Donald Cowan, for plaintiff/defendant-appellee Marc Basnight.

EDMUNDS, Justice.

Because these cases are procedurally entangled, our first task is to distinguish them. On 16 November 2001, the plaintiffs in *Stephenson v. Bartlett* (*Stephenson*) filed in Superior Court, Johnston County, their first amended complaint, alleging that the 2001 legislative redistricting plans for the North Carolina Senate and House (the 2001 plans), passed by the North Carolina General Assembly after the 2000 census in accordance with Article I, Section 2 of the United States Constitution and Article II, Sections 3 and 5 of the North Carolina Constitution, were flawed. The *Stephenson* plaintiffs' essential contention was that the 2001 plans violated the North Carolina Constitution by dividing counties into separate legislative districts for reasons other than compliance with federal voting law. On 16 November 2001, the Chief Justice of the Supreme Court of North Carolina designated the case as exceptional and assigned Johnston County Resident Superior Court Judge Knox V. Jenkins to preside. On 18 January 2002, the Superior Court, Johnston County, denied the *Stephenson* defendants' motion to change venue from Johnston County to Wake County. The *Stephenson* defendants did not appeal the denial.

On 20 February 2002, the Superior Court, Johnston County, found that the 2001 plans violated the North Carolina Constitution and allowed the *Stephenson* plaintiffs' motion for declaratory and injunctive relief. The court's order included a permanent injunction that prevented the *Stephenson* defendants from conducting future legislative elections under any redistricting plans that violate the North Carolina Constitution. On 7 March 2002, this Court issued an order enjoining legislative primary elections, and on 30 April 2002, affirmed the trial court's order declaring the 2001 plans unconstitutional and granting the *Stephenson* plaintiffs a permanent injunction. *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (*Stephenson I*). In that opinion, this Court established specific criteria to be used by the superior court in evaluating the constitutionality of any new redistricting plans enacted by the General Assembly. We then remanded the case to the superior court with directions that any new redistricting plans, "including any proposed on remand in this case," comply with the criteria. *Id.* at 384, 562 S.E.2d at 397. The superior court was authorized to enter any further orders necessary to implement the holdings of this Court.

The General Assembly thereafter enacted a second set of redistricting plans (the 2002 plans). After the *Stephenson* defendants filed these plans with the Superior Court, Johnston County for judicial review, the *Stephenson* plaintiffs challenged their constitutionality. On 31 May 2002, the superior court entered an order finding that the 2002 plans failed to comply with the requirements set out in *Stephenson I*. The superior court then adopted interim plans and ordered the State to conduct elections in accordance with those plans during the 2002 elections. The *Stephenson* defendants appealed, and on 16 July 2003, this Court affirmed the ruling of the trial court. *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) (*Stephenson II*).

The General Assembly enacted its most recent redistricting plans on 25 November 2003 (the 2003 plans). That same day, the General Assembly enacted 2003 N.C. Session Law 434 (the session law). Act of Nov. 25, 2003, ch. 434, 2003 N.C. Sess. Laws (1st Extra Sess. 2003). Sections 7 through 11 of the session law, which are the focus of this appeal, have been codified as sections 1-81.1, 1-267.1, 120-2.3, and 120-2.4. N.C.G.S. §§ 1-81.1, -267.1, 120-2.3, -2.4 (Special Supp. 2004). Section 1-81.1 provides that venue in any action involving redistricting lies exclusively with the Superior Court, Wake County. N.C.G.S. § 1-81.1. Section 1-267.1(a) provides for a three-

judge panel to hear legal challenges to legislative redistricting plans. N.C.G.S. § 1-267.1(a). The panel, which is to be appointed by the Chief Justice, shall consist of one resident superior court judge from the first through fourth judicial divisions (the eastern part of the state), one resident superior court judge from the fifth through eighth judicial divisions (the western part of the state), and, as the presiding judge, the senior resident superior court judge of Wake County. N.C.G.S. § 1-267.1(b). No judge who has been a member of the General Assembly may serve on the panel. *Id.* All redistricting actions must be heard and determined by the three-judge panel in Superior Court, Wake County. N.C.G.S. § 1-267.1. The session law directed that redistricting actions pending in a court other than Superior Court, Wake County, be transferred to that court. Ch. 434, sec. 11(b), 2003 N.C. Sess. Laws (1st Extra Sess. 2003). If a court finds a redistricting plan is flawed, the General Assembly has an opportunity to correct any defects before the court imposes a substitute plan. N.C.G.S. §§ 120-2.3, -2.4.

On 1 December 2003, the complaint in *Morgan v. Stephenson* (*Morgan*) was filed in Superior Court, Wake County. *Morgan* is a declaratory judgment action in which the plaintiffs seek a determination of the constitutionality of sections 7 through 11 of the session law. Some of the plaintiffs in *Morgan* are defendants in *Stephenson*, and all the defendants in *Morgan* are plaintiffs in *Stephenson*. Also on 1 December 2003, the *Stephenson* plaintiffs filed in Superior Court, Johnston County, their "Plaintiffs' Motion in the Cause for Declaratory and Injunctive Relief Concerning the Jurisdiction and Venue Stripping Provisions of the 2003 N.C. Extra Session Law, Chapter 434." This motion challenged the constitutionality of portions of sections 7 through 11 of the session law and raised the same core issue that the *Morgan* plaintiffs raised in their declaratory judgment action. The following day, the *Stephenson* plaintiffs filed in Superior Court, Johnston County, their "Motion in the Cause to Enforce Judgments and Request for Briefing Schedule and Expedited Hearing." This motion argued that the 2003 plans were unconstitutional under the criteria set out in *Stephenson I* and that they failed to comply with *Stephenson II*.

On 4 December 2003, Judge Jenkins entered an order in Superior Court, Johnston County, staying proceedings in *Stephenson* pending resolution of *Morgan*. In that order, Judge Jenkins noted that Judge Donald W. Stephens, Senior Resident Superior Court Judge in Wake County, had requested that the Chief Justice designate *Morgan* as an

exceptional case and appoint a judge to preside over all Wake County matters. On that same date, by letter to the Chief Justice, Judge Jenkins noted the practical difficulties in having these intertwined matters presided over by different judges in different counties. Because he believed that the Wake County matters took precedence, Judge Jenkins asked to be relieved. On 5 December 2003, the Chief Justice designated *Morgan* and redesignated *Stephenson* as exceptional, and then assigned Superior Court Judge Robert H. Hobgood to preside over both cases. On 12 December 2003, the defendants in *Morgan* moved to dismiss that case. Judge Hobgood denied this motion on 23 December 2003.

On 5 January 2004, Judge Hobgood entered a summary judgment order in *Morgan* in which he struck as facially unconstitutional those parts of the session law that (1) required that the Resident Wake County Superior Court Judge on the panel be the Senior Resident, and (2) required that the Chief Justice consult with the North Carolina Conference of Superior Court Judges and receive from that body a list of recommendations before making appointments to the three-judge panel. Finding that the session law had a severability provision, Judge Hobgood struck the offending portions and upheld the constitutionality of the remaining provisions of the session law. He also entered an order finding that the venue transfer provisions constitutionally applied to pending litigation and, therefore, transferred *Stephenson* from Johnston County to Wake County for resolution by the three-judge panel of any further questions in that case.

On 9 January 2004, the plaintiffs in *Stephenson* filed a notice of appeal from Judge Hobgood's order transferring venue. The defendants in *Morgan* also filed a notice of appeal from Judge Hobgood's summary judgment order and his order denying defendants' motion to dismiss. This Court, on 30 January 2004, issued an order consolidating the *Morgan* and the *Stephenson* actions for the purpose of reviewing the constitutionality of the session law.

[1] We begin by determining the status of *Stephenson*. The *Stephenson* plaintiffs argue that they have a vested right to venue in Johnston County before a single judge and that by enacting the session law, the General Assembly retroactively stripped them of their right, contrary to our holding in *Gardner v. Gardner*, 300 N.C. 715, 268 S.E.2d 468 (1980). In *Gardner*, the plaintiff brought an action in District Court, Wayne County, seeking alimony without divorce. The defendant's initial efforts to have venue changed to Johnston County were unsuccessful. However, during the pendency of the

action, the plaintiff moved to Georgia, and the General Assembly passed a bill to the effect that where one party in such an action has left the state, venue could be changed on motion of the other party. The defendant duly moved for a change of venue to Johnston County, and the motion was allowed. The Court of Appeals reversed the change of venue, and we affirmed, holding that a "statute may be applied retroactively only insofar as it does not impinge upon a right which is otherwise secured, established, and immune from further legal metamorphosis." *Id.* at 719, 268 S.E.2d at 471.

Thus, *Gardner* would apply to the case at bar if the *Stephenson* plaintiffs have a vested right to venue in Johnston County. However, such a right, even if established by circumstances, would exist only if *Stephenson* were an ongoing case. Our review of the record convinces us that *Stephenson I* and *II* together represent the final disposition of the case as it relates to the 2001 plans, the 2002 plans, and the 2002 general election. The issue sought to be litigated by plaintiffs when *Stephenson* was filed was the constitutionality of the General Assembly's 2001 redistricting plans. Modifying and affirming the trial court's order, this Court found in *Stephenson I* that the 2001 plans were not constitutional and set out specific requirements with which any subsequent redistricting plans must comply. When the trial court determined that the General Assembly's 2002 plans failed to meet the requirements set out in *Stephenson I* and developed interim plans for use in the 2002 legislative elections only, the *Stephenson* defendants filed a notice of appeal. This Court reviewed the complete record and concluded that the evidence supported the trial court's findings of fact and conclusions of law that the 2002 plans failed to comply with the standards set out in *Stephenson I* and were constitutionally deficient. *Stephenson II*, 357 N.C. 301, 582 S.E.2d 247.

This sequence demonstrates that while *Stephenson* ostensibly was brought to challenge a specific redistricting, our holding in *Stephenson I* set out for the General Assembly and for any reviewing trial court the requirements that any redistricting plans must meet to pass constitutional muster. Every action that has occurred subsequent to the issuance of our opinion in *Stephenson I* has been directed toward implementing the holding in that case, and none has been aimed at having this Court amend or overrule that holding. In other words, as a result of our opinions in *Stephenson I* and *II*, there is no longer any case and controversy before this Court relating to the constitutional requirements for a North Carolina legislative redistricting plan. Final orders have been issued as to the 2001 plans

and the 2002 plans, and the 2002 elections have been held. The case is over.

Because *Stephenson* is complete, *Gardner* does not apply and the *Stephenson* plaintiffs do not have an ongoing vested right to venue in Johnston County. We are nevertheless aware that legislative redistricting based upon the 2000 decennial census remains an unresolved matter. By letter dated 30 March 2004, the United States Department of Justice has advised the North Carolina Attorney General that it does not interpose any objections to the 2003 plans. Thus, if the *Stephenson* plaintiffs seek to challenge the constitutionality of those plans in terms of our holding in *Stephenson I*, they must file a motion in the cause in *Morgan* or file a complaint in Superior Court, Wake County, pursuant to N.C.G.S. § 1-81.1. Counsel for the *Morgan* plaintiffs acknowledged the possibility of a new suit in the following exchange at the hearing before Judge Hobgood as to the constitutionality of the session law:

> [COUNSEL]: Your Honor, so as I understand it, any challenge to the 2003 redistricting must be filed as a new claim in the 03 case, and the issue there would be whether that redistricting was consistent with the Stephenson line of cases out of Johnston County.
>
> THE COURT: Yes, sir.

For these reasons, the *Stephenson* plaintiffs' challenge to the 2003 redistricting plans was improvidently filed under the *Stephenson* caption.

[2] The trial court also properly denied the *Morgan* defendants' motion to dismiss the declaratory judgment action. The *Morgan* defendants argue that the *Morgan* plaintiffs do not have standing to bring such a suit. However, "[s]tanding to challenge the constitutionality of a legislative enactment exists where the litigant has suffered, or is likely to suffer, a direct injury as a result of the law's enforcement." *Maines v. City of Greensboro*, 300 N.C. 126, 130-31, 265 S.E.2d 155, 158 (1980). The *Morgan* plaintiffs include legislative leaders in the North Carolina General Assembly who, as indicated by *Stephenson*, may expect to be sued in their official capacities in any further redistricting litigation. Therefore, the *Morgan* plaintiffs meet the *Maines* standard.

In addition, the *Morgan* defendants argue that, pursuant to *State ex rel. Edmisten v. Tucker*, 312 N.C. 326, 348, 323 S.E.2d 294, 308-09

(1984), the trial court should not entertain a declaratory judgment action while there is another pending action involving the same issues and parties. However, in light of our holding that *Stephenson* has reached a final disposition, no contemporaneous case exists to conflict with *Morgan*. Moreover, the *Morgan* parties have an ongoing interest in the constitutionality of the statutes governing challenges to redistricting plans. We have recognized that "a petition for declaratory judgment is a particularly appropriate means for determining the constitutionality of a statute when the parties' desire and the public need requires a speedy determination of the important public interests involved." *Id.* Accordingly, we hold that the trial court properly denied the *Morgan* defendants' motion to dismiss the declaratory judgment action.

[3] We now turn to the constitutionality of the session law as codified. First, the *Morgan* defendants argue that N.C.G.S. § 1-267.1 unconstitutionally creates a new court. They contend that the only courts permitted by the North Carolina Constitution are the district courts, the superior courts, the court of appeals, and the Supreme Court. N.C. Const. art. IV, §§ 1, 2. However, we do not believe that the procedure established by the General Assembly for challenging redistricting plans creates a new court outside this constitutional framework. Section 1-267.1(a) specifically requires that any challenges to redistricting "shall be filed in the Superior Court of Wake County and shall be heard and determined by a three-judge panel of the Superior Court of Wake County." N.C.G.S. § 1-267.1(a). This language places redistricting challenges in the superior court, the court recognized by the North Carolina Constitution as having original general jurisdiction throughout the state. N.C. Const. art. IV, § 12.

Nor do we find that a new court is created by the statutory requirement that the proceedings be held before a three-judge panel. *See* N.C.G.S. § 1-267.1. The mandate that three superior court judges participate in cases challenging redistricting is, we believe, a matter of procedure that lies within the purview of the General Assembly. N.C. Const. art. IV, § 13(2). The General Assembly has exercised its prerogative to establish similar procedures in other types of cases. For instance, three-judge panels are statutorily authorized to review applications of electronic surveillance orders, N.C.G.S. §§ 15A-286(16), -291 (2003), and to review applications for the convening of an investigative grand jury, N.C.G.S. § 15A-622(h) (2003). Accordingly, we hold that the three-judge panel of superior court judges required by N.C.G.S.

§ 1-267.1 is not a new court outside the contemplation of the North Carolina Constitution.

[4] The *Morgan* defendants next argue that N.C.G.S. § 1-81.1 unconstitutionally restricts to Wake County the jurisdiction of the three-judge panel of the superior court hearing redistricting cases. However, our reading of the statute satisfies us that this provision does not affect jurisdiction. Instead, the General Assembly has done no more than establish venue for lawsuits that challenge redistricting. Venue is a procedural matter, *see Crain & Denbo, Inc. v. Harris & Harris Constr. Co.*, 250 N.C. 106, 109, 108 S.E.2d 122, 125 (1959), and, as noted above, the General Assembly has the constitutional authority to establish rules of procedure for the Superior Court Division. N.C. Const. art. IV, § 13(2). Pursuant to this authority, the General Assembly has, by statute, defined venue for every type of case. *See* N.C.G.S. §§ 1-76 to -82 (2003). In addition, once an action is filed, venue is sufficiently flexible that it may be changed "[w]hen the convenience of witnesses and the ends of justice would be promoted by the change." N.C.G.S. § 1-83(2) (2003). In light of the policies implied in these statutory provisions, we perceive no constitutional bar to the General Assembly's setting venue for redistricting challenges in the county where the capital of North Carolina is located.

[5] The *Morgan* defendants' next contention is that the provisions in N.C.G.S. § 1-267.1(b) requiring that the judges on the three-judge panel come from particular parts of the State infringe on the power of the Chief Justice to assign judges. Article IV, Section 11 of the North Carolina Constitution sets out powers and responsibilities of the Chief Justice, including the power to assign superior court judges. N.C. Const. art. IV, § 11. Section 1-267.1(b), as modified by the trial court, requires that the Chief Justice appoint to the three-judge panel a resident superior court judge from Wake County and "one resident superior court judge from the First through Fourth Judicial Divisions and one resident superior court judge from the Fifth through Eighth Judicial Divisions." N.C.G.S. § 1-267.1(b). In addition, the statute states that "no member of the panel . . . may be a former member of the General Assembly." *Id.*

The statute assures that the judges assigned by the Chief Justice to the three-judge panel will come from different parts of the State. Despite the *Morgan* defendants' claim, the geographical designation contained in N.C.G.S. § 1-267.1 cannot be said to be an impermissible encroachment on the Chief Justice's authority because the Chief

Justice has the unfettered power to select two of the panel members from dozens of qualified judges. Moreover, the requirement that one of the resident superior court judges from Wake County be on the panel is logical for several reasons. A Wake County judge would be best suited to coordinate with the other judges on the panel and deal with routine matters filed with the Wake County Clerk of Superior Court that do not demand the physical presence of all three panel judges. Moreover, Raleigh is the state capital, and the General Assembly has consistently shown a preference for having certain civil and administrative actions conducted there. *See, e.g.*, N.C.G.S. § 1-77 (2003) (actions against a public officer for an act done by him by virtue of his office should be tried in the county where the cause arose); N.C.G.S. § 87-4 (2003) (first meeting of State Licensing Board for General Contractors to be held in Raleigh); N.C.G.S. § 87-18 (2003) (first meeting of State Board of Examiners of Plumbing, Heating and Fire Sprinkler Contractors to be held in Raleigh); N.C.G.S. § 90-270.9 (2003) (North Carolina Psychology Board to meet annually in Raleigh); N.C.G.S. § 90A-57 (2003) (State Board of Sanitarian Examiners to meet annually in Raleigh); N.C.G.S. § 106-4 (2003) (Board of Agriculture to meet at least twice a year in Raleigh). The requirement that a former member of the General Assembly may not sit as a member of the three-judge panel is sensible insurance against any appearance of conflict of interest. Although this Court will zealously protect its prerogatives and exercise its duties under the Constitution, we hold that the provisions of N.C.G.S. § 1-267.1 within this specific context do not impermissibly infringe on the Chief Justice's authority to assign judges.

[6] The *Morgan* defendants argue that N.C.G.S. §§ 120-2.3 and 120-2.4 impermissibly limit the authority of the judicial branch to fashion appropriate relief for constitutional violations. Section 120-2.3 requires that any judicial order invalidating a redistricting act shall specify every defect found by the court. N.C.G.S. § 120-2.3. Section 120-2.4 states:

> If the General Assembly enacts a plan apportioning or redistricting State legislative or congressional districts, in no event may a court impose its own substitute plan unless the court first gives the General Assembly a period of time to remedy any defects identified by the court in its findings of fact and conclusions of law. That period of time shall not be less than two weeks. In the event the General Assembly does not act to remedy any identified defects to its plan within that period of time, the court

> may impose an interim districting plan for use in the next general election only, but that interim districting plan may differ from the districting plan enacted by the General Assembly only to the extent necessary to remedy any defects identified by the court.

N.C.G.S. § 120-2.4. We do not believe that these provisions are an unconstitutional usurpation of authority reserved to the courts. First, N.C.G.S. § 120-2.4 is consistent with the remedy fashioned by this Court in *Stephenson I*, where, after determining that the existing plans were unconstitutional, we acknowledged that the General Assembly should be given the initial opportunity to draw new plans. *See Stephenson I*, 355 N.C. at 385, 562 S.E.2d at 398 ("The General Assembly optimally should be afforded the first opportunity to enact new redistricting plans for the North Carolina Senate and North Carolina House of Representatives based on the 2000 census and the constitutional requirements which we have upheld in this opinion."). Second, and more generally, because redistricting is a legislative responsibility, N.C.G.S. §§ 120-2.3 and 120-2.4 give the General Assembly a first, limited opportunity to correct plans that the courts have determined are flawed. Not only do these statutes allow the General Assembly to exercise its proper responsibilities, they decrease the risk that the courts will encroach upon the responsibilities of the legislative branch. N.C. Const. art. I, § 6 ("The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."). Accordingly, we hold that N.C.G.S. §§ 120-2.3 and 120-2.4 are not unconstitutional limitations on the judicial branch.

Redistricting cases are inordinately complex, politically volatile, and relatively rare. Our review of the constitutionality of the session law as codified in N.C.G.S. §§ 1-81.1, 1-267.1, 120-2.3, and 120-2.4 has been informed by the delicacy of the balance of powers set out in our Constitution. In the context of redistricting, the potential for the branches of government to collide with each other is great, and the consequences of such a collision are grave. In passing these statutes, the General Assembly has recognized the unique nature of these infrequent but potentially divisive cases and has set out a workable framework for judicial review that reduces the appearance of improprieties.

The order of the trial court in *Morgan*, finding the session law constitutional as modified, is affirmed.

AFFIRMED.

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

STATE OF NORTH CAROLINA EX REL. COMMISSIONER OF INSURANCE	)	
v.	)	ORDER
NORTH CAROLINA RATE BUREAU IN THE MATTER OF THE FILING DATED MAY 1, 2001 BY THE NORTH CAROLINA RATE BUREAU FOR REVISED AUTOMOBILE INSURANCE RATES PRIVATE PASSENGER CARS AND MOTORCYCLES	)	

No. 596A03

Upon consideration of the petition filed by Appellant on the 20th day of February 2004 for rehearing the decision of this Court pursuant to Rule 31 and Rule 2, N.C. Rules of Appellate Procedure, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

> "Denied. The Court, however, ex mero motu allows the Rate Bureau's Petition filed on 12 November 2003 to the limited extent of addressing the following issue: Did the Commissioner incorrectly utilize investment income on capital and surplus in determining profit calculations? By order of the Court in conference, this the 3rd day of March 2004.
>
> s/Brady, J.
> For the Court"

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

Ashley v. Buster Brown Apparel Case below: 161 N.C. App. 741	No. 026P04	Defs' PDR Under N.C.G.S. § 7A-31 (COA02-1546)	Denied **03/22/04**
Battle Ridge Cos. v. N.C. Dep't of Transp. Case below: 161 N.C. App. 156	No. 643P03	Defs' PDR Under N.C.G.S. § 7A-31 (COA02-973)	Denied 03/04/04
Boyce & Isley, PLLC v. Cooper Case below: Wake County Superior Court	No. 598P02-2	1. Plts' PDR Prior to Determination by the COA (COA03-1542) 2. Plts' PWC to Review and/or Dismiss Interlocutory Appeal 3. Plts' Motion for Discovery Pending Appellate Review 4. Plts' Motion to Expedite Filing Briefs and Oral Argument 5. Defs' Conditional PDR as to Additional Issues	1. Denied 03/04/04 2. Denied 03/04/04 3. Denied 03/04/04 4. Dismissed as moot 03/04/04 5. Dismissed as moot 03/04/04 **Lake, C.J., Parker, J. and Orr, J., recused**
Carter v. Rockingham Cty. Bd. of Educ. Case Below: 158 N.C. App. 687	No. 406A03	Plt's and Defs' Motion to Withdraw NOA (COA02-716)	Allowed 03/04/04
Cox v. Steffes Case below: 161 N.C. App. 237	No. 630P03	1. Defs' Motion for Temporary Stay (COA02-972) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **12/05/03 Stay Dissolved 04/01/04** 2. Denied (04/01/04) 3. Denied (04/01/04)

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

Erwin v. Tweed Case below: 159 N.C. App. 579	No. 499A03	1. Unnamed Def's (N.C. Farm Bureau Mutual Insurance Company) NOA Based Upon a Dissent (COA02-1243) 2. Unnamed Def's (N.C. Farm Bureau Mutual Insurance Company) PDR as to Additional Issues	1. — 2. Denied 03/04/04
Finkel v. Finkel Case below: 162 N.C. App. 344	No. 091P04	Def's PWC to Review the Decision of the COA (COA02-1456)	Denied (04/01/04)
Green v. Walker Case below: 161 N.C. App. 540	No. 022P04	Plt's PWC to Review the Decision of the COA (COA03-154)	Denied 03/04/04
Hatcher v. Flockhart Foods, Inc. Case below: 161 N.C. App. 706	No. 035P04	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1400)	Denied (04/01/04)
Hodge v. N.C. Dep't of Transp. Case below: 161 N.C. App. 726	No. 028P04	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-51)	Denied (04/01/04)
Holcomb v. Colonial Assocs., L.L.C. Case below: 153 N.C. App. 413	No. 581A02	Def's (Colonial Associates, L.L.C.) PDR as to Additional Issues (COA01-1067)	Allowed 03/04/04
Hooker v. Stokes-Reynolds Hosp. Case below: 161 N.C. App. 111	No. 633P03	Defs' (Stokes-Reynolds Hospital and North Carolina Baptist Hospital) PDR Under N.C.G.S. § 7A-31 (COA02-1361)	Denied 03/04/04
James v. Perdue Farms, Inc. Case below: 160 N.C. App. 560	No. 590P03	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-795)	Denied **02/23/04**
John Alden Life Ins. Co. v. N.C. Ins. Guar. Ass'n Case below: 162 N.C. App. 167	No. 066P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-229)	Denied (04/01/04)

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Kaleel Builders, Inc. v. Ashby Case below: 161 N.C. App. 34	No. 637P03	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-1616)	Denied (04/01/04)
Kogut v. Joanne Rosenfeld, CPA Case below: 157 N.C. App. 487	No. 306A03	Joint Motion for Withdrawal of Appeal (COA02-264)	Allowed **02/13/04**
Lee v. Lee Case below: 161 N.C. App. 540	No. 008P04	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-79)	Denied (04/01/04)
Malloy v. Cooper Case below: 162 N.C. App. 504	No. 595P01-2	AG's Motion for Temporary Stay (COA00-898-2)	Allowed **03/09/04**
McKyer v. McKyer Case below: 159 N.C. App. 466	No. 516P03	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-1096)	Denied 03/04/04
Meeks v. Crawford Case below: 160 N.C. App. 708	No. 617P03	Plt's PDR Under N.C.G.S. § 7A-31 (COA02-1045)	Denied 03/04/04
Morris v. E.A. Morris Charitable Found. Case below: 161 N.C. App. 673	No. 033P04	Plts' PDR Under N.C.G.S. § 7A-31 (COA03-189)	Denied **02/09/04** **Edmunds, J., recused**
N.C. Bd. of Mortuary Science v. Crown Mem'l Park, L.L.C. Case below: 162 N.C. App. 316	No. 080A04	1. Def's NOA Based Upon a Constitutional Question (COA02-1562) 2. Plt's Motion to Dismiss Appeal	1. — 2. Allowed (04/01/04)
Norman v. N.C. Dep't of Transp. Case below: 161 N.C. App. 211	No. 052P04	1. Def's PDR Under N.C.G.S. § 7A-31 (COA02-1053) 2. Plt's Conditional PDR as to Additional Issues	1. Denied (04/01/04) 2. Dismissed as moot (04/01/04)

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Odom v. Lane Case below: 161 N.C. App. 534	No. 010P04	1. Defs' (Carolinas-Anson Healthcare, Inc. d/b/a Anson Community Hospital) PDR Under N.C.G.S. § 7A-31 (COA02-1759)	1. Denied 03/04/04
		2. Defs' (Carolinas-Anson Healthcare, Inc. d/b/a Anson Community Hospital) Motion for Temporary Stay	2. Allowed **01/29/04** Dissolved 03/04/04
		3. Defs' (Carolinas-Anson Healthcare, Inc. d/b/a Anson Community Hospital) Petition for Writ of Supersedeas	3. Denied 03/04/04
Resort Realty of the Outer Banks, Inc. v. Brandt Case below: 163 N.C. App. 114	No. 128P04	1. Defs' NOA Based on a Constitutional Question (COA03-464)	1. Dismissed *ex mero motu* (04/01/04)
		2. Defs' PDR Under N.C.G.S. § 7A-31	2. Denied (04/01/04)
State v. Arthur Case below: 150 N.C. App. 438	No. 314P02-2	Def's Motion to Reconsider PDR Ruling (COA01-666)	Dismissed 03/04/04
State v. Bell Case below: 161 N.C. App. 540	No. 016P04	Def's PWC to Review the Decision of the COA (COA02-1428)	Denied 03/04/04
State v. Berry Case below: New Hanover County Superior Court	No. 389A01-2	1. Def's Motion for Temporary Stay	1. Denied **02/13/04**
		2. Def's Petition for Writ of Supersedeas	2. Denied **02/13/04**
		3. Def's Petition for Writ of Mandamus	3. Denied **02/13/04**
		4. Def's Petition for Writ of Certiorari	4. Denied **02/13/04**
State v. Branch Case below: 162 N.C. App. 707	No. 095PA04	1. AG's Motion for Temporary Stay (COA03-350)	1. Allowed **03/03/04**
		2. AG's Petition for Writ of Supersedeas	2. Allowed (04/01/04)
		3. AG's PDR Under N.C.G.S. § 7A-31	3. Allowed (04/01/04)
		4. Def's PDR Under N.C.G.S. § 7A-31	4. Denied (04/01/04)

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State v. Carrigan Case below: 161 N.C. App. 256	No. 665P03	1. Def's NOA Based Upon a Constitutional Question (COA02-1577) 2. Def's PDR 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 03/04/04 3. Allowed 03/04/04
State v. Cassell Case below: 162 N.C. App. 181	No. 456P03-2	Def's PDR Under N.C.G.S. § 7A-31 (COA03-7)	Denied 03/04/04
State v. Chapman Case below: Johnston County Superior Court	No. 146A02	Def's Motion to Hold Decision Pending the United States Supreme Court's Decision in *Roper v. Simmons* (Johnston County)	Allowed (04/01/04)
State v. Cheek Case below: New Hanover County Superior Court	No. 577A97-3	Def's PWC to Review the Order of the Superior Court (New Hanover County)	Denied (04/01/04)
State v. Dawkins Case below: 162 N.C. App. 231	No. 083P04	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1637)	Denied (04/01/04) **Orr, J., recused**
State v. Dickens Case below: 161 N.C. App. 742	No. 015P04	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1395)	Denied (04/01/04)
State v. Farlow Case below: 161 N.C. App. 541	No. 001P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-123)	Denied (04/01/04)
State v. Fontaine Case below: Mecklenburg County Superior Court	No. 037P04	1. Def's PWC to Review the Order of the Superior Court 2. Def's Motion to Stay Further Proceedings in the Superior Court	1. Denied 03/04/04 2. Denied 03/04/04
State v. Frogge Case below: Forsyth County Superior Court	No. 413A95-3	AG's PWC to Review the Order of the Superior Court (Forsyth County)	Allowed (04/01/04)

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State v. Gist Case below: 161 N.C. App. 348	No. 025P04	1. Def's PWC to Review the Decision of the COA (COA03-134) 2. AG's Motion to Dismiss Appeal (COA03-134)	1. Denied (04/01/04) 2. Dismissed as moot (04/01/04) **Orr, J., recused**
State v. Godfrey Case below: 162 N.C. App. 360	No. 082P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-295)	Denied (04/01/04)
State v. Goode Case below: Johnston County Superior Court	No. 010A94-4	Def's PWC to Review the Order of the Superior Court (Johnston County)	Denied (04/01/04)
State v. Hatcher Case below: 156 N.C. App. 391	No. 123P04	Def's PWC to Review the Decision of the COA (COA02-270)	Denied (04/01/04)
State v. Holden Case below: 160 N.C. App. 503	No. 574PA03	1. AG's Motion for Temporary Stay (COA02-1478) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 (COA02-1478) 4. Def's Motion to Dismiss Petition	1. Allowed pending determination of the State's PDR **10/24/03** 2. Allowed 03/04/04 3. Allowed 03/04/04 4. Denied 03/04/04
State v. Hyman Case below: 161 N.C. App. 541	No. 004P04	1. Def's NOA Based Upon a Constitutional Question (COA02-1648) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied (04/01/04) 3. Allowed (04/01/04)

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State v. Johnson Case below: 161 N.C. App. 68	No. 639P03	1. Def's NOA Based Upon a Constitutional Question (COA02-1631) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. —— 2. Denied (04/01/04) 3. Allowed (04/01/04)
State v. Johnson Case below: 162 N.C. App. 181	No. 053P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-341)	Denied 03/04/04
State v. Lambert Case below: 162 N.C. App. 360	No. 087A04	Def's NOA Based Upon a Constitutional Question (COA03-345)	Dismissed *ex mero motu* (04/01/04)
State v. Lawrence Case below: 163 N.C. App. 205	No. 122P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-386)	Denied (04/01/04)
State v. Lyons Case below: 162 N.C. App. 722	No. 129P04	1. Def's NOA Based Upon a Constitutional Question (COA03-208) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* (04/01/04) 2. Denied (04/01/04)
State v. Mack Case below: 158 N.C. App. 314	No. 668P03	Def's PWC to Review the Decision of the COA (COA02-591)	Denied (04/01/04)
State v. Page Case below: Forsyth County Superior Court	No. 239A96-3	1. Defendant-Appellant's Petition for Writ of Prohibition 2. Defendant-Appellant's Petition for Writ of Mandamus 3. Defendant-Appellant's Petition for Writ of Certiorari 4. Defendant-Appellant's Motion for Stay of Execution	1. Denied **02/10/04** 2. Denied **02/10/04** 3. Denied **02/10/04** 4. Denied **02/10/04**

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State v. Page Case below: Forsyth County Superior Court	No. 239A96-4	1. State's Emergency Motion to Vacate Stay of Execution Entered by Superior Court of Forsyth County 2. Def's Motion to Dismiss State's Emergency Motion to Vacate State of Execution as Moot 3. AG's Motion to Withdraw Emergency Motion to Vacate Stay of Execution	1. — 2. Denied 03/04/04 3. Allowed 03/04/04
State v. Reed Case below: 162 N.C. App. 360	No. 232P01-2	1. Def's PWC to Review the Decision of the COA (COA99-1574-2) 2. AG's Motion to Dismiss Petition (COA99-1574-2)	1.Denied (04/01/04) 2. Dismissed as moot (04/01/04)
State v. Roberson Case below: 163 N.C. App. 129	No. 126P04	1. AG's Motion for Temporary Stay (COA03-397) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Denied **03/23/04** 2. Denied **03/23/04** 3. Denied **03/23/04**
State v. Shannon Case below: 162 N.C. App. 548	No. 117P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-343)	Denied (04/01/04)
State v. Smith ——— State v. Rodriguez Case below: Catawba County Superior Court	No. 072P04	Defs' PWC to Review the Order of the Superior Court (Catawba County)	Denied (04/01/04)
State v. Stiller Case below: 162 N.C. App. 138	No. 061P04	1. Def's NOA Based Upon a Constitutional Question (COA03-214) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied (04/01/04) 3. Allowed (04/01/04)
State v. Thompson Case below 160 N.C. App. 710	No. 610P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1597)	Denied 03/04/04

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State v. Troxler Case below: 162 N.C. App. 182	No. 058PA04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-215)	Allowed 03/04/04
State v. Vincent Case below: 161 N.C. App. 350	No. 644P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1165)	Denied 03/04/04
State v. Wade Case below: 161 N.C. App. 686	No. 029P04	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1663)	Denied 03/04/04
State v. Watson Case below: 162 N.C. App. 361	No. 075P04	1. Def's NOA Based Upon a Constitutional Question (COA03-105) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied (04/01/04) 3. Allowed (04/01/04)
State v. Welch Case below: 161 N.C. App. 350	No. 663P03	1. Def's NOA Based Upon a Constitutional Question 2. Def's PDR Under N.C.G.S. § 7A-31 (COA03-30) 3. AG's Motion to Dismiss Appeal	1. — 2. Denied (04/01/04) 3. Allowed (04/01/04)
State v. Wiggins Case below: 161 N.C. App. 351	No. 027P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-33)	Denied 03/04/04
State Farm Fire & Cas. Co. v. Darsie Case below: 161 N.C. App. 542	No. 031P04	1. Def's (Marion Harris Leinfelder) PDR Under N.C.G.S. § 7A-31 (COA03-40) 2. Plt's Conditional PDR	1. Denied 03/04/04 2. Dismissed as moot 03/04/04
Stephenson v. Bartlett Case below: Wake County Superior Court	No. 094PA02-3	Appellees' Motion to Amend Record	Denied **02/11/04** **Orr, J. and Martin, J. recused**

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Sturdivant v. Andrews Case below: 161 N.C. App. 177	No. 605P03	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA02-1455) 2. Plt's PWC to Review the Decision of the COA	1. Denied 03/04/04 2. Dismissed as moot 03/04/04
William Brewster Co. v. Town of Huntersville Case below: 161 N.C. App. 132	No. 642P03	1. Respondents' PDR Under N.C.G.S. § 7A-31 (COA02-1264) 2. Respondents' Motion for Withdrawal of Petition for Discretionary Review	1. — 2. Allowed 03/04/04
Young v. Young Case below: 161 N.C. App. 541	No. 046P04	Plt's PWC to Review the Decision of the COA (COA02-1674)	Denied 03/04/04

STATE OF NORTH CAROLINA v. CHARLES WESLEY ROACHE

No. 522A01

(Filed 7 May 2004)

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

A short-form murder indictment is sufficient to charge a defendant with first-degree murder under both the United States and the North Carolina Constitutions without the inclusion of aggravating circumstances.

2. Jury— capital trial—excusal for cause—inability to recommend death penalty

The trial court did not abuse its discretion in a multiple murder prosecution by excusing two prospective jurors for cause, because both prospective jurors demonstrated their inability to render a verdict in accordance with the laws of the State including: (1) one juror's repeated equivocations about his ability to recommend the death penalty and also his expressed concerns about following the law of the State of North Carolina; and (2) the other juror's statement that she could not recommend the death penalty for this defendant.

3. Jury— capital trial—requested preselection instruction—process of sentencing someone to death

The trial court did not abuse its discretion in a multiple murder prosecution by rejecting the specific preselection instruction proposed by defendant which would have explained the process of sentencing someone to death, because: (1) a review of the record reveals that the trial court correctly instructed the potential jurors about the law governing the capital sentencing process; (2) the actual instructions given by the trial judge were similar in substance to those requested by defendant; and (3) defendant's argument that prejudice occurred is purely speculative.

4. Jury— capital trial—right to impartial jury—voir dire concerning death penalty

The trial court did not abuse its discretion or impair defendant's right to an impartial jury in a multiple murder prosecution by overruling his objection to a line of questioning by the State which defendant claims chilled his right to conduct an adequate

voir dire concerning whether a prospective juror would automatically vote to impose the death penalty upon defendant's conviction regardless of any evidence of mitigating circumstances, because: (1) the prosecutor's questions were a correct statement of the law; and (2) the questions served to ensure that the impaneled jury would consider both punishment alternatives before making a punishment recommendation.

5. Jury— statutory obligation—full panel of twelve jurors

The trial court did not err in a capital multiple murder prosecution by allowing the State to pass individual jurors to defendant rather than a panel of twelve because: (1) N.C.G.S. § 15A-1214(j) authorizes a trial judge in a capital case to allow individual voir dire at his or her discretion for good cause shown; (2) when the trial court directs individual voir dire on all issues pursuant to N.C.G.S. § 15A-1214(j), all parties are required either to accept or reject a juror before the next prospective juror is called; (3) in the instant case, inasmuch as defendant did not request a finding of good cause when the trial judge indicated that he had reviewed the statute and was satisfied that the procedure was permitted, it is presumed that the trial judge found the necessary good cause; and (4) although defendant contends that the improper jury selection procedure violated his constitutional right to a fair and impartial jury, defendant did not raise this constitutional issue at trial, and thus, failed to preserve this assignment of error for appellate review.

6. Jury— juror discussing opinion in jury pool room—plain error analysis

The trial court did not commit plain error in a multiple murder prosecution by failing to intervene ex mero motu when a prospective juror revealed during questioning that another unnamed member of the venire had discussed his or her opinions of the case in the jury pool room because defendant did not object to this alleged error at trial, and plain error review is limited to errors in a trial court's jury instructions or a trial court's rulings on admissibility of evidence.

7. Constitutional Law— effective assistance of counsel—failure to request court action

Defendant's right to effective assistance of counsel was not violated in a multiple murder prosecution based on his attorneys' failure to request that the court intervene when a prospective

juror revealed during questioning that another unnamed member of the venire had discussed his or her opinions of the case in the jury pool room, because: (1) the juror was thoroughly examined as to her ability to be impartial; and (2) counsel's failure to object or to challenge that day's venire was not prejudicial when the pertinent juror was the only juror or alternate juror drawn from the panel called for 28 March 2001, and as a result, she was the only person who potentially could have been tainted by the unknown venire-member's comments that also could have prejudiced defendant's trial.

8. Witnesses— pretrial motion to sequester—abuse of discretion standard

The trial court did not err in a multiple murder prosecution by denying defendant's pretrial motion under N.C.G.S. § 8C-1, Rule 615 to sequester witnesses during the guilt phase of trial even though defendant contends it allowed members of the victims' family to be present in the courtroom throughout the presentation of testimony at the guilt phase which unduly elicited the jury's sympathy, because: (1) a ruling on a motion to sequester witnesses rests within the sound discretion of the trial court; and (2) defendant failed to demonstrate that the trial court's judgment was so arbitrary that it would constitute an abuse of discretion.

9. Criminal Law— arraignment—same day trial began

The trial court did not violate N.C.G.S. § 15A-943(b) in a multiple murder prosecution by arraigning defendant on the same day his trial began, nor was his counsel ineffective based on a failure to object to this procedure, because: (1) defendant waived his right to a week's interlude between his arraignment and trial; and (2) defense counsel were well-prepared for trial at that time.

10. Constitutional Law— effective assistance of counsel—trial strategy

Defendant did not receive ineffective assistance of counsel in a multiple murder prosecution based on defense counsel's admission during opening arguments of a murder for which defendant was not on trial before the trial court had the chance to rule on defendant's motion to suppress that crime, his concession that defendant was involved in a conspiracy to commit armed robbery, his acknowledgment of an aggravating circumstance by admitting the murder was brutal, and his allegedly undermining

the trial strategy now claimed by defendant that defendant lacked the capability to make rational choices about his actions on the night in question, because: (1) defense counsel's decision to mitigate the effect of the murder by previewing it for the jury in his opening statement was reasonable and acceptable trial strategy given the likelihood that this evidence would be admitted; (2) the decision to tell the jury about defendant participating in a plan with three other men to rob drug dealers was a reasonable strategy in that it merely forecast the evidence the jury would hear later in the trial, and a counsel's statement of a fact strongly suggesting guilt of a crime does not necessarily amount to an admission of legal guilt; (3) describing a murder as "brutal" does not satisfy the legal standard in the § 15A-2000(e)(9) aggravator that the capital felony was heinous, atrocious, or cruel; (4) viewed in light of the definition of diminished capacity, the statement that defendant "made the wrong choice" by no measure suggested that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment; and (5) defense counsel's admission of a murder for which defendant was not on trial did not rise to the level of the act condemned by our Supreme Court in *State v. Harbison*, 315 N.C. 175 (1985), and our Supreme Court refuses to find per se ineffective assistance of counsel in this case.

11. Evidence— videotape—photographs—statements by defendant—speculation—testimony

The trial court did not abuse its discretion in a multiple murder prosecution by allowing the State to introduce five pieces of evidence including a videotape of the crime scene, photographs of a murder victim for which defendant was not on trial, specific statements by defendant, a witness's speculation, and the testimony of another witness, because: (1) the videotape provided a unique perspective that the still photographs admitted into evidence did not depict, and the trial court gave a limiting instruction to the jury before it viewed the videotape, instructing it to consider the videotape only for the purpose of illustrating an officer's testimony; (2) the photographs lent credibility to defendant's confession and helped to demonstrate the circumstances and chain of events leading to the crimes for which defendant was being tried; (3) defendant's remarks concerning his potential for future dangerousness had significant probative value in light of the State's burden of proving premeditation and deliberation and were relevant to defendant's defense of diminished capacity;

(4) a witness's statement was properly admissible as a shorthand restatement of his perception at the time of the attack that defendant was the aggressor and would have done the witness severe bodily harm; and (5) meaningful review of defendant's challenges to another witness's testimony was impossible when defendant referred the Court to the entirety of the witness's testimony rather than to any particular portions of her testimony, and it cannot be concluded that the mere fact that a relative of the victims testified was so inflammatory as to constitute error.

12. Evidence— prosecutor's arguments in codefendant's case—not admissions of party opponent—not evidence

The trial court did not err in a multiple murder prosecution by excluding two of defendant's proffered exhibits consisting of excerpts from the State's arguments to the jury in a codefendant's trial in which the prosecutor avowed that the codefendant committed the murders of two of the victims, because: (1) our Supreme Court has already decided that arguments of counsel are not evidence or admissions of a party opponent, and (2) based on the fact that the district attorney's arguments from the codefendant's trial are inadmissible, defendant's constitutional argument also fails.

13. Constitutional Law— right to remain silent—effective assistance of counsel—failure to answer question about location of coparticipant after arrest

The trial court did not violate defendant's right to post-arrest silence in a multiple murder prosecution by overruling defendant's objection to an investigator's testimony that defendant did not answer a question about the location of his partner in crime shortly after his arrest, and his attorney's failure to raise constitutional grounds for the objection was not ineffective assistance of counsel, because: (1) the wording and context of counsel's objection coupled with his failure to object to another mention of defendant's silence makes it clear that his objection was based on a concern about incomplete discovery rather than constitutional error, and constitutional arguments not raised at trial are not preserved for appellate review; and (2) defendant has failed to show prejudice arising from this exchange for his ineffective assistance of counsel claim.

14. Appeal and Error— preservation of issues—pretrial motion to suppress—objection at trial

Although defendant contends the trial court erred in a multiple murder prosecution by denying his pretrial motion to suppress evidence concerning defendant's attempted robbery of another victim, this argument is overruled, because: (1) defendant did not object to the victim's testimony, a motion in limine is insufficient to preserve for appeal the question of admissibility of evidence if the defendant does not object, and defendant has neither assigned nor argued plain error as to the admission of this evidence; and (2) defendant was unable to show prejudice when at the time the State introduced the victim's testimony, defendant had already given a detailed description of the attempted robbery during his opening statement.

15. Evidence— testimony—defendant covering for someone else

The trial court did not err in a multiple murder prosecution by refusing to allow defendant's former co-worker to testify that she believed that defendant was covering for his coparticipant, and defense counsel's failure to proffer this testimony did not amount to ineffective assistance of counsel, because: (1) the type of opinion to which the witness allegedly would have testified was not a shorthand statement of fact for the reason that it was not rationally based on her perception; (2) testimony about a defendant's motivation for confessing to a crime, where as here the opinion is based on a telephone conversation and a prior relationship with a defendant, is beyond the purview of N.C.G.S. § 8C-1, Rule 701; and (3) defendant's claims of ineffective assistance fail when the witness was not competent to testify as to whether defendant was covering for his coparticipant.

16. Evidence— hearsay—corroboration—diminished capacity

The trial court did not err in a multiple murder prosecution by preventing defendant from presenting specific testimony from three witnesses who allegedly would have corroborated the testimony of defendant's expert witness to show that defendant's actions on the night of the murders were the result of diminished capacity based on the traumatic environment in which he was raised and his alcohol and drug use before the murders, because: (1) the testimony of two of the witnesses was properly excluded as inadmissible hearsay since the rule does not justify admission of extrajudicial declarations of someone other than the witness

purportedly being corroborated; and (2) the testimony the other witness would have given was so tenuously related to the issue of defendant's diminished capacity that it could not be said to be relevant under N.C.G.S. § 8C-1, Rule 401.

17. Appeal and Error— preservation of issues—objections sustained

Although defendant contends the trial court erred by allowing the State to repeatedly pose improper questions on cross-examination of defendant's witnesses and by failing to intervene ex mero motu to prevent the prosecutor from making certain statements during closing argument, any alleged error is not properly before the Court and would not have resulted in prejudice, because: (1) the trial court sustained defendant's objections to the questions specifically addressed by defendant in his brief; and (2) our Supreme Court will not review the propriety of questions for which the trial court sustained a defendant's objection absent a further request being denied by the court.

18. Criminal Law— prosecutor's argument—comparison of defendant to wild dogs—acting in concert

Although the prosecution in a multiple murder case improperly argued during closing arguments that defendant and his coparticipant packed up like wild dogs that were high on the taste of blood and power over their victims, the trial court did not err by failing to intervene ex mero motu given the overwhelming evidence of defendant's guilt and the fact that the remarks did not so infect the trial with unfairness that they rendered the conviction fundamentally unfair.

19. Criminal Law— prosecutor's argument—jurors put self in victims' places

The prosecutor's closing argument in a multiple murder prosecution did not improperly invite the jurors to put themselves in the victims' places through several comments during closing arguments, because: (1) the prosecutor merely highlighted the random nature of this killing, which has been held to be permissible; and (2) our Supreme Court has repeatedly found no impropriety when the prosecutor asks the jury to imagine the fear and emotions of a victim.

20. Criminal Law— prosecutor's argument—differences in life style between victims and defendant

The trial court in a multiple murder prosecution did not improperly allow the prosecutor to argue to the jury during closing arguments to convict defendant not because he was guilty, but based on the fact that he was of less worth than the victims, because: (1) the prosecutor merely drew a comparison to highlight the randomness of the murders and the innocence of the victims who had an expectation of safety in their respective homes, factors which were relevant to the issue of malice; and (2) the prosecutor did not go so far as to suggest to the jury that it base its decision on the differences in life style between the victims and defendant.

21. Appeal and Error— preservation of issues—failure to make argument

Although defendant contends the trial court erred by allowing the prosecutor to state during closing arguments that defendant sits over there and grins and has a big time while his attorneys try to paint him up as being the victim, this assignment of error is overruled because: (1) beyond citing this argument as problematic, defendant makes no argument as to why it is improper; and (2) N.C. R. App. P. 28(a) limits appellate review to issues defined clearly and supported by arguments and authorities.

22. Criminal Law— prosecutor's argument—expert's payment for testimony—comments not grossly improper

Although the prosecutor's comments during closing arguments about defendant's mental health expert's receipt of $5,000 in compensation for testifying verge on being unacceptable comments that the expert's opinion testimony was bought or was perjured for compensation, particularly the statement that you can "get whatever you want" for $5,000, such comments were not so grossly improper as to require intervention by the trial court ex mero motu.

23. Criminal Law— prosecutor's argument—defense counsel's integrity

The trial court did not err in a multiple murder prosecution by failing to intervene ex mero motu during the prosecutor's closing argument that allegedly reflect negatively on defense counsel's integrity because considered in context, the statements

defendant contends reflected poorly on defense counsel are more properly viewed as shorthand commentary on the arguments presented by defense counsel during closing statements.

24. Criminal Law— prosecutor's argument—personal opinion

The trial court did not err in a multiple murder prosecution by failing to intervene ex mero motu to stop the two district attorneys from inserting what defendant alleges was their own personal opinion throughout closing arguments, because: (1) the prosecutors' statements were nothing more than rhetorical flourishes made to advocate zealously for conviction; and (2) rather than stating his own beliefs, one of the prosecutors was emphasizing the severity of the crimes and advocating the State's position that defendant's evidence of his difficult childhood did not justify a diminished capacity defense.

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

Defendant did not receive ineffective assistance of counsel in a multiple murder prosecution based on defense counsel's failure to object to the prosecutor's statements during closing arguments and by failing to request a mistrial, because it cannot be concluded that trial counsel's failure to object or to move for mistrial on the basis of the challenged statements was not within the bounds of accepted professional representation when the challenged comments did not render defendant's trial fundamentally unfair nor deprive defendant of a trial whose result was unreliable.

26. Criminal Law— instructions—simply satisfied with defendant's evidence

The trial court did not err in a multiple murder prosecution by instructing the jury that it must be "simply satisfied" with defendant's evidence in order to find it believable, because: (1) the trial court properly charged the jury as to the burden of proof at two separate points in the jury charge by specifically stating that defendant had no burden of proof and also that the jury was to decide the case using as much of the evidence as they saw fit to believe, to the extent of beyond a reasonable doubt in accordance with what the State must prove; and (2) the charge to the jury and the trial court's supplemental clarification were correct statements of law and did not place an impermissible burden on defendant.

27. Homicide— diminished capacity—instructions

The trial court did not err in a multiple murder prosecution by refusing to give the exact wording of defendant's requested instruction on diminished capacity which stated that the jury must consider the evidence presented about mental capacity before determining defendant's guilt of premeditated and deliberate murder, because: (1) the trial court used the pattern jury instructions on diminished capacity which direct a jury to consider the defendant's mental capacity and whether or not intoxication or a drugged condition prevented the defendant from forming the specific intent necessary to commit the crimes charged; and (2) the charge as a whole was an accurate statement of the law.

28. Homicide— felony murder—diminished capacity—instructions

The trial court did not err in a multiple murder prosecution by failing to give an instruction on diminished capacity when instructing the jury on felony murder for the murder of one of the victims and by failing to refer to diminished capacity based on mental illness for the mandate given with reference to the felony murder of that victim, because by addressing specific intent and diminished capacity within the instruction on another victim's death, the trial court informed the jury that diminished capacity applied to armed robbery, which was the underlying felony in this victim's murder.

29. Criminal Law— instructions—diminished capacity—acting in concert

The trial court did not err in a multiple murder prosecution by failing to instruct on diminished capacity with regard to acting in concert, because our Supreme Court has never applied the doctrine of diminished capacity to the general intent necessary for acting in concert, and defendant has cited no authority to support extension of its application.

30. Criminal Law— instructions—diminished capacity—jury request for clarification on points of law

The trial court did not commit plain error in a multiple murder prosecution by failing to include an instruction on diminished capacity when the jury requested clarification on points of law after deliberations had begun, because: (1) the trial court prefaced the reinstruction by admonishing that the reinstruction was not to take the place of the original charge and that the com-

plete charge would not be repeated but must be considered; (2) the jury did not specifically request reinstruction on diminished capacity, although the trial court included such instruction with regard to some of the crimes; and (3) the trial court appropriately responded to the jury's questions by answering only that which was asked.

31. Constitutional Law— effective assistance of counsel—failure to object to reinstruction

Defendant did not receive ineffective assistance of counsel in a multiple murder prosecution based on defense counsel's failure to object to reinstruction on points of law after deliberations had begun, because inasmuch as the reinstruction was not erroneous and did not prejudice defendant, trial counsel's failure to renew earlier objections could not have amounted to ineffective assistance.

32. Criminal Law— shifting burden of proof

The trial court did not err in a multiple murder prosecution by allegedly shifting the State's burden of proof to defendant, because the trial court did not shift the State's burden or otherwise violate defendant's constitutional rights.

33. Kidnapping— first-degree—instruction—safe place

The trial court did not err in a multiple murder prosecution by its instruction to the jury on the "not released in a safe place" element of first-degree kidnapping that a person who is killed during the course of a kidnapping is not released in a safe place, because: (1) the instruction was proper and did not impermissibly usurp the jury's fact-finding role; (2) even assuming arguendo that the instruction was improper, defendant would not be prejudiced in this case when the "not released in a safe place" element applies to first-degree kidnapping, but not to second-degree kidnapping, but either crime would have served as an underlying felony for felony murder; and (3) even had the jury not been instructed that murder was the equivalent of not being released in a safe place, defendant would have been convicted of felony murder.

34. Evidence— murder for which defendant was not on trial—instructions—intent

The trial court did not commit plain error in a multiple murder prosecution by its instruction to the jury regarding evidence

of a murder for which defendant was not on trial that allegedly allowed the jury to consider the evidence too broadly, and defendant did not receive ineffective assistance of counsel based on a failure to object to this instruction, because: (1) the instruction was consistent with N.C.G.S. § 8C-1, Rule 404(b) which allows the State to introduce evidence of other crimes of a defendant for the limited purpose of showing proof of motive, opportunity, intent, preparation, or a plan; and (2) the murder could potentially be seen as evidence of defendant's intent to kill or as part of defendant's preparation in or overall plan for the crime spree.

35. Homicide— felony murder—instructions—unanimous jury

The trial court did not err in a multiple murder prosecution by failing to instruct the jury on felony murder that the jury had to be unanimous in determining whether defendant was guilty of felony murder based on defendant's commission of an underlying felony or based on acting in concert with his coparticipant in committing an underlying felony, and defendant did not receive ineffective assistance of counsel based on a failure to object to this instruction, because: (1) the trial court properly instructed the jury that it must be unanimous in finding defendant guilty of first-degree murder, whether based on felony murder or on premeditation and deliberation, and that the jury must be unanimous in finding which felony defendant engaged in that subjected him to the felony murder rule; (2) whether defendant acted in concert with his coparticipant or committed the underlying felony, defendant would still be guilty of felony murder in either case; and (3) the jurors were unanimous in finding defendant to be guilty of felony murder.

36. Homicide— felony murder—instructions—intent

The trial court did not err in a multiple murder prosecution by its instruction to the jury on intent with respect to the murder of one of the victims, because: (1) the trial court's instruction viewed as a whole correctly charged the jury on felony murder; and (2) the pertinent part of the instruction to which defendant objects meant that whether the felonies were committed by defendant or by his coparticipant, if defendant had the specific intent to commit one or any of the felonies, then he would be guilty of felony murder.

37. Homicide— alternative theories—aiding and abetting—acting in concert

The trial court did not err in a multiple murder prosecution by overruling defendant's objection to the State's use of two alternative theories of guilt including aiding and abetting in connection with premeditation and deliberation, and acting in concert with regard to felony murder, because: (1) defendant's argument that the two theories utilized by the State are mutually exclusive has no merit, and in any given case, both theories may be proven by the same evidence; and (2) defendant failed to show prejudice.

38. Sentencing— exhibits—arguments in coparticipant's trial—coparticipant committed murders

The trial court did not err in a multiple murder sentencing proceeding by denying defendant's motion at sentencing to admit two exhibits which were excerpts from the State's arguments to the jury at a coparticipant's trial during which the prosecutor avowed that the coparticipant committed two of the murders, because: (1) the exhibits were relevant only to the issue of whether defendant actually committed the murders for which he was already convicted, and thus, this evidence was appropriately excluded from the sentencing hearing; (2) the jury's final sentencing recommendation in this case demonstrates that defendant was not prejudiced by the exclusion of this evidence even had the trial court erred in excluding it when defendant was sentenced to life imprisonment instead of death for these two murders; and (3) although defendant now tries to argue that the admission of this statement could have had an impact on the jury's finding of the (e)(11) "course of conduct" aggravator in the murders for which he did receive the death penalty, defendant did not raise this argument at trial, and thus, it is deemed waived on appeal.

39. Sentencing— coparticipant's sentence—life imprisonment

The trial court did not err in a multiple murder sentencing proceeding by sustaining the State's objection to defendant's attempt to introduce the fact that his coparticipant was sentenced to life imprisonment for these same five murders, because: (1) our Supreme Court has previously determined that a coparticipant's sentence has no mitigating effect in and of itself; (2) the fact that the defendant's accomplices received a lesser

sentence is not an extenuating circumstance; (3) although the jury may consider an accomplice's sentence as a mitigating circumstance under the catchall instruction, this consideration applies in a case where evidence of the coparticipant's sentence is already before the court, such as where the coparticipant testified at trial and evidence of a plea bargain was presented by way of impeachment; (4) at no point did counsel suggest that this evidence be admitted for consideration in conjunction with the (f)(9) catchall mitigator; and (5) a defendant has no constitutional right to have his coparticipant's sentence considered in mitigation since such evidence is irrelevant to the sentencing proceeding.

40. Sentencing— victim impact statements—unique loss to society

The trial court did not err in a multiple murder sentencing proceeding by admitting victim impact statements, because: (1) the State properly used victim impact testimony to describe the specific harm caused by defendant's actions, including the psychological repercussions the murders had on family members and the community; and (2) the evidence was not so inflammatory as to render defendant's sentencing hearing fundamentally unfair, but instead reminded the sentencer that the victims were individuals whose deaths represented a unique loss to society and in particular to their families.

41. Sentencing— defendant's prior criminal history—effective assistance of counsel

The trial court did not err or commit plain error in a multiple murder sentencing proceeding by permitting the State to cross-examine defendant's mother about defendant's prior criminal history, and defense counsel was not ineffective based on a failure to object to these additional questions, because: (1) evidence of defendant's prior criminal history, including five cases of assault, was admitted during cross-examination of a witness by the State; (2) a trial court has great discretion to admit any evidence relevant to sentencing; (3) defendant's mother testified on direct examination that she did not know her son to be violent when he was not drinking and that defendant would drink in a shed behind her home; and (4) defense counsel was not ineffective by failing to object to these additional questions since the questions were relevant and reliable, and thus, were admissible.

42. Sentencing— coparticipant's behavior—relevancy

The trial court did not abuse its discretion in a multiple murder sentencing proceeding by sustaining the State's objection to defendant's attempt to elicit evidence from a behavioral specialist concerning his coparticipant's behavior, because the coparticipant's behaviors from ten years earlier, the only time period about which the behavioral specialist apparently had knowledge, cannot be said to be relevant to defendant's character, record, or the circumstances of the offense.

43. Sentencing— cross-examination—aggressive behavior—relationship with family—relevancy—good faith

The trial court did not err in a multiple murder sentencing proceeding by failing to intervene ex mero motu to stop the prosecutor's cross-examination of two witnesses concerning defendant's aggressive behavior while incarcerated, defendant's socializing with his sister and their father in the courtroom, and the source of funds enabling defendant's sister to be present at the trial, and defense counsel was not ineffective based on a failure to object to these additional questions, because: (1) the trial court's implicit determination that the evidence in question was relevant to the jury's sentencing decision did not constitute an abuse of discretion when the testimony concerning defendant's behavior in prison was relevant to rebut a witness's testimony on direct examination that defendant's character had changed while he was in prison and since he let the Lord come into his life, the State's questions to defendant's sister about defendant's interaction with his father in the courtroom were designed to discredit defendant's evidence that he and his father had a poor relationship, and the State sought to show that defendant's sister was at the trial at someone else's behest rather than out of sisterly devotion; and (2) defendant has pointed to nothing in the record suggesting that the prosecutor asked these questions in bad faith.

44. Sentencing— prosecutor's argument—personal opinion

The trial court did not err in a multiple murder sentencing proceeding by failing to intervene ex mero motu when the prosecutor allegedly injected personal opinion into his closing argument by use of phrases such as "we think," "we believe," "our perspective," "our idea," and "I come before you to state that many aggravating factors exist in this case," because: (1) the complained-of passages are not impermissible statements of opinion;

and (2) the phrases would have been understood by the jury as remonstrances by the prosecutor to find that the aggravating circumstances existed and outweighed the proposed mitigating circumstances to such an extent that the death penalty was the proper sentencing recommendation.

45. Sentencing— prosecutor's argument—aggravating circumstances—mitigating circumstances

The trial court did not err in a multiple murder sentencing proceeding by failing to intervene ex mero motu during the prosecutor's closing argument concerning the statutory scheme whereby the State is permitted to submit fewer aggravators than a defendant is allowed to submit mitigators, because our Supreme Court has upheld arguments of this nature in the past as methods of attacking the weight of mitigating circumstances and convincing the jury that a greater number of mitigators should not outweigh a lesser number of aggravators.

46. Sentencing— prosecutor's argument—place self in position of victims

The trial court did not err in a multiple murder sentencing proceeding by failing to intervene ex mero motu during the prosecutor's closing argument that allegedly urged the jury to place itself in the position of the victims, because the prosecutor's argument was less about jurors imagining themselves as the victims and more of an effort to force the jury to appreciate fully the circumstances and impact of the crime.

47. Sentencing— prosecutor's argument—speculation

The trial court did not err in a multiple murder sentencing proceeding by failing to intervene ex mero motu during the prosecutor's closing argument that allegedly speculated on matters outside of the record, because: (1) in regard to the statements that one victim was shielding his wife, another victim was protecting her daughter, and other statements concerning how the victims felt physically and emotionally during the attack, the prosecutor did no more than reconstruct the series of events from the perspectives of the victims using defendant's confession and the physical evidence at the scene and from the coroner's report along with reasonable inferences from these sources; (2) in regard to the statement that one of the victim's fathers was a good man with a broken heart who can't stay in Haywood County at the home that he put there since defendant destroyed his only

daughter, and that the father was unable to take the witness stand and give victim impact evidence, one of the victims' daughters had already testified that he could not live in his Haywood County home since the crimes and that he got upset if anyone mentioned his daughter's name; (3) in regard to the statement that defendant had victimized people numbering in the hundreds, this argument was a rhetorical method of reminding the jury that the victims were sentient beings with close family ties before they were murdered by defendant; (4) in regard to the prosecutor's statement that if the other daughters of two of the victims had also been present, then they probably would have been the victims of the mass murderer and atrocity, a reasonable inference can be drawn from the evidence that had there been more people present at the scene, defendant might have killed them also; (5) in regard to the prosecutor's comment about defendant's laughing and grinning during the course of the trial, a prosecutor may properly comment on a defendant's demeanor displayed throughout the trial; and (6) in regard to the prosecutor's statement that if the adult victims could be at trial, they would ask defendant to kill them instead of their child, the prosecutor was using the wide latitude afforded counsel in hotly contested cases to suggest that the murder of the fourteen-year-old victim was worthy of a death sentence.

48. Appeal and Error— preservation of issues—failure to make argument

Although defendant contends the trial court erred in a multiple murder sentencing proceeding by failing to intervene ex mero motu when the prosecutor allegedly argued to the jurors the positive impact a death verdict would have on the surviving relatives of the victims, defendant has waived his right to appellate review of this issue because defendant does no more than cite the allegedly problematic passages.

49. Sentencing— prosecutor's argument—religion

The trial court did not err in a multiple murder sentencing proceeding by failing to intervene ex mero motu when the prosecutor argued that each juror would lie in bed and thank the Lord for their own safety, the safety of their family, and for the knowledge he or she did the right thing, because: (1) rather than invoking religious law over secular law, this argument merely urged jurors to make the decision the State viewed as the proper one which was recommending a death sentence; and (2) even if it be

assumed arguendo that this statement was improper, the prejudice, if any, was neutralized by defense counsels' use of religious arguments during their closing analogizing that jurors should be merciful as Jesus Christ was.

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

Defendant did not receive ineffective assistance of counsel in a multiple murder sentencing proceeding based on defense counsel's failure to object to alleged errors in the State's closing argument and failure to request a mistrial.

51. Sentencing— nonstatutory mitigating circumstances—peremptory instructions

The trial court did not err in a multiple murder sentencing proceeding by refusing to give peremptory instructions for two of the forty-four nonstatutory mitigating circumstances submitted to the jury as to the murder of two of the victims, including that defendant did not flee after the murders and that defendant displayed remorse for his actions, because: (1) the evidence presented at trial permitted the inference that defendant intended to flee Haywood County upon leaving the scene of the crime; and (2) defendant's evidence showing remorse is indirect and tenuous.

52. Sentencing— mitigating circumstances—peremptory instructions—mental or emotional disturbance—impaired capacity

The trial court did not commit plain error in a multiple murder sentencing proceeding by failing to give peremptory instructions on the N.C.G.S. § 15A-2000(f)(2) mitigating circumstance that the murders were committed while defendant was under the influence of a mental or emotional disturbance and the N.C.G.S. § 15A-2000(f)(6) mitigating circumstance that defendant's capacity to appreciate the criminality of his conduct was impaired, and defense counsel did not provide ineffective assistance by failing to request such instructions, because a trial court's failure to give a peremptory instruction relating to a defendant's mental illness is not error where the evidence supporting the instruction came from a mental health professional evaluating the defendant in preparation for trial since this evidence lacks sufficient indicia of reliability to permit the conclusion that it is manifestly credible.

53. Sentencing— aggravating circumstances—same evidence

The trial court did not commit plain error in a multiple murder sentencing proceeding by failing to instruct the jury that it could not use the same evidence to support multiple aggravating circumstances, because: (1) defendant failed to make any request for an instruction that the same evidence cannot be used as a basis for finding more than one aggravating circumstance; and (2) assuming arguendo that failure to give the instruction was error, defendant has failed to demonstrate that the jury probably would have returned a different verdict absent the omission in the instructions.

54. Sentencing— death penalty—proportionate

The trial court did not err by sentencing defendant to the death penalty for two first-degree murders, because: (1) defendant was convicted of five first-degree murders, three on the basis of premeditation and deliberation and under the felony murder rule and two solely under the felony murder rule; (2) defendant killed one victim and then killed four other victims in an attempt to rid the scene of witnesses; (3) defendant invaded the home of two of the victims and killed five people from three generations of one family; and (4) the jury found three aggravating circumstances including the N.C.G.S. § 15A-2000(e)(4) aggravator that the capital felonies were committed for the purpose of avoiding or preventing a lawful arrest; the N.C.G.S. § 15A-2000(e)(9) aggravator that the murders were especially heinous, atrocious, or cruel; and the N.C.G.S. § 15A-2000(e)(11) aggravator that the murders were part of a course of conduct of other crimes of violence against other persons, and our Supreme Court has deemed the (e)(9) and (e)(11) aggravating circumstances standing alone to be sufficient to sustain a sentence of death.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of death entered by Judge James U. Downs on 24 and 25 April 2001 in Superior Court, Haywood County, upon a jury verdict finding defendant guilty of two counts of first-degree murder. On 4 November 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 September 2003.

Roy Cooper, Attorney General, by William B. Crumpler, Assistant Attorney General, for the State.

James P. Cooney III for defendant-appellant.

PARKER, Justice.

Defendant Charles Wesley Roache was indicted on 18 October 1999 for the first-degree murders of Earl Phillips, Cora Owens Phillips, Eddie Lewis Phillips, Mitzi Carolyn Blazer Phillips, and Katie Phillips. Defendant was tried capitally and found guilty of first-degree murder based on felony murder alone in the deaths of Earl Phillips and Cora Phillips. Defendant was found guilty of first-degree murder based on premeditation and deliberation and felony murder for the deaths of Eddie Phillips, Mitzi Phillips, and Katie Phillips. Following a capital sentencing proceeding, the jury recommended that defendant be sentenced to death for the murders of Mitzi Phillips and Katie Phillips, and to life imprisonment without parole for each of the other three murders. The trial court entered judgment accordingly.

The State's evidence tended to show that on the evening of 30 September 1999 defendant and Chris Lippard were on Rabbit Skin Road in the vicinity of the victims' houses. The two had been on a crime spree of approximately forty-eight hours duration, during which defendant killed a man named Chad Watt early in the morning of 29 September 1999 and assaulted a man named Bart Long at a rest area west of Hickory on Interstate 40 in the afternoon of 30 September 1999. Defendant and Lippard were driving on Interstate 40 in an attempt to leave North Carolina when they left the interstate at exit 20, Jonathan Creek Road, which intersects Rabbit Skin Road approximately thirty to fifty yards away. Lippard accidentally backed the truck off the road and into a ditch.

After their truck was disabled, Lippard offered the driver of one vehicle that stopped fifty dollars to drive them to the interstate. Defendant also attempted to stop at least one additional vehicle to get a ride. Two of the people in these cars later testified that one of the two men carried a case of beer. The efforts to obtain a ride from passers-by were unsuccessful.

Defendant and Lippard walked towards the nearest house on Rabbit Skin Road in order to steal a car. This house was 126 Earl Lane, the home of Earl and Cora Phillips. Lippard went into the house. Defendant entered the house after he heard a woman scream-

ing from within. Upon entering, defendant saw the woman, Cora Phillips, on the floor with Lippard holding a shotgun to her head. The woman's husband, Earl Phillips, pleaded with defendant to prevent Lippard from killing the woman. Defendant assured Earl that no one was going to die.

At defendant's request, Earl Phillips showed defendant the cabinet in which Earl kept his guns. Defendant took a 20 gauge shotgun, several shotgun shells, and a .22 caliber rifle. Defendant then disabled the telephone by cutting the cord leading into the wall. He also bound Earl and Cora Phillips' hands together with duct tape. Defendant and Lippard left in Earl Phillips' 1986 Ford pickup truck.

Defendant and Lippard drove Phillips' truck away from the house towards Rabbit Skin Road. While driving down the lane, they passed a small red car heading towards the house. Before reaching the intersection of Earl Lane and Rabbit Skin Road, Lippard overturned the truck. Defendant broke the passenger window in order for the pair to escape. Lippard returned to the house. Defendant stayed behind to gather their items from the truck and then waited in the woods near the wrecked truck.

Shortly thereafter, defendant heard Lippard yelling for assistance. The man from the red car was fighting with Lippard for control of a gun. Defendant shot the man, Eddie Phillips, once in the chest with the shotgun he was carrying. Defendant then reloaded the gun and went to the house with Lippard. The woman from the car, Mitzi Phillips, was standing in the doorway refusing the pair entry. Defendant broke open the door and shot Mitzi Phillips once in the face. Defendant saw a girl, fourteen-year-old Katie Phillips, run into the bathroom. He pushed open the door to find her sitting on the toilet. Defendant shot Katie Phillips once in the side of the head. Lippard, meanwhile, had gone to the living room where he and defendant had left Cora and Earl Phillips bound. Defendant returned to that room to find Earl Phillips slumped over. Cora Phillips was lying on the floor with blood coming from her head. Defendant shot both Cora and Earl Phillips once in the head.

Lippard drove himself and defendant away from the house in the red car, a 1993 Saturn belonging to Mitzi Phillips. While driving down Earl Lane they passed one car, later found to belong to Danny Messer. As they reached the end of the lane they passed another car, later found to belong to Todd Berrong. They drove the Saturn onto Interstate 40.

Danny Messer had been driving home that evening when he saw Earl Phillips' truck upside down at the end of Earl Lane. He turned into the lane to notify Earl Phillips that his truck "had rolled off." As he drove up to Earl and Cora Phillips' house, he saw Mitzi Phillips' red Saturn leave the parking area near the house, heading towards Rabbit Skin Road.

At the house, Messer saw the bodies of four of the victims: Eddie, Mitzi, Earl and Cora Phillips. Messer testified at trial that he believed Eddie Phillips was still alive at that time. After making this discovery, Messer left, encountering Todd Berrong at the end of Earl Lane at Rabbit Skin Road. Although there was some evidence to the contrary, Berrong and Messer apparently returned to the Phillips' house so that Berrong could view the bodies. The two then drove to a convenience store located approximately one-quarter of a mile away, and Berrong called 911.

Berrong testified that he waited at the end of Earl Lane for police. When the police arrived, they noted the locations of the bodies and that all the victims were deceased. The police secured the scene.

After defendant and Lippard left the scene of the crime, they drove for a short distance on Interstate 40 before they hit a concrete divider. The crash disabled the car. The accident occurred approximately one to one and a half miles west of the Jonathan Creek Road exit on Interstate 40. Defendant exited the vehicle and left the highway on the side with the guardrail. Lippard crossed the barrier at the opposite side of the road and disappeared.

Around 8:30 a.m. on 1 October 1999, Jim Fowler discovered defendant hiding under a camper top lying on Fowler's property, about three-quarters of a mile to one mile from the interstate where the red car crashed. Fowler's son called the police while Fowler watched defendant, holding him at gunpoint until a deputy arrived from the Haywood County Sheriff's Department.

Officer Beecher Phillips transported defendant to the sheriff's department, where he turned defendant over to the custody of Detective Larry Bryson and State Bureau of Investigation Agent Toby Hayes. Agent Hayes advised defendant of his rights, and defendant indicated his understanding. Defendant waived his rights by signing a form offered him by Agent Hayes.

Defendant initially told the officers that he had shot the man in the yard, the woman in the kitchen, and the girl in the bathroom. He

stated that Lippard had shot the older couple in the living room. During the course of the questioning and the recording of his statement, however, defendant admitted that he had shot all five victims. He persisted in stating that he was responsible for all five deaths even after officers pointed out the discrepancy between this statement and his earlier story.

Defendant also talked to police about the murder of Chad Watt in Alexander County. This murder resulted from a fight between the two, during which defendant "beat [Watt] so bad [defendant] knew [he]'d have to kill him so he wouldn't tell on [defendant]." Defendant gave police information on the location of the body, which led Alexander County Sheriff's deputies to recover Watts' body on 2 October 1999.

Defendant confessed as well to an attack on a man which occurred at a rest area on Interstate 40 west of Hickory. Defendant pretended to use a urinal while waiting for a victim to enter the restroom. When the victim, a man named Bart Long, entered a stall and sat on the toilet, defendant sprayed him with pepper spray and put him in a sleeper hold. Defendant attempted to obtain the man's wallet, but Long's yells attracted a crowd of people, causing defendant to flee.

Defendant additionally gave police information concerning his accomplice, Chris Lippard. At the time of his initial conversations with police, defendant did not know Lippard's last name. Over the next several days, however, defendant made telephone calls which eventually led him to discover Lippard's last name, information which he shared with police. This information led to Lippard's arrest in New Orleans about a week later.

Pathologists performed autopsies on all five victims on 2 October 1999 in Chapel Hill, North Carolina. Dr. John Butts, the Chief Medical Examiner of North Carolina, either performed or supervised each of these autopsies and testified at defendant's trial about the cause of death for and injuries to each victim. Earl Phillips' autopsy showed severe injury to his head as a result of a contact gunshot wound to the right side of his head, in the area of his right temple, meaning that the barrel of the shotgun was against the body of the victim at the time the gun was fired. Pathologists removed lead shot from his body. Dr. Butts testified that Earl Phillips' death was caused by a shotgun wound to the head. The pathologists also noted that Earl Phillips' hands were bound with duct tape.

Dr. Butts performed the autopsy of Cora Phillips, which revealed several injuries to her body. Her death was due to a single contact shotgun wound in the corner of her mouth on the left side of her face, which caused massive injury to her head. Pathologists found lead pellets and a plastic shot cup in her head. The autopsy also showed blunt force injuries—lacerations and bruising—on her right forearm, which were consistent with defensive injuries. These were incurred before she died. Cora Phillips' hands were also fastened together with duct tape.

The autopsy of the body of Eddie Phillips revealed a single gunshot to the left side of the body which struck multiple organs in the chest and abdomen. Pathologists determined that the gunshot wound was a contact wound. Shotgun pellets and shotgun wadding were recovered from Eddie Phillips' body at the time of the autopsy. In Dr. Butts' opinion the shotgun wound would have resulted in unconsciousness within a matter of seconds. Pathologists also found blunt force injuries on Eddie Phillips' head behind and a little above the left ear; these injuries were likely inflicted while the victim was still alive. Dr. Butts testified that Eddie Phillips' death was caused by the shotgun wound to his chest.

The autopsy on Mitzi Phillips disclosed that she died from a shotgun wound to the head. The entrance wound was a large injury which effectively covered the forehead. There was an exit wound on the right side of the head, where some of the shot pellets had created a hole. Nonetheless, some of the shot pellets remained inside the body. The shot was likely fired from a close range, based on the powder stippling marks on the forehead around the wound.

As to the autopsy on the body of Katie Phillips, Dr. Butts testified that this body had evidence of a single shotgun wound to the head which had entered in the left eye. Some of the shot had exited from the right side of the head, but some shot was still present in the head at the time of the autopsy. The track was through the left eye into the skull. The force of the blow was enough to remove the brain from the cranial wall. Dr. Butts was of the opinion that the shot was fired from close range and was immediately incapacitating. The autopsy also revealed a defensive injury from the shotgun blast to Katie Phillips' left hand, indicating that she had raised her hand to shield herself from the gun shot. The shotgun wound to the head was the cause of Katie Phillips' death.

Dr. Claudia Coleman, an expert in the field of forensic psychology, testified at trial that defendant suffered from a chronic anxiety disorder, had a low average intelligence, and had experienced a violent upbringing. Defendant, according to Dr. Coleman, exhibited features typical of a dependent personality disorder, meaning that he has a high need for affection and security from other individuals. Dr. Coleman also testified to defendant's long history of polysubstance dependence, which she attributed to his anxiety. In the expert's opinion, defendant's alcohol and drug use on the afternoon and night of 30 September 1999 in combination with his personality and his anxiety disorders would have affected his judgment, reasoning, and problem solving capacities at the time he murdered the Phillips family.

JURISDICTIONAL ISSUE

[1] Defendant first contends that use of the short-form murder indictment taken from N.C.G.S. § 15-144, as a charging instrument deprived the trial court of jurisdiction to sentence defendant to death after his conviction for first-degree murder. Defendant argues in part that aggravating circumstances must be alleged in the indictment in that Article I, Section 22 of the North Carolina Constitution requires that all elements of a crime be set forth in an indictment in order for a court to have jurisdiction over a defendant. Moreover, defendant would have this Court rule that, pursuant to the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556 (2002), aggravating circumstances are elements of first-degree capital murder and, accordingly, must be included in an indictment to comport with the North Carolina Constitution and the Due Process Clause of the Fifth Amendment as well as to avoid violation of the notice guarantee of the Sixth Amendment of the United States Constitution.

This Court addressed each point raised by defendant in the recent case of *State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593 (2003), in which the Court held that, even after *Ring*, the short-form murder indictment is sufficient under both the United States and the North Carolina Constitutions without the inclusion of the aggravating circumstances. *Id.* at 278, 582 S.E.2d at 607. As noted therein, the United States Supreme Court's ruling in *Ring* does not require reconsideration of our earlier holdings that: (i) the short-form murder indictment was an appropriate charging document, *see, e.g.*, *State v. Braxton*, 352 N.C. 158, 173-75, 531 S.E.2d 428, 436-38 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *State v. Wallace*, 351 N.C. 481, 503-08, 528 S.E.2d 326, 341-43, *cert. denied*, 531 U.S.

1018, 148 L. Ed. 2d 498 (2000); and (ii) that the constructive notice provided by the statute in which the aggravators are listed, N.C.G.S. § 15A-2000(e), satisfies all constitutional constraints mentioned by defendant, *see, e.g., State v. Holden*, 321 N.C. 125, 154, 362 S.E.2d 513, 531 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988); *State v. Williams*, 304 N.C. 394, 422, 284 S.E.2d 437, 454 (1981), *cert. denied*, 456 U.S. 932, 72 L. Ed. 2d 450 (1982). This assignment of error is accordingly overruled.

JURY SELECTION

[2] Defendant assigns error to several aspects of the jury selection. First, defendant contends that the trial court denied his rights under both the North Carolina Constitution and the United States Constitution by erroneously allowing the State's challenges for cause of prospective jurors Charles Lee and Alice Payton. Defendant argues that prospective jurors Lee and Payton unequivocally stated that they could consider both a death sentence and life imprisonment as possible penalties based on the evidence presented at trial and were, thus, improperly excused for cause.

The test for determining when a prospective juror may be excused for cause is whether his views "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)). The fact that a prospective juror "voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction" is insufficient justification for removal of a juror for cause. *Witherspoon v. Illinois*, 391 U.S. 510, 522, 20 L. Ed. 2d 776, 785 (1968). The decision as to whether a juror's views would prevent or substantially impair the performance of his or her duties is within the trial court's broad discretion, *State v. Gregory*, 340 N.C. 365, 394, 459 S.E.2d 638, 655 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996), to accommodate those situations "where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Wainwright v. Witt*, 469 U.S. at 425-26, 83 L. Ed. 2d at 852. Accordingly, the decision of the trial court to excuse a juror for cause "will not be disturbed absent an abuse of discretion." *State v. Blakeney*, 352 N.C. 287, 299, 531 S.E.2d 799, 810 (2000), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001).

Applying the *Wainwright* standard, we conclude that the trial court did not abuse its discretion in excusing these prospective jurors for cause. Both prospective jurors Lee and Payton clearly demonstrated their inability to render a verdict in accordance with the laws of the State. *See* N.C.G.S. § 15A-1212(8) (2003) (providing that a challenge for cause may properly be made on the grounds that, regardless of the facts and circumstances, a juror would be unable to render a verdict in accordance with the laws of North Carolina).

The State challenged prospective juror Lee for cause after his repeated insistence that he was unsure if he could recommend the death penalty and his more direct statement that he "probably could not recommend the death penalty." Furthermore, when the prosecutor asked Lee, "[A]re you saying that you would base [the punishment recommendation] on God's law rather than the law of the State of North Carolina," Lee's response was, "Probably." Defendant points out that Lee did state that he could consider the death penalty as punishment; however, further examination of the transcript reveals that when the prosecutor thereafter asked Lee whether his religious beliefs would prevent him from recommending the death penalty, he again said he did not know. Given Lee's repeated equivocations about his ability to recommend the death penalty, along with his expressed concern about following the law of the State of North Carolina, we hold that the trial court did not abuse its discretion in excusing him for cause.

Prospective juror Payton informed the prosecutor that she had beliefs against the death penalty and that she had made up her mind that she would not give defendant the death penalty. Defendant attempted to rehabilitate her, at which time she agreed that she could listen to all the evidence in the case and consider both punishment alternatives; however, when the prosecutor later asked Payton whether she had stated that she could not and would not vote for the death penalty, she replied, "That's what I said. I told you I didn't believe in death." She went on to confirm again that she "wouldn't vote for the death penalty." Since Payton unequivocally stated that she could not recommend the death penalty for this defendant, we hold that the trial court properly granted the State's challenge for cause.

[3] Defendant next argues that the trial court erred by rejecting the specific preselection instruction proposed by defendant. This instruction would have explained the process of sentencing someone to death. Defendant claims that giving his requested instruction would

have led to more meaningful *voir dire* of the potential jurors. We find defendant's contention to be without merit.

The trial court "has broad discretion 'to see that a competent, fair and impartial jury is impaneled and rulings in this regard will not be reversed absent a showing of abuse of discretion.' " *State v. Black*, 328 N.C. 191, 196, 400 S.E.2d 398, 401 (1991) (quoting *State v. Johnson*, 298 N.C. 355, 362, 259 S.E.2d 752, 757 (1979)). A review of the record reveals that the trial court correctly instructed the potential jurors about the law governing the capital sentencing process. The actual instructions given by the trial judge were similar in substance to those requested by defendant. Furthermore, defendant's argument that prejudice occurred is purely speculative. As a result we hold that the trial court did not err in refusing to give defendant's requested preselection instruction. This assignment of error is overruled.

[4] Next, defendant asserts that the trial court impaired his right to an impartial jury when it overruled his objection to a line of questioning by the State which defendant claims chilled his right to conduct an adequate *voir dire* under *Morgan v. Illinois*, 504 U.S. 719, 119 L. Ed. 2d 492 (1992). The United States Supreme Court held in *Morgan* that, under the Due Process Clause of the Fourteenth Amendment, defendants are entitled during *voir dire* to inquire as to whether a prospective juror would automatically vote to impose the death penalty upon defendant's conviction regardless of any evidence of mitigating circumstances. *Id.* at 729, 119 L. Ed. 2d at 503. In the instant case, defendant claims that the State began to "coach" jurors as to how to avoid dismissal on *Morgan* grounds after witnessing the dismissal of several jurors who indicated that they would automatically impose the death penalty on conviction. Defendant cites the following exchange, which occurred during the State's examination of prospective juror Tracie Smiley, and which the prosecutor repeated in a similar fashion with other jurors through the remainder of *voir dire*:

> Q: I want to point out also that on the other side of that is if the jury found the defendant guilty of five counts of premeditated and deliberated first degree murder, it would still be their obligation to consider both punishment possibilities, not to fly off and recommend one and not the other just without thinking about it, but still to consider both possibilities. Do you understand where I'm coming from there, ma'am?

A: Hmm-hmm.

Q: In either of those situations, whether it be one or five, Ms. Smiley, could you still consider both punishment possibilities and recommend the one that you and the other jurors felt was appropriate?

A: Yes.

Q: And I want to caution you, and you may hear this mentioned from time to time that there's nothing—the jury is not supposed to do anything running on automatic or nothing just knee jerk. There's a procedure to be followed, things to be weighed and considered.

There will never be a time when the judge is going to tell you that you're supposed to automatically do this or you're supposed to automatically do that. You won't hear that at all. There's a procedure to be followed in a cool-headed way, and to the extent that automatic is a bad word, you don't do anything—

[DEFENSE COUNSEL]: Objection.

[THE COURT]: Overruled.

After considering defendant's claim, we hold that the trial court did not err in overruling defendant's objection. To establish reversible error during *voir dire*, a defendant must show that the trial court abused its discretion and also that prejudice resulted from such error. *State v. Gell*, 351 N.C. 192, 200, 524 S.E.2d 332, 338-39, *cert. denied*, 531 U.S. 867, 148 L. Ed. 2d 110 (2000). In *State v. Ward*, 354 N.C. 231, 555 S.E.2d 251 (2001), this Court considered a line of questioning by the prosecutor similar in effect to those questions at issue here. *Id.* at 253-55, 555 S.E.2d at 266-67. We determined that such questions were properly within the trial court's discretion. *Id.* at 254-55, 555 S.E.2d at 267. The prosecutor there, as here, asked questions to elicit whether a juror would automatically sentence a defendant to death after finding him guilty. *Id.* at 254, 555 S.E.2d at 266. This Court stated,

> [T]he trial court did not abuse its discretion in permitting the prosecutor to question prospective jurors in the challenged manner. The questions were designed to determine whether the jurors would refrain from considering punishment until such time, if at all, as they reached the sentencing proceeding. . . . [The prosecutor] merely endeavored to determine whether the

prospective jurors could follow the law and serve as fair and impartial decisionmakers.

Id. at 255, 555 S.E.2d at 267.

The Court's reasoning in *Ward* is applicable here. The primary goal of *voir dire* is to seat a jury which will render a fair and impartial verdict at the guilt phase of trial and, if need be, at the sentencing proceeding. *State v. Conaway*, 339 N.C. 487, 511, 453 S.E.2d 824, 839, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995). The prosecutor's questions quoted above were a correct statement of the law. They additionally served to ensure that the impaneled jury would consider both punishment alternatives before making a punishment recommendation. Since the questions were well within the bounds of the stated purpose of *voir dire*, the trial court did not abuse its discretion in overruling defendant's objections to this line of questioning. Defendant's argument is without merit.

[5] Defendant's next assignment of error concerns the procedure used during jury selection. Defendant specifically complains that the trial court relieved the State of its statutorily-imposed obligation to pass a full panel of twelve jurors before defendant began his selection. Defendant filed a pretrial motion for individual *voir dire* and sequestration of jurors during *voir dire*. At the hearing on this motion, defense counsel stated: "We would ask for individual *voir dire* on all issues related to jury selection, and not simply pretrial publicity." The trial judge denied the motion but indicated that he would permit individual *voir dire* as to pretrial publicity.

Before jury selection began, the court revisited the issue, and in response to a question by defense counsel, the court informed counsel that jurors would be passed one at a time rather than in a panel of twelve. The first juror questioned by the prosecution was removed for cause. When the next juror was passed by the State, the trial court again revisited the issue of individual *voir dire*. Following discussion among counsel and the court and over defendant's objection, the court ruled that if individual *voir dire* were to continue, then the State would be required to pass only a single juror at a time. Once the State passed an individual juror, defendant was required to pass or challenge that same juror immediately. Thus, individual jurors were passed to defendant rather than a panel of twelve jurors accepted by the State.

Jury selection in criminal cases is controlled by N.C.G.S. § 15A-1214. Subsections (d) through (f) set forth a procedure to be

followed in the majority of cases. In this process the prosecutor must question the jurors, make any challenges desired, and, when satisfied with the twelve in the box, tender a complete panel to the defendant before the defendant conducts any examination. N.C.G.S. § 15A-1214(d) (2003). At that point the defendant has an opportunity to question the jurors and make his challenges. N.C.G.S. § 15A-1214(e). Should the defendant successfully challenge any jurors passed by the State, the clerk calls replacement jurors to fill the empty seats; and the State questions and challenges those replacements until the State again passes a full panel of twelve to the defendant. N.C.G.S. § 15A-1214(f). This process continues until both parties are satisfied with the panel of jurors. *Id.*

The General Assembly has also authorized a trial judge in a capital case to allow individual *voir dire* at his or her discretion. The statute provides, "In capital cases the trial judge for good cause shown may direct that jurors be selected one at a time, in which case each juror must first be passed by the State. These jurors may be sequestered before and after selection." N.C.G.S. § 15A-1214(j). Defendant would have this Court hold that the procedural rules from subsections (d) through (f), and in particular the requirement that the prosecutor pass a full panel of twelve jurors to the defendant, apply even where the trial court has used its discretion to order individual *voir dire* pursuant to subsection (j). We decline to so hold.

In interpreting a statute, this Court must first discern the legislative intent in passing the statute. *State v. Buckner*, 351 N.C. 401, 408, 527 S.E.2d 307, 311 (2000). In ascertaining intent, we look first to the plain language of the statute. *State v. Anthony*, 351 N.C. 611, 614, 528 S.E.2d 321, 322 (2000). Where the words of a statute are clear and unambiguous, the words will be given their plain and definite meaning. *State v. Jackson*, 353 N.C. 495, 501, 546 S.E.2d 570, 574 (2001).

Applying these principles of statutory construction, we conclude that subsection (j), applicable only in capital cases, contains a distinct procedure, separate from the mandatory procedure outlined in subsections (d) through (f). As basis we first note the differences between the language used in subsections (d) and (j). Subsection (d) provides, "When the prosecutor is satisfied with the 12 in the box, they must then be tendered to the defendant. Until the prosecutor indicates his satisfaction, he may make a challenge for cause or exercise a peremptory challenge to strike any juror, whether an original or replacement juror." N.C.G.S. § 15A-1214(d). Subsection (j) uses the

phrase "be selected one at a time" and directs that "each juror must first be passed by the State." This language when compared with the language in subsection (d) manifests a clear legislative intent for an alternative method of jury selection under subsection (j).

Additionally, we note that the phrase "be selected" means to be chosen from a number or group, *see Webster's Third New International Dictionary* 2058 (1971), and connotes a completed action. Defendant's interpretation would be more persuasive if the verb in subsection (j) were "examined" rather than "selected." When read in conjunction with the mandate that "each juror must first be passed by the State," the phrase "be selected one at a time" describes the procedure from the calling of the juror to acceptance by both parties. Thus, when the trial court directs individual *voir dire* on all issues pursuant to subsection (j), all parties are required either to accept or reject a juror before the next prospective juror is called. In this case the trial court did not err by not requiring the prosecution to pass a full panel of twelve.

We emphasize that nothing in this holding relative to subsection (j) should be interpreted to infringe upon the trial court's inherent authority to permit individual *voir dire* as to specific sensitive issues in any given case. However, if such questioning is undertaken, the procedure outlined in subsections (d) through (f), including the requirement to pass a complete panel of twelve, must be followed.

Finally, we note that the trial court in this case did not make a specific finding on the record as to the requirement in subsection (j) that good cause be shown. However, inasmuch as defendant did not request such finding when the trial judge indicated that he had reviewed the statute and was satisfied that the procedure was permitted, we presume the trial judge found the necessary "good cause." *See State v. T.D.R.*, 347 N.C. 489, 506, 495 S.E.2d 700, 710 (1998); *Cheape v. Town of Chapel Hill*, 320 N.C. 549, 557, 359 S.E.2d 792, 797 (1987). Defendant's assignment of error is overruled.

Defendant further argues that the improper jury selection procedure violated his constitutional right to a fair and impartial jury. As the State points out, defendant did not raise this constitutional issue at trial; consequently, the trial court did not have the opportunity to consider or rule on this issue. N.C. R. App. P. 10(b)(1). Defendant has accordingly failed to preserve this assignment of error for appellate review. *See State v. Fullwood*, 343 N.C. 725, 733, 472 S.E.2d 883, 887 (1996), *cert. denied*, 520 U.S. 1122, 137 L. Ed. 2d 339 (1997) (holding

that defendant failed to raise a constitutional issue at trial and thus failed to preserve the issue for appellate review).

[6] Next, defendant contends that the trial court erred by failing to intervene *ex mero motu* when prospective juror Penny Stollery revealed during questioning that another unnamed member of the venire had discussed his or her opinions of the case in the jury pool room. Prospective juror Stollery was seated as the twelfth juror in the case. Defendant claims that the trial court's failure to make an inquiry into the content and effect of the remarks by the unidentified juror, or alternatively to strike the panel for the entire day, was plain error. Moreover, defendant asserts that his attorneys' failure to request that the court take such action constituted a violation of his right to effective assistance of counsel.

[7] We note initially that defendant's complaint that the trial court should have made more specific inquiry is not properly before the Court for review. Defendant did not object to this alleged error at trial, and "plain error review is limited to errors in a trial court's jury instructions or a trial court's rulings on admissibility of evidence." *State v. Golphin*, 352 N.C. 364, 460, 533 S.E.2d 168, 230 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). However, defendant has raised the specter of ineffective assistance of counsel. To establish ineffective assistance, a "defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). Accordingly, we consider the possible existence of prejudice.

Juror Stollery told the court that the unidentified member of the venire discussed "[p]rimarily their opinion of what the case was and that they had already established what they felt it was, and what the verdict should be." As defendant points out, contact between a juror and an outside influence may be improper. *See State v. Willis*, 332 N.C. 151, 172-73, 420 S.E.2d 158, 168 (1992); *State v. Barnes*, 345 N.C. 184, 224-25, 481 S.E.2d 44, 66 (1997), *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). The importance of this principle has been addressed by the United States Supreme Court: "It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment." *Mattox v. United States*, 146 U.S. 140, 149, 36 L. Ed. 917, 921 (1892).

Examination of the record reveals that Juror Stollery came to the jury with an unbiased mind. After her revelation about the comments

made in the general jury pool, Juror Stollery agreed that she could and would put the comments she had heard aside:

> Q: Okay. Is there—is there anything about that—I'm thinking, probably if you mentioned it here, you seem to be the kind of person who is intelligent and large-minded enough and you have a good responsible job, you're an educated lady, *I think you could probably put [those comments] in context*, which would be probably a trash can context, *and not be influenced, am I correct in assuming that, ma'am?*
>
> A: *Yes, you're correct.*

(Emphasis added.) The prosecutor and then defense counsel questioned Juror Stollery about her ability to follow the law, to be impartial, and to consider only the evidence presented in court in making her decisions as a member of the jury. Thus, any damage which might have been done by the exposure to the venire-member's opinions was explored by the attorneys' questions before she was seated on the jury. Moreover, Juror Stollery was the only juror or alternate juror drawn from the panel called for 28 March 2001. As a result, she was the only person who potentially could have been tainted by the unknown venire-member's comments that also could have prejudiced defendant's trial. Since Juror Stollery was thoroughly examined as to her ability to be impartial, defendant was not prejudiced by the trial court's failure to inquire *ex mero motu* into the content and effect of the statements of the unknown prospective juror. By the same reasoning, defendant's claim of ineffective assistance must fail in that counsel's failure to object or to challenge that day's venire was not prejudicial. Defendant's assignments of error on this issue are overruled.

GUILT-INNOCENCE PHASE

[8] In his next assignment of error, defendant argues that the trial court erred by denying his pretrial motion to sequester witnesses during the guilt phase of trial, made pursuant to Rule 615 of the North Carolina Rules of Evidence. *See* N.C.G.S. § 8C-1, Rule 615 (2003). Defendant contends the denial of his motion allowed members of the victims' family to be present in the courtroom throughout the presentation of testimony at the guilt phase, unduly eliciting the jury's sympathy.

" 'A ruling on a motion to sequester witnesses rests within the sound discretion of the trial court, and the court's denial of the

motion will not be disturbed in the absence of a showing that the [action] was so arbitrary that it could not have been the result of a reasoned decision.' " *State v. Hyde*, 352 N.C. 37, 43, 530 S.E.2d 281, 286 (2000), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001) (quoting *State v. Call*, 349 N.C. 382, 400, 508 S.E.2d 496, 507-08 (1998)). Defendant here has failed to demonstrate that the trial court's judgment was so arbitrary that it would constitute an abuse of discretion.

[9] Defendant next contends that the trial court violated N.C.G.S. § 15A-943(b) by arraigning him on the same day his trial began and that counsel was ineffective for failing to object to this procedure. Defendant asserts that this error violated his federal and state constitutional rights, but defendant failed to assert these constitutional arguments before the trial court. Hence, these arguments are not properly before this Court for review. N.C. R. App. P. 10(b)(1); *State v. Anderson*, 350 N.C. 152, 175, 513 S.E.2d 296, 310, *cert. denied*, 528 U.S. 973, 145 L. Ed. 2d 326 (1999). We note initially that defendant has not shown whether N.C.G.S. § 15A-943(a) was applicable in Haywood County at the time of his trial. If section 15A-943(a) applies, then section 15A-943(b) provides a criminal defendant with the right not to be tried without his or her consent during the week following arraignment. N.C.G.S. § 15A-943(b) (2003); *see also State v. Shook*, 293 N.C. 315, 319, 237 S.E.2d 843, 846 (1977). However, a defendant must affirmatively assert the right; and when a defendant fails to object, this statutory right is waived, and a defendant is deemed to have implicitly consented for the trial to occur within the week. *See, e.g., id.* at 316, 237 S.E.2d at 845; *State v. Richardson*, 308 N.C. 470, 483, 302 S.E.2d 799, 807 (1983); *State v. Locklear*, 349 N.C. 118, 135, 505 S.E.2d 277, 287 (1998), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999). Defendant's arraignment in this case occurred on 5 April 2001, immediately following jury selection but before opening statements. Defendant did not object. Accordingly, we hold that defendant waived his right to a week's interlude between his arraignment and trial, and the trial court did not err in proceeding to trial immediately.

We additionally note that the record reflects clearly that defense counsel were well-prepared for trial at that time. "Subsection (b) is apparently designed to insure both the [S]tate and the defendant a sufficient interlude to prepare for trial. This is necessary because before arraignment neither the [S]tate nor defendant may know whether the case need proceed to trial." *State v. Shook*, 293 N.C. at

318, 237 S.E.2d at 846. Since the record reveals that defendant's plea was known by both parties well in advance of arraignment, the State and defendant both were aware that trial would proceed. Prejudice does not exist in this situation. A defendant must show prejudice in order to claim successfully ineffective assistance. *See Strickland v. Washington*, 466 U.S. at 687, 80 L. Ed. 2d at 693. Defendant's claim of ineffective assistance is denied.

[10] Defendant's next assignment of error asserts that his trial counsel provided ineffective assistance in violation of the Sixth Amendment during opening arguments. Specifically, defendant complains that his counsel made the following acknowledgments:

> Lippard brings Watt to that trailer looking for drugs. They are hoping that Charles and Stout may have some drugs. But they don't. And so, Lippard says, "Let's rob some drug dealers. I've got a gun; let's head out and rob some drug dealers."
>
> All four boys piled into Chad Watt's car and headed out. And the car breaks down in a rural area of Alexander County.
>
> Watt starts to argue with Charles about why this car is not running. They go back and forth and the argument turns violent and Charles starts to fight with Watt and Lippard joins and turns on his buddy, Watt, and joins Charles in beating Watt, and then Stout joins in beating Watt. They beat Watt badly. And then Charles shoots Watt in the head. It's not a fact that will change. Lippard shoots Watt in the head. And they bury that boy on the bank of the creek under a tree and they leave him there to rot.

Defendant also objects to his counsel calling the crimes against the Phillips family "brutal," as well as the following statement:

> This is a series of drunken, chain reactions, and Charles was reacting to the situation. And he's at the foot of Earl Lane with a choice. And he hears Lippard scream, "Charles, get him off me, he's going to kill me, Charles! Don't leave me, Charles!" And Charles makes the wrong choice.

Defendant claims that counsel, by making these statements, violated his right to effective assistance of counsel in that: (i) he admitted the murder of Watt before the trial court had the chance to rule on defendant's motion to suppress this crime; (ii) he conceded that defendant was involved in a conspiracy to commit armed robbery; (iii) he acknowledged an aggravating circumstance by admitting the

murder was "brutal"; and (iv) he undermined the trial strategy now claimed by defendant, namely, that defendant lacked the capability to make rational choices about his actions on the night in question.

"When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985). In order to meet this burden, a defendant must satisfy a two-part test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. at 687, 80 L. Ed. 2d at 693. Both prongs of this test must be demonstrated in order to claim successfully ineffective assistance of counsel. *Id.*

Defendant makes four distinct claims of ineffective assistance in this case. After considering each in turn, we conclude that defendant has not made the required showing that counsel's performance was constitutionally deficient under the *Strickland* analysis as to any claim.

Counsel for defendant acknowledged the murder of Chad Watt, a murder for which defendant was not on trial, in his opening statement. He did so despite the fact that the trial court had deferred a decision on defendant's motion to suppress evidence regarding this event until the State intended to use such evidence. Defendant claims counsel's acknowledgment eliminated the possibility that evidence on the Watt murder would be excluded and potentially prejudiced the jury against defendant through use of the language "leave him [Watt] there to rot."

This Court has held that "[c]ounsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." *State v. Fletcher*, 354 N.C. 455, 482, 555 S.E.2d 534, 551 (2001), *cert. denied*, 537 U.S. 846, 154 L. Ed. 2d 73 (2002); *see also State v. Prevatte*, 356 N.C. 178, 236, 570 S.E.2d 440, 472 (2002), *cert. denied*,

—— U.S. ——, 155 L. Ed. 2d 681 (2003). Moreover, this Court engages in a presumption that trial counsel's representation is within the boundaries of acceptable professional conduct. *State v. Fisher*, 318 N.C. 512, 532, 350 S.E.2d 334, 346 (1986). As the United States Supreme Court has stated,

> A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . . .

Strickland v. Washington, 466 U.S. at 689, 80 L. Ed. 2d at 694.

Defense counsel's admission of Watt's murder in this case was not an unreasonable trial strategy. This Court has previously held that counsel may reasonably reveal facts during opening arguments which will come out later at trial in an effort to lessen their impact when they are revealed. *State v. Strickland*, 346 N.C. 443, 455, 488 S.E.2d 194, 201 (1997), *cert. denied*, 522 U.S. 1078, 139 L. Ed. 2d 757 (1998). Defense counsel's choice to attempt to lessen the sting of the Watt murder by previewing it for the jury in his opening statement was reasonable given the likelihood that this evidence would be admitted. The same trial judge had previously admitted evidence of Watt's murder in Lippard's trial. The Watt murder occurred forty-eight hours before the crimes for which defendant was on trial. Defendant and Lippard's attempt to flee from North Carolina after Watt's murder was the reason for their presence in Haywood County. Thus, under this Court's holding in *State v. Agee*, 326 N.C. 542, 547-48, 391 S.E.2d 171, 174 (1990), the evidence of Watt's murder was admissible to show the chain of circumstances leading to the five murders for which defendant was being tried, subject only to Rule 403 balancing by the trial court. Furthermore, the prosecution had signaled in its opening statement and in its opposition to defendant's motion *in limine* that the prosecution intended to introduce evidence of the Watt murder just as it had at Lippard's trial. Under these circumstances, notwithstanding the trial court's deferral of its ruling on the pretrial motions, defense counsel's decision to mitigate the effect of the prior bad act preemptively was acceptable trial strategy under *Strickland v. Washington*.

Counsel's opening statement for defendant also informed the jury that defendant participated in a plan with Lippard, Watt, and another man to rob drug dealers. This fact arguably could be sufficient to convict defendant of conspiracy to commit armed robbery. *See* N.C.G.S. § 14-87 (2003) (defining armed robbery); *State v. Gell*, 351 N.C. at 209, 524 S.E.2d at 343 (defining criminal conspiracy as "an agreement, express or implied, between two or more persons, to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means"). This showing alone, however, is insufficient to establish that counsel's performance was deficient.

The decision to tell the jury about this conduct was a reasonable strategy in that it merely forecast the evidence the jury would hear later in trial. In defendant's statement to police, he flatly stated, "I had a sawed-off, 20 gauge, single shot, shotgun with me. . . . Chad wanted to buy one-half ounce of marijuana and I was going to take him to some Spanish drug dealers I knew. We were going to rob them and neither Chris nor Chad had a gun." This Court has held that a counsel's statement of a fact strongly suggesting guilt of a crime does not necessarily amount to an admission of legal guilt. *State v. Strickland*, 346 N.C. at 454, 488 S.E.2d at 200. This distinction is critical where, as here, a defendant has not been indicted for the crime about which the attorney makes factual concessions. Therefore, counsel's description to the jury of defendant's actions did not constitute ineffective assistance even though it potentially could have been sufficient to prove guilt of a crime.

Defense counsel also stated in opening arguments that "the best evidence that [the State] will present came from [defendant] less than forty-four hours after this *brutal* crime." (Emphasis added). Defendant now contends that the use of the word "brutal" in this sentence amounts to an admission of an aggravating circumstance, presumably N.C.G.S. § 15A-2000(e)(9), that "[t]he capital felony was especially heinous, atrocious, or cruel." We disagree. Describing a murder as "brutal" does not satisfy the legal standard in the (e)(9) aggravator that the capital felony was "heinous, atrocious, or cruel," much less "especially" so. This Court has held that for purposes of the e(9) aggravator, the murder must exhibit "brutality exceeding that which is normally found in first-degree murder." *State v. Quick*, 329 N.C. 1, 32, 405 S.E.2d 179, 198 (1991); *see also State v. Stanley*, 310 N.C. 332, 335-37, 312 S.E.2d 393, 395-97 (1984). Defense counsel did not concede the existence of the (e)(9) aggravating circumstance merely by calling the murder "brutal," and defendant's claim that his

attorney's characterization of the killing constituted ineffective assistance is without merit.

Defendant further contends that counsel undermined his diminished capacity defense in stating that defendant made "the wrong choice" by going back up Earl Lane to assist Lippard, an act which led ultimately to the killing of Eddie, Mitzi, and Katie Phillips. The planned diminished capacity defense, according to defendant, had two different aspects: (i) that Lippard rather than defendant was the leader of the crime spree, and (ii) that defendant's use of drugs and alcohol during the spree in combination with his pre-existing mental state provided reasonable doubt about defendant's ability to premeditate and deliberate. Using these two propositions, defendant hoped to convince the jury that he was only guilty of second-degree murder.

This statement by counsel did not refute defendant's planned trial strategy to the extent that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. at 687, 80 L. Ed. 2d at 693. As we have noted, this Court generally declines to question a party's trial strategy. *State v. Prevatte*, 356 N.C. at 236, 570 S.E.2d at 472 ("Decisions concerning which defenses to pursue are matters of trial strategy and are not generally second-guessed by this Court."). Moreover, the comment at issue here was merely one brief statement in an exhaustive opening argument.

Diminished capacity is a means of negating the "ability to form the specific intent to kill required for a first-degree murder conviction on the basis of premeditation and deliberation." *State v. Page*, 346 N.C. 689, 698, 488 S.E.2d 225, 231 (1997), *cert. denied*, 522 U.S. 1056, 139 L. Ed. 2d 651 (1998). The ability to choose is not necessarily inconsistent with a diminished capacity defense in that the mere decision to commit an act does not satisfy the test for specific intent. *See State v. Keel*, 333 N.C. 52, 58, 423 S.E.2d 458, 462 (1992) (holding that "the State must show more than an intentional act by the defendant" in order to prove specific intent).

The comment at issue here was merely one brief statement in an exhaustive opening statement. Viewed in light of the definition of diminished capacity, this statement that defendant "made the wrong choice" by no measure suggested that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v. Washington*, 466 U.S. at 687, 80 L. Ed. 2d at 693. We hold that nothing in counsel's opening statement alleged by defend-

ant to be ineffective assistance amounts to the constitutionally deficient performance required by *Strickland v. Washington*, for ineffective assistance of counsel.

Defendant further contends that the four statements complained of from his counsel's opening argument amounted to *per se* ineffective assistance under this Court's analysis in *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), *cert. denied*, 476 U.S. 1123, 90 L. Ed. 2d 672 (1986). In *Harbison*, this Court granted the defendant a new trial based on closing arguments by his attorney. *Id.* at 180-81, 337 S.E.2d at 507-08. In that case, the defendant maintained throughout his trial that he had acted in self defense. *Id.* at 177, 337 S.E.2d at 506. Trial counsel had adhered to that defense during the presentation of evidence by the State and the defense. *Id.* One of the defendant's attorneys continued to use that theory during his closing argument, but the defendant's other attorney expressed his personal opinion that the defendant should not be acquitted on the theory of self defense but should be convicted of manslaughter rather than first-degree murder. *Id.* at 177-78, 337 S.E.2d at 506. The defendant expressly alleged that he had not endorsed this change in theory. *Id.* at 177, 337 S.E.2d at 505. This Court in *Harbison* stated that "when counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed." *Id.* at 180, 337 S.E.2d at 507. The Court specifically held that the attorney's concession of guilt without the consent of his client amounted to *per se* ineffective assistance. *Id.* at 180, 337 S.E.2d at 507-08.

Despite defendant's contention that each of the four statements he objects to from his counsel's opening statement could be *per se* ineffective assistance, the only statement to which *Harbison* is arguably applicable is counsel's alleged admission of Watt's murder. Even this statement, though, is distinguishable from the acts of the defendant's counsel in *Harbison*. The act in *Harbison* that this Court found merited a new trial was counsel's admission of legal guilt as to the crime for which the defendant had been indicted and for which the defendant was being tried. In the instant case, defendant gave counsel written permission to admit the murders of Eddie, Mitzi, and Katie Phillips, but he did not explicitly authorize counsel to discuss the Watt murder. The murder of Watt, however, unlike the Phillips' murders, was not at issue in this trial; therefore, this defendant was not harmed in the same manner as the defendant in *Harbison*. Accordingly, defendant's counsel's admission of Watt's murder does

not rise to the level of the act condemned by this Court in *Harbison*. We decline to find *per se* ineffective assistance of counsel and overrule defendant's assignment of error.

[11] As his next argument, defendant asserts that the trial court abused its discretion by allowing the State to introduce five pieces of evidence: (i) a videotape of the crime scene; (ii) photographs of Chad Watt; (iii) specific statements by defendant; (iv) Bart Long's speculation; and (v) the testimony of Connie Millsaps. Defendant contends that this evidence was unduly prejudicial and was admitted in violation of Rule 403 of the North Carolina Rules of Evidence and in violation of defendant's constitutional right to a fair trial.

Initially, we note that defendant failed to raise constitutional error at the trial court for any of the five pieces of evidence he contends were inappropriately admitted. Thus, defendant's constitutional arguments have not been preserved for appellate review. *State v. Call*, 349 N.C. at 410, 508 S.E.2d at 514; *see* N.C. R. App. P. 10(b)(1).

The general rule regarding admission of evidence is that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly, or by [the Rules of Evidence]." N.C.G.S. § 8C-1, Rule 402. The Rules of Evidence define relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401. Further, "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403. The decision whether to exclude evidence under Rule 403 of the Rules of Evidence is within the discretion of the trial court and will not be overturned absent an abuse of discretion. *See State v. Williams*, 334 N.C. 440, 460, 434 S.E.2d 588, 600 (1993), *judgment vacated on other grounds*, 511 U.S. 1001, 128 L. Ed. 2d 42 (1994); *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. at 285, 372 S.E.2d at 527.

Having laid out the rules of law which bear upon all five pieces of evidence questioned by defendant, we now turn to consider the

admission of each item individually. Defendant first complains about State's Exhibit 143, a videotape of the crime scene admitted by the State during its case in chief.

This Court has stated that it looks to the law on photographic evidence in determining the admissibility of videotapes. *State v. Kandies*, 342 N.C. 419, 444, 467 S.E.2d 67, 80, *cert. denied*, 519 U.S. 894, 136 L. Ed. 2d 167 (1996). Defendant contends that the videotape in question was repetitive of photographs exhibited by the State as well as the testimony of witnesses for the State. This Court has ruled previously that even when a photograph is admissible, " 'the admission of an excessive number of photographs depicting substantially the same scene may be sufficient ground for a new trial when the additional photographs add nothing in the way of probative value but tend solely to inflame the jurors.' " *State v. Hennis*, 323 N.C. at 284, 372 S.E.2d at 527 (quoting *State v. Mercer*, 275 N.C. 108, 120, 165 S.E.2d 328, 337 (1969), *overruled in part on other grounds by State v. Caddell*, 287 N.C. 266, 290, 215 S.E.2d 348, 363 (1975)). However, " '[p]hotographs 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." *State v. Goode*, 350 N.C. 247, 258, 512 S.E.2d 414, 421 (1999) (quoting *State v. Hennis*, 323 N.C. at 284, 372 S.E.2d at 526).

The videotape was taken by State Bureau of Investigation Agent Andy Cline the night of the murders before the site was processed by police officers. The videotape graphically depicted the crime scene, including the bodies of the five victims, pools of blood surrounding the victims, and the blood spatter on various surfaces in the house. The scenes shown in the videotape illustrated the crime scene encountered by police officers at the Phillips' home as described by Investigator Cline and other witnesses. The videotape provided a unique perspective into the layout of the area in question that the still photographs admitted into evidence did not depict. Specifically, the videotape was helpful in understanding the locations of the bodies in relation to the houses at the crime scene. Additionally, the tape revealed a long shotgun found near Eddie Phillips' body which was not revealed in any other photograph admitted into evidence.

The trial court admitted the videotape over defendant's objection after a hearing outside the presence of the jury during which the trial judge carefully considered the arguments of both the State and defendant. Additionally, the trial court gave a limiting instruction to

the jury before it viewed the videotape, instructing it to consider the videotape only for the purpose of illustrating Investigator Cline's testimony. The record reflects that the videotape was not used excessively or solely to inflame the passions and prejudices of the jury against defendant. In light of the distinctive perspective that the videotape afforded and the limiting instruction given by the trial court, *see State v. Kandies*, 342 N.C. at 444, 467 S.E.2d at 80 (holding that a similar limiting instruction diminished the likelihood of unfair prejudice towards the defendant), we are unable to say that the trial court abused its discretion in admitting the videotape of the crime scene. We overrule this assignment of error.

Defendant also argues that the trial court abused its discretion by admitting into evidence photographs of Chad Watt's body taken after its location by Chief Deputy Hayden Bentley of the Alexander County Sheriff's Department, labeled State's Exhibits 82 and 83. The law governing admission of these photographs is identical to that outlined above governing the admission of videotapes.

Defendant's contention that these photographs had no probative value in this trial is misplaced. Defendant did not contest the admissibility of Deputy Bentley's testimony concerning the discovery of Chad Watt's body, and the photographs illustrated that testimony. Moreover, the photographs lent credibility to defendant's confession and helped to demonstrate the circumstances and chain of events leading to the crimes for which defendant was being tried. Contrary to defendant's contention, the trial court was not required to make findings of fact in balancing the prejudicial effect and probative value of the evidence under Rule 403 of the North Carolina Rules of Evidence. By admitting the photographs, the trial court implicitly determined that any undue prejudice resulting from the admission of the photographs was substantially outweighed by their probative value. The trial court did not abuse its discretion, and this assignment of error is rejected.

Defendant next assigns error to the trial court's allowing into evidence the testimony of two witnesses recounting statements made by defendant. Rule 801(d) of the North Carolina Rules of Evidence makes an exception to the general rule of exclusion for hearsay evidence: "A statement is admissible as an exception to the hearsay rule if it is offered against a party and it is (A) his own statement, in either his individual or a representative capacity. . . ." N.C.G.S. § 8C-1, Rule 801(d). However, even admissions of statements pursuant to Rule 801(d) are subject to the Rule 403 balancing of undue prejudice

against probative value. *See, e.g., State v. Lambert*, 341 N.C. 36, 50, 460 S.E.2d 123, 131 (1995). Defendant contends that the prejudicial impact of the two statements outweighed any probative value they might have had.

Lisa Adams testified that defendant, during a telephone call from jail, stated that he did not keep running from police because "he would kill more people." Defendant contends this remark prejudiced him in that it predisposed the jury to infer that defendant would kill again if given the chance. Additionally, the trial court, after a hearing to address defendant's objection, permitted Special Agent Umphlet to testify as to the contents of a statement made by defendant on 3 October 1999. The specific sentences to which defendant objected read as follows: "When I shot that guy [Chad Watt], it f—— with my mind. They say after you kill the first time, the others are easy and that's true." Defendant contends that this testimony prejudiced him in the same way as Adams' testimony, by raising the specter of his future dangerousness. Nonetheless, these remarks have significant probative value in light of the State's burden of proving premeditation and deliberation. *See State v. Davis*, 325 N.C. 607, 628, 386 S.E.2d 418, 429 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990). In this case where the main defense presented was that defendant lacked the mental capacity to form the requisite specific intent for first-degree murder, any evidence bearing on defendant's state of mind when he killed has substantial probative value. More than the potential for future dangerousness, defendant's statements permit the inference that killing gave him a thrill or "high." Thus, these statements were relevant to defendant's defense of diminished capacity. Accordingly, the trial court did not abuse its discretion in admitting Adams' and Special Agent Umphlet's testimony.

Bart Long testified at defendant's trial on behalf of the State about defendant and Lippard assaulting him in a rest area in McDowell County. During the course of defendant's cross-examination of Long, Long stated, "[Defendant] was the aggressor; he was the one who would have killed me if he could have." Defendant contends that the trial court abused its discretion under Rule 403 by overruling his objection to this statement and denying his motion to strike it.

Rule 701 of the North Carolina Rules of Evidence allows for opinion testimony by a non-expert witness where the opinion is based on the witness' perception and is helpful to the jury. N.C.G.S. § 8C-1, Rule 701. This Court has interpreted this rule to allow evidence which

"can be characterized as a 'shorthand statement of fact,' " *State v. Braxton*, 352 N.C. at 187, 531 S.E.2d at 445 (quoting *State v. Spaulding*, 288 N.C. 397, 411, 219 S.E.2d 178, 187 (1975), *judgment vacated on other grounds*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976)). In this case Long's statement was properly admissible as a shorthand restatement of Long's perception at the time of the attack that defendant was the aggressor and would have done Long severe bodily harm. We cannot say that the trial court abused its discretion by admitting this statement into evidence.

Finally, defendant argues that the trial court committed plain error by failing to intervene *ex mero motu* to prevent the State from questioning Connie Millsaps, one of Eddie and Mitzi Phillips' daughters. Defendant further contends that his attorneys provided constitutionally deficient assistance by failing to object to this testimony. We reject these assertions.

Defendant's assignment of error fails under Rule 10(c)(1) of the Rules of Appellate Procedure, which requires that "an assignment of error . . . direct[] the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references." N.C. R. App. P. 10(c)(1). The assignment of error submitted by defendant refers this Court to the entirety of Millsaps' testimony rather than to any particular portions of her testimony. This broad brush approach fails to distinguish between those parts of Ms. Millsaps' testimony that are relevant to the crimes from those parts dealing with personal matters about the family. When read as a whole, much of Millsaps' testimony connects defendant to the crime. For example, Millsaps identified Mitzi Phillips' Saturn automobile in a photograph and Mitzi and Katie's purses found in the Saturn. Millsaps also testified to conditions at her parents' home shortly before the crime as compared with the crime scene after the murders. We are unable to undertake meaningful review of defendant's challenges to Millsaps' testimony, and we cannot conclude that the mere fact that Millsaps testified was so inflammatory as to constitute error. The trial court did not abuse its discretion in admitting any of these five pieces of evidence at issue. Moreover, inasmuch as defendant made no objection based on violation of his federal or state constitutional rights before the trial court, any assignment of error premised on a constitutional violation is not properly before this Court for review. *State v. Anderson*, 350 N.C. at 175, 513 S.E.2d at 310.

Neither did defendant's counsel's failure to object to Millsaps' testimony constitute ineffective assistance. As noted above, the presumption favors the appropriateness of counsel's actions at trial. *State v. Fisher*, 318 N.C. at 532, 350 S.E.2d at 346. "Counsel is given wide latitude in matters of strategy," *State v. Fletcher*, 354 N.C. at 482, 555 S.E.2d at 551, and defense counsel in this case could well have feared alienating the jury by appearing callous toward Millsaps—the victims' daughter, granddaughter, and sister. This assignment of error is rejected.

[12] Defendant's next assignment of error pertains to the trial court's exclusion of proffered Defense Exhibits 34 and 35 consisting of excerpts from the State's arguments to the jury in Lippard's trial in which the prosecutor avowed that Lippard committed the murders of Earl and Cora Phillips. Defendant contends that statements made by prosecutors in Lippard's trial amounted to admissions of a party opponent admissible as evidence in this trial pursuant to N.C.G.S. § 8C-1, Rule 801(d). According to defendant, the exclusion of these proffered exhibits violated the North Carolina Rules of Evidence and infringed on defendant's constitutional right to present a defense and receive a fair trial. We disagree.

This Court has considered and rejected a claim identical in relevant part to this one in *State v. Collins*, 345 N.C. 170, 478 S.E.2d 191 (1996). Defendant has presented us with no material distinction between these cases. We decline to revisit the issue of the admissibility of an attorney's arguments from a prior case, even where the State is prosecuting a second defendant for identical crimes; "it is axiomatic that the arguments of counsel are not evidence." *Id.* at 173, 478 S.E.2d at 193. Moreover, since the district attorney's arguments from the Lippard trial are inadmissible, defendant's constitutional argument also fails: The assignment of error is overruled.[1]

[13] Defendant next suggests that the trial court erred by overruling defendant's objection to Investigator Bill Sterrett's testimony that defendant did not answer a question about the location of his partner in crime shortly after his arrest. Defendant contends that this testimony violated defendant's constitutional rights by using his post-arrest silence to his disadvantage. Further, defendant argues that his attorney's failure to raise constitutional grounds for the objection was ineffective assistance in violation of the Sixth Amendment.

1. Defendant also raises an assignment of error concerning the trial court's repeated exclusion of this same evidence at the sentencing proceeding. We address this issue below.

The testimony about which defendant is concerned reads as follows:

> Q. Did—tell members of the jury what you, what you noticed about the physical appearance of Mr. Roache?
>
> A. When I entered Lieutenant Phillips['] patrol car, I identified myself as a law enforcement officer of Haywood County Sheriff's office. And direct[ed] essentially one question to Mr. Roache [which] was where is your partner? We are concerned about him and we think he may be injured and we need to know where he is.
>
> Mr. Roache ch—
>
> [DEFENSE COUNSEL]: Objection. We've never been provided this in discovery, Your Honor.
>
> [PROSECUTOR]: Well, did he answer, and say anything?
>
> A. He said nothing.
>
> [THE COURT]: Overruled.
>
> [PROSECUTOR]: Okay. So, tell us then, would that being the interaction, or tell us what you noticed about his appearance?
>
> A. It might be that he was scared.
>
> Q. Did you notice anything about his complexion? His eyes?
>
> A. Stone-faced; motionless.
>
> Q. Anything unusual about his eyes?
>
> A. I have no recollection.
>
> Q. Anything unusual about his complexion?
>
> A. I have no recollection of that.
>
> Q. Did you smell any odor about him?
>
> A. No, I did not.
>
> Q. Do you have—do you have an opinion, Mr. Sterrett, based upon your observation and your experience in law enforcement, as to whether Mr. Roache was intoxicated on alcohol at that time?

A. I can't render an opinion on that because I wasn't with him long enough to observe as to his sobriety.

Q. Well, you know a drunk man when you see one, don't you, sir?

A. Well, I realize that. But I smelled no strong odor of alcohol around his person and that he would not communicate with me, so I can't comment on his speech.

Q. Well, I'm not asking you about his speech. I'm talking about his ah, the way he looked, the way he acted—he was awake, wasn't he?

A. He was awake. What I noticed was he was stone-faced; he would not communicate with me; he was looking straight ahead and would not respond to my question.

Q. Do you have an opinion as to whether he was drunk?

A. No—

Q. Sir?

A. No, sir.

[DEFENSE COUNSEL]: Objection. Asked and answered.

[THE COURT]: Wait just a moment. The objection is sustained.

[PROSECUTOR]: Are you saying you don't have an opinion?

[THE COURT]: The objection is sustained.

The wording and context of counsel's objection coupled with his failure to object to another mention of defendant's silence makes it clear that his objection was based on a concern about incomplete discovery rather than constitutional error. Constitutional arguments not raised at trial are not preserved for appellate review. *State v. Call*, 349 N.C. at 410, 508 S.E.2d at 514; *see* N.C. R. App. P. 10(b)(1).

We also reject defendant's claims of ineffective assistance rising from this exchange because defendant has shown no prejudice. Defendant contends the jury may have discounted his claim of diminished capacity by inferring from Investigator Sterrett's testimony that defendant had sufficient possession of his mental faculties to know not to speak to law enforcement officers. Such an inference would be supported had Investigator Sterrett testified that defendant was sober. Investigator Sterrett mentioned defendant's silence only in

passing; more significant was his steadfast refusal, despite prompting, to state an opinion as to defendant's sobriety. In this context the likelihood that the passing references to defendant's silence prejudiced defendant's diminished capacity defense is *de minimus*. The State did not argue that defendant's silence implied undiminished mental capacity or otherwise seek to take advantage of this testimony. Moreover, in light of testimony regarding defendant's later efforts to assist law-enforcement officers in locating his co-defendant, as well as the overwhelming evidence of guilt supplied by his extensive confessions to police, defendant has not shown that but for Investigator Sterrett's isolated remarks a reasonable probability exists that the result of the proceeding would have been different. In context this testimony would not have "undermine[d] confidence in the outcome" of defendant's trial. *Strickland v. Washington*, 466 U.S. at 694, 80 L. Ed. 2d at 698. Thus, defendant's ineffective assistance of counsel claim must fail. This assignment of error is overruled.

[14] Defendant by his next assignment of error contends that the trial court erred by denying his pre-trial motion to suppress evidence concerning defendant's attempted robbery of Bart Long. The transcript, however, reflects that the court actually deferred ruling on the motion until such time as the State attempted to introduce evidence on the subject. The State called Bart Long as a witness on the second day of trial to testify about his experience at the rest stop. At that time, defendant did not object to Long's testimony. This Court has held that

> a motion *in limine* is not sufficient to preserve for appeal the question of admissibility of evidence if the defendant does not object to that evidence at the time it is offered at trial. We have also held that a pretrial motion to suppress, a type of motion *in limine*, is not sufficient to preserve for appeal the issue of admissibility of evidence.

State v. Grooms, 353 N.C. 50, 65-66, 540 S.E.2d 713, 723 (2000) (citations omitted), *cert. denied*, 534 U.S. 838, 151 L. Ed. 2d 54 (2001). Defendant has neither assigned nor argued plain error as to the admission of this evidence. Hence, this issue is not properly before the Court. *Id.* Moreover, at the time that the State introduced Long's testimony, defendant had already given a detailed description of the attempted robbery during his opening statement. As a result, even if defendant had objected to this evidence, he would be unable to show prejudice. Defendant's argument has no merit.

[15] Defendant's next assignment of error alleges that the trial court erred by refusing to allow Lisa Adams, a former co-worker of defendant's, to testify that she believed that defendant was covering for Lippard. This assignment of error is without merit. During defendant's cross-examination of Adams, the following dialogue occurred:

> Q. Is it your feeling that Lippard was probably in charge of this?
>
> A. I think so.
>
> Q. I think you also told me that you thought that Charles was covering for Lippard?
>
> [PROSECUTOR]: Objection.
>
> [THE COURT]: Let me hear—let me hear that question again.
>
> [DEFENSE COUNSEL]: Do you feel like Charles was covering for Lippard, isn't that right, is that what you told him?
>
> A. I don't know whether—
>
> [PROSECUTOR]: Objection.
>
> [THE COURT]: Wait just a minute. Sustained as to what she felt like.
>
> [DEFENSE COUNSEL]: You did tell me that Charles was covering for Lippard?
>
> [PROSECUTOR]: Objection.
>
> [THE COURT]: Sustained.

Defendant made no further offer of proof as to what Adams' testimony would have been. Defendant now claims that the trial court violated the Rules of Evidence and infringed defendant's constitutional rights through its refusal to allow the witness to answer the questions quoted above. Defendant also contends that defense counsel's failure to proffer Adams' testimony amounted to ineffective assistance of counsel.

The defense claims specifically that Adams was competent to offer her opinion under Rule 701 of the North Carolina Rules of Evidence. This rule provides that a non-expert witness' "testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C.G.S. § 8C-1, Rule 701. As

noted above, this Court has interpreted this rule to allow evidence which "can be characterized as a 'shorthand statement of fact,' " *State v. Braxton*, 352 N.C. at 187, 531 S.E.2d at 445 (quoting *State v. Spaulding*, 288 N.C. at 411, 219 S.E.2d at 187), or, in other words, the "instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time," *State v. Spaulding*, 288 N.C. at 411, 219 S.E.2d at 187 (quoting *State v. Skeen*, 182 N.C. 844, 845-46, 109 S.E. 71, 72 (1921)). The type of opinion to which Adams allegedly would have testified is not such a "shorthand statement of fact," for the reason that it was not rationally based on her perception. Adams testified that she worked with defendant for six months approximately one and a half years before the murders of the Phillips family and that she had received three phone calls from defendant after he was arrested for these crimes. Testimony about a defendant's motivation for confessing to a crime—where, as here, the opinion is based on a telephone conversation and a prior relationship with a defendant—is beyond the purview of Rule 701.

Defendant's claims of constitutional error and ineffective assistance of counsel are flawed. Defendant did not argue the constitutional issue at trial. Hence, not having raised the constitutional arguments at trial, defendant has not preserved the arguments for appellate review. *State v. Call*, 349 N.C. at 410, 508 S.E.2d at 514; *see* N.C. R. App. P. 10(b)(1). Moreover, defendant's claims of ineffective assistance must fail. This witness was not competent to testify as to whether defendant was covering for Lippard. The evidence was not admissible pursuant to N.C.G.S. § 8C-1, Rule 701. Therefore, counsel's failure to proffer the witness's answers was not prejudicial. Defendant's assignment of error is accordingly overruled.

[16] In his next assignment of error, defendant contends that the trial court erroneously prevented him from presenting specific testimony from three witnesses: (i) Thomas Glove, a former convict who had been in jail with defendant in 1996 and had later spoken with him about the events in this case; (ii) Fern Absher, a retired speech pathologist who worked with defendant in elementary and middle school; and (iii) Bonnie Treadway, defendant's mother. Defendant claims the excluded testimony from these three witnesses would have corroborated the testimony of his expert witness, Dr. Claudia Coleman, that defendant's actions on the night of the Phillips' murders were the result of diminished capacity based on the traumatic

environment in which he was raised and his alcohol and drug use before the murders. Defendant believes that the exclusion of the evidence in question violated the Rules of Evidence as well as his constitutional rights.

Glove gave an offer of proof stating that defendant told him he had been drinking and using drugs for several days at the time he committed the Phillips' murders. Glove also would have testified that defendant said "something snapped" before he shot Eddie Phillips. Defense counsel at trial did not make an offer of proof as to Absher's or Treadway's testimony. Defendant now contends Absher would have testified as to what defendant told her about his home environment when he worked with her as a child. Similarly, defendant asserts that Treadway would have testified about her husband's harsh behavior while defendant was a child. Defendant claims that his attorney's failure to make an offer of proof as to the content of Absher's and Treadway's excluded testimony was ineffective assistance.

The testimony of Glove and Absher was correctly excluded as inadmissible hearsay. Hearsay is defined by statute as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c). "Hearsay is not admissible except as provided by statute or by these rules." N.C.G.S. § 8C-1, Rule 802. Defendant contends this testimony was properly admissible on the basis that "[p]rior consistent statements made by a witness are admissible for purposes of corroborating the testimony of that witness, if [they do] in fact corroborate his testimony." *State v. Holden*, 321 N.C. at 143, 362 S.E.2d at 526. This argument is misplaced. As we have previously stated, the rule " 'does not justify admission of extrajudicial declarations of someone other than the witness purportedly being corroborated.' " *State v. Murillo*, 349 N.C. 573, 587, 509 S.E.2d 752, 760 (1998) (quoting *State v. Hunt*, 324 N.C. 343, 352, 378 S.E.2d 754, 759 (1989)), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999). Glove and Absher's attempted testimony would have constituted an inappropriate use of the corroboration rule since their testimony did not relate to prior statements of Dr. Coleman, but rather to those of defendant. Thus, Glove and Absher's statements were appropriately excluded, and defendant's assignment of error is overruled as to those witnesses.

Bonnie Treadway testified at great length on defendant's behalf; defendant's objection pertains only to seven questions in Treadway's

extensive testimony. These questions related to only three different topics: the way her husband treated her in defendant's presence, the circumstances which drove her to leave defendant with his father, and the way her husband treated defendant's sister. Under the Rules of Evidence, evidence which is not relevant is not admissible. N.C.G.S. § 8C-1, Rule 402. The testimony defendant alleges Treadway would have given is so tenuously related to the issue of defendant's diminished capacity that it cannot be said to be "relevant" under Rule 401. The trial court properly excluded Treadway's testimony as to these three subjects. This assignment of error is overruled.

[17] Defendant's next argument pertains to two assignments of error. Defendant first suggests that the State repeatedly posed improper questions on cross-examination of defendant's witnesses, amounting to structural error. Second, defendant claims that the trial court erred by failing to intervene *ex mero motu* to prevent the prosecutor from making certain statements during closing argument. Defendant contends these arguments were more prejudicial because of the alleged improper questioning of witnesses by the State. Furthermore, defendant argues that his trial counsel provided ineffective assistance by failing to object to these arguments or to request a mistrial.

The trial court sustained defendant's objections to the questions specifically addressed by defendant in his brief to this Court. This Court will not review the propriety of questions for which the trial court sustained a defendant's objection absent a further request being denied by the court. *State v. Fleming*, 350 N.C. 109, 140, 512 S.E.2d 720, 741, *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 274 (1999). No prejudice exists, for when the trial court sustains an objection to a question the jury is put on notice that it is not to consider that question. *State v. Carter*, 342 N.C. 312, 324, 464 S.E.2d 272, 280 (1995), *cert. denied*, 517 U.S. 1225, 134 L. Ed. 2d 957 (1996). Accordingly, any error alleged by defendant to result from these questions is not properly before the Court, and regardless would not have resulted in prejudice.

Defendant makes seven distinct allegations regarding the prosecutor's closing argument at the guilt-innocence phase of trial. Inasmuch as defendant failed to object at trial, the standard of review for all defendant's contentions is as follows:

> Where a defendant fails to object to the closing arguments at trial, defendant must establish that the remarks were so grossly improper that the trial court abused its discretion by failing to

> intervene *ex mero motu*. "To establish such an abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair." *See State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999).

State v. Grooms, 353 N.C. at 81, 540 S.E.2d at 732; *see also State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999). Additionally, "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." *State v. Jones*, 355 N.C. 117, 134, 558 S.E.2d 97, 108 (2002).[2] Thus, to demonstrate reversible error defendant must show that the prosecutor's guilt-innocence phase closing remarks were so grossly improper as to have infected the trial with fundamental unfairness.

[18] We now turn to an individual consideration of each disputed argument. The first comment about which defendant raises concern was the prosecutor's statement that "[defendant and Lippard] packed up like wild dogs—they were high on the taste of blood and power over their victims. And just like wild dogs, if you run with the pack you are responsible for the kill." This Court does not condone comparisons between defendants and animals. *See, e.g., State v. Jones*, 355 N.C. at 133-34, 558 S.E.2d at 107-08. However, as defendant acknowledges, this Court has approved a similar argument in *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995). In *Goode* the prosecutor stated, " 'he who runs with the pack is responsible for the kill.' " *Id.* at 546-47, 461 S.E.2d at 650-51. The Court held that where a prosecutor uses this argument in a noninflammatory manner to illustrate the acting in concert doctrine, the argument is not improper. *Id.*

Although the prosecutor in this case utilized this analogy to illustrate the law on aiding and abetting and acting in concert, this argument, unlike the argument in *Goode*, went beyond noninflammatory remarks. By characterizing defendant and his accomplice as wild dogs "high on the taste of blood and power over their victims," the prosecutor "improperly [led] the jury to base its decision not on the evidence relating to the issue submitted, but on misleading charac-

2. 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 recognize new requirements as to the permissible scope of closing arguments but merely reiterated principles of law long followed by this Court.

terizations, crafted by counsel, that are intended to undermine reason in favor of visceral appeal." *State v. Jones*, 355 N.C. at 134, 558 S.E.2d at 108. We conclude, therefore, that the prosecutor's remarks were improper. However, given the overwhelming evidence of defendant's guilt, the remarks did not " 'so infect[] the trial with unfairness that they rendered the conviction fundamentally unfair.' " *State v. Grooms*, 353 N.C. at 81, 540 S.E.2d at 732 (quoting *State v. Davis*, 349 N.C. at 23, 506 S.E.2d at 467). Thus, the trial court did not abuse its discretion by failing to intervene *ex mero motu*.

[19] Defendant next contends that the State invited the jury to put itself in the victims' places through several comments. Specifically, defendant cites the following argument by the prosecutor:

> [G]ive these cases the same careful consideration that you would expect these cases to be given had it happened to be your family that has been victimized by Roache and Lippard. Because those men came through your county on Interstate 40 and it was a total random event they ended up on the doorstep there at the Phillips' residence; they could have just as easily have ended up in your driveway or mine. Give the case the same careful consideration that you would if this was some serious matter that happened to one of your family or neighbors in your county.

The prosecutor further asked the jury to imagine how the victims individually must have felt before they were killed. Defendant also complains that the prosecutor stated that "[t]he victims in those five caskets are crying out from their graves that justice be rendered." Defendant contends that these statements collectively invited the jury to make its decision based on emotion rather than on reason and the evidence presented.

The State is not permitted to make arguments asking the jurors to put themselves in the victims' places. *State v. Hinson*, 341 N.C. 66, 75, 459 S.E.2d 261, 267 (1995). This case, however, is distinguishable from that general statement of law. In his argument, the prosecutor merely highlighted the random nature of this killing, which was held permissible in *State v. Fletcher*, 354 N.C. at 485-86, 555 S.E.2d at 553. Similarly, this Court "has repeatedly found no impropriety when the prosecutor asks the jury to imagine the fear and emotions of a victim." *State v. Warren*, 348 N.C. 80, 109, 499 S.E.2d 431, 447, *cert. denied*, 525 U.S. 915, 142 L. Ed. 2d 216 (1998). The prosecutor's arguments cited by defendant were not so grossly improper that the trial court erred by not intervening *ex mero motu*.

[20] The prosecutor here also compared the Phillips to defendant, saying, "[The Phillips were] [p]eople, members of the jury, who are producing[,] contributing folks, not thieving, doping individuals, like Mr. Roache over here. People who are contributing to society, not acting as a drain upon society." He further stated that "Mitzi and Eddie and Katie . . . . lived in that nice home up on the hill that was built by the sweat of their brow. They weren't thieving, doping, stealing people either, members of the jury." Defendant contends that these arguments were an attempt by the State to convince the jury to convict him not because he was guilty, but because he was of less worth than the Phillips family. Such a line of reasoning would have been impermissible, but the prosecutor's argument was not so contentious.

The State here did nothing more than draw inferences based on the evidence in the record. Defendant himself presented evidence that he had been drinking and using drugs before committing the crimes which he admitted. Likewise, Connie Millsaps testified as to the general nature and background of the victims. The prosecutor merely drew a comparison to highlight the randomness of the murders and the innocence of the victims who had an expectation of safety in their respective homes, factors which were relevant to the issue of malice. The prosecutor did not go so far as to suggest to the jury that it base its decision on the differences in life style between the victims and defendant. We decline to find that this argument was grossly improper.

[21] Defendant also briefly complains of the prosecutor's argument that "they say [defendant]'s not guilty of first-degree murder and the [d]efendant, members of the jury, sits over there and grins and has a big time while his attorneys try to paint him up as being the victim. Justice absolutely stood upon it's [sic] head, still victimizing the Phillips' family." Beyond citing this argument as problematic, defendant makes no argument as to why it is improper. Rule 28(a) limits appellate review to issues defined clearly and supported by arguments and authorities. N.C. R. App. P. 28(a). Defendant has failed to so argue, and we deem this contention inadequate for meaningful review.

[22] Defendant next complains that the prosecutor in closing suggested that defendant's expert witness, Dr. Coleman, perjured herself in exchange for the approximately $5000 she received in compensation for testifying. Specifically, the prosecutor stated that Dr. Coleman, was a "nice lady who just like the rest of us, she's trying to make a living, too. She's trying to get the bills paid." He stated, "She

ignored, members of the jury, all of the evidence that disagreed with her five thousand dollar opinion." Further, the prosecutor argued that "for five thousand dollars, I promise you she could fit anybody on this jury and me . . . anywhere in that book." He labeled her testimony as "nothing more than a hundred and twenty dollar an hour scam." And, finally, the prosecutor rhetorically asked, "So, what do you get for five thousand dollars? You apparently get whatever you want."

We decline to find that the prosecutor's statements about Dr. Coleman's credibility were grossly improper. Generally speaking, "it is not improper for the prosecutor to impeach the credibility of an expert during his closing argument." *State v. Norwood*, 344 N.C. 511, 536, 476 S.E.2d 349, 361 (1996), *cert. denied*, 520 U.S. 1158, 137 L. Ed. 2d 500 (1997). More to the point, though, this Court has recently considered this issue in depth in *State v. Rogers*, 355 N.C. 420, 462-64, 562 S.E.2d 859, 885-86 (2002). We noted there that

> it is proper for a party to point out potential bias resulting from payment that a witness received or would receive for his or her services. However, where an advocate has gone beyond merely pointing out that the witness' compensation may be a source of bias to insinuate that the witness would perjure himself or herself for pay, we have expressed our unease while showing deference to the trial court.

Id. at 462-63, 562 S.E.2d at 885 (citations omitted). In *Rogers*, we concluded that a statement directly arguing that the defendant's expert witness lied in order to be paid was not so grossly improper that the trial court was required to intervene *ex mero motu*. *Id.* at 464, 562 S.E.2d at 886.

As in *Rogers*, the prosecutor's statements at issue—particularly the contention that you can "get whatever you want" for five thousand dollars—verge on being unacceptable. In keeping with our precedent as outlined in *Rogers*, we conclude that such statements were not so grossly improper as to require intervention *ex mero motu*. However, we do admonish counsel to refrain from suggesting that the expert's opinion testimony has been bought or is perjured for compensation.

[23] Defendant also asserts that the State made arguments during its closing that could be construed to reflect negatively on defendant's trial counsel's integrity. The prosecutor said, "I submit that when somebody standing up here [sic] before you [] plays fast and loose

with that kind of evidence, you better look out; you better look out." He also, rather nonsensically, stated, "Ah, if there was only dream-like state that I witnessed in this case was when my friend, Mr. Siemens, stood up and told that to you, not substantiated with all the facts anyway." Again, the prosecutor suggested that defense counsel "are doing nothing more than trying to hide Mr. Roache behind Dr. Coleman's skirts."

"[A] trial attorney may not make uncomplimentary comments about opposing counsel, and should 'refrain from abusive, vituperative, and opprobrious language, or from indulging in invectives.' " *State v. Sanderson*, 336 N.C. 1, 10, 442 S.E.2d 33, 39 (1994) (quoting *State v. Miller*, 271 N.C. 646, 659, 157 S.E.2d 335, 346 (1967)). Under this standard, the cases in which this Court has found comments about opposing counsel to be improper involved much more inflammatory language than the remarks at issue in this case. Considered in context, the statements defendant contends reflected poorly on defense counsel are more properly viewed as shorthand commentary on the arguments presented by defense counsel during closing statement. As a result, the trial counsel did not have an obligation to intervene *ex mero motu*.

[24] Finally, defendant contends that the trial court erred by failing to intervene *ex mero motu* to stop the two district attorneys from inserting what defendant alleges was their own personal opinion throughout closing. Defendant argues that the prosecutor personally vouched for the outrageousness of the crimes in saying, "I contend to you first of all that there never has been and never could be crimes and murders as outrageous and absolutely pointless as you've heard these described." He also claims the prosecutor placed his personal opinion before the jury by denigrating defendant's evidence of the punishment prescribed by his father as a child: "Let me tell you something, in criminal courts over the last twenty years, twenty-five years, I've heard a whole lot worse punishments described to juries than simply having a child stand at attention." Additionally, the prosecutor stated that giving defendant second-degree murder was the equivalent of handing him an apology, as well as that "this is a situation that ought to make somebody upset. If it don't make you upset, there's something's wrong [sic]."

" 'Argument of counsel must be left largely to the control and discretion of the trial judge, and counsel must be allowed wide latitude in their arguments which are warranted by the evidence and are not calculated to mislead or prejudice the jury.' " *State v. Rogers*, 323 N.C.

658, 663, 374 S.E.2d 852, 856 (1989) (quoting *State v. Riddle*, 311 N.C. 734, 738, 319 S.E.2d 250, 253 (1984)). In this case the prosecutors' statements were nothing more than rhetorical flourishes made to advocate zealously for conviction. *See State v. McCollum*, 334 N.C. 208, 227, 433 S.E.2d 144, 154 (1993) (holding that similar statements were proper because of the prosecutor's role as a zealous advocate), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). Rather than stating his own beliefs, the prosecutor was emphasizing the severity of the crimes and advocating the State's position that defendant's evidence of his difficult childhood did not justify a diminished capacity defense. *See State v. Rouse*, 339 N.C. 59, 91-92, 451 S.E.2d 543, 560-61 (1994), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995). We decline to hold these statements grossly improper.

[25] On this same point, defendant argues that his trial counsel's failure to object to these seven statements at trial and to request a mistrial demonstrated ineffective assistance. We disagree. As noted earlier, "[c]ounsel is given wide latitude in matters of strategy." *State v. Fletcher*, 354 N.C. at 482, 555 S.E.2d at 551. Moreover, a strong presumption exists that trial counsel's representation is within the boundaries of acceptable professional conduct. *State v. Fisher*, 318 N.C. at 532, 350 S.E.2d at 346. After reviewing defendant's assignments of error, we cannot conclude that trial counsel's failure to object or to move for mistrial on the basis of the challenged statements was not within the bounds of accepted professional representation. The challenged comments did not render defendant's trial fundamentally unfair nor deprive defendant of a trial whose result was unreliable. These assignments of error are overruled.

Defendant makes several assignments of error pertaining to the trial court's instructions to the jury, particularly with regard to the defense of diminished capacity. Defendant contends that the trial court erred by: (i) telling the jury that it must be "simply satisfied" with defendant's evidence in order to find it believable; (ii) failing to give defendant's requested instruction on diminished capacity; (iii) failing to give an instruction on diminished capacity as applied to the felony murder of Eddie Phillips; (iv) failing to give a diminished capacity instruction in connection with the acting in concert doctrine; and (v) failing to mention diminished capacity when the jury requested re-instruction on various issues. We consider each of these contentions in turn.

[26] Defendant first contends that the trial court erred by instructing the jury that it must be "simply satisfied" with defendant's evidence

in order to find it believable. By so instructing, defendant argues, the trial court impermissibly placed a burden on defendant to satisfy the jury that the evidence was believable, turning the defense of diminished capacity into an affirmative defense. Defendant additionally claims that the instruction would be understood by jurors to mean that unless all of the jurors were satisfied with the evidence, none of them could consider the evidence.

An instruction to a jury will not be viewed in isolation, but rather must be considered in the context of the entire charge. *State v. Holden*, 346 N.C. 404, 438-39, 488 S.E.2d 514, 533 (1997), *cert. denied*, 522 U.S. 1126, 140 L. Ed. 2d 132 (1998). Instructions that as a whole present the law fairly and accurately to the jury will be upheld. *State v. Rich*, 351 N.C. 386, 393-94, 527 S.E.2d 299, 303 (2000) (quoting *State v. Lee*, 277 N.C. 205, 214, 176 S.E.2d 765, 770 (1970)).

Here, the trial court properly charged the jury as to the burden of proof at two separate points in the jury charge by specifically stating that defendant had no burden of proof and also that the jury was to decide the case using "as much of th[e] evidence as you see fit to believe, to the extent of beyond a reasonable doubt in accordance with what the State must prove." After the court finished instructing the jury, defendant raised concerns about the court's instruction that the jury had to be "simply satisfied" with defendant's evidence, arguing that the instruction seemed to imply defendant had a burden to prove something. As a result the trial court clarified its instruction the following morning before deliberation began:

> Yesterday, during my instructions at various times, I told you that the ah, in order to believe any of the [d]efendant's evidence, that that does not have to be believed to the extent of beyond a reasonable doubt, but simply, that it's more likely than not to be believable or stated another way, just simply satisfy you that it's believable because the [d]efendant has no burden to prove anything and that's not to—by telling you that, that's not to infer or imply or express that the [d]efendant has any burden to prove anything.
>
> The burden remains with the State of North Carolina to satisfy you of his guilt as to the original charge or any lesser included charge from the evidence to the extent of beyond a reasonable doubt on each and every case. If the State fails to meet that in any respect or any regard, it would be your duty to find the

> [d]efendant not guilty on that case or those cases, whichever the case may be.

After this instruction, the trial court asked whether the parties had any comment about the instructions and defendant indicated that he did not, but that he would renew his earlier objections. The charge to the jury and the trial court's supplemental clarification were correct statements of law and did not place an impermissible burden on defendant. Accordingly, defendant's argument has no merit.

[27] Defendant also argues that the trial court erred by refusing to give the exact words of defendant's requested instruction on diminished capacity, which stated that the jury must consider the evidence presented about mental capacity before determining defendant's guilt of premeditated and deliberate murder. This argument has no merit.

A defendant may request a jury instruction in writing, and the trial court must so instruct provided the instruction is supported by the evidence. However, a trial court is not obligated to give a defendant's exact written instruction so long as the instruction actually given delivers the substance of the request to the jury. *State v. McNeill*, 346 N.C. 233, 239, 485 S.E.2d 284, 288 (1997), *cert. denied*, 522 U.S. 1053, 139 L. Ed. 2d 647 (1998); *State v. Atkins*, 349 N.C. 62, 90, 505 S.E.2d 97, 115 (1998), *cert. denied*, 526 U.S. 1147, 143 L. Ed. 2d 1036 (1999). Also, as noted above, when instructions, viewed in their entirety, present the law fairly and accurately to the jury, the instructions will be upheld. *State v. Rich*, 351 N.C. at 393-94, 527 S.E.2d at 303.

The trial court in this case instructed the jury first on specific intent, then on the elements of the crimes charged, and finally on diminished capacity. The trial court used the pattern jury instructions on diminished capacity. *See State v. Carroll*, 356 N.C. 526, 538-40, 573 S.E.2d 899, 907-09 (2002) (finding no plain error where the trial court gave pattern jury instructions on diminished capacity), *cert. denied*, —— U.S. ——, 156 L. Ed. 2d 640 (2003). The pattern instructions on diminished capacity direct a jury to consider the defendant's mental capacity and whether or not intoxication or a drugged condition prevented the defendant from forming the specific intent necessary to commit the crimes charged. N.C.P.I.—Crim. 305.10, 305.11 (2003). The charge as a whole was an accurate statement of the law, and the trial court did not err in refusing to give defendant's requested instruction.

[28] In his next argument, defendant contends that the trial court erred by failing to give an instruction on diminished capacity when instructing the jury on felony murder for the murder of Eddie Phillips. Defendant further alleges that the mandate given with reference to the felony murder of Eddie Phillips failed to refer to diminished capacity based on mental illness. After careful review of the record, however, we find that the jury was properly instructed.

We note initially that defendant's assignment of error does not contain any reference to the court's alleged omission of mental illness from the mandate in the felony murder charge for Eddie Phillips. Accordingly, the arguments from defendant's brief concerning this issue are not properly before this Court. N.C. R. App. P. 10(a).

We further note that defendant did not object to the instructions as given at trial and, thus, must satisfy the plain error standard of review. To demonstrate plain error, a defendant " 'must show that the instructions were erroneous and that absent the erroneous instructions, a jury probably would have returned a different verdict.' " *State v. Barden*, 356 N.C. 316, 383, 572 S.E.2d 108, 150 (2002) (quoting *State v. Lucas*, 353 N.C. 568, 584, 548 S.E.2d 712, 723 (2001)), *cert. denied*, — U.S. —, 155 L. Ed. 2d 1074 (2003).

The trial court, in instructing on the felony murder of Eddie Phillips based on the underlying felony of armed robbery, failed to give an instruction on diminished capacity. However, immediately after instructing for the offenses regarding Eddie Phillips, the trial court went on to instruct the jury on the offenses applicable to first Mitzi Phillips and then Katie Phillips. These instructions included instructions on diminished capacity. In particular, when the court instructed on the felony murder of Mitzi Phillips, which was based on the predicate felonies of first-degree burglary and/or armed robbery, the court added, "And let me go back just a minute. Each and both of those offenses, that is armed robbery and ah, also first degree burglary involve some aspect of specific intent to commit those offenses." The court then instructed on diminished capacity by reason of intoxication or a drugged condition and whether such a condition would affect defendant's ability to form the specific intent needed for either felony. By addressing specific intent and diminished capacity within the instruction on Mitzi Phillips' death, the trial court informed the jury that diminished capacity applied to armed robbery, which was the underlying felony in Eddie Phillips' murder. With this instruction the jurors would have understood that dimin-

ished capacity could be considered as a defense for the felony murder of Eddie Phillips. This assignment of error is overruled.

[29] Defendant next argues that the trial court erred in failing to instruct on diminished capacity with regard to acting in concert. The acting in concert doctrine allows a defendant acting with another person for a common purpose of committing some crime to be held guilty of a murder committed in the pursuit of that common plan even though the defendant did not personally commit the murder. *State v. Barnes*, 345 N.C. at 233, 481 S.E.2d at 71. Defendant argues that diminished capacity bears on a defendant's intent to join in the common purpose. However, a defense of diminished capacity negates the specific intent requirement of a specific intent crime because a defendant whose mental capacity is diminished is unable to form the specific intent to commit the crime. *State v. Page*, 346 N.C. at 699, 488 S.E.2d at 232. This Court has never applied the doctrine of diminished capacity to the general intent necessary for acting in concert, and defendant has cited no authority to support extension of its application. Given that under the acting in concert doctrine a defendant may be held guilty not only for the crime originally intended but also for "any other crime committed by the other in pursuance of the common purpose," *State v. Barnes*, 345 N.C. at 233, 481 S.E.2d at 71 (quoting *State v. Erlewine*, 328 N.C. 626, 637, 403 S.E.2d 280, 286 (1991)), we decline to so extend the doctrine at this time. Defendant's argument has no merit. Moreover, since we reject defendant's argument on the substantive question, we cannot conclude that defendant's counsel was ineffective for failing to object to the court's instruction as given.

[30] In another argument, defendant contends that the trial court erred by failing to include an instruction on diminished capacity when the jury requested clarification on points of law after deliberations had begun. The jury requested reinstruction on the elements of first-degree murder and on how premeditation and deliberation and aiding and abetting differ from felony murder. Defendant contends that the trial court erred by failing to reinstruct on diminished capacity with regard to the felony murders of Cora and Earl Phillips and by limiting the reinstruction to alcohol and drug intoxication for the felony murders of Eddie, Mitzi, and Katie Phillips. Defendant argues further that the reinstruction eliminated diminished mental capacity on account of mental illness from consideration in these felony murders. Although defendant did not object to the reinstruction at the time, defendant now claims that the error amounted to plain error

and that his counsel's failure to object constituted ineffective assistance. We reject these arguments.

As we stated above, for defendant to demonstrate plain error he " 'must show that the instructions were erroneous and that absent the erroneous instructions, a jury probably would have returned a different verdict.' " *State v. Barden*, 356 N.C. at 383, 572 S.E.2d at 150 (quoting *State v. Lucas*, 353 N.C. at 584, 548 S.E.2d at 723). We conclude that the instructions here were not erroneous. The trial judge began his response to the jury with a caveat:

> I'll remind you now, members of the jury, that even though I'm not going to repeat all of my instructions I previously gave you, you will consider that I have done so as if I have repeated them even though I'm not going to do that and even though I'm going to highlight my response based upon your question, but you're not to give any undue preference or deference to what I'm about to tell you versus what I've heretofore told you. It's simply to answer the specific question that you've asked.

Thus, the trial court prefaced the reinstruction by admonishing that the reinstruction was not to take the place of the original charge and that the complete charge would not be repeated but must be considered. The jury did not specifically request reinstruction on diminished capacity, although the trial court included such instruction with regard to some of the crimes. The trial court appropriately responded to the jury's questions by answering only that which was asked. Defendant's argument that this reinstruction constituted plain error is without merit.

[31] On this same point, defendant argues that his counsel's failure to object to the reinstruction demonstrated ineffective assistance. We disagree. Inasmuch as the reinstruction was not erroneous and did not prejudice defendant, trial counsel's failure to renew earlier objections could not have amounted to ineffective assistance.

[32] Defendant finally contends that the trial court committed error by effectively shifting the State's burden of proof to defendant. Defendant argues that the trial court relieved the State of its burden of proof, thus violating defendant's constitutional rights. We have addressed each assignment of error and have found no error with the trial court's instructions and actions. We, therefore, also conclude that the trial court did not shift the State's burden or otherwise vio-

late defendant's constitutional rights. Accordingly, these assignments of error are overruled.

[33] Defendant next assigns error to the trial court's instruction to the jury on the elements of first-degree kidnapping. The legislature has defined kidnapping as an unlawful confinement or removal from one place to another for the purpose of committing certain specified acts. N.C.G.S. § 14-39(a) (2003). Kidnapping is of the first degree "[i]f the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted." N.C.G.S. § 14-39(b). Defendant objected to the instruction on the element that the person confined was not released in a safe place:

> And if you find from the evidence beyond a reasonable doubt that either Earl Phillips and/or Cora Phillips was killed by the [d]efendant, either acting by himself or together with another, that would not—that would constitute not releasing one in a safe place.

Defendant contends that the trial court's instruction impermissibly deprived the jury of its fact-finding role with regard to the issue of whether the victims were released in a safe place and, thus, violated defendant's constitutional rights.

This Court has addressed an issue similar to this one in *State v. Johnson*, 320 N.C. 746, 360 S.E.2d 676 (1987), upholding a similar jury instruction regarding what constituted a serious injury for an element of first-degree kidnapping. *Id.* at 750-51, 360 S.E.2d at 679-80. In *Johnson*, the instruction given stated that the stabbing of a person with scissors would constitute a serious injury for purposes of the "serious injury" element of first-degree kidnapping. *Id.* Turning to the instant case, unquestionably, a person who is killed during the course of a kidnapping is not released in a safe place. Therefore, as in *Johnson*, we hold that this instruction is proper and did not impermissibly usurp the jury's fact-finding role.

Even assuming *arguendo* that the instruction was improper, defendant would not be prejudiced in this case. The "not released in a safe place" element applies to first-degree kidnapping, but not to second-degree kidnapping. N.C.G.S. § 14-39(b). Either crime, however, would have served as an underlying felony for felony murder. N.C.G.S. § 14-17 (2003). "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." *State v.*

Squires, 357 N.C. 529, 536, 591 S.E.2d 837, 842 (2003). *See also State v. Vance*, 328 N.C. 613, 623, 403 S.E.2d 495, 502 (1991). Accordingly, the jury here, by finding first-degree kidnapping, necessarily found facts sufficient to convict defendant of second-degree kidnapping, a felony which would have supported his felony murder conviction. Even had the jury not been instructed that murder was the equivalent of not being released in a safe place, defendant would have been convicted of felony murder. Contrary to defendant's contention, this error, if any, did not constitute structural error. Defendant having shown no prejudice, this assignment of error is overruled.

[34] By another assignment of error, defendant contends that the trial court's instruction to the jury regarding evidence of the Watt murder was improper in that it allowed the jury to consider the evidence too broadly. Defendant claims this error constituted a violation of his constitutional rights and contends that his counsel's failure to object to this evidence at trial constituted ineffective assistance of counsel. We reject these claims.

Defendant did not object to this instruction at the time it was given and, therefore, must show that the trial court committed plain error. For defendant to demonstrate plain error, he " 'must show that the instructions were erroneous and that absent the erroneous instructions, a jury probably would have returned a different verdict.' " *State v. Barden*, 356 N.C. at 383, 572 S.E.2d at 150 (quoting *State v. Lucas*, 353 N.C. at 584, 548 S.E.2d at 723).

The instruction in question stated:

> Now, members of the jury, evidence about the occurrences and events surrounding that particular alleged homicide were not admitted and are not admissible to prove that the [d]efendant was capable or likely to do the matters that he's charged with in these cases. They may be admissible, if you see fit to believe any of what you heard about that to the extent of beyond a reasonable doubt, they may be admissible for other purposes and those purposes are proof of motive and/or intent and/or preparation and/or plans with regard to the matters that he's charged with in these cases to the extent, if any, that he acted in conformity with the charge, with the charges that the State has lodged against him here. But for considering those events that you see fit to consider them all or you may not consider them for any other purposes.

This instruction is consistent with the Rule 404(b) of the North Carolina Rules of Evidence, which allows the State to introduce evidence of other crimes of a defendant for the limited purpose of showing "proof of motive, opportunity, intent, preparation, [or] plan." N.C.G.S. § 8C-1, Rule 404(b); *see also State v. Carter*, 338 N.C. 569, 592-93, 451 S.E.2d 157, 170 (1994). Watt's murder could potentially be seen as evidence of defendant's intent to kill or as part of defendant's preparation in or overall plan for the crime spree. Therefore, the trial court's instruction to the jury on the permissible uses of this evidence conveyed the correct legal standard to the jury and does not constitute error.

Having found no impropriety in the instruction given, we also reject defendant's claims of ineffective assistance rising out of defense counsel's failure to object. This assignment of error is overruled.

[35] Defendant next assigns error to the trial court's instructions on felony murder. Defendant specifically contends that the trial court should have instructed the jury that it had to be unanimous in determining whether defendant was guilty of felony murder based on defendant's commission of an underlying felony or based on acting in concert with Lippard in committing an underlying felony. Therefore, according to defendant, the State was relieved of its burden to prove all of the elements of felony murder. Defendant additionally claims that his trial counsel's failure to object constituted ineffective assistance of counsel. These arguments are without merit.

The trial court properly instructed the jury that it must be unanimous in finding defendant guilty of first-degree murder, whether based on felony murder or on premeditation and deliberation. *See* N.C.G.S. § 15A-1235(a) (2003). The trial court also instructed the jury that it must be unanimous in finding which felony defendant engaged in that subjected him to the felony murder rule. Whether defendant acted in concert with Lippard or committed the underlying felony, defendant would still be guilty of felony murder in either case. The jurors were unanimous in finding defendant to be guilty of felony murder. The instruction as given was not improper and defendant has failed to show plain error.

Defendant's claim of ineffective assistance of counsel based on his counsel's failure to object to the instructions at issue here must also fail. As held immediately above, this instruction was not given improperly, so defense counsel had no obligation to object. We overrule this assignment of error.

[36] Defendant's next assignment of error contests the trial court's instructions to the jury on intent with respect to the murder of Cora Phillips. The trial court instructed as follows:

> [I]f you find from the evidence . . . that the [d]efendant, either acting by himself or together with another, while committing the offenses of armed robbery, you remember these elements that I told you about . . . and I refer you again to the elements that I gave you that must be satisfied by the State to your satisfaction to the extent beyond a reasonable doubt as to first degree murder, and that the [d]efendant had the required specific intent to commit one, some or all of those underlying felonies, either acting by himself or together with another, considering his alleged intoxication, voluntary intoxication and/or—and/or drug condition, . . . or all of those underlying felonies considering his alleged voluntary intoxication and/or voluntary drug condition, that the [d]efendant either acted by himself or together with another, killed Cora Phillips . . . it would be your duty to return a verdict of guilty of first degree murder based upon the first degree felony murder rule.

Defendant contends that this instruction allowed jurors to impute Lippard's intent to defendant if the jurors found that Lippard had the necessary specific intent to commit the underlying felonies. By implication, according to defendant, the trial court shifted the State's burden of proof to defendant, violating due process requirements. Defendant further claims that his counsel's failure to object constituted ineffective assistance. These arguments are flawed.

A jury instruction must be evaluated as a whole. If the entire instruction is an accurate statement of the law, one isolated piece that might be considered improper or wrong on its own will not be found sufficient to support reversal. *State v. McWilliams*, 277 N.C. 680, 684-85, 178 S.E.2d 476, 479 (1971); *see also State v. Chandler*, 342 N.C. 742, 751-52, 467 S.E.2d 636, 641 (citations omitted), *cert. denied*, 519 U.S. 875, 136 L. Ed. 2d 133 (1996). The trial court's instruction viewed as a whole correctly charged the jury on felony murder. Defendant argues that one portion in particular was improper: "[T]he [d]efendant had the required specific intent to commit one, some or all of those underlying felonies, either acting by himself or together with another. . . ." We understand this part of the instruction to mean that whether the felonies were committed by defendant or by Lippard, if defendant had the specific intent to commit one or any of

the felonies, then he would be guilty of felony murder. This instruction was therefore proper. Defendant's claims of error on the instruction as well as on his counsel's assistance are without merit.

[37] Next, defendant contends that the trial court improperly overruled defendant's objection to the State's use of two alternative theories of guilt; namely, "aiding and abetting" in connection with premeditation and deliberation, and "acting in concert" with regard to felony murder. Defendant contends that the trial court's failure to require the State to elect between these two theories effectively relieved the State of its burden of proof. Therefore, according to defendant, his federal and state constitutional rights were violated.

Defendant's argument that the two theories utilized by the State are mutually exclusive has no merit. In any given case, both theories may be proven by the same evidence. We have held that " '[t]he distinction between [a defendant being found guilty of] aiding and abetting and acting in concert . . . is of little significance.' " *State v. Bonnett*, 348 N.C. 417, 440, 502 S.E.2d 563, 578 (1998) (quoting *State v. Williams*, 299 N.C. 652, 656, 263 S.E.2d 774, 777 (1980)) (alterations in original), *cert. denied*, 525 U.S. 1124, 142 L. Ed. 2d 907 (1999). In this case, defendant has shown no prejudice flowing from the fact that the State proceeded on both theories. Therefore, we find no merit to this argument.

SENTENCING PROCEEDING

[38] Next, defendant claims that the trial court erred by denying his motion at sentencing to admit Exhibits 34 and 35, excerpts from the State's arguments to the jury at Lippard's trial during which the prosecutor avowed that Lippard committed the murders of Earl and Cora Phillips. We considered and rejected this argument above in the context of the guilt phase of trial, but defendant contends that the unique considerations present in a sentencing hearing require admission of this evidence in sentencing even if it were deemed inadmissible at the guilt phase. In particular, defendant directs our attention to our holding in *State v. Jones*, 339 N.C. 114, 451 S.E.2d 826 (1994), *cert. denied*, 515 U.S. 1183, 132 L. Ed. 2d 873 (1995), that "[w]hen evidence is relevant to a critical issue in the penalty phase of a capital trial, it must be admitted, evidentiary rules to the contrary under State law notwithstanding." *Id.* at 154, 451 S.E.2d at 847. Defendant further points out that a sentencing body must "not be precluded from considering, as a mitigating factor, any aspect of the defendant's charac-

ter or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 990 (1978) (emphasis removed). The proffered exhibits in question do not meet the description of evidence which must be admitted at defendant's request.

This Court has held that "reconsideration of any residual doubt a juror might have privately harbored as to defendant's guilt is irrelevant in determining defendant's appropriate sentence, as it does not bear upon an aspect of defendant's character, record or the circumstances of the offense." *State v. Walls*, 342 N.C. 1, 53, 463 S.E.2d 738, 766 (1995), *cert. denied*, 517 U.S. 1197, 134 L. Ed. 2d 794 (1996). The exhibits defendant claims should have been admitted are relevant only to the issue of whether defendant actually committed the murders for which he was already convicted. Accordingly, this evidence was appropriately excluded from the sentencing hearing under our holding in *Walls*.

Moreover, the jury's final sentencing recommendation in this case demonstrates that defendant was not prejudiced by the exclusion of this evidence even had the trial court erred in excluding it. The statements by the prosecutor during Lippard's trial pertain to whether Lippard or defendant actually pulled the trigger in the murders of Earl and Cora Phillips. Defendant was sentenced to life imprisonment, not death, for these two murders; hence, defendant was not prejudiced at sentencing by the trial court's exclusion of this evidence. Defendant would also have us now consider whether the admission of this statement could have had an impact on the jury's finding of the (e)(11) "course of conduct" aggravator in the murders for which he did receive the death penalty. Defendant did not raise this argument at trial; thus, it is deemed waived on appeal. *See* N.C. R. App. P. 10(b)(1). "This Court will not consider arguments based upon matters not presented to or adjudicated by the trial tribunal." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991). This assignment of error is accordingly overruled.

[39] Defendant, by his next assignment of error, contends that the trial court erred by sustaining the State's objection to defendant's attempt to introduce the fact that Lippard was sentenced to life imprisonment for these five murders. Before this Court defendant argues that evidence of Lippard's sentences should have been admitted as support for the (f)(9) catchall mitigating circumstance. Defendant's argument misconstrues this Court's precedent.

This Court has previously determined that a co-defendant's sentence has no mitigating effect in and of itself. As this Court stated by way of rationale more than twenty years ago, "the fact that the defendant's accomplices received a lesser sentence is not an extenuating circumstance. It does not reduce the moral culpability of the killing nor make it less deserving of the penalty of death than other first-degree murders." *State v. Williams*, 305 N.C. 656, 687, 292 S.E.2d 243, 261, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982); *see also State v. Jaynes*, 353 N.C. at 563-64, 549 S.E.2d at 200-01.

Nonetheless, defendant argues that this Court's holding in *State v. Roseboro*, 351 N.C. 536, 528 S.E.2d 1, *cert. denied*, 531 U.S. 1019, 148 L. Ed. 2d 498 (2000), dictates that a co-defendant's sentence is relevant for consideration with regards to the catchall mitigator, N.C.G.S. § 15A-2000(f)(9). In *Roseboro* we acknowledged that "the jury may consider an accomplice's sentence as a mitigating circumstance under the 'catchall' instruction." *Id.* at 547, 528 S.E.2d at 8. However, this consideration applies in a case where evidence of the co-defendant's sentence is already before the court, such as where the co-defendant testified at trial and evidence of a plea bargain was presented by way of impeachment. *See, e.g., State v. Gregory*, 340 N.C. at 415, 459 S.E.2d at 667.

Even assuming *arguendo* that defendant's argument were well-founded, defendant would not benefit in this case. During the bench conference, defense counsel explicitly tied his request that the court admit evidence of Lippard's sentences to the (f)(8) mitigating circumstance, that defendant aided and abetted law enforcement in apprehending Lippard. At no point did counsel suggest that this evidence be admitted for consideration in conjunction with the (f)(9) catchall mitigator. "This Court will not consider arguments based upon matters not presented to or adjudicated by the trial tribunal." *State v. Eason*, 328 N.C. at 420, 402 S.E.2d at 814. Defendant's argument concerning the (f)(9) mitigator, is, therefore, waived on appeal.

Defendant's allegations of constitutional error are also misplaced. This Court, as explained above, has held that a defendant has no constitutional right to have his co-defendant's sentence considered in mitigation since such evidence is irrelevant to the sentencing proceeding. Thus, constitutional error cannot lie based on the omission of such evidence. Defendant's assignment of error is overruled.

[40] In his next assignment of error, defendant complains of the victim impact evidence presented by the State during the sentencing

hearing. The State presented evidence from four witnesses: three of Eddie and Mitzi Phillips' children—Ginger Phillips, Connie Millsaps, and Sarah Phillips—and Earlene Jenkins, Eddie Phillips' sister. These witnesses testified as to the physical, psychological, and emotional effect the five Phillips' deaths had on themselves and others in the family and community. Defendant contends that this evidence violated his right to due process and rendered his sentencing hearing fundamentally unfair.

We note initially that defendant's assignment of error relates only to the testimony of Connie Millsaps and Sarah Phillips. Accordingly, the arguments from defendant's brief concerning the testimony of Ginger Phillips and Earlene Jenkins are not properly before this Court. N.C. R. App. P. 10(a).

Admission of victim impact evidence has been approved by the United States Supreme Court, *see Payne v. Tennessee*, 501 U.S. 808, 115 L. Ed. 2d 720 (1991); this Court, *see State v. Reeves*, 337 N.C. 700, 722-24, 448 S.E.2d 802, 811-12 (1994); and the North Carolina legislature. N.C.G.S. § 15A-833 (2003). The impact evidence authorized by this statute includes "[a] description of the nature and extent of any physical, psychological, or emotional injury suffered by the victim as a result of the offense committed by the defendant." N.C.G.S. § 15A-833(a)(1). As this Court has stated, "So long as victim-impact statements are not so prejudicial as to 'render[] the [trial] fundamentally unfair,' no constitutional impediment exists to their use in capital sentencing hearings." *State v. Smith*, 352 N.C. 531, 554, 532 S.E.2d 773, 788 (2000) (quoting *Payne v. Tennessee*, 501 U.S. at 825, 115 L. Ed. 2d at 735), *cert. denied*, 532 U.S. 949, 149 L. Ed. 2d 360 (2001).

In this case the State properly used victim impact testimony to describe the specific harm caused by defendant's actions, including the psychological repercussions the murders had on these family members and the community. The evidence was not so inflammatory as to render defendant's sentencing hearing fundamentally unfair, but instead " 'remind[ed] the sentencer that . . . the victim[s] [were] individual[s] whose death[s] represent[] a unique loss to society and in particular to [their] famil[ies].' " *Payne v. Tennessee*, 501 U.S. at 825, 115 L. Ed. 2d at 735 (quoting *Booth v. Maryland*, 482 U.S. 496, 517, 96 L. Ed. 2d 440, 457 (1987) (White, J., dissenting), *overruled by Payne*). Defendant's assignment of error is overruled.

[41] Defendant next contends that the trial court committed error and plain error by permitting the State to cross-examine defendant's

mother, Bonnie Treadway, about defendant's prior criminal history during the sentencing hearing. Defendant argues that since the (f)(1) mitigating circumstance, that defendant had no significant history of criminal activity, was not submitted, this examination was improper. Specifically, the State asked Treadway about assaults by defendant on his father, his sister, his ex-wife, a girlfriend, and a deputy sheriff. Defense counsel only objected to a question concerning an assault on defendant's ex-wife. This objection was overruled. Defendant further asserts that counsel's failure to object to the remainder of the questions at issue was ineffective assistance.

"Admissibility of evidence at a capital sentencing proceeding is not subject to a strict application of the rules of evidence, but depends on the reliability and relevance of the proffered evidence." *State v. Atkins*, 349 N.C. at 77, 505 S.E.2d at 107; *see also State v. Strickland*, 346 N.C. at 461, 488 S.E.2d at 205. Additionally, the statute provides that "evidence presented during the guilt determination phase of the case . . . is competent for the jury's consideration in passing on punishment." N.C.G.S. § 15A-2000(a)(3). In this case, evidence of defendant's prior criminal history, including five cases of assault, was admitted into evidence during cross-examination of Dr. Coleman by the State. "[A] trial court has great discretion to admit any evidence relevant to sentencing." *State v. Thomas*, 350 N.C. 315, 359, 514 S.E.2d 486, 513, *cert. denied*, 528 U.S. 1006, 145 L. Ed. 2d 388 (1999). In this case Treadway testified on direct examination that she did not know her son to be violent when he was not drinking and that defendant would drink in a shed behind her home. In light of this testimony, we conclude the trial court did not commit error by overruling defendant's objection to the State's question about the assault on defendant's ex-wife, nor did it commit plain error by failing to intervene to stop the State from asking the other questions at issue. *See State v. Hedgepeth*, 350 N.C. 776, 784-85, 517 S.E.2d 605, 610-11 (1999). Moreover, defense counsel was not ineffective by failing to object to these additional questions in that the questions were relevant and reliable, and, thus, were admissible.

[42] Defendant also contends that the trial court erred by sustaining the State's objection to defendant's attempt to elicit evidence concerning Lippard's behavior. Jasper Dunlap testified for defendant during the sentencing proceeding about his treatment of defendant during Dunlap's tenure as a behavioral specialist at the Juvenile Evaluation Center in Swannanoa, North Carolina. Dunlap further testified that he had also been Lippard's behavioral specialist, but the

trial court sustained the State's objection to defendant's attempt to ask Dunlap if he had "observe[d] any particular behaviors in [Lippard]." Defense counsel did not make an offer of proof as to how Dunlap would have answered this question, and defendant now asserts that this failure constituted ineffective assistance.

As noted in the issue immediately above, the standard for whether evidence is admissible at a sentencing hearing hinges on the evidence's reliability and relevance. *State v. Atkins*, 349 N.C. at 77, 505 S.E.2d at 107. Before admitting evidence the trial court must determine that it is relevant to sentencing. *See State v. Thomas*, 350 N.C. at 359, 514 S.E.2d at 513. Lippard's behaviors from ten years earlier—the only time period about which Dunlap apparently had knowledge—cannot be said to be relevant to defendant's "character, record or the circumstances of the offense." *State v. Walls*, 342 N.C. at 53, 463 S.E.2d at 766 (referring to language from *Franklin v. Lynaugh*, 487 U.S. 164, 174, 101 L. Ed. 2d 155, 166 (1988)). We hold that the trial court did not abuse its discretion by excluding such evidence from the sentencing jury's consideration and that defendant has failed to show ineffective assistance of counsel.

[43] Defendant's next arguments mirror a pair of assignments of error discussed above in the context of the guilt phase of trial. First, defendant argues that the State improperly questioned witnesses with the effect of placing before the jury information on which it had presented no testimony or proof. Second, defendant contends that the trial court erred by failing to intervene *ex mero motu* to prevent the prosecutor from making certain arguments during his closing statement. Additionally, defendant claims that his trial counsel provided ineffective assistance by failing: (i) to object to the allegedly speculative questions; (ii) to object to the State's allegedly improper closing arguments; and (iii) to request a mistrial. We disagree.

Defendant points to the allegedly improper cross-examination of two witnesses as basis for this argument. The State cross-examined Vaughn Burnette, a minister, as to whether he had witnessed several occurrences of aggressive behavior by defendant while defendant was incarcerated such as tearing the telephone off the wall, throwing food, and throwing water; Burnette replied negatively. The State also cross-examined defendant's sister, Linda Josey, about defendant's socializing with her and their father in the courtroom and about the source of funds enabling her to be present at the trial. Defendant argues that these questions, along with the alleged deficiencies in the State's closing argument discussed be-

low, amounted to structural error for which defendant's death sentence should be overturned.

As noted above, the Rules of Evidence do not apply in sentencing proceedings. N.C.G.S. § 8C-1, Rule 1101(b)(3). Any evidence the trial court "deems relevant to sentence" may be introduced at this stage. N.C.G.S. § 15A-2000(a)(3). The limits of cross-examination are determined by the sound discretion of the trial court and the requirement that the questions be asked in good faith. *State v. Larry*, 345 N.C. 497, 523, 481 S.E.2d 907, 922, *cert. denied*, 522 U.S. 917, 139 L. Ed. 2d 234 (1997). Further, "[a] prosecutor's questions are presumed to be proper unless the record shows that they were asked in bad faith." *State v. Bronson*, 333 N.C. 67, 79, 423 S.E.2d 772, 779 (1992).

The trial court had no duty to intervene *ex mero motu* to stop the prosecutor from asking these questions. Moreover, the trial court's implicit determination that the evidence in question was relevant to the jury's sentencing decision did not constitute an abuse of discretion. The testimony concerning defendant's behavior in prison was relevant to rebut Burnette's testimony on direct examination that defendant's character had changed while he was in prison and since he "let the Lord come in his life." The State's questions to Josey about defendant's interaction with his father in the courtroom were designed to discredit defendant's evidence that he and his father had a poor relationship. Similarly, the State, by asking Josey how she had afforded to attend defendant's trial, sought to show that she was there at someone else's behest rather than out of sisterly devotion. These inferences to be drawn from the challenged testimony, illustrate that the evidence was relevant and, thus, permissible.

Furthermore, defendant has pointed us to nothing in the record suggesting that the prosecutor asked these questions in bad faith. Accordingly, we presume the questions were proper. Because the questioned testimony was relevant and was not elicited in bad faith, defendant's counsel's decision not to object did not constitute deficient performance. This assignment of error is overruled.

[44] Turning to defendant's assignment of error regarding the prosecution's closing, defendant's first of five specific arguments suggests that the State injected personal opinion into its closing argument. Primarily, defendant points to the State's use of the words "we think," "we believe," "our perspective," and "our idea." Additionally, he cites the following passage: "As the elected District Attorney and Chief Law Enforcement officer of this area, I come before you to state that

many aggravating factors exist in this case." The complained-of passages are not impermissible statements of opinion. These turns of phrase would have been understood by the jury as remonstrances by the prosecutor to find that the aggravating circumstances existed and outweighed the proposed mitigating circumstances to such an extent that the death penalty was the proper sentencing recommendation. Defendant having failed to object, we decline to find that the arguments in question were so grossly improper that the trial court was required to intervene *ex mero motu*.

[45] Second, defendant argues that the State impermissibly mischaracterized North Carolina law in order to encourage the jury to recommend a death sentence for defendant. Defendant asserts that the prosecution argued that this State's law favors killers over their victims at sentencing. The specific argument to which defendant assigns error concerned the statutory scheme that the State is permitted to submit fewer aggravators than a defendant is allowed to submit mitigators. This Court has upheld arguments of this nature in the past as methods of attacking the weight of mitigating circumstances and convincing the jury that a greater number of mitigators should not outweigh a lesser number of aggravators. *See State v. Frye*, 341 N.C. 470, 506-07, 461 S.E.2d 664, 683 (1995), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996). In keeping with our precedent, we hold that this argument was not grossly improper.

[46] Third, defendant directs our attention to portions of the prosecutor's closing in which he contends the State urged the jury to place itself in the position of the victims. Specifically, defendant directs our attention to the following argument by the prosecutor:

> It makes us think, members of the jury, how much we need our families. Think about, if you will, what a horrible experience it would be if one or two of our close family members were murdered. What about, members of the jury, if it was five members of three generations of your family or mine, murdered by complete strangers, at random, for no apparent reason.

The prosecutor also argued in the context of discussing the (e)(9) especially heinous, atrocious, or cruel aggravator, "Your home is entered by two strangers, Mr. Lippard and Mr. Roache." As we noted above in the context of the guilt phase of trial, the State is not permitted to make arguments asking the jurors to put themselves in the victims' places. *State v. Hinson*, 341 N.C. at 75, 459 S.E.2d at 267. However, the prosecutor's argument here was less about jurors imag-

ining themselves as the victims and more of an effort to force the jury to appreciate fully the circumstances and impact of the crime. The use of similar arguments for this purpose has been endorsed previously by this Court. *State v. Miller*, 339 N.C. 663, 684-85, 455 S.E.2d 137, 148-49, *cert. denied*, 516 U.S. 893, 133 L. Ed. 2d 169 (1995). The trial court was not required to intervene *ex mero motu* to prevent the prosecution from making these arguments.

[47] Fourth, defendant points to arguments that he contends speculated on matters outside of the record. This Court has held that

> [c]ounsel are entitled to argue to the jury all the law and facts in evidence and all reasonable inferences that may be drawn therefrom, but may not place before the jury incompetent and prejudicial matters and may not travel outside the record by interjecting facts . . . not included in the evidence.

State v. Fletcher, 354 N.C. at 486, 555 S.E.2d at 553 (quoting *State v. Syriani*, 333 N.C. 350, 398, 428 S.E.2d 118, 144, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993)) (alterations in original). After close consideration of each statement defendant claims was speculation, we hold that the trial court did not err.

Defendant would have us hold that the prosecutor engaged in speculation when he made three arguments: (i) that Earl Phillips "shielded" his wife; (ii) that Mitzi Phillips was protecting her daughter; and (iii) what the victims felt physically and emotionally during the attack. We have considered each of these statements in detail and determined that the prosecutor did no more than reconstruct the series of events from the perspectives of the victims using defendant's confession and the physical evidence at the scene and from the coroner's report, along with reasonable inferences from these sources. Such arguments will not be held to extend beyond the record.

Defendant also contends that the prosecutor departed from record evidence by stating that Mitzi Phillips' father, Gerald Blazer, was "[a] good man with a broken heart who can't stay in Haywood County at the home that he put here, because Charles Roache destroyed his only daughter. Mr. Gerald Blazer, right there, was unable to take the witness stand and give you victim impact evidence. . . ." Despite defendant's position that this is speculation, one of Eddie and Mitzi Phillips' daughters, Ginger Phillips Boyd, testified that Blazer could not live in his Haywood County home since the

crimes and that he got upset if anyone mentioned Mitzi Phillips' name. The prosecutor's argument did not stray from record evidence and reasonable inferences therefrom.

The prosecutor also stated that defendant had "victimized people numbering in the hundreds." While evidence was not presented which literally supports this statement, the statement is more measured than impermissible speculation. More aptly, this argument was a rhetorical method of reminding the jury that "the victims were sentient beings with close family ties before they were murdered by defendant." *State v. Conaway*, 339 N.C. at 528, 453 S.E.2d at 850. The trial court was not required to intervene *ex mero motu* to prevent the jury from considering this argument.

Defendant also complains that the prosecutor stated that if Eddie and Mitzi Phillips' other "four daughters had been there, the four other daughters, they probably would have been the victims of the mass murderer and atrocity, also." Evidence at trial showed that defendant murdered Earl, Cora, Mitzi, and Katie Phillips because they were witnesses to his murder of Eddie Phillips. Accordingly, a reasonable inference can be drawn from the evidence that, had there been more people present at the scene, defendant might have killed them also.

The prosecutor also made a comment about defendant's "laughing and grinning" during the course of the trial. Defendant contends this comment wandered beyond the scope of the record, but this Court has held that "[a] prosecutor may properly comment on a defendant's demeanor displayed throughout the trial." *State v. Flippen*, 349 N.C. 264, 276, 506 S.E.2d 702, 710 (1998), *cert. denied*, 526 U.S. 1135, 143 L. Ed. 2d 1015 (1999). Thus, the argument was not an impermissible consideration.

Defendant's final claim of speculation comes from the prosecutor's statement that if the adult victims could be at trial, they would ask defendant, "Why Katie? Take us, Charles Roache, but why[] Katie?" The prosecutor, through this argument, was not improperly engaging in speculation outside the record but was using the wide latitude afforded counsel in hotly contested cases, *see e.g.*, *State v. Haselden*, 357 N.C. 1, 19, 577 S.E.2d 594, 606, *cert. denied*, —— U.S. ——, 157 L. Ed. 2d 382 (2003); *State v. Roseboro*, 344 N.C. 364, 376, 474 S.E.2d 314, 320 (1996), to suggest that the murder of fourteen-year-old Katie Phillips was worthy of a death sentence. This argument was not grossly improper.

[48] Fifth, defendant contends that the prosecutor impermissibly argued to the jurors the positive impact a death verdict would have on the surviving relatives of the victims and with respect to the jurors' relationships with God. Defendant's argument in the brief about the sentencing recommendation's impact on the family is insufficient to enable this Court to undertake a meaningful review. *See* N.C. R. App. P. 28(a). Defendant does no more than cite the allegedly problematic passages.

> The function of all briefs required . . . by these rules is to define clearly the question presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs.

Id. Defendant has waived his right to appellate review of this issue.

[49] Defendant argues with regard to the prosecutor's religious reference during closing that this Court has designated religion as a subject inappropriate for closing arguments. Admittedly, some religious statements are discouraged in closing argument. *See, e.g., State v. Williams*, 350 N.C. 1, 25-27, 510 S.E.2d 626, 642-43, *cert. denied*, 528 U.S. 880, 145 L. Ed. 2d 162 (1999). In particular, we have " 'distinguished as improper remarks that state law is divinely inspired . . . or that law officers are 'ordained' by God.' " *State v. Braxton*, 352 N.C. at 217, 531 S.E.2d at 462 (quoting *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)) (alterations in original). The argument at issue here, however, that each juror would lie in bed and thank the Lord for their own safety, the safety of their family, and for the knowledge he or she did the right thing, is not of the type which we have overturned on previous occasions. We hold that, rather than invoking religious law over secular law, this argument merely urges jurors to make the decision the State viewed as the proper one—recommending a death sentence. Moreover, even if it be assumed *arguendo* that this statement was improper, the prejudice, if any was neutralized by defense counsels' use of religious arguments during their closing, analogizing that jurors should be merciful as Jesus Christ was. *See State v. Daniels*, 337 N.C. 243, 279, 446 S.E.2d 298, 320-21 (1994) (reasoning that the defendant's use of religious arguments to the jury lowered the risk of prejudice from the prosecutor's use of religious arguments), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995). The State's argument was not grossly improper.

[50] We hold that none of the arguments or lines of reasoning challenged in this assignment of error were so grossly improper as to require the trial court to intervene *ex mero motu.*

To conclude his argument on this point, defendant claims that his trial counsel's failure to object to these alleged errors in the State's closing argument at sentencing and failure to request a mistrial demonstrated ineffective assistance. We decline to so hold. As we have stated repeatedly above, "[c]ounsel is given wide latitude in matters of strategy." *State v. Fletcher*, 354 N.C. at 482, 555 S.E.2d at 551. None of the complained-of statements were sufficiently flagrant to require the court to intervene *ex mero motu*; thus, counsel's failure to object to them or to request a mistrial on their bases is deemed insufficient to overcome this Court's strong presumption that trial counsel's representation is within the boundaries of acceptable professional conduct. *State v. Fisher*, 318 N.C. at 532, 350 S.E.2d at 346. These assignments of error are overruled.

[51] Defendant next assigns error to the trial court's refusal to give peremptory instructions for two of the forty-four nonstatutory mitigating circumstances submitted to the jury as to the murder of Mitzi and Katie Phillips. The trial court submitted forty-nine mitigating circumstances consecutively numbered, five of which were statutory and forty-four of which were nonstatutory. Defendant contends that uncontradicted plenary evidence showed that defendant "did not flee Haywood County after this murder," (nonstatutory mitigator number 5) and "displayed remorse for his actions" (nonstatutory mitigator number 46). Defendant argues that this error infected two potentially powerful mitigators and, hence, amounted to constitutional error such that his sentences of death should be reversed. We disagree.

"If the evidence supporting a nonstatutory mitigating circumstance is uncontroverted and manifestly credible, the defendant is entitled to a peremptory instruction on that circumstance upon his request." *State v. Buckner*, 342 N.C. 198, 235, 464 S.E.2d 414, 435 (1995), *cert. denied*, 519 U.S. 828, 136 L. Ed. 2d 47 (1996); *see also State v. Nicholson*, 355 N.C. 1, 56, 558 S.E.2d 109, 146, *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002). The evidence defendant contends supports the nonstatutory mitigating circumstance that defendant did not flee after these murders does not meet this standard. Defendant argues that the evidence is uncontradicted that the morning after the murders, defendant was looking for someone to whom he could surrender and wanted to turn himself in; that he voluntarily

surrendered; and that he did not run. However, the evidence at trial tended to show that Lippard and defendant drove from Earl Lane onto I-40, where Lippard wrecked the car they had stolen. At that point defendant left the wrecked automobile and hid approximately a mile away under a camper top, where he did not reveal himself until he was found by the owner of the land, Jim Fowler. Fowler threatened to kill defendant if he made a move and held defendant at gunpoint until the police arrived to arrest him. Thus, the evidence presented at trial permits the inference that defendant intended to flee Haywood County upon leaving the scene of the crime. Accordingly, the evidence supporting the nonstatutory mitigating circumstance that defendant "did not flee Haywood County" did not warrant a peremptory instruction.

Neither did the trial court err by refusing to give a peremptory instruction on the nonstatutory mitigating circumstance that defendant "had displayed remorse for his actions." Defendant's evidence showing remorse is indirect and tenuous. No witness testified expressly that defendant was remorseful or sorry for the crimes he committed. Evidence that defendant was "tormented" or thought the victims' families "need justice" is subject to more than one interpretation. Defendant not having presented evidence which definitively established remorse by defendant for his actions, a peremptory instruction was not mandated. This assignment of error is overruled as to both mitigating circumstances number 5 and number 46.

[52] Defendant next contends that the trial court committed plain error by failing to give peremptory instructions on the statutory mitigating circumstance that the murders were committed while defendant was under the influence of a mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2), and the statutory mitigating circumstance that defendant's capacity to appreciate the criminality of his conduct was impaired, N.C.G.S. § 15A-2000(f)(6). Defendant argues that this failure prevented the jury from giving this evidence the full mitigating value it required and resulted in constitutional error. Additionally, defendant suggests that counsel's failure to request peremptory instructions constituted ineffective assistance.

As defendant acknowledges, counsel did not specifically request peremptory instructions on these mitigating circumstances. " 'In order to be entitled to [a peremptory] instruction defendant must timely request it.' " *State v. Gregory*, 340 N.C. at 415, 459 S.E.2d at 667 (quoting *State v. Johnson*, 298 N.C. 47, 77, 257 S.E.2d 597, 619 (1979),

overruled in part on other grounds by State v. Williams, 339 N.C. 1, 452 S.E.2d 245 (1994)) (alterations in original). Nonetheless, the only evidence to which defendant directs our attention as support for these mitigators came from Dr. Coleman, who testified that she had been hired by defendant in preparation for this trial. This Court has held previously in *State v. Richmond*, 347 N.C. 412, 495 S.E.2d 677, *cert. denied*, 525 U.S. 843, 142 L. Ed. 2d 88 (1998), that a trial court's failure to give a peremptory instruction relating to a defendant's mental illness was not error where the evidence supporting the instruction came from a mental health professional evaluating the defendant in preparation for trial. *Id.* at 440, 495 S.E.2d at 693. As we stated in *Richmond*, "[T]his evidence lacks sufficient indicia of reliability to permit the conclusion that it is manifestly credible." *Id.* Following this precedent, we hold that the trial court in this case was not obligated to give a peremptory instruction on these mitigators. Moreover, defense counsel did not provide ineffective assistance by failing to request such instructions. This assignment of error is without merit.

[53] In his next assignment of error, defendant contends that the trial court committed plain error by failing to instruct the jury that it could not use the same evidence to support multiple aggravating circumstances. Defendant additionally claims that the error violated his constitutional rights and that his counsel's failure to request an instruction constituted ineffective assistance. We reject these claims.

The trial court submitted four aggravating circumstances for the murders of Mitzi and Katie Phillips, the only crimes for which defendant received the death penalty: (i) the murders were committed to avoid or prevent a lawful arrest, N.C.G.S. § 15A-2000(e)(4); (ii) the murders were committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); (iii) the murders were especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and (iv) the murders were part of a course of conduct in which the defendant engaged and included the commission by defendant of other crimes of violence against another person or persons, N.C.G.S. § 15A-2000(e)(11). Defendant contends that, absent an instruction, the jury could have used the same evidence to support more than one aggravating factor. "Where . . . there is separate evidence supporting each aggravating circumstance, the trial court may submit both 'even though the evidence supporting each may overlap.' " *State v. Rouse*, 339 N.C. at 97, 451 S.E.2d at 564 (quoting *State v. Gay*, 334 N.C. 467, 495, 434 S.E.2d 840, 856 (1993)). However, we have held that a defendant must request that the trial court so instruct: " 'When the court perceives a

possible overlap of evidence supporting more than one aggravating circumstance *and* when the court is requested to instruct the jury that the same evidence cannot be used as a basis for finding more than one aggravating circumstance, it should do so.' " *State v. Holmes*, 355 N.C. 719, 740, 565 S.E.2d 154, 169 (2002) (quoting *State v. Smith*, 352 N.C. at 565, 532 S.E.2d at 795). Defendant in the instant case failed to make any request for this instruction. This Court has previously held that a defendant did not make a proper request for the same instruction where the request was not made in writing. *State v. Holmes*, 355 N.C. at 741, 565 S.E.2d at 169. Nevertheless, assuming *arguendo*, that failure to give the instruction was error, after careful review, we conclude that defendant has failed to demonstrate that absent the omission in the instructions, the jury probably would have returned a different verdict. The jury found all of the aggravators except for the pecuniary gain factor. The other three aggravators each are supported by different evidence. Thus, the jury would not have used the same evidence to find each of them.

Defendant did not raise his constitutional claims at trial. Accordingly, they have not been preserved for appellate review. *State v. Call*, 349 N.C. at 410, 508 S.E.2d at 519; *see* N.C. R. App. P. 10(b)(1). Defendant also contends that his counsel's failure to request the instruction demonstrates ineffective assistance. This contention is meritless. Defendant has failed to show prejudice; therefore, this assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises sixteen additional issues that he concedes have previously been decided contrary to his position by this Court: (i) whether the short-form indictment was adequate to confer jurisdiction on the trial court to try defendant for first-degree murder; (ii) whether the trial court erred by denying defendant's motion to prohibit death qualification of the jury; (iii) whether the death penalty is unconstitutional as currently imposed under North Carolina law; (iv) whether the trial court erred by denying defendant's motion to prohibit a death sentence based on international law; (v) whether the trial court erred by failing to prevent the State from exercising peremptory challenges against venire-members not properly excludable under *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776, and *Wainwright v. Witt*, 469 U.S. 412, 83 L. Ed. 2d 841, but who expressed reservations about the death penalty; (vi) whether the trial court erred by denying defendant's request to *voir dire* potential jurors on their conception of parole eligibility; (vii) whether the trial court

erred by refusing to bar the State from changing its theory on who committed the murders of Earl and Cora Phillips at defendant's trial; (viii) whether the aggravating circumstance that these crimes were especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9) (2003), is unconstitutionally vague and overbroad; (ix) whether the trial court erred by denying defendant's request for an instruction telling the jury that it could consider any sympathy or mercy for defendant that arose from the evidence; (x) whether the trial court erred by denying defendant's request for an instruction informing the jury that if it could not agree on a unanimous verdict within a reasonable time that a sentence of life imprisonment would be imposed; (xi) whether the trial court erred by instructing jurors they "may" consider mitigating circumstances; (xii) whether the trial court erred by denying defendant's request to modify the Pattern Jury Instructions to eliminate the language "taken as a whole must satisfy you," from the instruction on the burden of proof for mitigating circumstances; (xiii) whether the trial court erred by instructing the jury that it was to determine whether nonstatutory mitigating circumstances had mitigating value; (xiv) whether the trial court erred by instructing the jury a mitigating circumstance must "extenuate" or "reduce" the "moral culpability" of the homicide; (xv) whether the trial court erred by instructing jurors that they had to be unanimous in order to impose a sentence of life imprisonment; and (xvi) whether the trial court erred by instructing the jury that it had a "duty" to find that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and a "duty" to find that the aggravating circumstances were sufficiently substantial to call for the imposition of the death penalty.

Defendant raises these issues for purposes of urging this Court to reexamine its prior holdings and to preserve them for federal review. We have considered defendant's arguments on these issues and conclude that defendant has demonstrated no compelling reason to depart from our prior holdings. We thus overrule these assignments of error.

PROPORTIONALITY

[54] 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. at 239, 433 S.E.2d at 161.

After a thorough review of the transcript, record on appeal, briefs, and oral arguments of counsel, we conclude that the jury's finding of the three distinct aggravating circumstances submitted was supported by the evidence. We also conclude that nothing in the record suggests that defendant's death sentences were 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. at 164-65, 362 S.E.2d at 537 (1987). 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. at 400, 428 S.E.2d at 146. Whether the death penalty is disproportionate "ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *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 five first-degree murders—three on the basis of premeditation and deliberation and under the felony murder rule and two solely under the felony murder rule. As to the murders of Mitzi Phillips and Katie Phillips, for each of which defendant received a sentence of death, the jury found three of the four aggravating circumstances submitted: (i) that the capital felonies were committed for the purpose of avoiding or preventing a lawful arrest, N.C.G.S. § 15A-2000(e)(4); (ii) that the murders were especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and (iii) that the murders were 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). A fourth aggravating circumstance was submitted to but not found by the jury: that the capital felonies were committed for pecuniary gain, N.C.G.S. § 15A-2000(e)(6).

The trial court submitted five statutory mitigating circumstances for the jury's consideration; namely, (i) the capital felonies were committed while defendant was under the influence of mental or emotional disturbance, N.C.G.S. § 15A-2000(f)(2); (ii) defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, N.C.G.S. § 15A-2000(f)(6); (iii) defendant's age at the time of the crime, N.C.G.S. § 15A-2000(f)(7); (iv) defendant aided in the apprehension of another capital felon, N.C.G.S. § 15A-2000(f)(8); and (v) the catchall mitigating circumstance that there existed any other circumstance arising from the evidence which the jury deemed to have mitigating value, N.C.G.S. § 15A-2000(f)(9). The jury found the (f)(2), (f)(6), and (f)(8) mitigating circumstances to exist. The trial court also submitted forty-four nonstatutory mitigating circumstances; the jury found thirty-five of these circumstances to exist.

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 killed one victim and then killed four other victims in an attempt to rid the scene of witnesses. He invaded the home of two of the victims and killed five people from three generations of one family. "A murder in the home 'shocks the conscience, not only because a life was senselessly taken, but because it was taken [at] an especially private place, one [where] a person has a right to feel secure.' " *State v. Adams*, 347 N.C. 48, 77,

490 S.E.2d 220, 236 (1997) (quoting *State v. Brown*, 320 N.C. 179, 231, 358 S.E.2d 1, 34, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 407 (1987)) (alterations in original), *cert. denied*, 522 U.S. 1096, 139 L. Ed. 2d 878 (1998); *accord State v. Nicholson*, 355 N.C. at 72, 558 S.E.2d at 155. As to these two murders, defendant was convicted based on 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. at 341, 384 S.E.2d at 506. Furthermore, this Court has deemed the (e)(9) 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 sentences in this case are not disproportionate. Accordingly, the judgments of the trial court are left undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA v. MARCUS DOUGLAS JONES, SR.

No. 22A02

(Filed 7 May 2004)

1. Jury— voir dire—conceptions of parole

There was no error in the denial of a capital first-degree murder defendant's motion to permit voir dire of prospective jurors about conceptions of parole eligibility for a person serving a life sentence.

2. Jury— selection—capital trial—passage of entire panel to defendant

The trial court did not err in a capital first-degree murder prosecution by following the method of jury selection in N.C.G.S.

§ 15A-1214(d), under which the State is allowed to remove some prospective jurors and replace them with others before passing the entire panel to the defendant.

3. Jury— selection—15 member panels—randomness

Defendant waived review of the randomness of a jury chosen from 15 member panels by not challenging them properly.

4. Jury— selection—rehabilitation—ability of system to answer concerns—legal conclusion

There was no abuse of discretion during jury selection for a capital first-degree murder in sustaining the State's objection to defendant's question about whether the system took into account his concerns about the strength of the evidence. The question called for a legal conclusion.

5. Jury— selection—capital trial—excusal for cause

The trial court did not abuse its discretion by excusing two jurors for cause during jury selection for a capital first-degree murder prosecution where one juror wavered about whether he could vote for the death penalty and eventually said that he was predisposed for life imprisonment, and the other remained unequivocal in his unwillingness to give proper weight to aggravators and in his preference for a life sentence.

6. Evidence— statements by defendant—duplicative—relevant and admissible

Statements by a first-degree murder defendant to medical personnel that he shot his wife and stepson and that he was drinking at the time were relevant and admissible, even if they duplicated other evidence.

7. Appeal and Error— preservation of issues—statements to nurses—not raised at trial or in assignments of error

A first-degree murder defendant's contention that his statements to nurses were inadmissible hearsay was not reviewed where defendant did not include that argument in his trial court motions or his assignments of error on appeal.

8. Evidence— audiotape—properly authenticated

An audiotape of a first-degree murder defendant arguing with his victims was properly authenticated where the tape was found in a victim's desk ten months after the murder and passed

through several hands before coming into the custody of the district attorney's office. Testimony at a voir dire hearing was sufficient to establish the accuracy of the tape, demonstrate that it was legally obtained, and support a finding that the tape contained competent evidence of defendant's malice, intent, and ill will toward the victim.

9. Evidence— hearsay—tape of defendant arguing with victims—offered to show malice

An audiotape of a first-degree murder defendant arguing with his victims was not inadmissible hearsay because it was offered to show malice rather than the truth of the statements.

10. Evidence— audiotape—defendant arguing with victims—probative value not exceeded by prejudice

The probative value of an audiotape of a murder defendant arguing with his victims was not exceeded by its prejudice. When a husband is charged with murdering his wife, as here, evidence spanning the entire marriage has been allowed consistently to show malice, intent, and ill will.

11. Evidence— officer's opinion—admissible

There was no error in a first-degree murder prosecution in the admission of a police officer's opinion about which victim was shot first. The court implicitly recognized the officer to be an expert in crime scene investigation, and his experience, the nature of his job, and his personal investigation of the crime scene qualified him to offer expert testimony to demonstrate how the crime scene was found.

12. Evidence— defendant's mental status—basis of expert's opinion

There was no error in a capital first-degree murder prosecution in allowing an expert in forensic psychiatry to testify about an on-call physician's observations of defendant's mental state on the night of the murders, or about his own observations of defendant's mental state when he was admitted to Dorothea Dix Hospital. An expert may testify about the information he relied upon in forming his opinion so long as that information is of a type reasonably relied upon by experts in the field.

13. Evidence— psychiatrist's opinion—defendant's mental state at time of murder—interview one year later

An expert in forensic psychiatry was properly allowed to render an opinion about a first-degree murder defendant's mental state at the time of the murders based upon his interviews, personal observations, and review of reports, although he did not meet defendant until more than a year after the murder.

14. Criminal Law— prosecutor's argument—first-degree murder—alcoholism and low I.Q.

A prosecutor's argument that the jury should not accept any attempt by defense counsel to blame defendant's murders on alcoholism or low IQ instead of his own choices was not improper.

15. Criminal Law— prosecutor's argument—defense psychologist

A prosecutor's argument that defendant's psychologist only noted those things useful to his client was not condoned, but there was no objection at trial and the argument was not so grossly improper that the trial court erred by not intervening ex mero moto.

16. Sentencing— capital—aggravating circumstance—course of conduct for two murders—separate evidence for each murder

There was no error in submitting the course of conduct aggravating circumstance in a capital sentencing proceeding for each of two murders where defendant contended that the jury must have relied on the same evidence in both crimes because both victims were killed at approximately the same time. There was separate evidence for each murder, and the jury may find this aggravating circumstance where defendant killed more than one victim. N.C.G.S. § 15A-2000(e)(11).

17. Sentencing— aggravating circumstance—especially heinous, atrocious, or cruel—family killing

The trial court did not err by submitting the especially heinous, atrocious, or cruel circumstance in a capital sentencing proceeding for the murder of defendant's stepson where defendant killed his wife and then his stepson. This circumstance is proper when a parental relationship exists between the victim and the accused; moreover, defendant's stepson was in close proximity to the horrific murder of his mother, being

sprayed with her blood after a shotgun blast, and he was aware of but helpless to prevent his own impending death. N.C.G.S. § 15A-2000(e)(9).

18. Sentencing— aggravating circumstances—especially heinous, atrocious, or cruel—course of conduct—not overlapping

The especially heinous, atrocious, or cruel aggravating circumstance did not completely overlap the course of conduct aggravating circumstance. Ample evidence existed to support each circumstance.

19. Sentencing— aggravating circumstance—course of conduct—not unconstitutionally vague

The course of conduct aggravating circumstance is not unconstitutionally vague.

20. Criminal Law— prosecutor's closing argument—prosecutor allowed to cure error

The trial court did not err in a capital sentencing proceeding where the prosecutor, during his closing argument, attempted to play an audiotape of the defendant arguing with the victims, defendant objected, and the court allowed the prosecutor to cure any error by telling the jury that the tape had been admitted only to show malice. Allowing the prosecutor to cure the error did not show favoritism because the decision was made at a bench conference.

21. Sentencing— prosecutor's argument—sequence of murders—supported by evidence

The prosecutor's capital sentencing argument that defendant shot his wife before shooting his stepson was supported by the evidence.

22. Sentencing— prosecutor's argument—gunshot sound effects

There was no gross error requiring intervention by the trial court ex mero moto in a capital sentencing proceeding where the prosecutor used sound effects while holding the shotgun used to kill the victims. However, the prosecutor's use of sound effects is not condoned.

23. Sentencing— prosecutor's argument—jury to imagine victims' thoughts

The prosecutor's argument in a capital sentencing proceeding that the jurors should imagine what the victims were thinking was not so grossly improper that the trial court erred by failing to intervene ex mero moto.

24. Criminal Law— prosecutor's argument—defense expert—impeachment

The prosecutor argued from the evidence in a capital sentencing proceeding when he impeached an expert defense witness by emphasizing that the witness had said that certain test data should not be turned over to unqualified people, and then pointed to a test answer that seemed well within the grasp of jury members but was unfavorable to defendant's theory of the case.

25. Sentencing— instructions—life without parole

There was no error in a capital sentencing hearing where the court included "without parole" when it first described life imprisonment, but merely said "life in prison" thereafter.

26. Sentencing— death penalty—proportionate

A death sentence was proportionate for a defendant who murdered his wife and stepson with a shotgun in their home.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from judgments imposing sentences of death entered by Judge W. Allen Cobb, Jr., on 9 November 2000 in Superior Court, Onslow County, upon jury verdicts finding defendant guilty of two counts of first-degree murder. Heard in the Supreme Court 7 April 2003.

Roy Cooper, Attorney General, by Teresa H. Pell, Special Deputy Attorney General, for the State.

Margaret Creasy Ciardella for defendant-appellant.

ORR, Justice.

Defendant, Marcus Douglas Jones, Sr., was indicted on 14 September 1999 for the first-degree murders of his wife Benita[1] Irene Futrell Jones and stepson Marvin Chase Thomas. Defendant was

1. We note that the indictment refers to the female victim as "Benita," while the transcript and the parties' briefs refer to her as "Bonita." In order to remain consistent, we refer to her as "Benita."

tried capitally, and the jury found him guilty of both murders on the basis of premeditation and deliberation. 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 State's evidence at trial tended to show the following:

On the night of 24 July 1999, while in his marital home, defendant used a twelve gauge shotgun to shoot and kill his wife, Benita Jones, and stepson, Marvin Thomas. Defendant then used the shotgun to shoot himself in the face.

Onslow County Deputy Sheriffs Robert Marshall and Ralph Hines went to defendant's home in response to a 911 call. Defendant answered the door. Deputy Marshall testified that "[w]hen Mr. Jones opened the door, I noticed a large portion of his face appeared to be missing. There was a large area [sic] appeared to be blood and soft tissue hanging down from the chin area."

Deputy Marshall further testified that he saw two bodies (later identified as the bodies of Benita Jones and Marvin Thomas) lying on the couch in defendant's home. Deputy Hines testified that he rode with defendant to Onslow Memorial Hospital, where defendant was treated for his gunshot wound. Defendant was later transferred to Pitt County Memorial Hospital where he remained until 24 August 1999, when he was arrested and taken into custody.

JURY SELECTION

[1] First, defendant argues the trial court erred by denying his pretrial "Motion to Permit Voir Dire Examination of Potential Jurors Regarding Conceptions of Parole Eligibility on a Life Sentence." Defendant claims his state and federal constitutional rights to be tried before a fair and impartial jury were violated because he was unable to determine jurors' perceptions regarding life in prison without possibility of parole. Defendant argues he was unable to make reasonably intelligent use of his peremptory challenges because of the trial court's denial of his motion. However, "[w]e have held that a trial court does not err by refusing to allow *voir dire* concerning prospective jurors' conceptions of the parole eligibility of a defendant serving a life sentence." *State v. Smith*, 347 N.C. 453, 460, 496 S.E.2d 357, 361, *cert. denied*, 525 U.S. 845, 142 L. Ed. 2d 91 (1998); *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). We find no reason to

depart from our prior rulings on this issue. Therefore, defendant's assignment of error is overruled.

[2] Next, defendant contends the trial court erred by following the method of jury selection set out by N.C.G.S. § 15A-1214(d). Defendant claims N.C.G.S. § 15A-1214(d) improperly permits the State to remove prospective jurors from a twelve juror panel and replace them with other potential jurors before passing the entire panel to defendant, and thus violates defendant's constitutional rights.

Defendant contends that N.C.G.S. § 15A-1214(d) is unconstitutional and deprives him of his right to a fair and unbiased jury because, according to defendant, the statute allows the State the advantage of passing the jury panel of its choosing. However, in *State v. Anderson*, we upheld the statutorily mandated procedure, stating: "We believe that in enacting N.C.G.S. § 15A-1214, the legislature intended to provide uniformity in the selection of jurors in criminal cases." *State v. Anderson*, 355 N.C. 136, 147, 558 S.E.2d 87, 95 (2002). In the case at bar, the trial court did not err because it followed the mandate in N.C.G.S. § 15A-1214(d). Hence, defendant's assignment of error is without merit.

[3] In his next assignment of error, defendant contends the process of subdividing potential jurors into fifteen member panels violates the randomness requirement of N.C.G.S. § 15A-1214(a) and violates his constitutional right to a fair and impartial jury. N.C.G.S. § 15A-1214(a) states in part:

> The clerk, under the supervision of the presiding judge, must call jurors from the panel by a system of random selection which precludes advance knowledge of the identity of the next juror to be called.

N.C.G.S. § 15A-1214(a) (2003).

In order to properly allege a violation of N.C.G.S. § 15A-1214, a defendant's challenge to a jury panel "[m]ust be in writing," "[m]ust specify the facts constituting the ground of challenge," and "[m]ust be made and decided before any juror is examined." N.C.G.S. § 15A-1211(c) (2003). Such challenges to jury selection must be made at the trial court level. N.C.G.S. § 15A-1211(b) (2003). Because defendant did not properly challenge the jury selection procedure before the trial court, he waived his assignment of error. *State v. Cummings*, 353 N.C. 281, 292, 543 S.E.2d 849, 856, *cert. denied*, 534 U.S. 965, 151 L. Ed. 2d 286 (2001) (holding that by failing to object to

the trial court, defendant waived his argument that juror panels violated the randomness requirement of N.C.G.S. § 15A-1214(a)). Additionally, because defendant failed to object to the jury panels, he has waived review of his argument that the panels were unconstitutional. *Id.* Accordingly, we overrule this assignment of error.

[4] Defendant next contends the trial court improperly sustained the State's objection to a question defense counsel posed during his attempted rehabilitation of prospective juror Robert Coxe after the State challenged him for cause. "[W]hile counsel is allowed wide latitude in examining jurors on *voir dire*, the form of counsel's questions is within the sound discretion of the trial court." *State v. Jones*, 339 N.C. 114, 134, 451 S.E.2d 826, 835 (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995). Hence, we must determine whether the trial court abused its discretion by sustaining the State's objection.

Prospective juror Coxe raised his hand when the trial court asked whether any of the prospective jurors had "personal feelings about capital punishment." Through questioning, the prosecutor elicited from Coxe that Coxe had strong reservations about the death penalty and was reluctant to give weight to aggravating factors. The prosecutor challenged Coxe for cause. The trial court then permitted defense counsel to attempt to rehabilitate Coxe as follows:

[Defense]: Specifically, one of the questions, of course, you understand that the aggravating factors, there's a greater burden of proof on those than other mitigating factors. Do you understand that?

[Coxe]: Sure.

[Defense]: Proof beyond a reasonable doubt and that the defendant, if we do get to mitigating facts, the facts which reduce the reason for the imposition of the death penalty in a certain case, they only have to be proved by a preponderance or fifty percent of the evidence and you understand that.

[Coxe]: Sure.

[Defense]: So the system already seems to take into account your concerns about the strength of the evidence with respect to the cases, is that correct, Mr. Coxe?

[State]: Objection.

[Court]: Sustained.

[Defense]: Understanding that, do you believe you could now be a fair and impartial juror in this case and follow the Court's instructions as to the law, Mr. Coxe?

[Coxe]: Going back over what I've already said, if my duty as a juror is to give both sentences equal consideration, I don't think I could.

The prosecutor then renewed its challenge to prospective juror Coxe for cause, and the trial court excused him. Defendant contends that the trial court erred by sustaining the State's objection. We disagree.

"The regulation of the manner and the extent of the inquiry rests largely in the trial judge's discretion." *State v. Bryant*, 282 N.C. 92, 96, 191 S.E.2d 745, 748 (1972), *cert. denied*, *White v. North Carolina*, 410 U.S. 958, 35 L. Ed. 2d 691, and *cert. denied*, *Holloman v. North Carolina*, 410 U.S. 987, 36 L. Ed. 2d 184 (1973). This Court may reverse for abuse of discretion only upon a showing that the trial court's ruling in regards to the examination of prospective jurors "was so arbitrary that it could not have been the result of a reasoned decision." *State v. Allen*, 322 N.C. 176, 189, 367 S.E.2d 626, 633 (1988).

Defense counsel's question was improper because it called for a legal conclusion: whether the system already addresses the prospective juror's concerns about the strength of the evidence. We have consistently held that "counsel is not permitted to 'fish' for legal conclusions." *State v. Leroux*, 326 N.C. 368, 384, 390 S.E.2d 314, 325, *cert. denied*, 498 U.S. 871, 112 L. Ed. 2d 155 (1990) (quoting *State v. Phillips*, 300 N.C. 678, 682, 268 S.E.2d 452, 455 (1980)). Thus, the trial court acted within its discretion in sustaining the State's objection, and defendant's assignment of error is overruled.

[5] Defendant next contends the trial court erred by excusing for cause prospective jurors Coxe and Zirnheld, both of whom voiced objections regarding the application of the death penalty. A prospective juror may be excused for cause when "[a]s a matter of conscience, regardless of the facts and circumstances, [the juror] would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina." N.C.G.S. § 15A-1212(8) (2003). We recently reiterated the test for determining when a prospective juror should be excused for cause in *State v. Jones*:

> The test . . . is whether his or her views "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 849, (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589 (1980)).

State v. Jones, 355 N.C. 117, 121, 558 S.E.2d 97, 100 (2002). Moreover, "the decision to excuse a prospective juror is within the discretion of the trial court because 'there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.' " *State v. Nobles*, 350 N.C. 483, 495, 515 S.E.2d 885, 893 (1999) (quoting *Wainwright v. Witt*, 469 U.S. at 425-26, 83 L. Ed. 2d at 851-52).

Though Coxe stated there were certain types of cases which warranted the imposition of the death penalty, the transcript reveals he remained unequivocal in his unwillingness to give proper weight to aggravators and in his preference for a life sentence over the death penalty. Likewise, although Zirnheld stated that he believed in the death penalty, he wavered when asked whether he could vote for the death penalty as a possible punishment. When pushed further by the prosecutor, Zirnheld responded "yes" when asked whether he was predisposed to vote for life imprisonment. In *State v. Simpson*, we held "excusals for cause may properly include persons who equivocate or who state that although they believe generally in the death penalty, they indicate that they personally would be unable or would find it difficult to vote for the death penalty." *State v. Simpson*, 341 N.C. 316, 342-43, 462 S.E.2d 191, 206 (1995), *cert. denied*, 516 U.S. 1161, 134 L. Ed. 2d 194 (1996). Therefore, we conclude the excusals of prospective jurors Coxe and Zirnheld were well within the sound discretion of the trial court, and defendant's assignment of error is overruled.

GUILT-INNOCENCE PHASE

[6] Defendant next claims the trial court erred by admitting the out-of-court statements defendant made to two nurses while he received treatment at Pitt County Memorial Hospital on the night of 29 July 1999. In a pre-trial motion, defendant moved to suppress the statements, contending they were inadmissible because they were protected under the physician-patient privilege and were unreliable. Defendant now argues to this Court that the statements at issue were irrelevant and were inadmissible hearsay.

On 29 July 1999, defendant was in Pitt County Memorial Hospital receiving treatment for a self-inflicted gunshot wound to the head. Nurses Deborah Anderson and Diana Watson provided him with treatment to help him breathe after he became agitated. In order to determine whether he was cognizant, the nurses asked defendant if he knew where he was and why he was there. In response, defendant stated the following: "I shot myself. . . . I shot my wife and the kid. . . . [T]hey are both dead." Additionally, defendant replied "yes" when the nurses asked if he had been drinking. Defendant claims the trial court erred by admitting these statements into evidence.

Defendant argues that because other evidence proves he shot his wife and stepson, and that he was inebriated during the incident, his statements to the nurses are irrelevant because they are duplicative of other evidence. We agree with defendant's contention that his statements to the nurses are duplicative evidence. We disagree, however, with defendant's contention that duplicative evidence cannot be relevant. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2003). Defendant's statements that he shot his wife and stepson, and that he was drinking at the time make it more likely that he shot his wife and stepson and that he was inebriated when he shot them. Thus, we conclude that his statements are relevant.

[7] Defendant also argues that his statements to the two nurses were inadmissible hearsay. However, defendant failed to include his hearsay argument in his trial court motion to suppress or in his assignments of error before this Court. "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, *stating the specific grounds* for the ruling the party desired the court to make . . . ." N.C. R. App. P. 10(b)(1) (2004) (emphasis added). Also, "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal . . . ." N.C. R. App. P. 10(a). Therefore, this argument is not properly before this Court. Defendant's assignment of error regarding admission of the statements in question is overruled.

Next, defendant claims the trial court erred by: (a) admitting an audiotape (State's Exhibit Number 80), (b) permitting a deputy

sheriff to render opinions he was not qualified to render, and (c) allowing the State's forensic psychiatry expert to state inadmissible opinions.

[8] Defendant contends that the trial court erroneously admitted into evidence, over his objections, an audiotape (State's Exhibit 80) found in a tape recorder at his home ten months after the murders took place. Defendant challenges the admissibility of this tape on the grounds that: (1) it was not properly authenticated; (2) it contained inadmissible hearsay, and (3) its probative value was substantially outweighed by the danger of unfair prejudice in violation of N.C.G.S. § 8C-1, Rule 403.

The evidence showed that the audiotape contained the voices of defendant and the two victims as they engaged in heated discussions at an unknown time. Testimony established the following circumstances of the tape's discovery and its subsequent chain of custody: Members of Benita's family closed the marital home in June 2000, ten months after the murders. Shirley Horne, Benita's niece, observed a tape recorder containing an audiotape in a desk in a room that Benita used as an office. Horne and Wendy Futrell, Benita's daughter, packed the tape recorder in a box. William Futrell moved the box to the house of Frances Williams, Benita's sister. Williams first listened to the tape in August 2000, after she unpacked the box containing the tape recorder.

After listening to the tape, Frances Williams carried it to Jo Williams, a legal assistant in the Onslow County District Attorney's office, and left it with her on 22 August 2000. Each person who handled or played the tape between its being discovered and its being placed in the custody of the District Attorney denied altering or changing the tape in any way. Defendant stipulated that the tape was delivered to the District Attorney and that the tape was not altered, changed or otherwise modified. Defendant also stipulated that Detective Bud Major at the Onslow County Sheriff's Department kept the tape unaltered, unchanged, or unmodified in any way until the trial.

Outside of the presence of the jury, defendant first objected for the purpose of ascertaining the reason underlying the State's desire to admit the tape. The prosecutor argued that he tendered the tape for the limited purpose of showing defendant had malice, intent, and ill will towards the victims. At this hearing, defendant initially stipulated that: (1) the audiotape was authentic because the State had a

witness who could testify to the voices on the tape, and (2) the tape was legally obtained because the witnesses who obtained the tape had a legal basis for packing up the house.

However, the next day, defendant requested that the trial court hold a *voir dire* hearing so the prosecution could present witness testimony regarding the tape's authenticity. Defendant further requested the trial court to make findings of fact and conclusions of law regarding the authenticity of the tape. During this hearing, defendant objected to the tape's admission under N.C.G.S. § 8C-1, Rule 403, contending that the highly prejudicial contents of the tape substantially outweighed its probative value.

The trial court denied defendant's Rule 403 objection and admitted the audiotape on the basis that the evidence was "relevant under the holding of State vs. M[u]rillo[,] 349 NC 573 to show malice, intent and ill will towards the victims." Defendant took exception to the trial court's decision. The jury returned to the courtroom and heard testimony regarding the discovery of the tape and its subsequent chain of custody. Over defendant's objection, the tape was played for the jury with limiting instructions that it was received "solely for the purpose of showing malice, intent and ill will towards the victims."

Defendant now argues that the trial court's order was based on erroneous findings of fact and erroneous conclusions of law. Defendant specifically challenges the following five findings of fact that supported the trial court's order admitting the tape:

> 4. Tape recording was made some time before July [1999] in the residence of the defendant [and] of the two deceased victims.
>
> . . . .
>
> 6. Tape recorder was operating in close proximity to the victim—excuse me—to the defendant and the deceased victims so as to adequately pick up the voice levels of the defendant and the victims.
>
> 7. The defendant appeared to not be aware that he was being taped and his comments appeared to be spontaneous in nature.
>
> . . . .

10. The recording accurately relates the conversations or statements on the tape.

. . . .

12. The tape is sufficiently intelligible.

Defendant specifically challenges as error the following three conclusions of law that also supported the order:

2. The tape recorder was capable of recording testimony and that it was operating properly at the time the conversation was recorded.

. . . .

5. That the recording is accurate and authentic.

6. That no changes, additions or deletions have been made since the tape has been made.

Defendant argues that the preceding five findings of fact were not supported by the record and that the conclusions of law were not supported by the trial court's findings of fact; therefore, he argues, the trial court erred. He asserts that the State failed to present evidence relating to the location and time of the recording, or recordings. Furthermore, defendant contends the State failed to present evidence to show whether the tape comprised one conversation or several conversations recorded over a period of time. Defendant also contends that in many instances, the voices are unintelligible and the only persons able to identify whether the recording accurately reflects the conversations are the persons participating in the conversations or the person or persons who recorded the tape.

Evidence is authentic if it conforms to Rule 901 of the North Carolina Rules of Evidence.[2] "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C.G.S. § 8C-1, Rule 901(a) (2003). "Under Rule 901, testimony as to accuracy based on personal knowl-

2. The trial court appears to have made its findings of fact and conclusions of law in accordance with *State v. Lynch*, 279 N.C. 1, 17, 181 S.E.2d 561, 571 (1971). We note that in *State v. Stager*, this Court adopted N.C.G.S. § 8C-1, Rule 901 as the basis for analyzing the admissibility of an audiotape. 329 N.C. 278, 317, 406 S.E.2d 876, 898 (1991) (stating "the authentication requirements of Rule 901 have superseded and replaced the seven-pronged *Lynch* test"). Although the trial court applied the wrong test, it arrived at the correct conclusion: that the audiotape was authentic.

edge is all that is required to authenticate a tape recording, and a recording so authenticated is admissible if it was legally obtained and contains otherwise competent evidence." *State v. Stager*, 329 N.C. 278, 317, 406 S.E.2d 876, 898 (1991). We conclude that the testimony during the *voir dire* hearing was sufficient to establish the accuracy of the tape, demonstrate that it was legally obtained, and support a finding that the tape contained competent evidence of defendant's malice, intent and ill will towards the victims. Therefore, the prosecutor properly authenticated the audiotape.

[9] Defendant also argues that the conversations on the tape constituted inadmissible hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C.G.S. § 8C-1, Rule 801(c) (2003). In the case at bar, the prosecution sought to introduce the tape to show defendant had malice, intent and ill will towards the victims and not for the truth of the matter asserted therein. Because the audiotape was not admitted to show that the statements contained therein were true, the trial court did not err by admitting the audiotape.

[10] Lastly, defendant argues that the audiotape's contents were more prejudicial than probative and that the trial court erred by not excluding the tape's contents under N.C.G.S. § 8C-1, Rule 403. Rule 403 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." N.C.G.S. § 8C-1, Rule 403 (2003). "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401.

The decision "to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court." *Stager*, 329 N.C. at 308, 406 S.E.2d at 893. "[T]he 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), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

In the case at bar, the evidence was admitted for the limited purpose of showing that defendant had malice, intent, and ill will towards the victims. "We consistently have allowed evidence span-

ning the entire marriage when a husband is charged with murdering his wife in order 'to show malice, intent and ill will towards the victim.' " *State v. Murillo*, 349 N.C. 573, 591, 509 S.E.2d 752, 763 (1998), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999) (quoting *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985)) *quoted in State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990). Therefore, the trial court did not abuse its discretion in admitting evidence of the entire pattern and history of violence between defendant and the victims. Defendant's assignment of error regarding the admission of the audiotape is overruled.

[11] Next, defendant argues the trial court erroneously admitted opinion testimony from Lieutenant Richard Sutherland of the Onslow County Sheriff's Department. Defendant contends Sutherland was unqualified to render an expert opinion that, based on the blood on the clothing of the victims, Benita was shot first, followed by Marvin. Defendant also complains that Sutherland was unqualified to testify that Marvin was shot while he was in a defensive position.

Defendant failed to object at trial to the admission of Sutherland's testimony; thus, we must review this assignment of error under the plain error rule. *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997). Under the plain error standard of review, defendant has the burden of showing: "(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *Id.*

Lieutenant Sutherland testified that he was a forensic investigator for three and a half years with the Onslow County Sheriff's Department. His duties included conducting crime scene investigations, preserving physical evidence, and assisting in analysis and presentation of the evidence for court. Sutherland testified that he had investigated over five hundred cases, ten to fifteen of which were homicide cases. In addition to his on-the-job training, his formal education included basic law enforcement school and classroom training.

The prosecution concedes Lieutenant Sutherland was never formally tendered as an expert witness. However, in *State v. White*, we held that although "the better practice may be to make a formal tender of a witness as an expert, such a tender is not required." *State v. White*, 340 N.C. 264, 293, 457 S.E.2d 841, 858, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995). A review of the record reveals that

the trial court implicitly found Sutherland to be an expert in crime scene investigation and admitted his testimony under N.C.G.S. § 8C-1, Rule of Evidence 702(a), which reads:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C.G.S. § 8C-1, Rule 702(a) (2003). Sutherland's experience, the nature of his job, and his personal investigation of the crime scene at issue here qualified him to offer expert testimony to demonstrate how the crime scene was found after the police arrived.

We find no evidence in the transcript that Lieutenant Sutherland opined that the blood on Benita's socks originated from Marvin or that Benita was shot first. Sutherland testified that "neither the blood on either of [Benita's] socks, either the drops or the transfer blood, are consistent with having originated from her injuries." This neither implies nor suggests that the blood on Benita's socks originated from Marvin. This testimony merely states that the blood on Benita's socks did not originate from her own injuries. This testimony is proper because as an expert witness, Sutherland is permitted to offer "scientific, technical or other specialized knowledge" to "assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.*

Defendant's contention that it was improper for the trial court to allow Sutherland to testify about the position of Marvin's arms and legs is also without merit for the reasons stated above. As an expert in crime scene investigation, Sutherland's testimony was properly admitted to "assist the trier of fact to understand the evidence or to determine a fact in issue." *Id.*

Because we conclude that the trial court implicitly found Sutherland to be an expert, Sutherland's testimony was admissible as expert testimony, and defendant has failed to show that the admission of Sutherland's opinion testimony amounted to error, much less plain error. Therefore, defendant's assignment of error is overruled.

[12] Defendant next argues the trial court erred in allowing James Groce, M.D., an expert in forensic psychiatry, to testify to the on-call physician's observations of defendant's mental status upon defendant's admission to Dorothea Dix Hospital for psychiatric evaluation on 16 October 2000. Defendant also argues that Dr. Groce should not

have been allowed to render an opinion regarding defendant's state of mind on the night of the murders. Dr. Groce testified as a rebuttal witness for the State.

Defendant failed to object at trial to the admission of Dr. Groce's testimony. Because defendant failed to object, he "has the burden of showing that the error constituted plain error, that is, (i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial." *Bishop*, 346 N.C. at 385, 488 S.E.2d at 779.

Defendant argues that Dr. Groce's testimony about defendant's mental status on 16 October 2000 was inadmissible hearsay. Dr. Groce first interviewed defendant on 17 October 2000, the day after defendant was admitted to the hospital. To prepare for that interview, Dr. Groce relied on the admitting physician's notes stating that defendant did not report any delusions, was logical in his presentation of information, and was coherent.

Dr. Groce testified about the admitting physician's out-of-court statements in order to provide the jury the information he relied upon to form his opinion of defendant's state of mind. An expert may testify about the information he relied upon in forming his opinion so long as the information is of a type reasonably relied upon by experts in his field. N.C.G.S. § 8C-1, Rule 703 (2003). "[T]estimony as to information relied upon by an expert when offered to show the basis for the expert's opinion is not hearsay, since it is not offered as substantive evidence." *State v. Huffstetler*, 312 N.C. 92, 107, 322 S.E.2d 110, 120 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169-70 (1985). Therefore, the trial court did not commit error, much less plain error, by allowing Dr. Groce to make use of the admitting physician's notes, in addition to his own personal observations, to form his expert opinion.

[13] Defendant further complains that Dr. Groce should not have been allowed to render an opinion of defendant's mental state at the time of the murders because Dr. Groce did not meet with defendant until 17 October 2000, more than a year after the murders took place. Based on his interviews with defendant on 17 October and 20 October 2000, Dr. Groce testified, without objection, that in his expert opinion defendant had the mental capacity on 24 July 1999 to form specific intent and that defendant "would have been able to make and carry out plans at that time." Defendant also contends that Dr. Groce's fail-

ure to review defendant's medical records from his month-long stay at Pitt Memorial Hospital after the night of the shootings renders Dr. Groce's opinion inadmissible.

Review of the record in this case reveals that the trial court did not commit plain error in admitting the now challenged testimony from Dr. Groce. He also testified that during the second interview, defendant related that he had "bits and pieces" of memory about the day of the murders. Dr. Groce testified that during his second interview with defendant, Dr. Groce asked defendant to clarify some of the things defendant had said in their prior interview. Nonetheless, in response to Dr. Groce's follow-up questions, defendant was able to clarify the events as they transpired on the day of the murders. Based on both interviews, his personal observations of defendant, and his review of reports prepared by the defense and the State, Dr. Groce rendered his expert opinion that on 24 July 1999, defendant's mental functioning "would have been well enough at that time that he would have been able to form that specific intent." Dr. Groce further testified that defendant "would have been able to make and carry out plans at that time."

We conclude that the trial court did not err by admitting Dr. Groce's testimony under N.C.G.S. § 8C-1, Rule 702. "Rule 702 provides that a witness qualified as an expert may testify in the form of an opinion if it will assist the trier of fact in understanding the evidence. The rule does not require that an opinion be based on a personal interview." *State v. Daniels*, 337 N.C. 243, 269, 446 S.E.2d 298, 314 (1994), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995). In the case *sub judice*, Dr. Groce had ample information to form his opinion regarding defendant's mental state. Therefore, defendant's assignment of error is overruled.

Next we address defendant's complaint that portions of the prosecutors' closing arguments in the guilt-innocence phase of defendant's trial were improper.

Defense counsel failed to object during the prosecutors' closing arguments. This Court has previously set the standard of review under such circumstances as follows:

> The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene

> *ex mero motu*. *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999). In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

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

"[C]ounsel are given wide latitude in arguments to the jury and are permitted to argue the evidence that has been presented and all reasonable inferences that can be drawn from that evidence." *State v. Richardson*, 342 N.C. 772, 792-93, 467 S.E.2d 685, 697, *cert. denied*, 519 U.S. 890, 136 L. Ed. 2d 160 (1996). However, "counsel may not, by argument or cross-examination, place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs and personal opinions not supported by the evidence." *State v. Locklear*, 294 N.C. 210, 217, 241 S.E.2d 65, 69 (1978).

[14] Defendant contends that during the State's closing argument, the prosecutors improperly disparaged defense counsel in an effort to shift the focus from determination of defendant's guilt or innocence to degradation of defense counsel, thus making statements unsupported by evidence. The prosecution's closing argument included the following statements:

> The evidence proves beyond a reasonable doubt that this particular defendant did these things, and don't let his lawyers get up here and attempt to blame something called alcoholism or attempt to blame low I.Q. or attempt to blame anything else for these acts, ...
>
> . . . .
>
> Now, [defense counsel] can come up here all, with all the excuses they want about low I.Q.[,] about alcohol, about dimished [sic] capacity. The truth is this defendant intentionally, with specific intent to kill, pulled the trigger against those two individuals. . . . It's not because of alcohol; it's not because of low I.Q.; it's not because of dimished [sic] capacity, [it's] because he chose to do this, and ladies and gentlemen, don't let [defense counsel] get away with that.

We conclude that the prosecutors' remarks were not improper because they were arguing reasonable inferences drawn from the evidence. Furthermore, we find that the prosecution did not personally disparage opposing counsel by making the comments to which defense counsel failed to object. *State v. Gaines*, 345 N.C. 647, 675, 483 S.E.2d 396, 413, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997).

At trial, defendant's counsel argued that because defendant's capacity was diminished, defendant did not have the specific intent to kill the victims. To show diminished capacity, defense counsel introduced evidence of defendant's low I.Q. and evidence that defendant was intoxicated on the evening of 24 July 1999. The prosecutors' comments in closing argument about defendant's I.Q. and intoxication were not improper because these comments countered defense counsel's argument that defendant did not have the requisite intent to kill on the night in question. As we stated above, the prosecutor argued reasonable inferences drawn from the evidence and thus stayed within the parameters of proper closing arguments.

[15] Defendant next contends the following statements made by the prosecution in closing argument improperly implied defendant's expert was paid to intentionally hide unfavorable information:

> Now, [defense counsel] can call every psychologist in the world, pay them all to come in here and say he didn't have a specific intent to kill.
>
> . . . .
>
> [T]he psychologist only writes down things apparently favorable to the defendant.
>
> . . . .
>
> [Dr. Noble] never ask[ed] the defendant, the one who pulled the trigger[,] "why did you pull the trigger. Why did you shoot them?" He never asked him that. Apparently he didn't want to know the answer.
>
> . . . .
>
> [Dr. Noble] had the word loaded crossed out [of his notes] because it wasn't favorable to his client.

Defendant also contends the prosecutor improperly argued that defendant's expert concealed information and was paid to do so.

However, this Court has rejected similar challenges in past cases. *See, e.g., State v. May*, 354 N.C. 172, 180-81, 552 S.E.2d 151, 157 (2001), *cert. denied*, 535 U.S. 1060, 152 L. Ed. 2d 830 (2002); *State v. Cummings*, 352 N.C. 600, 626, 536 S.E.2d 36, 55 (2000), *cert. denied*, 532 U.S. 997, 149 L. Ed. 2d 641 (2001). Although we do not condone the prosecutor's argument that the defense's expert witness "only writes down things apparently favorable to" his client, we conclude that the prosecutor's comments "are not so grossly improper that the trial court erred when it failed to intervene *ex mero motu*." *State v. Barden*, 356 N.C. 316, 358, 572 S.E.2d 108, 135 (2002), *cert. denied* —— U.S. ——, 155 L. Ed. 2d 1074 (2003). Defendant's assignment of error is overruled.

SENTENCING PROCEEDING

[16] Defendant argues that the trial court erred by submitting the "course of conduct" aggravating circumstance for both murders. N.C.G.S. § 15A-2000(e)(11) (2003). Defendant contends that because the victims were killed at approximately the same time, the jury must have relied on the same evidence to find the course of conduct aggravating factor for each murder. In *State v. Cummings*, we held "the closer the incidents of violence are connected in time, the more likely that the acts are part of a plan, scheme, system, design or course of action." 332 N.C. 487, 510, 422 S.E.2d 692, 705 (1992). "[I]n order to find course of conduct, a court must consider the circumstances surrounding the acts of violence and discern some connection, common scheme, or some pattern or psychological thread that ties them together." *Id.* Moreover, the fact that the victims were related to each other and to the accused supports submission of the course of conduct aggravator. *Id.* at 511, 422 S.E.2d at 706.

The rationale in *Cummings* applies to the case at bar. Here, defendant shot and killed his wife and then killed his stepson. Thus, there exists separate evidence upon which the jury can rely for each murder. Moreover, we have consistently held that a jury may find the N.C.G.S. § 15A-2000(e)(11) aggravating circumstance where defendant killed more than one victim. *See, e.g., State v. Walters*, 357 N.C. 68, 112, 588 S.E.2d 344, 370, *cert. denied*, —— U.S. ——, 157 L. Ed. 2d 320 (2003); *State v. Conaway*, 339 N.C. 487, 530, 453 S.E.2d 824, 851, *cert. denied*, 516 U.S. 884, 133 L. Ed. 2d 153 (1995). Therefore, we conclude that the trial court did not err by submitting the course of conduct aggravating factor for each murder.

[17] Next, defendant contends the trial court erroneously submitted the "especially heinous, atrocious, or cruel" aggravating circumstance for the murder of Marvin Thomas. N.C.G.S. § 15A-2000(e)(9) (2003). However, this Court has remained steadfast in upholding the submission of the (e)(9) aggravating circumstance when a parental relationship exists between the victim and the accused. *See, e.g., State v. Anderson*, 350 N.C. 152, 186, 513 S.E.2d 296, 316, *cert. denied*, 528 U.S. 973, 145 L. Ed. 2d 326 (1999); *State v. Flippen*, 349 N.C. 264, 270, 506 S.E.2d 702, 706 (1998); *State v. Elliott*, 344 N.C. 242, 280, 475 S.E.2d 202, 219 (1996), *cert. denied*, 520 U.S. 1106, 137 L. Ed. 2d 312 (1997). "The victim's age and the existence of a parental relationship between the victim and the defendant may also be considered in determining the existence of the especially heinous, atrocious, or cruel circumstance." *Elliott*, 344 N.C. at 280, 475 S.E.2d at 219.

"A murder is especially heinous, atrocious, or cruel when it is a 'conscienceless or pitiless crime which is unnecessarily torturous to the victim.' " *Walters*, 357 N.C. at 98, 588 S.E.2d at 362 (quoting *State v. Dixon*, 283 So. 2d 1 (Fla.) (1973), cert. denied, 416 U.S. 943, 40 L. Ed. 2d 295 (1974)), *quoted in Flippen*, 349 N.C. at 270, 506 S.E.2d at 706 (1998). Moreover, we have upheld submission of the especially heinous, atrocious, or cruel aggravating factor in those cases that "involve infliction of psychological torture by leaving the victim in his 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).

The evidence demonstrates that defendant shot Marvin's mother in the chest with a shotgun, spraying blood onto Marvin who sat on the same couch. Then defendant pulled the trigger and shot his stepson. Though defendant was not Marvin's biological father, Marvin had been known to call defendant "dad." Because of the existence of the parental relationship, and because Marvin was "aware of but helpless to prevent [his] impending death," *id.*, in close proximity to the horrific murder of his mother, the murder of Marvin was "conscienceless" and "unnecessarily torturous." *Walters*, 357 N.C. at 98, 588 S.E. 2d at 362. Thus, the trial court did not err by submitting the (e)(9) aggravating factor.

[18] Additionally, defendant contends the especially heinous, atrocious, or cruel aggravating circumstance (N.C.G.S. § 15A-2000(e)(9)) submitted for the murder of Marvin Thomas completely overlapped the course of conduct aggravating factor (N.C.G.S. § 15A-2000(e)(11)). "A jury may not consider two aggravating cir-

cumstances when one completely overlaps the other." *State v. Miller*, 357 N.C. 583, 593, 588 S.E.2d 857, 865 (2003). However, "[w]hile a complete overlap is impermissible, some overlap in the evidence supporting each aggravating circumstance is permissible." *Id.* at 595, 588 S.E.2d at 866.

We conclude that ample evidence exists to support each aggravating factor. For example, the evidence indicating defendant killed Marvin minutes after he killed Benita supports the course of conduct aggravating factor for each murder. *Cummings*, 332 N.C. at 510, 422 S.E.2d at 705. The evidence that Marvin was only fourteen years old and that defendant was a father-figure to Marvin supports submission of the especially heinous, atrocious, or cruel aggravating factor. *Anderson*, 350 N.C. at 186, 513 S.E.2d at 316. Thus, defendant's assignment of error is overruled.

[19] Defendant also contends that the course of conduct aggravating circumstance is unconstitutionally vague. However, we have consistently held to the contrary. *See, e.g., State v. Williams*, 305 N.C. 656, 685, 292 S.E.2d 243, 260-61, *cert. denied*, 459 U.S. 1056, 74 L. Ed. 2d 622 (1982). We find no reason to depart from our prior holdings. Therefore, we overrule defendant's assignment of error.

Next, defendant contends the trial court made several errors during the prosecutor's sentencing proceeding closing argument.

[20] First, defendant claims the trial court erred by allowing the prosecutor to give a limiting instruction related to an audiotape containing heated discussions between defendant and the victims. In the guilt/innocence phase, the trial court admitted this tape for the sole purpose of showing defendant's ill will towards the victims. The tape was not admitted as substantive evidence.

The prosecutor attempted to play the tape again during his closing argument at the sentencing phase. Once the prosecutor began to play the tape, defendant objected on the grounds that the tape was not admitted as substantive evidence. The prosecutor and defense counsel then approached the bench, whereupon defense counsel requested an instruction that the tape was only admitted for the limited purposes of showing motive and intent and that the tape was not admitted for the purpose of showing the taped statements were true. The prosecutor then said he would notify the jury that the tape was not admitted as substantive evidence. The trial court then stated, "I'll let [the prosecutor] cure it that way. If he does not, then I will." Next,

the prosecutor told the jury that the tape was offered solely "to show [defendant's] malice, intent and ill will" towards the victims.

Defendant contends the prosecutor did not properly cure his own error. We disagree. Defendant objected to the prosecutor's playing the audiotape on the grounds that the jury could have believed the tape was substantive evidence. We conclude that the prosecutor cured any potential error by instructing the jury that the tape was not substantive evidence, but was admitted solely "to show malice, intent and ill will" towards the victims.

Defendant further contends the trial court improperly expressed bias in favor of the prosecution when choosing the manner in which the jury would be informed of the specific purposes for which the tape could be considered. Instead of personally instructing the jury on this matter, the trial court allowed the prosecutor to "cure" his own error directly with the jury. However, at trial defendant did not object to the prosecutor "curing" his own error. Therefore, we must determine whether the trial court committed a gross impropriety by allowing the prosecutor to instruct the jury on the limited admissibility of the tape. *Barden*, 356 N.C. at 358, 572 S.E.2d at 135.

The trial court "may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C.G.S. § 15A-1222 (2003). "Also, an alleged improper statement will not be reviewed in isolation, but will be considered in light of the circumstances in which it was made. Furthermore, defendant must show that he was prejudiced by a judge's remark." *State v. Weeks*, 322 N.C. 152, 158, 367 S.E.2d 895, 899 (1988) (internal citations omitted).

However, "a trial court generally is not impermissibly expressing an opinion when it makes ordinary rulings during the course of the trial." *Id.* In the instant case, the trial court merely required the prosecutor to keep his argument within the bounds of the law. We conclude that the trial court made an "ordinary ruling[] during the course of the trial," *id.*, and hence, defendant was not prejudiced by the ruling. Moreover, contrary to defendant's contentions, the trial court did not intimate favoritism towards the State. Although the trial court allowed the prosecutor to cure any potential error, the trial court made this decision at a bench conference which the jury did not hear. Because the jury had no knowledge of the trial court's decision, we will not conclude that the decision inevitably prejudiced defendant. Defendant's assignment of error is overruled.

[21] Next, defendant argues he was prejudiced by the prosecutor's sentencing phase closing argument because the prosecutor stated that Benita was shot first, used sound effects of a gun firing, asked jurors to put themselves in the place of the victims, and disparaged defendant's expert witness. Because defendant did not object to the prosecutor's closing argument, we must determine "whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero moto*." *Jones*, 355 N.C. at 133, 558 S.E.2d at 107.

In a capital trial, the prosecutor "is permitted to argue the facts which have been presented, as well as reasonable inferences which can be drawn therefrom." *State v. McCollum*, 334 N.C. 208, 223, 433 S.E.2d 144, 152 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). The prosecutor stated that defendant shot Benita before he shot Marvin. Defendant argues that the evidence does not show defendant shot Benita first. However, defendant's expert witness, Dr. Noble, testified that defendant stated in an interview that defendant "believed that B[e]nita was shot first." Moreover, Lieutenant Sutherland proffered testimony regarding the crime scene which could lead to the reasonable inference that Benita was shot before Marvin. Therefore, it was not improper for the prosecutor to argue the inference that defendant shot Benita before he shot Marvin.

[22] The prosecutor twice used the sound effect of a gun firing during his closing argument. Defendant also complains that the prosecutor used these sound effects while holding the shotgun defendant used to kill the victims.

During the sentencing phase of the trial, the jury may not be influenced by "passion, prejudice, or any other arbitrary factor." N.C.G.S. § 15A-2000(d)(2) (2003). "While the melodrama inherent to closing argument might well inspire some attorneys to favor stage theatrics over reasoned persuasion, such preference cannot be countenanced . . . ." *Jones*, 355 N.C. at 135, 558 S.E.2d at 109. Although we do not condone the prosecutor's use of gunshot sound effects during his closing argument, we conclude that his actions were not "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's assignment of error is overruled.

[23] We next address defendant's argument that the prosecutor erred by asking the jurors to place themselves in place of the victims. A prosecutor may not ask the jury to " 'put themselves in place of the

victims.' " *State v. McCollum*, 334 N.C. at 224, 433 S.E.2d at 152 (quoting *United States v. Pichnarcik*, 427 F.2d 1290, 1292 (9th Cir. 1970)).

The record indicates that, although the prosecutor repeatedly asked the jury to imagine what the victims were thinking, he never asked the jury to put themselves in the victims' positions. We have consistently found such requests to imagine what the victims were thinking to be proper. *See, e.g., State v. Miller*, 357 N.C. at 597, 588 S.E.2d at 867. Therefore, we conclude that the prosecutor's requests for the jury to imagine what the victims were thinking were not "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.

[24] Additionally, defendant argues that during closing argument, the prosecutor disparaged Dr. Noble, defendant's expert witness. At trial, Dr. Noble testified that he had an ethical responsibility to ensure psychological test materials were not released to untrained, unqualified individuals and that the adult intelligence scale and MMPI-2 carry a warning that only qualified psychologists may use and interpret them. On cross-examination, Dr. Noble reviewed some of the questions and statements that were presented to defendant during testing and provided defendant's responses to the jury. Dr. Noble testified that one of the statements on the MMPI-2 was "I'll do something desperate to prevent a person I love from abandoning me" and that defendant's response was "True." Based on this evidence the prosecutor argued:

> And you heard their own psychologist. All these witnesses, I would contend or State contends, were pretty honest to you except that man. He sat there and said, told Mr. Paramore I don't want to give you this psychological I.Q. testing because you folks won't understand. Well, MMPI—excuse me. You all won't understand. What in the world couldn't you understand about the one question—Would you do something drastic if your family were about to abandon you? Yes. What was it that you folks are not smart enough to understand about that? Well, maybe he just didn't want you to know about that.

Counsel "may not become abusive" during closing argument. N.C.G.S. § 15A-1230(a) (2003); *Jones*, 355 N.C. at 127, 558 S.E.2d at 104 (quoting N.C.G.S. § 15A-1230(a) (1999)). However, "it is not improper for the prosecutor to impeach the credibility of an expert during his closing argument." *State v. Norwood*, 344 N.C. 511, 536, 476 S.E.2d 349, 361 (1996), *cert. denied*, 520 U.S. 1158, 137 L. Ed. 2d 500 (1997).

In this passage from the prosecutor's closing argument, the prosecutor was not abusive. Rather, the prosecutor attempted to impeach the expert witness's credibility. In his argument the prosecutor emphasized that Dr. Noble said testing data should not be turned over to unqualified persons, meaning—by reasonable inference—the jury. Then the prosecutor pointed out an inference that could reasonably be drawn from a test question and answer that were reviewed on cross-examination—data that seemed to be well within the grasp of jury members, but unfavorable to defendant's theory of the case. We conclude that the prosecutor properly argued the evidence in an attempt to impeach Dr. Noble's credibility and that the prosecutor neither exceeded the bounds allowed in capital sentencing proceedings nor violated the scope of permissible prosecutorial conduct.

[25] Defendant asserts next that the trial court committed reversible constitutional error by failing to include the words "without parole" when describing the sentence of life imprisonment as an alternative to the death sentence. Defendant admits that the trial court correctly stated that "[a] sentence of life imprisonment means a sentence of life without parole" at the beginning of the jury charge, but contends that later during the jury charge, the court merely said "life in prison." Defendant argues the trial court erred by failing to instruct the jury adequately that "life in prison means life in prison without parole."

In *State v. Davis*, this Court concluded that N.C.G.S. § 15A-2002 does not require the trial judge to use the words "without parole" in each instance he describes a life sentence. "We find nothing in the statute that requires the judge to state 'life imprisonment without parole' every time he alludes to or mentions the alternative sentence." *State v. Davis*, 353 N.C. 1, 41, 539 S.E.2d 243, 269 (2000), *cert. denied*, 534 U.S. 839, 151 L. Ed. 2d 55 (2001).

N.C.G.S. § 15A-2002 provides in pertinent part: "The judge shall instruct the jury, in words substantially equivalent to those of this section, that a sentence of life imprisonment means a sentence of life without parole." N.C.G.S. § 15A-2002 (2003). Here, in instructing the jury, the trial court stated the following:

> All right, Members of the Jury, having found the defendant guilty of murder in the first degree, it is now your duty to recommend to the Court whether the defendant should be sentenced to death or to life imprisonment. A sentence of life imprisonment means a sentence of life without parole.

Thus, the trial court met the statutory requirement, and defendant's assignment of error is overruled.

PRESERVATION ISSUES

Defendant raises additional issues that he concedes this Court has previously decided against him. First, defendant claims the trial court erred by denying his motion to require the State to disclose the criminal records of all witnesses. However, we have previously rejected this argument. *See, e.g., State v. Gibson*, 342 N.C. 142, 149-50, 463 S.E.2d 193, 198 (1995).

Defendant also argues the trial court erred by denying his motion to prevent the State from relying on the N.C.G.S. § 15A-2000(e)(11) course of conduct aggravating factor. Defendant contends N.C.G.S. § 15A-2000(e)(11) is unconstitutionally vague. However, as discussed earlier in this opinion, we have previously rejected this claim. *See, e.g., Williams*, 305 N.C. at 684-85, 292 S.E.2d at 260-61.

Additionally, defendant argues that, in violation of his constitutional rights, the murder indictments failed to allege all the elements of first-degree murder and all the aggravating circumstances to be applied at the capital sentencing hearing. However, we previously rejected this claim. The failure to include all aggravating circumstances in an indictment "violates neither the North Carolina nor the United States Constitution." *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 elements of first-degree murder need not be charged. *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).

Next, defendant argues the trial court erred by denying defendant's motion for Individual *Voir Dire* and Sequestration of Jurors During *Voir Dire*. However, we rejected this argument in *State v. Burke*, holding that such decisions are within the trial court's discretion. 342 N.C. 113, 121-22, 463 S.E.2d 212, 217-18 (1995).

Additionally, defendant argues North Carolina's death penalty statute is unconstitutional, arbitrary and discriminatory on its face and that applying it in this case constitutes cruel and unusual punishment. However, we have previously rejected this argument. *See, e.g., State v. Garner*, 340 N.C. 573, 605, 459 S.E.2d 718, 735 (1995), *cert. denied*, 516 U.S. 1129, 133 L. Ed. 2d 872 (1996).

Next, defendant argues the trial court erred by using the terms "satisfaction" and "satisfy" when instructing the jury on the burden of

proof required to find that a given mitigating circumstance exists. Defendant argues that the trial court's instructions allowed jurors to establish for themselves the legal standard to be applied to evidence of mitigating circumstances. However, we have previously considered and rejected this argument. *See, e.g., State v. Payne*, 337 N.C. 505, 531-33, 448 S.E.2d 93, 108-09 (1994), *cert. denied*, 514 U.S. 1038, 131 L. Ed. 2d 292 (1995).

Next, defendant argues that the trial court erred in its instructions to the jury by stating that the jury had a "duty" to recommend death. Defendant argues the trial court's instruction precluded jurors from considering a sentence of life in prison. However, we have previously considered and rejected this argument. *See, e.g., State v. Thomas*, 350 N.C. 315, 363-64, 514 S.E. 2d 486m 515-16 (1999).

Defendant next argues the trial court erred by using the word "unanimously" in three of the questions appearing on the "Issues and Recommendation as to Punishment" form. Defendant claims the trial court improperly used the word "unanimously" in questions listed under the following three issues:

> [Issue One] Do you *unanimously* find from the evidence, beyond a reasonable doubt, the existence of the following aggravating circumstance?
>
> . . . .
>
> [Issue Three] Do you *unanimously* find beyond a reasonable doubt that the mitigating circumstance or circumstances found is, or are, insufficient to outweigh the aggravating circumstance found by you?
>
> [Issue Four] Do you *unanimously* find beyond a reasonable doubt that the aggravating circumstance you found is sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances found by one or more of you?

(Emphasis added.) Defendant contends that these instructions prejudiced him by precluding jurors from considering a sentence of life in prison. However, we have previously rejected defendant's argument in *State v. McCarver*, 341 N.C. 364, 388-94, 462 S.E.2d 25, 38-42 (1995), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996).

Defendant next contends the trial court erred by instructing the jury during sentencing that "each juror *may* consider any mitigating circumstance or circumstances that he or she determine to exist by a preponderance of the evidence in issue two." (Emphasis added.) Defendant argues that the use of the word "may" in these instructions permits jurors to ignore established mitigation evidence. Defendant also argues that the trial court's instruction precluded a juror from considering mitigating evidence found by any other juror. However, we have repeatedly considered and rejected these arguments. *See, e.g., State v. McNeill*, 349 N.C. 634, 653, 509 S.E.2d 415, 426 (1998), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999); *State v. Green*, 336 N.C. 142, 175, 443 S.E.2d 14, 33-34, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994).

Finally, defendant contends the trial court erred by denying his motion to prohibit the prosecution from death qualifying the jury. However, this Court has previously rejected defendant's argument. *See, e.g., State v. Hyatt*, 355 N.C. 642, 669, 566 S.E.2d 61, 78 (2002), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003).

We see no reason to depart from our prior holdings. Therefore, defendant's assignments of error which relate to his preservation issues are overruled.

PROPORTIONALITY REVIEW

[26] Having found no error in either the guilt/innocence phase or the sentencing proceeding of defendant's trial, we must determine whether: (1) the evidence supports the aggravating circumstances found by the jury; (2) passion, prejudice, or any other arbitrary factor influenced the imposition of the death sentence; and (3) the death sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2).

In the present case, defendant was convicted of two counts of first-degree murder on the basis of malice, premeditation, and deliberation. With respect to each murder, the jury found the aggravating circumstance that the murder "was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons." N.C.G.S. § 15A-2000(e)(11). With respect to defendant's murder of Marvin Thomas, the jury found as an additional aggravating circumstance that the murder was "especially heinous, atrocious,

or cruel." N.C.G.S. § 15A-2000(e)(9). After reviewing the records, transcripts, briefs, and oral arguments, we conclude that the evidence supports all of the aggravating circumstances for each murder.

Additionally, we conclude, based on a thorough review of the record, that the sentences of death were not imposed under the influence of passion, prejudice, or any other arbitrary factor. Thus, the final statutory duty of this Court is to conduct a proportionality review.

Proportionality review is designed "to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). In conducting proportionality review, we determine whether "the sentence of death 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); *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. at 198, 443 S.E.2d at 47 (*quoting Williams*, 308 N.C. at 81, 301 S.E.2d at 355).

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 (2002); *State v. Benson*, 323 N.C. 318, 328, 372 S.E.2d 517, 523 (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 in part on other grounds by State v. Gaines*, 345 N.C. 647, 676-77, 483 S.E.2d 396, 414 (1997), and *by State v. Vandiver*, 321 N.C. 570, 573-74, 364 S.E.2d 373, 375-76 (1988); *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, 183 (1983); and *State v. Jackson*, 309 N.C. 26, 46, 305 S.E.2d 703, 717 (1983).

However, each of these eight cases is distinguishable from the present case. First, in the present case, defendant was convicted of two counts of first-degree murder. This Court has "never found the sentence of death disproportionate in a case where the defendant was found guilty of murdering more than one victim." *State v. Davis*, 349 N.C. 1, 60, 506 S.E.2d 455, 488 (1998), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999).

In *Young*, 312 N.C. at 691, 325 S.E.2d at 194, this Court noted that the jury failed to find the especially heinous, atrocious, or cruel aggravating circumstance. However, in the case at bar, the jury found the especially heinous, atrocious, or cruel aggravating circumstance.

In *Benson*, 323 N.C. at 328, 372 S.E.2d at 522, *Stokes*, 319 N.C. at 27, 352 S.E.2d at 667-68, and *Jackson*, 309 N.C. at 43, 305 S.E.2d at 716, the defendants were convicted of felony murder only. Here, defendant was convicted of murder with premeditation and deliberation. This Court has held "[t]he finding of premeditation and deliberation indicates a more cold-blooded and calculated crime." *State v. Artis*, 325 N.C. 278, 341, 384 S.E.2d 470, 506 (1989), *judgment vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990).

Additionally in the case *sub judice*, the jury found the course of conduct aggravating circumstance, N.C.G.S. § 15A-2000(e)(11), in connection with each murder. This Court has held that the (e)(11) circumstance, standing alone, can support a sentence of death. *See State v. Bacon*, 337 N.C. 66, 110, 446 S.E.2d 542, 566 (1994), *cert. denied*, 513 U.S. 1159, 130 L. Ed. 2d 1083 (1995).

Further, defendant murdered his wife and stepson in their home. "A murder in the home 'shocks the conscience, not only because a life was senselessly taken, but because it was taken [at] an especially private place, one [where] a person has a right to feel secure.' " *State v. Adams*, 347 N.C. 48, 77, 490 S.E.2d 220, 236 (1997), *cert. denied*, 522 U.S. 1096, 139 L. Ed. 2d 878 (1998) (alterations in original) (quoting *State v. Brown*, 320 N.C. 179, 231, 358 S.E.2d 1, 34, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987)). Finally, we note that "[n]one of the cases found disproportionate by this Court involved the murder of a child." *State v. Elliott*, 344 N.C. at 288, 475 S.E.2d at 224.

We also compare the present case with cases in which this Court has found the death penalty proportionate. *See McCollum*, 334 N.C. at 244, 433 S.E.2d at 164. We consider all the cases in the pool of similar cases when engaging in proportionality review; however, "we will not undertake to discuss or cite all of those cases each time we carry out that duty." *Id.* For the reasons discussed in the preceding paragraphs, we find the instant 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.

We conclude that defendant received a fair trial and sentencing hearing free from prejudicial error. Accordingly, the death sentences imposed by the trial court must be left undisturbed.

NO ERROR.

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. 303PA02-2

(Filed 7 May 2004)

Evidence— attorney-client privilege—information regarding third party

The trial court correctly ordered that some of the statements made by a now-deceased client to an attorney be revealed where those statements concerned a third party, did not implicate the client, and were not privileged. The information was provided to the trial court in a sealed affidavit, which the court reviewed under the mandate of a prior Supreme Court opinion. Portions of the trial court's order were modified: the use of "interest of justice" language was unnecessary and contrary to the prior opinion, the trial court did not need to determine the harm to this client in this case, and any dispute over whether the attorney may be interviewed is to be determined by the trial court, with the cautionary note that this is a very narrow exception to the attorney-client privilege.

On a joint petition for discretionary review pursuant to N.C.G.S. § 7A-31(b), prior to a review by the Court of Appeals, of two orders (a summary published order and a detailed sealed order) requiring disclosure of certain communications between attorney and client entered 2 October 2003 by Judge Donald W. Stephens in Superior Court, Wake County. Calendared for argument in the Supreme Court on 17 March 2004; determined on the briefs without oral argument pursuant to N.C. R. App. P. 30(f)(1).

Poyner & Spruill LLP, by Joseph E. Zeszotarski, Jr., for respondent-appellant.

Roy Cooper, Attorney General, by William B. Crumpler, Assistant Attorney General, and C. Colon Willoughby, Jr., District Attorney, Tenth Prosecutorial District, for the State-appellee.

ORR, Justice.

The primary issue presented to this Court is whether the trial court correctly determined that disclosure of certain communications between attorney Richard T. Gammon and his client Derril H. Willard, now deceased, was warranted pursuant to instructions in this Court's opinion, *In re Investigation of Death of Eric Miller*, 357 N.C. 316, 584 S.E.2d. 772 (2003) [Miller I]. The procedural history and background of this case are reported in detail in *Miller I*, 357 N.C. 318-21, 584 S.E.2d. 776-78; however, we nonetheless will summarize the basic procedural history and factual background to include events that have transpired since this Court issued its previous decision.

On 2 December 2000, Eric D. Miller (Dr. Miller) died in Raleigh, North Carolina, as a result of arsenic poisoning. *Id.* at 319, 584 S.E.2d at 776. During the course of the subsequent investigation, law enforcement officials determined that Dr. Miller's wife, Ann Rene Miller (Mrs. Miller), was involved in a relationship with her co-worker, Derril H. Willard (Mr. Willard). *Id.* at 319-20, 584 S.E.2d at 777. Shortly after Dr. Miller's death, Mr. Willard sought legal counsel from Attorney Richard T. Gammon (respondent). *Id.* at 320, 584 S.E.2d at 777. Within days of meeting with Attorney Gammon, Mr. Willard committed suicide. *Id.*

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 necessary, an *in camera* examination to determine whether Attorney Gammon should be compelled to disclose the communications between himself and Mr. Willard for the "proper administration of justice." *Id.* On 7 March 2002, the trial court ordered Attorney Gammon to

> present to the court forthwith a sealed affidavit containing all of the information provided to him by Darril [sic] Willard regarding any act committed by any person which was intended

> to cause harm to Eric Miller or which in fact caused harm to Eric Miller.

The order further provided that the trial court would conduct an *in camera* review of the sealed affidavit to determine if the "interest of justice" required disclosure of the information to the State. *Id.* at 320, 584 S.E.2d at 778. Attorney Gammon immediately appealed the order to the North Carolina Court of Appeals. On 27 June 2002, this Court allowed the parties' joint petition for discretionary review prior to determination by the North Carolina Court of Appeals.

The question originally presented on appeal was "whether, during [the course of] 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." *Id.* at 321, 584 S.E.2d at 778.

After a thorough analysis, this Court: (1) affirmed the trial court's decision to use an *in camera* review to determine whether the communications were protected, *id.* at 337, 584 S.E.2d at 787; (2) rejected the trial court's application of an "interest of justice" balancing test, *id.* at 333, 584 S.E.2d at 785; and (3) instructed the trial court to determine whether "some or all of the communications are outside the scope of the attorney-client privilege," *id.* at 343, 584 S.E.2d at 791. After a comprehensive review and discussion of the attorney-client privilege, including approval of the five-part test espoused in *State v. McIntosh*, 336 N.C. 517, 523-24, 444 S.E.2d 438, 442 (1994), this Court further stated:

> [W]e 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.

Miller I, 357 N.C. at 342-43, 584 S.E.2d at 791. Thus, this Court affirmed in part, reversed in part, and remanded the case to the trial court.

On remand, in an order dated 11 September 2003, the Honorable Donald W. Stephens ordered Attorney Gammon to "file with the court under seal the aforesaid affidavit [containing certain information provided to him by Derril Willard] and any legal memorandum setting forth the basis for a claim of confidentiality or privilege which would preclude disclosure of this information to the District Attorney." Judge Stephens further authorized and requested the State "to file a legal memorandum . . . in support of any contention regarding the nature of information subject to disclosure under the Supreme Court's decision in this case." Attorney Gammon complied with the trial court's order and provided a seven-page sealed affidavit to Judge Stephens on 26 September 2003.

On 2 October 2003, after reviewing the sealed affidavit *in camera*, Judge Stephens entered an "Order [Sealed by the Court]" containing findings of fact and conclusions of law, a copy of which was served upon Attorney Gammon. No other person was provided with a copy of this sealed order. On the same day, Judge Stephens issued a public order in which he summarized "in a general way as appropriate" his findings of fact which include the following:

> To maintain the confidentiality of the specific information set forth in Mr. Gammon's affidavit, the Court will not, in this order, recite any specific information contained in such affidavit, except to characterize that information in a general way as appropriate to give public notice of the nature of the Court's ruling by separate order which is now under seal.
>
> A thorough review by the Court of the submitted affidavit reveals that all statements made by Derril Willard to Attorney Gammon were made in anticipation that such statements would be confidential and would never be revealed to anyone else, were made at a time that an attorney-client relationship existed, were made in the course of Willard seeking legal advice and for a

proper purpose, and were made regarding a matter for which Attorney Gammon was being professionally consulted. Mr. Willard never waived the attorney-client privilege and never authorized any waiver or release of this information to anyone else, including this court.

The review of this affidavit reveals that no information provided to Attorney Gammon by Derril Willard incriminated Mr. Willard in any manner, directly or indirectly, in the death of Eric Miller.

However, Derril Willard did provide to Attorney Gammon information concerning activities and statements of a third person regarding the death of Eric Miller. Such information concerning this third person did not reveal any collaborative involvement of Willard and did not implicate Willard in any way in the death of Eric Miller

Judge Stephens then summarized his conclusions in the public order:

Under the rules announced by the Supreme Court opinion in this case, the information regarding the activities and statements of a third party are not privileged and are therefore subject to disclosure to the District Attorney in the interest of justice and are hereby ordered to be disclosed in a manner more particularly described in the sealed order signed and entered on this date. All other information in the affidavit is privileged and shall not be disclosed.

The order further stated:

The Court finds and concludes that disclosure of the information regarding a third party's activities and statements would not expose Derril Willard to criminal liability, even if he were living; would not subject Derril Willard or his estate to civil liability, and would not harm Derril Willard's reputation or harm Derril Willard's loved ones.

After Attorney Gammon filed notice of appeal to the Court of Appeals from both orders entered by Judge Stephens, all parties petitioned this Court for discretionary review prior to determination by the Court of Appeals. We allowed the petition for discretionary review on 8 January 2004. We have reviewed the sealed affidavit, public order, and "Order [Sealed by the Court]" and decide the issues presented as follows:

(1) We affirm the trial court's finding in the "Order [Sealed by the Court]" that "no information provided to Attorney Gammon by Derril Willard incriminated Mr. Willard in any manner, directly or indirectly, in the death of Eric Miller."

(2) We affirm the trial court's finding in the "Order [Sealed by the Court]" that "Derril Willard did provide to Attorney Gammon information concerning activities and statements of a third person regarding the death of Eric Miller. Such information concerning this third person did not reveal any collaborative involvement of Willard and did not implicate Willard in any way in the death of Eric Miller. This information is contained in paragraph number 12 on pages 5 and 6 of the affidavit."

(3) The trial court concluded in part in the "Order [Sealed by the Court]:" "[T]he information regarding activities and statements of a third party are not privileged and are subject to disclosure to the District Attorney, if the interest of justice requires." As to this conclusion of law in applying the narrow legal standard set forth by this Court in *Miller I*, we affirm. However, the trial court's inclusion of the language "if the interest of justice requires" was unnecessary surplusage and contrary to this Court's disavowal of the use of an "interest of justice test" in *Miller I*. *See* 357 N.C. at 333, 584 S.E.2d at 785.

(4) The trial court found and concluded in the "Order [Sealed by the Court]" that "disclosure of the information regarding a third party in paragraph number 12 above would not expose Derril Willard to criminal liability, even if he were living; would not subject Derril Willard or his estate to civil liability, and would not harm Derril Willard's reputation or harm Derril Willard's loved ones." While not disagreeing with the trial court's findings and conclusions just quoted, we note that such a determination would only be necessary under *Miller I* where "the communications relate to a third party but also affect the client's own rights or interests and thus remained privileged." *Miller I*, 357 N.C. at 343, 584 S.E.2d at 791. Because the trial court's findings and conclusions do not reveal such a situation in this case, it was unnecessary for the trial court to have so determined.

(5) Further, the "Order [Sealed by the Court]" finds and concludes "that the non-privileged information concerning a third party which is specifically set forth in numbered paragraph 12 of Attorney Gammon's affidavit should be disclosed to the District Attorney for the 10th Judicial District in its entirety." We affirm this finding and

conclusion. In addition, the trial court found and concluded "that all other information contained in the affidavit is privileged and should not be disclosed." We likewise affirm this finding and conclusion.

(6) Finally, Attorney Gammon argues that the trial court erred in ordering any form of production to the State other than merely producing a copy of the relevant portions of Mr. Gammon's sealed affidavit. In the "Order [Sealed by the Court]," Judge Stephens ordered that "Attorney Richard Gammon shall, on or by 5:00 p.m. on Friday, October 10th, 2003, provide to the District Attorney for the 10th Judicial District all information regarding a third person, as set forth in numbered paragraph 12 of his affidavit." (Stayed by order of Judge Stephens in the public order.) It is not clear from this language exactly how the information is to be conveyed to the District Attorney. Counsel for Attorney Gammon argues that "[t]o the extent that the sealed order may require, or the State may contend, that Mr. Gammon must submit to an interview with the State, such a requirement is contrary to the law." Since we do not read Judge Stephens' order as requiring anything more than a disclosure of the contents of paragraph 12 to the District Attorney, it is unnecessary to reach this issue. To the extent there is disagreement over the method of disclosure, any such dispute is for the trial court to determine initially. However, we add as a cautionary note that this very narrow exception to the attorney-client privilege should be appropriately limited both as to its scope and method of disclosure.

For the reasons previously stated, the trial court's orders are affirmed as modified and this matter is remanded for such other action as is consistent with this opinion.

AFFIRMED AS MODIFIED.

IN THE MATTER OF: T.R.B.

No. 296A03

(Filed 7 May 2004)

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. 609, 582 S.E.2d 279 (2003), reversing and remanding an adjudication order entered 2 August 2001 by Judge Joseph E. Setzer, Jr. and a dispositional order

entered 27 September 2001 by Judge David B. Brantley in District Court, Wayne County. On 21 August 2003, this Court allowed the State's petition for discretionary review as to additional issues. Heard in the Supreme Court 15 March 2004.

Roy Cooper, Attorney General, by Laura E. Crumpler, Assistant Attorney General, for the State-appellant.

Marjorie S. Canaday for respondent-appellee.

Coe W. Ramsey, on behalf of the American Civil Liberties Union of North Carolina Legal Foundation, amicus curiae.

PER CURIAM.

This appeal arises from an adjudication order entered by Judge Joseph E. Setzer, Jr. and from a dispositional order entered by Judge David B. Brantley. Respondent T.R.B. was adjudicated delinquent and was sentenced to twelve months' probation under the supervision of a juvenile court counselor. The Court of Appeals held that respondent's confession was obtained in violation of N.C.G.S. § 7B-2101 and reversed and remanded the case for a new adjudication hearing. Judge Wynn wrote separately, "concurring in part, dissenting in part," with the majority's opinion. *In re T.R.B.*, 157 N.C. App. 609, 623, 582 S.E.2d 279, 288 (2003).

The State, through the Attorney General, appealed to this Court pursuant to N.C.G.S. § 7A-30(2), and this Court granted the State's petition for discretionary review as to additional issues. We have now determined that the petition for discretionary review as to additional issues was improvidently allowed. Additionally, because Judge Wynn concurred with the Court of Appeals' majority opinion on all substantive grounds and merely raised an additional issue for consideration, the State's appeal pursuant to N.C.G.S. § 7A-30(2) is hereby dismissed.

APPEAL DISMISSED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

MARCEL ELUHU v. VLADIMIR ROSENHAUS

No. 498A03

(Filed 7 May 2004)

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. 355, 583 S.E.2d 707 (2003), affirming an order entered 25 March 2002 by Judge Robert H. Hobgood in Superior Court, Wake County. Heard in the Supreme Court 13 April 2004.

Cheshire, Parker, Schneider, Bryan & Vitale, by Jonathan McGirt, for plaintiff-appellant.

Wyrick, Robbins, Yates & Ponton, L.L.P., by Heidi C. Bloom and K. Edward Greene, for defendant-appellee.

PER CURIAM.

AFFIRMED.

PALMER v. JACKSON

[358 N.C. 373 (2004)]

MARIA TERESA PALMER, GUARDIAN AD LITEM FOR J. CARMEN FUENTES, EMPLOYEE v. W. BRENT JACKSON D/B/A JACKSON'S FARMING COMPANY, EMPLOYER, AND COMPANION PROPERTY AND CASUALTY, CARRIER

No. 336PA03

(Filed 7 May 2004)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 157 N.C. App. 625, 579 S.E.2d 901 (2003), vacating and remanding orders entered 10 July and 24 July 2001 by Judge Russell J. Lanier, Jr., in Superior Court, Sampson County. Heard in the Supreme Court 16 March 2004.

Roy Cooper, Attorney General, by Celia Grasty Lata, Special Deputy Attorney General, and Brent D. Kiziah, Assistant Attorney General, for The University of North Carolina Hospitals and The University of North Carolina Physicians & Associates, appellees.

White & Allen, P.A., by Thomas J. White, III; and The Bricio Law Firm, by Francisco J. Bricio, for White Law Offices, P.A., and Massengill & Bricio, P.L.L.C., appellees.

Morris York Williams Surles & Barringer, L.L.P., by John F. Morris and Keith B. Nichols, for defendant-appellants.

Ott Cone & Redpath, P.A., by Melanie M. Hamilton and Wendell H. Ott, on behalf of amici curiae health care providers.

Nelson Mullins Riley & Scarborough, L.L.P., by Joseph W. Eason, on behalf of the North Carolina Insurance Guaranty Association, amicus curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
ROBERT LEWIS McCLAIN	)	

No. 140A00

By Order dated 31 January 2002, this Court remanded the case to the Superior Court, Mecklenburg County, for a hearing on defendant's Motion for Appropriate Relief. At the conclusion of the hearing, the superior court determined that defendant was mentally retarded within the definition of N.C.G.S. § 15A-2005(a)(1) and vacated defendant's sentence of death. In accordance with our Order, the superior court transmitted its findings to this Court.

Because defendant is no longer eligible for a death sentence, his appeal to this Court is dismissed and the case is transferred to the North Carolina Court of Appeals for disposition as a life imprisonment case, including rebriefing and reargument if directed by that court.

By order of the Court in Conference, this the 13th day of April, 2004.

s/Edmunds, J.
For the Court

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

Finkel v. Finkel Case below: 162 N.C. App. 344	No. 091P04	1. Def's PWC to Review the Decision of the COA (COA02-1456) 2. *Plt's Motion to Dismiss PDR*	1. Denied **04/01/04** 2. Dismissed as moot 05/06/04
Green v. Wilson Case below: 163 N.C. App. 186	No. 160PA04	1. Defs' (Polly Pate Wilson, Individually and as Administratrix of the Estate of Wadell H. Pate, Janet Pate Holmes, and Darien Pate) NOA Based Upon a Constitutional Question (COA03-714) 2. Defs' (Polly Pate Wilson, Individually and as Administratrix of the Estate of Wadell H. Pate, Janet Pate Holmes, and Darien Pate) PDR Under N.C.G.S. § 7A-31 3. Plts' Motion to Dismiss NOA Based Upon a Constitutional Question	1. — 2. Allowed 05/06/04 3. Allowed
Griffis v. Lazarovich Case below: 161 N.C. App. 434	No. 038P04	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-181)	Denied 05/06/04
Guarascio v. New Hanover Health Network, Inc. Case below: 163 N.C. App. 160	No. 165P04	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-492)	Denied 05/06/04
Headley v. Williams Case below: 162 N.C. App. 300	No. 074P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-284)	Denied 05/06/04
In re Canseco Case below: 162 N.C. App. 180	No. 090P04	Petitioner's (Forsyth County Department of Social Services) and Guardian ad Litem's PDR Under N.C.G.S. § 7A-31 (COA03-206)	Denied 05/06/04
In re R.T.W., D.O.B. 5/4/01	No. 079P04	Respondent's PWC to Review the Order of the COA (COA03-1302)	Allowed 05/06/04
In re T.R.B. Case below: 157 N.C. App. 609	No. 296A03	Respondent's (T.R.B.) Motion to Dismiss the State's Appeal Regarding the Probation Condition Issue for Mootness (COA02-531)	Dismissed as moot 05/06/04

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

Jane Doe 1 v. Swannanoa Valley Youth Dev. Ctr. Case below: 163 N.C. App. 136	No. 158P04	1. Defs' (Swannanoa Valley Youth Development Center and N.C. Department of Juvenile Justice and Delinquency Prevention) PDR Under N.C.G.S. § 7A-31 (COA03-416) 2. Defs' (Swannanoa Valley Youth Development Center and N.C. Department of Juvenile Justice and Delinquency Prevention) Motion for Temporary Stay 3. Defs' (Swannanoa Valley Youth Development Center and N.C. Department of Juvenile Justice and Delinquency Prevention) Petition for Writ of Supersedeas Under Rule 23	1. Denied **04/15/04** 2. Dismissed **04/15/04** 3. Dismissed **04/15/04**
Jones v. Lake Hickory R.V. Resort, Inc. Case below: 162 N.C. App. 618	No. 113A04	1. Plt's NOA Based Upon a Dissent (COA02-1114) 2. Plt's PDR as to Additional Issues 3. Def's PDR as to Additional Issues	1. — 2. Denied 05/06/04 3. Denied 05/06/04
Keener v. Arnold Case below: 161 N.C. App. 634	No. 048P04	Plts' PDR Under N.C.G.S. § 7A-31 (COA02-145)	Denied 05/06/04
Knott v. Dixie-Denning Supply Co. Case below: 162 N.C. App. 180	No. 056P04	Plts' PDR Under N.C.G.S. § 7A-31 (COA03-159)	Denied 05/06/04
Kyle & Assocs. v. Mahan Case below: 161 N.C. App. 341	No. 655PA03	Def's PDR Under N.C.G.S. § 7A-31 (COA03-131)	Allowed 05/06/04
Malloy v. Cooper Case below: 162 N.C. App. 504	No. 595P01-2	1. AG's Petition for Writ of Supersedeas (COA00-898-2) 2. AG's NOA Based Upon A Constitutional Question 3. Plt's Motion to Dismiss Appeal 4. AG's PDR Under N.C.G.S. § 7A-31 5. Plt's Conditional PDR Under N.C.G.S. 7A-31	1. Denied, Stay dissolved 05/06/04 2. — 3. Allowed 05/06/04 4. Denied 05/06/04 5. Dismissed as moot 05/06/04

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

McIntyre v. Forsyth Cty. Dep't of Soc. Servs. Case below: 162 N.C. App. 94	No. 067P04	Petitioner's (Robert Winfrey) PDR Under N.C.G.S. § 7A-31 (COA02-1301)	Denied 05/06/04
N.C. Farm P'ship v. Pig Improvement Co. Case below: 163 N.C. App. 318	No. 156P04	Def's Motion for Temporary Stay (COA03-328)	Allowed **04/02/04**
N.C. Indus. Capital, LLC v. Rushing Case below: 163 N.C. App. 204	No. 157P04	Def's (West's Charlotte Transfer & Storage, Inc.) Motion for Temporary Stay (COA03-274)	Denied **04/06/04**
Phillips v. Ledford Case below: 162 N.C. App. 150	No. 059P04	1. Plt's NOA Based Upon a Constitutional Question (COA02-1605) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 05/06/04 2. Denied 05/06/04
Santomassimo v. Valley Forge Life Ins. Co. Case below: 161 N.C. App. 570	No. 086P04	1. Def's' (Valley Forge Life Ins. Co. and CNA Life Ins. Co.) PDR Under N.C.G.S. § 7A-31 (COA02-1328)	1. Denied 05/06/04
Scarborough v. Dillard's, Inc. Case below: 162 N.C. App. 360	No. 085P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-358)	Denied 05/06/04
State v. Anderson Case below: 162 N.C. App. 181	No. 065P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-544)	Denied 05/06/04
State v. Banks Case below: 163 N.C. App. 31	No. 121P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-322)	Denied 05/06/04
State v. Beck Case below: 163 N.C. App. 469	No. 191P04	AG's Motion for Temporary Stay (COA03-466)	Allowed **04/26/04**

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

State v. Blackwell Case below: 163 N.C. App. 12	No. 148P04	Def's PWC to Review the Decision of the COA (COA03-199)	Denied 05/06/04
State v. Bryant Case below: 163 N.C. App. 478	No. 173P04	AG's Motion for Temporary Stay (COA02-1706)	Allowed Pending Determination of the State's PDR **04/19/04**
State v. Dennison Case below: 163 N.C. App. 375	No. 179A04	AG's Motion for Temporary Stay (COA02-1512)	Allowed **04/19/04**
State v. Doyle Case below: 161 N.C. App. 247	No. 658P03	1. Def's NOA Based Upon a Constitutional Question (COA03-94) 2. Def's PDR Under N.C.G.S. § 7A-31 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 05/06/04 3. Allowed 05/06/04
State v. Escoto Case below: 162 N.C. App. 419	No. 111P04	Def's (Ludy Fernando Escoto) PDR Under N.C.G.S. § 7A-31 (COA03-70)	Denied 05/06/04
State v. Foster Case below: 162 N.C. App. 665	No. 104PA04	1. AG's Motion for Temporary Stay (COA03-348) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed **03/05/04** 2. Allowed 05/06/04 3. Allowed 05/06/04
State v. Fox Case below: 157 N.C. App. 574	No. 125P04-2	Def's PWC to Review the Decision of the COA (COA02-886)	Dismissed 05/06/04
State v. Goode Case below: Johnston County Superior Court	No. 010A94-5	1. Def's Motion for Stay (Johnston County) 2. Def's Petition for Writ of Supersedeas	1. Denied **04/21/04** 2. Denied **04/21/04**
State v. Holbrooks Case below: 161 N.C. App. 349	No. 656P03	Def's PDR Under N.C.G.S. § 7A-31 (COA03-251)	Denied 05/06/04

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

State v. Hughes Case below: 159 N.C. App. 229	No. 190P04	Def's PWC to Review the Decision of the COA (COA02-1207)	Denied 05/06/04
State v. Hurt Case below: 163 N.C. App. 429	No. 192A04	1. AG's Motion for Temporary Stay (COA03-26) 2. AG's PWC 3. AG's NOA Based Upon a Dissent	1. Allowed **04/27/04** 2. Allowed **04/27/04** 3. —
State v. Jacobs Case below: 162 N.C. App. 722	No. 138P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-136)	Denied 05/06/04 **Orr, J., recused**
State v. Jones Case below: 161 N.C. App. 615	No. 018P04	1. Def's NOA Based Upon a Constitutional Question (COA02-1739) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. — 2. Denied 05/06/04 3. Allowed 05/06/04
State v. Mack Case below: 161 N.C. App. 595	No. 023P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-176)	Denied 05/06/04 **Orr, J., recused**
State v. Matthews Case below: 162 N.C. App. 339	No. 084P04	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1690)	Denied 05/06/04
State v. McCollum Case below: 162 N.C. App. 182	No. 039P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-63)	Denied 05/06/04
State v. Ogles Case below: 161 N.C. App. 541	No. 007P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-83)	Denied 05/06/04
State v. Sharpe Case below: 162 N.C. App. 722	No. 139A04	Def's NOA Based Upon a Constitutional Question (COA03-366)	Dismissed *ex mero motu* 05/06/04

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

State v. Shue Case below: 163 N.C. App. 58	No. 103P04	1. AG's Motion for Temporary Stay (COA03-133) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 4. Def's PWC to Review the Decision of the COA	1. Denied 05/06/04 2. Denied 05/06/04 3. Denied 05/06/04 4. Denied 05/06/04
State v. Smith Case below: 162 N.C. App. 548	No. 110P04	1. Def's NOA Based on a Constitutional Question (COA03-299) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 05/06/04 2. Denied 05/06/04
State v. Snow Case below: 162 N.C. App. 182	No. 063P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-28)	Denied 05/06/04 **Orr, J., recused**
State v. Williams Case below: 161 N.C. App. 742	No. 032P04	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1508)	Denied
Sykes v. Moss Trucking Co. Case below: 163 N.C. App. 206	No. 153P04	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-548)	Denied 05/06/04
Taylor v. Gore Case below: 161 N.C. App. 300	No. 657P03	1. Def's (L. R. Gore) PDR Under N.C.G.S. § 7A-31 (COA03-219) 2. Plts' PDR Under N.C.G.S. § 7A-31	1. Denied 05/06/04 2. Denied 05/06/04
University of N. C. at Chapel Hill v. Feinstein ——— University of N. C. at Chapel Hill v. Gorman ——— N.C. State Univ. v. Wilkins Case below: 161 N.C. App. 300	No. 021P04	1. Respondent's (Martin Feinstein) PDR Under N.C.G.S. § 7A-31 (COA03-225) 2. Respondents' (Howard Gorman and Pearl A. Wilkins) PDR Under N.C.G.S. § 7A-31	1. Denied 05/06/04 2. Denied 05/06/04

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

PETITIONS TO REHEAR

Draughon v. Harnett Cty. Bd. of Educ. No. 392A03 Case below: 358 N.C. 137 No. 358A03 Case below: 358 N.C. 131	No. 392A03 No. 358A03	Plt's Petition for Rehearing	Denied 05/06/04

STATE OF NORTH CAROLINA v. FERNANDO LOUIS GARCIA, III

No. 504A01

(Filed 25 June 2004)

1. **Homicide—first-degree murder—short-form indictment—bill of particulars—notice**

The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder under the felony murder rule with attempted rape as the underlying felony, or in the alternative, by denying his motion for a bill of particulars even though defendant contends the short-form indictment used to charge him lacked adequate notice of the underlying felony, because: (1) murder indictments that comply with N.C.G.S. § 15-144 are sufficient to charge first-degree murder on the basis of any theory set forth in N.C.G.S. § 14-17, and therefore, a short-form indictment is sufficient to charge first-degree murder on the basis of felony murder committed during an attempted rape; (2) defendant was not entitled to learn the State's theory of the case by a bill of particulars when the State is not required to choose its theory of prosecution prior to trial; and (3) there was no palpable or gross abuse in this case based on the denial of a bill of particulars when the State's legal theory was not factual information within the meaning of N.C.G.S. § 15A-925(b) and defendant was not denied any information necessary to adequately prepare or conduct his defense.

2. **Confessions and Incriminating Statements—motion to suppress—custody—Miranda warnings**

The trial court did not err in a first-degree murder case by denying defendant's motion to suppress an inculpatory statement made at the police station because defendant was not in custody and Miranda warnings were not required where: (1) defendant was not under arrest and defendant's movement was not restrained to the degree associated with a formal arrest at the time he made the contested statement; (2) after reviewing the totality of circumstances surrounding defendant's interview, the four factors defendant identifies including three pat-downs, a closed interview room door, a detective's statement that defendant's girlfriend had "given him up," and the fact that defendant would not have been able to leave either police car on his own because the rear doors of police vehicles lock automatically, did

not render him in custody; (3) non-communicated subjective suspicions and non-communicated subjective intent of individual officers have no bearing on Miranda analysis; and (4) defendant's case is not analogous to *State v. Buchanan*, 355 N.C. 264, when there was no abruptly elevated security in defendant's case nor did the defendant make the same type of incriminating initial confession.

3. Jury—selection—excusal for cause—inability to return death sentence

The trial court did not abuse it discretion in a first-degree murder case by excusing a prospective juror on the ground that she would be unable to return a sentence of death, because: (1) the prospective juror's answers in this case were inconsistent; and (2) the trial court was well equipped to discern whether the prospective juror's beliefs would substantially impair the performance of her duties to fairly consider aggravating and mitigating circumstances, to weigh those circumstances consistent with the trial court's instructions, and to exercise guided discretion in returning an appropriate sentence.

4. Jury—selection—questioning replacement jurors before approval of panel of twelve

Although the trial court violated North Carolina's jury selection statute under N.C.G.S. § 15A-1214(f) by requiring defendant to question replacement jurors in a first-degree murder case before the State approved a full panel of twelve individuals, this error was not prejudicial to defendant and was not structural constitutional error because: (1) defendants claiming error in jury selection procedures must show prejudice in addition to a statutory violation before they can receive a new trial; (2) defendant has not complained that the aberrant procedure resulted in a biased jury, an inability to question the prospective jurors, an interference with his right to challenge, or any other defect without which a different result might have been reached; (3) our Supreme Court has previously held, under similar circumstances of juror shortage, that a defendant is not prejudiced by questioning fewer than a full panel of replacement jurors when that defendant has not exhausted his peremptory challenges, and defendant in this case possessed adequate remaining peremptory challenges during both court sessions for which he assigns error; and (4) defendant has failed to show that he was denied a trial by a fair and impartial jury or to show that any other constitutional

error resulted from the jury selection procedure employed at his trial, and defendant did not raise this constitutional issue at trial.

5. Homicide—felony murder—attempted rape—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of felony murder based on attempted rape, because: (1) defendant removed his victim from a public area to a secluded location, defendant removed the victim's shorts and underwear, defendant made statements to police concerning rape, and defendant did not run away when the victim resisted; and (2) the evidence presented by the State was sufficient evidence from which a jury could infer defendant's intent to engage in vaginal intercourse with the victim against her will.

6. Confessions and Incriminating Statements; Evidence—threat to female detention officer—relevancy

The trial court did not err in a first-degree murder case by overruling defendant's objection to evidence regarding a threat he made to a female detention officer while defendant was in a holding cell, because: (1) defendant failed to raise a constitutional objection to this statement at trial, and constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal; (2) defendant failed to raise a N.C.G.S. § 8C-1, Rule 404 objection to the evidence; and (3) the evidence was relevant since it tended to prove that defendant acknowledged guilt in the death of the victim in this case, and its probative value was not substantially outweighed by the danger of unfair prejudice.

7. Sentencing—capital—mitigating circumstances—remorse

Although the trial court erred during a first-degree murder capital sentencing proceeding by excluding evidence of defendant's remorse, the error was harmless beyond a reasonable doubt because: (1) defendant failed to raise this constitutional issue at trial; and (2) other evidence of defendant's remorse that was not specifically objected to by the State was before the jury.

8. Sentencing—capital—closing arguments—personal opinions—murder especially heinous, atrocious, or cruel

The trial court did not err in a first-degree murder capital sentencing proceeding by failing to intervene ex mero motu during closing arguments when prosecutors made comments concerning

whether this was an ordinary homicide or exceptionally disturbing and that "it doesn't get any worse than what you've seen in this case" even though defendant contends those comments represented the improper personal opinions and extra-record knowledge of the prosecutors, because: (1) the statements of prosecutors represented permissible argument regarding a matter in issue, which was the existence or nonexistence of the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel; (2) prosecutors properly drew reasonable inferences about the degree of brutality accompanying the victim's murder, explained those inferences to the jury, and argued that the jury should conclude that the killing committed by defendant was especially heinous, atrocious, or cruel; (3) prosecutors did not urge their personal beliefs to the jury, but instead reminded jurors that they must make an independent decision; and (4) prosecutors did not venture outside the record to inject facts of their own knowledge, but instead properly limited their argument to conclusions derived from facts in evidence.

9. 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 based upon the felony murder rule with the underlying felony being attempted rape, and our Supreme Court has held that murders committed during the perpetration of a sexual assault may be more deserving of the death penalty; (2) the jury found the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel; and (3) evidence presented by the State suggested that the victim was conscious during much of the attack, that the attack took place over a period of time, and that the nature and extent of the blows inflicted upon the victim were mutilating.

Justice EDMUNDS concurring.

Justice ORR dissenting.

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 19 April 2001 in Superior Court, Wake County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 13 October 2003.

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

Rudolf Maher Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellant.

BRADY, Justice.

Juliann Bolt was murdered in the ladies' room of her apartment complex clubhouse on 21 June 2000. On 10 July 2000, defendant Fernando Louis Garcia, III[1] was indicted for the first-degree murder of Bolt. Defendant was tried capitally and was found guilty of first-degree murder under the felony murder rule, with attempted rape as the underlying felony. Following a capital sentencing proceeding, the jury recommended that defendant be sentenced to death, and the trial court entered judgment in accordance with that recommendation. Defendant appealed his conviction and sentence pursuant to N.C.G.S. § 7A-27(a), and this Court heard oral argument in defendant's case on 13 October 2003. After consideration of the assignments of error raised by defendant on appeal and a thorough review of the transcript, the record on appeal, the briefs, and oral arguments, we find no error meriting reversal of defendant's capital conviction or death sentence.

At trial, the State's evidence tended to show that both defendant and Bolt resided at Cameron Lakes Apartments in Raleigh, North Carolina. Shortly after 8:00 p.m. on 21 June 2000, Bolt went to the apartment clubhouse intending to exercise in the workout area. The workout room had glass walls, doors, and windows and adjoined a hallway that led to the men's and ladies' restrooms. Defendant, who did not know Bolt, entered the workout area. He escorted Bolt from the room, across the hallway, and into the ladies' restroom at gunpoint. Once inside, defendant forced Bolt to remove her gym shorts and underwear. Defendant struck Bolt with his revolver. He made her lie face down on the restroom floor and pinned her in that position by placing his knee on her back. At some point, Bolt tried to kick at defendant's groin. Defendant continued beating Bolt with the revolver, cracking open her skull and dislodging the right frontal lobe of her brain. When defendant left the restroom, Bolt was bloodied, lying on the restroom floor, and making gurgling sounds.

1. We note that the judgment and commitment refers to the defendant as "Fernando Louis Garcia, III," while other documents sometimes refer to the defendant as "Fernando Luis Garcia, III." In order to remain consistent, we refer to him as "Fernando Louis Garcia, III."

Defendant then went to the men's restroom where he discarded his underwear, which had become bloody. He discarded his T-shirt in a dumpster outside the clubhouse and returned to his apartment to wash his tennis shoes and sweat pants. At the apartment, defendant also cleaned the revolver with alcohol and hid it under his bed.

Defendant was convicted primarily on the basis of his own confession and physical evidence, including blood evidence, DNA evidence, shoe prints, fingerprints, his bloody clothing, fresh scratches on his face, knee, back, and nose, and the murder weapon (which had been recovered by police), as well as the testimony of crime scene investigators, a blood spatter analyst, and a pathologist. During the guilt-innocence phase of his trial, defendant called one witness, Dr. Andrew Paul Mason, a toxicologist who testified that forty hours after the murder defendant's blood contained trace amounts of cocaine. Dr. Mason also expressed his expert opinion that, at the time of the murder, defendant had recently used and was under the influence of cocaine. Dr. Mason further testified that cocaine use facilitates violent behavior.

Additional relevant facts will be presented when necessary to resolve specific assignments of error raised by defendant.

PRE-TRIAL ISSUES

[1] Defendant contends that the trial court erred by denying his motion to dismiss the first-degree murder charge against him and, in the alternative, by denying his motion for a bill of particulars. Defendant argues that he lacked notice as to which underlying felony or felonies supported the felony murder count because he was charged in a short-form indictment. Defendant contends that the absence of such notice is a jurisdictional defect requiring dismissal of his case. Defendant further contends that if the indictment is constitutional, it is vague and should have been supplemented by a bill of particulars which sets forth the felonies upon which the State intended to rely at trial. We disagree.

We note at the outset that information obtained through a bill of particulars cannot remedy a constitutionally infirm indictment. *State v. Greer*, 238 N.C. 325, 331, 77 S.E.2d 917, 922 (1953); *State v. Gibbs*, 234 N.C. 259, 261, 66 S.E.2d 883, 885 (1951). However, we do not find defendant's indictment to be defective. Short-form indictments for homicide are authorized by N.C.G.S. § 15-144, which states:

> In indictments for murder and manslaughter, it is not necessary to allege matter not required to be proved on the trial; but in the body of the indictment, after naming the person accused, and the county of his residence, the date of the offense, the averment "with force and arms," and the county of the alleged commission of the offense, as is now usual, it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law . . . and any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law. . . .

N.C.G.S § 15-144 (2003). It is well settled that short-form indictments authorized by section 15-144 meet state and federal constitutional requirements. *See State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593, *cert. denied*, 539 U.S. 985, 156 L. Ed. 2d 702 (2003); *see also State v. Mitchell*, 353 N.C. 309, 328-29, 543 S.E.2d 830, 842, *cert. denied*, 534 U.S. 1000, 151 L. Ed. 2d 389 (2001); *State v. Davis*, 353 N.C. 1, 44-45, 539 S.E.2d 243, 271 (2000), *cert. denied*, 534 U.S. 839, 151 L. Ed. 2d 55 (2001); *State v. Braxton*, 352 N.C. 158, 173-75, 531 S.E.2d 428, 436-38 (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). More specifically, this Court has consistently held that murder indictments that comply with N.C.G.S. § 15-144 are sufficient to charge first-degree murder on the basis of *any theory* set forth in N.C.G.S. § 14-17. *Braxton*, 352 N.C. at 174, 531 S.E.2d at 437; *State v. May*, 292 N.C. 644, 661, 235 S.E.2d 178, 189, *cert. denied*, 434 U.S. 928, 54 L. Ed. 2d 288 (1977). N.C.G.S. § 14-17 states that "[a] murder . . . 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." N.C.G.S. § 14-17 (2003) (emphasis added). Therefore, a short-form indictment is sufficient to charge first-degree murder on the basis of felony murder committed during an attempted rape. Because defendant was convicted of felony murder predicated upon attempted rape, and because defendant was charged in a short-form indictment in compliance with N.C.G.S. § 15-144, we find the indictment to be constitutionally sufficient. For these reasons, the trial court correctly denied defendant's motion to dismiss.

Concerning defendant's motion for a bill of particulars, a defendant may request a bill of particulars "to supplement the facts con-

tained in the indictment." *State v. Randolph*, 312 N.C. 198, 210, 321 S.E.2d 864, 872 (1984). The purpose of a bill of particulars is to "inform [the] defendant of specific occurrences intended to be investigated at trial" and "to limit the course of the evidence to [that] particular scope of inquiry." *State v. Young*, 312 N.C. 669, 676, 325 S.E.2d 181, 186 (1985). To those ends, N.C.G.S. § 15A-925(b) requires that "[a] motion for a bill of particulars must request and specify items of *factual information* desired by the defendant which pertain to the charge and which are not recited in the pleading." N.C.G.S. § 15A-925(b) (2003) (emphasis added). However, when first-degree murder is charged, the State is not required to elect between theories of prosecution prior to trial. *State v. Wingard*, 317 N.C. 590, 594, 346 S.E.2d 638, 641 (1986). Moreover, when the factual basis for prosecution is sufficiently pled, "a defendant must be prepared to defend against any and all legal theories which [the] facts may support." *State v. Holden*, 321 N.C. 125, 135, 362 S.E.2d 513, 522 (1987), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988).

The grand jury indictment in this case charged defendant with "FIRST DEGREE MURDER . . . in violation of G.S. § 14-17." Under section 14-17, the State may prove first-degree murder by presenting evidence to support one of several theories, including "deliberate[] and premeditated killing" and killing "committed in the perpetration or attempted perpetration" of an enumerated felony. N.C.G.S. § 14-17. By requesting that the State identify which predicate felony it intended to prove at trial, defendant essentially sought disclosure of the State's legal theory. At the pre-trial hearing, defense counsel explained, "[W]e asked what is the *state's theory*, whether it be premeditation, deliberation, or felony murder, and if it is felony murder, what are the felonies upon which they rely?" (emphasis added). Such legal theories of the prosecution are not "factual information" within the meaning of N.C.G.S. § 15A-925. *Cf. State v. Brown*, 306 N.C. 151, 184, 293 S.E.2d 569, 590 (noting that "G.S. 15A-925 does not authorize a trial court to order the State to disclose its aggravating circumstances prior to trial" because "aggravating circumstances are not 'factual information' within the meaning of G.S. 15A-925"), *cert. denied*, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982); *Young*, 312 N.C. at 676, 325 S.E.2d at 186 (because aggravating circumstances are not " 'factual information' within the meaning of N.C.G.S. § 15A-925(b)[,] . . . [t]he trial court did not err in failing to require the State to list in a bill of particulars [the] aggravating circumstances it intended to prove"). The State is not required to choose its theory of prosecution prior to

trial. Accordingly, defendant was not entitled to learn the State's theory of the case by a bill of particulars.

Moreover, N.C.G.S. § 15A-925(b) states that a motion for a bill of particulars "must allege that the defendant *cannot adequately prepare or conduct his defense* without such [requested] information." N.C.G.S. § 15A-925(b) (emphasis added). However, it is apparent from the transcript that defendant knew the State possessed at least some evidence to support a conviction for felony murder based upon robbery or attempted rape. In particular, defense counsel raised the subject later in the pre-trial hearing, expressing his position that there was insufficient evidence to prove that either rape or sexual offense had taken place and requesting the trial court to limit discussion of those felonies during opening arguments. Defense counsel stated, "Well, I'm concerned actually about the state taking the jury out on the theory that we're going to show you, for example, a robbery occurred, a sexual offense occurred, when there's no evidence to support those. And that case would not go to the jury on felony murder based on those potential felonies." In light of counsel's discussion with the trial court, there does not appear to be any factual information later introduced at trial which was beyond defendant's knowledge and necessary to enable defendant to "adequately prepare or conduct his defense." *Id.* To the contrary, the record shows that the State voluntarily provided defendant with open file discovery. During the pre-trial hearing, the prosecutor assured the court "[a]nd again I'm telling the [c]ourt we're giving them open file," indicating that the State had fully complied with the mandates of N.C.G.S. § 15A-903 (2003) and N.C.G.S. § 15A-907 (2003).

The granting or denial of a motion for a bill of particulars is a matter soundly within the discretion of the trial court and is not subject to review except in cases of palpable and gross abuse of discretion. *State v. Williams*, 355 N.C. 501, 542, 565 S.E.2d 609, 633 (2002), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003); *Young*, 312 N.C. at 676, 325 S.E.2d at 186. Because the State's legal theory is not factual information within the meaning of N.C.G.S. § 15A-925(b), and because defendant was not denied any information necessary for adequate preparation or conduct of his defense, we do not find palpable and gross abuse in this case. This assignment of error is overruled.

[2] Next, defendant assigns error to the trial court's denial of his motion to suppress an inculpatory statement made at the police station. Defendant argues that he made the statement while he

was in "custody" for purposes of *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), that no *Miranda* warnings were given, and that the statement should have been suppressed. In support of his position, defendant emphasizes that the statement was made in an interview room at police headquarters, that defendant was transported to the station in the back seat of a locked police car, and that defendant had been patted down three times by police officers. Following careful review of the record, we find that defendant was not in "custody" for purposes of *Miranda* and that *Miranda* warnings were, therefore, not required.

We note at the outset that, under *Miranda*, whether an individual is in custody is a mixed question of law and fact. *Thompson v. Keohane*, 516 U.S. 99, 112, 133 L. Ed. 2d 383, 394 (1995). Accordingly, we review the trial court's findings of fact to determine whether they are supported by competent record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions " 'reflect[] a correct application of [law] to the facts found.' " *State v. Golphin*, 352 N.C. 364, 409, 533 S.E.2d 168, 201 (2000) (quoting *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997)), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). In doing so, this Court must look first to the circumstances surrounding the interrogation and second to the effect those circumstances would have on a reasonable person. *Thompson*, 516 U.S. at 112, 133 L. Ed. 2d at 394.

The trial court considered defendant's motion to suppress at the pre-trial hearing conducted on or about 19 February 2001. On this matter, the State called, and defense counsel cross-examined, several police officers with whom defendant had contact on the night of the murder. Thereafter, the court entered an order setting forth findings of fact and conclusions of law as follows: Just before 10:00 p.m. on 21 June 2000, an off-duty police officer, D.J. Erhart, and his friend, Matt Natusch, walked into the clubhouse of Cameron Lakes Apartments located at 6200 Rieese Drive in Raleigh, North Carolina. The clubhouse contained a workout room, lockers, and men's and ladies' restrooms, and it connected to an outdoor swimming pool. The men were at the clubhouse to leave a note for the owner of one of the lockers. While Officer Erhart affixed the note, Natusch saw a black female walk into the ladies' restroom. Soon thereafter, both men heard the female scream. They went into the ladies' restroom where they discovered Juliann Bolt's body lying on the floor next to the door. Officer Erhart immediately called the authorities.

Meanwhile, the unidentified female left the clubhouse. Natusch followed her to a nearby apartment within the complex at 4001-2D Guy Circle. He observed her enter the apartment and kept watch until she emerged approximately ten minutes later wearing different clothing. The female then walked back to the clubhouse to speak with police officers who had arrived to investigate.

Detective Brad Kennon, a City of Raleigh police officer, responded to the scene. Detective Kennon interviewed both Officer Erhart and Natusch at his supervisor's request. From Natusch, Detective Kennon learned the address of the black female (now known to be Keisha Maynor). Maynor had returned to the scene and was waiting to be voluntarily transported to the Raleigh City Police Department Headquarters (hereinafter the police station) for questioning.

Thereafter, Detective Kennon walked to Maynor's apartment, located at 4001-2D Guy Circle, where he knocked on the door. Defendant answered wearing only shorts. He appeared to be wet. Detective Kennon asked whether defendant's girlfriend had gone to the pool to report a crime to the police and defendant affirmed that she had. Detective Kennon then informed defendant that his girlfriend Maynor was going to be transported to the police station to give a statement. Defendant asked whether Detective Kennon would like him to go to the police station as well. Detective Kennon replied that sometimes people are more comfortable if they have a family member or friend with them while they are waiting at the police station and that it would be fine if defendant wanted to go. Defendant stated that he wanted to go to the station but would like to get dressed. Detective Kennon engaged in casual conversation with defendant and, while waiting for him to dress, Detective Kennon observed defendant wash his hands and forearms.

After dressing, defendant followed Detective Kennon out of the apartment and locked the door. They walked back to the clubhouse together. On the way, another officer approached Detective Kennon and informed him that there was an outstanding arrest warrant for defendant. Detective Kennon told the officer not to worry about it and that defendant wanted to go sit with his girlfriend at the police station. The officer then walked away, and Detective Kennon and defendant continued their conversation. Defendant mentioned that it was a hot night and that he had been swimming in the clubhouse pool earlier in the evening.

At the parking lot, Detective Kennon informed defendant that he already had a full car and that defendant would have to wait for another officer to transport him to the police station. Defendant stated that he understood. Detective Kennon informed Sergeant Kerrigan that defendant wanted to go to the station but needed transportation. Detective Kennon also informed Sergeant Kerrigan that he considered defendant to be suspicious and that an arrest warrant should be served on defendant if he decided to leave. Detective Kennon then drove Officer Erhart and Natusch to the police station.

While waiting for transportation to the police station, defendant was alone. He leaned up against one of the empty patrol cars approximately twenty to thirty feet from the crime scene. Detective Kennon observed defendant standing alone by the patrol car as he drove away from the complex. At no time did Detective Kennon or Sergeant Kerrigan convey their personal suspicions to defendant by word or action.

While defendant waited for transportation, Maynor was already en route to the station. During the trip, Maynor told the transporting officer, Detective Mary Blalock, that her boyfriend (defendant) was involved in the crime. Detective Blalock stopped the car and contacted Lieutenant Ken Mathias at the crime scene to relay that information. Raleigh Police Detective Ken Andrews and Sergeant Paula O'Neil overheard portions of Lieutenant Mathias' conversation with Detective Blalock. Detective Andrews left the crime scene and drove to the police station in order to interview defendant when he arrived. Sergeant O'Neil informed another officer on the scene, Officer Robert Council, that she had information indicating that defendant might be involved in the homicide and that the victim appeared to have sustained a gunshot wound. At that time, defendant remained alone leaning on a police car. No other officers were nearby.

Officer Council shared the information he received from Sergeant O'Neil with his supervisor, Sergeant Mead. Sergeant Mead told Officer Council to ask defendant for permission to pat him down. Officer Council approached defendant and asked if he would mind having a seat in the patrol car while transportation was being arranged. Defendant agreed that would be "fine." Officer Council informed defendant that he was not under arrest but that it was routine department policy and procedure for officer safety to perform a pat-down for weapons before allowing anyone into a police car. Defendant said that a pat-down would be "fine." Another uniformed officer accompanying Officer Council performed the pat-down, and

defendant waited in the back of the patrol car. Officer Council reported back to Sergeant Mead and was told that Corporal McNeil would transport defendant to the station.

Officer Council returned to defendant and told him that a different officer would take him to the station. Officer Council repeated that defendant was not under arrest but asked permission to pat him down again, explaining that defendant was going to be moved to another police car. Defendant consented. At Corporal McNeil's vehicle, defendant was again informed that he was not under arrest but that the transporting officer would like to conduct his own pat-down. Defendant stated that he understood and consented to the search. Corporal McNeil, accompanied by Officer Detric Bond, then drove defendant to the police station. On the way to the station, conversation was polite, lighthearted, and casual. The three talked about cars and an upcoming concert. They arrived at the station around 11:30 p.m.

At the police station, Officer Bond walked in with defendant, and they rode the elevator to the fourth floor, where the investigative division was located. The area was crowded and Officer Bond had difficulty finding defendant a room in which to wait. As Officer Bond was looking for a room, defendant stated that he was thirsty. Officer Bond told defendant that he could go use the water fountain. Defendant walked to the fountain alone and returned to where Officer Bond was standing. Officer Bond then directed defendant to an office that had been converted into a polygraph room. The room was approximately eight feet by ten feet, was carpeted, and contained a desk and chairs. Officer Bond told defendant that someone would be with him shortly and that he would be out in the common area completing paperwork if defendant needed anything. Officer Bond closed the door, but the door remained unlocked at all times. Officer Bond went across the hallway to a desk where he sat to work. The officer's back was to defendant's room, and defendant made no requests of him.

Detective Andrews entered the interview room at approximately 11:57 p.m. to speak with defendant. He was dressed in plain clothes, was not wearing a jacket, and had removed his firearm. Detective Andrews entered the room alone, shook hands with defendant, introduced himself, and thanked defendant for coming in to talk as others at the apartment complex had done. Detective Andrews asked defendant if he needed anything, but defendant responded that he had already had some water.

Detective Andrews asked defendant about his activities that evening. Defendant told Detective Andrews that he had been in the pool earlier that day, from around 2:30 to 4:30 in the afternoon. Defendant further stated that around 6:00 p.m., he went to visit a friend named Tony and that he did not return home until 9:30 p.m. Defendant could not provide any specific details about Tony or how to contact him.

Next, Detective Andrews asked defendant about a cut on his finger. Defendant stated that he had injured his finger on Tony's car door. Detective Andrews told defendant that the information he had provided was different from the information other witnesses from the apartment complex were providing. Defendant stated that he was telling the truth, but Detective Andrews responded that Maynor had "given him up." Defendant requested a drink and a cigarette lighter and said that he had a story for Detective Andrews.

Detective Andrews left defendant in the room alone and went to retrieve a lighter and a beverage for defendant. When Detective Andrews returned, defendant lit a cigarette. Then, defendant gave a detailed confession stating that he had forced "the girl" into the ladies' restroom, made her lie face down on the floor, and beat her with the revolver. Defendant stated that he had intended to rob "the girl," that he did not have sex with her, and that he could not maintain an erection because he had been drinking all day and was high on cocaine. Defendant explained that he had removed the victim's shorts and underwear and pushed up her shirt because he wanted to make the attack look like a rape. Among other specifics, defendant told Detective Andrews where to find his bloody clothes, his tennis shoes, and the revolver. The interview lasted no longer than thirty minutes. At the conclusion of defendant's confession, Detective Andrews left him alone in the room.

The trial court found that defendant was coherent and did not appear to be under the influence of any impairing substance during the interview, that neither Detective Andrews nor defendant raised his voice, that defendant was not threatened, and that no promises were made to defendant. According to the trial court, defendant was never misled, deceived, or confronted with false accusations of evidence. Actually, every request by defendant was granted, including transportation to the police station, water, a soft drink, and a cigarette lighter. At no time was defendant handcuffed. Finally, at the time of his interview, defendant was familiar with the criminal justice

system, having two prior convictions and other charges pending against him in a third matter.

Ultimately, the trial court concluded, as a matter of law, that defendant was not formally arrested or otherwise subjected to a restraint on his freedom of movement to the degree associated with a formal arrest. The court further concluded that a reasonable person in defendant's position would not have understood himself to be under arrest or under formal restraint. Therefore, the court determined that defendant was not in custody for *Miranda* purposes and that Detective Andrews was not required to recite defendant's constitutional rights as outlined by *Miranda*.

Miranda protects individuals from the "inherently compelling pressures" of custodial interrogation. *Miranda*, 384 U.S. at 467, 16 L. Ed. 2d at 719. A person is "in custody" for purposes of *Miranda* when it is apparent from the "totality of the circumstances" that there is a " 'formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.' " *State v. Buchanan*, 353 N.C. 332, 339, 543 S.E.2d 823, 828 (2001) (*Buchanan I*); *accord California v. Beheler*, 463 U.S. 1121, 1125, 77 L. Ed. 2d 1275, 1279 (1983) (per curiam). Because *Miranda* warnings are implemented to prevent coerced self-incrimination, *Dickerson v. United States*, 530 U.S. 428, 435, 147 L. Ed. 2d 405, 414 (2000) ("[T]he coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk that an individual will not be 'accorded his privilege under the Fifth Amendment . . . not to be compelled to incriminate himself.' ") (quoting *Miranda*, 384 U.S. at 439, 16 L. Ed. 2d at 704), custody analysis examines the interrogation subject's point of view, *Stansbury v. California*, 511 U.S. 318, 323-24, 128 L. Ed. 2d 293, 299 (1994) (per curiam) ("[U]nder *Miranda* '[a] policeman's unarticulated plan has no bearing on the question whether a suspect was "in custody" at a particular time'; rather, 'the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.' ") (quoting *Berkemer v. McCarty*, 468 U.S. 420, 442, 82 L. Ed. 2d 317, 336 (1984)) (alterations in original). "[T]he initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury*, 511 U.S. at 323, 128 L. Ed. 2d at 298. We must therefore determine whether, based upon the trial court's findings of fact, a reasonable person in defendant's position would have believed that he was under arrest or was restrained in his move-

ment to that significant degree. *Buchanan I*, 353 N.C. at 339-40, 543 S.E.2d at 828.

Defendant is an adult male who has prior experience with the criminal justice system in this state. He was transported to the police station at his own request. While waiting for transportation, defendant was generally alone. Although defendant was frisked before entering any police vehicle, officers explained the reason for the pat-downs and carried them out with defendant's consent. During this process, Officer Council twice informed defendant that he was not under arrest.

The trial court noted that defendant's conversation was polite, lighthearted, and casual while en route to the police station. Upon arrival, he was free to move about unescorted to get a drink of water from the fountain. Thereafter, defendant was asked to wait in an unlocked interview room. A plain-clothed, unarmed officer conducted defendant's interview. At no time did either party raise his voice. Defendant was not threatened in any way, and no promises were made to him. He was not handcuffed at any time preceding, during, or immediately following the interview. Each of defendant's requests was granted, and in fact, Detective Andrews took a break during the interview to fulfill them. Given these circumstances, we agree with the trial court that defendant was not under arrest and that defendant's movement was not restrained to the degree associated with a formal arrest at the time he made the contested statement.

Defendant argues that a reasonable person subjected to three pat-downs, a closed interview room door, and Detective Andrews' statement that Maynor had "given him up" would believe himself to be under arrest or restrained in movement to that degree. Defendant also points out that he would not have been able to leave either police car on his own because the rear doors of police vehicles lock automatically. However, no single factor controls the determination of whether an individual is "in custody" for purposes of *Miranda*. *State v. Barden*, 356 N.C. 316, 338, 572 S.E.2d 108, 124 (2002), *cert. denied*, 538 U.S. 1040, 155 L. Ed. 2d 1074 (2003). We are persuaded that, after reviewing the totality of circumstances surrounding defendant's interview, the four factors defendant identifies did not render him in custody as defined by *Miranda*.

Defendant also emphasizes that Detective Kennon suspected him of participation in the homicide. It is well settled that non-communi-

cated subjective suspicions and the non-communicated subjective intent of individual officers have no bearing on *Miranda* analysis. *Stansbury*, 511 U.S. at 324, 128 L. Ed. 2d at 299 ("[A] police officer's subjective view that the individual under questioning is a suspect, if undisclosed, does not bear upon the question whether the individual is in custody for purposes of *Miranda*."). Here, the trial court found, based upon ample evidence, that Detective Kennon's personal suspicions were not communicated to defendant. Additionally, the transcript indicates that all discussions about defendant's possible involvement were limited to law enforcement officers and took place out of defendant's hearing. In fact, when informed of an outstanding warrant on defendant in defendant's presence, Detective Kennon told the informing officer not to worry about it. Because Detective Kennon's suspicions were not communicated to defendant, they are irrelevant to our inquiry.

Finally, defendant argues that his case is analogous to *State v. Buchanan*, 355 N.C. 264, 559 S.E.2d 785 (2002) (*Buchanan II*) (per curiam), in which this Court upheld a trial court ruling suppressing incriminating statements by a defendant.[2] Defendant's reliance on *Buchanan II* is misplaced.

In *Buchanan*, the suspect admitted during a station-house interview to participation in a homicide. *Buchanan I*, 353 N.C. at 334, 543 S.E.2d at 825. Specifically, the suspect stated that he engaged in a drunken confrontation with the two victims before he "just went berserk," took the shotgun off a rack on the wall, and started shooting. *Id.* Shortly thereafter, the suspect asked to use the restroom. *Id.* His request was granted, and the suspect went to the restroom accompanied by the two police interrogators, one of whom was in uniform and carried a firearm. *Id.* at 334-35, 543 S.E.2d at 824-25. (Prior to the interrogation, the investigating officer had allowed the

2. *Buchanan*, which this Court has twice reviewed on appeal, involved the question of whether a suspect was in custody for purposes of *Miranda* at the time he made an incriminating statement. *Buchanan II*, 355 N.C. at 265, 559 S.E.2d at 785. *Buchanan I* was originally heard by this Court on 17 October 2000. *Buchanan I*, 353 N.C. at 332, 543 S.E.2d at 824. On 6 April 2001, this Court remanded that case, instructing the trial court to make additional findings of fact and to draw new conclusions of law considering only those circumstances surrounding the defendant's interrogation which "would contribute to an objective determination that [the] defendant's freedom of movement was restrained to the degree associated with a formal arrest." *Id.* at 342, 543 S.E.2d at 830. On remand, the trial court added two findings of fact to its previous findings and under the proper test reassessed the circumstances surrounding the defendant's interrogation. *Buchanan II*, 355 N.C. at 265, 559 S.E.2d at 785. We affirmed the trial court's new conclusions of law on appeal. Id. at 265, 559 S.E.2d at 785-86.

suspect to use the restroom and to get a drink of water by himself.) *Id.* at 334, 543 S.E.2d at 824. Upon returning to the interrogation room, the suspect signed a written copy of his first statement and made a second statement further incriminating himself. *Id.* at 335, 543 S.E.2d at 825. After this second statement was reduced to writing and signed by the suspect, he was arrested and given *Miranda* warnings. *Id.* Thereafter, the interviewing officers filled out a *Miranda* waiver form, which the suspect also signed. *Id.* The trial court suppressed "any statements [the suspect] made between the time he returned from the bathroom until *Miranda* warnings were properly administered," *Buchanan II*, 355 N.C. at 265, 559 S.E.2d at 785, and this Court affirmed. *Id.* at 265, 559 S.E.2d at 785-86.

In the present case, defendant gave a single incriminating statement to a plain-clothed, unarmed detective. Although a recess was taken during both the interrogation in *Buchanan* and defendant's questioning in the present case, the break in *Buchanan* was accompanied by circumstances that would cause a reasonable person to believe he was under arrest or that his movement had been restrained to that degree. In *Buchanan*, the presence of two interrogating officers, one of whom was uniformed and armed, escorting the suspect to the restroom represented a heightened level of security and a marked shift in the tone of the suspect's station-house interview. The changed nature of the suspect's relationship with the interviewing officers would have been especially apparent because the facts of *Buchanan* indicate that before giving his first inculpatory statement, the suspect was allowed to visit the restroom and get a drink of water by himself. Also, the suspect in *Buchanan* had a second compelling reason to believe he was under arrest, having just confessed to two police officers that he had become "berserk" and shot two people to death in their bedroom. Indeed, the facts of *Buchanan* show that the suspect's preliminary statement prompted the officers to accompany him to the men's restroom.

We find no such abruptly elevated security in the defendant's case nor did the defendant make the type of incriminating initial confession as did the suspect in *Buchanan*. Instead, we reiterate that custody analysis, for purposes of *Miranda*, is dependent upon the unique facts surrounding each incriminating statement. *Barden*, 356 N.C. at 337, 572 S.E.2d at 123 ("The proper inquiry for determining whether a person is 'in custody' for purposes of *Miranda* is 'based on the *totality of the circumstances*, whether there was a "formal arrest or restraint on freedom of movement of the degree associated

with a formal arrest." ' ") (quoting *Buchanan I*, 353 N.C. at 339, 543 S.E.2d at 828) (emphasis added). This Court reviews those facts and circumstances together as a whole because the effect on a reasonable person is best discerned from context. No one factor is determinative.

Based upon the totality of the circumstances, we hold that a reasonable person in defendant's position would not have believed that he was under arrest or that his freedom of movement was restrained to the degree of a formal arrest. We conclude that the trial court's findings of fact are supported by competent record evidence, and that the court properly applied the law to those facts. Defendant was not in custody when he made the contested statements; therefore, the police were not required to give *Miranda* warnings. This assignment of error is overruled.

JURY SELECTION

[3] Next, defendant sets forth two assignments of error arising from the jury selection process, which he contends entitle him to a new trial. First, defendant argues that the trial court erred by excusing prospective juror, Beth Bond, on the ground that she would be unable to return a sentence of death. Defendant argues that despite Bond's personal views opposing the death penalty, her testimony indicated that she would be able to follow the law and to vote to return a verdict recommending the death sentence if appropriate. Therefore, defendant contends that the trial court violated his constitutional right to an impartial jury. We disagree.

During *voir dire*, Bond stated that she had "been opposed to capital punishment all of [her] adult life, and in terms of public policy." She explained that she had held these beliefs for thirty-one years. Upon questioning by the prosecutor as to whether she could vote "under any circumstance" to impose a death sentence, Bond replied in part, "I'm uncertain. That's as honest an answer as I can give you. . . . I would probably work hard to find some other way than that, but I can't say to you, no, I would not apply the law. I can't." When asked to repeat her statement, Bond said, "I can't say to you I absolutely would not; if I were seated, I would have to." Bond explained the "public policy" reasons for which she opposed the death penalty and agreed that she would be predisposed to vote for life without parole "[i]f [she could] do that in [her] mind and apply the law."

Thereafter, the court questioned Bond. When asked directly whether she could give both sides the benefit of a "level playing

field," Bond responded, "The State would not be in a hole; it would be in [an] indentation, though, and that's the honest truth." The court then excused Bond for cause.

The United States Supreme Court first addressed the constitutionality of excluding prospective jurors who express uneasiness about participation in the imposition of a death sentence in *Witherspoon v. Illinois*, 391 U.S. 510, 20 L. Ed. 2d 776 (1968). In *Witherspoon*, the Supreme Court examined an Illinois statute that allowed challenges for cause "of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same" in murder trials. *Id.* at 512, 20 L. Ed. 2d at 779. Concluding that "[a] man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror," the Court struck down the statute and granted the defendant a new trial. *Id.* at 519, 20 L. Ed. 2d at 783.

In *Adams v. Texas*, the Supreme Court clarified *Witherspoon*, as a "limitation on the State's power to exclude [jurors]," 448 U.S. 38, 48, 65 L. Ed. 2d 581, 591 (1980), but recognized "the State's legitimate interest in obtaining jurors who could follow their instructions and obey their oaths." *Id.* at 44, 65 L. Ed. 2d at 589. Thus, the Court stated, "This line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* 448 U.S. at 45, 65 L. Ed. 2d at 589. The United States Supreme Court confirmed *Adams* as the proper standard to be applied when a juror's personal opposition to the death penalty becomes apparent. *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851 (1985) ("We therefore take this opportunity to clarify our decision in *Witherspoon*, and to reaffirm the above-quoted standard from *Adams* as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment.").

Our General Assembly effectively codified *Wainwright* in N.C.G.S. § 15A-1212(8), which states that any juror who, "[a]s a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina" may be challenged for cause. N.C.G.S. § 15A-1212(8) (2003). Additionally, in *State v. Cummings*, this Court applied *Wainwright*, listing several "sworn duties of a

juror in a capital sentencing hearing" in North Carolina. 326 N.C. 298, 306, 389 S.E.2d 66, 70 (1990). As explained in *Cummings*, a capital juror's duties include "consideration of aggravating and mitigating circumstances, weighing such circumstances under the court's instructions, and exercising the guided discretion necessary for a reliable sentence." *Id.* Under *Wainwright*, *Cummings*, and N.C.G.S. § 15A-1212(8), if personal beliefs substantially impair a juror's ability to carry out these duties, that juror may properly be excused for cause.

In *Wainwright* the United States Supreme Court recognized that the law leaves

> trial courts with the difficult task of distinguishing between prospective jurors whose opposition to capital punishment will not allow them to apply the law or view the facts impartially and jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial.

469 U.S. at 421, 83 L. Ed. 2d at 850. In this task, the United States Supreme Court provided guidance. The Court emphasized that trial judges are uniquely positioned to observe the demeanor, credibility, and state of mind of a prospective juror. *Id.* at 428, 83 L. Ed. 2d at 854. As such, findings based upon those observations are "peculiarly within a trial judge's province" and are "entitled to deference even on direct review." *Id.* Further, the proper standard, as noted by the Court in *Wainwright*,

> does not require that a juror's bias be proved with 'unmistakable clarity.' This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. . . . [M]any veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

Id. at 424-26, 83 L. Ed. 2d at 852-53 (footnote omitted). For these same reasons, this Court consistently applies abuse of discretion as the standard of review when a defendant argues that the trial court erred by excusing a juror solely because of that juror's personal views opposing the death penalty. *See State v. Berry*, 356 N.C. 490, 500, 573 S.E.2d 132, 141 (2002) ("In light of [the prospective juror's] final assertion that he could not follow the law if the evidence were circumstantial, the trial court did not abuse its discretion in excusing him for cause."); *State v. Kemmerlin*, 356 N.C. 446, 461-62, 573 S.E.2d 870, 883 (2002) ("[W]e ordinarily 'defer to the trial court's judgment as to whether the prospective juror could impartially follow the law.' ") (quoting *State v. Morganherring*, 350 N.C. 701, 726, 517 S.E.2d 622, 637 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 322 (2000)); *State v. Wiley*, 355 N.C. 592, 608-10, 565 S.E.2d 22, 35-36 (2002) (applying the abuse of discretion standard to the excusal of a prospective juror for cause based upon that juror's views about the death penalty), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003).

Furthermore, we have declined to find abuse of discretion in these cases when prospective jurors' responses are inconsistent or when jurors' answers regarding their ability to follow the law are equivocal. *See Berry*, 356 N.C. at 500, 573 S.E.2d at 141 (concluding the trial court did not abuse its discretion by excusing a prospective juror for cause because his responses were "not consistent during *voir dire*, in that he sometimes stated that he could follow the law, while other times he qualified his answers by adding that he would require more than circumstantial evidence" to recommend a sentence of death); *State v. Jones*, 355 N.C. 117, 122, 558 S.E.2d 97, 101 (2002) (holding the same given the "equivocating nature of [a prospective juror's] responses" during *voir dire*); *State v. Greene*, 351 N.C. 562, 567-68, 528 S.E.2d 575, 578-79 (2000) (concluding the same when a prospective juror gave conflicting answers regarding his ability to impartially follow the law), *cert. denied*, 531 U.S. 1041, 148 L. Ed. 2d 543 (2000); *State v. Yelverton*, 334 N.C. 532, 544, 434 S.E.2d 183, 190 (1993) (holding the same when "equivocation in the prospective juror's answers resulted from his expressed, conscientious desire to do his duty as a juror and to follow the trial court's instructions in the face of recognizing his personal inability to impose the death penalty").

Here, Bond's answers were inconsistent. Even though Bond indicated a sincere desire to follow the law, the best Bond was able to tell the court was "I can't say to you, no, I would not apply the

law." Bond told the prosecutor about strong beliefs against the death penalty which she has held for thirty-one years, stating that because of those beliefs, she was "uncertain" as to whether she could return a death sentence under any circumstance. When questioned by the trial judge, Bond communicated clearly that in her mind the prosecution would begin at a disadvantage, which she characterized as "in [an] indentation."

The mixed nature of Bond's responses demonstrates the dilemma articulated in *Wainwright*: *voir dire* does not always elicit concrete answers. *See Greene*, 351 N.C. at 567, 528 S.E.2d at 579 (" 'The conflicting answers given by these prospective jurors illustrate clearly the United States Supreme Court's conclusion that a prospective juror's bias may, in some instances, not be provable with unmistakable clarity.' ") (quoting *State v. Davis*, 325 N.C. 607, 624, 386 S.E.2d 418, 426 (1989), *cert. denied*, 496 U.S. 905, 110 L. Ed. 2d 268 (1990)). Here, Bond earnestly did not know how she would react when faced with imposing a death sentence. Seeking clarity, the trial judge questioned Bond himself. As a first-person observer of *voir dire*, the trial court was well equipped to discern whether Bond's beliefs would substantially impair the performance of her duties to fairly consider aggravating and mitigating circumstances, to weigh those circumstances consistent with the trial court's instructions, and to exercise guided discretion in returning an appropriate sentence. In light of Bond's apparent inner struggle and the ambiguous and conflicting nature of her responses, we cannot say that the trial judge abused his discretion by discerning bias and excusing her for cause. Accordingly, this assignment of error is overruled.

[4] Next, defendant argues that the trial court violated North Carolina's jury selection statute, N.C.G.S. § 15A-1214(f), and also committed structural constitutional error by requiring defendant to question replacement jurors before the State approved a full panel of twelve individuals. Defendant points to aberrant selection procedure on two separate occasions and argues that such deviations from the statutory method automatically entitle him to a new trial. We disagree.

Jury selection began on 26 March 2001. By Friday, 30 March 2001, the State and defendant had agreed on seven jurors. Even though five replacement jurors were needed to complete the twelve-member jury panel, only four individuals remained in the jury pool. Foreseeing this shortage, the trial judge had announced at close of court the previous

day that "in my discretion, as I have already said twice, well, it's not fair to [the four individuals left in the jury pool] to dangle them on the hook, because they may very well be on the jury, so we're going to do that tomorrow."

While questioning the remaining four prospective jurors on 30 March 2001, the State successfully challenged one of them for cause, leaving only three jurors to pass to defense counsel for questioning. Defense counsel then conducted *voir dire* without objection, exercising peremptory challenges with respect to two of the candidates and passing one to sit on the jury unchallenged. Upon completing *voir dire* of these three prospective jurors, three of defendant's fourteen peremptory challenges remained unused.

The second incident in question occurred on Monday, 2 April 2001 when four replacement jurors were needed to reach a full panel of twelve. Late that afternoon the State indicated satisfaction with three prospective jurors but then challenged or excused four consecutive candidates. When it became apparent that the State might not select four jurors in time for the defendant to conduct *voir dire* that same day, the judge determined that the State should pass the three jurors it had selected. As a result, those jurors would not need to return to court on the following morning. The judge prefaced his decision with the recognition that

> [t]hese three people have been here all day, and in my discretion, unless there are any objections, I would like to go ahead and send home the balance of the panel. And out of a matter of courtesy, let [defense counsel] talk to the three people who you passed, so they'll know one way or the other.

The judge then asked whether "anybody [had] a problem with that," to which defense counsel did not respond. Thereafter, the three prospective jurors were passed to defendant for questioning. Defendant exercised a peremptory challenge as to one candidate and selected the remaining two to serve on the jury. At the close of court on 2 April 2001, defendant had two peremptory challenges remaining.

The General Assembly codified the method by which juries are to be selected in North Carolina in N.C.G.S. § 15A-1214. N.C.G.S. § 15A-1214 (2003). The statute was enacted to ensure uniform jury selection processes throughout the state. N.C.G.S. § 15A-1214 official commentary (2003). Through N.C.G.S. § 15A-1214, the legislature prescribed a selection method during which replacement jurors

are not passed to the defendant until the State accepts a sufficient number of jurors to complete a full panel of twelve. N.C.G.S. § 15A-1214(f). Section 15A-1214 provides in pertinent part:

> (d) The prosecutor must conduct his examination of the first 12 jurors seated and make his challenges for cause and exercise his peremptory challenges. If the judge allows a challenge for cause, or if a peremptory challenge is exercised, the clerk must immediately call a replacement into the box. When the prosecutor is satisfied with the 12 in the box, they must then be tendered to the defendant. Until the prosecutor indicates his satisfaction, he may make a challenge for cause or exercise a peremptory challenge to strike any juror, whether an original or replacement juror.
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> . . .
>
> (f) Upon the calling of replacement jurors, the prosecutor must examine the replacement jurors and indicate satisfaction with a completed panel of 12 before the replacement jurors are tendered to a defendant . . . This procedure is repeated until all parties have accepted 12 jurors.

Id. § 15A-1214(d), (f) (emphasis added).

Defendant now argues that the trial court deviated from the statutorily mandated jury selection process on the two occasions described above. However, defendant did not object to these deviations at trial. Nonetheless, " 'when a trial court acts contrary to a statutory mandate . . . the right to appeal the court's action is preserved.' " *State v. Jaynes*, 353 N.C. 534, 544-45, 549 S.E.2d 179, 189 (2001) (quoting *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985)), *cert. denied*, 535 U.S. 934, 152 L. Ed. 2d 220 (2002); *State v. Lawrence*, 352 N.C. 1, 13, 530 S.E.2d 807, 815 (2000), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001). Accordingly, defendant's statutory assignment of error is preserved for review.

We agree that the procedures employed at trial violated the express requirements of N.C.G.S. § 15A-1214(f). The prosecutor passed less than a full panel of twelve replacement jurors to defendant on two separate occasions. However, a new trial does not automatically follow a finding of statutory error. This Court has consistently required that defendants claiming error in jury selection procedures show prejudice in addition to a statutory violation before they can receive a new trial. *Jaynes*, 353 N.C. at 545, 549 S.E.2d at 190 (Although the trial court deviated from prescribed statutory jury

selection procedure, the defendant's assignment of error was overruled "because defendant . . . failed to demonstrate prejudice."); *State v. Hyde*, 352 N.C. 37, 49, 530 S.E.2d 281, 290 (2000) (emphasizing that defendant consented to deviations from statutory jury selection procedures and that "defendant conced[ed] that the trial court's jury selection method did not disadvantage or prejudice him"), *cert. denied*, 531 U.S. 1114, 148 L. Ed. 2d 775 (2001); *Lawrence*, 352 N.C. at 13, 530 S.E.2d at 815 ("Although the jury selection procedure violated the express requirement of N.C.G.S. § 15A-1214(d) that the State pass a full panel of twelve jurors, defendant has failed to show prejudice."). That is, defendant must prove that a reasonable possibility exists that, had the error not been committed, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (2003).

The intended result of jury selection is to empanel an impartial and unbiased jury. *See State v. Williams*, 286 N.C. 422, 427-28, 212 S.E.2d 113, 117 (1975) (providing that jurors should be "free from a preconceived determination to vote contrary to [either party's] contention concerning the defendant's guilt"); *State v. Carey*, 285 N.C. 497, 506, 206 S.E.2d 213, 220 (1974) ("The basic concept in jury selection is that each party to a trial has the right to present his cause to an unbiased and impartial jury."). To that end, the parties conduct *voir dire* which "serves the dual purpose of ascertaining whether grounds exist for challenge for cause and of enabling counsel for the State and for the defendant to exercise intelligently their peremptory challenges." *State v. Simpson*, 341 N.C. 316, 336, 462 S.E.2d 191, 202 (1995), *cert. denied*, 516 U.S. 1161, 134 L. Ed. 2d 194 (1996). Fairness is promoted by ensuring that the defendant has a full opportunity to face jurors, question them, and challenge unsatisfactory candidates. During jury selection, defendants, who question last, reap the benefit of information developed during the State's *voir dire*. *See State v. Harris*, 283 N.C. 46, 51, 194 S.E.2d 796, 799 (noting that a defendant enjoyed "the last opportunity to exercise his right of challenge [after] the State had all pertinent information concerning the fitness and competency of the juror"), *cert. denied*, 414 U.S. 850, 38 L. Ed. 2d 99 (1973).

Although defendant on appeal has stated that prejudice occurred, he has made no attempt, either in written brief or at oral argument before this Court, to show how the identified statutory violation prejudiced his case. Defendant has not complained that the aberrant procedure resulted in a biased jury, an inability to question the prospective jurors, an interference with his right to challenge, or any

other defect without which a different result might have been reached. Having explained *what* happened, defendant has failed to show *how* the incidents in question affected the conduct or outcome of his trial.

Moreover, this Court has previously held, under similar circumstances of juror shortage, that a defendant is not prejudiced by questioning fewer than a full panel of replacement jurors when that defendant has not exhausted his peremptory challenges. *See e.g.*, *Lawrence*, 352 N.C. at 12-13, 530 S.E.2d at 814-15 (finding no prejudice when three more jurors were required, but, because the prosecution had exhausted the jury pool, only one replacement juror was passed to defendant and defendant neither exercised his remaining peremptory challenge nor challenged the passed replacement juror for cause). The number of remaining peremptory challenges is most appropriately measured from the time of the alleged error in jury selection. *Cf. State v. Wilson*, 313 N.C. 516, 524-25, 330 S.E.2d 450, 457 (1985) (determining that defendant, who argued that the sheriff had improperly summoned additional jurors, possessed two unused peremptory challenges at the time the alleged error occurred). If peremptory challenges are unused, and the defendant makes no challenge for cause, then he cannot be said to have been forced to accept an undesirable juror. *Lawrence*, 352 N.C. at 13, 530 S.E.2d at 815.

Here, defendant possessed adequate remaining peremptory challenges during both court sessions for which he assigns error. Following the first deviation from the statutory selection procedure, defendant accepted one juror, but possessed *three* remaining peremptory challenges. Following the second deviation, defendant accepted two jurors, but possessed *two* remaining peremptory challenges. Altogether, defendant exercised only twelve of his fourteen peremptory challenges during jury selection proper. In fact, defendant carried two unused peremptory challenges over into the alternate juror selection process. Although defendant eventually exhausted his peremptory challenges, defendant had multiple challenges available to him during all sessions for which he assigns error. Accordingly, defendant has failed to show prejudice, and his assignment of statutory error is overruled.

Defendant also argues that the improper jury selection procedure amounted to structural error. While defendant's brief is somewhat unclear on this point, we presume that defendant is asserting that the alleged structural error violated his constitutional right to a fair and impartial jury.

Structural error is a rare form of constitutional error resulting from "structural defects in the constitution of the trial mechanism" which are so serious that " 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.' " *Arizona v. Fulminante*, 499 U.S. 279, 309-10, 113 L. Ed. 2d 302, 331 (1991) (quoting *Rose v. Clark*, 478 U.S. 570, 577-78, 92 L. Ed. 2d 460, 470 (1986)). "Such errors 'infect the entire trial process,' *Brecht v. Abrahamson*, 507 U.S. 619, 630, and *'necessarily* render a trial fundamentally unfair, *Rose*, 478 U.S. at 577.' " *Neder v. United States*, 527 U.S. 1, 8, 144 L. Ed. 2d 35, 46 (1999). For this reason, a defendant's remedy for structural error is not dependant upon harmless error analysis; rather, such errors are reversible *per se. Id.* at 34, 144 L. Ed. 2d at 62. ("The very premise of structural-error review is that even convictions reflecting the 'right' result are reversed for the sake of protecting a basic right.").

Although the United States Supreme Court first defined structural error in 1991, that Court has identified only six instances of structural error to date: (1) complete deprivation of right to counsel, *Johnson v. United States*, 520 U.S. 461, 468-69, 137 L. Ed. 2d 718, 728 (1997) (citing *Gideon v. Wainwright*, 372 U.S. 335, 9 L. Ed. 2d 799 (1963)); (2) a biased trial judge, *Tumey v. Ohio*, 273 U.S. 510, 71 L. Ed. 749 (1927); (3) the unlawful exclusion of grand jurors of the defendant's race, *Vasquez v. Hillery*, 474 U.S. 254, 88 L. Ed. 2d 598 (1986); (4) denial of the right to self-representation, *McKaskle v. Wiggins*, 465 U.S. 168, 79 L. Ed. 2d 122 (1984); (5) denial of the right to a public trial, *Waller v. Georgia*, 467 U.S. 39, 81 L. Ed. 2d 31 (1984); and (6) constitutionally deficient jury instructions on reasonable doubt, *Sullivan v. Louisiana*, 508 U.S. 275, 124 L. Ed. 2d 182 (1993). *See Johnson*, 520 U.S. at 468-69, 137 L. Ed. 2d at 728 (identifying the six cases in which the United States Supreme Court has found structural error). The Court has also determined that other, arguably serious, constitutional errors were not "harmless beyond a reasonable doubt" before granting a new trial. *See e.g.*, *Neder*, 527 U.S. at 15, 144 L. Ed. 2d at 51 (applying harmless error analysis to a trial court's omission of an element of the offense from the jury charge); *Fulminante*, 499 U.S. at 295, 113 L. Ed. 2d at 322 (applying harmless error analysis to trial court's admission of a coerced confession); and *Rose*, 478 U.S. at 579, 92 L. Ed. 2d at 471 (An "erroneous malice [jury] instruction does not compare with the kinds of errors that *automatically* require reversal of an otherwise valid conviction.") (emphasis added). In fact, the United States Supreme Court emphasizes a

strong presumption *against* structural error, *Rose*, 478 U.S. at 579, 92 L. Ed. 2d at 471 ("If the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis"); *See Neder*, 527 U.S. at 8, 144 L. Ed. 2d at 46 ("[W]e have found an error to be 'structural,' and thus subject to automatic reversal, only in a 'very limited class of cases.') (quoting *Johnson*, 520 U.S. at 468, 137 L. Ed. 2d at 728), and this Court has recently declined to extend structural error analysis beyond the six cases enumerated by the United States Supreme Court, *State v. Anderson*, 355 N.C. 136, 142-43, 558 S.E.2d 87, 92-93 (2002) (holding that improper prosecutorial questions and comments during *voir dire* are not within the limited class of structural errors defined by the United States Supreme Court).

In each of the six United States Supreme Court cases rectifying structural error, the defendant made a preliminary showing of a violated constitutional right and the identified constitutional violation *necessarily* rendered the criminal trial fundamentally unfair or unreliable as a vehicle for determining guilt or innocence. *See Gideon*, 372 U.S. 335, 9 L. Ed. 2d 799; *Tumey*, 273 U.S. 510, 71 L. Ed. 749; *Vasquez*, 474 U.S. 254, 88 L. Ed. 2d 598; *McKaskle*, 465 U.S. 168, 79 L. Ed. 2d 122; *Waller*, 467 U.S. 39, 81 L. Ed. 2d 31; *Sullivan*, 508 U.S. 275, 124 L. Ed. 2d 182.

Here, defendant has failed to show that he was denied trial by a fair and impartial jury or to show that any other constitutional error resulted from the jury selection procedure employed at his trial. Defendant has shown only a technical violation of the state jury selection statute. Without more, this statutory violation is insufficient to support a claim of constitutional structural error.

Moreover, defendant did not raise this constitutional issue at trial. Consequently, the trial court was denied the opportunity to consider and, if necessary, to correct the error. It is well settled that constitutional matters that are not "raised and passed upon" at trial will not be reviewed for the first time on appeal. *State v. Watts*, 357 N.C. 366, 372, 584 S.E.2d 740, 745 (2003), *cert. denied*, —— U.S. ——, 158 L. Ed. 2d 370, (2004); N.C. R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion . . ."). Structural error, no less than other constitutional error, should be preserved at trial. *See State v. Roache*, 358 N.C. 243, 595 S.E.2d 381 (2004) (determining that the defendant's assignment of error which alleged that "improper jury

selection procedure violated his constitutional right to a fair and impartial jury" was not raised at trial and, consequently, had not been preserved for appellate review); *cf. Johnson*, 520 U.S. at 466, 137 L. Ed. 2d at 726 (determining that structural error must be preserved for review on direct appeal from judgment of conviction in the federal courts). Accordingly, defendant has not only failed to allege any constitutional error warranting a new trial, but has also failed to preserve this assignment of error for appellate review. This assignment of error is overruled.

GUILT-INNOCENCE PHASE

[5] Next, defendant argues that the trial court erred by submitting the charge of felony murder based on attempted rape to the jury. Defendant contends that the State did not introduce sufficient evidence to support his conviction for that crime. Specifically, defendant argues there is insufficient evidence that he intended to "engage in vaginal intercourse with [the victim] by force and against her will." We disagree.

Evidence presented by the State at trial tended to show that on the night of her murder, Bolt was exercising alone in the workout room of her apartment's clubhouse. The room had glass walls, doors, and windows, which allowed people passing by to easily see inside. During his interview with Detective Andrews, defendant admitted to forcing Bolt from the workout area, across a hallway, and into the ladies' restroom at gunpoint.

Bolt's gym shorts and underwear were found on the floor in the end toilet stall. Defendant told Detective Andrews that he had removed Bolt's clothing after the attack; however, her shorts and underwear were not bloodstained. Crime scene photographs and witness testimony showed that Bolt's body, as well as her remaining clothing, including socks and sneakers, were blood-soaked. Blood spatter evidence indicated that defendant began beating Bolt in the last toilet stall.

Defendant told Detective Andrews that he had forced Bolt to her knees, and forensic evidence confirmed that Bolt's knees were bruised and swollen. Next, defendant said that he made Bolt lie on her stomach, pinning her down by placing his knee in her back. Defendant further stated that he became angry and lost control, striking Bolt on the head with the revolver after she tried to kick at the area between his legs.

Following the attack, defendant discarded his underwear in the adjacent men's restroom. Testing revealed that Bolt's blood had soaked into the top front portion of defendant's underwear. The remainder of defendant's underwear was not stained. Defendant told Detective Andrews that his underwear had become bloody because the sweat pants he wore kept slipping down.

Bolt was found lying in the fetal position on the restroom floor. Her hair was flung forward over her head; her shirt was pushed up, and she was naked from the waist down. When asked by Detective Andrews why Bolt was exposed in this manner, the defendant stated that he was trying to make the attack look like a rape. Upon further questioning as to whether he had ejaculated on Bolt, defendant explained that he could not maintain an erection because he had been drinking and was high on cocaine all day.

Defendant moved for a dismissal at the end of the State's case and again at the close of all evidence. Both motions were denied. Defendant then objected to the submission of the felony murder charge to the jury, specifically objecting to felony murder predicated on attempted rape. The trial court overruled defendant's objection and submitted two charges for the jury's consideration: (1) first-degree murder based upon premeditation and deliberation, and (2) first-degree felony murder based upon attempted rape. The jury deliberated and returned a unanimous verdict finding defendant guilty of first-degree murder committed during the perpetration of a felony, the felony being attempted rape.

When a defendant moves to dismiss a charge against him on the ground of insufficiency of the evidence, the trial court must determine "whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996); *see also State v. Smith*, 357 N.C. 604, 615, 588 S.E.2d 453, 461 (2003). "Substantial evidence" is relevant evidence that a reasonable person might accept as adequate, *State v. Squires*, 357 N.C. 529, 535, 591 S.E.2d 837, 841 (2003), or would consider necessary to support a particular conclusion, *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995). A "substantial evidence" inquiry examines the sufficiency of the evidence presented but not its weight. *State v. Sokolowski*, 351 N.C. 137, 143, 522 S.E.2d 65, 69 (1999). The reviewing court considers all evidence in the light most favorable to the State, and the State receives the benefit of every reasonable inference

supported by that evidence. *Squires*, 357 N.C. at 535, 591 S.E.2d at 841. Evidentiary "[c]ontradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *State v. Gibson*, 342 N.C. 142, 150, 463 S.E.2d 193, 199 (1995). Finally, sufficiency review "is the same whether the evidence is circumstantial or direct, or both." *State v. Jones*, 303 N.C. 500, 504, 279 S.E.2d 835, 838 (1981).

Murder committed during the "attempted perpetration of . . . rape" qualifies as first-degree felony murder under N.C.G.S. § 14-17. N.C.G.S. § 14-17. The elements of attempted first-degree rape are: (1) specific intent to rape the victim, and (2) completion of an overt act done for that purpose that goes beyond mere preparation but falls short of the actual commission of the rape. *State v. Bell*, 311 N.C. 131, 140, 316 S.E.2d 611, 616 (1984). Rape can be defined as vaginal intercourse carried out against the will of another person and facilitated by force, during which the offender employed or displayed a dangerous weapon or inflicted serious personal injury upon the victim. N.C.G.S. § 14-27.2 (2003).

Defendant argues that the facts of the present case are similar to those of *State v. Walker*, 139 N.C. App. 512, 533 S.E.2d 858 (2000), in which the Court of Appeals found "the evidence of defendant's [sexual] intent [was], at most, ambiguous." *Id.* at 518, 533 S.E.2d at 861. Initially, we note that, while Court of Appeals decisions may be persuasive authority, "[t]his Court is not bound by precedents established by the Court of Appeals." *Northern Nat'l Life Ins. Co. v. Lacy J. Miller Mach. Co.*, 311 N.C. 62, 76, 316 S.E.2d 256, 265 (1984); *Mazza v. Medical Mut. Ins. Co.*, 311 N.C. 621, 631, 319 S.E.2d 217, 223 (1984). Moreover, we believe that there is significantly more evidence in the present case from which a jury might discern defendant's sexual intent than there was in *Walker*.

In *Walker*, the defendant attacked a woman in a public restroom. 139 N.C. App. at 514, 533 S.E.2d at 859. The evidence in that case indicated that the perpetrator peeked at the woman around a partition, turned off the lights, grabbed her from behind, and forced her to the restroom floor. *Id.* He lay " 'completely on top of' " the woman and told her to roll onto her stomach. *Id.* At one point, the woman felt the attacker's right hand touch her side. *Id.* at 515, 533 S.E.2d at 859. When he could not prevent the woman from screaming, the perpetrator ran away. *Id.* The defendant in *Walker* was tried and convicted for attempted rape; however, the Court of Appeals vacated that conviction. *Id.* at 514, 533 S.E.2d at 859.

Although both defendant and the perpetrator in *Walker* attacked their victims in a ladies' restroom and both forced their victims to lie on their stomachs, only defendant removed his victim from a public area to a secluded location, removed his victim's shorts and underwear, and made statements to police concerning rape. Unlike the perpetrator in *Walker*, defendant did not run away when Bolt resisted.

We conclude that the evidence presented by the State is sufficient evidence from which a jury could infer defendant's intent to engage in vaginal intercourse with the victim against her will. Accordingly, the trial judge properly submitted the crime of felony murder predicated upon attempted rape to the jury. This assignment of error is overruled.

[6] Defendant next argues that the trial court erred by overruling his objection to evidence regarding a threat he made to a female detention officer employed by the Office of the Sheriff, Wake County, while in a holding cell. Defendant contends that the threat is not relevant, that its admission was unfairly prejudicial, and that the threat represents impermissible character evidence as defined by North Carolina Rule of Evidence 404(b). Defendant states that the trial court's admission of the threat violated both his constitutional and statutory rights. We disagree.

On 22 June 2000, the afternoon following his arrest, defendant was taken to the Wake County Courthouse for his first appearance. After the hearing, defendant was placed in a holding cell adjacent to the courtroom. Detention Officer Sandra McCormick supervised the cell. The State called Officer McCormick to testify at trial about defendant's behavior on that afternoon. Officer McCormick was questioned about her interaction with defendant and testified as follows:

> [The State]: Officer McCormick, June 22nd of last year, please describe any other action [sic] you had with the Defendant in the holding cell in the jail, please.
>
> [Witness]: Well, I was standing up at the podium, next to the courtroom door where the guys were going in and out, but Garcia was across over from me. He was really loud, boisterous. I tried to get him to calm down, because I know when people in there, how somebody talking the way he was, they would contact the D.A.'s office. I was doing it for his behalf, and that's when he made the statement to me.

> [The State]: Okay. Let's start with what he was saying. What was he saying out loud to everybody?
>
> [Defense Counsel]: Objection.
>
> The Court: Overruled.
>
> [The State]: You may answer. What was he saying out loud?
>
> [Witness]: After I told him, tried to get him to be—to be quiet, he made the statement, *I've already killed one. I got one up under my belt. And he was telling me about how he got so many black belts, you know, he didn't have anything to lose, I'll kill you . . . .*

(Emphasis added).

Prior to this line of questioning and out of the presence of the jury, defendant had objected to the portion of Officer McCormick's testimony recounting defendant's threat on her life. Defendant argued, through counsel, that the words "so many black belts" and "I'll kill you" were not relevant. At that time, however, defense counsel conceded that the accompanying phrases "I've already killed one" and "I got one up under my belt" were relevant as possible admissions of guilt. Specifically, defense counsel stated:

> Your Honor, what I anticipate we are about to hear is a statement that Mr. Garcia is alleged to have made in the holding cell in his first appearance, something to the effect I got one under my belt, I've already killed someone, I've got nothing to lose. Which, obviously, goes directly to this incident. The portion of the statement that we object to is, at least according to the report, he went on to say that he would kill her, referring to Ms. McCormick, and something to the effect of I've got six years of black belt and I'll kill you.

The transcript further reveals that defendant objected solely on the grounds that the noted portions of Officer McCormick's testimony were not relevant. However, defendant failed to enter an objection based on constitutional grounds or based on North Carolina Rule of Evidence 404(b).

We recognize at the outset that defendant failed to raise a constitutional objection to this statement at trial and that "[c]onstitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *Watts*, 357 N.C. at 372, 584 S.E.2d at 745.

Furthermore, defendant did not raise a Rule 404 objection to the evidence. Likewise, in the absence of a specific objection based on Rule 404, defendant has failed to preserve this matter for review. N.C. R. App. P. 10(b)(1) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."); *see State v. Thibodeaux*, 352 N.C. 570, 577, 532 S.E.2d 797, 803 (2000) (declining to review an evidentiary assignment of error when defendant failed to enter a specific objection premised on the evidentiary rule purported to be violated), *cert. denied*, 531 U.S. 1155, 148 L. Ed. 2d 976 (2001). Therefore, we will address only the issue of relevance which defendant properly raised at trial.

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2003). "All relevant evidence is admissible. . . ." *Id.*, Rule 402 (2003). In the context of a murder, "evidence is relevant if it 'tend[s] to shed light upon the circumstances surrounding the killing,' " *State v. Richmond*, 347 N.C. 412, 428, 495 S.E.2d 677, 685 (quoting *State v. Stager*, 329 N.C. 278, 322, 406 S.E.2d, 876, 901 (1991)) (alteration in original), *cert. denied*, 525 U.S. 843, 142 L. Ed. 2d 88 (1998), or "if it has any logical tendency, however slight, to prove a fact in issue," *Smith*, 357 N.C. at 613, 588 S.E.2d at 460.

Defendant concedes that the phrases "I've already killed one" and "I got one up under my belt" could be interpreted as statements of guilt. We hold that defendant's subsequent statements "so many black belts" and "I'll kill you" are relevant in the context of direct examination to show that what was "up under [defendant's] belt" was a human life, that the defendant had already "killed one" woman like Officer McCormick, and that by "belt," defendant meant black belt. Because these statements tend to prove that defendant acknowledged guilt in the death of Bolt, they are relevant.

Pursuant to Rules of Evidence 402 and 403, relevant evidence is generally admissible unless "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (2003). The decision whether to exclude

relevant evidence under Rule 403 lies within the sound discretion of the trial court, *Braxton*, 352 N.C. at 186, 531 S.E.2d at 444, and " 'its ruling may be reversed for abuse of discretion only upon a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision,' " *Richmond*, 347 N.C. at 429, 495 S.E.2d at 686 (quoting *State v. Collins*, 345 N.C. 170, 174, 478 S.E.2d 191, 194 (1996)). We find no such arbitrary action in this case. Accordingly, defendant's threat was admissible at trial. This assignment of error is overruled.

CAPITAL SENTENCING PROCEEDING

[7] Defendant next argues that the trial court erred by excluding evidence of remorse during his sentencing proceeding. Specifically, defendant argues that his mother would have testified that he expressed remorse in conversations with her following the killing; however, the trial court improperly sustained several objections to that testimony. Although remorse was submitted to the jury as a nonstatutory mitigating factor, no juror found remorse to exist and to have mitigating value. Defendant contends that the exclusion of this evidence violated his constitutional rights to present mitigating evidence, to a fair sentencing hearing, and to be free from cruel and unusual punishment. We disagree.

Defendant called his mother, Libertad Rodriguez, as a witness during the sentencing phase of his capital trial. Rodriguez testified extensively about her own drug use while pregnant with defendant and throughout defendant's childhood and about defendant's addiction to narcotics at an early age. Rodriguez also offered testimony regarding defendant's broken home life, the severely impoverished and violent neighborhood in which she and defendant lived, her inability to provide safe child care for defendant, the death of defendant's grandparents, and defendant's successful completion of a drug treatment program. Near the end of Rodriguez's testimony, the State objected to five questions concerning defendant's discussions with Rodriguez after the murder. The trial court sustained three of those objections. It is apparent from the context of defense counsel's questions, including questions posed to Rodriguez during her prior testimony, that she had intended to testify to her son's remorse for the murder of Bolt.

> [Defense Counsel]: After [defendant] was arrested for killing Juliann Bolt, did you have telephone conversations with him?

[Rodriguez]: Yes, we talked—we talked a lot. We talked a lot. He didn't want to talk about the crime. And we never have talked about the crime. I knew very little about the crime until I got—I came here, but I knew, you know, what's happened. Basically, just the basic and—but he, he did, you know, the things that he could tell me was, you know, he—I feel very sad because he would tell me, you know, like momma, I feel so bad about what happened, but I don't want to—

[The State]: Objection, Your Honor.

[Rodriguez]: —talk about it.

The Court: Sustained.

. . .

[Defense Counsel]: Did you and [defendant], he discuss his feelings about what had happened?

[Rodriguez]: Yes, we—he did.

[Defense Counsel]: And what was that discussion about?

[Rodriguez]: He—

[The State]: Object to this, Your Honor.

The Court: Overruled.

[Rodriguez]: We talked, and, you know—

[The State]: I object to this, Your Honor.

The Court: Overruled.

[Rodriguez]: Sometimes on the phone, he would be sounding depressed. And, you know, my thing to him was always, like I love you. You know, I know this is, you know, bad, but, you know, we love you, we're behind you. And I would talk a lot about the [L]ord to him, and tell him, you know, just ask the [L]ord, why do you—you don't—once you make peace with the [L]ord, then you're okay, you know. And he expressed to me that he did. And he even would say momma, read this first, because that will help you, because that helped me. And read this other verse, like that. And it helped me to know that he was, you know, sometimes he would be really depressed and say, I wish I was back working, mom, I wish this never had happened, but it was tough—

[Defense Counsel]: In those phone calls, when you're talking about [defendant], about his feelings, about what had happened, did he ever express any remorse or sympathy about the case?

[Rodriguez]: Yes.

[The State]: Objection.

The Court: Sustained.

[Defense Counsel]: Other than what you've told us about making peace with the [L]ord, what other feelings were expressed to you about—

[Rodriguez]: About the case? We didn't go into any specifics or anything.

[Defense Counsel]: I'm talking about feelings, not the details of the case.

[Rodriguez]: About feelings, he always told me he was sorry because he apologize—

[The State]: Object.

The Court: Sustained.

[Defense Counsel]: Nothing further.

Defendant argues that the trial court rulings sustaining the State's objections were improper because they prevented him from offering evidence of remorse to mitigate his sentence. We agree that the trial court erred; however, we find that defendant did not preserve this error at trial and, in the alternative, that the error is harmless beyond a reasonable doubt.

Traditional rules of evidence do not apply to capital sentencing hearings. During those proceedings, all relevant mitigating evidence must be admitted, even when state evidentiary rules dictate its exclusion. *See Green v. Georgia*, 442 U.S. 95, 97, 60 L. Ed. 2d 738, 741 (1979) (per curiam). Our courts employ this relaxed standard because in capital cases " 'the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.' " *Eddings v. Oklahoma*, 455 U.S. 104, 112, 71 L. Ed. 2d 1, 9 (1982) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304, 49 L. Ed. 2d 944, 961

(1976)) (alteration in original); *Lockett v. Ohio*, 438 U.S. 586, 601, 57 L. Ed. 2d 973, 988 (1978) (same). Defendant's proffered testimony, which tended to prove that he felt regret for the crime he committed, should have been admitted as relevant mitigating evidence in the sentencing phase of his capital trial. Accordingly, we determine that the trial court committed constitutional error by excluding these portions of Rodriguez's testimony.

However, defendant did not raise this constitutional issue at trial. As a result, the trial court was denied the opportunity to consider and correct the error. Because it is well settled that constitutional matters that are not raised and passed upon at trial will not be reviewed for the first time on appeal, defendant has failed to preserve this assignment of error for our review. *Watts*, 357 N.C. at 372, 584 S.E.2d at 745.

Even so, we believe the trial court's rulings were harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b) (2003) (providing that constitutional error "is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt"). The erroneous exclusion of evidence is not prejudicial when "the same or substantially the same testimony is subsequently admitted into evidence." *State v. Burke*, 342 N.C. 113, 120, 463 S.E.2d 212, 217 (1995) (quoting *State v. Hageman*, 307 N.C. 1, 24, 296 S.E.2d 433, 446 (1982)); *accord State v. Walden*, 311 N.C. 667, 673-74, 319 S.E.2d 577, 581 (1984). Moreover, the State has shown beyond a reasonable doubt that under the specific facts of this case, the exclusion was harmless and did not affect the outcome of the trial.

Notwithstanding the trial court's error, other evidence of defendant's remorse, not specifically objected to by the State, was before the jury. Rodriguez testified that defendant felt "very sad" and felt "so bad about what happened." She also testified that defendant told her he had made "peace with the [L]ord" and that he "wish[ed] this never had happened." When asked directly whether defendant talked about feelings of remorse, Rodriguez answered "yes." Finally, Rodriguez stated that defendant "always told [her] he was sorry because he would apologize." Although the State's objections effectively interrupted the flow of Ms. Rodriguez's testimony, and eventually halted defense counsel's line of questioning, the State made no motion to strike Ms. Rodriguez's prior admitted evidence of defendant's remorse.

Also, Charles Rabb, a man involved in prison ministries, testified that defendant told him that he had murdered Bolt and that defend-

ant was taking his sins to Christ. From this testimony and the admitted testimony of defendant's mother, the jury could have determined that defendant felt meaningful personal regret for his wrongdoing.

In summary, we determine that defendant failed to preserve this assignment of constitutional error for review. In the alternative, if defendant had preserved an assignment of constitutional error, then any error resulting from the exclusion of this evidence would be deemed harmless beyond a reasonable doubt. This assignment of error is overruled.

[8] Next, defendant argues that the trial court erred by failing to intervene *ex mero motu* during closing arguments at the capital sentencing proceeding. Specifically, defendant argues that throughout closing arguments, both prosecutors made comments suggesting they knew about other murders that were less egregious than the killing committed by defendant and that those comments represented the improper personal opinions and extra-record knowledge of the prosecutors.

In particular, defendant cites the following statement:

> Members of the jury, I hope I am successful in refocusing this jury and reminding this jury what really is relevant and what is important in this case. [The] [q]uestion I have for you is what is the price for causing such misery, for causing such pain? *As the final issue this jury will have to determine, you have to ask yourself is this an ordinary case of homicide, or is there something exceptionally disturbing about this first degree murder?*

(Emphasis added). Also, defendant takes exception to the prosecutors' description of Bolt's murder as "Society's worst fear realized" and "Society's worst fear," as well as their statement that "[i]t doesn't get any worse than what you've seen in this case." Defendant contends that these arguments represent personal opinions and extra-record knowledge that the State used to advance the theme that Bolt's murder was an extraordinary murder in order to persuade the jury to find one aggravating circumstance—an especially heinous, atrocious, or cruel murder—and to convince the jury that the aggravator warranted a sentence of death. We recognize at the outset that " 'statements contained in closing arguments to the jury are not to be placed in isolation or taken out of context on appeal,' " *Jaynes*, 353 N.C. at 559, 549 S.E.2d at 198 (quoting *State v. Green*, 336 N.C. 142,

188, 443 S.E.2d 14, 41, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994)), and that because defendant failed to object to these allegedly improper statements during closing arguments, he "must demonstrate that the prosecutor's closing arguments amounted to gross impropriety," *State v. Rouse*, 339 N.C. 59, 91, 451 S.E.2d 543, 560 (1994), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995).

The same standard of gross impropriety governs closing arguments during both phases of a capital trial. Defendant's arguments are correct in that "[d]uring a closing argument to the jury an attorney may not . . . inject his personal experiences . . . or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice." N.C.G.S. § 15A-1230(a) (2003). However, an attorney may "on the basis of his analysis of the evidence, argue any position or conclusion with respect to a *matter in issue*." *Id.* (emphasis added). Additionally, because "the objectives of the arguments in the two phases are different . . . rhetoric that may be prejudicially improper in the guilt phase is acceptable in the sentencing phase." *State v. Kandies*, 342 N.C. 419, 452, 467 S.E.2d 67, 85, *cert. denied*, 519 U.S. 894, 136 L. Ed. 2d 167 (1996).

During the capital sentencing phase of a trial, matters in issue for the jury's consideration generally include those circumstances surrounding a murder which tend to aggravate or mitigate a defendant's criminal culpability. Accordingly, a prosecutor may properly argue the existence of aggravating circumstances, as well as the relative weight the jury should lend to each circumstance. *Cf. State v. Craig*, 308 N.C. 446, 460, 302 S.E.2d 740, 749 ("[C]ounsel is entitled to argue what weight [mitigating] circumstances should ultimately be assigned."), *cert. denied*, 464 U.S. 908, 78 L. Ed. 2d 247 (1983). N.C.G.S. § 15A-2000(e) lists the eleven "[a]ggravating circumstances which may be considered" by a capital jury, including that "[t]he capital felony was especially heinous, atrocious, or cruel." N.C.G.S. § 15A-2000(e)(9) (2003). This Court has previously determined that N.C.G.S. § 15A-2000(e)(9) refers to the level of brutality incident to the murder, and that to meet this aggravator, prosecutors must show that the brutality involved exceeded that which is normally present in any killing. *State v. Goodman*, 298 N.C. 1, 24-25, 257 S.E.2d 569, 585 (1979).

We determine that prosecutors properly drew reasonable inferences about the degree of brutality accompanying Bolt's murder, explained those inferences to the jury, and argued that the jury

should conclude that the killing committed by defendant was "especially heinous, atrocious, or cruel." *See Jaynes*, 353 N.C. at 560-61, 549 S.E.2d at 199 (" 'A prosecutor in a capital trial is entitled to argue all the facts submitted into evidence as well as any reasonable inferences therefrom.' ") (quoting *State v. Gregory*, 340 N.C. 365, 424, 459 S.E.2d 638, 672 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996)). Prosecutors did not urge their personal beliefs to the jury, but instead reminded jurors that they must make an independent decision. The questions "is this an ordinary case of homicide, or is there something exceptionally disturbing about this first degree murder?" and "what is the price for causing such misery, for causing such pain?" focused the jurors' attention on the decision they were required to make as to whether the section 15A-2000 e(9) "especially heinous, atrocious, or cruel" aggravator existed and if so as to what weight its existence should be given. Prosecutors did not venture outside the record to inject facts of their own knowledge, but instead properly limited their argument to conclusions derived from facts in evidence. Prosecutors argued that the jury should place great weight on the e(9) aggravator by recounting the circumstances surrounding Ms. Bolt's death and concluding that those circumstances constituted "[s]ociety's worst fear."

We determine that, when viewed in context, the statements of prosecutors during defendant's sentencing proceeding represented permissible argument regarding a matter in issue, the existence or nonexistence of statutory aggravator N.C.G.S. § 15A-2000(e)(9). For these reasons, we decline to find any gross impropriety which would necessitate *sua sponte* action on the part of the trial court. This assignment of error is overruled.

PRESERVATION ISSUES

Initially, we address two assignments of error which have not been characterized as preservation issues by defendant, but which our review indicates are most appropriately examined under this heading. First, defendant argues that the State's failure to allege aggravating circumstances in the short-form murder indictment is a jurisdictional defect and that prosecution under such an insufficient charging document violates his federal and state constitutional rights. We have recently considered and rejected this argument in *State v. Hunt*, 357 N.C. 257, 582 S.E.2d 593. In *Hunt*, this Court held that short-form indictments satisfy state and federal constitutional requirements. *Id.* Accordingly, the trial court had jurisdiction to try defendant; the short-form indictment did not violate defendant's con-

stitutional rights, and his prosecution was proper. This assignment of error is overruled.

Second, defendant argues that he is entitled to a new capital sentencing hearing because the statutory aggravating circumstance submitted to the jury—that the murders were especially heinous, atrocious, or cruel—is unconstitutionally vague. We have consistently rejected this argument, *see, e.g.*, *State v. Miller*, 357 N.C. 583, 601, 588 S.E.2d 857, 869 (2003); *State v. Haselden*, 357 N.C. 1, 26, 577 S.E.2d 594, 610, *cert. denied*, —— U.S. ——, 157 L. Ed. 2d 382 (2003); *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), and decline to re-examine our prior holdings. This assignment of error is overruled.

Defendant raises nine additional issues, each of which this Court has consistently decided contrary to defendant's position. Defendant claims the trial court erred by: (1) allowing the State to try defendant for first-degree murder when the short-form indictment failed to allege all the elements of that offense; (2) instructing the jurors that they must act unanimously when answering any of the following questions: (i) did the aggravating circumstance submitted to them exist?; (ii) are any mitigating circumstances found insufficient to outweigh the aggravating circumstance?; and (iii) was the aggravating circumstance sufficiently substantial to support the death penalty when considered with any mitigating circumstances?; (3) instructing the jury that it had a duty to return a sentence of death if it made certain findings; (4) instructing the jury that defendant's burden of proof applicable to mitigating circumstances was to the jury's "satisfaction"; (5) instructing the jury not to consider nonstatutory mitigating circumstances unless the jury deemed the circumstances to have "mitigating value"; (6) giving an unconstitutionally broad instruction defining "aggravation"; (7) instructing jurors that they "may" consider mitigating circumstances when determining (i) whether mitigating circumstances were insufficient to outweigh aggravating circumstances and (ii) whether aggravating circumstances were sufficiently substantial to call for the death penalty; and (8) instructing the jury that each juror may only consider mitigating evidence which that particular juror had found to exist when determining (i) whether mitigating evidence was insufficient to outweigh aggravating evidence and (ii) whether the aggravating evidence was sufficiently substantial to warrant imposition of the death penalty. Defendant also argues that the North Carolina death penalty statute is unconstitutionally vague and overbroad and is unconstitutionally applied in an arbitrary

and discriminatory manner and that the death penalty is inherently cruel and unusual.

Defendant raises these issues for the purpose of requesting this Court to reconsider its prior decisions and for the purpose of preserving them for further appellate review of his case. We have considered defendant's arguments on these issues and decline to depart from our existing holdings. These assignments of error are overruled.

PROPORTIONALITY

[9] Having concluded that defendant's trial and capital sentencing proceeding were free from prejudicial error, we must now determine: (1) whether the record supports the aggravating circumstance found by the jury and upon which the sentence of death was based; (2) whether the death sentence was entered under the influence of passion, prejudice, or any other arbitrary factor; and (3) whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. N.C.G.S. § 15A-2000(d)(2) (2003).

As to the first two of these tasks, "[w]here there is evidence to support the aggravating factors relied upon by the State . . . the jury's balancing of aggravation and mitigation will not be disturbed unless it appears that the jury acted out of passion or prejudice or made its sentence arbitrarily." *State v. Zuniga*, 320 N.C. 233, 273, 357 S.E.2d 898, 923, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987). In the instant case, defendant was convicted of first-degree murder. His conviction was based upon the felony murder rule with the underlying felony being attempted rape. Following defendant's capital sentencing proceeding, the prosecution submitted one aggravating circumstance for the jury's consideration: "Was this murder especially heinous, atrocious, or cruel?" The jury found that aggravating circumstance to exist.

The jury also found two statutory mitigating circumstances: (1) defendant has no significant history of prior criminal acts, and (2) the capital felony was committed while defendant was under the influence of mental or emotional disturbance. N.C.G.S. § 15A-2000(f)(1),(2) (2003). Two additional statutory mitigating circumstances were submitted to, but not found by, the jury. Those circumstances were: (1) "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the

requirements of [the] law was impaired," and (2) the catchall statutory mitigating circumstance, which is "[a]ny other circumstance arising from the evidence which the jury deems to have mitigating value." *Id.* § 15A-2000(f)(6),(9) (2003). Of the twenty-four nonstatutory mitigating circumstances submitted, one or more jurors found that eight existed and had mitigating value.

After thoroughly reviewing the record, transcripts, and briefs in this case, we conclude that the evidence fully supports the aggravating circumstance found by the jury. Further, we conclude that nothing in the record suggests defendant's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. Accordingly, we will not disturb the jury's balancing of aggravating and mitigating circumstances on appeal.

Turning now to our final statutory duty, we recognize that proportionality review is designed to "eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *Smith*, 357 N.C. at 621, 588 S.E.2d at 464. In conducting the proportionality review, we must determine 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). This determination " 'ultimately rest[s] upon the "experienced judgments" of the members of this Court.' " *Smith*, 357 N.C. at 622, 588 S.E.2d at 465 (quoting *Green*, 336 N.C. at 198, 443 S.E.2d at 47) (alteration in original).

This Court has previously determined that the death penalty was 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 in part on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *Young*, 312 N.C. 669, 325 S.E.2d 181; *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). In only two of these cases, *Stokes* and *Bondurant*, did the jury find the murder to be especially heinous, atrocious, or cruel. Both *Stokes* and *Bondurant* are easily distinguished from the case at bar.

In *Stokes*, the seventeen-year-old defendant was the only one of four assailants to receive the death penalty. 319 N.C. at 3-4, 11, 352

S.E.2d at 654-64, 668. In *Bondurant*, the defendant not only indicated remorse immediately after shooting the victim, but he also took the victim to the hospital for treatment. 309 N.C. at 694, 309 S.E.2d at 182-83. Unlike the defendant in *Stokes*, defendant in the present case murdered Bolt by himself, and he was thirty-one years old at the time. Furthermore, defendant took no such apologetic or ameliorative actions as were present in *Bondurant*.

Among other circumstances, this Court considers the brutality of a killing during proportionality review. *State v. Reeves*, 337 N.C. 700, 740, 448 S.E.2d 802, 822 (1994) ("In determining proportionality, we are impressed with the cold-blooded, callous and brutal nature of this murder."), *cert. denied*, 514 U.S. 1114, 131 L. Ed. 2d 860 (1995); *State v. Moseley*, 336 N.C. 710, 725, 445 S.E.2d 906, 915 (1994) ("In determining proportionality, we are impressed with the brutality and 'overkill' evidenced in this murder."), *cert. denied*, 513 U.S. 1120, 130 L. Ed. 2d 802 (1995). We have also determined that murders committed during the perpetration of a sexual assault may be more deserving of the death penalty. *See State v. Payne*, 337 N.C. 505, 537, 448 S.E.2d 93, 112 (1994) (listing the brutality of the attack and rape of the victim as distinguishing characteristics of the defendant's crime during proportionality review), *cert. denied*, 514 U.S. 1038, 131 L. Ed. 2d 292 (1995). Here, defendant committed the murder during his attempt to rape Bolt, and evidence presented during both the guilt-innocence and sentencing phases of trial tended to show that his attack on her was dehumanizing. Defendant forced Bolt to strip from the waist down. He then began striking her, forced her to the bathroom floor, and continued to beat her with a revolver. At some point, defendant pushed up Bolt's shirt. Once Bolt was forced to the floor, forensic evidence, including a lack of blood on the soles of her shoes, indicated that she was unable to stand again. However, evidence present at trial does show that Bolt tried to fight back and to get away from defendant. The State's witness, Dr. Dennis Ose, who performed an autopsy on Bolt, testified that Bolt had sustained multiple defensive wounds to her hands and arms, including a broken fingernail on her right hand.

Additionally, evidence presented by the State suggested that Bolt was conscious during much of the attack. State Bureau of Investigation Special Agent Duane Deaver, a blood spatter expert, testified that he observed blood smear stains on multiple areas of the restroom floor and that one explanation for the stains is that Bolt was crawling in her own blood. Dr. Ose testified that he removed 200 ccs

of blood from Bolt's stomach during the autopsy and that, in his opinion, Bolt was alive when she swallowed that blood.

Further, there is evidence that the attack took place over a period of time. Agent Deaver testified that Bolt's blood was smeared, pooled, and spattered in multiple locations within the restroom. From his observations, Deaver determined that the attack began in a toilet stall, but continued as Bolt lay or crawled on the floor. Two separate and significant pools of blood on the floor indicated that Bolt lay bleeding in one area for some period of time before moving, or being moved, to the second area. Additionally, Deaver testified that, in his opinion, bleeding wounds like the ones sustained by Bolt do not result from a single blow. According to Deaver, multiple impacts to the same part of a person's body are generally required to inflict openly bleeding injuries.

Finally, the nature and extent of the blows inflicted upon Bolt were mutilating. Crime scene investigator Leyla Iz testified that she was unable to identify Bolt's body by comparing it to her photograph. Bolt sustained multiple skull fractures including an open skull fracture. Responding police officers discovered brain matter on the restroom floor. Dr. Ose testified that Bolt's right frontal lobe was missing from her skull and that sixty-five grams of brain matter arrived for autopsy separate from her body. When questioned about the amount of force required to open a human skull, Dr. Ose testified that pathologists usually use an electric saw to open a skull during autopsies. A large portion of Bolt's body was covered in blood such that her body needed to be cleaned for autopsy photographs. Blood had even saturated Bolt's socks. Dr. Ose testified that Bolt lost approximately two units of blood from her head injuries and that a human body generally contains a total of four to five units of blood. Finally, Dr. Ose testified that Bolt had also sustained bruising or lacerations to her face, neck, back, shoulders, knees, arms, and right hand.

In the instant case, defendant murdered Bolt during the perpetration of an attempted rape; Bolt was murdered in a dehumanizing manner; Bolt was conscious during part of the attack; Bolt knew she was in life-threatening danger; Bolt tried to defend herself; blood spatter evidence indicates defendant beat Bolt for a significant period of time, and defendant used a gross amount of force resulting in Bolt's mutilation. From this and other relevant evidence, we conclude that the crime committed by defendant in this case was equally as brutal as other murders for which a death sentence has been

imposed. Although we "compare this case with the cases in which we have found the death penalty to be proportionate . . . . we will not undertake to discuss or cite all of those cases each time we carry out that duty." *State v. McCollum*, 334 N.C. 208, 244, 433 S.E.2d 144, 164 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994). Our determination that the sentence of death is not disproportionate is sufficient. We hold, therefore, that the sentence is neither excessive nor disproportionate given the nature of both the defendant and the crime he committed.

As a collateral matter, we note that defendant argues that this Court's standards for proportionality review are vague and arbitrary, depriving defendant of his constitutional rights to notice, effective assistance of counsel, due process, and freedom from cruel and unusual punishment. We considered and rejected this argument in *Simpson*, 341 N.C. at 358-59, 462 S.E.2d at 215-16, and we see no reason to depart from our prior holding.

Based on the foregoing and the entire record in this case, we hold that defendant received a fair trial and capital sentencing proceeding, free of reversible error. Accordingly, the judgment of the trial court must be and is left undisturbed.

NO ERROR.

Justice EDMUNDS concurring.

Although I agree with the premise of the dissent that North Carolina's procedures and case law relating to a bill of particulars contain more promise than substance, I do not believe that the trial court abused its discretion here. Defendant's motion for a bill of particulars made three requests. First, he asked for the date and time of the victim's death. There is no indication that defendant did not receive this information. Second, defendant asked for "[t]he basis for prosecution of the Defendant for first degree murder, that is, whether the State relies on the felony murder rule, on the existence of premeditation, deliberation, and intent to kill, or on some other theory in seeking conviction of the Defendant for first degree murder." The record indicates that defendant at trial was aware that the prosecution was proceeding under the theories both of felony murder and of premeditation and deliberation. Finally, defendant asked that the prosecution set out "[t]he aggravating circumstances the State contends are present in this case in order to justify the death penalty."

Under the facts here, the only aggravating circumstance that might implicate felony murder is set out in N.C.G.S. § 15A-2000(e)(5). This circumstance arises where "[t]he capital felony was committed while the defendant was engaged . . . in the commission of . . . any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb." N.C.G.S. § 15A-2000(e)(5) (2003). While the felony underlying a felony murder conviction can also serve as an aggravating circumstance where a defendant is convicted of first-degree murder both on the basis of felony murder and of premeditation and deliberation, *see, for example, State v. Robinson*, 355 N.C. 320, 341, 561 S.E.2d 245, 258, *cert. denied*, 537 U.S. 1006, 154 L. Ed. 2d 404 (2002), defendant here did not request that the prosecution commit itself to establishing any of the offenses listed in this circumstance. Instead he only asked, in effect, whether the prosecution would seek to submit this aggravating circumstance to the jury at sentencing.

Thus, defendant did not request that the prosecution state which underlying felony or felonies it would attempt to prove to establish felony murder. In addition, even if he had, the controlling statute states that "[a] motion for a bill of particulars must request and specify items of factual information." N.C.G.S. § 15A-925(b) (2003). Defendant's motion did not request specific factual information on which the prosecution would rely to support any underlying felony that the prosecution might seek to establish as a basis for felony murder. Because defendant's motion for a bill of particulars did not meet the statutory requirements, I do not believe that the trial judge's denial of the motion was a " 'palpable and gross abuse' " of discretion. *State v. Easterling*, 300 N.C. 594, 601, 268 S.E.2d 800, 805 (1980) (quoting *State v. McLaughlin*, 286 N.C. 597, 603, 213 S.E.2d 238, 242 (1975), *death sentence vacated*, 428 U.S. 903, 49 L. Ed. 2d 1208 (1976)).

Justice ORR dissenting.

I write separately to express my concerns on the issue of whether defendant was deprived of adequate notice for the underlying felony alleged in this felony murder case. Defendant framed this issue in two parts: first, that the trial court erred in denying defendant's motion to quash the indictment for failure to allege the particular felony upon which the charge of felony murder was based; and second, that defendant's request for a bill of particulars should have been allowed.

The majority concludes that the indictment was proper and that the denial of defendant's request for a bill of particulars was not error. I disagree.

From the outset, I note that this issue is distinct and separate from the issue of whether the short-form indictment is an adequate instrument for charging an accused with homicide. I recognize, and concur with, the long-held view of this Court that the short-form indictment remains a viable homicide-charging instrument, and I raise no arguments here against its continuing vitality. My concerns, rather, are focused on the specific problems endemic to charging an accused with felony murder, a unique offense complicated by the fact that it requires proof of one crime in order to establish proof of another.

The verdict sheet in this case reveals that defendant was convicted of first-degree murder, and though the jury had the option of premising its verdict on the basis of premeditation and deliberation, it declined to do so. Instead, its verdict was based on the fact that the killing was committed "in the perpetration of a felony," and that the felony committed was "attempted rape." Thus, this case proceeded to this Court on appeal from the jury's verdict finding defendant guilty of what is commonly referred to as felony murder and the imposition of a death sentence.

When a defendant faces a murder charge premised on a killing that occurs during the commission of a violent felony, *see* N.C.G.S. § 14-17 (2003), the prosecution must prove at trial two things: (1) that defendant's participation in the underlying crime satisfies the statutory or common law elements of the offense, and (2) that the victim died during the commission of, or as a consequence of, the underlying crime.

Of course, self-evident circumstances tend to demonstrate the second requirement; there would be no capital murder charge to begin with if someone had not died during the commission of, or as a consequence of, the violent felony at issue. For example, the facts of this case amply show that the victim died a tragically violent death in the weight room of her apartment complex. The relevant question at trial, therefore, was whether defendant's actions led to her death and, if so, did such actions constitute the commission of a violent crime that qualifies as an underlying felony for purposes of felony murder. In essence, prosecutions in felony murder cases boil down to proving that defendant committed the underlying crime. The practical effect

of such proof—as found by a jury by the standard of beyond a reasonable doubt—translates into the following: defendant committed the underlying crime and a death ensued; therefore, defendant committed felony murder. Put another way, the outcome of a felony murder trial, when stripped to its core, hinges on whether or not defendant committed the underlying offense. If the jury determines he did not (commit the underlying crime), it simultaneously exonerates him of the felony murder charge.

In my view, if a defendant's conviction for felony murder hinges on proving whether or not he committed the underlying offense, then constitutional notice requirements demand that he be afforded notice of the crime he must defend against. *See Hodgson v. Vermont*, 168 U.S. 262, 269, 42 L. Ed. 461, 463 (1897) (holding that "in all criminal prosecutions the accused must be informed of the nature and cause of the accusation against him; that in no case can there be, in criminal proceedings, due process of law where the accused is not thus informed, and that the information which he is to receive is that which will acquaint him with the essential particulars of the offence, so that he may appear in court prepared to meet every feature of the accusation against him"); *see also* N.C. Const. Art. I, § 23 ("In all criminal prosecutions, every person charged with crime has the right to be informed of the accusation . . . ."); N.C.G.S. § 15A-924(a)(5) (2003) (criminal pleadings must contain a "plain and concise factual statement . . . with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation"). Thus, if the State pursues a felony murder charge against a defendant, it would appear that the State is obligated to somehow inform the defendant of the specific underlying felony it aims to prove at trial. The practical implications of this specific information go to the heart of a defendant's ability to prepare for trial and to defend himself through examination of witnesses, the production of evidence, and argument to the jury.

The majority first concludes that the indictment at issue was sufficient, relying on our prior holdings dealing with short-form indictments. The majority then explains that case law has also established that the State need not choose between "theories" of its case prior to trial. In its view, defendant was properly denied his request for the State to identify the crime he would defend against at trial because the State is not required to reveal its "theory" of the case before trial. Thus, according to the majority, the State's "theory" translates into the identity of the actual crime alleged. In my view,

the State's "theory" of a case—the whats, hows, and whys of a criminal offense—is not synonymous with identifying the particular offense alleged. The two are separate and distinct entities. If, as the majority asserts, the State's "theory" of the case is indeed commensurate with identifying the specific crime at issue, and the State is not required to reveal its "theory" pre-trial, how could an indictment requirement exist for any crime?

This Court has yet to address directly the issue of what constitutes adequate notice of the underlying felony charge as it relates to a felony murder prosecution. One obvious solution would be to require the State to secure a separate indictment for the underlying offense. However, a review of felony murder cases over the past thirty years reveals that few such prosecutions have included such separate indictments. Although this Court at one point suggested, without elaboration, that separate indictments were unnecessary, *see State v. Carey*, 288 N.C. 254, 274, 218 S.E.2d 387, 400 (1975) ("[i]t seems to us that the better practice . . . would be that the solicitor should not secure a separate indictment for the felony"), *death sentence vacated*, 428 U.S. 904, 49 L. Ed. 2d 1209 (1976), I note that it did so amid dicta surrounding the issue of arresting judgments, *id.* The Court in *Carey* did not address the separate indictment issue in the context of providing notice to the defendant of the charges against him, nor did it include any explanation as to why it felt a single indictment—for felony murder—was "the better practice."

I note that the Court in *Carey*, when considering the issue of separate indictments, may not have concerned itself with notice requirements since existing law at the time had affirmatively declared that a felony-murder defendant who desires more definite information concerning the underlying crime "ha[s] the right to request a bill of particulars." *State v. Crawford*, 260 N.C. 548, 556, 133 S.E.2d 232, 238 (1963) (quoting *State v. Mays*, 225 N.C. 486, 489, 35 S.E.2d 494, 496 (1945)). However, the problem then, as now, is that when a felony-murder defendant moves for a bill of particulars concerning the alleged underlying crime, his motion is subject to the discretion of the trial judge, *see State v. Covington*, 290 N.C. 313, 343, 226 S.E.2d 629, 649 (1976), and is not subject to review except for palpable and gross abuse of discretion, *State v. Swift*, 290 N.C. 383, 391, 226 S.E.2d 652, 660 (1976); *see also State v. Williams*, 355 N.C. 501, 542, 565 S.E.2d 609, 633 (holding that a " 'denial of a defendant's motion for a bill of particulars will be held error only when it clearly appears to the appellate court that the lack of timely access to the requested

information significantly impaired defendant's preparation and conduct of his case' "), (quoting *State v. Easterling*, 300 N.C. 594, 601, 268 S.E.2d 800, 805 (1980)), *cert. denied*, *Williams v. North Carolina*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003). Therefore, a felony-murder defendant's "right" is limited to *requesting* more definite information, not to receive it. A review of case law in the wake of *Crawford* yields no case in which a felony-murder defendant successfully petitioned the trial court for a bill of particulars that would identify the underlying felony he was accused of committing. As a consequence, any such "right" to a bill of particulars reveals itself as a paper tiger, a toothless guarantee.

I note that the felony-murder defendant in *Crawford* did not move the trial court for a bill of particulars concerning the details or identity of the underlying crime, prompting the Court to advise him thusly: " 'If the defendant desired more definite information he had the right to request a bill of particulars, *in the absence of which he has no cause to complain.*' " 260 N.C. at 556, 133 S.E.2d at 238 (emphasis added) (quoting *Mays*, 225 N.C. at 489, 35 S.E.2d at 496). The implication of the holding, and any inference reasonably drawn therefrom, certainly suggest, if not establish, that had the defendant moved for a bill of particulars, he would have cause to complain. Yet in the instant case, where defendant did in fact petition for such a bill of particulars, the majority concludes he, too, is without cause to complain. If a defendant is deemed without complaint for failing to move for a bill of particulars, and he is deemed without complaint when he moves for a bill of particulars but does not receive the information he has requested, when precisely will a felony-murder defendant be positioned to complain (that he cannot mount a credible defense against a crime that may not even be identified until the trial's end)?

Matters pertaining to the scope and procedure of a bill of particulars are outlined in N.C.G.S. § 15A-925. The first three subsections are particularly relevant to the instant case and read as follows:

> (a) Upon motion of a defendant . . ., the court in which a charge is pending may order the State to file a bill of particulars with the court and to serve a copy on defendant.
>
> (b) A motion for a bill of particulars must request and specify items of factual information desired by the defendant which pertain to the charge and which are not recited in the pleading, and

must allege that the defendant cannot adequately prepare or conduct his defense without such information.

(c) If any or all of the items of information requested are necessary to enable the defendant adequately to prepare or conduct his defense, the court must order the State to file and serve a bill of particulars. Nothing contained in this section authorizes an order for a bill of particulars which requires the State to recite matters of evidence.

N.C.G.S. § 15A-925 (2003). A breakdown of the statute's key provisions is as follows: (1) defendant needs to specify the desired information pertaining to the charge that is not included in the pleading (indictment); (2) he needs to allege that he cannot prepare his defense without such information; and, when he does so, (3) the trial court *must* order the State to provide a bill of particulars if defendant shows they are necessary to prepare his defense. In the context of a felony murder charge, what could be more necessary to enable a defendant to prepare his defense than to be informed of the actual charge he must defend against? Again, I emphasize that a conviction for felony murder is tantamount to proving, beyond a reasonable doubt, that defendant committed the underlying felony.

In addition, I note that whether spelled out in an indictment or not, the underlying felony is treated as a distinct criminal offense. If a defendant is convicted of felony murder, he is also "convicted" of the underlying felony. In the instant case, an examination of the issue and judgment sheets reveals that defendant was convicted of two crimes—felony murder *and* the underlying felony of attempted rape. The case is far from unique; its verdict emulates those of all other felony murder prosecutions that resulted in convictions. Thus, despite the aforementioned notice protections accorded suspects in our state's Constitution and statutes, a criminal defendant can be, and frequently has been, convicted of an offense for which he has not been indicted, and that has not even been identified until his trial is over.

The particular circumstances of the instant case, in which defendant was on trial for his life, vividly demonstrate the logistical problems associated with notice in felony murder prosecutions. After being indicted by short form for felony murder, defendant filed a pretrial motion with the trial court for a bill of particulars concerning details of what the State intended to prove at trial. At a hearing addressing the motion, defendant requested that the State be com-

pelled to provide two pieces of information germane to the discussion at issue: (1) whether the State planned to proceed on the theory of first-degree murder premised on premeditation and deliberation or felony murder; and (2) if premised on felony murder, what would be the underlying felony the State intended to prove at trial.

After properly denying defendant's request for information concerning whether the State intended to choose between theories of premeditation and deliberation or felony murder, *see State v. Avery*, 315 N.C. 1, 13-14, 337 S.E.2d 786, 793 (1985) (holding that the state's Constitution does not require a murder indictment to specifically allege premeditation and deliberation or felony murder), the following discussion took place concerning defendant's request for specifying the underlying felony:

> MS. SPURLIN (Assistant District Attorney): Your Honor, I would say to the Court, the [S]tate intends to proceed not only on first-degree murder with premeditation and deliberation, but also first-degree murder under the felony murder rule, and we'll be asking the Court, *at the end of all the evidence*, to submit all of those felonies which the [S]tate has provided sufficient evidence to go as to the basis of the felony murder rule. And again[,] *that decision will be made at the end of all of the evidence.*
>
> MR. GASKINS (Defense Counsel): [W]hile I recognize that the [S]tate contends that it is proceeding on the felony murder rule, the defendant contends, based on lots of factors, including the material revealed in discovery, that there are no controls and that if the [S]tate just would like to just kind of say, let's throw it all out there, see how it all comes out in the wash, I don't think we're permitted to do that . . . .
>
> . . . I think if the [S]tate has evidence of felonies, of underlying felonies, then we're required to know specifically what those are.
>
> . . . .
>
> MS. SPURLIN: Again, the defendant has all the discovery. We may have a difference of opinion as to whether or not this is a case that will go to the jury for felony murder. . . . I'm simply saying to the Court we believe the evidence will support those. We are not required to state those prior to trial.
>
> I don't know that we're in a position to be able to state that to this Court. Again, the issue is what, *at the end of all of the evi-*

dence, has been supported by the evidence to be presented to the jury. It's not required and again I don't believe the [S]tate's in a position to be able to do that.

THE COURT: Well, what is ultimately going to go to the jury is going to be decided by me after I have heard all of the evidence.

(Emphasis added). In the aftermath of this discussion, the trial court informed defense counsel thusly: "Mr. Gaskins, unfortunately, from what I've heard since you made that motion, I don't know that they know what the underlying felony is going to be other than there are two possibilities—one, robbery, a theory no one believes in law enforcement or the girlfriend, and the other has to be sex. Other than that, I don't know of any theory." The trial court then proceeded to deny defendant's motion for a bill of particulars concerning the particular underlying felony defendant was alleged to have committed.

Thus, to that point, amid pre-trial proceedings, the trial court informed defendant that: (1) the State did not know which underlying felony it would attempt to prove; (2) the State was not required to allege before trial which underlying felony it would attempt to prove; and (3) defendant was not entitled to know which particular felony or felonies he would be defending against at trial.

Then, at the *close* of all the evidence presented at trial, the trial court weighed whether or not the State provided ample evidence to warrant a jury instruction for the following underlying felonies: (1) robbery, (2) kidnapping, and (3) attempted rape. The trial court dismissed the robbery allegation out of hand and then heard arguments regarding kidnapping and attempted rape. After deliberating through a lunch recess, the trial court returned and, without elaboration, announced it would instruct the jury on felony murder, with attempted rape being the underlying felony.

Thus, at some point after the close of all the evidence presented at trial, defendant was notified of the specific crime he was expected to defend against. Of course, at that juncture, the information was of no use; the evidentiary portion of the trial was over. Defendant, facing the prospect of a death sentence, had defended the entire evidentiary portion of his trial without the benefit of knowing the specific crime the State intended to submit for the jury's consideration. To make matters worse, the trial judge's pre-trial prediction as to what

the underlying crime may be—"robbery" or "sex"—provided little useful guidance and, in fact, proved partially erroneous. In addition to the two crimes suggested by the trial court during pre-trial proceedings, a third crime—"kidnapping"—emerged as a potential underlying felony at trial, and in fact was offered as such at the close of evidence by the State. As a consequence, defendant proceeded through trial attempting to defend the charges against him unaware of whether the facts and circumstances of his case would lead to proving attempted rape, kidnapping, robbery (and/or even perhaps attempted robbery, which was also proposed and discussed by the State's counsel). The very idea that the State can allege unspecified criminal activity, present factual evidence, and then seek to define the specific crime in the aftermath of such evidence is, in fact, contrary to our well-established principles of criminal justice, a hallmark of which is the constitutional guarantee that a criminal defendant be given notice of the crime that he must defend against.

My research yields no other example of a criminal defendant who faces the prospect of trial without prior knowledge of the specific crime he is alleged to have committed and must defend against. In fact, there are scores, if not hundreds, of cases that conclude that a criminal defendant must be so informed. *See, e.g., State v. Nugent*, 243 N.C. 100, 101, 89 S.E.2d 781, 783 (1955) (holding that the constitutional right of a defendant to be informed of the accusation against him requires that the indictment or warrant set out the offense with sufficient certainty to identify it and enable defendant to prepare for trial). *See also State v. Lorenzo*, 147 N.C. App. 728, 734, 556 S.E.2d 625, 629 (2001); *State v. Burroughs*, 147 N.C. App. 693, 695-96, 556 S.E.2d 339, 342 (2001).

If, as the majority asserts, the procedural circumstances of the instant case allow the State to proceed against a felony-murder defendant without identifying the crime he is expected to defend against, would not such a holding run counter to this Court's long history of rejecting criminal charging vehicles that fail to identify the specific criminal offense at issue? Our case books are replete with cases in which indictments and other notice-providing documents have been deemed fatally defective for far lesser reasons than the failure to identify the crime. *See, e.g., State v. Smith*, 267 N.C. 755, 756, 148 S.E.2d 844, 844-45 (1966) (holding that an indictment charging that defendant broke and entered "a certain building occupied by one Chatham County Board of Education, a Government corporation" was fatally defective in failing to identify the premises with suf-

ficient certainty); *State v. Price*, 265 N.C. 703, 704-05, 144 S.E.2d 865, 866-67 (1965) (holding that an indictment that does not incorporate the word "feloniously" or charge that the offense is a felony cannot support a conviction of an offense greater than a misdemeanor); *State v. Overman*, 257 N.C. 464, 468, 125 S.E.2d 920, 924 (1962) (holding that where the indictment charged the name of the injured as "Frank E. Nutley" while the proof at trial showed the injured was "Frank E. Hatley," there was a material variance warranting a nonsuit); and *State v. Finch*, 218 N.C. 511, 511-12 11 S.E.2d 547, 547-48 (1940) (holding that where the name of one of the defendants did not appear in the indictment, it was fatally defective as to him, *notwithstanding that his name appeared on the envelope, that his name was placed on the court dockets prepared for the judge and counsel, and that he was fully informed of the charge against him*).

Thus, while this Court has held that an indictment—either by itself or in tandem with other notice-providing instruments, such as a bill of particulars—may prove insufficient for failing to reference *details* of a particular crime, such as an individual element of the offense, the precise location of an offense, or even whether the alleged offense constituted a felony, the majority here concludes that such instruments will not be deemed deficient if they fail to identity the crime itself. Such a conclusion, in my view, not only defies logic; it is without support under the law. As a consequence, I cannot offer my support to the majority's conclusion.

In the instant case, defendant faced a first-degree murder conviction, and a possible death sentence, if the jury determined that the victim was killed during defendant's commission of a violent felony. The indictment did not specify the underlying felony, and when defendant sought a bill of particulars in order to identify the felony, the State argued it did not have to provide such information and contended that any qualifying felony would eventually emerge from the evidence presented at trial. The trial judge denied defendant's motion and explained to defendant that in all likelihood, he could expect to defend against only two possible offenses—robbery or sex. Then, *after the close of all evidence*, the State proffered as many as four possible underlying felonies, with the trial judge ultimately choosing one—attempted rape—as the basis for the felony murder charge. As a consequence of the foregoing chronology, defendant learned of the crime he would have to defend against at a time when he could no longer plan or mount any defense against it. Such procedure flies in the face of any rational interpretation of our state's constitutional

mandates, which guarantee a criminal defendant the right to pre-trial notice of the crime he is alleged to have committed, and the crime he must prepare to defend against.

In my view, the trial court's failure to ensure that defendant was informed of the crime he would defend against at trial amounted to prejudicial error. As a result, I respectfully dissent from those portions of the majority opinion that address defendant's pre-trial motion for the State to identify the specific underlying felony it intended to prove at trial.

W. BRUCE HOWERTON, JR., DDS v. ARAI HELMET, LTD., A JAPANESE CORPORATION; ARAI HELMET, LTD., A NEW JERSEY CORPORATION; AND TOM BRISSEY

No. 383PA03

(Filed 25 June 2004)

1. Evidence—expert scientific testimony—*Daubert* approach rejected

The Court of Appeals erred in a products liability case by affirming the trial court's grant of summary judgment in favor of defendant on the issue of causation based on its conclusion that plaintiff's expert scientific testimony was excluded by the federal *Daubert* standard, because: (1) North Carolina law governing the admissibility of expert testimony under N.C.G.S. § 8C-1, Rule 702 is distinct from that adopted by the federal courts when application of the North Carolina approach is less mechanistic and rigorous than the exacting standards of reliability demanded by the federal approach; (2) our Supreme Court is unwilling to impose upon our trial courts an obligation to expend the human resources required to delve into complex scientific and technical issues at the level of understanding necessary to generate with any meaningfulness the conclusions required under *Daubert*; and (3) our Supreme Court is concerned that trial courts asserting sweeping pretrial gatekeeping authority under *Daubert* may unnecessarily encroach upon the constitutionally-mandated function of the jury to decide issues of fact and to assess the weight of the evidence.

2. Unfair Trade Practices—dissemination of false and misleading information—summary judgment

The Court of Appeals erred in a products liability case by affirming the trial court's grant of summary judgment in favor of defendant on plaintiff's unfair and deceptive practices claim under N.C.G.S. § 75-1.1 based on alleged intentional dissemination of false and misleading information concerning the safety of a motorcycle helmet, because: (1) the record revealed a genuine issue of material fact as to plaintiff's reliance on defendant's alleged misrepresentations; and (2) although defendant presented some evidence calling into question plaintiff's reliance on the advertisements at issue, it is not the function of our courts to weigh conflicting evidence of record and is instead an issue preserved for the jury.

3. Products Liability—safer, feasible design alternative—summary judgment

The Court of Appeals erred by affirming the trial court's grant of summary judgment in favor of defendant on plaintiff's claim that defendant unreasonably failed to adopt a safer, feasible design alternative as required under N.C.G.S. § 99B-6, because: (1) the Court of Appeals could not first exclude plaintiff's expert testimony as unreliable and then subsequently embrace the merits of the very same evidence in support of alternative grounds for summary judgment favoring defendant; (2) even if the Court of Appeals appropriately considered the published report of one of plaintiff's experts, there was nevertheless a legitimate conflict of evidence raised by the expert's deposition testimony that created a genuine issue of material fact precluding summary judgment under N.C.G.S. § 1A-1, Rule 56; and (3) review of whether defendant failed to adopt a safer, feasible design alternative is enmeshed with, if not altogether dependent on, the opinions of plaintiff's experts that were excluded on an improper basis.

Justice PARKER concurring in part and dissenting in part.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 158 N.C. App. 316, 581 S.E.2d 816 (2003), affirming an order for summary judgment entered 1

March 2002 by Judge Wade Barber in Superior Court, Orange County. Heard in the Supreme Court 17 February 2004.

Womble Carlyle Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr., Richard T. Rice, and Alison R. Bost, for plaintiff-appellant.

Ellis & Winters LLP, by Richard W. Ellis, Matthew W. Sawchak, and Andrew S. Chamberlin; and Wilson Elser Moskowitz Edelman & Dicker, by James C. Ughetta, pro hac vice, for defendants-appellees.

Jeff Hunt on behalf of the North Carolina Conference for District Attorneys, amicus curiae.

Twiggs, Beskind, Strickland & Rabenau, P.A., by Howard F. Twiggs, Donald H. Beskind, and Jerome P. Trehy, Jr.; and Robert P. Mosteller, on behalf of the North Carolina Academy of Trial Lawyers, amicus curiae.

Nelson Mullins Riley & Scarborough, L.L.P., by George Major Teague; Robinson, Bradshaw & Hinson, P.A., by John Robbins Wester and Scott William Gaylord; and Bailey & Dixon, L.L.P., by Gary S. Parsons, on behalf of the North Carolina Citizens for Business and Industry and the North Carolina Association of Defense Attorneys, amici curiae.

Smith Moore LLP, by J. Donald Cowan, Jr., and Dixie Wells, on behalf of the Product Liability Advisory Council, Inc., amicus curiae.

WAINWRIGHT, Justice.

On 5 October 1996, plaintiff, W. Bruce Howerton, Jr., D.D.S. ("Howerton"), suffered a devastating motorcycle accident while riding his off-road motorcycle at a motocross practice track in western North Carolina. Howerton was an experienced off-road motorcycle enthusiast who had been riding motorcycles since he was a child. He had owned numerous motorcycles throughout his life and was knowledgeable in the technical aspects of motorcycles and motorcycle equipment.

The motocross track on which Howerton rode the day of the accident was a winding dirt course with numerous jumps and obstacles. Howerton wore typical motocross safety gear, including riding boots, knee braces, gloves, and an Arai "MX/a" motorcycle helmet. While jumping a course obstacle known as a "table top," Howerton landed

atop another motorcycle rider who had entered the landing area of the jump perpendicular to Howerton's line of travel. The two motorcycles became entangled on impact, causing Howerton's motorcycle to stop abruptly and launching Howerton into an airborne somersault over the handlebars of his motorcycle. Howerton landed upside down on the back of his helmeted head, breaking the chin guard attached to his helmet and forcing his chin downward into his chest. As he landed, Howerton experienced what he described as severe popping, crunching, and pain in his neck. Lying in the dirt, Howerton struggled to breathe and was unable to move his legs; he immediately recognized the severity of his injuries. Paramedics were summoned and Howerton was transported to the hospital by helicopter. As a result of his accident, Howerton sustained debilitating cervical vertebral fractures at the C5/C6 level that left him a quadriplegic, permanently paralyzed from the neck down.

On 4 October 1999, Howerton brought actions against the other motorcycle rider, the owners of the motocross track, and Arai Helmet, Ltd.,[1] the manufacturer of the motorcycle helmet Howerton was wearing when the accident occurred. Our review of this matter concerns only Howerton's claims against Arai.

Howerton's products liability claims against Arai set forth various theories of negligence and breach of implied and express warranties. Howerton alleged, among other things, that Arai negligently designed, manufactured, and promoted a helmet that was unreasonably dangerous under ordinary usage and that such negligence was the direct and proximate cause of his quadriplegia. Howerton further claimed that Arai breached both express and implied warranties by manufacturing a defective helmet and by failing to provide adequate warnings of its dangerous condition. On 13 August 2001, Howerton amended his complaint to include a claim that Arai intentionally engaged in a campaign to deceptively advertise and market the allegedly defective helmet, thereby engaging in an unfair and deceptive trade practice in violation of N.C.G.S. § 75-1.1.

The Arai "MX/a" helmet worn by Howerton on the day of his accident was equipped with a flexible, removable guard across the chin and mouth that was secured to the helmet on each side by nylon screws. By comparison, many other helmets are designed with a

1. As indicated by the pleadings, Arai Helmet, Ltd. technically consists of Arai Helmet (Japan) Limited, a Japanese corporation that manufactures motorcycle helmets, and Arai Helmet (Americas) Limited, a New Jersey corporation that markets the helmets. Collectively, we refer to these multiple Arai defendants as "Arai."

rigid, integral chin bar that is structurally molded into the helmet. In addition to protecting the motorcyclist's mouth and nose area from debris, some of these rigid guards are purportedly designed to increase the strength and stability of the motorcyclist's neck upon impact by preventing the neck from rotating too far forward. Such a chin guard limits the forward rotation of the head by stopping against the motorcyclist's chest, protecting the head and neck from extreme forward rotation.

The purpose of the guard on the specific Arai "MX/a" helmet worn by Howerton on the day of his accident is subject to conflicting characterizations which lie at the heart of this litigation. Howerton complains that the chin guard on his Arai helmet should have restricted the movement of his neck like a rigid chin guard and cushioned his head on impact so as to prevent the catastrophic spinal injury which he suffered. Howerton alleges that when the nylon screws securing the chin guard to his helmet broke on impact, his head was allowed to rotate too far forward, beyond its normal anatomical range, resulting in a "hyperflexion" of his neck which caused the resulting cervical fractures and paralysis. Howerton additionally claims that Arai's advertising and marketing led him to believe that the helmet provided superior neck protection, when in fact it did not, and that Arai failed to warn him that its chin guard would neither withstand nor protect against the physical forces Howerton experienced in his motorcycle accident.

According to Arai, however, "[t]he intended function of the mouth guard on the MX/a helmet is to prevent pebbles, dirt and small branches from contacting that part of the rider's face behind the mouth guard while riding off-road or in wooded areas." Arai insists that its breakaway rock guard was never designed "to function as an integral part of a full face helmet and was never intended to offer the same degree of facial protection . . . in the full range of possible motorcycle accidents." Rather, Arai contends that the chin guard on its helmet was intentionally designed to bend or break away on impact so as to minimize excessive and dangerous torquing of the neck.

To prove the alleged defectiveness of his Arai helmet and its causal connection to his injuries, Howerton offered the opinion testimony of four key expert witnesses:

(1) Professor Hugh H. Hurt, Jr. is an expert in motorcycle accidents and motorcycle helmets. Professor Hurt is President of the

Head Protection Research Laboratory of Southern California and Professor Emeritus of Safety Science at the University of Southern California. Professor Hurt has researched and published extensively in the field of motorcycle accidents and motorcycle helmet safety for more than twenty-five years. Based upon Professor Hurt's extensive credentials, Arai stipulated that he is qualified as an expert pursuant to North Carolina Rule of Evidence 702. Professor Hurt's opinion was that the flexible chin guard on Howerton's Arai helmet was defectively designed and manufactured such that it broke loose on impact and failed to limit the forward rotation of Howerton's head. Instead of stopping the chin against the sternum, as a rigid chin guard would do, Professor Hurt opined that the flexible chin guard on Howerton's Arai helmet broke on impact, allowing Howerton's neck to flex towards the chest, beyond its normal range of movement. Finding the chin guard on the Arai helmet to be "flexible and weak," Professor Hurt was further of the opinion that the Arai helmet's apparent similarity to other motorcycle helmets with structurally rigid chin guards created a "misleading and dangerous" "illusion of protection."

(2) William C. Hutton, D.Sc. is an expert in biomechanics and orthopaedic biomechanics. Dr. Hutton is Professor and Director of Orthopaedic Research at Emory University School of Medicine. He is widely published and has over thirty-five years of experience in the fields of biomechanics, orthopedic research, and spinal injuries. Dr. Hutton's opinion was that the flexible chin guard on Howerton's Arai helmet broke and allowed Howerton's head and neck to travel beyond their normal range of motion, causing the hyperflexion and compression that resulted in Howerton's paralysis.

(3) James Randolph Hooper is an expert in the design and manufacture of composite materials such as those found in motorcycle helmets. Hooper worked as a design engineer on the development of other full-face, off-road motorcycle helmets and is personally experienced with off-road motorcycles and motorcycle accidents. Hooper's opinion was that the flexible chin guard on Howerton's Arai helmet offered no protection on impact and, in fact, created a considerable hazard due to its flexible nature. Hooper further opined that the chin guard on Howerton's Arai helmet was known to detach on impact and lacked the protective features typical of helmets with rigid chin guards.

(4) Charles Edward Rawlings, III, M.D. is a board certified neurosurgeon. With more than ten years of neurosurgical experience, Dr.

Rawlings has conducted numerous spinal surgeries on patients with cervical fractures similar to the one sustained by Howerton. Although Dr. Rawlings was not Howerton's treating neurosurgeon, Dr. Rawlings reviewed Howerton's medical records and opined that Howerton suffered a flexion-compression injury that was the cause of his paralysis.

On 7 January 2002, Arai filed its "Omnibus Motion for Summary Judgment on All Claims and Motion to Exclude Testimony of Plaintiff's Experts on the Issue of Causation." In this motion, Arai argued that:

> Plaintiff must prove that his injuries were caused by the product at issue. In this complex product liability case, Plaintiff cannot meet this burden absent admissible expert testimony on the issue of causation. Four of Plaintiff's experts, Dr. Charles Rawlings, Dr. William Hutton, Mr. Hugh H. Hurt and Mr. Randolph Hooper, have attempted to offer expert opinion testimony supporting Plaintiff's case on this issue [of causation]. None of these experts have performed testing relevant to the causation issues in this case. None have undertaken independent research to support their hypotheses or subjected their hypotheses to peer-review via publication. Each has relied on inadequate or non-existent data that renders their opinions subject to an unreasonably high rate of error. Finally, none of these expert[s] have been able to demonstrate that their opinions are generally accepted within their own fields. In fact, many of the opinions expressed by these experts are contrary to the existing body of medical or biomechanical research. In some cases, the opinions expressed by these experts are in conflict with one another, or in conflict with their own previously published opinions. Accordingly, the Arai Defendants move that the opinions of Plaintiff's experts be held inadmissible at trial pursuant to Rule 104 and Rule 702 of the North Carolina Rules of Evidence and the related authorities of the North Carolina courts and United States Supreme Court. Further, that the Court award the Arai Defendants summary judgment on all claims based on the inability of Plaintiff to offer admissible evidence of causation.

On 29 January 2002, the trial court conducted a brief hearing on the matter, considering arguments from counsel, discovery materials, and pleadings. The trial court did not, however, hear live voir dire testimony from the experts.

On 1 March 2002, the trial court granted Arai's motion to exclude the testimony of Howerton's experts on the issue of causation. With respect to each of Howerton's four experts, the trial court made the following findings of fact:

Professor Hugh H. Hurt, Jr.

16. Professor Hugh Hurt is a helmet expert from California. He opined that a full-face helmet equipped with an integrated chin bar would have prevented plaintiff's injury.

17. Professor Hurt's opinion was based on the assertion that he had noticed red "u" or "v" shaped marks on the chests of three motorcycle riders who were involved in motorcycle accidents while wearing full-face helmets. The necks of the three riders were not broken, however, two of these riders were killed in the accidents at issue. Professor Hurt deduced that these marks were caused by the rigid integrated chin bars on the riders' full-face helmets striking their chests during the accident, and concluded that this may have prevented a neck injury.

18. Professor Hurt explained the basis of his opinion that the marks on the chests of three riders proves that rigid chin bars prevent neck injuries as follows: "like Bo knows baseball, Hurt knows motorcycle accidents."

19. Professor Hurt could not quantify the extent to which a full-face helmet would prevent forward flexion of the head and neck.

20. Professor Hurt did not test or perform independent research on his hypothesis that full-face helmets equipped with rigid chin bars prevent neck injuries. He did not subject his hypothesis to peer review by publishing it to his peers.

21. Professor Hurt did not report his hypothesis to the United States government, for whom he conducted extensive studies that included work on motorcycle helmet safety.

22. Professor Hurt was not able to identify any published work by any author that expressly supported his hypothesis and, thus, did not present any evidence other than his unsupported assertions that his hypothesis is generally accepted in his field.

23. Indeed, Professor Hurt's published work did not support—and in fact tends to contradict—his hypothesis that full-

face helmets prevent neck injuries. In a University of Southern California report published in 1981, Professor Hurt published data indicating that serious neck injuries occurred more frequently in riders wearing full-face helmets than in riders wearing full coverage helmets (i.e., open-face helmets that were not equipped with chin bars.).

24. Professor Hurt also opined that the MX/a design provided superior head protection, and that open-face helmets, that is, helmets without chin bars, are not defective.

25. Professor Hurt's opinion that a full-face helmet would have prevented plaintiff's injury is speculative and based on inadequate data.

26. Professor Hurt's opinion that a full-face helmet would have prevented plaintiff's injury is not reliable. Professor Hurt's opinion was not developed through sound scientific or engineering methods. Professor Hurt has not performed relevant testing or independent research and has not subjected his hypothesis that full face helmets prevent neck injuries to peer-review by publishing that claim. Further, he was unable to demonstrate that his hypothesis is generally accepted in his field by pointing to any published support for his claim. Finally, to the extent that his methods represent a technique, it is clear that this technique is subject to an unacceptably high risk of error.

James Randolph Hooper

27. Mr. Randolph Hooper was proffered by plaintiff as an expert based on his role in the design and manufacture of a motorcycle helmet in the late 1970's and early 1980's. Like Professor Hurt, Mr. Hooper also opined that a full-face helmet with integrated chin bar would have prevented plaintiff's injury.

28. Mr. Hooper is not a medical doctor, an accident reconstructionist, an expert in biomechanics, or an engineer. He does not have a college degree.

29. When deposed, Mr. Hooper expressly conceded that he did not have the expertise to opine that a full-face helmet equipped [with] an integrated chin bar would have prevented plaintiff's injury.

30. Nevertheless, Mr. Hooper was willing to testify about his own history of motorcycle accidents involving full-face helmets

for the apparent purpose of supporting the inference that a full-face helmet would have prevented plaintiff's injury.

31. However, Mr. Hooper was admittedly unaware of the salient details of plaintiff's accident. In addition, he was unable to relate the specific details of his own accidents.

32. Mr. Hooper is not qualified to offer the opinion that a full-face helmet would have prevented plaintiff's injury in this case. His opinion that a full-face helmet would have prevented plaintiff'[s] injury was speculative and based on inadequate data. Further, Mr. Hooper did not have a reliable basis to offer any meaningful comparison between his own history of accidents and plaintiff's accident.

Dr. Charles Rawlings

33. Dr. Charles Rawlings is a neurosurgeon. Dr. Rawlings currently is attending law school and has not actively practiced neurosurgery on a full time basis since at least January of 2000.

34. Dr. Rawlings has never performed independent research or testing on the mechanisms of cervical fractures. He has never published any medical article on the mechanisms of cervical fracture. He has never published on hyperflexion neck injuries.

35. Dr. Rawlings opined that plaintiff suffered no injuries, including his paralysis, prior to the time his head rotated forward beyond the normal range of motion.

36. When deposed Dr. Rawlings admitted that the medical literature does identify a "hyperflexion" injury of the cervical spine. Dr. Rawlings conceded that the hallmark features of hyperflexion injuries include bilateral or unilateral locked facets. He further conceded that plaintiff's injury did not involve bilateral or unilateral locked facets.

37. Due to the absence of these features, Dr. Rawlings defined plaintiff's injury as a flexion-compression injury. Dr. Rawlings nevertheless opined that eighty percent of all compression-flexion injuries involve hyperflexion. However, Dr. Rawlings was unable to identify any published medical literature that supports this claim.

38. Dr. Rawlings never examined plaintiff and reviewed only a selected portion of his medical records. Although Dr. Rawlings

offered opinions based on efforts to compare plaintiff's accident to the accidents experienced by patients in his practice, he did not have adequate data to make such a comparison. To the extent that this represented a medical technique, if at all, it incorporated an unacceptably high potential for error.

39. Dr. Rawlings also opined based on plaintiff's radiology films that plaintiff's head rotated ten to twenty degrees beyond his normal anatomical range. However, he conceded that he has never published his claimed ability to draw such conclusions from radiology films. Nor could he cite any published authority supporting the conclusion that such an estimate can be accurately derived from medical records or radiology films. Dr. Rawlings further testified that a body of scientific literature may exist that addresses head rotation with respect to neck injury, but conceded that he had made no effort to research this literature.

40. Dr. Rawlings made no attempt to validate his hypothesis that plaintiff's head rotated ten to twenty degrees beyond his normal anatomical range. He could not point to any tests, measurements or literature supporting his opinion on this point.

41. Dr. Rawlings was unable to offer any medically reliable opinion on the extent to which plaintiff's head may have been rotated forward at impact. He conceded that unless the amount of force is known, it is impossible to distinguish one degree and forty-five degrees of flexion based on radiology films. Dr. Rawlings conceded that he did not know the amount of force involved in this accident. Dr. Rawlings acknowledged that he had no medical basis to opine about whether plaintiff's head was rotated forward in flexion five degrees or forty-five degrees at impact.

42. Even though he did not know the force involved in the accident and could not accurately identify the position of plaintiff's head at impact, Dr. Rawlings opined that plaintiff would not have been paralyzed but for his head rotating forward beyond the normal anatomical range of motion. He admitted, however, that there are no objective criteria that can be used to confirm this hypothesis. Nor could he point to any medical literature indicating that it is possible to state whether a particular patient would be paralyzed based on a given set of variables.

43. Dr. Rawlings opined that plaintiff experienced an anterior teardrop fracture of C5 and that this feature was indicative of a hyperflexion mechanism. This opinion was generally inconsistent with the testimony of the treating neurosurgeon who used the anterior face of C5 as a site to attach a metal plate to fuse plaintiff's vertebra and was in a superior position to judge its condition. Dr. Rawlings' claim that C5 was the only possible source of the bone fragment at issue is contrary to the report of the attending radiologist. In any event, the Arai defendants presented evidence that even if a teardrop fracture occurred, fractures of this type are not specific to hyperflexion injury mechanisms.

44. Dr. Rawlings' opinion that plaintiff's injury was caused by hyperflexion is speculative and based on inadequate data.

45. Dr. Rawlings' opinion that plaintiff's injury was caused by hyperflexion is not reliable. Dr. Rawlings' opinion was not based on sound scientific or medical methods. He has not performed independent research or testing on cervical injury mechanisms or on hyperflexion. He has never subjected his related hypotheses to peer-review by publication. Moreover, the hypotheses underlying Dr. Rawlings' opinion are not generally accepted. Finally, to the extent that his methods represent a technique, it is clear that his potential for error is inappropriately high.

Dr. William Hutton

46. Dr. William Hutton was proffered as an expert in the field of biomechanics. He is not a medical doctor.

47. Dr. Hutton opined, among other things, that at some point after the initiation of the fracture of plaintiff's neck, his head and neck moved forward beyond the normal range of motion. He further opined that this hyperflexion caused the bone fragments to be retropulsed further into the spinal canal.

48. Dr. Hutton conceded, however, that he has never researched, tested or published his hypothesis that the degree of retropulsion of bone fragments is a function of the degree of flexion or hyperflexion involved. He could cite no medical or scientific literature in support of this position. Dr. Hutton also conceded that retropulsion of bone fragments can occur in the absence of hyperflexion. Further, he acknowledged that plaintiff could have sustained some degree of retropulsion even if he had been wearing a full-face helmet. Finally, he conceded that he does

not know how much retropulsion the spinal cord can withstand before paralysis occurs.

49. Dr. Hutton admitted that he had never dealt with a cervical injury similar to that experienced by plaintiff.

50. Dr. Hutton admitted that he could not identify any literature that supported the conclusion that plaintiff would not have been paralyzed but for hyperflexion.

51. Dr. Hutton's opinion that plaintiff's injuries were caused by hyperflexion is speculative and based on inadequate data.

52. Dr. Hutton's opinion that plaintiff's injuries were caused by hyperflexion is not reliable. Dr. Hutton has not researched or tested the hypotheses that he relies on in support of his opinion. He has not subjected these hypotheses to peer-review by publication. Nor has he demonstrated that these hypotheses are generally accepted in the field. To the extent that his methods represent a technique, it is clear that they incorporate an unacceptably high rate of error.

Based upon these findings of fact, the trial court excluded the testimony of all of Howerton's causation experts, ruling in relevant part that:

1. North Carolina has adopted *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). *See State v. Goode*, 341 N.C. 513, 527, 461 S.E.2d 631, 639 (1995); *see also State v. Bates*, 140 N.C. App. 743, 748, 538 S.E.2d 597, 600 (2000).

2. Even before the issuance of the *Daubert* decision, North Carolina courts adopted "reliability" as the touchstone of admissibility for expert opinion testimony as demonstrated in *State v. Pennington*, 327 N.C. 89, 98, 393 S.E.2d 847, 852 (1990). The indicia of reliability identified by the North Carolina Supreme Court in *Pennington* are consistent with the indicia of reliability found in *Daubert*. The opinions expressed by plaintiff's experts fail under either analysis.

3. The inquiry of the Court is not limited to the qualifications of the experts. Implicit in Rule 702 of the North Carolina Rules of Evidence is the precondition that the matters or data upon which an expert bases his opinion be recognized in the scientific community as sufficiently reliable and relevant. *Davis*

v. City of Mebane, 132 N.C. App. 500, 503, 512 S.E.2d 450, 452 (1999), *rev. dismissed as improvidently granted*, 351 N.C. 329, 524 S.E.2d 569 (2000). The test of reliability involves a preliminary assessment of whether the reasoning or methods at issue are sufficiently valid. *Goode*, 341 N.C. at 527, 461 S.E.2d at 639 (citing *Daubert*).

4. The Court, in its discretion, has concluded that Professor Hurt's opinion that a full-face helmet design would have prevented plaintiff's injury is unreliable and inadmissible.

5. The Court, in its discretion, has concluded that Mr. Hooper is not qualified to offer the opinion that a full-face helmet would have prevented plaintiff's injury. The Court further concludes that his opinion on this issue is based on inadequate data and is otherwise unreliable and inadmissible.

6. The Court, in its discretion, has concluded that Dr. Rawlings' opinion that plaintiff's injuries were caused by hyperflexion is unreliable and inadmissible.

7. The Court, in its discretion, has concluded that Dr. Hutton's opinion that plaintiff's injuries were caused by hyperflexion is unreliable and inadmissible.

8. After reviewing all of the relevant materials submitted by the parties, and based on the preceding findings of fact and conclusions of law, the Court, in its discretion, concludes that the above-cited opinions of Professor Hurt, Mr. Hooper, Dr. Rawlings and Dr. Hutton, should be excluded from the trial of this matter.

With the testimony of each of his causation experts excluded on the basis of the federal standard set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993), Howerton was without any admissible evidence to establish a prima facie case that his injuries were caused by Arai's allegedly defective helmet. Thus, the trial court granted summary judgment in favor of Arai:

1. In its Order on Arai Defendants' Motion to Exclude the Testimony of Plaintiff's Experts, this Court, in its discretion, found that the opinion testimony of Dr. Charles Rawlings, Dr. William Hutton, Professor Hugh Hurt, and Mr. Randolph Hooper, offered on the issue of causation, is unreliable under the

> standards set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), and/or *State v. Pennington*, 327 N.C. 89, 393 S.E.2d 847 (1990). As a result, this Court found that the opinion testimony of the above witnesses is inadmissible. In the absence of reliable expert opinion testimony on the issue of causation, the Court finds that plaintiff has failed to offer evidence sufficient to raise a material issue of disputed fact as to the element of causation. On that basis, the Arai defendants are entitled to judgment as a matter of law on all claims, and accordingly their motion for summary judgment is hereby GRANTED.

Additionally, the trial court granted Arai's motion for summary judgment with respect to Howerton's claim of unfair and deceptive trade practices and granted Arai's motion for summary judgment with respect to Howerton's claim that Arai failed to adopt a safer, feasible design alternative as required under N.C.G.S. § 99B-6, which sets forth statutory guidelines for products liability claims based on inadequate design or formulation.

On 5 March 2002, Howerton gave Notice of Appeal to the North Carolina Court of Appeals, arguing, among other things, that: (1) the trial court erred in its reliance upon and application of *Daubert* to exclude the expert testimony advanced by Howerton; (2) the trial court erred by concluding that Howerton's unfair and deceptive trade practices claim failed as a matter of law; and (3) the trial court erred by concluding that Howerton presented insufficient evidence to establish a prima facie claim that Arai unreasonably failed to adopt a safer, feasible design alternative.

The North Carolina Court of Appeals rejected all of Howerton's assignments of error and affirmed the order of the trial court in its entirety. *Howerton v. Arai Helmet, Ltd.*, 158 N.C. App. 316, 581 S.E.2d 816 (2003). As to Howerton's expert witnesses, the Court of Appeals ruled that North Carolina has adopted *Daubert* as the proper test for judging the admissibility of scientific expert testimony. *Id.* at 332, 581 S.E.2d at 826. Notably, the Court of Appeals held that:

> From a thorough review of our case law, it is eminently clear that North Carolina has adopted the *Daubert* analysis. This is not novel. *Daubert* has been the prevailing law in this state since *Goode*. Three years ago, in *Bates*, this Court expressly held that our Supreme Court in *Goode* adopted *Daubert*.

Id. Applying an abuse of discretion standard of review, the Court of Appeals evaluated the causation testimony of each of Howerton's four experts under the basic *Daubert* criteria and held that the trial court's decision to exclude all such testimony was neither arbitrary nor an abuse of discretion. *Id.* at 332-37, 581 S.E.2d at 827-30.

As to Howerton's claim of unfair and deceptive trade practices, the Court of Appeals held that the trial court properly granted summary judgment in favor of Arai. *Id.* at 340, 581 S.E.2d at 831. The court found that, even if Arai had engaged in the allegedly unfair and deceptive advertising, Howerton failed to establish that he had relied on such advertising to his detriment or that such advertising was the proximate cause of his injuries. *Id.* at 338-40, 581 S.E.2d at 830-31.

Finally, with respect to Howerton's claim that Arai failed to adopt a safer, feasible design alternative, the Court of Appeals likewise affirmed the order of the trial court granting summary judgment in favor of Arai, concluding in a footnote to its opinion that the evidence forecasted by Howerton was insufficient to support a prima facie cause of action under N.C.G.S. § 99B-6. *Id.* at 337-38 n.13, 581 S.E.2d at 830 n.13.

On 21 August 2003, this Court allowed Howerton's petition for discretionary review. Among the issues raised by Howerton and which we now address are: (1) whether this Court has adopted the *Daubert* standard for determining the admissibility of expert testimony; (2) whether Howerton presented sufficient evidence to withstand summary judgment on his claim of unfair and deceptive practices; and (3) whether Howerton presented sufficient evidence to withstand summary judgment on his claim that Arai unreasonably failed to adopt a safer, feasible design alternative.

[1] This case initially presents us with the question of whether North Carolina has adopted the federal standard under *Daubert v. Merrell Dow Pharmaceuticals* for ruling on the admissibility of expert testimony under North Carolina Rule of Evidence 702. The Court of Appeals held that we have impliedly done so and Arai argues that we should now expressly do so. For the reasons stated below, we reject both of these contentions.

Our consideration of this issue begins with an overview of the cases that have come to define the federal approach to the admissibility of expert testimony under Federal Rule of Evidence 702. In *Daubert v. Merrell Dow Pharmaceuticals*, the United States Supreme

Court delineated the modern standard for admitting expert scientific testimony in federal trials. 509 U.S. 579, 125 L. Ed. 2d 469. For more than half a century prior to *Daubert*, however, federal courts relied upon the "general acceptance" test of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), as the exclusive standard for the admission of expert testimony in federal courts. Under *Frye*, scientific expert testimony was admissible only when based upon "sufficiently established" principles which had gained "general acceptance in the particular field in which it belongs." *Id.* at 1014.

In *Daubert* the Supreme Court held that *Frye* had been superseded by Congressional enactment of the Federal Rules of Evidence. 509 U.S. at 587-89, 125 L. Ed. 2d at 479-80. Characterizing the general acceptance standard as both "rigid" and "austere," the Court held that *Frye* was "at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion" testimony.' " *Id.* at 588-89, 125 L. Ed. 2d at 480. Thus, the Court held that the *Frye* standard was no longer applicable in federal trials. *Id.* at 589, 125 L. Ed. 2d at 480.

While rejecting the general acceptance requirement of *Frye*, the Supreme Court nevertheless recognized inherent "limits on the admissibility of purportedly scientific evidence" and imposed upon trial courts an obligation to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* This directive is what is commonly referred to as the trial court's "gatekeeping" function. *Id.* at 597, 125 L. Ed. 2d at 485.

Under *Daubert*, then, the trial court is instructed to preliminarily determine "whether the reasoning or methodology underlying the [expert] testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93, 125 L. Ed. 2d at 482. The focus of the trial court's inquiry in this regard "must be solely on principles and methodology, not on the conclusions that they generate." *Id.* at 595, 125 L. Ed. 2d at 484. In particular, the Supreme Court articulated five factors it considered important measures of scientific reliability: (1) Whether the scientific theory or technique upon which the expert's opinion is based "can be (and has been) tested." *Id.* at 593, 125 L. Ed. 2d at 483. (2) Whether the theory or technique employed by the expert "has been subjected to peer review and publication." *Id.* (3) The "known or potential rate of error" of the scientific technique. *Id.* at 594, 125 L. Ed. 2d at 483. (4) The "existence and maintenance of standards controlling the

technique's operation." *Id.* (5) Whether the theory or technique is generally accepted within its relevant scientific community. *Id.* The Court noted that use of these factors was to be "flexible." *Id.* at 594, 125 L. Ed. 2d at 483-84.

In the years since *Daubert*, the United States Supreme Court has continued to refine the "gatekeeping" role of federal trial courts when ruling on the admissibility of expert testimony under Federal Rule of Evidence 702. In *General Electric Co. v. Joiner*, 522 U.S. 136, 139 L. Ed. 2d 508 (1997), the Court identified abuse of discretion as the proper appellate standard by which to review a federal trial court's decision to admit or exclude scientific expert testimony. *Id.* at 146, 139 L. Ed. 2d at 519. The Court additionally suggested that under the *Daubert* analysis it is permissible for a federal trial court to exclude expert testimony that, even though methodologically sound, nonetheless reaches questionable conclusions:

> [C]onclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

Id.

In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 L. Ed. 2d 238 (1999), the Court extended the effect of *Daubert* to any type of specialized expert testimony proffered under Federal Rule of Evidence 702, not just expert testimony that is scientific in nature. *Id.* at 147-49, 143 L. Ed. 2d at 249-51. In a concurring opinion, it was additionally forecasted that "failure to apply one or another of [the *Daubert* factors] may be unreasonable, and hence an abuse of discretion." *Id.* at 159, 143 L. Ed. 2d at 256-57 (Scalia, O'Connor, & Thomas, JJ., concurring). And more recently, in *Weisgram v. Marley Co.*, 528 U.S. 440, 145 L. Ed. 2d 958 (2000), the Court held that an appellate court may not only reverse a trial court's decision to admit expert testimony under *Daubert*, but that it may, instead of remand, direct the entry of judgment as a matter of law when it determines that expert testimony was erroneously admitted at trial and that the remaining evidence is insufficient to support a prima facie case. *Id.* at 457, 145 L. Ed. 2d at 973.

In light of this background on the admissibility of expert testimony under the federal rules, we now turn to North Carolina's established standard for admitting expert testimony and the specific issue of whether North Carolina has implicitly adopted the federal *Daubert* standard.

North Carolina Rule of Evidence 702 reads, in pertinent part:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C.G.S. § 8C-1, Rule 702(a) (2003).

It is well-established that trial courts must decide preliminary questions concerning the qualifications of experts to testify or the admissibility of expert testimony. N.C.G.S. § 8C-1, Rule 104(a) (2003). When making such determinations, trial courts are not bound by the rules of evidence. *Id.* In this capacity, trial courts are afforded "wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). Given such latitude, it follows that a trial court's ruling on the qualifications of an expert or the admissibility of an expert's opinion will not be reversed on appeal absent a showing of abuse of discretion. *State v. Anderson*, 322 N.C. 22, 28, 366 S.E.2d 459, 463, *cert. denied*, 488 U.S. 975, 102 L. Ed. 2d 548 (1988); *Bullard*, 312 N.C. at 144, 322 S.E.2d at 378; *State v. Moore*, 245 N.C. 158, 164, 95 S.E.2d 548, 552 (1956) ("[T]his Court has uniformly held that the competency of a witness to testify as an expert is a question primarily addressed to the court, and his discretion is ordinarily conclusive, that is, unless there be no evidence to support the finding, or unless the judge abuse[s] his discretion.").

The most recent North Carolina case from this Court to comprehensively address the admissibility of expert testimony under Rule 702 is *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995), which set forth a three-step inquiry for evaluating the admissibility of expert testimony: (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? *Id.* at 527-29, 461 S.E.2d at 639-40. (2) Is the witness testifying at trial qualified as an expert in that area of testimony? *Id.* at 529, 461 S.E.2d at 640. (3) Is the expert's testimony relevant? *Id.* at 529, 461 S.E.2d at 641.

In the first step of the *Goode* analysis, the trial court must determine whether the expert's method of proof is sufficiently reliable as an area for expert testimony. *Id.* at 527-29, 461 S.E.2d at 639-40. As discussed in *Goode*, the requirement of reliability is nothing new to the law of scientific and technical evidence in North Carolina and, indeed, pre-dates the federal court's adoption of the *Daubert* standard. *See id.*; *see also State v. Pennington*, 327 N.C. 89, 98, 393 S.E.2d 847, 852 (1990) ("A new scientific method of proof is admissible at trial if the method is sufficiently reliable."); *Bullard*, 312 N.C. at 149-53, 322 S.E.2d at 381-84, (discussing factors relevant in determining whether scientific methods in their infancy are reliable); *State v. Crowder*, 285 N.C. 42, 53, 203 S.E.2d 38, 46 (1974) (expert testimony based on scientific tests "competent only when shown to be reliable"), *vacated in part on other grounds*, 428 U.S. 903, 49 L. Ed. 2d 1207 (1976).

Under *Goode*, to determine whether an expert's area of testimony is considered sufficiently reliable, "a court may look to testimony by an expert specifically relating to the reliability, may take judicial notice, or may use a combination of the two." 341 N.C. at 530, 461 S.E.2d at 641. Initially, the trial court should look to precedent for guidance in determining whether the theoretical or technical methodology underlying an expert's opinion is reliable. Although North Carolina does not exclusively adhere to the *Frye* "general acceptance" test, *Pennington*, 327 N.C. at 98, 393 S.E.2d at 852, when specific precedent justifies recognition of an established scientific theory or technique advanced by an expert, the trial court should favor its admissibility, provided the other requirements of admissibility are likewise satisfied. *See, e.g.*, *State v. Williams*, 355 N.C. 501, 553-54, 565 S.E.2d 609, 640 (2002) (recognizing the admissibility of DNA evidence and upholding its use as the basis of an opinion by a properly qualified expert in forensic DNA analysis), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003); *Goode*, 341 N.C. at 530-31, 461 S.E.2d at 641-42 (reliability of bloodstain pattern interpretation supported in part by prior appellate acceptance of such technique in North Carolina and other jurisdictions); *State v. Barnes*, 333 N.C. 666, 680, 430 S.E.2d 223, 231 (1993) (recognizing the long-established admissibility of the results of blood group testing for identification purposes), *cert. denied*, 510 U.S. 946, 126 L. Ed. 2d 336 (1993); *Pennington*, 327 N.C. at 100, 393 S.E.2d at 854 (finding persuasive authority in other jurisdictions' acceptance of DNA profiling); *State v. Rogers*, 233 N.C. 390, 397-98, 64 S.E.2d 572, 578 (1951) (recognizing that fingerprint evidence is an established and reliable method of

identification), *overruled on other grounds by State v. Silver*, 286 N.C. 709, 213 S.E.2d 247 (1975).

Conversely, there are those scientific theories and techniques that have been recognized by this Court as inherently unreliable and thus generally inadmissible as evidence. *See, e.g.*, *State v. Hall*, 330 N.C. 808, 820-21, 412 S.E.2d 883, 890 (1992) (concluding that "evidence that a prosecuting witness is suffering from post-traumatic stress syndrome should not be admitted for the substantive purpose of proving that a rape has in fact occurred" because of the unreliability of underlying psychiatric procedures used to diagnosis the condition); *State v. Peoples*, 311 N.C. 515, 533, 319 S.E.2d 177, 188 (1984) (holding that "hypnosis has not reached a level of scientific acceptance which justifies its use for courtroom purposes"); *State v. Grier*, 307 N.C. 628, 645, 300 S.E.2d 351, 361 (1983) (holding that polygraphs are inadmissible in any trial, even if otherwise stipulated to by the parties).

Where, however, the trial court is without precedential guidance or faced with novel scientific theories, unestablished techniques, or compelling new perspectives on otherwise settled theories or techniques, a different approach is required. Here, the trial court should generally focus on the following nonexclusive "indices of reliability" to determine whether the expert's proffered scientific or technical method of proof is sufficiently reliable: "the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked 'to sacrifice its independence by accepting [the] scientific hypotheses on faith,' and independent research conducted by the expert." *Pennington*, 327 N.C. at 98, 393 S.E.2d at 852-53 (quoting *Bullard*, 312 N.C. at 150-51, 322 S.E.2d at 382), *quoted in Goode*, 341 N.C. at 528, 461 S.E.2d at 640.

Within this general framework, reliability is thus a preliminary, foundational inquiry into the basic methodological adequacy of an area of expert testimony. This assessment does not, however, go so far as to require the expert's testimony to be proven conclusively reliable or indisputably valid before it can be admitted into evidence. In this regard, we emphasize the fundamental distinction between the admissibility of evidence and its weight, the latter of which is a matter traditionally reserved for the jury. *Queen City Coach Co. v. Lee*, 218 N.C. 320, 323, 11 S.E.2d 341, 343 (1940) ("The competency, admissibility, and sufficiency of the evidence is a matter for the court to determine. The credibility, probative force, and weight is a matter for

the jury. This principle is so well settled we do not think it necessary to cite authorities.").

Therefore, once the trial court makes a preliminary determination that the scientific or technical area underlying a qualified expert's opinion is sufficiently reliable (and, of course, relevant), any lingering questions or controversy concerning the quality of the expert's conclusions go to the weight of the testimony rather than its admissibility. *See, e.g., Barnes*, 333 N.C. at 680, 430 S.E.2d at 231 (holding that a forensic serologist's failure to conduct or provide for additional, independent testing of blood samples went to the weight of the evidence, not its admissibility); *McLean v. McLean*, 323 N.C. 543, 556, 374 S.E.2d 376, 384 (1988) (concluding that deficiencies in the expert's methodology were relevant in considering the expert's credibility and the weight to be given his testimony, but that they did not render his opinion inadmissible). Here, we agree with the United States Supreme Court that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596, 125 L. Ed. 2d at 484; *accord Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 244, 311 S.E.2d 559, 571 (1984) ("It is the function of cross-examination to expose any weaknesses in [expert] testimony . . . .").

In the second step of analysis under *Goode*, the trial court must determine whether the witness is qualified as an expert in the subject area about which that individual intends to testify. 341 N.C. at 529, 461 S.E.2d at 640. Under the North Carolina Rules of Evidence, a witness may qualify as an expert by reason of "knowledge, skill, experience, training, or education," where such qualification serves as the basis for the expert's proffered opinion. N.C.G.S. § 8C-1, Rule 702(a). As summarized in *Goode*,

> "It is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist, licensed, or even engaged in a specific profession." "It is enough that the expert witness 'because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.' "

341 N.C. at 529, 461 S.E.2d at 640 (citations omitted). "Whether a witness has the requisite skill to qualify as an expert in a given area is chiefly a question of fact, the determination of which is ordinarily

within the exclusive province of the trial court." *State v. Goodwin*, 320 N.C. 147, 150, 357 S.E.2d 639, 641 (1987).

As pertains to the sufficiency of an expert's qualifications, we discern no qualitative difference between credentials based on formal, academic training and those acquired through practical experience. In either instance, the trial court must be satisfied that the expert possesses "scientific, technical or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue." N.C.G.S. § 8C-1, Rule 702(a); *see* 2 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 184, at 44-45 (6th ed. 2004) ("[A] jury may be enlightened by the opinion of an experienced cellar-digger, or factory worker, or shoe merchant, or a person experienced in any other line of human activity. Such a person, when performing such a function, is as truly an 'expert' as is a learned specialist . . . ." (footnotes omitted)).

The third and final step under *Goode* concerns the relevancy of the expert's testimony. The trial court must always be satisfied that the expert's testimony is relevant. *Goode*, 341 N.C. at 529, 461 S.E.2d at 641. To this end, we defer to the traditional definition of relevancy set forth in the North Carolina Rules of Evidence: " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2003). As stated in *Goode*, "in judging relevancy, it should be noted that expert testimony is properly admissible when such testimony can assist the jury to draw certain inferences from facts because the expert is better qualified than the jury to draw such inferences." 341 N.C. at 529, 461 S.E.2d at 641.

We further note that, in addition to the foregoing principles of reliability under Rule 702, a trial court has inherent authority to limit the admissibility of all evidence, including expert testimony, under North Carolina Rule of Evidence 403, which provides that relevant evidence may nonetheless be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (2003); *see State v. Mackey*, 352 N.C. 650, 657, 535 S.E.2d 555, 559 (2000) ("[U]nder Rule 403 even relevant [expert] evidence may properly be excluded by the trial court if its probative value is outweighed by the danger that it would confuse the issues before the court or mislead the jury." (citations omit-

ted)); *Newton v. New Hanover County Bd. of Educ.*, 342 N.C. 554, 565, 467 S.E.2d 58, 66 (1996) ("The expert's testimony, even if relevant, must also have probative value that is not substantially outweighed by the danger of unfair prejudice, confusion, or undue delay."). Whether to exclude expert testimony under Rule 403 is within the sound discretion of the trial court and will only be reversed on appeal for abuse of discretion. *Anderson*, 322 N.C. at 28, 366 S.E.2d at 463.

Based on our review of these well-settled principles of North Carolina law governing the admissibility of expert testimony under North Carolina Rule of Evidence 702, we are satisfied that our own approach is distinct from that adopted by the federal courts. Contrary to the conclusion of the Court of Appeals, it is not "eminently clear" that North Carolina adopted the *Daubert* standard. Such a bold proposition is neither confirmed by the case law of this Court nor buttressed by the "express holding" of the lower court in *State v. Bates*, 140 N.C. App. 743, 748, 538 S.E.2d 597, 600 (2000), *disc. rev. denied*, 353 N.C. 383, 547 S.E.2d 19 (2001), which was nothing more than a passing citation parenthetical suggesting without analysis or discussion that this Court had adopted *Daubert* in the *Goode* opinion.

In *Goode*, this Court made but one reference to *Daubert*:

> As recognized by the United States Supreme Court in its most recent opinion addressing the admissibility of expert scientific testimony, this requires a preliminary assessment of whether the reasoning or methodology underlying the testimony is sufficiently valid and whether that reasoning or methodology can be properly applied to the facts in issue. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, —— U.S. ——, 125 L. Ed. 2d 469 (1993).

341 N.C. at 527, 461 S.E.2d at 639. This was the first and the only time that this Court has ever referenced *Daubert* prior to our present analysis. We did so to underscore the generally acknowledged importance of preliminarily assessing the reliability of the reasoning or methodology underlying expert testimony.

As described above, however, our focus on reliability in this context had been developing under North Carolina case law for many years prior to *Daubert*. *See, e.g.*, *Bullard*, 312 N.C. at 150-54, 322 S.E.2d at 382-85 (ruling that expert testimony concerning footprint identification was reliable because of the expert's explanatory testi-

mony, professional achievements, independent research, and use of scientifically established techniques); *State v. Temple*, 302 N.C. 1, 12, 273 S.E.2d 273, 280 (1981) (ruling that expert testimony concerning bite mark identification was reliable when such testimony was based upon the application of "scientifically established techniques of dentistry and photography to the solution of a particular novel problem"); *Crowder*, 285 N.C. at 53-54, 203 S.E.2d at 46 (ruling that the expert's use of flameless atomic absorption spectrophotometry to identify gunshot residue on defendant's hands was a reliable basis for testimony where the expert was experienced in the field of gunshot residue and had presented technical papers on the subject, and independent research verified the reliability of his testing methodology).

While these and other North Carolina cases share obvious similarities with the principles underlying *Daubert*, application of the North Carolina approach is decidedly less mechanistic and rigorous than the "exacting standards of reliability" demanded by the federal approach. *See Weisgram*, 528 U.S. at 455, 145 L. Ed. 2d at 972. Moreover, had we ever intended to adopt *Daubert* and supercede this established body of North Carolina case law, we would certainly have referenced the basic *Daubert* factors that have come to define the federal standard. But we did not.

We did not do so because we are not satisfied that the federal approach offers the most workable solution to the intractable challenge of separating reliable expert opinions from their unreliable counterparts, of distinguishing science from pseudoscience, or of discerning where in this "twilight zone" a "scientific principle or discovery crosses the line between the experimental and demonstrable stages." *Frye*, 293 F. at 1014. Obviously, there are no easy solutions to the inherent difficulties of determining the legal reliability of scientific and technical hypotheses. While the law works towards conclusiveness and finality, science operates on an evolving continuum of probabilities and likelihoods that, in many instances, is not consonant with the legal paradigm. In light of this dilemma, our challenge is to define a standard of admissibility that does not create more problems than it solves and that does not raise more questions than it answers.

One of the most troublesome aspects of the *Daubert* "gatekeeping" approach is that it places trial courts in the onerous and impractical position of passing judgment on the substantive merits of the scientific or technical theories undergirding an expert's opinion. We

have great confidence in the skillfulness of the trial courts of this State. However, we are unwilling to impose upon them an obligation to expend the human resources required to delve into complex scientific and technical issues at the level of understanding necessary to generate with any meaningfulness the conclusions required under *Daubert*. Indeed, this concern was adeptly described by the Ninth Circuit after *Daubert* had been remanded and again appealed:

> [T]hough we are largely untrained in science and certainly no match for any of the witnesses whose testimony we are reviewing, it is our responsibility to determine whether those experts' proposed testimony amounts to "scientific knowledge," constitutes "good science," and was "derived by the scientific method."
>
> The task before us is more daunting still when the dispute concerns matters at the very cutting edge of scientific research, where fact meets theory and certainty dissolves into probability. As the record in this case illustrates, scientists often have vigorous and sincere disagreements as to what research methodology is proper, what should be accepted as sufficient proof for the existence of a "fact," and whether information derived by a particular method can tell us anything useful about the subject under study.
>
> Our responsibility, then, unless we badly misread the Supreme Court's opinion, is to resolve disputes among respected, well-credentialed scientists about matters squarely within their expertise, in areas where there is no scientific consensus as to what is and what is not "good science," and occasionally to reject such expert testimony because it was not "derived by the scientific method."

Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1316 (9th Cir. 1995), *cert. denied*, 516 U.S. 869, 133 L. Ed. 2d 126 (1995). This same sentiment has been echoed in the writings of countless other courts and commentators. *See, e.g., Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co.*, 161 F.3d 77, 81 (1st Cir. 1998) (noting that "choreographing the *Daubert* pavane remains an exceedingly difficult task. Few federal judges are scientists, and none are trained in even a fraction of the many scientific fields in which experts may seek to testify."); *Zuchowicz v. United States*, 870 F. Supp. 15, 19 (D. Conn. 1994) ("[J]udges may not always have the 'special competence' to resolve complex issues which stand 'at the frontier of current medical and epidemiological inquiry.' " (citations omitted)); *Goeb v.*

Tharaldson, 615 N.W.2d 800, 812-13 (Minn. 2000) (observing that "*Daubert* takes from scientists and confers upon judges uneducated in science the authority to determine what is scientific. This approach, which necessitates that trial judges be 'amateur scientists,' has also been frequently criticized." (citations omitted)); 29 Charles A. Wright & Victor J. Gold, *Federal Practice and Procedure* § 6266, at 271 (1997) ("It is unrealistic to think that courts can resolve disputes concerning the scientific validity of issues on the frontiers of modern science where even the experts may disagree. As a result, *Daubert* has been harshly criticized for imposing such a burden on the lower courts." (footnotes omitted)); George D. Marlow, *From Black Robes to White Lab Coats: The Ethical Implications of a Judge's Sua Sponte, Ex Parte Acquisition of Social and Other Scientific Evidence During the Decision-Making Process*, 72 St. John's L. Rev. 291, 333 (1998) (contending that "few judges possess the academic credentials or the necessary experience and training in scientific disciplines to separate competently high quality, intricate scientific research from research that is flawed").

When the United States Supreme Court jettisoned the "rigid 'general acceptance' requirement" of *Frye*, it did so in order to further the " 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion" testimony.' " *Daubert*, 509 U.S. at 588, 125 L. Ed. 2d at 480. We believe that in practice, however, application of the "flexible" *Daubert* standard has been anything but liberal or relaxed and that trial courts, such as the one in the present case, have often been reluctant to stray far from the original *Daubert* factors in their analysis of the reliability of expert testimony. As expressed by one critic,

> Those who predicted that trial judges would flex their gatekeeper muscles to exclude vast quantities of plaintiffs' proposed expert causation opinion testimony in products liability cases have turned out to be right. The post-*Daubert* era can fairly be described as the period of "strict scrutiny" of science by non-scientifically trained judges.

Lucinda M. Finley, *Guarding the Gate to the Courthouse: How Trial Judges Are Using Their Evidentiary Screening Role to Remake Tort Causation Rules*, 49 DePaul L. Rev. 335, 341 (1999); *see also Goeb*, 615 N.W.2d at 812-14 (rejecting *Daubert* on grounds that, among other things, *Daubert* has not achieved its stated intention of relaxing the barriers to the admissibility of expert testimony); 2 Michael H.

Graham, *Handbook of Federal Evidence* § 702.5, at 461-62 (5th ed. 2001) ("*Daubert* is a very incomplete case if not a very bad decision. It did not, in any way, accomplish what it was meant to, i.e., encourage more liberal admissibility of expert witness evidence. In fact, *Daubert* overall in practice actually created a more stringent test for expert evidence admissibility especially in civil cases."); David Crump, *The Trouble with* Daubert-Kumho*: Reconsidering the Supreme Court's Philosophy of Science*, 68 Mo. L. Rev. 1, 40 (2003) ("[A]s often happens, a premature pronouncement that was intended to be flexible has become an established set of criteria. It was foolhardy for the Court to ignore what was going to happen, which was that trial judges would consider the four *Daubert* factors to be legal principles established by the Supreme Court." (footnotes omitted)).

As a consequence of these stringent threshold standards for admitting expert testimony, we are concerned with the case-dispositive nature of *Daubert* proceedings, whereby parties in civil actions may use pre-trial motions to exclude expert testimony under *Daubert* to bootstrap motions for summary judgment that otherwise would not likely succeed. As expressed in dicta by one federal trial court,

> This court notes that inherently, the judge's role in a *Daubert* determination [is] fraught with conflict. In most cases, if the court bars the testimony of one party's expert witness or witnesses, that party is unable to present an essential element of his or her claim, or to proffer a defense. Accordingly, judges are aware that applying *Daubert* heavy-handedly has the effect of lightening one's caseload, as a party stripped of its expert often must dismiss the claims or settle the lawsuit.

Brasher v. Sandoz Pharms. Corp., 160 F. Supp. 2d 1291, 1295 n.12 (N.D. Ala. 2001); *see also* Lloyd Dixon & Brian Gill, RAND Institute for Civil Justice, *Changes in the Standards for Admitting Expert Evidence in Federal Civil Cases Since the* Daubert *Decision* 62 (2001) ("Challenges to expert evidence increasingly resulted in summary judgment after *Daubert*.").

Procedurally, this imbalance may be explained because trial courts apply different evidentiary standards when ruling on motions to exclude expert testimony and motions for summary judgment. In a motion for summary judgment, the evidence presented to the trial court must be admissible at trial, N.C.G.S. § 1A-1, Rule 56(e) (2003), and must be viewed in a light most favorable to the non-moving party. *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975).

Where there are genuine, conflicting issues of material fact, the motion for summary judgment must be denied so that such disputes may be properly resolved by the jury as the trier of fact. *Kessing v. Nat'l Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971) ("Since this rule provides a somewhat drastic remedy, it must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue.").

Not so in the case of preliminary motions to exclude expert testimony under *Daubert*, which are resolved under Rule of Evidence 104(a). Here, trial courts are not bound by the rules of evidence, are not required to view the evidence in a light favorable to the non-movant, and may preliminarily resolve conflicting issues of fact relevant to the *Daubert* admissibility ruling. N.C.G.S. § 8C-1, Rule 104(a). Taking advantage of these procedural differences, a party may use a *Daubert* hearing to exclude an opponent's expert testimony on an essential element of the cause of action. With no other means of proving that element of the claim, the non-moving party would inevitably perish in the ensuing motion for summary judgment. By contrast, a party who directly moves for summary judgment without a preliminary *Daubert* determination will not likely fare as well because of the inherent procedural safeguards favoring the non-moving party in motions for summary judgment.

In such instances, we are concerned that trial courts asserting sweeping pre-trial "gatekeeping" authority under *Daubert* may unnecessarily encroach upon the constitutionally-mandated function of the jury to decide issues of fact and to assess the weight of the evidence. *See* N.C. Const. art I, § 25. *See also Brasher*, 160 F. Supp. 2d at 1295 (applying *Daubert*, but acknowledging that "[f]or the trial court to overreach in the gatekeeping function and determine whether the opinion evidence is correct or worthy of credence is to usurp the jury's right to decide the facts of the case"); *Logerquist v. McVey*, 196 Ariz. 470, 488, 1 P.3d 113, 131 (2000) ("The *Daubert/Joiner/Kumho* trilogy of cases . . . puts the judge in the position of passing on the weight or credibility of the expert's testimony, something we believe crosses the line between the legal task of ruling on the foundation and relevance of evidence and the jury's function of whom to believe and why, whose testimony to accept, and on what basis."); *Bunting v. Jamieson*, 984 P.2d 467, 472 (Wyo. 1999) (adopting *Daubert*, but nonetheless expressing concern that "application of the *Daubert* approach to exclude evidence has been criticized as a misappropria-

tion of the jury's responsibilities. . . . '[I]t is imperative that the jury retain its fact-finding function.' " (citations omitted)).

Although our criticism of *Daubert* is largely anecdotal and by no means exhaustive, given the serious implications of these concerns, we believe that on balance the North Carolina law which has coalesced in *Goode* establishes a more workable framework for ruling on the admissibility of expert testimony under North Carolina Rule of Evidence 702. Long before *Daubert* was decided, North Carolina had in place a flexible system of assessing the foundational reliability of expert testimony, the practicability of which is evidenced by the case law. Within this system, our trial courts are already vested with broad discretion to limit the admissibility of expert testimony as necessitated by the demands of each case. Requiring a more complicated and demanding rule of law is unnecessary to assist North Carolina trial courts in a procedure which we do not perceive as in need of repair. We therefore expressly reject the federal *Daubert* standard upon which both the trial court and the Court of Appeals erroneously based their respective rulings. North Carolina is not, nor has it ever been, a *Daubert* jurisdiction.

"When the order or judgment appealed from was entered under a misapprehension of the applicable law, the judgment, including the findings of fact and conclusions of law on which the judgment was based, will be vacated and the case remanded for further proceedings." *Concerned Citizens of Brunswick County Taxpayers Ass'n v. Holden Beach Enters.*, 329 N.C. 37, 54-55, 404 S.E.2d 677, 688 (1991). Accordingly, we hereby vacate the judgment of the trial court on this issue and reverse the opinion of the Court of Appeals affirming that judgment. The matter is remanded to the trial court for further proceedings not inconsistent with this opinion.

[2] The next major issue for our review is whether the Court of Appeals properly affirmed summary judgment in favor of Arai with respect to Howerton's claim of unfair and deceptive trade practices under N.C.G.S. § 75-1.1. Howerton alleged in his amended complaint that Arai intentionally disseminated false and misleading information concerning the safety of his helmet, which led him to believe that the helmet provided superior protection from injury and was the "best in the market." In particular, Howerton alleges that Arai placed a "Snell" sticker on the helmet, indicating its safety certification by the Snell Memorial Foundation, which conducts independent testing of various types of helmets. Howerton claims that the sticker gave him a false

impression of superior protection as to the helmet's overall safety when, in fact, the "Snell" certification did not apply to the chin guard in dispute.

Without elaboration, the trial court granted summary judgment in favor of Arai on this claim. The Court of Appeals affirmed, concluding that "even assuming that Arai engaged in an unfair and deceptive trade practice in or affecting commerce, the deposition testimony of Dr. Howerton clearly demonstrates that he did not, in fact, detrimentally rely on the assumed misrepresentation." *Howerton*, 158 N.C. App. at 339, 581 S.E.2d at 830.

"In order to establish a *prima facie* claim for unfair trade practices, a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *Dalton v. Camp*, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001); *see also* N.C.G.S. § 75-1.1 (2003). Summary judgment is appropriate where "there is no genuine issue as to any material fact" and "any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2003). In ruling on a motion for summary judgment, "the court may consider the pleadings, depositions, admissions, affidavits, answers to interrogatories, oral testimony and documentary materials." *Dendy v. Watkins*, 288 N.C. 447, 452, 219 S.E.2d 214, 217 (1975). All such evidence must be considered in a light most favorable to the non-moving party. *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). On appeal, an order allowing summary judgment is reviewed *de novo*. *Id.*

In the present case, the record reveals a genuine issue of material fact as to Howerton's reliance on Arai's alleged misrepresentations. By Howerton's own testimony, he conducted considerable research before purchasing his motorcycle helmet. Howerton subscribed to two off-road motorcycle magazines from which he gleaned significant information and impressions concerning Arai helmets. He stated that he would have read closely all of Arai's advertisements, including the "Important Note" and "Snell" certified representations contained therein, because it was his practice to read all of his off-road magazines to stay abreast of product information. Perhaps most importantly, Howerton testified that "I would not have purchased the [Arai] MX/a helmet had I known the true facts because I would not have been convinced that the Arai MX/a offered the same overall level of protection as a full face helmet with an integral chin guard." Although Arai presented some evidence calling into question

Howerton's reliance on the advertisements at issue, it is not the function of this Court, or the trial court for that matter, to weigh conflicting evidence of record. Rather, in cases such as this, when there are genuine issues of material fact that are legitimately called into question, summary judgment should be denied and the issue preserved for the jury.

Accordingly, as to Howerton's claim of unfair and deceptive trade practices and whether Howerton relied on the alleged misrepresentations by Arai, we conclude that the Court of Appeals erred in affirming summary judgment in favor of Arai.

[3] The final issue for our review is whether Howerton forecasted sufficient evidence to establish a prima facie claim that Arai unreasonably failed to adopt a safer, feasible design alternative, as required under N.C.G.S. § 99B-6. *See* N.C.G.S. § 99B-6 (2003). In a footnote to its opinion, the Court of Appeals concluded that Howerton failed to adduce such evidence and affirmed the trial court's granting of summary judgment in favor of Arai on this issue. *Howerton*, 158 N.C. App. at 337-38 n.13, 581 S.E.2d at 830 n.13. The Court of Appeals based its conclusion on a 1981 motorcycle helmet safety report authored by Professor Hugh H. Hurt, Jr., one of Howerton's experts, which concluded in part that full-face helmet designs were actually associated with more neck injuries than open-face helmet designs. *Id.* According to the Court of Appeals, Professor Hurt's 1981 report completely undermined all evidentiary basis for Howerton's claim that Arai failed to adopt a safer, feasible design alternative. *Id.*

We fail to see how the Court of Appeals could first exclude Professor Hurt's expert testimony as unreliable and then subsequently embrace the merits of the very same evidence in support of alternative grounds for summary judgment favoring Arai. Moreover, a review of the record reveals deposition testimony by Professor Hurt that clearly supports Howerton's claim that Arai's flexible chin bar was inadequately designed within the meaning of N.C.G.S. § 99B-6. Thus, even if the Court of Appeals appropriately considered Professor Hurt's published report, there is nevertheless a legitimate conflict of evidence raised by Professor Hurt's deposition testimony that creates a genuine issue of material fact precluding summary judgment under Rule 56 of the North Carolina Rules of Civil Procedure.

As with the causation issue, review of whether Arai failed to adopt a safer, feasible design alternative under N.C.G.S. § 99B-6 is

enmeshed with, if not altogether dependent on, the opinions of Howerton's experts. We therefore conclude that the Court of Appeals erred in upholding summary judgment in favor of Arai on Howerton's section 99B-6 claim based on inadequate product design.

In summary, for the reasons stated above, we hereby reverse the opinion of the Court of Appeals in its entirety and vacate the judgment of the trial court in its entirety. The case is remanded to the Court of Appeals with instructions to remand to the trial court for further proceedings not inconsistent with this Court's opinion.

REVERSED AND REMANDED.

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

Justice PARKER concurring in part and dissenting in part.

I concur in the majority's holding that this Court has not adopted the federal test for admissibility of expert testimony enunciated in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993), and in the decision not to adopt the *Daubert* factors as the test for determining admissibility of expert testimony under Rule 702 of the North Carolina Rules of Evidence but to continue to adhere to the test enunciated in our prior case law.

However, I am constrained to dissent respectfully from the holding of the majority reversing the opinion of the Court of Appeals and vacating the trial court's order allowing defendant's motion to exclude testimony of plaintiff's experts and the trial court's order allowing defendants' omnibus motion for summary judgment. In my view plaintiff's experts' testimony failed to satisfy the first prong of the three-part analysis set forth in the majority opinion based on this Court's decision in *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995), namely, whether "the expert's proffered method of proof [is] sufficiently reliable as an area for expert testimony." As revealed in the careful analysis of the evidence in the trial court's findings, none of plaintiff's expert witnesses had done independent research or used established techniques to substantiate their respective proffered hypotheses as to (i) how the injury occurred, and (ii) whether the injury would have been prevented had plaintiff's helmet had a rigid mouth guard rather than a flexible one. *See State v. Pennington*, 327 N.C. 89, 98, 393 S.E.2d 847, 852-53 (1990) (stating nonexclusive indices of reliability).

The trial court relied on both *Daubert* and *Pennington* in exercising its discretion to exclude the experts' testimony as to causation. Given this Court's jurisprudence governing the admissibility of expert testimony, the trial court's use of the *Daubert* factors does not in my opinion render the trial court's ruling fatally defective. *See Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989) (stating that "[i]f the correct result has been reached, the judgment will not be disturbed even though the trial court may not have assigned the correct reason for the judgment entered").

I would also vote to affirm the Court of Appeals' decision upholding the trial court's summary judgment for defendants on plaintiff's section 99B-6 and unfair and deceptive practices claims.

STATE OF NORTH CAROLINA v. NORMAN WAYNE JONES

No. 591PA03

(Filed 25 June 2004)

1. Drugs—possession of cocaine–felony–habitual felon support

Possession of cocaine is a felony under N.C.G.S. § 90-95(d)(2) and can therefore serve as an underlying felony to an habitual felon indictment because the language of N.C.G.S. § 90-95(d)(2), the statute's legislative history, the terminology used in other statutes, and the General Assembly's acquiescence in the long-standing practice in our criminal justice system of classifying possession of cocaine as a felony all indicate the intent of the General Assembly to classify possession of cocaine as a felony offense.

2. Appeal and Error–Court of Appeals–panel bound by prior decision

A panel of the Court of Appeals erred by concluding that possession of cocaine is a misdemeanor when a prior decision of that court held that possession of cocaine is a felony because the panel is bound by the prior decision until it is overturned by a higher court.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 161 N.C. App. 60, 588 S.E.2d 5 (2003), vacating and remanding a judgment entered 24 May 2002 by Judge William Z. Wood, Jr. in Superior Court, Forsyth County. Heard in the Supreme Court 18 February 2004.

Roy Cooper, Attorney General, by Daniel P. O'Brien, Assistant Attorney General, and William P. Hart, Special Deputy Attorney General, for the State.

Staples Hughes, Appellate Defender, by Constance E. Widenhouse, Assistant Appellate Defender, for defendant-appellee.

Marshall Hurley, PLLC, by Marshall Hurley, for Families Against Mandatory Minimums; and Charles E. Daye and Paul M. Green, for the North Carolina Academy of Trial Lawyers, amici curiae.

BRADY, Justice.

The sole issue presented for review is whether the North Carolina General Assembly classifies the offense of possession of cocaine as a misdemeanor or a felony under N.C.G.S. § 90-95(d)(2). For the reasons stated in this opinion, we conclude that possession of cocaine is a felony and therefore reverse the decision of the Court of Appeals holding otherwise.

The underlying facts are as follows: Defendant Norman Wayne Jones[1] was indicted on 26 November 2001 for possession with intent to sell and deliver cocaine and for being an habitual felon. Defendant's habitual felon indictment was supported by three underlying felonies, one of which was a 12 November 1991 conviction for possession of cocaine.[2] On 24 May 2002, defendant pled guilty to possession with intent to sell and deliver cocaine and to attaining habitual felon status. Based upon defendant's stipulation to a prior record

1. We note that the indictments refer to defendant as "Norman Wayne Jones aka Norman Waynetta Jones aka Norman Dewayne Jones aka Norman Wayneth Jones." The Judgment and Commitment Order refers to defendant as "Jones, Norman." He is referred to by all of these names throughout the record on appeal. To remain consistent, we refer to him as Norman Wayne Jones.

2. Defendant's habitual felon indictment was also supported by a 1993 conviction for possession with intent to sell and deliver a counterfeit controlled substance and a 1995 conviction for possession with intent to sell and deliver cocaine. Although both of these convictions are controlled substance violations, they are not at issue in this case.

level of IV for felony sentencing purposes, defendant received a minimum sentence of 107 months to a maximum sentence of 138 months' imprisonment.[3] Pursuant to his plea agreement, defendant preserved a right to appeal the trial court's denial of his motion to suppress, motion for writ of habeas corpus, and motion to dismiss his habitual felon indictment.

Defendant appealed to the North Carolina Court of Appeals. Defendant contended that his habitual felon indictment was insufficient because one of the convictions supporting the indictment, the 1991 conviction for possession of cocaine, was classified as a misdemeanor under N.C.G.S. § 90-95(d)(2). A panel of the Court of Appeals unanimously agreed based upon its conclusion that in 1991 N.C.G.S. § 90-95(d)(2) "plainly" classified possession of cocaine as a misdemeanor. *State v. Jones*, 161 N.C. App. 60, 67, 588 S.E.2d 5, 11 (2003). Accordingly, the court held that because defendant's habitual felon indictment was improperly supported by a misdemeanor conviction, the indictment was invalid and did not convey jurisdiction on the trial court. *Id.* As a result, the Court of Appeals vacated defendant's guilty plea to attaining habitual felon status.[4] *Id.* The case is now before this Court pursuant to the State's petition for discretionary review of the portion of the decision of the Court of Appeals which held that possession of cocaine is a misdemeanor.

Under N.C.G.S. § 14-7.1,

> Any person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon. For the purpose of this Article, a felony offense is defined as an offense which is a felony under the laws of the State or other sovereign wherein a plea of guilty was entered or a conviction was returned regardless of the sentence actually imposed.

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3. Although the trial court orally announced defendant's sentence in open court, it appears that defendant's sentencing term was inadvertently omitted from the Judgment and Commitment Order. Because the Court of Appeals vacated defendant's judgment for reasons unrelated to the issue discussed in this case, defendant's judgment remains vacated regardless of our decision here. We therefore find it unnecessary to direct the trial court to correct this and other errors in the Judgment and Commitment Order.

4. The Court of Appeals also vacated defendant's guilty plea to possession with intent to sell and deliver cocaine based upon its determination that defendant's plea agreement was invalid for reasons unrelated to the issue before this Court. *Jones*, 161 N.C. App. at 67, 588 S.E.2d at 11.

N.C.G.S. § 14-7.1 (2003). To determine whether defendant's 1991 conviction for possession of cocaine properly served as an underlying felony for his habitual felon indictment, we must decide whether the offense of possession of cocaine is a felony or a misdemeanor.

[1] We conclude that possession of cocaine is a felony and therefore can serve as an underlying felony to an habitual felon indictment. The language of N.C.G.S. § 90-95(d)(2), the statute's legislative history, and the terminology used in other criminal statutes all indicate the General Assembly's intent to classify possession of cocaine as a felony offense. Moreover, for nearly twenty-five years, our criminal justice system has treated possession of cocaine as a felony pursuant to N.C.G.S. § 90-95(d)(2). If the General Assembly had not intended such an interpretation of section 90-95(d)(2) to continue, it could have amended the statute to end this long-standing practice. Because it did not, and in light of other factors discussed below, we conclude that possession of cocaine is a felony.

I.

The North Carolina Controlled Substances Act categorizes cocaine as a Schedule II controlled substance. N.C.G.S. § 90-90(1)d. (2003); *accord* N.C.G.S. § 90-90(a)4. (1990) (renumbered as N.C.G.S. § 90-90(1)d. (1999)) (providing, at the time of defendant's 1991 conviction for possession of cocaine, that cocaine was a Schedule II controlled substance). Under N.C.G.S. § 90-95(a)(3), it is generally unlawful to possess a controlled substance. N.C.G.S. § 90-95(a)(3) (2003).

> [A]ny person who violates G.S. 90-95(a)(3) with respect to:
>
> . . . .
>
> (2) *A controlled substance classified in Schedule II, III, or IV shall be guilty of a Class 1 misdemeanor.* If the controlled substance exceeds four tablets, capsules, or other dosage units or equivalent quantity of hydromorphone or if the quantity of the controlled substance, or combination of the controlled substances, exceeds one hundred tablets, capsules or other dosage units, or equivalent quantity, the violation shall be punishable as a Class I felony. *If the controlled substance is* methamphetamine, amphetamine, phencyclidine, or *cocaine* and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or coca leaves and any salt, isomer, salts of isomers, compound, derivative, or prepa-

> ration of coca leaves, or any salt, isomer, salts of isomers, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances (except decocanized coca leaves or any extraction of coca leaves which does not contain cocaine or ecgonine), *the violation shall be punishable as a Class I felony.*

N.C.G.S. § 90-95(d)(2) (2003) (emphasis added).[5]

Defendant contends that under the plain language of section 90-95(d)(2), the offense of possession of cocaine is a misdemeanor. Defendant explains that this result is dictated by N.C.G.S. § 90-90(1)d., which classifies cocaine as a Schedule II controlled substance, and the first sentence of section 90-95(d)(2), which states that a person in possession of a "Schedule II, III, or IV" controlled substance is "guilty of a Class 1 misdemeanor." N.C.G.S. § 90-95(d)(2). According to defendant, the statute's third sentence, providing that a conviction for possession of cocaine is "punishable as a Class I felony," *id.*, does not serve to classify possession of cocaine as a felony for determining habitual felon status. Rather, that phrase simply denotes the proper punishment or sentence for a conviction for possession of cocaine. Defendant argues that because a conviction for possession of cocaine is not classified as a felony, it cannot serve as a predicate offense for an habitual felon indictment. We disagree with defendant's interpretation of section 90-95(d)(2).

When interpreting statutes, our principal goal is "to effectuate the purpose of the legislature." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 574, 573 S.E.2d 118, 121 (2002). "When 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." *Lemons v. Old Hickory Council, Boy Scouts of Am., Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988). "But where a statute is ambiguous, judicial construction must be used to ascertain the legislative will." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136-37 (1990). Furthermore, "where a literal interpretation of the language of a statute will . . . contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and pur-

5. Defendant's 12 November 1991 conviction for possession of cocaine was governed by a prior version of section 90-95(d)(2). *See* N.C.G.S. § 90-95(d)(2) (Supp. 1991) (amended 1993). Although section 90-95(d)(2) has been subsequently amended on several occasions, the text of the statute relevant to the issue presented by this appeal remains the same today as it appeared in November 1991. For convenience, we refer only to the current version of section 90-95(d)(2) in our opinion.

pose of the law shall control and the strict letter thereof shall be disregarded." *State v. Barksdale*, 181 N.C. 621, 625, 107 S.E. 505, 507 (1921), *quoted in Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999).

As with any other statute, the legislative intent controls the interpretation of a criminal statute. *State v. Hearst*, 356 N.C. 132, 136-37, 567 S.E.2d 124, 128 (2002). We generally construe criminal statutes against the State. *Id.* at 136, 567 S.E.2d at 128. However,

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

United States v. Brown, 333 U.S. 18, 25-26, 92 L. Ed. 442, 448 (1948) (quoting *United States v. Raynor*, 302 U.S. 540, 552, 82 L. Ed. 2d 413, 420 (1938)), *quoted in Hearst*, 356 N.C. at 137, 567 S.E.2d at 128; *see also United States v. Giles*, 300 U.S. 41, 48, 81 L. Ed. 493, 497 (1936).

Defendant's interpretation of section 90-95(d)(2) evinces, at best, an ambiguity in the General Assembly's use of the phrase "punishable as a . . . felony," thus making the statute susceptible to more than one interpretation. We believe an interpretation other than the one asserted by defendant controls the meaning of N.C.G.S. § 90-95(d)(2). The first sentence of section 90-95(d)(2), providing that a person found guilty of possession of a Schedule II, III, or IV controlled substance is "guilty of a . . . misdemeanor," is a general provision governing convictions for possession of Schedule II, III, or IV controlled substances. N.C.G.S. § 90-95(d)(2). The next two sentences of the statute are exceptions to that general rule, by which the General Assembly chose to treat the possession of certain controlled substances differently by elevating them to felony status.

Pursuant to these exceptions, when a person is found in possession of the substances listed, a conviction for that crime is "punishable as a Class I felony." *Id.* Under N.C.G.S. § 90-95(d)(2), the phrase "punishable as a Class I felony" does not simply denote a sentencing classification, but rather, dictates that a conviction for possession of the substances listed therein, including cocaine, is elevated to a felony classification for all purposes. Concerning the controlled substances listed therein, the specific exceptions contained in section

90-95(d)(2) control over the general rule that possession of any Schedule II, III, or IV controlled substance is a misdemeanor. *See State ex rel. Utils. Comm'n v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969) ("It is a well established principle of statutory construction that a section of a statute dealing with a specific situation controls, with respect to that situation, other sections which are general in their application.").

II.

Our interpretation of N.C.G.S. § 90-95(d)(2) is not only supported by the statute's language and phrasing but also accords with the statute's legislative history. The legislative intent of a statute may first be ascertained through examining the language of the statute, and then by examining the statute's legislative history, the spirit of the statute, and the goal that the statute seeks to accomplish. *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001); *see also Burgess*, 326 N.C. at 216, 388 S.E.2d at 141 ("Legislative history is a factor to consider in determining legislative intent.").

In 1971 the General Assembly enacted the North Carolina Controlled Substances Act "to revise the laws concerning drugs, the various illegal and dangerous drugs and drug substances." Act of July 19, 1971, ch. 919, 1971 N.C. Sess. Laws 1477 (codified as N.C.G.S. §§ 90-86 to -113.8). Pursuant to the Controlled Substances Act, the General Assembly categorized various drugs into one of six schedules, *see* ch. 919, sec. 1, 1971 N.C. Sess. Laws at 1481-88 (codified as N.C.G.S. §§ 90-89 to -94), and classified offenses involving these drugs as either misdemeanors or felonies, *see id.* at 1488-90 (codified as N.C.G.S. § 90-95). Prior to the enactment of the Controlled Substances Act, possession of cocaine was a misdemeanor. *See State v. Miller*, 237 N.C. 427, 429, 75 S.E.2d 242, 243 (1953) (concluding that because a person convicted under the Uniform Narcotic Drug Act, the predecessor to the Controlled Substances Act, was not punished "by either death or imprisonment in the State's Prison . . . they must be punished as misdemeanants rather than as felons"). Relevant to our discussion here, the 1971 General Assembly classified coca leaves or any derivative thereof, presumably including cocaine, as a Schedule II controlled substance, *see* ch. 919, sec. 1, 1971 N.C. Sess. Laws at 1483 (originally codified as N.C.G.S. § 90-90(a)4.), and further provided that a person in possession of a Schedule II controlled substance "shall be guilty of a felony and shall be sentenced to a term of imprisonment of not more than five years or fined not more than five

thousand dollars ($5,000) or both in the discretion of the court," *id.* at 1488 (originally codified as N.C.G.S. § 90-95(c)). Thus, it appears that under the Controlled Substances Act as originally enacted, possession of cocaine was a felony.

The General Assembly amended the Controlled Substances Act in 1973 to increase the penalties for certain violations. Act of May 22, 1973, ch. 654, 1973 N.C. Sess. Laws 967 (rewriting N.C.G.S. § 90-95, amending N.C.G.S. § 90-96, and adding N.C.G.S. § 90-96.1). Specifically, the revised N.C.G.S. § 90-95 provided in pertinent part, that those persons in possession of either a Schedule II, III, or IV controlled substance

> shall be guilty of a misdemeanor . . . ; but if the quantity of the controlled substance . . . exceeds 100 tablets, capsules, or other dosage units, or equivalent quantity, the violation shall be a felony punishable by a term of imprisonment of not more than five years or a fine of not more than five thousand dollars ($5,000), or both in the discretion of the court.

Id. at 967-68 (codified as N.C.G.S. § 90-95(d)(2)). Thus, following the 1973 amendments, possession of a Schedule II, III, or IV controlled substance was generally classified as a misdemeanor, unless the quantity of the substance exceeded a certain amount; then the classification for possession of those substances was a felony.

The following year, the General Assembly further amended N.C.G.S. § 90-95(d)(2) to specifically provide that "one gram or more of cocaine" was "equivalent" to the threshold number of pills or other dosage units that would convert a possession violation from a misdemeanor to a felony. Act of April 12, 1974, ch. 1358, sec. 10, 1973 N.C. Sess. Laws (2d Sess. 1974) 722, 724. Thus, effective 12 April 1974, section 90-95(d)(2) provided, in pertinent part, that those in possession of a Schedule II controlled substance "shall be guilty of a misdemeanor . . . ; but if the quantity of the controlled substance . . . exceeds 100 tablets, capsules or other dosage units, or equivalent quantity, including . . . one gram or more of cocaine, the violation shall be a felony punishable by a term of imprisonment" or a fine, or both. *Id.* at 724-25.

In 1979 the General Assembly enacted the Fair Sentencing Act as part of "a movement away from indeterminate sentencing and toward the imposition of presumptive terms for specified crimes." *State v. Thompson*, 310 N.C. 209, 219, 311 S.E.2d 866, 872 (1984),

overruled in part on other grounds by State v. Vandiver, 321 N.C. 570, 573-74, 364 S.E.2d 373, 375-76 (1988); *see also* Act of June 4, 1979, ch. 760, 1979 N.C. Sess. Laws 850, 850 ("An Act to Establish a Fair Sentencing System in North Carolina Criminal Courts.") (codified as N.C.G.S. §§ 15A-1340.1 to -1340.7 (amended 1991) (repealed 1993)).[6] Although the Fair Sentencing Act was to become effective on 1 July 1980, it "underwent technical amendments in 1980 and more substantial amendments in 1981" and thus applied "only to felonies committed on or after 1 July 1981." *State v. Ahearn*, 307 N.C. 584, 594, 300 S.E.2d 689, 695 (1983). The new sentencing act established ten categories of felonies, Classes A through J. *See* ch. 760, sec. 1, 1979 N.C. Sess. Laws at 850 (codified as N.C.G.S. § 14-1.1). The Act also amended various sections of Chapter 14 of the North Carolina General Statutes to assign a specific class to each felony defined therein. *Id.*, sec. 5 at 859-71. The Act set a maximum prison term for each class, *id.*, sec. 1 at 850, as well as a presumptive prison term for Classes C through J, *id.*, sec. 2 at 853-54 (codified as N.C.G.S. § 15A-1340.4(f)). *See generally* Susan Kelly Nichols, Comment, *Criminal Procedure—The North Carolina Fair Sentencing Act*, 60 N.C. L. Rev. 631 (1982) (discussing in detail the Fair Sentencing Act and its effect on sentencing procedures in North Carolina).

Pursuant to the Fair Sentencing Act, the General Assembly amended several substantive criminal statutes, including N.C.G.S. § 90-95(d)(2), to remove references to the length of a particular felony sentence and replace those references with the appropriate felony class level. *See* ch. 760, sec. 5, 1979 N.C. Sess. Laws at 859-71. Similar to changes made to other criminal statutes, section 90-95(d)(2) was "amended by deleting the phrase 'a felony punishable by a term of imprisonment of not more than five years or a fine of not more than five thousand dollars ($5,000), or both, in the discretion of the court' and inserting *in lieu thereof* 'punishable as a Class I felony'." *Id.* at 870 (emphasis added). There was no indication in either the language of the statute or the legislative history that the General Assembly intended to classify possession of one gram or more of cocaine as a felony for sentencing purposes only. Rather, the General Assembly amended section 90-95(d)(2) to bring the statute in conformity with the Fair Sentencing Act's new felony classification system.

6. The principal provisions of the Fair Sentencing Act were contained in Chapter 15A, Article 81A of the North Carolina General Statutes; the Act also "resulted in revisions to other portions of the General Statutes." *State v. Ahearn*, 307 N.C. 584, 594 n.1, 300 S.E.2d 689, 695 n.1 (1983).

Subsequent to the enactment of the Fair Sentencing Act and prior to defendant's 1991 conviction for possession of cocaine, the General Assembly again amended N.C.G.S. § 90-95(d)(2) to add that, in addition to possession of cocaine, possession of certain derivatives of cocaine was also punishable as a felony. Act of April 27, 1987, ch. 105, sec. 4, 1987 N.C. Sess. Laws 102, 103. Moreover, in 1989 the General Assembly deleted the "one gram or more of" language in N.C.G.S. § 90-95(d)(2), thereby making possession of cocaine punishable as a felony without regard to quantity. Act of July 15, 1989, ch. 641, sec. 1, 1989 N.C. Sess. Laws 1761, 1761. The relevant session law was entitled "An Act to Make the Possession of Any Amount of Cocaine or Phenclyclidine *a Felony*." *Id.* (emphasis added). The act's title, making no distinction between a classification for conviction purposes and for sentencing purposes, is further persuasive evidence that the General Assembly intended to classify possession of cocaine as a felony for all purposes. *See also State ex rel. Cobey v. Simpson*, 333 N.C. 81, 90, 423 S.E.2d 759, 764 (1992) (noting that " 'when the meaning of an act is at all doubtful, all the authorities now concur that the title should be considered' ") (quoting *State v. Woolard*, 119 N.C. 779, 780-81, 25 S.E. 719, 719 (1896)).

Amendments to section 90-95(d)(2) following defendant's 1991 conviction also support this conclusion. *See cf. Burgess*, 326 N.C. at 216, 388 S.E.2d at 141 ("Courts may use subsequent enactments or amendments as an aid in arriving at the correct meaning of a prior statute by utilizing the natural inferences arising out of the legislative history as it continues to evolve."). When enacting the Structured Sentencing Act in 1993, the General Assembly reinserted language into N.C.G.S. § 90-95(d)(2) making possession of "one gram or more of" cocaine, rather than any amount of cocaine, punishable as a felony. Act of July 24, 1993, ch. 539, sec. 1358.1, 1993 N.C. Sess. Laws 2370, 2823. However, prior to the 1 January 1995 effective date of that amendment, the General Assembly repealed the session law inserting the "one gram or more of" language. Act of March 14, 1994, ch. 11, sec. 1, 1993 N.C. Sess. Laws (Extra Sess. 1994) 22, 22 (providing that "[s]ection 1358.1 of Chapter 539 of the 1993 Session Laws is repealed"). The repealing act was entitled, in relevant part, "An Act to Repeal the Provision in the Structured Sentencing Act That Would Have Provided That Possession of Less Than One Gram of Cocaine Was Not *a Felony*." *Id.* (emphasis added). Again, with no distinction made between convictions and sentences for possession of cocaine, the title provides yet another indication that the General Assembly

intended that possession of cocaine was to be classified as *a felony* for all purposes.

Furthermore, the legislative history of N.C.G.S. § 90-95(d)(2) evinces the General Assembly's acquiescence to the long-standing practice in our criminal justice system of classifying possession of cocaine as a felony. In *Wells v. Consol. Jud'l Ret. Sys.*, 354 N.C. 313, 553 S.E.2d 877 (2001), this Court upheld a state agency's interpretation of certain statutes governing the judicial-retirement system based in part upon the agency's long-standing adherence to that interpretation and the lack of legislative intervention. 354 N.C. at 319-20, 553 S.E.2d at 881. The agency in *Wells* was "established to administer the retirement statutes" and "ha[d] adhered to the same interpretation . . . since the 1970s." *Id.* at 319, 553 S.E.2d at 881. The Court in *Wells* stated that "[t]he legislature is presumed to act with full knowledge of prior and existing law," and "[w]hen the legislature chooses not to amend a statutory provision that has been interpreted in a specific way, we assume it is satisfied with the administrative interpretation." *Id.* Although it is this Court's ultimate duty to construe statutes, we "accord great weight to the administrative interpretation, especially when, as [in *Wells*], the agency's position has been long-standing and has been met with legislative acquiescence." *Id.* at 319-20, 553 S.E.2d at 881.

We have applied this principle of legislative acquiescence in the criminal context when the General Assembly failed to intervene in light of a long-standing judicial practice. *See, e.g., State v. Gardner*, 315 N.C. 444, 462, 340 S.E.2d 701, 713 (1986) (concluding that it was not double jeopardy to convict and sentence a defendant in the same trial for both breaking and/or entering and larceny when the Court "uniformly and frequently held, from as early as the turn of the century, that [the two crimes] are separate and distinct crimes," and "[those] many years of uniform construction have been acquiesced in by our legislature"); *State v. Council*, 129 N.C. 511, 513, 39 S.E. 814, 815 (1901) (recognizing that the General Assembly had previously acquiesced in the Court's century-old practice of granting petitions to rehear criminal cases).

Since insertion of the "punishable as a . . . felony" language into N.C.G.S. § 90-95(d)(2) in 1979, our judiciary, the branch of government responsible for the adjudication of criminal cases, has universally adhered to the practice of classifying possession of cocaine as a felony. Indeed, for almost twenty-five years, defendants charged with possession of cocaine, including defendant in the case *sub judice*,

have been indicted as felons and tried and convicted as felons in the Superior Court Division of the General Courts of Justice. We presume, as we must, that the General Assembly had full knowledge of the judiciary's long-standing practice. Yet, during the course of *multiple* clarifying amendments to N.C.G.S. § 90-95(d)(2) between 1979 and the present, at no time did the General Assembly amend section 90-95(d)(2) to convert the crime of possession of cocaine to misdemeanor status. If the General Assembly intended for possession of cocaine to be treated as a misdemeanor, "it could have addressed the matter during the course of these many years." *Gardner*, 315 N.C. at 463, 340 S.E.2d at 713. Because the General Assembly has not done so, it is clear that the legislature has acquiesced in the practice of classifying the offense of possession of cocaine as a felony.

III.

We acknowledge that the General Assembly utilizes differing terminology to classify criminal offenses as felonies. *Compare* N.C.G.S. § 90-95(d)(2) (providing that possession of cocaine is "punishable as a Class I felony"), *with* N.C.G.S. § 90-95(e)(9) (providing that any person in possession of a controlled substance at "a penal institution or local confinement facility shall be guilty of a Class H felony"), *and* N.C.G.S. § 90-95(h)(3) (providing that a person who sells, manufactures, delivers, transports, or possesses twenty-eight grams of cocaine or more "shall be guilty of a felony"). However, we reject defendant's argument that these differences indicate the General Assembly's intent to create a special felony sentencing classification for possession of cocaine. We recognize that it is within the General Assembly's authority to create such a classification. *See cf. State v. Perry*, 316 N.C. 87, 101, 340 S.E.2d 450, 459 (1986). Nonetheless, given our review of the legislative history behind N.C.G.S. § 90-95(d)(2), we conclude that the General Assembly has not done so.

Furthermore, the use of the phrase "punishable as a . . . felony" is not limited to N.C.G.S. § 90-95(d)(2). The phrase is also the nomenclature used by our General Assembly to establish other serious felonies, including manslaughter, burglary, and kidnapping. To accept defendant's interpretation of the "punishable as" language and to take his argument to its logical end would necessarily lead us to the absurd conclusion that the General Assembly intended these and other serious crimes to be misdemeanors. We decline to do so.

The General Assembly routinely uses the phrases "punished as" or "punishable as" a "felony" or "felon" to classify certain crimes

as felonies. *See, e.g.*, N.C.G.S. § 14-18 (2003) (providing that "[v]oluntary manslaughter shall be punishable as a Class D felony, and involuntary manslaughter shall be punishable as a Class F felony"); N.C.G.S. § 14-30 (2003) (stating that a person who commits the crime malicious maiming "shall be punished as a Class C felon"); N.C.G.S. § 14-39(b) (2003) (noting that first-degree kidnapping "is punishable as a Class C felony" and that second-degree kidnapping "is punishable as a Class E felony"); N.C.G.S. § 14-52 (2003) (stating that "[b]urglary in the first degree shall be punishable as a Class D felony, and burglary in the second degree shall be punishable as a Class G felony"); N.C.G.S. § 14-58 (2003) (providing that first-degree arson "is punishable as a Class D felony" and that second-degree arson "is punishable as a Class G felony"); N.C.G.S. § 14-202.1(b) (2003) (stating that "[t]aking indecent liberties with children is punishable as a Class F felony"); N.C.G.S. § 20-106 (2003) (providing that a person guilty of receiving or transferring stolen vehicles "shall be punished as a Class H felon"); N.C.G.S. § 20-138.5(a), (b) (2003) (noting, pursuant to the habitual impaired driving statute, that if a person drives while impaired and has been convicted of three or more offenses involving impaired driving as defined by N.C.G.S. § 20-4.01(24a) within the previous seven years, that person "shall be punished as a Class F felon").

In addition, other statutes contain a structure similar to N.C.G.S. § 90-95(d)(2), in which a crime is classified as a misdemeanor, but elevated to a felony by the language "punishable" or "punished" as a "felony" or "felon" where special circumstances exist. These circumstances include the existence of a prior conviction, the use of deadly force or a dangerous weapon, the possession of an elevated quantity of an illegal substance, or the possession of a certain particularly problematic substance. *See, e.g.*, N.C.G.S. § 14-56.1 (2003) (providing that anyone who breaks into or forcibly opens a coin- or currency-operated machine "shall be guilty of a Class 1 misdemeanor, but if such person has previously been convicted of violating this section, such person shall be punished as a Class I felon"); N.C.G.S. § 14-56.3 (2003) (noting the same for the crime of breaking into paper currency machines); N.C.G.S. § 14-136 (2003) (stating that a person who sets fire to "grass and brushlands and woodlands" shall be "guilty of a Class 2 misdemeanor for the first offense" and "guilty of a Class 1 misdemeanor" for the second offense, but if the person intends to damage another's property, the person "shall be punished as a Class I felon"); N.C.G.S. § 14-288.9(c) (2003) (providing that any person who assaults emergency personnel "is guilty of a Class 1 misdemeanor,"

and any person who does so with a dangerous weapon or substance "shall be punished as a Class F felon"); N.C.G.S. § 90-95(d)(4) (stating that any person in possession of a Schedule VI controlled substance "shall be guilty of a Class 3 misdemeanor," but if that substance exceeds one-half of an ounce of marijuana or one-twentieth of an ounce of hashish, "the violation shall be punishable as a Class 1 misdemeanor"; and if the substance exceeds one and one-half ounces of marijuana or three-twentieths of an ounce of hashish, or consists of any quantity of synthetic tetrahydrocannabinols, "the violation shall be punishable as a Class I felony"); *see cf. State v. Mitchell*, 336 N.C. 22, 27, 442 S.E.2d 24, 26 (1994) (noting, in passing, that under N.C.G.S. § 90-95(d)(4), the State must prove that the defendant possessed more than one and one-half ounces of marijuana to convict the defendant of "the felony"); *State v. Sullivan*, 111 N.C. App. 441, 443, 432 S.E.2d 376, 378 (1993) (referring to a violation of N.C.G.S. § 14-56.1 as a "*felony-grade* breaking into a coin-operated machine" where the defendant had a prior conviction for such a violation) (emphasis added).

"It is well settled that the General Assembly and not the judiciary determines the minimum and maximum punishment which may be imposed on those convicted of crimes. The legislature alone can prescribe the punishment for those crimes." *Perry*, 316 N.C. at 101, 340 S.E.2d at 459. Part and parcel of the General Assembly's authority to prescribe criminal punishment is its authority to classify criminal offenses. In adopting defendant's narrow interpretation of N.C.G.S. § 90-95(d)(2), the Court of Appeals improvidently rewrote our General Statutes by, in essence, judicially reclassifying dozens of crimes as misdemeanors in contravention of the General Assembly's authority and long-standing practice. Accordingly, we conclude that under N.C.G.S. § 90-95(d)(2), the offense of possession of cocaine is classified as a felony for all purposes.

IV.

[2] Finally, in the present case, *Jones*, 161 N.C. App. 60, 588 S.E.2d 5, a panel of the Court of Appeals concluded that possession of cocaine was a misdemeanor, despite a prior published decision by another panel of that court holding that possession of cocaine is a felony. *See State v. Chavis*, 134 N.C. App. 546, 555, 518 S.E.2d 241, 248 (1999) (concluding that N.C.G.S. § 90-95(d)(2) "clearly states that the possession of any amount of cocaine is a felony"), *appeal dismissed and disc. rev. denied*, 351 N.C. 362, 542 S.E.2d 220 (2000). In a subsequent

decision for which this Court has also allowed discretionary review, *State v. Sneed*, 161 N.C. App. 331, 588 S.E.2d 74 (2003), another panel of the Court of Appeals acknowledged that court's prior holding in *Chavis*, but followed *Jones* and its independent review of N.C.G.S. § 90-95(d)(2) to conclude that possession of cocaine is a misdemeanor. Given that *Chavis*, *Jones*, and *Sneed* concern the interpretation of the same statute, the Court of Appeals panel in the present action, *Jones*, and the panel in *Sneed* effectively overruled the Court of Appeals decision in *Chavis*. In so doing, the two panels ignored a well-established rule of appellate law: "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Appeal from Civil Penalty Assessed for Violations of Sedimentation Pollution Control Act*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). While we recognize that a panel of the Court of Appeals may disagree with, or even find error in, an opinion by a prior panel and may duly note its disagreement or point out that error in its opinion, the panel is bound by that prior decision until it is overturned by a higher court.

In conclusion, because N.C.G.S. § 90-95(d)(2) classifies possession of cocaine as a felony, defendant's 1991 conviction for possession of cocaine was sufficient to serve as an underlying felony for his habitual felon indictment, and thus, defendant's habitual felon indictment was valid.

Accordingly, we reverse in part the decision of the Court of Appeals and remand this case to that court for further remand to the Superior Court, Forsyth County, for proceedings not inconsistent with this opinion.

REVERSED IN PART AND REMANDED.

ALBERTA McRAE, EMPLOYEE v. TOASTMASTER, INC., EMPLOYER SELF-INSURED (CORPORATE CLAIMS MANAGEMENT, SERVICING AGENT)

No. 287A03

(Filed 25 June 2004)

1. Workers' Compensation—*Seagraves* test—injured employee's right to continuing benefits—termination for misconduct

Our Supreme Court adopts the *Seagraves*, 123 N.C. App. 228 (2003), test for determining an injured employee's right to continuing workers' compensation benefits after being terminated for misconduct whereby an employer must demonstrate initially that the employee was terminated for misconduct, the same misconduct would have resulted in the termination of a nondisabled employee, and the termination was unrelated to the employee's compensable injury, in order to find that an employee constructively refused suitable work, thus barring workers' compensation benefits for lost earnings unless the employee is then able to show that his inability to find or hold other employment at a wage comparable to that earned prior to the injury is due to the work-related injury.

2. Workers' Compensation—constructive refusal of suitable employment—termination for misconduct unrelated to workplace injuries

The Industrial Commission erred in a workers' compensation case by concluding that defendant employer met its burden of providing competent evidence that plaintiff employee's failure to perform her UPC labeling duties was not related to her prior compensable injury under workers' compensation, which thereby led to her termination for misconduct and denial of additional workers' compensation benefits based on an alleged failure to accept a suitable position reasonably offered by her employer, because: (1) the evidence relied upon by the Commission's majority indicated that plaintiff was having continuing problems in the wake of, and as a result of, her injuries; (2) there was no competent evidence referenced in the Commission's opinion and award that supported a showing by defendant employer that plaintiff employee's termination was unrelated to her injuries, and defendant cannot meet this burden by showing that plaintiff failed to show otherwise; and (3) evidence and testimony indicated plain-

tiff's efforts toward finding subsequent commensurate employment may have been compromised by both market conditions and her lack of work experience, neither of which may serve as a means for defendant employer to sidestep its benefit obligations.

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. 70, 579 S.E.2d 913 (2003), affirming an opinion and award entered by the North Carolina Industrial Commission on 18 April 2002. Heard in the Supreme Court 15 October 2003.

H. Bright Lindler and Charles R. Hassell, Jr., for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Kirk D. Kuhns and Jaye E. Bingham, for defendant-appellees.

LAKE, Chief Justice.

This case arises out of an employment dispute that ultimately resulted both in plaintiff's termination and in her loss of workers' compensation benefits. The sole issue presented on appeal to this Court is whether defendant-employer provided competent evidence showing that plaintiff's failure to perform her assigned job duties was not related to her prior compensable injury under workers' compensation. The Court of Appeals held there was such competent evidence, thereby denying plaintiff additional benefits. For the reasons set forth herein, we reverse.

At the outset, we note the significance of the circumstances of the case at bar. Only a handful of cases concerning the termination of injured employees have been scrutinized by the state's appellate courts—and none by this Court. We thus recognize that our decision here will impact many workers' compensation claims that involve an employee who is not performing his work-related duties at preinjury levels. In its consideration of the instant case, the Court of Appeals applied a balancing test originally established in *Seagraves v. Austin Co. of Greensboro*, 123 N.C. App. 228, 472 S.E.2d 397 (1996),[1] and concluded that plaintiff had failed to demonstrate that she was entitled to continued benefits after being terminated from employment

1. The noted citation has been alternately referred to as *"Seagraves" and "Seagroves"* since its publication in 1996. As the record demonstrates that the plaintiff's name was Cheryl D. "Seagraves," this Court will cite to the case as *"Seagraves v. Austin Co. of Greensboro."*

for misconduct. As a consequence of this holding, we therefore must determine whether: (1) the test in *Seagraves* is the appropriate means for deciding a case of this nature, and, if so, (2) whether the test was appropriately applied in this instance.

I.

In 1996, plaintiff Alberta McRae began working as an assembler for defendant, Toastmaster, Inc. Her initial duties required her to peel Uniform Product Code (UPC) labels from a roll and place them on boxes. After working in this position for six months, plaintiff was transferred to a different department, where she installed clock components.

Sometime in 1997, plaintiff began experiencing pain and numbness in her right hand. In January 1998, plaintiff visited the company nurse, complaining of continuing discomfort in her hand. She was referred to the Occupational Health Center at Scotland Memorial Hospital and was placed on light-duty work through mid-February.

Plaintiff's symptoms persisted throughout the first half of 1998, and in June she obtained permission to see an orthopedic surgeon. She was diagnosed with carpal tunnel syndrome and initially treated with medication. In July 1998, plaintiff informed the surgeon that she had experienced some improvement in her condition; however, in September 1998, she returned to the doctor complaining of problems with both hands. Soon thereafter, plaintiff was diagnosed with bilateral carpal tunnel syndrome. During this period, plaintiff's doctor recommended that plaintiff refrain from clock assembling duties at work. In response, defendant assigned plaintiff to other light-duty work assignments.

In late October 1998, plaintiff had surgery on her right wrist. Similar surgery on her left wrist was performed about a month later. In the wake of her surgeries, plaintiff briefly returned to clock assembling, but she continued to feel discomfort performing the tasks required. Plaintiff's doctor finally advised her to avoid such work permanently.

Sometime in April 1999, defendant reassigned plaintiff to her duties as a UPC box labeler—her original position with the company. However, in the weeks that followed, plaintiff failed to label the boxes as required. When she was reprimanded by the company for her miscues, plaintiff could not explain why she missed so many boxes, although she would later testify at her workers' compensation

hearing that she had some difficulty with her hands while trying to peel the individual labels off their roll.

On 5 May 1999, defendant terminated plaintiff's employment with the company. Defendant admitted liability for benefits related to plaintiff's carpal tunnel syndrome surgery, paid plaintiff compensation for the periods of work she missed due to her surgery, and paid plaintiff's medical bills that were associated with her hand injuries.

Plaintiff then sought additional relief for the continuation of benefit payments and complied with all necessary procedures to procure a hearing before a deputy commissioner of the North Carolina Industrial Commission. In an order filed 9 February 2001, the deputy commissioner found that: (1) although plaintiff was terminated for errors she committed as a UPC labeler, her errors were not intentional and did not constitute misconduct; (2) there was a serious question regarding whether the labeling job was suitable for plaintiff in view of her hand ailments and the repetitive pinching and hand movements required by the position; and (3) she continued to have some residual symptoms in her hands while performing the job.

As a result of these findings, the deputy commissioner concluded that: (1) since plaintiff was not terminated for misconduct, she did not constructively refuse suitable employment; and (2) plaintiff is therefore entitled to elect between receiving compensation for her disability and compensation for her actual wage loss, whichever proves to be the "more munificent remedy."

The deputy commissioner then calculated plaintiff's disability award at a rate of $166.67 per week, to begin the week after her termination. The deputy commissioner also ordered that such payments continue, as applicable, until plaintiff returned to work or if unable to do so, through her lifetime.

Defendant appealed to the full Commission. The Commission, with one commissioner dissenting, filed an opinion and award on 18 April 2002, finding that the greater weight of the evidence "fail[ed] to establish that plaintiff could not perform the UPC labeler position [due to her injuries]." The majority went on to find that plaintiff's failure to perform her labeling duties constituted "a failure to accept a suitable position reasonably offered by her employer." The Commission's majority then concluded that plaintiff "was terminated for misconduct and she thereby constructively refused suitable

employment." As a result, the majority reduced plaintiff's benefit award to $166.67 for sixteen weeks.

The Commission's dissenting opinion, in essence, concurred with the deputy commissioner's view, concluding that plaintiff's inability to keep up with the demands of the UPC labeling job was caused by her compensable occupational disease. Plaintiff was under doctor's orders to avoid " 'repetitious pushing, pulling, gripping, pinching[,] and fingering,' " which, in the dissent's reasoning, constituted the core duties of a UPC box labeler. Thus, because plaintiff was assigned a task that required her to perform the same type of repetitive hand functions that had effected her original injuries, it could not be appropriately determined that plaintiff had refused—constructively or otherwise—a suitable offer of employment.

Upon review by the Court of Appeals, a majority affirmed the full Commission's opinion and award, concluding that: (1) defendant-employer had provided competent evidence that plaintiff's failure to perform her UPC labeling duties was not related to her prior compensable injury, and (2) plaintiff had failed to present any evidence of disability, and any presumption of such disability ended when plaintiff returned to work. The Court of Appeals' majority thus affirmed the Commission's conclusions that plaintiff had constructively refused suitable employment and that she was entitled only to a reduced award.

The Court of Appeals' dissenting opinion concluded that the evidence was susceptible to only two interpretations—plaintiff's failure to perform tasks previously accomplished was attributable to either her intervening injury or negligence—neither of which meets the legal criteria required to establish misconduct or a constructive refusal of suitable employment. The dissent's paramount concern focused on the potential prospective effect of the majority's holding, which, according to the dissent, would expand an employer's right to terminate an injured employee well beyond the narrow parameters recognized under existing law.

II.

On appeal to this Court, plaintiff argues that the majorities on the Industrial Commission and the Court of Appeals decided her case under a misapprehension of the law. In sum, she contends that her conduct under the circumstances did not amount to either: (1) misconduct that would justify her termination without regard for her

compensable injury, or (2) a refusal—actual or constructive—to engage in suitable employment.

In *Seagraves*, the Court of Appeals examined the question of whether an employee can be deemed to have refused suitable employment, thereby precluding injury-related benefits, if she is terminated for misconduct that is unrelated to her workplace injuries. 123 N.C. App. 228, 472 S.E.2d 397; *see also* N.C.G.S. § 97-32 (2003) (refusal of injured employee to accept suitable employment shall result in suspension of compensation); and N.C.G.S. § 97-32.1 (2003) (if an employee's trial return to work is unsuccessful, his or her right to continuing compensation shall be unimpaired unless terminated or suspended thereafter pursuant to the Workers' Compensation Act). In its analysis in *Seagraves*, the court acknowledged that the underlying purpose of the North Carolina Workers' Compensation Act is to "provide compensation to workers whose earning capacity is diminished or destroyed by injury arising from their employment" and took note of "the liberal construction which has long been accorded its provisions." 123 N.C. App. at 233, 472 S.E.2d at 401 (citations omitted). As a result of both the Act's purpose and history, the court concluded that "where an employee, who has sustained a compensable injury and has been provided . . . rehabilitative employment, is terminated . . . for misconduct . . ., such termination *does not automatically constitute a constructive refusal to accept [suitable] employment* so as to bar the employee from receiving benefits[.]" *Id.* at 233-34, 472 S.E.2d at 401 (emphasis added).

[1] In lieu of an employee's termination for misconduct serving as an automatic bar to benefits, the court in *Seagraves* adopted a test that measures whether the employee's loss of earning capacity is attributable to the wrongful act that caused the employee's termination from employment, in which case benefits would be barred, or whether such loss of earning capacity is due to the employee's work-related disability, in which case the employee would be entitled to benefits intended for such disability. *Id.* at 234, 472 S.E.2d at 401. Thus, under the *Seagraves'* test, to bar payment of benefits, an employer must demonstrate initially that: (1) the employee was terminated for misconduct; (2) the same misconduct would have resulted in the termination of a nondisabled employee; and (3) the termination was unrelated to the employee's compensable injury. *Id.*

An employer's successful demonstration of such evidence is "deemed to constitute a constructive refusal" by the employee to perform suitable work, a circumstance that would bar benefits for lost

earnings, "*unless* the employee is then able to show that his or her inability to find or hold other employment . . . at a wage comparable to that earned prior to the injury[] is due to the work-related disability." *Id.* (emphasis added). In other words, a showing of employee misconduct is not dispositive on the issue of benefits if the employee can demonstrate that his or her subsequent failure to perform suitable work or find comparable work was the direct result of the employee's work-related injuries. Under *Seagraves*, the employee would be entitled to benefits if he or she can demonstrate that work-related injuries, and not the circumstances of the employee's termination, prevented the employee from either performing alternative duties or finding comparable employment opportunities.

We note that the pertinent inquiry under *Seagraves* is not focused on determining whether an employer may fire an injured employee for misconduct unrelated to his injuries; it is clear that an employer may do so. *See, e.g.*, N.C.G.S. § 95-241(b) (2003). Rather, the relevant question is determining whether, upon firing an injured employee for such misconduct, an employer can nevertheless be held responsible for continuing to pay injury benefits to the terminated employee.

The court in *Seagraves* defended its balancing test as a fair and effective means for protecting the interests of both employers and injured employees. 123 N.C. App. at 233-34, 472 S.E.2d at 401. On the one hand, the test serves to protect injured employees from unscrupulous employers who might fire them in order to avoid paying them their due benefits. On the other hand, according to the lower court, the test simultaneously serves employers as a shield against injured employees who engage in unacceptable conduct while employed in rehabilitative settings. *Id.*

This Court's review of the *Seagraves*' test reveals that its proper application, as dictated by the Court of Appeals, can and will produce results that square with the underlying intent of our state's workers' compensation laws. In our view, the test provides a forum of inquiry that guides a fact finder through the relevant circumstances in order to resolve the ultimate issue: Is a former employee's failure to procure comparable employment the result of his or her job-related injuries or the result of the employee's termination for misconduct? In disputes like the one at bar, the critical area of inquiry into the circumstances of an injured employee's termination is to determine from the evidence whether the employee's failure to perform is due to an *inability* to perform or an *unwillingness* to perform.

If, on the one hand, the greater weight of the evidence shows that the former employee is a victim of job-related injuries, the original employer remains responsible for benefit obligations arising out of the employee's job-related injury. Under such circumstances, the fact that the employee was fired for unrelated misconduct is irrelevant because the employee's termination has no bearing on either the employee's existing compensable injury or how that injury affects his or her ability to find other employment. In our view, any rule that would allow employers to evade benefit payments simply because the recipient-employee was terminated for misconduct could be open to abuse. Such a rule could give employers an incentive to find circumstances that would constitute misconduct by employees who were previously injured on the job. We also recognize that the current benefit scheme faces the potential for abuse by employees. If injury-related benefits continued without regard to an employee's misconduct, injured employees conceivably could commit misconduct in order to be terminated without suffering the appropriate financial consequences.

On the other hand, if the terminated-for-misconduct employee fails to show by the greater weight of the evidence that his or her inability to find or perform comparable employment is due to the employee's work-related injuries, the employer is then freed of further benefit responsibilities. Under such circumstances, the employee would be held accountable for his or her misconduct, which would be deemed tantamount to a constructive refusal to perform suitable work duties. As a consequence of such refusal, the employee would forfeit the right to benefits, pursuant to section 97-32, which provides that "[i]f an injured employee refuses employment procured for him suitable to his capacity[,] he shall not be entitled to any compensation at any time during the continuance of such refusal." N.C.G.S. § 97-32.

The test in *Seagraves* is intended to weigh the actions and interests of employer and employee alike. Ultimately, the *Seagraves* rule aims to provide a means by which the Industrial Commission can determine if the circumstances surrounding a termination warrant preclusion or discontinuation of injury-related benefits. As such, we conclude that this test is an appropriate means to decide cases of this nature.

III.

In adopting the *Seagraves*' test for determining an injured employee's right to continuing benefits after being terminated for

misconduct, we turn our attention to the case *sub judice*, and consider whether the test was appropriately applied in this instance. We note that the case at bar has sparked deeply divided opinions among those who have considered it previously. To this point, seven decision-making officials have reviewed this matter. Four of them have agreed with the defendant-employer and three have favored the employee's position.

In considering this issue, we reiterate that when reviewing Industrial Commission decisions, appellate courts must examine "whether any competent evidence supports the Commission's findings of fact and whether [those] findings . . . support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). The Commission's findings of fact are conclusive on appeal when supported by such competent evidence, "even though there [is] evidence that would support findings to the contrary." *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965). However, evidence tending to support a plaintiff's claim is to be viewed in the light most favorable to the plaintiff, and "plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998); *see also Hollman v. City of Raleigh*, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968) (holding that "our Workmen's Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees . . ., and its benefits should not be denied by a technical, narrow, and strict construction"). The Commission's conclusions of law are reviewed *de novo*. *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 534, 491 S.E.2d 678, 681 (1997), *disc. rev. denied*, 347 N.C. 671, 500 S.E.2d 86 (1998). Although this Court's review of the case is limited to the decision of the Court of Appeals, our examination will necessarily include an analysis of whether that court properly utilized the applicable standard of appellate review and whether its conclusions find support within that standard's framework. In order to do so, this Court must also review whether the evidence presented before the Commission supports its factual findings, and whether those findings support the Commission's conclusions of law in its opinion.

In applying the *Seagraves'* test, with respect to the burden of proof, the Commission must determine first if the employer has met its burden of showing that the employee was terminated for misconduct, that such misconduct would have resulted in the termination of

a nondisabled employee, and that the termination was unrelated to the employee's compensable injury. Assuming the employer has satisfied such burden, the Commission must then determine if the employee has demonstrated that her inability to perform work assignments for the employer, or to procure commensurate work from other prospective employers, is a consequence of her work-related injury.

At the Commission hearing, defendant-employer presented evidence showing that in the aftermath of her work-related injury, plaintiff-employee failed to adequately perform her assigned duties. After her injury, plaintiff was assigned the task of applying UPC labels to boxes. Under normal conditions, according to the Commission's order, plaintiff was expected to label approximately 1,000 boxes a day. Prior to her injury, plaintiff performed the assigned duties without incident. However, when she returned to the labeler position, post injury, she failed to label the requisite number of boxes. Between mid-April 1999 and early May 1999, plaintiff was reprimanded on several occasions for missing labels. The series of omissions eventually resulted in her termination on 5 May 1999.

A review of the record reveals that there is some competent evidence demonstrating that plaintiff failed to perform her assigned duties as a UPC labeler during the period in question. Thus, this Court will not fault the Commission's finding of fact to that effect. *Deese*, 352 N.C. at 116, 530 S.E.2d at 553; *Jones*, 264 N.C. at 402, 141 S.E.2d at 633. In addition, this Court also concludes that the circumstances demonstrated, by the greater weight of the evidence, that plaintiff was terminated for misconduct (failure to adequately perform), and that her actions would have resulted in the termination of a nondisabled employee. Thus, defendant has satisfied its burden on two of the three initial requirements under *Seagraves*. 123 N.C. App. at 234, 472 S.E.2d at 401.

[2] We now examine whether defendant has shown by the greater weight of the evidence that plaintiff's termination was unrelated to her compensable injury, *id.* (part three of defendant's initial three-part burden), and, *if so*, whether plaintiff has countered by demonstrating that her failure to perform her post-injury duties or to procure commensurate work from other employers was due to her work-related injuries, *id.* (outlining plaintiff's burden when defendant satisfies all three elements of the three-part test). In essence, defendant argues that the Commission's extant findings show plain-

tiff's termination was not related to her injury while plaintiff contends that those same findings demonstrate that her injuries prevented her from performing her duties or from finding commensurate employment.[2] As a consequence, we review in turn the Commission's findings as they pertain to: (1) defendant's contention that plaintiff's termination was unrelated to her job-related injury versus plaintiff's contention that her injuries prevented her from performing her duties, and (2) plaintiff's contention that her inability to find commensurate employment was due to her job-related injury.

In its opinion and award, the Commission found that "[t]he greater weight of the evidence . . . fails to establish that plaintiff *could not* perform the UPC labeler position." (Emphasis added.) In support of this finding of fact, the Commission also found that: (1) plaintiff did not explain to her superiors why she missed the boxes; (2) plaintiff testified that she had some difficulty with her hands while performing the labeling job; (3) although plaintiff had residual symptoms, in view of her inability to remember certain pertinent information, it was not clear that she actually remembered having problems with the repetitive movements required by the labeler job; and (4) plaintiff's medical doctor, on 10 May 1999, issued permanent restrictions against activities involving repetitive pushing, pulling, gripping, fingering, and pinching. From this evidence, the Commission determined, under finding of fact number nine, that "the evidence shows that plaintiff was able to perform the UPC label position satisfactorily before her injury, and there was no evidence that plaintiff sought medical attention or otherwise was not mentally or physically able to perform the UPC labeler position after her recovery from the [carpal tunnel syndrome] surgery."

In our view, the problem with the majority's finding of fact number nine is two-fold: First, the evidence itself, as reflected by the Commission's opinion and award, suggests that plaintiff was indeed experiencing difficulties with her labeling duties. Plaintiff testified that she had trouble with her hands while labeling, and the Commission acknowledged, in finding of fact number six, that she also had "residual symptoms." In addition, the Court notes that plaintiff made a return visit to her medical doctor on 13 April 1999, and that less than a month later, on 10 May 1999, the physician issued fur-

2. The Court notes that under *Seagraves*, the question of whether an employee's termination was unrelated to her injury is separate from the question of whether the employee's injury prevented her from procuring commensurate employment. Thus, in future cases, the Industrial Commission should make findings of fact that specifically address each question in turn.

ther restrictions on her duties. Thus, if anything, the evidence relied on by the Commission's majority indicates that plaintiff was having continuing problems in the wake of, and as a result of, her injuries. *See Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (holding that evidence tending to support a plaintiff's claim is to be viewed in the light most favorable to the plaintiff, and "plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence").

Second, and perhaps more troubling, is the fact that the Commission's opinion is bereft of any evidence proffered by defendant that would support the quoted portion of finding of fact number nine. The test in *Seagraves* makes it incumbent on a defendant to show, by the greater weight of the evidence, that a plaintiff's termination was unrelated to his or her work-related injuries; the burden is not on a plaintiff to show that the termination was so related. A careful reading of the Commission's opinion reveals the majority reached finding of fact number nine because plaintiff failed to demonstrate adequately that her termination was tied to her injuries and not because defendant had shown by the greater weight of the evidence that the termination was not related to plaintiff's injuries. This burden shift is improper and compels this Court to conclude that the Commission's majority erred when it found that "there was no evidence that plaintiff . . . was not mentally or physically able to perform the UPC labeler position."

In sum, we find no competent evidence referenced in the Commission's opinion and award that supports *a showing by the company-defendant that the plaintiff-employee's termination was unrelated to her injuries.* The initial burden is on the company to demonstrate by a greater weight of the evidence that the termination of the employee was not related to the employee's injuries. A defendant-company cannot meet this burden by showing that a plaintiff-employee failed to show otherwise. It is not incumbent on the plaintiff-employee to make such a showing. Rather, the burden is on the defendant-company to produce evidence that demonstrates *the employee was mentally and physically able to perform* the duties assigned to her. In the instant case, we find no such evidence in the majority's findings.[3]

3. We note that the Commission's majority additionally erred when it included a conclusion of law under the aegis of its findings of fact. In the final sentence of finding of fact number nine, the Commission's majority stated that "[p]laintiff's failure to perform the UPC labeler position under the facts of this case *constitutes a failure to accept a suitable position reasonably offered by her employer.*" (Emphasis added.)

In addition, the Court notes that the evidence and testimony indicate plaintiff's efforts toward finding subsequent commensurate employment may have been compromised by both market conditions and her lack of work experience. Neither circumstance may serve as a means for defendant to sidestep its benefit obligations. *See Mabe v. North Carolina Granite Corp.*, 15 N.C. App. 253, 256, 189 S.E.2d 804, 807 (1972) (holding, in essence, that when an industrial injury renders an employee unable to earn wages, the employer is not alleviated of benefit obligations if the employee's lack of education or experience prevents the employee from finding alternative employment within the marketplace); *see also Peoples v. Cone Mills Corp.*, 316 N.C. 426, 443-44, 342 S.E.2d 798, 808-09 (1986) (holding that an injured employee shall retain benefit eligibility if the employee's age, inexperience, lack of education, or any other preexisting factor preclude the employee from procuring alternative employment).

Because this Court has concluded that the Commission's opinion and award does not reflect that the company met its initial burden of showing that plaintiff's termination was unrelated to her work-related injuries, we find it unnecessary at this time to consider whether plaintiff has shown that her inability to procure commensurate employment was due to her injuries. If, upon remand, the Commission properly concludes that the evidence presented shows that defendant terminated plaintiff without regard to her injuries, we instruct the Commission to then determine whether plaintiff has shown, by the greater weight of the evidence, that her work-related injuries prevented her: (1) from performing her duties as a UPC labeler, or (2) from finding alternative commensurate employment. *Seagraves*, 123 N.C. App. at 234, 472 S.E.2d at 401. If plaintiff makes this showing, she is entitled to continued benefits. *Id.* If she fails to do so, the company is alleviated of future injury-related benefit obligations. *Id.*

We therefore reverse the decision of the Court of Appeals and remand this case to that court for further remand to the Industrial

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While the issue of whether plaintiff failed to perform her duties is a question of fact, the determination of whether plaintiff's failings constituted a constructive refusal to accept suitable employment is a question of law. The distinction is significant, as an appellate court's standard of review of the Commission's findings of fact is markedly different from its standard for reviewing the Commission's conclusions of law. Thus, we urge commissioners to exercise care when differentiating between the two entities in the future.

Commission for reconsideration in line with *Seagraves* and the attendant directives contained herein.

REVERSED AND REMANDED.

CECIL C. HOLCOMB v. COLONIAL ASSOCIATES, L.L.C., AND JOHN OLSON

No. 581A02

(Filed 25 June 2004)

1. Animals—vicious—negligence—strict liability—owner or keeper

The Court of Appeals erred in a negligence (premises liability) case by concluding that defendant landlord could not be liable for the actions of its tenant's dogs who attacked a third party unless defendant was the owner or keeper of the dogs, because: (1) the fact that a strict liability cause of action is recognized against owners and keepers of vicious animals does not preclude a party from alleging negligence against a party who may or may not be an owner or keeper of an animal; and (2) plaintiff was not required to show defendant was an owner or keeper of the dogs in order to show that defendant was negligent.

2. Animals; Premises Liability–tenant's dogs–landlord's duty to third parties–instructions

The trial court did not err in a negligence case arising from a tenant's dogs attacking a third party by instructing the jury regarding defendant landlord's duty, because: (1) a party need not be an owner or a keeper of an animal to be liable for negligence based on injuries caused by that animal; and (2) the landlord and tenant contractually agreed that the landlord would retain control over the tenant's dogs, and the pertinent lease provision gave defendant and its management company sufficient control to remove the danger posed by the tenant's dogs.

3. Agency—independent contractor—degree of control

The trial court did not err in a negligence case arising from a tenant's dogs attacking a third party by instructing the jury that the rental property management company, although an indepen-

dent contractor, could be found by the jury to be defendant landlord's agent with respect to the dogs, because: (1) although ordinarily an independent contractor cannot be an agent, whether an independent contractor is an agent in certain instances depends upon the degree of control exercised by the person or entity who hired the independent contractor; and (2) defendant possessed control over the management company with respect to the dogs, and a jury could find that defendant had control over the harboring of the dogs and had the ability to order the management company to order the tenant to remove the dogs.

4. Premises Liability—lawful visitor—dog attack

The trial court did not err in a negligence case arising from a tenant's dogs attacking a third party by denying defendant landlord's motions for directed verdict and judgment notwithstanding the verdict even though defendant contends that plaintiff was a trespasser at the time and place of the injury, because plaintiff was a lawful visitor when: (1) defendant landlord placed a "For Sale" sign on its property and allowed buyers and their agents to inspect the property; and (2) plaintiff was an employee of a prospective buyer who entered the property for the sole purpose of inspecting it for a potential purchaser.

Justice PARKER dissenting.

Justice WAINWRIGHT joins in the dissent.

Appeal by plaintiff 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. 413, 570 S.E.2d 248 (2002), reversing a judgment entered on 4 October 2000 and an order entered on 14 February 2001 by Judge James C. Spencer, Jr. in Superior Court, Wake County. The issue from the Court of Appeals dissent was heard in the Supreme Court 17 November 2003.

On 5 February 2004, this Court allowed plaintiff's petition for writ of certiorari as to an additional issue, and on 4 March 2004, this Court allowed defendant Colonial's petition for discretionary review as to three additional issues. The issues raised in both parties' petitions were decided by this Court on the parties' briefs and without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Smith Moore LLP, by James G. Exum, Jr.; and Waller, Stroud, Stewart & Araneda, LLP, by W. Randall Stroud, for plaintiff-appellant.

Bailey & Dixon, L.L.P., by Gary S. Parsons and Warren T. Savage, for defendant-appellee Colonial.

ORR, Justice.

This case involves the issue of whether a landlord can be held liable for negligence when his tenant's dogs injure a third party. Although the dogs in this case committed vicious acts, we refer the readers of this case to *State v. Wallace* for a recitation of the many virtues of dogs. 49 N.C. App. 475, 271 S.E.2d 760 (1980). As Judge Harry Martin said, "[t]he dog is of a noble, free nature, yet is domesticated and dedicated to the well-being of people of all races." *Id.* at 477, 271 S.E.2d at 762. Thus, the acts committed by the dogs in this case should not cast aspersion on the species as a whole.

The facts of this case are as follows: Colonial Associates, L.L.C. ("Colonial" or "defendant") owned thirteen acres of land on Nelson Road in Wake County. There were two houses on this land. Defendant John Olson ("Olson") resided as a tenant in one of the houses. John Feild ("Feild")[1] resided as a tenant in the other house. Management Associates ("Management") managed the rental property for Colonial. Olson's lease granted Colonial[2] the right to terminate the lease in the event the property was sold for commercial development. The property, including both houses, was posted for sale the entire time Olson resided in the house. The property was listed with Powell Properties, Inc. Colonial knew Powell Properties was showing the house.

Under the terms of the lease, Olson could keep one Rottweiler dog on the property. However, Management permitted Olson to keep two Rottweilers on the property. The lease required Olson to "remove any pet . . . within forty-eight hours of written notification from the landlord that the pet, in the landlord's sole judgment, creates a nuisance or disturbance or is, in the landlord's opinion, undesirable."

1. Mr. Feild is also referred to as "Mr. Field" in portions of the trial transcript and other court documents.

2. The lease identified Dillard Powell, owner of Colonial, as the landlord. When Olson entered his lease, Mr. Powell owned the property in his individual capacity. At some time during the lease Mr. Powell transferred ownership of the leased premises to Colonial. Colonial then became Olson's landlord and was empowered with all powers granted to Mr. Powell in the lease.

The evidence demonstrated that the dogs frequently were not confined or restrained and were allowed to run freely. Moreover, on two occasions prior to the incident involving plaintiff, one of Olson's Rottweilers attacked nearby neighbors.

The first such incident occurred sometime in 1993 or 1994. One of the Rottweilers positioned itself between Feild and his vehicle. When Feild "realized that [he] was up against something," he went to another vehicle to get a machete for protection. The dog lunged at Feild and was struck by the machete, resulting in a gash in the dog's nose. Feild stated that he did not see Olson during the incident, but he related the incident to Management.

The second incident occurred sometime before April 1996 and took place nearly 300 feet from Olson's house. Tomas Sanchez, Feild's co-worker, was retrieving scaffolding from Feild's house when both dogs attacked him. One of the dogs bit Sanchez in the leg. Management knew of the incident.

The incident which resulted in the case *sub judice* occurred on 18 April 1996. Parker Lincoln Developers, a company interested in purchasing Colonial's property, contacted plaintiff Cecil Holcomb, a demolition contractor and licensed builder, to request an estimate on demolishing the two rental homes. Plaintiff visited the rental homes in order to prepare his estimate. He rang the doorbell and knocked on the door to the house where Olson resided. When no one answered, plaintiff stood on the sidewalk and made notes about the house. Plaintiff then walked toward the back of the house where Olson's two dogs approached him and began to threaten him. One of the Rottweilers lunged at plaintiff, causing him to fall to the ground. Plaintiff incurred a distal radius fracture and injured his back when he braced himself for the fall.

On 26 May 1998, plaintiff filed suit against Colonial and Olson in Wake County Superior Court, asserting a strict liability claim against Olson and negligence claims against Olson and Colonial. The trial court denied Colonial's motion for a directed verdict on 22 September 2000. On 26 September 2000, a jury returned a verdict in favor of Holcomb, finding both Olson and Colonial negligent and awarding Holcomb $330,000.00 in damages. On 14 February 2001, the trial court entered an order denying Colonial's motions for judgment notwithstanding the verdict and a new trial.

A divided panel of the Court of Appeals reversed the judgment of the trial court. The Court of Appeals held the trial court erred in fail-

ing to direct a verdict or grant Colonial's motion for judgment notwithstanding the verdict after the trial. *Holcomb v. Colonial Assocs.*, 153 N.C. App. 413, 418, 570 S.E.2d 248, 251 (2002). The majority concluded that "plaintiff has failed to establish an essential element of his prima facie case, i.e., that Colonial was an *owner* or *keeper* of the two dogs." *Id.*

The dissenting opinion in the Court of Appeals, however, concluded that "plaintiff presented sufficient evidence on the *prima facie* elements of his case against Colonial." *Id.* at 420, 570 S.E.2d at 253. The dissent found plaintiff's facts "tend to support an inference that Colonial is a keeper by virtue of its control evident in the lease," *id.* at 420, 570 S.E.2d at 252, as required under strict liability.

Plaintiff appealed to this Court as of right pursuant to N.C.G.S. § 7A-30(2) (2003). On 15 November 2002, plaintiff filed a petition for discretionary review as to additional issues, arguing that the Court of Appeals erred by deciding the case on a strict liability (wrongful keeper) theory, rather than the negligence (premises liability) theory that was alleged by plaintiff and found by the jury at trial. On 2 December 2002, defendant Colonial filed a conditional petition for discretionary review as to two additional issues: (1) whether the superior court erred by holding defendant-appellee Colonial liable for the torts of its independent contractor, Management Associates; and (2) whether the superior court erred by holding defendant-appellee liable to plaintiff-appellant when plaintiff was a trespasser at the time and place of his injury. On 27 March 2003, this Court denied plaintiff's petition for discretionary review and dismissed defendant's conditional petition as moot.

On 30 April 2003, plaintiff filed a petition for writ of certiorari as to additional issues, and on 13 May 2003, defendant Colonial again filed a conditional petition for discretionary review of additional issues. In these petitions, both parties made essentially the same arguments they made in their previous petitions for discretionary review. We denied both of these petitions on 21 August 2003.

On 17 November 2003, we heard oral arguments in this case. The only issue properly before this Court at that time was the issue arising from the Court of Appeals dissent: whether the Court of Appeals erred by concluding that defendant Colonial was neither the owner nor the keeper of Olson's dogs. However, after further review, this Court determined that we should address the issues of premises liability and negligence. On 5 February 2004, this Court *ex mero motu*

vacated its 21 August 2003 order denying plaintiff's petition for writ of certiorari as to additional issues and allowed plaintiff's petition for writ of certiorari as to the additional issue of the validity of premises liability principles of negligence. This Court then ordered the parties to brief that issue.

On 13 February 2004, defendant Colonial filed a petition for discretionary review as to the following additional issues: (1) whether the superior court erred by holding defendant Colonial liable for the torts of its independent contractor, Management Associates; (2) whether the superior court erred by holding Colonial liable to plaintiff when plaintiff was a trespasser at the time and place of his injury; and (3) whether the superior court erred in instructing the jury regarding Colonial's duty and Management's status as an independent contractor. On 4 March 2004, we allowed this petition.

The parties then submitted briefs on the issue in plaintiff's petition for writ of certiorari and the three issues in defendant's petition for discretionary review, but did not argue them before this Court. We have decided these additional issues based on the parties' briefs.[3]

I.

[1] We first address the issue before us based on the Court of Appeals dissent: Whether the Court of Appeals correctly concluded that Colonial was neither an owner nor a keeper of Olson's dogs. The Court of Appeals majority and dissent focused their analysis on whether Colonial was the owner or keeper of Olson's dogs based upon the issue of strict liability as set out in *Swain v. Tillett*, 269 N.C. 46, 152 S.E.2d 297 (1967). In *Swain*, strict liability was based upon whether: (1) " 'the animal was dangerous, vicious, mischievous, or ferocious, or one termed in law as possessing a vicious propensity; and (2) [whether] the *owner* or *keeper* knew or should have known of the animal's vicious propensity, character, and habits.' " *Id.* at 51, 152 S.E.2d at 301 (quoting *Sellers v. Morris*, 233 N.C. 560, 561, 64 S.E.2d 662, 663 (1951)) (alterations in original). However, plaintiff did not allege in his complaint that defendant Colonial was strictly liable. Instead plaintiff alleged defendant was negligent, and in fact the case was tried against Colonial on a negligence theory.

3. We note that the primary question raised in defendant Colonial's appeal to the Court of Appeals was whether the trial court erred by denying its motions for a directed verdict, judgment notwithstanding the verdict, and a new trial. The substantive issues directed to this question are those we now address.

Plaintiff need not show defendant was an owner or a keeper in order to demonstrate a *prima facie* case of negligence. The fact that we recognize a strict liability cause of action against owners and keepers of vicious animals, *Swain*, 269 N.C. at 51, 152 S.E.2d at 301, does not preclude a party from alleging negligence (a different cause of action) against a party who may or may not be an owner or keeper of an animal. Because we conclude that plaintiff was not required to show Colonial was an owner or keeper of the dogs in order to show Colonial was negligent, we conclude that the Court of Appeals majority and dissent erred by concluding that Colonial could not be liable unless it was the owner or keeper of the dogs. Moreover, the Court of Appeals majority erred by holding that defendant's motions for directed verdict and judgment notwithstanding the verdict should have been allowed.

II.

[2] Next, we address defendant's argument that the trial court erred in instructing the jury regarding Colonial's duty and Management's status as an independent contractor. The trial court's instructions about Colonial's duty were as follows:[4]

> In this case, the plaintiff contends, and the defendant denies, that Management Associates was negligent in one or more of the following ways:
>
> The first contention is that Management Associates as agent of the owner of the premises, Colonial Associates, L.L.C[.], failed to use ordinary care by failing to require the defendant Olson to restrain his Rottweiler dogs, or remove them from the premises when Management Associates knew, or in the exercise of reasonable care, should have known, from the dogs' past conduct, that they were likely, if not restrained, to do an act from which a reasonable person in the position of Management Associates could foresee that an injury to the person of another would be likely to result.
>
> The second contention is that Management Associates, as agent, and owner Colonial Associates, L.L.C., failed to use ordinary care by failing to give adequate warning to a lawful visitor of a hidden or dangerous condition, that is, unrestrained Rottweiler

4. The jury instructions address Management's duty. However, because the issue of Colonial's negligence was submitted to the jury based on the theory that Management was Colonial's agent, the jury instructions also address Colonial's duty.

dogs, about which Management Associates knew, or in the exercise of reasonable care, should have known.

Defendant first argues the above instructions are erroneous because "they place a duty on a landlord to protect third parties from a tenant's dogs that the landlord neither owns nor keeps." However, as we stated above, a party need not be an owner or a keeper of an animal to be liable for negligence based on injuries caused by that animal. Therefore, defendant's argument is without merit.

Colonial also argues the instructions are erroneous because they "place[] precisely the same duty on a landlord as on the tenant, even though the tenant had exclusive possession of the property and control of the dogs." Colonial cites a Court of Appeals case for the proposition that " 'a landlord who has neither possession nor control of the leased premises is not liable for injuries to third persons.' " *Vera v. Five Crow Promotions, Inc.*, 130 N.C. App. 645, 650-51, 503 S.E.2d 692, 696 (1998) (quoting *Craig v. A.A.R. Realty Corp.*, 576 A.2d 688, 694 (Del. Super. Ct. 1989), *aff'd*, 571 A.2d 786 (Del. 1990). However, as the quote from *Vera* indicates, a landlord is potentially liable for injuries to third persons if he has " 'control of the leased premises.' " *Id.*; *see also Franklin Drug Stores, Inc. v. Gur-Sil Corp.*, 269 N.C. 169, 173, 152 S.E.2d 77, 79 (1967). Similarly, a landlord owes a duty to third parties for conditions over which he retained control. *See Batra v. Clark*, 110 S.W.3d 126, 129-30 (Tex. App.-Houston 1st Dist. 2003); *see also Uccello v. Laudenslayer*, 44 Cal. App. 3d 504, 514, 118 Cal. Rptr. 741, 747 (Cal. App. 5th Dist. 1975) (holding the landowner had control via the power "to order his tenant to cease harboring the dog under pain of having the tenancy terminated"); *Shields v. Wagman*, 350 Md. 666, 684, 714 A.2d 881, 889-90 (1998) (holding the landowner could exercise control over his tenant's dog by refusing to renew a month-to-month lease agreement); *McCullough v. Bozarth*, 232 Neb. 714, 724-25, 442 N.W.2d 201, 208 (1989) (holding liability may be imposed on a landlord where, "by the terms of the lease, [the landlord] had the power to control the harboring of a dog by the tenant and neglected to exercise that power").

In the case *sub judice*, the lease agreement required the tenant to "remove any pet . . . within forty-eight hours of written notification from the landlord that the pet, in the landlord's sole judgment, creates a nuisance or disturbance or is, in the landlord's opinion, undesirable." Thus, landlord and tenant contractually agreed that landlord would retain control over tenant's dogs. This lease provision granted Colonial and Management sufficient control to remove the danger

posed by Olson's dogs. Therefore, because the evidence supports a jury finding that defendant had control over the dogs, defendant's argument is without merit.

[3] Colonial also contends the trial court's instruction on agency was incorrect. The jury found that Management was Colonial's agent and therefore Colonial was liable for Management's negligence. Specifically, Colonial contends the trial court erred by instructing the jury that an independent contractor can be an agent. Colonial further contends that because Management was an independent contractor, not Colonial's agent, the jury could not impute Management's knowledge to Colonial. The trial court instructed the jury as follows:

> However, I instruct you that an independent contractor may also be an agent.
>
> Plaintiff contends and defendant denies that for purposes of communication, negotiation, and contacts with and concerning its tenants, Management Associates was, though an independent contractor in certain respects, acting as the agent of Colonial Associates, L.L.C. for these purposes.

"There are two essential ingredients in the principal-agent relationship: (1) authority, either express or implied, of the agent to act for the principal, and (2) the principal's control over the agent." 24 Strong's North Carolina Index 4th *Principal and Agent* § 1 (1993) (footnote omitted). Ordinarily an independent contractor cannot be an agent. *Livingston v. Essex Inv. Co.*, 219 N.C. 416, 425, 14 S.E.2d 489, 494 (1941).

However, we agree with the trial court's statement that an independent contractor can, in certain respects, be an agent. *Standard Supply Co. v. Reliance Ins. Co.*, 49 N.C. App. 616, 621, 272 S.E.2d 394, 397 (1980); Restatement (Second) of Agency 2d § 2(3) at 12 (1958). Whether an independent contractor is an agent in certain instances depends upon the degree of control exercised by the person or entity who hired the independent contractor. *Gammons v. N.C. Dept. of Human Res.*, 344 N.C. 51, 58, 472 S.E.2d 722, 726 (1996) (whether an entity is an agent depends upon the degree of control exercised by the principal). The evidence supports a finding that Colonial possessed control over Management with respect to the subject of the litigation—the dogs. Olson's lease gave Dillard Powell, owner of Colonial, the authority to remove Olson's dogs at any time. After

plaintiff filed suit against Colonial, Powell exercised this control, requesting Management to order Olson to remove the dogs. Management complied with Powell's request and, pursuant to this request, Olson removed his dogs from the property. Thus, a jury could find Colonial had control over the harboring of the dogs and had the ability to order Management to order Olson to remove the dogs. Looking at the evidence in the light most favorable to plaintiff, the evidence supports both the jury instruction on agency and the jury's finding that Management was Colonial's agent.

[4] Additionally, defendant contends that because the evidence shows as a matter of law that plaintiff was a trespasser at the time and place of the injury, the Court of Appeals properly reversed the trial court's denial of a directed verdict or judgment notwithstanding the verdict. "[A] trespasser has no basis for claiming protection beyond refraining from willful injury." *Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998). A landowner is not liable to trespassers for negligence. *Id.* Therefore, we must determine whether plaintiff was a lawful visitor.

A lawful visitor is one who is on the premises with the landowner's permission or by legal right. *Nelson*, 349 N.C. at 617, 507 S.E.2d at 883-84. The permission granted by a landowner may be express or implied from the circumstances. *See id.*; *Mazzacco v. Purcell*, 303 N.C. 493, 497, 279 S.E.2d 583, 586-87 (1981) (*overruled in part by Nelson*, 349 N.C. 615, 507 S.E.2d 882). Permission to enter may be implied when a visitor adheres to the normal customs of the community unless a landowner expresses specific opposition to those customs. *Smith v. VonCannon*, 283 N.C. 656, 661-62, 197 S.E.2d 524, 528-29 (1973). Whether a person has implied permission to enter another's land must be evaluated on the basis of the reasonableness of the visitor's entry, with due regard given "to customs prevailing in the community." *Id.* at 662, 197 S.E.2d at 529.

In the instant case, the jury found plaintiff was a lawful visitor. The evidence supports the jury's finding. Colonial placed a "For Sale" sign on its property and allowed buyers and their agents to inspect the property. Plaintiff, an employee of a prospective buyer, entered the property for the sole purpose of inspecting it for a potential purchaser. After evaluating the evidence presented at trial, the jury found that plaintiff was "a lawful visitor at the time and place of his alleged injury." The evidence supports this finding. Therefore, defendant's argument is without merit.

Because we ruled against defendant's position based upon the dissent and because defendant has failed to show error in the issues presented by its petition for discretionary review, we find it unnecessary to consider the issue presented by plaintiff in his petition for writ of certiorari.

The decision of the Court of Appeals is reversed, and that court is instructed to reinstate the judgment of the trial court.

REVERSED.

Justice PARKER dissenting.

Until today this Court has not applied premises liability principles to allow recovery for injuries inflicted by an animal. The requirements for liability have been that the person be the keeper of the animal and have knowledge of the animal's vicious propensity. In *Swain v. Tillet*, 269 N.C. 46, 152 S.E.2d 297 (1967), this Court stated:

> To recover for injuries inflicted by a domestic animal, *domitae naturae*, plaintiff must allege and prove: "(1) that the animal was dangerous, vicious, mischievous, or ferocious, or one termed in law as possessing a vicious propensity; and (2) that the *owner* or *keeper* knew or should have known of the animal's vicious propensity, character, and habits." (Emphasis added.) *Sellers v. Morris*, 233 N.C. 560, 561, 64 S.E.2d 662, 663; *Plumidies v. Smith*, 222 N.C. 326, 22 S.E.2d 713; *Hill v. Moseley*, 220 N.C. 485, 17 S.E.2d 676. See also *Sink v. Moore and Hall v. Moore*, 267 N.C. 344, 148 S.E.2d 265. "The gravamen of the cause of action in this event is not negligence, but rather the wrongful keeping of the animal with knowledge of its viciousness; and thus both viciousness and scienter are indispensable elements to be averred and proved." *Barber v. Hochstrasser*, 136 N.J.L. 76, 79, 54 A.2d 458, 460; 2 Strong, N.C. Index, Animals § 2 (1959).

Id. at 51, 152 S.E.2d at 301. Thus, North Carolina jurisprudence has wisely had a separate cause of action which recognized the special nature of animals and that responsibility for an injury caused by an animal must be placed on the person who maintains the animal and is in the best position to control the creature.

Unlike a hole that can be filled or a broken step that can be repaired, an animal is not a condition of the premises. Animals are

mobile and have moods and personalities. Thus, to hold that a landlord can be liable in negligence for an attack by a tenant's animal on account of the landlord's failure, pursuant to the terms of a lease, to order removal of an animal places an undue burden on the landlord. In my opinion the control is too remote to hold that the landlord breached its duty of care. Notwithstanding the majority's overture to dogs, today is, I fear, a sad day for Fido and Rover. Accordingly, I respectfully dissent.

Justice WAINWRIGHT joins in this dissent.

CAROLINA POWER & LIGHT COMPANY v. THE CITY OF ASHEVILLE

No. 631A03

(Filed 25 June 2004)

Cities and Towns—annexation—combination of adjacency to municipality and to areas developed for urban purposes

The trial court erred in an annexation case by affirming defendant city's annexation ordinance 2708 regarding the pertinent non-urban or undeveloped parcels, because: (1) the plain meaning of N.C.G.S. § 160A-48(d)(2) states that there must be a combination of adjacency to the municipality and adjacency to areas developed for urban purposes; and (2) the proposed annexation as to Non-Urban Areas 1 and 4 is invalid since those areas do not qualify under (d)(2) for inclusion with developed areas which meet the Urban Use/Subdivision Test in N.C.G.S. § 160A-48(c) when no part of those two areas are adjacent to the city limits.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 161 N.C. App. 1, 587 S.E.2d 490 (2003), affirming a judgment entered 18 February 2002 by Judge Zoro J. Guice, Jr. in Superior Court, Buncombe County. Heard in the Supreme Court 13 April 2004.

Van Winkle, Buck, Wall, Starnes and Davis, P.A. by Larry S. McDevitt and Craig D. Justus, for plaintiff-appellant.

Robert W. Oast, Jr. and William F. Slawter for defendant-appellee.

LAKE, Chief Justice.

This case concerns legislative policy and procedure as it relates to undeveloped land desired to be annexed by a municipal governing board, pursuant to N.C.G.S. § 160A-48 which defines the "character" of an area to be annexed. Specifically, the issue before this Court on appeal is the proper interpretation of the exception set forth in N.C.G.S. § 160A-48(d)(2) as it relates to areas of land that are not developed for urban purposes, an issue of first impression for this Court. The Court of Appeals' majority opinion concluded that the language of this subsection of the statute allows for annexation of the non-urban or undeveloped parcels at issue because the parcels, on at least sixty percent of their external boundary, are adjacent to areas which are developed for urban purposes. Because we conclude that this is not what the statutory language proposes and intends, we reverse the decision of the Court of Appeals and remand this case to that court for further remand to the trial court.

On 22 February 2000, the City of Asheville ("the City") adopted a resolution of intent to annex approximately 1,500 acres in the Long Shoals Area, including properties owned by Carolina Power & Light Company ("CP&L"). This acreage was being utilized in a variety of ways. The largest single property and use within the entire area is the steam-generated electrical power plant owned and operated by CP&L. This property includes the power plant, Lake Julian, and other associated facilities.

An annexation services plan ("ASP") depicting the boundaries of the Long Shoals Area to be annexed was approved by the City on 15 March 2000. The ASP purported to qualify the Long Shoals Area under one of the five available standards or tests specified in N.C.G.S. § 160A-48 for determining whether an area is "developed for urban purposes," which test is set forth in subsection (c)(3) and is known as the "Urban Use/Subdivision Test." This test, in essence, provides that an area *is* developed for urban purposes if at least sixty percent of the total number of lots in the area are used for residential, commercial, industrial, institutional, or governmental purposes and is subdivided into lots such that at least sixty percent of the total

acreage of the area, not counting that used for commercial, industrial, governmental, or institutional purposes, consists of lots three acres or less in size. N.C.G.S. § 160A-48(c)(3) (2003).

Richard Cowick, a consultant from Benchmark, Inc., was hired by the City to classify the character of the property to be annexed. Cowick reported that 101 out of 134 lots or tracts in the Long Shoals Area, or 75.37 percent, were actively used for residential, commercial, industrial, institutional, or governmental purposes. Cowick and the City also reported that only 114.06 acres in the Long Shoals Area were undeveloped areas or developed areas being used for residential purposes. Of that total, it was contended that 72.17 acres, or 63.27 percent of the undeveloped or residential areas, consisted of lots or tracts three acres or less in size, thus bringing the Long Shoals Area within the standards set forth in N.C.G.S. § 160A-48(c)(3).

In its ASP, the City classified 288.21 acres out of the 1,500 acres of the Long Shoals Area as "non-urban," or not developed for urban purposes. The City excluded this acreage from the subdivision test calculations. These 288.21 acres are separated into five, noncontiguous tracts denominated as Non-Urban Areas 1 through 5. The external boundaries for Non-Urban Area 1 and Non-Urban Area 4, consisting of 122.75 acres and 66.51 acres respectively, are not adjacent to the City's existing municipal boundary line.

On 23 May 2000, a public hearing was held concerning the annexation of the Long Shoals Area. On 13 June 2000, the City adopted Ordinance 2708, which purported to annex the Long Shoals Area, including the CP&L property, effective 1 July 2001. With the adoption of the ordinance, the City modified some of the calculations for the Urban Use/Subdivision Test referenced in its ASP, determining that 63.08 percent of the total acreage of lots undeveloped and lots used for residential purposes consisted of lots or tracts three acres or less in size. The City did not modify any of its prior determinations from the ASP for Non-Urban Area 1 and Non-Urban Area 4. Within Non-Urban Area 1, there is a farm of over thirty acres that is not contiguous to the existing city limits which the City unsuccessfully attempted to classify as urban and annex in a prior case. *See Asheville Indus., Inc. v. City of Asheville*, 112 N.C. App. 713, 436 S.E.2d 873 (1993).

On 11 August 2000, CP&L filed a petition for review in Superior Court, Buncombe County, challenging the City's adoption of

Ordinance 2708. CP&L contended that the City erroneously characterized as "Non-Urban," under N.C.G.S. § 160A-48(d)(2), the residential or vacant properties in Non-Urban Area 1, including the farm, and in Non-Urban Area 4, as those areas are not adjacent to the existing municipal boundary line as required by the statute. With such characterization, CP&L argued that the City erroneously excluded that acreage from the Subdivision Test in N.C.G.S. § 160A-48(c)(3), resulting in a false percentage of at least sixty percent, which ostensibly met the Subdivision Test requirements.

At trial, the parties stipulated that a 4.4-acre tract owned by the Meece family was incorrectly listed as commercial and should have been classified as a residential lot larger than three acres in size. The effect of this reclassification on the Subdivision Test was to decrease to 60.71 percent the percentage of undeveloped lots or those used for residential purposes consisting of lots or tracts three acres or less in size.

The trial court affirmed the City's Annexation Ordinance 2708. CP&L appealed the decision to the North Carolina Court of Appeals. The Court of Appeals' majority opinion affirmed the trial court's ruling, with Judge Tyson dissenting on the issue of the City's compliance with N.C.G.S. § 160A-48(d)(2) as it related to Non-Urban Area 1 and Non-Urban Area 4. CP&L appealed that decision to this Court as a matter of right, based upon the dissenting opinion. For the following reasons, we reverse the decision of the Court of Appeals.

Involuntary annexation is by its nature a harsh exercise of governmental power affecting private property and so is properly restrained and balanced by legislative policy and mandated standards and procedure. Annexation is initiated upon the decision of a municipal governing board to extend the municipal corporate limits, and upon challenge by a property owner, the extent and implementation of this decision must comply with legislative intent. The declaration of state policy for annexation by municipalities having a population of 5,000 or more persons, as set forth in N.C.G.S. § 160A-45, specifies that annexation should be done in accordance with uniform legislative standards to provide "governmental services essential for sound urban development and for the protection of health, safety and welfare in areas being *intensively used* for residential, commercial, industrial, institutional and governmental purposes or in areas undergoing such development." N.C.G.S. § 160A-45(2) (2003) (emphasis added).

In N.C.G.S. § 160A-48, the General Assembly has carefully specified the standards which must be met in order for any area to be annexed, so as to prevent municipalities from extending their boundaries arbitrarily or without due regard for the policy, reasons, and standards mandated by the legislature. Subsection (a) of this statute states that a municipality may extend its corporate limits "to include any area (1) [w]hich meets the general standards of subsection (b), and (2) *[e]very part of which* meets the requirements of either subsection (c) or subsection (d)." N.C.G.S. § 160A-48(a)(1), (2) (2003) (emphasis added). Subsection (b) of this statute begins by stating that: "The total area to be annexed *must meet the following standards*:", and subsection (c) of this statute begins by stating: "Part or all of the area to be annexed *must be developed* for urban purposes." N.C.G.S. § 160A-48(b), (c) (2003) (emphasis added). For purposes of this case on appeal, the general standards of subsection (b) are not relevant, and our focus is solely upon subsection (c)(3), the Urban Use/Subdivision Test to determine an area developed for urban purposes, and subsection (d)(2), the exception provision for including in the area to be annexed an undeveloped area if it meets the conditions specified therein.

Areas that do not meet the test of subsection (c)(3) of section 160A-48 are by implication "non-urban areas" or areas not developed for urban purposes. These areas are still subject to annexation if they meet the requirements of subsection (d). The purpose of subsection (d) is "to permit municipal governing boards to extend corporate limits to include all nearby areas developed for urban purposes and where necessary to include areas which at the time of annexation are not yet developed for urban purposes but which constitute necessary land connections between the municipality and areas developed for urban purposes or between two or more areas developed for urban purposes." N.C.G.S. § 160A-48(d) (2003). The specific wording of subsection (d), and more narrowly, (d)(2) is at the heart of this case. Subsection (d) states in part:

> (d) In addition to areas developed for urban purposes, a governing board may include in the area to be annexed any area which does not meet the requirements of subsection (c) if such area either:
>
> (1) Lies between the municipal boundary and an area developed for urban purposes so that the area developed for urban purposes is either not adjacent to the municipal

boundary or cannot be served by the municipality without extending services and/or water and/or sewer lines through such sparsely developed area; or

(2) Is adjacent, on at least sixty percent (60%) of its external boundary, to any combination of the municipal boundary and the boundary of an area or areas developed for urban purposes as defined in subsection (c).

N.C.G.S. § 160A-48(d)(1), (2).

This Court has held that "[j]udicial review of an annexation ordinance is limited to determination of whether the annexation proceedings substantially comply with the requirements of the applicable annexation statute." *Food Town Stores v. City of Salisbury*, 300 N.C. 21, 40, 265 S.E.2d 123, 135 (1980). On appeal, this Court is bound by the facts found by the trial court if supported by the evidence. *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980). Conclusions of law drawn by the trial court from its findings of fact are reviewable *de novo* on appeal. *Id.*

The issue before this Court in the instant appeal is a question of law, the proper interpretation of N.C.G.S. § 160A-48(d)(2), specifically whether the wording "any combination" will allow use of only one boundary in the equation, either the "municipal boundary" or the boundary of an area "developed for urban purposes." As stipulated by the parties, no part of the City's Non-Urban Area 1 or Non-Urban Area 4 is adjacent to the city limits. The Court of Appeals' majority opinion concluded that the language of the statute allowed for annexation of the non-urban parcels at issue because the parcels are adjacent, on at least sixty percent of their external boundary, exclusively to areas developed for urban purposes. The majority reasoned that "any combination" could include a situation where the parcel abuts an area developed for urban purposes but not a municipal boundary.

The Court of Appeals in its majority opinion stated:

[T]he plain language of the statute includes all possible combinations which make the following equation work: the amount of border which the non-urban area shares with the municipality *combined with* the amount of border [which] the non-urban area shares with an area or areas developed for urban purposes *equals* sixty percent of the border of the non-urban area. One

> workable combination exists where a non-urban area touches, on at least sixty percent of its external border, *only* an area or areas developed for urban purposes.

Carolina Power & Light Co. v. City of Asheville, 161 N.C. App. 1, 10, 587 S.E.2d 490, 496 (2003).

"The primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute." *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972). The foremost task in statutory interpretation is " 'to determine legislative intent while giving the language of the statute its natural and ordinary meaning unless the context requires otherwise.' " *Spruill v. Lake Phelps Vol. Fire Dep't, Inc.*, 351 N.C. 318, 320, 523 S.E.2d 672, 674 (2000) (quoting *Turlington v. McLeod*, 323 N.C. 591, 594, 374 S.E.2d 394, 397 (1988)). Where the statutory language is clear and unambiguous, "the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language." *Fowler v. Valencourt*, 334 N.C. 345, 348, 435 S.E.2d 530, 532 (1993). If the language is ambiguous or unclear, the reviewing court must construe the statute in an attempt not to "defeat or impair the object of the statute . . . if that can reasonably be done without doing violence to the legislative language." *North Carolina Baptist Hosp., Inc. v. Mitchell*, 323 N.C. 528, 532, 374 S.E.2d 844, 846 (1988).

The crux of the statutory language in question is focused upon the phrase, "to any combination of the municipal boundary and the boundary of an area or areas developed for urban purposes as defined in subsection (c)." N.C.G.S. § 160A-48(d)(2). In considering this wording, little ambiguity presents itself facially. "Combination" is defined as the "[c]ombined state or condition of two or more things." *The Oxford English Dictionary*, Vol. II, 647 (1961). "Combine" is defined as "[t]o couple or join two or more things together" or "[t]o unite . . . or exhibit in union." *Id.* at 648.

In defining areas not developed for urban purposes that nevertheless may be annexed, subsection (d)(2) clearly specifies a combination of two things, in "any" variation or quantities of these two entities: the municipal boundary and the boundary of the urban developed area. To totally exclude one entity in this equation, the boundary with the municipality, fails to yield a true "combination." The Court of Appeals' majority opinion appears to rest upon the premise, in theory at least, that a quantity or value of zero is

computable and can, as the statute requires, unite with something else. This approach ignores the ordinary meaning of the words of the statute and imposes a theoretically strained interpretation and application.

The interpretation of the Court of Appeals' majority is not bolstered by the fact that the General Assembly chose "any" as the adjective to precede "combination." "Any" refers to the kind of "combination," which must by definition "unite" or "combine" two things. Thus, "any" does not affect the meaning of "combination." That the combination must join areas adjacent to a municipality and areas adjacent to urban developed areas is emphasized by the use of the conjunctive term "and" within the statute. *Cf. Grassy Creek Neighborhood Alliance, Inc. v. City of Winston-Salem*, 142 N.C. App. 290, 297-98, 542 S.E.2d 296, 301 (2001) (stating that the natural and ordinary meaning of the disjunctive "or" permits compliance with either condition).

While there is no prior state case law precisely on point in construing this language, previous cases examining N.C.G.S. § 160A-48(d)(2) are instructive. In the case of *In re Annexation Ordinance Adopted by the City of Jacksonville*, 255 N.C. 633, 122 S.E.2d 690 (1961), this Court addressed the issue of what area might qualify as "non-urban" or "not developed for urban purposes but subject to annexation due to its properties." The petitioner in that case contended that the tract of land to be annexed was not sufficiently urbanized. This Court noted that although the tract was undeveloped, its acreage qualified under a predecessor statute to N.C.G.S. § 160A-48(d)(2). This Court stated in upholding the annexation that "[a] casual examination of the annexation map shows that more than 60% of the external boundary of the 15.5 acre tract is *adjacent to the city limits* and the Forest Hills Development." *Id.* at 643, 122 S.E.2d at 698 (emphasis added).

Similarly, in *In re Annexation Ordinance Adopted by the City of Albemarle*, 300 N.C. 337, 266 S.E.2d 661 (1980), this Court stated that: "Cities with 5,000 or more people may annex an outlying urban area pursuant to G.S. 160A-48(c) and the intervening undeveloped lands pursuant to G.S. 160A-48(d) so long as the entire area meets the requirements of G.S. 160A-48(b)." *Id.* at 341, 266 S.E.2d at 663. In the instant case, the non-urban areas are not "intervening undeveloped lands" between the City and the urban area proposed for annexation as stated by this Court in *Albemarle*.

The Court of Appeals has analyzed N.C.G.S. § 160A-48(d)(2) several times since *Albemarle*. In all of those cases, the proposed non-urban areas were adjacent to their respective existing municipal boundaries. *Chapel Hill Country Club, Inc. v. Town of Chapel Hill*, 97 N.C. App. 171, 388 S.E.2d 168, *disc. rev. denied*, 326 N.C. 481, 392 S.E.2d 87 (1990); *Wallace v. Town of Chapel Hill*, 93 N.C. App. 422, 378 S.E.2d 225 (1989); *Southern Glove Mfg. Co. v. City of Newton*, 75 N.C. App. 574, 331 S.E.2d 180, *disc. rev. denied*, 314 N.C. 669, 336 S.E.2d 401 (1985); *The Little Red School House, Ltd. v. City of Greensboro*, 71 N.C. App. 332, 322 S.E.2d 195 (1984), *appeal dismissed and disc. rev. denied*, 313 N.C. 514, 329 S.E.2d 392 (1985).

In *The Little Red School House*, petitioners challenged a proposed annexation on the ground that the subdivided land did not meet the requirements of N.C.G.S. §§ 160A-48(c) and 160A-48(d). 71 N.C. App. at 337-38, 322 S.E.2d at 198. The Court of Appeals upheld the trial court's finding of fact that although one of the subareas did not meet the requirements of N.C.G.S. § 160A-48(c), the area fully complied with the requirements of N.C.G.S. § 160A-48(d), by "having 74.9% of its external boundary adjacent to the boundaries of the municipality and subareas [developed for urban purposes as defined in N.C.G.S. § 160A-48(c)]." *Id.* at 338, 322 S.E.2d at 198.

In *Southern Glove*, petitioners argued that annexation by the City of Newton was not authorized by statute because the undeveloped areas were not "necessary land connections" under N.C.G.S. § 160A-48(d)(2), and that the word "necessary" within the purpose section following the numbered paragraphs in (d) acted as a limitation on the criteria set forth in those numbered paragraphs. 75 N.C. App. at 578, 331 S.E.2d at 183. The Court of Appeals affirmed the trial court's decision that the adjoining undeveloped tracts qualified under subsection (d)(2) for annexation. *Id.* The city did not need to prove that a land connection was "necessary" so long as it met the adjacency standards in subsection (d)(2). *Id.* "We believe the sub-area allowed by G.S. 160A-48(d)(2) is one of those described by the unnumbered paragraph as a 'necessary land connection.' If we were to hold otherwise[,] we believe we would not be following the words of the statute." *Id.*

In *Wallace*, the Town of Chapel Hill planned to annex three urbanized areas meeting the requirements of subsection (c) and one area which did not meet the requirements of subsection (c), thereby being designated as "non-urban." 93 N.C. App. at 423, 378 S.E.2d at 226.

Despite petitioners' argument to overturn *Southern Glove*, the Court of Appeals held that "[t]he Town presented evidence that the non-urban property met the criteria of (d)(2) in that the non-urban property was adjacent on at least sixty percent of its external boundary to a *combination* of the Town's boundary *and* the boundary of the area developed for urban purposes." *Id.* at 430, 378 S.E.2d at 230 (emphasis added).

In the year following the decision in *Wallace*, the Court of Appeals addressed the language in the purpose section, which follows part (2) of N.C.G.S. § 160A-48(d), in *Chapel Hill Country Club*. There the Court of Appeals reiterated that a municipality may annex a non-urban property if it meets the criteria either of (d)(1) or (d)(2) without regard to language within the purpose section following those parts. 97 N.C. App. at 179-80, 388 S.E.2d at 173.

Further, the legislative purpose behind N.C.G.S. § 160A-48(d) and public policy favor an interpretation giving effect to the plain meaning of the words "and" and "combination." Subsection (d) was created to allow municipalities the opportunity to extend their services to reach urban core areas without being thwarted by "intervening undeveloped land." *In re Annexation Ordinance Adopted by the City of Albemarle*, 300 N.C. at 341-42, 266 S.E.2d at 663-64. These intervening undeveloped lands connect the municipality and the areas developed for urban purposes, making them important and must-have areas for annexation. Nonintervening, non-urban areas do not serve that same purpose, and annexation of such areas is not essential to extending services. If those areas do not meet the requirement of (d)(2), there is no basis for their annexation.

This Court has cited the legislative history of annexation laws as demonstrating that the legislative standard should " 'act as a brake only with respect to attempted annexation of large tracts of agricultural or vacant land where no evidence of urban development can be shown.' " *Lithium Corp. of America, Inc. v. Town of Bessemer City*, 261 N.C. 532, 537, 135 S.E.2d 574, 578 (1964) (quoting North Carolina General Assembly, *Supplementary Report of the Municipal Government Study Commission*, p. 11 (1959)). Furthermore, in 1998 the General Assembly amended the annexation statutes in numerous ways, including limiting the scope of a city's authority to annex undeveloped acreage by: (1) reducing the acreage that would otherwise qualify as being subdivided for urban purposes under N.C.G.S. § 160A-48(c)(3) from a maximum of five acres to three acres

or less in size; (2) amending N.C.G.S. § 160A-48(d) to place a twenty-five percent cap on the amount of property a city can classify as a non-urban "necessary land connection"; and (3) stating that a reviewing court will no longer be required to accept a city's estimates of population and degree of land subdivision for purposes of meeting the requirements of N.C.G.S. § 160A-48 if "the actual population, total area, or degree of land subdivision falls below the standards" set in that statute. Act of Sept. 22, 1998, ch. 150, secs. 14, 19, 1997 N.C. Sess. Laws (2d Sess. 1998) 432, 446-48, 456-57. These steps evidence the General Assembly's desire to limit or restrict rather than facilitate annexation.

Because the plain meaning of N.C.G.S. § 160A-48(d)(2) states that there must be a "combination" of adjacency to the municipality *and* adjacency to areas developed for urban purposes, the proposed annexation as to Non-Urban Areas 1 and 4 is invalid. Those areas do not qualify under (d)(2) for inclusion with developed areas which meet the Urban Use/Subdivision Test in N.C.G.S. § 160A-48(c). This interpretation is in accordance with the intent of the General Assembly and case history.

CP&L contends that the effect of including Non-Urban Areas 1 and 4 under subsection (c) rather than (d)(2) is to decrease the percentage for the Urban Use/Subdivision Test to under sixty percent, thereby invalidating the entire annexation as outlined in the ASP. As this issue was not raised in the dissent, we decline to address it but note its importance on remand.

The decision of the Court of Appeals is reversed, and this case is remanded to that court for further remand to the trial court for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

IN THE MATTER OF THE TESTAMENTARY TRUST OF ETHYLENE R. CHARNOCK, DECEASED

No. 326A03

(Filed 25 June 2004)

Trusts—modification—appointment of trustees—subject matter jurisdiction

The trial court did not err by dismissing based on lack of subject matter jurisdiction petitioner's case arising out of a request for modification of a trust seeking to remove the trustee designated by the testatrix and to appoint new co-trustees, because: (1) the request for modification of the trust was properly characterized as a motion for removal of respondent-appellee as trustee; and (2) the plain language of N.C.G.S. § 36A-23.1(a) provides that the clerk of superior court has exclusive jurisdiction over the removal and appointment of trustees.

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. 35, 579 S.E.2d 887 (2003), affirming a judgment entered 23 May 2002 by Judge Catherine C. Eagles in Superior Court, Guilford County. Heard in the Supreme Court 18 November 2003.

Wyatt Early Harris Wheeler, LLP, by William E. Wheeler, for petitioner-appellants Sabrina C. Schumaker, Cleta Mae Kearns, Bernice Ragsdale, Delbert Ragsdale, Faedene Maness, and Daisy Vestal.

Molly N. Howard for guardian ad litem-appellee.

Robinson, Bradshaw & Hinson, P.A., by Edward F. Hennessey, IV, for respondent-appellee Ben Farmer.

PARKER, Justice.

The issue before this Court is whether the Court of Appeals erred in affirming an order dismissing petitioners' case for lack of subject matter jurisdiction.

On 8 July 1999 Ethylene R. Charnock (decedent) executed a will that had been prepared for her by respondent Ben Farmer. Ms. Charnock's will left her entire estate in an irrevocable trust for the benefit of her daughter, Sabrina C. Schumaker (Schumaker), for life.

The trust provided that any unexpended principal and trust income left over at Schumaker's death would be paid over to Ms. Charnock's five siblings (or to the living issue of any predeceasing sibling) in fee simple. The will named Ben Farmer as trustee, with High Point Bank and Trust Company named as an alternate trustee in the event Ben Farmer was unable to serve as Trustee for any reason. The will included a direction "to apply so much of the principal and net income thereof to the support, education, welfare, and maintenance of [Schumaker] as my Trustee shall deem necessary and proper." The will also directed the trustee to consider written instructions or opinions given to him by Ms. Charnock before her death. Ms. Charnock wrote a note dated 5 September 1999 which read:

> Also issue to Sabrina [a] monthly check in the amount of $500. This with the $550 (TIAA) and insurance should be sufficient for the time being. $500 could easily be generated from interest on the CD's. I want to hold as much as possible for her future—but in case of medical emergency use your judgment.

This letter, given to Ben Farmer by Ms. Charnock, also directed that "[a]t my death Sabrina is to receive anything in my home . . . she needs."

Ms. Charnock died on 2 February 2000. Respondent Ben Farmer acted as trustee and funded the trust. At Schumaker's request respondent agreed not to sell the house as he had intended. Respondent asserts that he and Schumaker agreed that Schumaker and her husband could live in Ms. Charnock's house and that the trust would pay the real estate taxes, insurance, major repairs, and yard maintenance; this arrangement was to be in lieu of Schumaker's $500 monthly check. In March of 2001 Schumaker, through counsel, requested the $500 monthly payments from the trust. Respondent wrote to Schumaker telling her that he would begin paying her that amount if she elected to move out of the house.

Decedent's five siblings and Schumaker entered into a "Consent and Agreement of Beneficiaries to Modification of Trust" (consent and agreement) and filed a "Proceeding for Modification of a Trust" (petition) on 14 February 2002 in superior court. The proposed modification was to change the number of trustees and to replace Ben Farmer as trustee with substitute co-trustees Wendy Heafner (a grandniece of decedent) and High Point Bank and Trust Company. Petitioners cited dissatisfaction with the conduct of Ben Farmer as trustee as the reason for the modification request. A *guardian ad*

litem was appointed by the court to represent the interests of any unknown or unborn potential beneficiaries of the trust. The *guardian ad litem* consented to the modification.

On 23 May 2002 the trial court entered judgment granting respondent's motion to dismiss for lack of subject matter jurisdiction. Costs of the action were taxed to the petitioners.

A divided panel of the Court of Appeals upheld the dismissal of the petition for lack of subject matter jurisdiction. *In re Testamentary Tr. of Charnock*, 158 N.C. App. 35, 579 S.E.2d 887 (2003). The Court of Appeals majority concluded that the request for modification of the trust was "properly characterized as a motion for removal of appellee as trustee." *Id.* at 41, 579 S.E.2d at 891. Therefore, the request fell under N.C.G.S. § 36A-23.1(a), which provides that clerks of superior court have exclusive jurisdiction over proceedings to remove a trustee. N.C.G.S. § 36A-23.1(a) (2001). In his dissent, Judge Wynn stated his opinion that the General Assembly "expressly created an alternative mechanism for beneficiaries to remove a trustee: namely, removal without cause" by enacting N.C.G.S. § 36A-125.4(a). *Charnock*, 158 N.C. App. at 47, 579 S.E.2d at 894. Thus, by this reasoning, the superior court had subject matter jurisdiction to hear the petition.

Before this Court the petitioners contend that their request to modify the trust by changing the number of trustees constitutes a modification for purposes of N.C.G.S. § 36A-125.4, bringing this matter within the jurisdiction of the superior court. N.C.G.S. § 36A-125.4 (2001). We disagree.

At the time this proceeding was instituted, section 36A-23.1(a) directed that

> [t]he clerks of superior court of this State have original jurisdiction over all proceedings initiated by interested persons concerning the internal affairs of trusts except proceedings to modify or terminate trusts. Except as provided in subdivision (3) of this subsection, the clerk's jurisdiction is exclusive. Proceedings that may be maintained under this subsection are those concerning the administration and distribution of trusts, the declaration of rights, and the determination of other matters involving trustees and trust beneficiaries, to the extent that those matters are not otherwise provided for in the governing instrument. These include proceedings:

> (1) To appoint or remove a trustee; . . .
>
> (3) To ascertain beneficiaries, to determine any question arising in the administration or distribution of any trust, including questions of construction of trust instruments, and to determine the existence or nonexistence of trusts created other than by will and the existence or nonexistence of any immunity, power, privilege, duty, or right. The clerk, on the clerk's own motion, may determine that a proceeding to determine an issue listed in this subdivision shall be originally heard by a superior court judge.

N.C.G.S. § 36A-23.1(a) (2001). Effective 1 January 2004, the first sentence of this statute was amended to delete the words "to modify or terminate trusts" and to read "except proceedings governed by Article 11A of this Chapter." Act of June 26, 2003, ch. 261, sec. 1, 2003 N.C. Sess. Laws 440, 440. This amendment applied to all trusts, including the irrevocable trust at issue here. *Id.*, sec. 8, 2003 N.C. Sess. Laws at 443.

Modifications and terminations of irrevocable trusts are addressed by Article 11A of Chapter 36A, "Trusts and Trustees," of the North Carolina General Statutes. Article 11A, titled "Modification and Termination of Irrevocable Trusts," provides for modification by the consent of beneficiaries: "Except as provided in subsection (b) of this section, if all beneficiaries of an irrevocable trust consent, they may compel modification or termination of the trust in a proceeding before the superior court." N.C.G.S. § 36A-125.4(a) (2001). The statute goes on to say that if the beneficiaries seek to modify the trust

> in a manner that affects its continuance according to its terms, and if the continuance of the trust is necessary to carry out a material purpose of the trust, the trust cannot be modified or terminated unless the court in its discretion determines that the reason for modifying or terminating the trust under the circumstances substantially outweighs the interest in accomplishing a material purpose of the trust.

N.C.G.S. § 36A-125.4(b) (2001).[1]

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1. Effective 30 May 2003, subsection (b) of this statute was amended to read as follows:

> Where the beneficiaries of an irrevocable trust seek to compel a termination of the trust and the continuance of the trust is necessary to carry out a material purpose of the trust, or where the beneficiaries seek to compel a modification of the trust in a manner that is inconsistent with its material purpose, the trust cannot

Under both the pre- and post-amendment versions of N.C.G.S. § 36A-23.1, the clerk of superior court lacked original jurisdiction over proceedings to "modify or terminate" a trust. Thus, an action that is characterized as a modification must be brought before the superior court. The nature of an action will, therefore, determine whether jurisdiction over the action lies with the clerk of superior court or with the superior court.

In this case, the beneficiaries sought to change the terms of the trust by changing the number of trustees from a single trustee to two co-trustees. The result of this action would be to remove the existing trustee, respondent Ben Farmer, and replace him with the proposed co-trustees Wendy Heafner and the High Point Bank and Trust Company. However, with respect to Wendy Heafner, the consent and agreement provided:

> In the event Wendy Heafner resigns, dies, becomes incapacitated, incapable or unwilling to act as Co-trustee, High Point Bank and Trust Company, and its successors in interest, shall serve as sole Trustee and shall possess all powers and duties originally granted under the Trust.

The consent and agreement further provided that Wendy Heafner would receive no compensation and that High Point Bank and Trust Company would receive compensation in accordance with its applicable fee schedule. The petition recited that the "Modification does not effect any substantive change to the Trust."

After considering the substance of the petition and of the consent and agreement, the Court of Appeals majority concluded that petitioners' "request for 'modification' of the trust is properly characterized as a motion for removal of [respondent] as trustee." *Charnock*, 158 N.C. App. at 41, 579 S.E.2d at 891. The majority further determined that the "petition does not establish consent by the beneficiaries to a structural or substantive change in the terms of the trust, but only to the removal and replacement of a particular trustee." *Id.* The Court of Appeals concluded that "this appeal does not present the general question of whether beneficiaries of a testamentary trust may properly bring an action to modify the terms of a trust instrument to provide for administration by two co-trustees, rather than by a single

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be modified or terminated unless the court in its discretion determines that the reason for modifying or terminating the trust under the circumstances substantially outweighs the interest in accomplishing a material purpose of the trust.

Act of May 30, 2003, ch. 93, sec. 1, 2003 N.C. Sess. Laws 119, 119.

trustee." *Id.* Accordingly, the Court of Appeals did not determine the issue of whether a proper proceeding to provide for the administration of the trust by co-trustees rather than a single trustee would be brought before the clerk of superior court or the superior court.

The dissent does not disagree with these conclusions by the majority. Rather the dissent's position is that regardless of whether the petition is "characterized as a petition for modification or a petition for removing a trustee," section 36A-125.4 provides "an alternative mechanism" for beneficiaries to remove a trustee without showing cause. *Id.* at 47, 579 S.E.2d at 894.

Thus, the issue of whether the petition was for modification of the trust has been resolved against petitioner and is not a basis for appeal. N.C. R. App. P. 16(b). The sole issue before this Court is whether the trial court had subject matter jurisdiction to hear a proceeding to remove the trustee designated by the testatrix and appoint new co-trustees. In this regard we note that although the trial court did not make a specific finding, the trial court by implication found that this proceeding was one to remove a trustee. The trial court's judgment states, "This dismissal shall be without prejudice to Petitioners' rights, if any, to seek removal of the Trustee in an action before the Clerk of this Court pursuant to G.S. § 36A-23.1, *et seq.*"

In ascertaining legislative intent, the Court looks first to the language of the statute and gives the words their ordinary and plain meaning. *Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999). Section 36A-23.1(a) by its plain language gives the clerk of superior court exclusive jurisdiction over the removal and appointment of trustees. By contrast, section 36A-125.4 says nothing about the removal of a trustee but addresses only the modification or termination of an irrevocable trust by consent of the beneficiaries. Of note, Article 11A, including section 36A-125.4, was enacted in 1999, Act of July 9, 1999, ch. 266, sec. 2, 1999 N.C. Sess. Laws 982, 984, and section 36A-125.4 was amended in 2003, Act of May 30, 2003, ch. 93, sec. 1, 2003 N.C. Sess. Laws 119, 119. Section 36A-23.1(a) was enacted in 2001, Act of Sept. 14, 2001, ch. 413, sec. 1, 2001 N.C. Sess. Laws 1594, 1595-96, and was amended in 2003, ch. 261, sec. 1, 2003 N.C. Sess. Laws at 440-41, to refer specifically to Article 11A pertaining to modification and termination of an irrevocable trust. From this treatment of these statutes by the General Assembly, the inference can be drawn that the legislature did not intend for "modification of a trust" to include the removal and appointment of a trustee or for section 36A-125.4 to be an alterna-

tive mechanism for removal of a trustee without cause by consent of the beneficiaries. *See Victory Cab Co. v. Charlotte*, 234 N.C. 572, 576, 68 S.E.2d 433, 436 (1951) (where the meaning of a statute is doubtful, "statutory changes over a period of years" may be considered to ascertain its true meaning). "[A] statute dealing with a specific situation controls, with respect to that situation, other sections which are general in their application." *State ex rel. Util. Comm. v. Lumbee River Elec. Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969).

Given the plain language of N.C.G.S. § 36A-23.1(a) that the clerk of superior court has exclusive jurisdiction over the removal and appointment of trustees, we conclude the trial court did not have subject matter jurisdiction over petitioners' petition. Accordingly, for the reasons stated herein, the decision of the Court of Appeals affirming the trial court's dismissal of petitioners' petition is affirmed.

AFFIRMED.

ERIC JOHN LUHMANN v. BILLY HOENIG AND CAPE CARTERET VOLUNTEER FIRE AND RESCUE DEPARTMENT, INC.

No. 664A03

(Filed 25 June 2004)

Immunity–sovereign–rural fire department—fire protection districts

Although the Court of Appeals properly concluded that defendant rural fire department and defendant fireman were entitled to immunity from plaintiff's suit, the Court of Appeals erred by concluding defendants were entitled to immunity from plaintiff's negligence suit pursuant to N.C.G.S. § 58-82-5, which limits the liability of rural fire departments. Instead, defendants were entitled to sovereign immunity from the suit pursuant to N.C.G.S. § 69-25.8, which provides immunity for fire protection districts, and the fire department waived its sovereign immunity to the extent of its liability insurance that was in excess of one million dollars.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 161 N.C. App. 452, 588 S.E.2d

550 (2003), reversing an order entered 2 April 2002 by Judge W. Allen Cobb, Jr. and a judgment entered 3 May 2002 by Judge Carl Tilghman in Superior Court, Carteret County. Heard in the Supreme Court 10 May 2004.

Wheatly, Wheatly, Nobles, Weeks, Valentine & Lupton, P.A., by C.R. Wheatly, Jr. and Stevenson L. Weeks, and Gaskins & Gaskins, P.A., by Herman E. Gaskins, Jr., for plaintiff-appellant.

Cranfill, Sumner & Hartzog, L.L.P., by Edward C. LeCarpentier III, for defendant-appellants.

WAINWRIGHT, Justice.

On 26 February 2000, a brush fire started in plaintiff Luhmann's neighborhood. Defendant Cape Carteret Volunteer Fire and Rescue Department, Inc. responded to the fire with several vehicles. Two of the vehicles, a tanker truck and a pumper truck, were connected to one another by a fire hose.

While the fire was being extinguished, plaintiff approached the trucks to speak with a fireman. Plaintiff was not asked to leave the area. As plaintiff was speaking with the fireman, Fire Chief Harold Henrich instructed defendant, fireman Billy Hoenig ("Hoenig"), to leave the scene and replenish the water supply in the tanker truck. Contrary to standard procedures, Hoenig failed to walk around the truck to check for connected hoses. As Hoenig backed away in the tanker truck, the hose connecting the tanker truck to the pumper truck tightened and pinned plaintiff's legs against the pumper truck. Plaintiff felt his leg breaking as someone yelled for the truck to stop.

Plaintiff suffered a fractured tibia, tears in his meniscus cartilage and ruptures in his anterior cruciate ligaments. Plaintiff had two surgeries and underwent physical therapy. As a result of his injuries, plaintiff was forced to sell the auto repair business that he owned. Plaintiff wears a leg brace and has developed a chronic pain syndrome called reflex sympathetic dystrophy. Plaintiff will likely never again climb, stoop, kneel, or crouch. He can occasionally walk. Pain remains a significant part of plaintiff's life. At some point, it is likely that plaintiff will need further treatment, including a possible knee replacement.

On 14 June 2000, plaintiff filed suit against Hoenig and the Cape Carteret Volunteer Fire and Rescue Department, seeking damages for

their alleged negligence. On 5 February 2002, following summary judgment motions by both parties, the trial court ruled that defendants were negligent as a matter of law. On 2 May 2002, a jury awarded plaintiff $950,000 in damages.

On 24 May 2002, defendants filed a Notice of Appeal with the Court of Appeals. On 2 December 2003, a divided panel of the Court of Appeals reversed the trial court's decision and vacated the judgment. *Luhmann v. Hoenig*, 161 N.C. App. 452, 458, 588 S.E.2d 550, 554 (2003). The Court of Appeals majority concluded that defendants were entitled to statutory immunity from plaintiff's suit pursuant to N.C.G.S. § 58-82-5, which limits the liability of rural fire departments. *Id.* at 457, 588 S.E.2d at 553-54. Judge Wynn dissented, concluding that defendants were entitled to sovereign immunity from the suit pursuant to N.C.G.S. § 69-25.8, which provides sovereign immunity for fire protection districts. *Id.* at 458, 588 S.E.2d at 554. Judge Wynn further concluded that defendants had waived their sovereign immunity to the extent that they purchased two insurance policies, in effect at the time of plaintiff's injury, each with a one million dollar policy limit. *Id.* at 459, 588 S.E.2d at 554. Based on Judge Wynn's dissent, plaintiffs appealed to this Court.

The critical issue in the present case is whether defendants are entitled to the statutory immunity in N.C.G.S. § 58-82-5 or the sovereign immunity in N.C.G.S. § 69-25.8.

N.C.G.S. § 58-82-5 states in pertinent part:

> (a) For the purpose of this section, a "rural fire department" means a bona fide fire department incorporated as a nonprofit corporation which under schedules filed with or approved by the Commissioner of Insurance, is classified as not less than Class "9" in accordance with rating methods, schedules, classifications, underwriting rules, bylaws, or regulations effective or applied with respect to the establishment of rates or premiums used or charged pursuant to Article 36 or Article 40 of this Chapter and which operates fire apparatus of the value of five thousand dollars ($5,000) or more.
>
> (b) A rural fire department or a fireman who belongs to the department shall not be liable for damages to persons or property alleged to have been sustained and alleged to have occurred by reason of an act or omission, either of the rural fire department or of the fireman at the scene of a reported fire, when that act or

> omission relates to the suppression of the reported fire or to the direction of traffic or enforcement of traffic laws or ordinances at the scene of or in connection with a fire, accident, or other hazard by the department or the fireman unless it is established that the damage occurred because of gross negligence, wanton conduct or intentional wrongdoing of the rural fire department or the fireman.

N.C.G.S. § 58-82-5 (2003).

N.C.G.S. § 69-25.8 states in pertinent part:

> Any county, municipal corporation or fire protection district performing any of the services authorized by this Article shall be subject to the same authority and immunities as a county would enjoy in the operation of a county fire department within the county, or a municipal corporation would enjoy in the operation of a fire department within its corporate limits.
>
> . . . .
>
> Members of any county, municipal or fire protection district fire department shall have all of the immunities, privileges and rights, including coverage by workers' compensation insurance, when performing any of the functions authorized by this Article, as members of a county fire department would have in performing their duties in and for a county, or as members of a municipal fire department would have in performing their duties for and within the corporate limits of the municipal corporation.

N.C.G.S. § 69-25.8 (2003).

Following the verdict in the trial court, defendants made a motion to stay enforcement of the judgment. In this motion, defendants asserted that under N.C.G.S. § 69-25.8, they were entitled to "enjoy the 'same authority' and the same 'immunities, privileges and rights' as their county and municipal colleagues." Based on this representation, the trial court allowed defendants' motion and entered an order to stay all proceedings to enforce judgment pending resolution of the appeal. Defendants' post-judgment assertion of sovereign immunity pursuant to Chapter 69 mirrors their original pleading of immunity as an affirmative defense in their Answer, where they claimed that they were "entitled to sovereign, governmental and qualified immunity, except to the extent that those immunities may be deemed to have been waived by the purchase of [] liability insurance policies."

Moreover, the facts of the present relationship between the County and the fire department are consistent with a fire protection district within the meaning of Chapter 69. N.C.G.S. § 69-25.5(1) authorizes a board of county commissioners to provide fire protection services for a district by contracting with an incorporated nonprofit volunteer fire department. N.C.G.S. § 69-25.5(1) (2003). Under N.C.G.S. § 69-25.4(a), a board of county commissioners is authorized to fund its fire protection services by levying and collecting taxes for that purpose. N.C.G.S. § 69-25.4(a) (2003).

In the present case, the Carteret County Board of Commissioners entered into a contract with the fire department on 13 October 1997, whereby the fire department agreed to provide continuing fire protection within the Cape Carteret Fire and Rescue Service District in exchange for compensation from Carteret County funded by the levy and collection of an ad valorem property tax not to exceed ten cents per one hundred dollars valuation on all taxable property within the district. This contractual arrangement generated approximately $850,000 a year for the fire department, accounting for approximately 98% of its annual budget, and transforming the department from one staffed by volunteers to one staffed by paid professionals.

Thus, based on defendants' own representations to the trial court, as well as our fact-specific examination of the relationship between the Cape Carteret Volunteer Fire and Rescue Department and Carteret County, we are satisfied that the fire department in this case constitutes a fire protection district within the meaning of Chapter 69. As such, the fire department is entitled to the same immunities as a county or municipal fire department under N.C.G.S. § 69-25.8.

The well-established common law principle of sovereign immunity referenced in Chapter 69 precludes a county, as a recognizable unit of the state, from being sued except upon its consent or waiver of immunity. *Dawes v. Nash County*, 357 N.C. 442, 445, 584 S.E.2d 760, 762 (2003). Under N.C.G.S. § 153A-435(a), the purchase of liability insurance "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." N.C.G.S. § 153A-435(a) (2001).

Here, the Cape Carteret Volunteer Fire and Rescue Department was covered by liability insurance in excess of one million dollars.

Therefore, to the extent of this insurance coverage, the Fire Department has waived its sovereign immunity pursuant to N.C.G.S. § 153A-435(a) and is liable for damages.

Accordingly, the opinion of the Court of Appeals is reversed as to the issue of sovereign immunity. However, as to the additional assignments and cross assignments of error raised by both parties but not addressed by the Court of Appeals, this case is hereby remanded to the Court of Appeals for its consideration of these issues.

REVERSED AND REMANDED.

STEVE UDZINSKI, ADMINISTRATOR OF THE ESTATE OF LOUISE UDZINSKI AND ADMINISTRATOR OF THE ESTATE OF VICTOR UDZINSKI v. JEFFREY D. LOVIN, M.D. AND HAYWOOD MEDICAL IMAGING, P.C.

No. 477A03

(Filed 25 June 2004)

Medical Malpractice–wrongful death–statute of repose

Reading the provisions of N.C.G.S. §§ 1-15(c), 90-21.11 and 1-53(4) together and considering the function of a statute of repose, the legislature did not intend for actions premised on medical malpractice to be instituted more than four years after the last allegedly negligent act, even when the damages sought are for wrongful death.

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. 272, 583 S.E.2d 648 (2003), affirming a judgment entered 29 January 2002 by Judge Mark E. Klass in Superior Court, Iredell County. Heard in the Supreme Court 15 March 2004.

Comerford & Britt, L.L.P., by Clifford Britt and Terre T. Yde, for plaintiff-appellant.

Carruthers & Roth, P.A., by Richard L. Vanore and Norman F. Klick, Jr., for defendants-appellees.

Womble Carlyle Sandridge & Rice, PLLC, by Sara R. Lincoln, on behalf of the North Carolina Association of Defense Attorneys, amicus curiae.

Law Office of Michael W. Patrick, by Michael W. Patrick, and Faison & Gillespie, by Mark R. McGrath, on behalf of the North Carolina Academy of Trial Lawyers, amicus curiae.

PER CURIAM.

Plaintiff as administrator of the estate of his mother, Louise Udzinski, and of his father, Victor Udzinski, instituted this civil action grounded in medical malpractice seeking to recover damages for the wrongful death of Louise Udzinski and for the emotional distress suffered by Victor Udzinski prior to his death. Louise Udzinski died of metastatic lung cancer. Victor Udzinski, who was distraught by his wife's suffering during her last illness and by her death, died of a heart attack approximately six months later.

Plaintiff's complaint, filed on 27 July 2001, alleges that on 17 February 1997 defendant Jeffrey D. Lovin, M.D. negligently misinterpreted Mrs. Udzinski's chest x-ray by failing to detect what was later determined to be a cancerous lesion. When diagnosed in February 1998, the cancer was incurable. Mrs. Udzinski died approximately thirteen months later on 1 April 1999. Prior to filing the complaint, plaintiff obtained an extension of the statute of limitations in a medical malpractice action pursuant to Rule 9(j) of the North Carolina Rules of Civil Procedure on 27 March 2001.

The trial court allowed defendants' motions to dismiss for failure to state a claim for relief and for judgment on the pleadings on the basis that plaintiff's complaint was barred by the statute of repose in N.C.G.S. § 1-15(c). A divided panel of the Court of Appeals affirmed the trial court but without a majority opinion. *Udzinski v. Lovin*, 159 N.C. App. 272, 583 S.E.2d 648 (2003).

Plaintiff contends that this action is one for wrongful death and is governed solely by the two year statute of limitations in N.C.G.S. § 1-53(4). Defendants contend that this action, filed more than four years after the last allegedly negligent act of defendant Lovin, is barred by the statute of repose in N.C.G.S. § 1-15(c) applicable to professional malpractice. We affirm the Court of Appeals.

Section 1-15(c) states, "Except where otherwise provided by statute, a cause of action for malpractice arising out of the perform-

ance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action. . . ." N.C.G.S. § 1-15(c) (2003). This Court has interpreted this language to mean that claims for medical malpractice are governed by N.C.G.S. § 1-15(c). *Black v. Littlejohn*, 312 N.C. 626, 325 S.E.2d 469 (1985). Moreover, a "medical malpractice action" is defined in section 90-21.11 as a "civil action for damages for personal injury *or death* arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider." N.C.G.S. § 90-21.11 (2003) (emphasis added).

In N.C.G.S. § 1-15(c) the General Assembly specifically proscribed bringing an action for professional malpractice "more than four years from the last act of the defendant giving rise to the cause of action," with an exception for claims arising out of foreign objects left in the body. This Court has previously held that the time requirement in a statute of repose is an element of the claim that must be satisfied in order for the claim to be maintained. *Bolick v. Am. Barmag Corp.*, 306 N.C. 364, 370, 293 S.E.2d 415, 420 (1982).

> Unlike a limitation provision which merely makes a claim unenforceable, a condition precedent establishes a time period in which suit must be brought in order for [a] cause of action to be recognized. If the action is not brought within the specified period, the plaintiff "literally has *no* cause of action. The harm that has been done is damnum absque injuria—a wrong for which the law affords no redress."

Hargett v. Holland, 337 N.C. 651, 655, 447 S.E.2d 784, 787 (1994) (quoting *Rosenberg v. Town of North Bergen*, 61 N.J. 190, 199, 293 A.2d 662, 667 (1972)), *quoted in Boudreau v. Baughman*, 322 N.C. 331, 340-41, 368 S.E.2d 849, 857 (1988) (alteration in original). Thus, this statute of repose acts as "an unyielding and absolute barrier that prevents a plaintiff's right of action even before his cause of action may accrue." *Black*, 312 N.C. at 633, 325 S.E.2d at 475. If a plaintiff fails to bring his action within the time specified by the statute of repose, the plaintiff has no recourse in a court of law. *Hargett*, 337 N.C. at 655, 447 S.E.2d at 787-88.

Section 1-53(4) upon which plaintiff relies provides a two year statute of limitations for "[a]ctions for damages on account of the death of a person caused by the wrongful act, neglect or fault of

another under G.S. 28A-18-2." N.C.G.S. § 1-53(4) (2003). The statute further provides, "[T]he cause of action shall not accrue until the date of death. Provided that, whenever the decedent would have been barred, had he lived, from bringing an action for bodily harm because of the provisions of G.S. 1-15(c) . . . no action for his death may be brought." *Id.* Reading the provisions of N.C.G.S. §§ 1-15(c), 90-21.11, and 1-53(4) together and considering the function of a statute of repose, we conclude that the legislature did not intend for actions premised on medical malpractice to be instituted more than four years after the last allegedly negligent act, even when the damages sought are for wrongful death.

In the instant case, the last act of defendant Lovin giving rise to this cause of action occurred on 17 February 1997 when defendant Lovin interpreted Mrs. Udzinski's x-ray. This action was filed on 27 July 2001. The passage of four years from defendant Lovin's last act triggered the operation of the statute of repose in N.C.G.S. § 1-15(c). Notwithstanding that plaintiff was seeking damages for wrongful death, by the time he filed his complaint, and even by the time he filed his request to extend the statute of limitations, he had no cause of action.

For the foregoing reasons, the decision of the Court of Appeals is affirmed.

AFFIRMED.

No. 601PA03 FIFTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

* * * * * * * * * * * * * * * *

STATE OF NORTH CAROLINA

v. From New Hanover County

COREY TYRONE SNEED

* * * * * * * * * * * * *

ORDER

Upon defendant's motion to modify, the Court enters the following order:

The opinion, filed 25 June 2004, is withdrawn *ex mero motu*, and the opinion, as modified, is refiled simultaneously with the filing of this order. Defendant's conditional motion for temporary stay of the mandate is dismissed as moot.

By order of the Court in Conference, this 1st day of July, 2004.

Brady, J.
For the Court

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STATE OF NORTH CAROLINA v. COREY TYRONE SNEED

No. 601PA03

(Filed 1 July 2004)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 161 N.C. App. 331, 588 S.E.2d 74 (2003), vacating a judgment entered 17 July 2002 by Judge W. Allen Cobb, Jr. in Superior Court, New Hanover County. Heard in the Supreme Court 18 February 2004.

Roy Cooper, Attorney General, by William P. Hart, Special Deputy Attorney General, and Lisa Granberry Corbett, Assistant Attorney General, for the State.

Daniel Shatz for defendant-appellee.

Marshall Hurley, PLLC, by Marshall Hurley, for Families Against Mandatory Minimums; and Charles E. Daye and Paul M. Green, for the North Carolina Academy of Trial Lawyers, amici curiae.

PER CURIAM.

Pursuant to this Court's opinion in *State v. Jones*, 358 N.C. ——, —— S.E.2d —— (June 25, 2004) (No. 591PA03), we reverse the decision of the Court of Appeals. However, as to the additional assignments of error raised by defendant but not addressed by the Court of Appeals, this case is hereby remanded to the Court of Appeals for its consideration of these issues.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA *EX REL.* COMMISSIONER OF INSURANCE v. NORTH CAROLINA RATE BUREAU; IN THE MATTER OF THE FILING DATED MAY 1, 2001 BY THE NORTH CAROLINA RATE BUREAU FOR REVISED AUTOMOBILE INSURANCE RATES—PRIVATE PASSENGER CARS AND MOTORCYCLES

No. 596A03

(Filed 25 June 2004)

Appeal by Rate Bureau pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 160 N.C. App. 416, 586 S.E.2d 470 (2003), affirming an order entered 14 December 2001 by the North Carolina Commissioner of Insurance, Docket No. 1043, in Raleigh, North Carolina. On 3 March 2004, the Supreme Court granted discretionary review of one additional issue. Heard in the Supreme Court 10 May 2004.

North Carolina Department of Insurance, by Sherri L. Hubbard and Stewart L. Johnson, for respondent-appellee.

Young Moore and Henderson, P.A., by R. Michael Strickland, William M. Trott, and Marvin M. Spivey, Jr., for petitioner-appellant.

PER CURIAM.

As to the appeal of right based on the dissenting opinion, we affirm the majority decision of the Court of Appeals. We conclude that the petition for discretionary review as to an additional issue was improvidently allowed.

AFFIRMED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

DIANE ATKINS, EMPLOYEE v. KELLY SPRINGFIELD TIRE COMPANY, EMPLOYER, TRAVELERS INSURANCE COMPANY, CARRIER

No. 10PA03

(Filed 25 June 2004)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 154 N.C. App. 512, 571 S.E.2d 865 (2002), reversing an opinion and award entered by the North Carolina Industrial Commission on 4 October 2001 and remanding for further proceedings. Heard in the Supreme Court 13 October 2003.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner; and Jay A. Gervasi, Jr., for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Jonathan C. Anders and Jaye E. Bingham, for defendant-appellants.

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

Teague, Campbell, Dennis & Gorham, L.L.P., by Linda Stephens, Bruce A. Hamilton, and Season D. Atkinson, on behalf of the North Carolina Association of Self-Insurers, amicus curiae.

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

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE	)	
	)	
v.	)	ORDER
	)	
WALTERS	)	

No. 58A02-2

This case is before the Court on defendant's motion for new trial and defendant's motion that the time for docketing the record on appeal be tolled until such time as the motion for new trial is finally resolved. After careful review of defendant's motion and the State's response, the Court is of the opinion that defendant's motion for a new trial should be denied by this Court and that the case should be remanded to the trial court for an evidentiary hearing to determine whether the transcript of defendant's capital trial at the 19 March 2001 criminal session of Superior Court, Robeson County, wherein defendant was convicted of first-degree murder and sentenced to death, and such other transcripts heretofore ordered by the trial court on 10 April 2003 and 11 February 2004 pertaining to defendant's hearing on mental retardation and his first trial commenced at the 9 March 2001 criminal session of Superior Court, Robeson County, respectively, can be adequately and accurately transcribed from existing resources so as to permit meaningful appellate review. Further, defendant should be entitled to the assistance of an expert court reporter to evaluate the existing notes, tapes, and transcripts and to present testimony at the hearing.

THEREFORE, IT IS ORDERED that defendant's motion for new trial be denied; that this case be remanded to the trial court for an evidentiary hearing for the purposes stated above; that an expert court reporter be appointed to assist defendant; and that the time for perfecting defendant's appeal to this Court be tolled until such time as the issues regarding the transcripts, including defendant's entitlement to a new trial, have been finally resolved.

s/ Brady, J.
For the Court

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

Atlantic and E. Carolina Ry. Co. v. Wheatly Oil Co. Case below: 163 N.C. App. 748	No. 244P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-515)	Denied 06/24/04 **Wainwright, J., recused**
Bass v. Pinnacle Custom Homes Case below: 163 N.C. App. 171	No. 162P04	Plts PDR Under N.C.G.S. § 7A-31 (COA03-248)	Denied **05/10/04**
Cockrell v. LeMaire Case below: 162 N.C. App. 360	No. 127P04	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-327)	Denied 06/24/04
Coley v. Champion Home Builders Co. Case below: 162 N.C. App. 163	No. 101P04	Def's (Champion Home Builders Co.) PDR Under N.C.G.S. § 7A-31 (COA02-1697)	Denied 06/24/04
Crawford v. Impink Case below: 163 N.C. App. 610	No. 211P04	1. Defs' (Impinks) PDR Under N.C.G.S. § 7A-31 (COA03-710) 2. Plts' Conditional PDR	1. Denied 06/24/04 2. Dismissed as moot 06/24/04
Crowder v. Preston Trucking Co. Case below: 161 N.C. App. 181	No. 607P03	1. Def's (N.C. Self-Insurance Guaranty Association) PDR Under N.C.G.S. § 7A-31 (COA02-1250) 2. Def's (N.C. Self-Insurance Guaranty Association) Petition for Writ of Supersedeas	1. Denied 06/24/04 2. Denied 06/24/04
Department of Transp. v. Elm Land Co. Case below: 163 N.C. App. 257	No. 180P04	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-468)	Denied 06/24/04
Dillard v. Merchants, Inc. Case below: 162 N.C. App. 180	No. 060P04	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-126)	Denied 06/24/04
Dove v. Wil-O-Wisp Apartments Case below: 163 N.C. App. 610	No. 186P04	Plt's PDR Review Under N.C.G.S. § 7A-31 (COA03-1219)	Denied 06/24/04

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

Fantasy World, Inc. v. Greensboro Bd. of Adjust. Case below: 162 N.C. App. 603	No. 140P04	1. Petitioner's NOA Based Upon a Constitutional Question (COA03-52) 2. Petitioner's PDR Under N.C.G.S. § 7A-31	1. Dismissed ex mero motu 06/24/04 2. Denied 06/24/04
Gibbs v. Mayo Case below: 162 N.C. App. 549	No. 141P04	1. Def's (Mayo) PDR Under N.C.G.S. § 7A-31 (COA03-290) 2. Plts' PDR Under N.C.G.S. § 7A-31 3. Def's (Mayo) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 06/24/04 2. Denied 06/24/04 3. Dismissed as moot 06/24/04
Hahne v. Hanzel Case below: 161 N.C. App. 494	No. 009P04	Plts' PDR Under N.C.G.S. § 7A-31 (COA03-72)	Denied 06/24/04
Hardee v. N.C. Bd. of Chiropractic Exam'rs Case below: 164 N.C. App. 628	No. 288P04	Petitioner's Motion for Temporary Stay (COA03-860)	Allowed **06/18/04**
Hobbs Realty & Constr. Co. v. Scottsdale Ins. Co. Case below: 163 N.C. App. 285	No. 166P04	1. Def's PWC to Review the Decision of the COA (COA03-514) 2. Def's Motion to Withdraw the PWC 3. Def's Second PWC to Review the Decision of the COA	1. — 2. Allowed 06/24/04 3. Denied 06/24/04
Hunter v. Guardian Life Ins. Co. of Am. Case below: 162 N.C. App. 477	No. 108P04	1. Def's (The Guardian Life Insurance Company of America) PDR Under N.C.G.S. § 7A-31 (COA02-1533) 2. Defs' (Consolidated Planning, Inc., Robert M. Ball, Todd H. Dickens, and Lang MacBain) PDR Under N.C.G.S. § 7A-31	1. Denied 06/24/04 2. Denied 06/24/04
In re C.A.M. Case below: 162 N.C. App. 180	No. 055P04	Respondent's PDR Under N.C.G.S. § 7A-31 (COA03-314)	Denied 06/24/04
In re D.S. Case below: 162 N.C. App. 215	No. 081P04	Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA03-212)	Denied 06/24/04
In re H.W. Case below: 163 N.C. App. 438	No. 194P04	1. Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA03-679) 2. Respondent's (Father) PDR Under N.C.G.S. § 7A-31	1. Denied 06/24/04 2. Denied 06/24/04

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

Jones v. N.C. Ins. Guar. Ass'n Case below: 163 N.C. App. 105	No. 164P04	Def (Farm Bureau Insurance Co.) PDR Under N.C.G.S. 21 7A-31 (COA03-158)	Denied **05/13/04**
Katsifos v. Pulte Home Corp. Case below: 163 N.C. App. 204	No. 151P04	Plt-Appellant's PDR Under N.C.G.S. § 7A-31 (COA03-429)	Denied 06/24/04
Marketplace Antique Mall, Inc. v. Lewis Case below: 163 N.C. App. 596	No. 220P04	Plt's (Samuel) PDR Under N.C.G.S. § 7A-31 (COA03-562)	Denied 06/24/04
McCormick v. Hanson Aggregates Southeast, Inc. Case below: 164 N.C. App. 459	No. 304P04	Plt's Motion for Temporary Stay (COA03-630)	Allowed **06/21/04**
McIntyre v. Forsyth Cty. DSS Case below: 162 N.C. App. 94	No. 068P04	Petitioner's (Robert Winfrey) PDR Under N.C.G.S. § 7A-31 (COA03-231)	Denied 06/24/04
Monteith v. Kovas Case below: 162 N.C. App. 545	No. 102PA04	Plt's PDR Under 7A-31 (COA02-1493)	Allowed **05/13/04** **Martin, J., recused**
Moon v. Moon Case below: 160 N.C. App. 708	No. 623P03	Def's PWC to Review the Decision of the COA (COA02-1506)	Denied 06/24/04
Morris v. Thomas Case below: 161 N.C. App. 680	No. 030P04	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA03-237) 2. Defs' Conditional PDR as to Additional Issues	1. Denied 06/24/04 2. Dismissed as moot 06/24/04 **Edmunds, J., recused**
N.C. Farm P'ship v. Pig Improvement Co. Case below: 163 N.C. App. 315	No. 156P04	1. Def's Motion for Temporary Stay (COA03-328) 2. Def's Petition for Writ of Supersedeas	Allowed **04/02/04** Stay Dissolved **06/24/04** 2. Denied

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

Nie-Hmok v. Ayers Case below: 163 N.C. App. 610	No. 206P04	Plts' PDR Under N.C.G.S. § 7A-31 (COA03-604)	Denied 06/24/04
Norman v. N.C. Dep't of Transp. Case below: 161 N.C. App. 211	No. 052P04-2	1. Plt's PWC to Review the Decision of the COA (COA02-1053) 2. Def's Conditional PWC to review the Decision of the COA	1. Denied 06/24/04 2. Dismissed as moot 06/24/04
Oliver v. Bynum Case below: 163 N.C. App. 166	No. 200P04	Plts' and Counterclaim Def's (James) PDR Under N.C.G.S. § 7A-31 (COA03-6)	Denied 06/24/04
Painter-Jamieson v. Painter Case below: 163 N.C. App. 527	No. 207P04	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA02-1752) 2. Plt's Motion to Withdraw PDR	1. — 2. Allowed 06/24/04
Phillips v. Gray Case below: 163 N.C. App. 52	No. 130P04	1. Def's (Ike Gray) PDR Under N.C.G.S. § 7A-31 (COA02-1570) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 06/24/04 2. Dismissed as moot 06/24/04
Russ v. Hedgecock Case below: 161 N.C. App. 334	No. 661P03	Plts' PDR Under N.C.G.S. § 7A-31 (COA02-1615)	Denied 06/24/04
Sloan v. Hitt Case below: 163 N.C. App. 611	No. 216P04	Plt's PWC to Review the Decision of the COA (COA03-455)	Denied 06/24/04
Stafford v. County of Bladen Case below: 163 N.C. App. 149	No. 197P04	1. Plts' NOA Based Upon a Constitutional Question (COA03-405) 2. Def's Motion to Dismiss Appeal 3. Plts' PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Dismiss PDR	1. — 2. Allowed 06/24/04 3. Denied 06/24/04 4. Dismissed 06/24/04

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

State v. Allen Case below: 162 N.C. App. 587	No. 137PA04	1. Def's NOA Based Upon a Constitutional Question (COA02-1624) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed ex mero motu 06/24/04 2. Allowed for the limited purpose of remanding to the COA for reconsideration in light of *Crawford v. Washington* (2004) 06/24/04
State v. Beck Case below: 163 N.C. App. 469	No. 191PA04	1. AG's Motion for Temporary Stay (COA03-466) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 4. Def's NOA Based Upon a Constitutional Question 5. AG's Motion to Dismiss Appeal 6. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/26/04** 2. Allowed 06/24/04 3. Allowed 06/24/04 4. — 5. Allowed 6. Denied 06/24/04
State v. Betancourt Case below: 164 N.C. App. 228	No. 268P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-576)	Denied 06/24/04
State v. Bowen Case below: 164 N.C. App. 411	No. 286P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-375)	Denied 06/24/04
State v. Brandon Case below: 162 N.C. App. 181	No. 062P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-227)	Denied 06/24/04
State v. Brown Case below: 163 N.C. App. 205	No. 171P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-174)	Denied 06/24/04
State v. Brown Case below: 161 N.C. App. 181	No. 634P03	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1448)	Denied 06/24/04

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

State v. Carter Case below: 156 N.C. App. 446	No. 131P04	Def's PWC to Review the Decision of the COA (COA02-24)	Denied 06/24/04
State v. Davis Case below: 163 N.C. App. 587	No. 213P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-88)	Denied 06/24/04
State v. Doyle Case below: 164 N.C. App. 411	No. 402P03-2	1. AG's Motion for Temporary Stay (COA03-339) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Denied **06/09/04** 2. Denied **06/09/04** 3. Denied 06/24/04
State v. Frink Case below: 158 N.C. App. 581	No. 409P03	1. Def's NOA (Constitutional Question) (COA02-570) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. — 2. Allowed 06/24/04 3. Denied 06/24/04 **Brady, J., recused**
State v. Gonzales Case below: 163 N.C. App. 612	2 No. 222P04	1. Def's NOA Based on a Constitutional Question (COA03-653) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. — 2. Allowed 06/24/04 3. Denied 06/24/04
State v. Kagonyera Case below: 161 N.C. App. 349	No. 013P04	Def's PWC to Review the Decision of the COA (COA03-643)	Denied 06/24/04
State v. Lee Case below: 163 N.C. App. 784	No. 256P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-137)	Denied 06/24/04
State v. Mason Case below: 163 N.C. App. 613	No. 210P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-166)	Denied 06/24/04
State v. Mays Case below: 158 N.C. App. 563	No. 198P04	1. Def's PWC to Review the Decision of the COA (COA01-1387) 2. AG's Motion to Dismiss Appeal	1. Denied 06/24/04 2. Dismissed as moot 06/24/04

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

State v. Mays Case below: 154 N.C. App. 572	No. 199P04	1. Def's PWC to Review the Decision of the COA (COA01-1388) 2. AG's Motion to Dismiss Appeal	1. Denied 06/24/04 2. Dismissed as moot 06/24/04
State v. McDonald Case below: 163 N.C. App. 458	No. 208P04	Def's (McDonald) PDR Under N.C.G.S. § 7A-31 (COA03-1)	Denied 06/24/04
State v. McKinney Case below: 164 N.C. App. 230	No. 247P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-371)	Denied 06/24/04
State v. McNair Case below: 163 N.C. App. 785	No. 229P04	1. Def's NOA Based Upon a Substantial Constitutional Question (COA03-298) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. — 2. Allowed 06/24/04 3. Denied 06/24/04
State v. McNeill Wake County Superior Court	No. 184A96-2	Def's PWC to Review the Order of the Wake County Superior Court	Denied 06/24/04
State v. McRae Case below: 163 N.C. App. 359	No. 205P04	1. Def's NOA Based on a Constitutional Question (COA03-261) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. — 2.Allowed 06/24/04 3. Denied 06/24/04
State v. Owens Case below: 162 N.C. App. 360	No. 078P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-144)	Denied 06/24/04
State v. Poteat Case below: 163 N.C. App. 741	No. 223P04	1. Appellant-Bondsman's (Mathis) PDR Under N.C.G.S. § 7A-31 (COA03-764) 2. Appellant-Bondsman's (Mathis) Second PDR Under N.C.G.S. § 7A-31	1. Denied 06/24/04 2. Denied 06/24/04
State v. Pouncy Case below: 163 N.C. App. 613	No. 225P04	Def's PWC to Review the Decision of the COA (COA03-407)	Denied 06/24/04 **Orr, J., recused**
State v. Reynolds Case below: 160 N.C. App. 579	No. 588P03	AG's PDR Under N.C.G.S. § 7A-31 (COA02-1510)	Denied

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

State v. Robinson Case below: 164 N.C. App. 413	No. 262P04	1. AG's Motion for Temporary Stay (COA03-712) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Denied **06/09/04** 2. Denied **06/09/04** 3. Denied 06/24/04
State v. Rorie Case below: 160 N.C. App. 596	No. 147P04	Def's PWC to Review the Decision of the COA (COA02-1555) Penalty Act	Dismissed 06/24/04
State v. Scanlon Durham County Superior Court	No. 480A99-4	1. Def's Renewed Motion for Reversal of Judgments and Dismissal of Charges (Durham County Superior Court) 2. Def's Renewed Motion for New Trial	1. Denied 06/24/04 2. Denied 06/24/04
State v. Smith Case below: 162 N.C. App. 723	No. 133P04	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1494)	Denied 06/24/04 ***Orr, J.*, recused**
State v. Stanley Case below: 160 N.C. App. 596	No. 592A03	1. Def's NOA Based Upon a Constitutional Question (COA02-1630) 2. AG's Motion to Dismiss Appeal	1. — 2. Allowed 06/24/04
State v. Velazquez Case below: 162 N.C. App. 548	No. 096P04	1. Def's NOA Based Upon a Constitutional Question (COA03-68) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. — 2. Allowed 06/24/04 3. Denied 06/24/04
State v. Westmoreland Case below: 158 N.C. App. 315	No. 132P02-2	1. Def's PWC to Review the Decision of the COA (COA02-884) (Filed as NOA Based on a Constitutional Question) 2. Def's PWC to Review the Decision of the COA (Filed as a PDR)	1. Denied 06/24/04 2. Denied 06/24/04
State v. Willis Case below: 163 N.C. App. 572	No. 221P04	Defs' PDR Under N.C.G.S. § 7A-31 (COA03-681)	Denied 06/24/04
Towns v. Epes Transp. Case below: 163 N.C. App. 566	No. 202P04	Defs' PDR Under N.C.G.S. § 7A-31 (COA03-527)	Denied 06/24/04

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

Unifour Constr. Servs., Inc. v. BellSouth Telecomms., Inc. Case below: 163 N.C. App. 657	No. 203P04	Defs' PDR Under N.C.G.S. § 7A-31 (COA02-1640)	Denied 06/24/04
Wood v. Weldon Case below: 160 N.C. App. 697	No. 614P03	1. Unnamed Defs' (Interstate Insurance Company/Harbor Specialty Insurance Company) PDR Under N.C.G.S. § 7A-31 (COA02-1311) 2. Plt's Conditional PDR as to Additional Issues	1. Denied 06/24/04 2. Denied 06/24/04
Wright v. Kraus Case below: 164 N.C. App. 232	No. 278P04	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-926)	Denied 06/24/04

PETITION TO REHEAR

In re Will of Barnes 358 N.C. 143	No. 262A03	Propounder-Appellee's (Propounders of 1989 Will) Petition for Rehearing	Dismissed 06/24/04

STATE v. TIRADO

[358 N.C. 551 (2004)]

STATE OF NORTH CAROLINA v. FRANCISCO EDGAR TIRADO

STATE OF NORTH CAROLINA v. ERIC DEVON QUEEN

No. 5A01

(Filed 13 August 2004)

1. Criminal Law— joint trial—motion to sever

The trial court did not abuse its discretion in a first-degree murder, first-degree kidnapping, robbery with a dangerous weapon, conspiracy to commit first-degree murder, conspiracy to commit first-degree kidnapping, conspiracy to commit robbery with a dangerous weapon, attempted murder, and assault with a deadly weapon with intent to kill inflicting serious injury case by joining the trial of both defendants, because: (1) in regard to the argument that joinder prevented defendant from offering the portions of his redacted confession that implicated his codefendant, defendant's defense strategy focused on mitigation rather than on denying culpability, the full statement provided no exculpatory relief for defendant, convincing evidence of defendant's guilt was presented at trial including his own admissions and eyewitness testimony, and defendant's only expressed concern was that the jury would not be able to consider his full statement for mitigation purposes but defendant was allowed to present the entire statement to the sentencing jury in order for it to consider the full extent of defendant's cooperation with investigators; (2) even though defendant contends he conducted his defense differently based on his belief that he would not be able to introduce his statement implicating his codefendant, the record demonstrates that from the outset, all parties were aware that the statement existed and that it might be introduced in redacted form; and (3) even though defendants differed on their view of whether a particular juror should serve on the panel, defendant failed to put the court on notice that the difference was detrimental to him when he did not move to sever the trial at that time, the juror was eventually removed for cause, and a defendant is not entitled to a particular juror even after a jury has been empaneled.

2. Jury— peremptory challenges—*Batson* objection

The trial court in a prosecution for first-degree murder, first-degree kidnapping, robbery with a dangerous weapon and other offenses did not fail to adequately address whether the State's articulable reasons for exercising its peremptory challenges

against minorities were legitimate or a pretext because the factors, taken together, provided a wholly adequate basis for the court's determination that the prosecutor's facially race-neutral explanations for these peremptory challenges were race-neutral in fact including that: (1) one defendant was of mixed African-American and Hispanic descent, while the other defendant was African-American; (2) the two murder victims were white and the surviving kidnapping victim was African-American; (3) the State did not exhaust its peremptory challenges while selecting the first twelve jurors and four alternates; (4) the jury originally seated was racially diverse and so were the alternate jurors selected; and (5) the trial court also stated that it considered its own observations of each prospective juror and the various exchanges between the court, the prosecutor, and the prospective jurors.

3. Jury— selection—use of panels—randomness—waiver of review

Defendant waived review of the constitutionality of the trial court's use of panels for jury selection and the trial court's placement of a prospective juror into a particular panel where defendants raised no objection to the use of panels or the manner in which the trial court placed prospective jurors into panels. Moreover, defendants waived review as to whether the trial court's use of panels violated its duty under N.C.G.S. § 15A-1214(a) to ensure that jury selection was conducted in a random manner because defendants did not follow the statutorily mandated procedure for challenging the court's use of panels of jurors. Even if the statute was violated by the trial court's placement of a hearing impaired prospective juror into a particular panel, which is not determined, defendants showed no prejudice where defendants consented to the juror's excusal and neither defendant was forced to accept an undesirable juror.

4. Jury— excusal of prospective juror—qualifications

The trial court did not err in a prosecution for first-degree murder and other offenses by excusing a prospective juror based on the fact that she was not qualified under N.C.G.S. § 15A-1211(b), because: (1) defendants waived this issue by failing to object at trial; and (2) in any event, the prospective juror was properly excused based on the fact that she was no longer a resident of the pertinent county.

5. Kidnapping— instructions—purpose not alleged in indictment—absence of prejudice

Although the trial court erred by instructing the jury as to particular purposes for the kidnapping of two victims that had not been specified in the indictments and by instructing on the purpose set out in the indictment for the kidnapping of a third victim along with an additional purpose that had not been alleged in the indictment, this error was not prejudicial because (1) the indictments for the first two victims charged the purpose of "facilitating the commission of a felony," and the trial court's instructions placed a higher burden on the State by limiting the underlying felonies that the jury could find to support the kidnapping charge; and (2) the evidence as to the third victim supported both the purpose set out in the indictment and the additional purpose set out in the trial court's instructions so that a different result would not have been reached had the trial court instructed only on the purpose charged in the indictment.

6. Criminal Law— multiple conspiracies—sufficiency of evidence

The trial court did not err by entering judgments against defendants based on multiple convictions of conspiracy for first-degree murder, first-degree kidnapping, and robbery with a dangerous weapon even though defendants contend the State's evidence was insufficient to prove the existence of more than a single conspiracy, because: (1) a rational juror, considering the series of meetings, the variety of locations and participants, the different objectives, and the statements of conspirators, could readily find the evidence established multiple separate conspiracies rather than one single conspiracy; and (2) neither defendant objected to the conspiracy charges submitted to the jury.

7. Constitutional Law— double jeopardy—submission of attempted first-degree murder and assault with deadly weapon inflicting serious injury

The trial court did not violate defendants' double jeopardy rights by submitting to the jury both attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury, and by imposing consecutive sentences for these offenses, because: (1) assault with a deadly weapon with intent to kill inflicting serious injury requires proof of the use of a deadly weapon as well as proof of serious injury, neither of which

are elements of attempted first-degree murder; and (2) attempted first-degree murder includes premeditation and deliberation, which are not elements of assault with a deadly weapon with intent to kill inflicting serious injury.

8. Criminal Law— prosecutor's argument—codefendant's post-arrest statements corroborated eyewitness—right of confrontation

Defendant's right of confrontation was not denied when one of the prosecutors stated during closing arguments that a nontestifying codefendant's post-arrest statements corroborated the testimony of an eyewitness regarding the events of 16-17 August 1998, because: (1) the statements were redacted to delete all references to the defendant; (2) the trial court gave the jury limiting instructions that the statements could only be considered as evidence against the codefendant who made the statements and not against the defendant; (3) the prosecutor made a statement reminding the jury of the defined purpose for which the evidence had been admitted; and (4) any error was harmless beyond a reasonable doubt when substantial physical and testimonial evidence independent of the codefendant's statements corroborated the eyewitness's testimony against the defendant.

9. Aiding and Abetting— acting in concert—motion to dismiss—sufficiency of evidence—constructive presence

The trial court did not err by denying defendant's motion to dismiss the charges for the substantive offenses of attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, kidnapping, and robbery with a dangerous weapon committed against one of the victims based on the theory of aiding and abetting or acting in concert even though defendant contends that he was not physically present for these crimes, because: (1) the State presented sufficient evidence to allow a rational juror to conclude that defendant joined with one or more persons in the purpose to kidnap, rob, assault with a deadly weapon, and attempt to murder the victim; and (2) defendant was constructively present when these crimes were carried out.

10. Sentencing— capital—bifurcated proceedings—individual jury poll—intervening evidence—prejudicial error

One defendant is entitled to a new capital sentencing proceeding because the trial court failed to follow the mandate of

N.C.G.S. § 15A-2000(b) that jurors be individually polled upon delivery of the sentence recommendation by the jury foreman where the trial court bifurcated the sentencing proceedings so that a codefendant's unredacted statement could be read to the jury without prejudicing defendant; defendant's capital sentencing proceeding was held first; the trial court deferred the poll of the individual jurors in defendant's case until after the codefendant's sentencing proceeding was completed; and the statutorily mandated poll of the individual jurors in defendant's sentencing proceeding did not occur until after the jury heard additional inculpatory evidence in the codefendant's sentencing proceeding that the trial court had ruled inadmissible as to defendant.

11. Jury— dismissal of juror during trial—pending charges against juror—abuse of discretion standard

The trial court did not abuse its discretion in a prosecution for first-degree murder, first-degree kidnapping, robbery with a dangerous weapon and other offenses by dismissing a juror during the trial and substituting an alternate, because: (1) the court and trial counsel were notified that the juror was under investigation for embezzlement; (2) the trial court properly exercised its discretion to discharge the juror prior to deliberations when the court was informed that felony warrants were pending against the juror; and (3) the trial court took pains to ensure that the right to a fair trial for both defendants was protected.

12. Discovery— failure to provide false exculpatory statement—failure to show prejudice

The trial court did not abuse its discretion by denying defendant's motion for a mistrial based on the prosecutor's failure to provide essential discovery as required by N.C.G.S. § 15A-903 including defendant's false exculpatory statement to investigators to the effect that he had not participated in the kidnapping of two of the victims, because: (1) although the statement is relevant to defendant's strategy of focusing on his cooperation in order to win mitigation in the capital case, defendant failed to show any prejudice resulting from the nondisclosure; (2) defendant received pretrial notice that he had incorrectly told investigators at an earlier time on the same date that he was not present when the two victims were kidnapped; and (3) the statement had no effect on the outcome of defendant's trial.

13. Constitutional Law— double jeopardy—first-degree murder—first-degree kidnapping—victims seriously injured

The trial court did not violate defendant's double jeopardy rights by convicting defendant for first-degree murders and also for first-degree kidnapping based on a finding that two of the victims were seriously injured, and also for the crimes of both assault with a deadly weapon with intent to kill inflicting serious jury and first-degree kidnapping when another victim was also seriously injured, because: (1) defendant failed to preserve this issue for appellate review since he did not object at trial to the submission of first-degree kidnapping or to the instructions on that offense; and (2) even if the issue had been preserved, double jeopardy does not apply here when each crime charged contains an element not required to be proved in the other.

14. Appeal and Error— preservation of issues—failure to object at trial on constitutional grounds

Although defendant contends his constitutional right to individualized sentencing in a capital first-degree murder case was violated when the trial court allowed the same jury to consider sentences for defendant and his codefendant at separate sentencing proceedings, this assignment of error is dismissed because: (1) defendant waived this issue by failing to object at trial on these constitutional grounds; and (2) even if this issue was preserved, the trial court took care to ensure that the jury gave individualized consideration to defendant's argument that he should be spared the death penalty by instructing the jury not to consider against defendant any evidence presented in the codefendant's prior sentencing hearing, and jurors are presumed to follow the trial court's instructions.

15. Sentencing— capital—bifurcated proceedings—jury's knowledge of codefendant's sentence

The principle that a codefendant's sentence is irrelevant in a capital sentencing determination was not violated in defendant's sentencing proceeding when his codefendant was sentenced first in a separate proceeding by the same jury and the jury knew what the sentence was, because: (1) the trial court explicitly instructed the jury that it could not consider anything presented in the codefendant's sentencing hearing against defendant and required the jury to consider separately the evidence as to any aggravating and mitigating circumstances

for each defendant; and (2) the record reflected that the trial court properly severed the sentencing hearings of the two defendants for the specific purpose of protecting the right of each to individualized sentencing.

16. Indigent Defendants— capital trial—right to two counsel

An indigent defendant's statutory right to the assistance of two attorneys was not violated when one of his attorneys was absent during a portion of his codefendant's sentencing hearing, because: (1) N.C.G.S. § 7A-450(b1) does not require, either expressly or impliedly, that both of a capital defendant's attorneys be present at all times for all matters; (2) the trial court properly complied with the statute by appointing two counsel to represent defendant months before the trial began; and (3) defendant consented to his counsel's absence for a previously scheduled vacation when the other attorney remained.

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

The trial court did not err in a capital sentencing proceeding by submitting to the jury under the pattern jury instructions the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murders were especially heinous, atrocious, or cruel, because: (1) the evidence showed that the murder victims endured a prolonged dehumanizing ordeal; (2) the murder victims were unquestionably aware of but helpless to prevent impending death; and (3) the killings of the victims demonstrated an unusual depravity of mind on the part of defendant.

18. Constitutional Law— right to fair sentencing hearing—cruel and unusual punishment—required presence at codefendant's sentencing hearing

The trial court did not deny defendant a fair sentencing hearing and freedom from cruel and unusual punishment by requiring him to be present during his codefendant's sentencing hearing, because: (1) defendant waived appellate review of this issue by failing to object to the trial court's ruling that he had to attend his codefendant's sentencing hearing; and (2) the trial court acted out of an abundance of caution and with the purpose of avoiding any claim of error arising from defendant's absence.

19. Sentencing— aggravating circumstances—murder committed during commission of kidnapping—murder committed for pecuniary gain—murder part of course of conduct

The trial court did not commit plain error in a capital sentencing proceeding by submitting as separate aggravating circumstances under N.C.G.S. § 15A-2000(e)(5) that the murders were committed while defendant was engaged in the commission of kidnapping, under N.C.G.S. § 15A-2000(e)(6) that the murders were committed for pecuniary gain, and under N.C.G.S. § 15A-2000(e)(11) that the murders were part of a course of conduct, because: (1) the (e)(5) circumstance directs the jury's attention to the factual circumstances of defendant's crimes, thus addressing defendant's conduct, and evidence supporting this circumstance was the hijacking of one victim's car; (2) the (e)(6) circumstance requires the jury to consider not defendant's actions but his motive for killing the victims, and the evidence supporting this circumstance was the robbery of the victims; and (3) it is proper for a sentencing jury in a double homicide case to find each murder to be a course of violent conduct aggravating the other murder, thus providing the basis for the (e)(11) circumstance.

20. Sentencing— death penalty—proportionate

The trial court did not err by sentencing defendant to the death penalty for two first-degree murders, because: (1) the jury found defendant guilty of premeditation and deliberation and under the felony murder rule; (2) no death sentence involving multiple homicides has been determined to be disproportionate; and (3) our Supreme Court has never found a sentence of death to be disproportionate where more than two aggravating circumstances were found.

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 two sentences of death for each defendant entered by Judge William C. Gore, Jr., on 11 April 2000 in Superior Court, Cumberland County, upon jury verdicts finding each defendant guilty of two counts of first-degree murder. On 31 January 2002, the Supreme Court allowed defendants' motions to bypass the Court of Appeals as to their appeal of additional judgments. Heard in the Supreme Court 3 February 2003.

Roy Cooper, Attorney General, by G. Patrick Murphy, Special Deputy Attorney General, and Mary D. Winstead, Assistant Attorney General, for the State.

Glover & Petersen, P.A., by Ann B. Petersen, for defendant-appellant Tirado.

Rudolf Maher Widenhouse & Fialko, by M. Gordon Widenhouse, Jr., for defendant-appellant Queen.

EDMUNDS, Justice.

Defendants Francisco Edgar Tirado and Eric Devon Queen were indicted on 4 January 1999. In 98 CRS 34831, Tirado was charged with two counts of first-degree murder, two counts of first-degree kidnapping, two counts of robbery with a dangerous weapon, one count of conspiracy to commit first-degree murder, one count of conspiracy to commit first-degree kidnapping, and one count of conspiracy to commit robbery with a dangerous weapon, all involving alleged offenses against victims Susan Moore and Tracy Lambert on 17 August 1998. In 98 CRS 34836, Queen was similarly charged with the same offenses against the same victims. Additional indictments were returned on 25 January 1999. In 98 CRS 35037, Tirado was charged with 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 for crimes committed against Debra Cheeseborough on 17 August 1998. In 98 CRS 35028, Queen was charged with the same offenses against the same victim.

On 17 December 1999, the trial court granted the State's motions both to join offenses as to each defendant and to join defendants' cases for trial. Defendants were tried capitally before a jury at the 7 February 2000 Criminal Session of Superior Court, Cumberland County. On 3 April 2000, the jury found defendants guilty on all fourteen of the submitted charges. The verdicts of first-degree murder as to each victim were based both on premeditation and deliberation and on felony murder.

The trial court ordered separate sentencing proceedings for defendants. At the conclusion of Tirado's capital sentencing proceeding, the trial court ordered the verdict sealed until Queen's capital sentencing proceeding was complete. The jury recommended that Tirado and Queen be sentenced to death for the murders of Susan Moore and Tracy Lambert, and the trial court entered judgments

accordingly. The trial court also sentenced defendants to consecutive terms for the other twelve felony convictions.

Evidence presented at trial established that defendants were two of nine members of the Crips gang who undertook a number of "missions," or criminal acts, during the night of 16-17 August 1998, in Fayetteville, North Carolina. In addition to defendants Tirado and Queen, the gang members included gang leader or "queen" Christina Walters, Ione Black, Tameika Douglas, Carlos Frink, John Juarbe, Carlos Nevills, and Darryl Tucker. These individuals belonged to different "sets," or subgroups, of the Crips gang.

On 16 August 1998, the gang members gathered at Walters' residence, a trailer located at 1386 Davis Street. Ione Black, who had been a member of another gang, was initiated into the Crips by means of a ceremony involving being beaten by the others. Thereafter, the gang members undertook preparations for the evening's missions. Walters, Douglas, and an unidentified male drove to the local Wal-Mart to steal toiletries and clothing and to purchase cartridges. The unidentified male returned alone to the trailer with a box of cartridges. Using fingernail polish from Walters' bedroom, Tirado painted the tips of the bullets blue, the color identified with the Crips gang. Meanwhile, Queen directed Black and Nevills to return to Wal-Mart and retrieve Walters and Douglas.

After the group returned from Wal-Mart, Walters assigned a mission to Douglas, Black, and Nevills, directing them to find a victim to rob, steal the victim's car, put the victim in the trunk of the car, then return to Walters' residence within an hour and a half. After providing Nevills with a gun, Walters and the unidentified male drove away. Douglas, Black, and Nevills walked around looking for a car to steal, and at about 12:30 a.m., they spotted Debra Cheeseborough closing and locking the door to the Bojangles restaurant where she worked as manager. They abducted Cheeseborough at gunpoint and forced her into the back seat of her car.

On the way back to Walters' residence, the gang members robbed Cheeseborough of her jewelry and money, and then remembering their instructions, stopped and forced her into the trunk. When they reached Walters' trailer, everyone gathered around the car, arguing over who would shoot Cheeseborough. Although Tirado stated, "I'll shoot the bitch," Queen, Walters, Douglas, and Frink drove away in Cheeseborough's car. The rest of the gang remained at Walters'

trailer, where Tirado mumbled several times, "Damn, they should have let me go."

Queen drove Cheeseborough's car to Smith Lake, a location on the Fort Bragg military base. Cheeseborough was removed from the trunk, and Douglas took from Cheeseborough a cross that she was wearing. Walters then pointed a handgun at her and pulled the trigger. When the pistol jammed, Walters recocked it and fired a bullet into Cheeseborough's right side, knocking her to the ground on her stomach. As she lay there, she heard a male say, "Hit her in the head." Walters fired another shot that passed through Cheeseborough's glasses, grazed her eyelid, and hit her in the thumb. Walters fired additional shots into Cheeseborough's back, side, right leg, and chest. Cheeseborough feigned death and the four gang members drove away. The next morning, a passerby found Cheeseborough. She was taken to a hospital and treated for multiple gunshot wounds.

After the group left Cheeseborough for dead, they returned to Walters' trailer, where the rest of the gang remained congregated. Upon realizing that they needed a second car to accommodate everyone, Queen, accompanied by Walters, Frink, Black, Douglas, and Tucker, drove Cheeseborough's car to find another vehicle. They eventually targeted a 1989 Pontiac Grand Prix driven by Susan Moore and in which Tracy Lambert was a passenger. After following the Grand Prix for some distance, Queen was able to trap it at the end of a dead-end road. Walters handed a gun to Tucker and someone in the car told him to "go ahead." Queen, Walters, and Frink then drove away in Cheeseborough's car after Queen directed Black, Douglas, and Tucker to be back at Walters' trailer in forty-five minutes.

Douglas and Tucker forced Moore and Lambert into Moore's trunk at gunpoint, and then Black, Douglas, and Tucker drove Moore's car to Walters' trailer. At one point during the drive, Tucker stopped the car so that Black and Douglas could open the trunk and rob Moore and Lambert of their jewelry.

Upon this group's arrival at Walters' trailer, the entire gang surrounded the car. While the gang divided Moore's and Lambert's money and jewelry and burned their purses and identification, they discussed who would kill the women. On instructions from Walters, the gang members then drove Cheeseborough's and Moore's cars to a location in Linden. Moore and Lambert were forced out of the trunk of the Grand Prix. Both were pleading for mercy. Queen told Lambert to shut up, then shot her in the head. As Lambert fell, Queen walked

back to the car and stood next to Tirado. When Tirado held a large knife to Moore's throat, Moore begged him not to cut her and to shoot her instead. In response, Tirado shot Moore in the back of the head. Both Lambert and Moore died of their wounds.

The gang members returned to Walters' trailer in Cheeseborough's and Moore's cars, and then split up. Seven members of the gang, including Tirado and Queen, fled to Myrtle Beach. On Tuesday, 18 August 1998, Myrtle Beach police officers apprehended Juarbe and Tucker in Moore's car. The next day, Myrtle Beach police officers arrested defendants Tirado and Queen, along with Walters, Frink, and Douglas, in a motel room rented by Walters.

Additional evidence will be discussed below as necessary to address specific issues. Because both Tirado and Queen present several similar assignments of error, we will first address those arguments together. We will then consider each defendant's individual assignments of error.

PRE-TRIAL ISSUES

[1] Defendants Tirado and Queen both contend that the trial court erred when it allowed their cases to be joined for trial. Defendants claim that the joinder deprived them of their state and federal constitutional rights to due process of law.

Each defendant was charged in two multi-count indictments. On 29 September 1999, the State filed pretrial motions both to join the offenses against each defendant and to join for trial the cases of defendants so that all charges against both defendants would be resolved in a single trial. At a hearing on the motions, the State argued that both defendants were accountable for each of the offenses enumerated in the indictments and that these offenses were part of a common scheme or plan, that individual activities of defendants were part of the same act or transaction, and that the offenses were closely connected in time, place, and occasion. The prosecutor also acknowledged that:

> As it relates to a joint trial, Mr. Queen made a statement which implicated himself as a killer of one of the young ladies and implicated Mr. Tirado as a killer of the other young lady.
>
> We realize that, in a joint trial, we would not be able to offer the aspect of Mr. Queen's statement/confession implicating Mr.

Tirado. And we are aware of that, and we plan to deal with that if it becomes an eventuality.

Defendants objected to joinder and argued that the State should present evidence from which the court could make findings of fact. Tirado also objected on the grounds of "potential Bruton problems." *See Bruton v. United States*, 391 U.S. 123, 20 L. Ed. 2d 476 (1968) (holding that at a joint trial, admission of a statement by a nontestifying co-defendant incriminating the other defendant violated that defendant's Sixth Amendment rights under the Confrontation Clause). The hearing judge, relying on the State's representations of the nature of the cases, allowed joinder of offenses as to each defendant and joinder of defendants for trial, subject to the trial judge's satisfaction that Queen's statements could be redacted to omit references to Tirado.

Tirado again raised the issue of joinder at the completion of jury selection on 23 February 2000, when he moved to sever his trial from Queen's. Tirado also filed a motion *in limine* requesting redaction of Queen's out-of-court statement pursuant to *Bruton v. United States*. *See id.* Queen objected to the admission of a redacted statement, arguing that he was relying on the jury finding mitigating value in his willingness to admit his wrongdoing. Queen's position was that if a redacted statement was admitted, the jury would not be able to consider his entire statement for mitigation purposes and that it would appear he had not been fully candid with the investigators. The trial court denied the motion to sever and ordered that a redacted version of Queen's statement would be admissible in the guilt-innocence phase of trial. When both defendants were found guilty during that phase, the trial court severed the sentencing hearings and admitted Queen's unredacted statement during his sentencing hearing.

North Carolina General Statutes provide for joinder of defendants subject to the following provisions:

> (b) Separate Pleadings for Each Defendant and Joinder of Defendants for Trial.
>
> (1) Each defendant must be charged in a separate pleading.
>
> (2) Upon written motion of the prosecutor, charges against two or more defendants may be joined for trial:

a. When each of the defendants is charged with accountability for each offense; or

b. When, even if all of the defendants are not charged with accountability for each offense, the several offenses charged:

1. Were part of a common scheme or plan; or

2. Were part of the same act or transaction; or

3. Were so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

N.C.G.S. § 15A-926(b) (2003).

In addition, North Carolina General Statute § 15A-927(c), dealing with multi-defendant cases, provides that the court

(2) . . . must deny a joinder for trial or grant a severance of defendants whenever:

a. If before trial, it is found necessary to protect a defendant's right to a speedy trial, or it is found necessary to promote a fair determination of the guilt or innocence of one or more defendants; or

b. If during trial, upon motion of the defendant whose trial is to be severed, or motion of the prosecutor with the consent of the defendant whose trial is to be severed, it is found necessary to achieve a fair determination of the guilt or innocence of that defendant.

N.C.G.S. § 15A-927(c)(2) (2003).

Public policy supports consolidation of trials where defendants are alleged to be responsible for the same behavior. *State v. Nelson*, 298 N.C. 573, 586, 260 S.E.2d 629, 639 (1979), *cert. denied*, 446 U.S. 929, 64 L. Ed. 2d 282 (1980). A trial court's ruling on a motion for joinder is reviewed for abuse of discretion in light of the circumstances of the case, and the ruling will not be disturbed on appeal absent a showing that the joinder caused the defendant to be deprived of a fair trial. *State v. Golphin*, 352 N.C. 364, 399, 533 S.E.2d 168, 195 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

Queen first argues that joinder prevented him from offering the portions of his redacted confession that implicated his co-defendant,

Tirado. Queen argues that the trial court's redacting the statement to avoid prejudice to Tirado caused prejudice to him by making him appear less than candid with law enforcement officers. Specifically, Queen contends that all the other evidence indicated that both he and Tirado participated in the crimes, and that the absence of any reference to Tirado in Queen's statement was obvious to the jury and suggested that he was not completely honest with the investigators when he confessed.

We have held that when joinder interferes with a defendant's opportunity to use a confession to his advantage because the defendants have antagonistic defenses, the trial court should grant severance. *See State v. Boykin*, 307 N.C. 87, 90-92, 296 S.E.2d 258, 260-61 (1982) (where defendant was unable to explain that he gave false statements to protect his co-defendant brother); *State v. Alford*, 289 N.C. 372, 385-89, 222 S.E.2d 222, 231-33 (where defendant was unable to use confession of co-defendant more fully to support his alibi), *judgment vacated in part on other grounds by Carter v. North Carolina*, 429 U.S. 809, 50 L. Ed. 2d 69 (1976). However, when the deletions do not result in a "severely censored statement[] going to the heart of the accused's defense," this Court has held that the trial court's denial of severance is not so arbitrary that it could not have been the result of a reasoned decision. *State v. Barnes*, 345 N.C. 184, 223, 481 S.E.2d 44, 65, *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).

Our review of the redacted and the unredacted versions of Queen's statement reveals that the only difference between the two is that the latter contains no mention of Tirado. As in *State v. Barnes*, Queen's redacted statement does not rise to the level of a severely censored statement that goes to the heart of his defense. Even accepting Queen's argument that the redacted statement made him appear less than forthright to law enforcement, his strategy focused on mitigation, not on denying his culpability. Convincing evidence of Queen's guilt was presented at trial, including his own admissions and the eyewitness testimony of Ione Black. Queen's full statement inculpating Tirado provided no exculpatory relief for Queen. Therefore, Queen's defense was not jeopardized by the admission of his redacted statement during the guilt-innocence phase of the trial. Moreover, Queen was allowed to present the entire statement to the sentencing jury after the trial court instructed that the original statement had been redacted by the court to delete references to Tirado as required by law and that the jury should harbor no resentment

toward Queen. As a result, the jury at sentencing was able to consider the full extent of Queen's cooperation with investigators.

Second, Queen maintains that he was prejudiced because he believed that, as a result of his case being joined with Tirado's for trial, his statement would not be introduced because it implicated Tirado. Queen claims that, as a result, he followed a trial strategy of denying guilt and that had he known the statement would be introduced, he would have defended the case differently. However, the record demonstrates that from the outset, all parties were aware that the statement existed and that it might be introduced in redacted form. As noted above, at the 15 December 1999 hearing on the State's joinder motion, the district attorney pointed out that "we would not be able to offer the aspect of Mr. Queen's statement/confession implicating Mr. Tirado." Queen made no motion to suppress his statement, and when a witness was called to introduce the statement at trial, his counsel stated:

> We have known for some time it was going to be an issue. I believe when we talked about redacting the statement and the question or the ultimate hearing was reserved for the time of trial—the court may recall that I made a statement at that time that there is a problem with not letting in the statement in its totality so the jury may consider every inference and nuance from that particular statement.

Thus, Queen's only expressed concern was that the jury would not be able to consider his full statement for mitigation purposes. Under these circumstances, we fail to see how he was unfairly prejudiced in conducting his defense.

Finally, Queen argues that he was prejudiced when he and co-defendant Tirado differed as to whether juror Lucier should be dismissed by the court. As is detailed later in this opinion, the district attorney received information during the trial that this juror was under criminal investigation. Although both defendants initially opposed excusing juror Lucier, Tirado later apparently changed his mind and asked that juror Lucier be removed. Queen argues that he was therefore at odds with his co-defendant. However, if Queen believed that Tirado's change in position as to the dismissal of juror Lucier was detrimental to him, he could have put the court on notice by moving then to sever. The court eventually removed the juror for cause. A trial court has the authority under N.C.G.S. § 15A-2000(a)(2) to excuse a disqualified juror before the sentencing proceeding

begins and the court's decision is reviewed for abuse of discretion. *State v. Nobles*, 350 N.C. 483, 513, 515 S.E.2d 885, 903 (1999). Although Queen also argues that he "was entitled to his selected jurors," a defendant is not entitled to a particular juror, even after a jury has been empaneled. *State v. Nelson*, 298 N.C. at 593, 260 S.E.2d at 644. We see no abuse in the judge's decision here, nor do we perceive that either defendant was unfairly prejudiced.

Tirado argues that if the joinder was improper as to Queen, it was similarly improper as to him. Because we have determined that Queen was not prejudiced by joinder, Tirado also was not prejudiced.

These assignments of error are overruled.

JURY SELECTION ISSUES

[2] Tirado and Queen contend that the trial court erred by allowing the State to exercise peremptory challenges in a racially discriminatory manner in violation of their state and federal constitutional rights. Specifically, defendants contend that the State's reasons for excusing prospective jurors Amilcar Picart and Regina London were pretextual and that the trial court failed to conduct an adequate inquiry of the reasons these prospective jurors were excused.

"The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 26 of the North Carolina Constitution prohibit a prosecutor from peremptorily excusing a prospective juror solely on the basis of his or her race." *Batson v. Kentucky*, 476 U.S. 79, 86, 90 L. Ed. 2d 69, 80 (1986); *State v. White*, 349 N.C. 535, 547, 508 S.E.2d 253, 262 (1998), *cert. denied*, 527 U.S. 1026, 144 L. Ed. 2d 779 (1999). "In *Batson* the United States Supreme Court set out a three-pronged test to determine whether a prosecutor impermissibly excluded prospective jurors on the basis of their race." *State v. Bonnett*, 348 N.C. 417, 433, 502 S.E.2d 563, 574 (1998), *cert. denied*, 525 U.S. 1124, 142 L. Ed. 2d 907 (1999). First, a defendant must establish a *prima facie* case that the peremptory challenge was exercised on the basis of race. *State v. Williams*, 355 N.C. 501, 550, 565 S.E.2d 609, 638 (2002), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003). Second, if such a showing is made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. *Id.* Third, the trial court must then determine whether the defendant has proven purposeful discrimination. *Id.*

In the case at bar, defendants raised their *Batson* objections during jury selection after the State exercised its second group of five

peremptory challenges. At the time defendants objected, the State had peremptorily challenged two white, two Hispanic, and six African-American prospective jurors and had accepted two African-American and four white prospective jurors. Based upon a review of these challenges, the trial court found that defendants had made a *prima facie* showing of discrimination and required the State to offer explanations for peremptory challenges six through ten. The prosecutor provided the following reasons for its peremptory challenge of prospective juror Amilcar Picart, a Latino male:

> As to Mr. Picart, we have notes that we've made as to the manner in which he conducted himself. We were observant of his body language. We observed it on several occasions when we would ask questions, he would not maintain eye contact with us. He would then—on other occasions, he'd look at us and look down and look away to the left and try to avoid eye contact on many occasions with us. In addition to that, I tried to draw him out on some of his answers and I could not get him to give us more than a few words answer.
>
> Based on that total lack of participation as far as the answers go and the fact that he would not—we could not—we had lack of eye contact with him, number one, and when we did have it, he was quick to look away and look down to the left and then, in addition to that, we observed him on what we believe to be several occasions making or attempting to make eye contact either with one of the defendants or looking for long periods of time in that particular defendant's direction. Those are the considerations we had with him.

With respect to prospective juror Regina London, an African-American female, the prosecutor provided the following explanation for its peremptory challenge:

> As to Ms. London, one of our big concerns with her was that early on when Your Honor asked her a question—asked her questions, at least on one occasion I remember that she didn't seem to follow the question and you had to go back and address her and so we found that to be a problem with us, specifically when I asked her about proof of the element of the crime and if she would require anything else. She said she would ask questions. She would want to know certain things. Those were concerns that we had that either she didn't understand sometimes—I don't—can't say that she wasn't paying attention. I don't know. We just don't

> know what the cause of it was, but we could see the result of that concern was her sitting over a long trial whenever she had that difficulty even during this selection.

The trial court then allowed defendants an opportunity to respond. Queen's counsel reiterated that eight out of the State's first ten peremptory challenges were exercised on African-American or other minority prospective jurors and observed that "the Court was present when this voir dire was done, was able to observe these individuals." Tirado's counsel also pointed out the number of minority prospective jurors that had been excused by the prosecution. The court noted that both the prosecutor and defense counsel had consented to excusing a number of jurors, both Caucasian and minorities, that might otherwise have been challenged, and then found:

> [T]he stated reasons for excusing each of the named jurors, specifically Chester Goodwin, Cynthia Johnson, Mary Morrisey, Amilcar Picart, and Regina London, does have a basis in fact. That it is not pretextual in the Court's opinion and the state has rebutted to the Court's satisfaction the prima facie showing made by the defense in its discrimination. And, therefore, the objection made by the defendants and each of them to the state's exercise of peremptory challenge to excuse these jurors named by the Court is denied and the state may exercise those peremptory challenges.

Defendants argue that even though the State gave "articulable" reasons for exercising its peremptory challenges, the trial court's finding that these reasons were non-pretextual was not based on an adequate inquiry. Stated differently, defendants argue that the trial court failed properly to address the third *Batson* inquiry, whether the proffered reasons were "legitimate or a pretext." *State v. Porter*, 326 N.C. 489, 498, 391 S.E.2d 144, 150 (1990). The findings quoted above indicate that the court was fully aware of the three *Batson* requirements, so the issue before us is whether the court's determinations were based on sufficient findings. Because the trial court was in the best position to assess the prosecutor's credibility, we will not overturn its resolution of this issue absent clear error. *State v. Lemons*, 348 N.C. 335, 361, 501 S.E.2d 309, 325 (1998), *sentence vacated on other grounds*, 527 U.S. 1018, 144 L. Ed. 2d 768 (1999).

This third prong in a *Batson* analysis requires the trial court to consider various factors, such as the

> "susceptibility of the particular case to racial discrimination, whether the State used all of its peremptory challenges, the race of witnesses in the case, questions and statements by the prosecutor during jury selection which tend to support or refute an inference of discrimination, and whether the State has accepted any African-American jurors."

State v. Golphin, 352 N.C. at 427, 533 S.E.2d at 211 (quoting *State v. White*, 349 N.C. at 548-49, 508 S.E.2d at 262).

Tirado is of mixed African-American and Hispanic descent, while Queen is African-American. The two murder victims, Moore and Lambert, were white, and the surviving kidnapping victim, Cheeseborough, was African-American. The State did not exhaust its peremptory challenges while selecting the first twelve jurors and four alternates. The jury originally seated was racially diverse, consisting of three white males, two white females, one Filipino-Hawaiian male, one Asian female, one Hispanic male, one Hispanic female, two African-American females, and one African-American male.[1] Of the four alternate jurors selected, two were African-American and two were white. In addition, the trial court also stated that it considered its own observations of each prospective juror and the various exchanges between the court, the prosecutor, and the prospective jurors.

These factors, taken together, provide a wholly adequate basis for the court's determination that the prosecutor's facially race-neutral explanations for these peremptory challenges were race-neutral in fact. Accordingly, we uphold the trial court's ruling that defendants did not meet their burden of showing purposeful discrimination.

These assignments of error are overruled.

[3] Next, defendants contend that the trial court violated its statutory duty under N.C.G.S. § 15A-1214(a) to ensure that jury selection was conducted in a random manner. Defendants argue that as a result, their state and federal constitutional rights to a fair and impartial jury were violated. Defendants present a two-fold argument. They first argue that the trial court's use of panels during jury selection resulted in the parties having advance knowledge of the identity of

1. Prior to the jury being empaneled, juror number two, who identified himself as Filipino-Hawaiian, was excused because of a medical problem. Alternate juror number one, an African-American female, took his place.

the next prospective juror to be called. Second, defendants argue that the court's placing prospective juror Janie Swindell into a particular panel resulted in a non-random system of selection.

Constitutional questions not raised and passed on by the trial court will not ordinarily be considered on appeal. *State v. Benson*, 323 N.C. 318, 322, 372 S.E.2d 517, 519 (1988). Statutory violations, however, are reviewable regardless of objections at the trial court. *State v. Golphin*, 352 N.C. at 411, 533 S.E.2d at 202. Here, defendants raised no objection to the use of panels for jury selection or the manner in which the trial court placed prospective jurors into panels. Therefore, defendants waived review of the constitutionality of the trial court's actions. *See id.*

Turning to the alleged statutory violations, N.C.G.S. § 15A-1214(a) provides that "[t]he clerk, under the supervision of the presiding judge, must call jurors from the panel by a system of random selection which precludes advance knowledge of the identity of the next juror to be called." N.C.G.S. § 15A-1214(a) (2003). The statute neither prescribes nor proscribes any particular method of achieving random selection. *See id.* Any challenge to a jury panel:

(1) May be made only on the ground that the jurors were not selected or drawn according to law.

(2) Must be in writing.

(3) Must specify the facts constituting the ground of challenge.

(4) Must be made and decided before any juror is examined.

N.C.G.S. § 15A-1211(c)(1), (2), (3), (4) (2003). Although this statute apparently uses the term "panel" to refer to the entire jury pool or venire, we have also applied it where challenges were raised to the procedures used by the trial court to divide the entire jury pool into smaller and more manageable groups (or "panels") of jurors who are questioned as part of the voir dire process. *See State v. Wiley*, 355 N.C. 592, 606-07, 565 S.E.2d 22, 34-35 (2002). In this case, defendants did not follow the statutorily mandated procedure for challenging the court's use of panels of jurors. As a result, both defendants waived review of their assignments of error as to this issue. *See id.* at 607, 565 S.E.2d at 34-35 (defendant waived assignment of error regarding challenge to division of jurors into panels because he failed to comply with N.C.G.S. § 15A-1211(c)); *see also State v. Golphin*, 352 N.C. at 411-12, 533 S.E.2d at 202.

Defendants further contend that a specific violation of the randomness requirement occurred when the trial court placed prospective juror Janie Swindell into a particular panel. Defendants argue that because the trial court acted contrary to statutory mandate, their right to appeal the action is preserved despite a failure to object at trial. *See State v. Jones*, 336 N.C. 490, 497, 445 S.E.2d 23, 26 (1994). Prospective juror Swindell, who was selected to be in panel G, did not answer in court when her name was called. Once all the names had been called for panel G, the court asked again about Swindell, but she still did not respond. After the remaining prospective jurors were called and placed into panels, the court made inquiry of the individuals who were still in the courtroom. At that point, Swindell was identified. She reported that she had not heard her name called, and a deputy pointed out that Swindell was wearing a hearing aid. The judge directed the clerk to place her into panel L, the final panel. Later, when Swindell's panel was called to the jury box for questioning, the judge noted that Swindell demonstrated an inability to hear or to understand questions and instructions. Based on these observations, all parties consented to the court's excusing of Swindell.

This issue has been resolved by our ruling in *State v. Golphin*, 352 N.C. at 413-14, 533 S.E.2d at 203-04. In that case, the trial court divided the prospective jurors into panels and placed members with hardships or whose written excuses had been denied in the last panel. Although the defendants did not raise a contemporaneous objection to the procedure, they later argued that the requirement of random selection had been violated. Citing *State v. Harris*, 338 N.C. 211, 227, 449 S.E.2d 462, 470 (1994), we held that the "right to challenge is not a right to select but to reject a juror" and concluded that the defendant had demonstrated no prejudice. *State v. Golphin*, 352 N.C. at 414, 533 S.E.2d at 204. In the case at bar, neither defendant was forced to accept an undesirable juror, and in fact, defendants consented to Swindell's excusal. The trial judge, confronted with a problem caused by Swindell's apparent disability, fashioned a reasonable response. Although we do not determine whether the court's action violated N.C.G.S. § 15A-1214, even if there were a violation, neither defendant can demonstrate prejudice. *See State v. Lawrence*, 352 N.C. 1, 13, 530 S.E.2d 807, 815 (2000), *cert. denied*, 531 U.S. 1083, 148 L. Ed. 2d 684 (2001).

These assignments of error are overruled.

[4] Defendants Tirado and Queen contend that the trial court erred by excusing prospective juror Sarah McMillan as not qualified.

Defendants argue that, even though McMillan had moved to Raleigh, in Wake County, she was nevertheless a "permanent" resident of Cumberland County and qualified to serve as a juror. Because defendants did not object when the court excused McMillan, they waived appellate review of this issue. *See State v. Golphin*, 352 N.C. at 424, 533 S.E.2d at 209-10 (defendant who suggested that a juror who had served on a federal jury within two years be excused but did not object on constitutional grounds failed to preserve the issue for appellate review). In addition, as to any alleged statutory violation that defendants argue is preserved for appellate review, we conclude that the excusal of prospective juror McMillan was proper. North Carolina General Statute § 9-3 provides: "All persons are qualified to serve as jurors and to be included on the jury list who are citizens of the State and residents of the county . . . . Persons not qualified under this section are subject to challenge for cause." N.C.G.S. § 9-3 (2003). In addition, N.C.G.S. § 15A-1211(b) states that the trial judge must decide "all questions concerning the competency of jurors." N.C.G.S. § 15A-1211(b) (2003). In this case, the record supports the trial court's ruling that McMillan was not qualified for service. On 9 February 2000, as jury selection began, the trial judge informed prospective jurors of the grounds for disqualification and asked those who believed they were not qualified to present their reasons. The following exchange ensued:

THE COURT: Ma'am?

[PROSPECTIVE JUROR MCMILLAN]: Sarah McMillan.

THE COURT: Yes, ma'am?

[PROSPECTIVE JUROR MCMILLAN]: I live in Raleigh.

THE COURT: You do not live in Cumberland County?

[PROSPECTIVE JUROR MCMILLAN]: No, sir.

THE COURT: When did you move, ma'am?

[PROSPECTIVE JUROR MCMILLAN]: November.

THE COURT: And how did you get the summons? Was it forwarded to you?

[PROSPECTIVE JUROR MCMILLAN]: My permanent address is here with my mom. I was born and raised in Fayetteville so—I've lived in Raleigh since—

THE COURT: So this went to your mom's house?

[PROSPECTIVE JUROR MCMILLAN]: Luckily she opened it I would say two days ago.

The trial judge then asked if either the State or the defendants wished to be heard. When neither expressed any objection, the trial judge excused McMillan from service because she was no longer a resident of Cumberland County. This record adequately establishes that the trial court properly executed its authority under N.C.G.S. § 15A-1211(b) to determine that prospective juror McMillan failed to meet the statutory requirements to sit as a Cumberland County juror.

These assignments of error are overruled.

GUILT-INNOCENCE PHASE ISSUES

[5] Both Tirado and Queen assign error to the trial court's instructions to the jury on the kidnapping charges, arguing that the trial court instructed on theories not alleged in the indictments. Defendants further contend that this error also skewed the sentencing proceeding because the jury found as to both defendants the aggravating circumstance that the murder was committed while defendants engaged in the commission of first-degree kidnapping. According to defendants, the erroneous finding of this aggravating circumstance warped the sentencing jury's balancing of all the aggravating and mitigating circumstances found by the jury.

Defendants acknowledge that they did not object to the instructions at trial, so we consider this issue under the plain error standard of review. *See* N.C. R. App. P. 10(b)(2), (c)(4). Under such an analysis, defendants must show that the instructions were erroneous and that absent the erroneous instructions, a jury probably would have returned a different verdict. N.C.G.S. § 15A-1443(a) (2003). The error must be "so fundamental that it denied the defendant a fair trial and quite probably tilted the scales against him." *State v. Collins*, 334 N.C. 54, 62, 431 S.E.2d 188, 193 (1993). "It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977).

Error arises when a trial judge permits a jury to convict upon an abstract theory not supported by the bill of indictment. *State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980). This Court has held such error to be prejudicial when the trial court's instruc-

tion as to the defendant's underlying intent or purpose in committing a kidnapping differs from that alleged in the indictment. *See State v. Brown*, 312 N.C. 237, 249, 321 S.E.2d 856, 863 (1984) (holding that when the trial court charged the jury on an additional purpose for kidnapping not listed in the indictment and the State presented no evidence on such theory, the jury instructions constituted plain error); *see also State v. Taylor*, 301 N.C. at 171, 270 S.E.2d at 413-14 (holding that complete failure to instruct the jury on the theory charged in the bill of indictment together with instructions based on theories not charged in the indictment constituted prejudicial error); *State v. Dammons*, 293 N.C. 263, 272, 237 S.E.2d 834, 841 (1977) (holding that where theories of the crime were "neither supported by the evidence nor charged in the bill of indictment," the instructions constituted prejudicial error). However, we have also found no plain error where the trial court's instruction included the purpose that was listed in the indictment and where compelling evidence had been presented to support an additional element or elements not included in the indictment as to which the court had nevertheless instructed. *State v. Lucas*, 353 N.C. 568, 588, 548 S.E.2d 712, 726 (2001).

Here, the indictments for Lambert's and Moore's kidnapping alleged that each defendant confined, restrained, and removed the victims for the purpose of "facilitating the commission of a felony." The trial court charged the jury that it could find each defendant guilty if it found that the defendant, acting either by himself or with others, "removed" Lambert or Moore for the purpose of "facilitating the defendant's or another person's commission of robbery with a firearm or doing serious bodily injury to the person so removed." Similarly, the indictment for Cheeseborough's kidnapping alleged that each defendant confined, restrained, and removed her for the "purpose of doing serious bodily injury to her." The trial court charged the jury that it could find defendants guilty if it found that each, acting by himself or with others, removed the victim for the purpose of "facilitating . . . commission of robbery with a firearm or for the purpose of doing serious bodily injury." Thus, as to each kidnapping charge relating to victims Lambert and Moore, the jury was instructed as to particular purposes for the kidnapping that had not been specified in the indictment and as to the kidnapping charge relating to victim Cheeseborough, the jury was instructed on the purpose set out in the indictment, along with an additional purpose that had not been alleged in the indictment.

Because the instructions given by the trial court contained purposes not charged in the respective indictments, these instructions were erroneous. However, after examining the instructions and the record in its entirety, we cannot say that the defect was "a 'fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done.' " *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.) (footnote omitted), *cert. denied*, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982) (quoting *United States v. Coppola*, 486 F.2d 882, 884 (10th Cir. 1973), *cert. denied*, 415 U.S. 948, 39 L. Ed. 2d 563 (1974)). As to victims Lambert and Moore, the indictments did not specify any particular underlying felony, *see State v. Freeman*, 314 N.C. 432, 435, 333 S.E.2d 743, 745 (1985), while the trial court instructed as to two possible underlying felonies that the jury could find. Compelling evidence was presented at trial that defendants or members of the gang with whom defendants were acting in concert kidnapped these victims both for the purpose of facilitating the commission of armed robbery and for the purpose of doing serious bodily injury to each victim. As a result, the instruction placed a higher burden of proof on the State by limiting the underlying felonies that the jury could find to support the kidnapping charge. As to victim Cheeseborough, the evidence supported both the theory set out in the indictment and the additional theory set out in the trial court's instructions. Accordingly, we conclude that a different result would not have been reached had the trial court instructed only on the purpose charged in the indictment, and that the error in the instructions was not prejudicial. *See State v. Lucas*, 353 N.C. at 588, 548 S.E.2d at 726. Because there was no prejudicial error in the instructions, we also conclude that the sentencing proceeding was not improperly compromised.

These assignments of error are overruled.

[6] Defendants next contend that the trial court erred in entering judgments against them based on multiple convictions of conspiracy when the State's evidence was insufficient to prove the existence of more than a single conspiracy. As to victims Moore and Lambert, each defendant was indicted for one count of conspiracy to commit first-degree murder, one count of conspiracy to commit first-degree kidnapping, and one count of conspiracy to commit robbery with a dangerous weapon. As to victim Cheeseborough, each defendant was indicted for one count of conspiracy to commit first-degree murder. Defendants argue that because all of the offenses were committed as part of a continuing series of events on 16-17 August 1998, there was

no evidence of separate and distinct agreements to justify convictions for more than a single count of criminal conspiracy.

The question of whether multiple agreements constitute a single conspiracy or multiple conspiracies is a question of fact for the jury. *State v. Rozier*, 69 N.C. App. 38, 54, 316 S.E.2d 893, 903, *cert. denied*, 312 N.C. 88, 321 S.E.2d 907 (1984). The nature of the agreement or agreements, the objectives of the conspiracies, the time interval between them, the number of participants, and the number of meetings are all factors that may be considered. *State v. Dalton*, 122 N.C. App. 666, 672-73, 471 S.E.2d 657, 661-62 (1996). "Ordinarily, the conspiracy ends with the attainment of its criminal objectives, but precisely when this occurs may vary from case to case." *State v. Gary*, 78 N.C. App. 29, 37, 337 S.E.2d 70, 76 (1985), *disc. rev. denied*, 316 N.C. 197, 341 S.E.2d 586 (1986).

In the case at bar, the evidence in the record supports the existence of multiple separate conspiracies. As to the count of conspiracy to commit first-degree murder against Debra Cheeseborough, the State's evidence showed that Walters assigned a mission to Douglas, Black, and Nevills, directing them to find a victim to rob, steal the victim's car, put the victim in the trunk of the car, and then return to Walters' residence within an hour and a half. During the abduction, Nevills told Cheeseborough that if she cooperated, she would not be hurt. This evidence indicates that Douglas, Black, and Nevills did not anticipate Cheeseborough's attempted murder, but instead thought that their mission was auto theft, armed robbery, and kidnapping. The plan to kill Cheeseborough formed during the course of the kidnapping, after she was abducted and brought to Walters' residence, where the remainder of the gang gathered around the car and argued over who was going to shoot her. Black testified at trial that defendant Tirado stated, "I'll shoot the bitch." Defendant Queen then told defendant Tirado not to let anyone go anywhere, and with Cheeseborough still in the trunk, Queen, Walters, Douglas, and Frink drove away in Cheeseborough's car. Black testified that the rest of the gang remained at Walters' trailer, and that defendant Tirado mumbled several times, "Damn, they should have let me go." The four gang members drove Cheeseborough to Smith Lake, where Walters shot Cheeseborough numerous times.

As to the three counts of conspiracy for crimes committed against Susan Moore and Tracy Lambert, the State's evidence showed that after Cheeseborough was left for dead, the gang reassembled at Walters' residence and separate new conspiracies were hatched.

When Walters complained that the gang needed another car, a gang member instructed Black, Douglas, and Tucker to go on another mission. Defendant Queen, accompanied by Walters, Frink, Black, Douglas, and Tucker, drove Cheeseborough's car while the others eventually targeted the 1989 Pontiac Grand Prix driven by Susan Moore and in which Tracy Lambert was a passenger. The gang members trapped Moore's car at the end of a dead-end road and stole the vehicle at gunpoint. Tucker and Douglas forced Moore and Lambert into Moore's trunk, then Black, Douglas, and Tucker returned to Walters' trailer. At that point, Walters' announced reason for the group's leaving the residence, to obtain another car, had been accomplished. Once again, the entire gang then gathered to discuss what to do with the women. Amid some disagreement, the gang drove Moore and Lambert to a location in Linden, where Queen shot Lambert in the head and Tirado shot Moore in the head. These shootings marked the completion of the gang's last conspiracy, to murder Moore and Lambert.

A rational juror, considering this series of meetings, the variety of locations and participants, their different objectives, and the statements of conspirators, could readily find the evidence established multiple separate conspiracies, rather than one single conspiracy. Moreover, we note that neither defendant objected to the conspiracy charges submitted to the jury.

These assignments of error are overruled.

[7] Next, Tirado and Queen argue that the trial court erred by submitting to the jury both attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury, and by imposing consecutive sentences for these offenses in violation of their state and federal constitutional rights to be free from double jeopardy. The Double Jeopardy Clause of the Fifth Amendment states that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V; *see also* N.C. Const. art. I, § 19. The Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 664-65 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 104 L. Ed. 2d 865 (1989); *see also State v. Murray*, 310 N.C. 541, 547, 313 S.E.2d 523, 528 (1984), *overruled on other grounds by State v. White*, 322 N.C. 506, 369 S.E.2d

813 (1988). Defendants assert that they have impermissibly received multiple punishments for the same offense.

This Court has recognized that:

> [E]ven where evidence to support two or more offenses overlaps, double jeopardy does not occur unless the evidence required to support the two convictions is identical. If proof of an additional fact is required for each conviction which is not required for the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same.

State v. Murray, 310 N.C. at 548, 313 S.E.2d at 529. The elements of attempted first-degree murder are: (1) a specific intent to kill another; (2) an overt act calculated to carry out that intent, which goes beyond mere preparation; (3) malice, premeditation, and deliberation accompanying the act; and (4) failure to complete the intended killing. *See* N.C.G.S. § 14-17 (2003); *State v. Peoples*, 141 N.C. App. 115, 117, 539 S.E.2d 25, 28 (2000). The elements of assault with a deadly weapon with intent to kill inflicting serious injury are: (1) an assault, (2) with the use of a deadly weapon, (3) with an intent to kill, and (4) inflicting serious injury, not resulting in death. *See* N.C.G.S. § 14-32(a) (2003); *State v. Peoples*, 141 N.C. App. at 117, 539 S.E.2d at 28. Therefore, assault with a deadly weapon with intent to kill inflicting serious injury requires proof of the use of a deadly weapon, as well as proof of serious injury, neither of which are elements of attempted first-degree murder. *See* N.C.G.S. §§ 14-17, -32(a). Similarly, attempted first-degree murder includes premeditation and deliberation, which are not elements of assault with a deadly weapon with intent to kill inflicting serious injury. *Id.* Because each offense contains at least one element not included in the other, defendants have not been subjected to double jeopardy.

These assignments of error are overruled.

Having determined that we find no error in any of defendants' collective arguments, we now address each defendant's separate assignments of error.

DEFENDANT TIRADO

GUILT-INNOCENCE PHASE ISSUES

[8] Defendant Tirado claims that the trial court erred when it allowed one of the prosecutors to argue to the jury at the close of the guilt-innocence phase that co-defendant Queen's post-arrest state-

ments corroborated the testimony of Ione Black regarding the events of 16-17 August 1998. Tirado contends that because Queen's statements were inadmissible against Tirado, the trial court's ruling deprived him of his rights under the North Carolina and United States Constitutions to due process, to confrontation, and to be free from cruel and unusual punishment.

An out-of-court statement is admissible as an exception to the hearsay rule when it was made by the party against whom it is being offered. N.C.G.S. § 8C-1, Rule 801(d) (2003). However, when a nontestifying co-defendant's post-arrest statement is admitted in evidence at a joint trial in a manner that invites or permits the jury to use the statement against the non-declarant defendant, fundamental conflicts with the non-declarant defendant's state and federal right to confrontation may arise. *See Lilly v. Virginia*, 527 U.S. 116, 144 L. Ed. 2d 117 (1999). As a result, the United States Supreme Court has held that before a nontestifying co-defendant's post-arrest statement may be admitted in evidence, it must be redacted to remove all references to the non-declarant defendant, and the jury should be instructed that the statement was admitted as evidence only against the declarant co-defendant. *Gray v. Maryland*, 523 U.S. 185, 140 L. Ed. 2d 294 (1998); *Bruton v. United States*, 391 U.S. 123, 20 L. Ed. 2d 476. Here, having ruled that Queen's statements would be redacted to delete all references to Tirado, the trial court admitted them after correctly instructing the jury that they could be considered only as evidence against Queen and could not be considered by the jury for any purpose against Tirado.

During closing arguments, one of the prosecutors argued that Queen's post-arrest statements to law enforcement officers corroborated the testimony of Ione Black regarding the events of 16-17 August 1998. Tirado's attorney objected as soon as the prosecutor mentioned Queen's statement and advised the court of the basis of the objection, but the objection was overruled. Thereafter, the prosecutor made such arguments as, "Ione told you about these things. She told you that they had to go on missions. Eric Queen told you the same thing." The prosecutor then argued that all of the evidence presented to the jury, including Queen's statements, corroborated Ione Black's testimony. Tirado contends that the prosecutor's arguments that Queen's statement corroborated Black's testimony had the effect of inviting the jury to consider Queen's statement as implicating Tirado.

The court in its final instructions advised the jury that "[i]f you find that Mr. Queen made the statements, you may consider them against Mr. Queen and only against Mr. Queen. It has—they have no relevance at all to Mr. Tirado's guilt or innocence and you may not consider any statement against Mr. Tirado in any way whatsoever." In addition, at appropriate times during Black's testimony, the trial court gave accurate limiting instructions to the jury restricting the purposes for which it could consider her hearsay evidence and the hearsay statements made by her co-conspirators. The law presumes that jurors follow the court's instructions. *Parker v. Randolph*, 442 U.S. 62, 73, 60 L. Ed. 2d 713, 723 (1979). Moreover, the prosecutor advised the jury, shortly after beginning her closing argument: "Remember as I discuss the evidence with you the purpose for which the judge said that evidence could come in and you could hear it. I'm arguing it for no other purpose other than what the judge instructed you that it could come in as." Therefore, in light of the court's limiting instruction to the jury that Queen's statements were not to be used against Tirado and the prosecutor's statement reminding the jury of the defined purpose for which the evidence had been admitted, we conclude that Tirado's contention that the prosecutor improperly used the statements of Queen to corroborate Black and thereby bolster the case against Tirado is without merit.

Nonetheless, even assuming *arguendo* that the trial court erred in overruling Tirado's objection to this argument, the error was harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b) (2003); *see also State v. Spaulding*, 288 N.C. 397, 407-08, 219 S.E.2d 178, 185 (1975), *vacated in part on other grounds*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976) (holding that erroneous admission of a defendant's out-of-court statement against a co-defendant was not reversible error despite violation of defendant's constitutional rights when the total evidence against the non-declaring defendant was so overwhelming that the error was harmless). Substantial physical and testimonial evidence independent of Queen's statements corroborated Black's testimony against Tirado. The testimony of Debra Cheeseborough, the only surviving victim, was consistent with Black's testimony as she and Black provided markedly similar descriptions of Cheeseborough's abduction. Black testified that the gang members burned a purse and some identifications, and police recovered Cheeseborough's burned wallet at Walters' Davis Street address. Blue material recovered from the wound tracks of victims Moore and Lambert was chemically consistent with the blue nail polish seized from Walters' residence. Tirado's fingerprint was located on one of

the boxes of cartridges that was recovered from the stolen vehicles. This and other similar evidence satisfies us that any impermissible references to Queen's statements during closing arguments were harmless beyond a reasonable doubt. This assignment of error is overruled.

[9] Tirado next asserts that the evidence was insufficient to sustain his convictions for the substantive offenses of attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, kidnapping, and robbery with a dangerous weapon, all of which related to crimes committed against Cheeseborough. He argues that the trial court erred when it denied his motions to dismiss the substantive charges because he was neither actually nor constructively present when the crimes were committed.

When reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the State, resolving all conflicts in the evidence in favor of the State and giving it the benefit of all reasonable inferences. *State v. Lucas*, 353 N.C. at 581, 548 S.E.2d at 721. Moreover, "[c]ircumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988). The jurors must decide whether the evidence satisfies them beyond a reasonable doubt that the defendant is guilty. *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965).

When addressing the offenses with which Tirado had been indicted relating to Cheeseborough, the trial court instructed the jury as to aiding and abetting and acting in concert, specifically noting that if two or more persons join in a purpose to commit offenses, each was guilty if actually or constructively present. This instruction is consistent with the law of North Carolina. *See State v. Laws*, 325 N.C. 81, 97, 381 S.E.2d 609, 618 (1989), *judgment vacated on other grounds*, 494 U.S. 1022, 108 L. Ed. 2d 603 (1990). Therefore, because Tirado was not physically present, we must consider whether he was constructively present when the substantive offenses against Cheeseborough were committed.

We have held that where a defendant and a co-defendant shared a criminal intent and the co-defendant who actually committed the crime knew of the shared intent, if the defendant was in a position to aid or encourage the co-defendant when the co-defendant committed the offense, the defendant was constructively present and acting in concert with the co-defendant. *State v. Willis*, 332 N.C. 151, 179, 420

S.E.2d 158, 171 (1992). Here, the State's evidence showed that Tirado belonged to the Crips gang and was among those who participated in the initiation of new members on the night of 16-17 August 1998. Tirado met with the others at Walters' residence prior to her sending the initiates on specified criminal missions, participated in obtaining bullets to support the missions, and painted the gang's color on the bullets. After Cheeseborough was abducted and brought back to Walters' residence, Tirado asked to be allowed to shoot her and grumbled when others took the job. Based on this record, we conclude that the State presented sufficient evidence to allow a rational juror to conclude that Tirado joined with one or more persons in the purpose to kidnap, rob, assault with a deadly weapon, and attempt to murder Cheeseborough and was constructively present when these crimes were carried out. Accordingly, the trial court properly denied Tirado's motions to dismiss the charges for substantive offenses against Cheeseborough. This assignment of error is overruled.

SENTENCING PROCEEDING ISSUE

[10] Tirado argues that he is entitled to a new capital sentencing proceeding because the trial court failed to comply with the statutory mandate for an individual poll of jurors immediately upon delivery of a sentencing recommendation. He claims that this error deprived him of his statutory right to an individual poll of the sentencing jury at a time before the jury became subject to outside influences, and of his state and federal constitutional rights to trial by jury, to a unanimous verdict, to due process of law, and to be free from cruel and unusual punishment.

As noted above, the trial court bifurcated the sentencing proceedings so that Queen's unredacted statement could be read to the jury without prejudicing Tirado. Tirado's capital sentencing proceeding was held first. When the jury delivered its sentencing verdicts as to Tirado on Friday, 7 April 2000, the trial court examined the verdict forms for consistency, then sealed them and delivered them to the clerk. The court instructed the jurors that "it will be necessary for you folks to be polled individually as you were after the verdict in the first part of the case when the verdict is opened and announced for the record," and then excused the jurors with further instructions to return the following week for the sentencing proceeding for Queen.

Thereafter, during Queen's sentencing proceeding on 11 April 2000, his unredacted statements implicating Tirado were admitted into evidence. The jury again deliberated and, that same day,

returned its sentencing verdicts as to Queen. The trial judge unsealed the sentencing verdicts delivered the previous week for Tirado, and the clerk announced both capital verdicts. When the trial judge began to poll the jury, Tirado objected and moved for a mistrial on the ground that the poll was invalid because the jury had been exposed to extraneous material after Tirado's sentencing phase verdict was delivered. The trial court overruled the objection and denied the motion, then proceeded to poll the jury individually on the sentencing verdicts for Tirado and, separately, for Queen.

In a capital case, the right to an individual jury poll is statutorily mandated. North Carolina General Statute § 15A-2000(b) provides, in pertinent part, that "[u]pon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned." N.C.G.S. § 15A-2000(b) (2000). The purpose of an individual poll of the jury is:

> [T]o give each juror an opportunity, before the verdict is recorded, to declare in open court his assent to the verdict which the foreman has returned, and thus to enable the court and the parties to ascertain *with certainty* that a unanimous verdict has been in fact reached and that no juror has been coerced or induced to agree to a verdict to which he has not fully assented.

Davis v. State, 273 N.C. 533, 541, 160 S.E.2d 697, 703 (1968). If the record does not establish affirmatively that each individual juror assents to the verdict returned, the verdict is invalid. *State v. Dow*, 246 N.C. 644, 646, 99 S.E.2d 860, 862 (1957). The jury poll should occur "[u]pon delivery of the sentence recommendation by the foreman of the jury." N.C.G.S. § 15A-2000(b). The rationale behind the timing of the poll is to ensure that nothing extraneous to the jury's deliberations can cause any of the jurors to change their minds. *State v. Black*, 328 N.C. 191, 198, 400 S.E.2d 398, 402-03 (1991). "[O]nce the jury is dispersed after rendering its verdict and later called back, it is not the same jury that rendered the verdict." *Id.* at 198, 400 S.E.2d at 403.

Here, the jury returned its sentence recommendation as to Tirado on 7 April 2000. The jurors were then excused for a weekend recess. When they reassembled on 11 April 2000 for Queen's sentencing proceeding, the jurors heard for the first time Queen's complete statement, which included a description of Tirado's participation in the planning and execution of the crimes. Therefore, Tirado's statutorily

mandated poll of the individual jurors occurred after the passage of several days and after the jury heard additional inculpatory evidence that the trial court had ruled inadmissible as to Tirado. As a result, the poll failed to measure each juror's intentions at the time the jury returned its sentencing verdicts as to Tirado. Under these circumstances, we believe it unlikely that any juror who was wavering when the verdict was returned on 7 April would have expressed any doubts when polled on 11 April.

Although counsel for both defendants had raised issues relating to Queen's statement and their joint trial, Tirado's attorney did not make a contemporaneous objection to the trial court's decision to defer polling the jurors. Instead, counsel moved for a mistrial after Queen's verdict was returned. The trial court denied the motion. The statute applicable to such motions states in pertinent part: "The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, . . . resulting in substantial and irreparable prejudice to the defendant's case." N.C.G.S. § 15A-1061 (2003). Here, the procedure followed by the trial court violated the provisions of N.C.G.S. § 15A-2000(b) because the poll was not timely and because the intervening evidence heard by the jury led to substantial and irreparable prejudice to Tirado. Accordingly, we hold that the trial court erred in denying Tirado's motion for mistrial and that he is entitled to a new sentencing proceeding. As a result, we need not address his remaining assignments of error related to sentencing.

DEFENDANT QUEEN

GUILT-INNOCENCE PHASE ISSUES

[11] Defendant Queen argues that the trial court erred when it dismissed juror Margaret Lucier during the trial. Queen argues that the trial court's handling of the matter was fundamentally unfair and constitutes reversible error, or in the alternative, that the trial court abused its discretion.

The record indicates that, after the trial had been under way for several weeks, a police officer from Spring Lake advised one of the prosecutors that juror Lucier was under investigation for embezzlement. The prosecutor notified the trial court and opposing counsel. Although the court recognized that Lucier had not been arrested and was presumed innocent, it posed the possibility of removing her from the jury. Both defendants objected. After addi-

tional inquiries, the trial judge stated, "if I determine to my satisfaction that there exists probable cause for an arrest warrant to issue or for the [S]tate to proceed with an indictment, I will exercise my discretion to take her off. I will not have a person in those circumstances sitting on the jury."

Three days later, after all the evidence had been presented and as the court was preparing to instruct the jury on issues related to defendants' guilt or innocence, Tirado changed his position. Tirado's counsel advised the court that "[w]e would concur with the Court's removal of—and would move to strike her for cause." Queen continued to oppose Lucier's removal. The court was then informed that felony warrants were pending against Lucier. The trial judge instructed the jury, and thereafter, in its discretion, discharged Lucier and replaced her with an alternate.

North Carolina General Statute § 15A-2000(a)(2) provides, in pertinent part, that

> [i]f prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel.

N.C.G.S. § 15A-2000(a)(2) (2003); *see also* N.C.G.S. § 15A-1215(a) (2003). The decision to replace a juror with an alternate lies within the trial court's discretion. *State v. Nobles*, 350 N.C. at 513, 515 S.E.2d at 903.

> "The trial judge has broad discretion in supervising the selection of the jury to the end that both the state and the defendant may receive a fair trial. This discretionary power to regulate the composition of the jury continues beyond empanelment. It is within the trial court's discretion to excuse a juror and substitute an alternate at any time before final submission of the case to the jury panel. These kinds of decisions relating to the competency and service of jurors are not reviewable on appeal absent a showing of abuse of discretion, or some imputed legal error."

State v. McLaughlin, 323 N.C. 68, 101, 372 S.E.2d 49, 70 (1988) (quoting *State v. Nelson*, 298 N.C. at 593, 260 S.E.2d at 644) (citations omitted)), *judgment vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990).

Queen contends that the trial court improperly allowed the State to expedite juror Lucier's arrest, with the result that she was excused despite Queen's desire to keep her on the panel. However, the trial court took pains to ensure that the rights of both defendants to a fair trial were protected. The judge repeatedly expressed his desire not to interfere with law enforcement's investigation. When he finally discharged juror Lucier, the judge made the following findings:

> That the Court finds that this is absolutely necessary to preserve the integrity of the jury. That the juror has—the Court has a distinct concern that, aside from the appearance of impropriety and undermining the confidence of the public and the parties and the integrity of the jury's verdict in this case, that there might be some real issue as to whether or not Ms. Lucier's verdict would be completely fair and unbiased and based solely on the evidence if she recognizes or knows that she may be required to have dealings with the state concerning these charges against her.
>
> That the Court has not delayed, deferred or encouraged the preparation and/or service of these warrants nor attempted to interfere with the discretion of the district attorney and the law enforcement officers in the discharge of their official duties.

Therefore, when presented with this unusual situation, the trial court exercised the discretion allowed under N.C.G.S. § 15A-2000(a)(2) and our case law to replace juror Lucier with an alternate. The trial court's findings are fully supported by the record, and we see no abuse of discretion. This assignment of error is overruled.

[12] Queen next argues that the prosecutor failed to provide essential discovery as required by N.C.G.S. § 15A-903 and *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963). The heart of Queen's claim is that the prosecution failed to disclose prior to trial his false exculpatory statement to investigators to the effect that he had not participated in the kidnapping of Moore and Lambert. Queen contends that, as a result, his strategy of seeking mitigation on the basis of his early cooperation was compromised, violating his federal and state constitutional and statutory rights.

Our review of the record reveals that, prior to trial, Queen filed a "Request for Voluntary Discovery" in which he sought, among other things, all of his written and oral statements. In response, Queen was given notes of an oral interview conducted by Sergeant Ray Wood at the Myrtle Beach Police Department. This interview began at 2:07

a.m. on 20 August 1998. However, at trial, Sergeant Wood provided direct testimony about two statements Queen made to him at different times on 20 August 1998. Sergeant Wood testified that during the first interview, conducted at 2:07 a.m., when Queen was asked about the shooting of Moore and Lambert, he responded that he "turned his back and heard pow, pow." Sergeant Wood testified that he disbelieved Queen and told him that the interview was over. Queen then admitted shooting one of the victims. Notes of this interview were provided to Queen prior to trial. Sergeant Wood then testified that the second interview began at 10:28 p.m. Notes of this examination were not provided to Queen prior to trial. During this interview, Queen advised Sergeant Wood that the investigators did not know everyone who had been involved, and then described the actions of "Carlos." In relating the substance of this second statement, Sergeant Wood testified that "Queen went on to state that the two white females were trying to drive out from the neighborhood when he was making a U-turn. Queen stated the two white females could not go anywhere and he left." In his cross-examination of Sergeant Wood, Queen's counsel stressed his client's cooperation. However, during the redirect examination, the prosecutor highlighted the fact that Queen initially made inaccurate self-serving statements to the sergeant.

Queen objected on the ground that, despite his request for voluntary discovery, he was unaware of the false exculpatory statement as to his role in the kidnapping. The trial court conducted a *voir dire* hearing and determined that the sergeants who had questioned Queen on 20 August 1998 had not turned over their interview notes containing Queen's false claim that he had not participated in the kidnapping of Moore and Lambert both because they did not believe Queen and because verbal skirmishing with suspects over details of a statement are routine during police interrogations. The trial court also ascertained that the district attorney's office had failed to advise the investigators that a prior discovery order entered in the case required notes of interviews be given to prosecutors for subsequent release to defense counsel. During this *voir dire*, Queen moved for a mistrial.

After hearing the evidence and considering the arguments of counsel, the trial court concluded that the only material before the jury that had not been provided to defense counsel prior to trial was Queen's statement to the effect that he was not involved in the kidnapping of Moore and Lambert. The trial court determined that the prosecutors had substantially complied with the requirements of

Brady and that Queen had not been prejudiced. Accordingly, the trial court denied Queen's motion for mistrial.

Queen argues that he was unfairly prejudiced because the State never gave him notice of a false exculpatory statement that could have altered his trial strategy of claiming to have been cooperative at all times. However, the trial court's determination that Queen was not unfairly prejudiced is adequately supported by the record. Queen's 2:07 a.m. statement, which had been given to him in a timely fashion and was the subject of pretrial motions pertaining to redaction and admissibility, contained Queen's initial claim that he did not shoot either Moore or Lambert. This same statement also includes the following: "Queen states he, Paco [Tirado], C-Lo [Frink] dropped Little 60 [Douglas], Star [Black] and Jr. [Tucker] off. Queen states that he told them he had to go back to the crib. He states they came back with the girls in the Grand Prix in the trunk." This portion of Queen's 2:07 a.m. statement is effectively indistinguishable from the corresponding portion of his unrevealed 10:28 p.m. statement, quoted above, in which he told Sergeant Wood that he left once the car containing the victims was pinned and they could not drive away.

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. at 87, 10 L. Ed. 2d at 218. However, in *United States v. Agurs*, 427 U.S. 97, 49 L. Ed. 2d 342 (1976), the United States Supreme Court rejected the idea that every nondisclosure automatically constitutes reversible error and held that "prejudicial error must be determined by examining the materiality of the evidence." *State v. Howard*, 334 N.C. 602, 605, 433 S.E.2d 742, 744 (1993). "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682, 87 L. Ed. 2d 481, 494 (1985). We have also held that when determining whether the suppression of certain information was violative of a defendant's constitutional rights, "the focus should not be on the impact of the undisclosed evidence on the defendant's ability to prepare for trial, but rather should be on the effect of the nondisclosure on the outcome of the trial." *State v. Alston*, 307 N.C. 321, 337, 298 S.E.2d 631, 642 (1983). The defendant has the burden of

showing that the undisclosed evidence was material and affected the outcome of the trial. *Id.*

While we agree that Queen's 10:28 p.m. statement denying involvement in the kidnapping of Moore and Lambert is relevant to Queen's strategy of focusing on his cooperation in order to win mitigation in the capital case, we conclude that he failed to show any prejudice arising from the nondisclosure. Queen was properly provided his 2:07 a.m. statement in which he made the false initial claim that he had not shot either victim. Although the 10:28 p.m. statement contained Queen's false exculpatory statement that he did not participate in the kidnapping of these victims after their car was stopped, the 2:07 a.m. statement also contained a similar suggestion that Queen claimed to be elsewhere when these victims were kidnapped. Thus, Queen received pretrial notice that he had incorrectly told investigators on 20 August 1998 that he was not present when Moore and Lambert were kidnapped.

In addition, the record discloses that the 10:28 p.m. statement had no effect on the outcome of Queen's trial. His strategy of seeking mitigation on the basis of his cooperation was not compromised by the revealing at trial of his second statement. Queen presented his unredacted 2:07 a.m. statement to the jury during the sentencing proceeding and was able to argue to the jury that he was entitled to mitigation because of his cooperation. The trial judge peremptorily instructed the jury "[t]he defendant aided in the apprehension of another capital felon," and one or more jurors found both mitigating circumstances submitted by Queen regarding cooperation. We therefore conclude that the State's failure to disclose Queen's 10:28 p.m. statement did not constitute prejudicial error because there is no reasonable probability that timely providing it would have affected the outcome of Queen's trial. The judge did not abuse his discretion in denying Queen's motion for mistrial. This assignment of error is overruled.

[13] In his next assignment of error, Queen contends that he received multiple punishments for the same offense in violation of the prohibition against double jeopardy. Queen argues that he was punished twice for the murders of Lambert and Moore, once when convicted of first-degree murder and again when convicted of first-degree kidnapping based on a finding that the victims were seriously injured. Queen also argues that he was punished twice for serious injury to Cheeseborough, once when convicted of assault with a deadly weapon with intent to kill inflicting serious injury and again

when convicted of first-degree kidnapping based on a finding that the victim was seriously injured.

As detailed above, both the Fifth Amendment to the United States Constitution and Article I, Section 19 of the North Carolina Constitution protect against multiple punishments for the same offense. *See State v. Fernandez*, 346 N.C. 1, 18, 484 S.E.2d 350, 361 (1997). However, because Queen did not object to the submission of first-degree kidnapping or to the instructions on that offense, he has failed to preserve this issue for appellate review. *Id.* (defendant waived appellate review when he failed to object at trial to the submission of first-degree murder and first-degree kidnapping based on the murders); *see also State v. Mitchell*, 317 N.C. 661, 670, 346 S.E.2d 458, 463 (1986) (defendant waived appellate review when he did not raise the double jeopardy issue at trial).

Even assuming *arguendo* that the issue had been preserved, we conclude that double jeopardy does not apply here. In *Fernandez*, where the defendant raised a similar argument, we applied the test enunciated in *Blockburger v. United States*, 284 U.S. 299, 76 L. Ed. 306 (1932). *State v. Fernandez*, 346 N.C. at 19, 484 S.E.2d at 361-62. We follow that same analysis here.

Under our formulation of the *Blockburger* test,

> even where evidence to support two or more offenses overlaps, double jeopardy does not occur unless the evidence required to support the two convictions is identical. If proof of an additional fact is required for each conviction which is not required for the other, even though some of the same acts must be proved in the trial of each, the offenses are not the same.

State v. Murray, 310 N.C. at 548, 313 S.E.2d at 529. In the case at bar, each crime charged contains an element not required to be proved in the other. First-degree murder is the unlawful killing of another human being with malice and with premeditation and deliberation. N.C.G.S. § 14-17 (2003). First-degree kidnapping is: (a) the unlawful, nonconsensual confinement, restraint or removal of a person for the purpose of committing certain specified acts; and (b) either the failure to release the person in a safe place, or the injury or sexual assault of the person. N.C.G.S. § 14-39 (2003). Thus, as to victims Lambert and Moore, first-degree kidnapping is not a lesser-included offense of murder, and because each of these offenses contains an element that is not an element of the other, defendant was not subject

to double jeopardy. *State v. Fernandez*, 346 N.C. at 20, 484 S.E.2d at 362. Similarly, because the elements of assault with a deadly weapon inflicting serious injury and the elements of first-degree kidnapping do not coincide, Queen was not punished twice for inflicting the same injury on victim Cheeseborough.

These assignments of error are overruled.

SENTENCING PROCEEDING ISSUES

[14] Queen contends that his federal and state constitutional right to individualized sentencing was violated when the trial court allowed the same jury to consider his and Tirado's sentences at separate sentencing proceedings. Queen argues that the Eighth Amendment to the United States Constitution mandates individualized consideration of a defendant's argument that he or she should be spared the death penalty. *See Lockett v. Ohio*, 438 U.S. 586, 605, 57 L. Ed. 2d 973, 990 (1978). Queen also contends that the trial court's procedures violated this Court's determination that a co-defendant's sentence is irrelevant in a capital sentencing determination. *See State v. Jaynes*, 353 N.C. 534, 563-64, 549 S.E.2d 179, 200-01 (2001), *cert. denied*, 535 U.S. 934, 152 L. Ed. 2d 220 (2002).

Although Queen objected to the separate sentencing proceeding, he based his objection on his concern that the jury might not be able to consider his cooperation with law enforcement as mitigating evidence, a consideration that the trial court later addressed. Thus, Queen's objection was not founded on an alleged constitutional violation. Constitutional claims not raised and passed on at trial will not ordinarily be considered on appeal. *State v. Golphin*, 352 N.C. at 411, 533 S.E.2d at 202; *State v. Benson*, 323 N.C. at 322, 372 S.E.2d at 519. Accordingly, Queen waived appellate review of this constitutional claim.

Even assuming *arguendo* that Queen did not waive appellate review, the trial court took care to ensure that the jury gave individualized consideration to his argument that he should be spared the death penalty. The trial judge admonished the jurors:

> Now, ladies and gentlemen, you have heard the evidence concerning Mr. Tirado and his sentencing and you have submitted a sentence recommendation for Mr. Tirado which has been sealed by the Court. I want to advise you now and instruct you now that as we commence this sentencing hearing for Eric Devon Queen, that if there was anything said in the sentencing hear-

ing concerning Mr. Queen, and I frankly don't personally remember any mention at all of Mr. Queen in that sentencing hearing, but if there was anything that was said in that sentencing hearing which related to Mr. Queen, you may not consider anything that you heard in the sentencing hearing for Mr. Tirado against Mr. Queen.

Now, everything that you heard during the guilt-innocence phase of this trial as against each of the defendants certainly is something that you can consider as you consider your sentence recommendation for Mr. Queen, but you are not to consider any matter that was asserted in Mr. Tirado's sentencing hearing against Mr. Queen. If you understand and will follow that instruction, raise your hand, please.

Let the record show that all the jurors have so indicated.

Because jurors are presumed to follow the instructions of the trial court, *State v. Hardy*, 353 N.C. 122, 138, 540 S.E.2d 334, 346 (2000), *cert. denied*, 534 U.S. 840, 151 L. Ed. 2d 56 (2001), we conclude that Queen's constitutional right to individualized sentencing was not violated.

[15] Queen also contends that he was prejudiced because Tirado was sentenced first and the jury knew what the sentence was. He claims that, as a result, the consecutive sentencing proceedings violated the principle that a defendant's sentence is irrelevant to the sentence of any co-defendant for the same murder. *See State v. Jaynes*, 353 N.C. at 563, 549 S.E.2d at 200-01. However, as quoted above, the trial court explicitly instructed the jury that they could not consider anything presented in Tirado's sentencing hearing against Queen and required the jury to consider separately the evidence as to any aggravating and mitigating circumstances for each defendant. Accordingly, the separate sentencing procedure used here does not implicate this Court's jurisprudence regarding the relevance of a co-defendant's sentence. The record reflects that the trial court severed the sentencing hearings of Tirado and Queen for the specific purpose of protecting the right of each to individualized sentencing. This assignment of error is overruled.

[16] Queen next contends that his statutory right to the assistance of two attorneys was violated when one of his attorneys was absent during a portion of co-defendant Tirado's sentencing hearing. Although North Carolina General Statute § 7A-450(b1) provides, in pertinent

part, that "[a]n indigent person indicted for murder may not be tried where the State is seeking the death penalty without an assistant counsel being appointed in a timely manner," N.C.G.S. § 7A-450(b1) (2003), we have held that the statute "does not require, either expressly or impliedly, that *both* of a capital defendant's attorneys be present at *all* times for *all* matters." *State v. Thomas*, 350 N.C. 315, 337, 514 S.E.2d 486, 500, *cert. denied*, 528 U.S. 1006, 145 L. Ed. 2d 388 (1999). In *Thomas*, the trial court did not halt the proceedings whenever one of the defendant's appointed attorneys would briefly leave the courtroom. *Id.* Noting that two counsel had been appointed to represent the defendant months before the trial began, we concluded that the trial court properly complied with the statute and did not err.

Queen received the assistance of both of his attorneys throughout his entire trial and his individual sentencing proceeding. As detailed below, the trial court instructed that Queen and his counsel be present during Tirado's sentencing proceeding. However, on the final day that evidence was being presented at Tirado's sentencing proceeding, one of Queen's attorneys went on a previously scheduled vacation. Queen consented to the attorney's absence, and Queen and his other attorney remained. Thus, one of Queen's attorneys was not present during the cross- and redirect examination of Tirado's expert witness. In light of our holding in *Thomas* and defendant's acquiescence in the procedure, we hold that this absence, occurring during a portion of his co-defendent's sentencing hearing, did not violate Queen's statutory right to the assistance of two attorneys. This assignment of error is overruled.

[17] Queen contends that the trial court erred when it submitted to the jury the aggravating circumstance that the murders were "especially heinous, atrocious, or cruel." N.C.G.S. § 15A-2000(e)(9). Queen argues that there was insufficient evidence to support submission of this aggravating circumstance and that the circumstance is unconstitutionally vague. When " 'determining the sufficiency of the evidence to submit an aggravating circumstance to the jury, the trial court must consider the evidence in the light most favorable to the State, with the State entitled to every reasonable inference to be drawn therefrom, and discrepancies and contradictions resolved in favor of the State.' " *State v. Anthony*, 354 N.C. 372, 434, 555 S.E.2d 557, 596 (2001) (quoting *State v. Syriani*, 333 N.C. 350, 392, 428 S.E.2d 118, 141, *cert. denied*, 510 U.S. 948, 126 L. Ed. 2d 341 (1993)), *cert. denied*, 536 U.S. 930, 153 L. Ed. 2d 791 (2002). This Court has recognized sev-

eral categories of murders that warrant submission of the (e)(9) aggravating circumstance.

> The first type consists of those killings that are physically agonizing for the victim or which are in some other way dehumanizing. *State v. Lloyd*, 321 N.C. 301, 319, 364 S.E.2d 316, 328, *sentence vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988). The second type includes killings that are less violent but involve infliction of psychological torture by leaving the victim in his or her "last moments aware of but helpless to prevent impending death," *State v. Hamlet*, 312 N.C. [162,] 175, 321 S.E.2d [837,] 846 [(1984)], and thus may be considered "conscienceless, pitiless, or unnecessarily torturous to the victim," *State v. Brown*, 315 N.C. 40, 65, 337 S.E.2d 808, 826-27 (1985), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 733 (1986), *and overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). The third type includes killings that "demonstrate[] an unusual depravity of mind on the part of the defendant beyond that normally present in first-degree murder[s]." *Id.* at 65, 337 S.E.2d at 827.

State v. Lloyd, 354 N.C. 76, 122, 552 S.E.2d 596, 627-28 (2001) (alterations in original), *quoted in State v. Anthony*, 354 N.C. at 434-35, 555 S.E.2d at 596. Moreover, a murder is not rendered especially heinous, atrocious, or cruel merely by the specific method in which a victim is killed, but by the entire set of circumstances surrounding the killing. *See, e.g., State v. Golphin*, 352 N.C. at 464, 533 S.E.2d at 233.

The evidence here supported each of the three types of murder that warrant submission of the (e)(9) aggravating circumstance. First, the evidence showed that victims Lambert and Moore endured a prolonged dehumanizing ordeal. When Queen and several other gang members pinned Moore's car at the end of a dead-end road, she jumped out of her car and ran, repeatedly screaming, "Oh my God, oh my God." When she called her mother on her cellular telephone, a gang member wrestled the telephone out of her hand. Another gang member forced Lambert and then Moore into the trunk of Moore's car at gunpoint, and then Douglas, Black, and Tucker drove away in Moore's car. From the trunk, Lambert and Moore cried and begged their abductors not to hurt them. When Moore pleaded that she had a seven-year-old daughter, Douglas told her to "shut up, bitch," and then turned up the radio's volume. At one point, the driver stopped the car so that Black and Douglas could open the trunk and rob the

victims of their jewelry. Upon the group's return to Walters' trailer, the entire gang surrounded Moore's car and discussed who would kill the two women in the trunk. On instructions from Walters, gang members drove the two victims, still locked in the trunk, to a location in Linden, where they were murdered. Based on this evidence, we hold that the ordeal that Lambert and Moore endured prior to their death supported submission of the (e)(9) circumstance.

Second, the two victims were unquestionably "aware of but helpless to prevent impending death." *State v. Lloyd*, 354 N.C. at 122, 552 S.E.2d at 627-28. At Walters' trailer, Lambert and Moore could hardly have failed to hear the gang members discussing who would kill them. Once the gang drove the victims to Linden and forced them out of the trunk, they pleaded for mercy. Lambert stated, "Oh, God, Susan, we're going to die. I don't want to die." Queen told Lambert to shut up and shot her in the head. Queen then walked back to the car and stood next to Tirado, who held a large knife to Moore's throat. When Moore begged Tirado not to cut her and to shoot her instead, he shot her in the back of the head. This evidence, combined with the evidence narrated above, demonstrated that both victims anticipated the moment the gang would end their lives, again supporting submission of the (e)(9) circumstance. *See State v. Mann*, 355 N.C. 294, 313, 560 S.E.2d 776, 788 (when the victim was alive when forced into the trunk of her car and the evidence supported a reasonable inference that she "tried desperately, but futilely, to free herself as she anticipated the moment when defendant would end her life," the trial court committed no error in submitting the (e)(9) aggravating circumstance), *cert. denied*, 537 U.S. 1005, 154 L. Ed. 2d 403 (2002).

Third, the killings of Lambert and Moore "demonstrate an unusual depravity of mind on the part of the defendant." *State v. Lloyd*, 354 N.C. at 122, 552 S.E.2d at 627-28. Evidence showed that immediately after shooting Lambert, Queen stated, "Oh, sh—, I seen that bitch's brains." Queen also stated to law enforcement that the motivation behind his actions was "to show my B.G. [that is, baby gangster, or gang initiate] she ain't up there with me." This evidence of Queen's unusually depraved state of mind supported submission of the (e)(9) circumstance.

We also note that this Court has repeatedly held that the North Carolina Pattern Jury Instructions on the (e)(9) aggravating circumstance provide constitutionally sufficient guidance to the jury. *State v. Syriani*, 333 N.C. at 391-92, 428 S.E.2d at 141. Because the instruc-

tions on the (e)(9) aggravating circumstance here followed the pattern, Queen's arguments to the contrary are without merit.

Viewed in the light most favorable to the State, the evidence supported the trial court's submission of the (e)(9) aggravating circumstance that the murders were especially heinous, atrocious, or cruel. In addition, the instruction as to the circumstance was constitutionally sufficient. This assignment of error is overruled.

[18] Queen next contends that he was denied his federal and state constitutional rights to a fair sentencing hearing and freedom from cruel and unusual punishment when the trial court required him to be present during co-defendant Tirado's sentencing hearing. Queen maintains that his presence prejudiced him by allowing and encouraging the jury to consider the evidence in Tirado's sentencing proceeding at Queen's sentencing proceeding and by permitting the jury to draw improper adverse inferences linking the two defendants' sentences together.

As noted above, constitutional claims not raised and passed on at trial will not be considered on appeal. *State v. Golphin*, 352 N.C. at 411, 533 S.E.2d at 202; *State v. Benson*, 323 N.C. at 322, 372 S.E.2d at 519. To preserve a question for appellate review, a party must have presented the trial court with a timely request, objection, or motion, stating the specific grounds for the ruling if the specific grounds are not apparent from the context. N.C. R. App. P. 10(b)(1). When the logistics of Tirado's and Queen's separate sentencing hearings before the same trial jury were discussed at trial, the following colloquy occurred between the trial judge and Queen's counsel:

> THE COURT: All right, now I want to make it clear that Mr. Queen and counsel certainly will be allowed to be here in the courtroom and to observe the proceedings and to hear and see the evidence that is presented. What is the defendant Queen's position in that regard?
>
> . . . .
>
> [DEFENSE COUNSEL]: —it is the position of the defendant Queen that if counsel are allowed to be present during Mr. Tirado's sentencing—and [the other defense counsel] and I have discussed this matter and it's our intention that either one or both of us will be present during the sentencing hearing—that it is not necessary for Mr. Queen to attend.

> I don't know if it's appropriate at this time. And we object to the separate sentencing hearings on grounds that we have heretofore raised with the court and we discussed at some length earlier in the trial, and we're just renewing our objection at this point.
>
> Other than that, assuming that the court is overruling the objection, we think it will be sufficient as long as counsel are present and observe and see what's going on, just in case something does arise that we need to deal with during Mr. Queen's sentencing.
>
> THE COURT: Well, inasmuch as the defendant has a non-waivable right to be present and inasmuch as this is the same jury that has determined his guilt and will determine the sentence recommendation, I am ordering that he be here and that you folks be here.

Queen made no objection to the court's ruling that he attend Tirado's sentencing hearing. Therefore, Queen waived appellate review of this assignment of error.

We further note that the trial judge acted out of an abundance of caution and with the purpose of avoiding any claim of error arising from Queen's absence at Tirado's sentencing proceeding. Queen has failed to demonstrate prejudice arising from the trial court's decision. This assignment of error is overruled.

[19] Queen next contends that the trial court committed reversible constitutional error by submitting as separate aggravating circumstances that the murders were "committed while the defendant was engaged . . . in the commission of . . . kidnapping," N.C.G.S. § 15A-2000(e)(5), that the murders were "committed for pecuniary gain," N.C.G.S. § 15A-2000(e)(6), and that the murders were "part of a course of conduct . . . which included the commission by the defendant of other crimes of violence against another person or persons," N.C.G.S. § 15A-2000(e)(11). Queen argues that these three aggravating circumstances were based on the same evidence and are inherently duplicitous.

Queen did not object, as required by Rule 10(b)(1) of the Rules of Appellate Procedure, to the trial court's submission of any of these three aggravating circumstances, either alone or in combination with one another. *See* N.C. R. App. P. 10(b)(1). Under these circumstances,

we review for plain error. *See State v. Cummings*, 346 N.C. 291, 330, 488 S.E.2d 550, 573 (1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998).

North Carolina law provides that impermissible "double-counting" of aggravating circumstances occurs "when two aggravating circumstances based upon the same evidence are submitted to the jury." *State v. Call*, 349 N.C. 382, 426, 508 S.E.2d 496, 523 (1998).

> "It is established law in North Carolina that it is error to submit two aggravating circumstances when the evidence to support each is precisely the same. Conversely, where the aggravating circumstances are supported by separate evidence, it is not error to submit both to the jury, even though the evidence supporting each may overlap."

State v. Davis, 353 N.C. 1, 42, 539 S.E.2d 243, 270 (2000) (quoting *State v. East*, 345 N.C. 535, 553-54, 481 S.E.2d 652, 664, *cert. denied*, 522 U.S. 918, 139 L. Ed. 2d 236 (1997)) (citations omitted), *cert. denied*, 534 U.S. 839, 151 L. Ed. 2d 55 (2001). In determining whether such evidence is impermissibly identical or merely overlapping, we may consider the aspect of the case or defendant addressed by the aggravating circumstance.

> [I]n some cases the same evidence will support inferences from which the jury might find that more than one of the enumerated aggravating circumstances is present. This duality will normally occur where the defendant's motive is being examined rather than where the state relies upon a specific factual element of aggravation.

State v. Goodman, 298 N.C. 1, 30, 257 S.E.2d 569, 588 (1979).

The (e)(5) circumstance, carrying out the murder while in commission of a kidnapping, "directs the jury's attention to the factual circumstances of defendant's crimes," and thus addresses the defendant's conduct. *State v. Green*, 321 N.C. 594, 610, 365 S.E.2d 587, 597, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988). In contrast, the (e)(6) circumstance, committing the murder for pecuniary gain, "requires the jury to consider not defendant's actions but his motive" for killing the victims. *Id.* Here, the evidence at trial showed that after Cheeseborough's car was stolen and she was shot, Walters ordered several members of the gang to find an additional vehicle because all of the members could not fit into Cheeseborough's car.

The gang then stole at gunpoint Moore's 1989 Pontiac Grand Prix and forced the two women into the trunk. On the way back to Walters' trailer, the gang stopped the car and robbed Lambert and Moore of their cash and jewelry. After the two women were eventually murdered, members of the gang drove the stolen car to Myrtle Beach, where some of the stolen jewelry was pawned. Hence, evidence that the murders were committed in the course of kidnapping, which was accomplished while highjacking Moore's car, supported submission of the (e)(5) circumstance. The subsequent robbery of Lambert and Moore's jewelry and money supported submission of the (e)(6) circumstance. *See State v. Miller*, 357 N.C. 583, 595, 588 S.E.2d 857, 866 (2003).

Queen also contends that impermissible double-counting could have occurred if the jury used evidence of one of the robberies to support the (e)(11) aggravating circumstance (course of conduct). However, this Court has previously held that it is proper for a sentencing jury in a double homicide case to find each murder to be a course of violent conduct aggravating the other murder. *See, e.g., State v. Nicholson*, 355 N.C. 1, 49, 558 S.E.2d 109, 142, *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002); *State v. Boyd*, 343 N.C. 699, 719-20, 473 S.E.2d 327, 338 (1996), *cert. denied*, 519 U.S. 1096, 136 L. Ed. 2d 722 (1997). In this case, each murder provided the basis for the (e)(11) circumstance as to the other murder.

This analysis demonstrates that the evidence of the stealing of Moore's car, the theft of the victims' jewelry, and the double homicide independently supported different aggravating circumstances without impermissible double-counting. Although defendant argues that the trial court's instructions allowed double-counting by failing to direct the jury as to which evidence supported each aggravating circumstance, we have never required such specificity. *See State v. Prevatte*, 356 N.C. 178, 570 S.E.2d 440 (2002), *cert. denied*, 538 U.S. 986, 155 L. Ed. 2d 681 (2003). Even so, the record demonstrates that the trial court "did not allow the jury to find . . . [all three] aggravating circumstances using the exact same evidence." *State v. Call*, 349 N.C. at 427, 508 S.E.2d at 524. After instructing the jury on each submitted aggravating circumstance, the trial court specifically instructed that "the same evidence cannot be used as a basis for more than one aggravating factor or circumstance." *See State v. Leeper*, 356 N.C. 55, 63, 565 S.E.2d 1, 6 (2002) (trial court did not err when trial judge instructed jurors not to use same evidence as basis for finding more than one aggravating circumstance). Accordingly, we conclude

both that the (e)(5), (e)(6), and (e)(11) aggravating circumstances were not subsumed within each other, and that the trial court did not commit error by instructing the jury on all three circumstances.

These assignments of error are overruled.

PRESERVATION ISSUES

Queen raises several additional issues that he concedes previously have been decided by this Court contrary to his position. He argues that the murder indictment was constitutionally insufficient because it failed to allege the aggravating circumstances applicable at the capital sentencing proceeding. However, we have held that the failure to include all aggravating circumstances in an indictment "violates neither the North Carolina nor the United States Constitution." *State v. Hunt*, 357 N.C. 257, 278, 582 S.E.2d 593, 607, *cert. denied*, —— U.S. ——, 156 L. Ed. 2d 702 (2003). Queen next contends that the trial court erred when it instructed the jury that their answers to Issues One, Three, and Four must be unanimous for capital sentencing. We have previously held that because any jury recommendation requiring a sentence of death or life imprisonment must be unanimous pursuant to Article I, Section 24 of the North Carolina Constitution and N.C.G.S. § 15A-2000(b), Issues One, Three, and Four must be answered unanimously by the jury. *See State v. McCarver*, 341 N.C. 364, 388-94, 462 S.E.2d 25, 38-42 (1995), *cert. denied*, 517 U.S. 1110, 134 L. Ed. 2d 482 (1996). Queen maintains that the trial court erroneously instructed the jury that it had a "duty" to return a death sentence if it made certain findings. We have previously approved such instructions. *See, e.g., State v. Williams*, 355 N.C. 501, 588, 565 S.E.2d 609, 659 (2002), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003). Queen also maintains that the trial court's instructions as to his burden of proof to establish mitigating circumstances was unconstitutionally vague as a result of the use of the term "satisfies you." We have previously approved similar instructions. *See State v. Anthony*, 354 N.C. at 451, 555 S.E.2d at 606.

Queen contends that the trial court erred in instructing the sentencing jury that it could reject nonstatutory mitigating circumstances on the grounds that the circumstances had no mitigating value. We have held that such instructions do not permit the jury to refuse to consider relevant mitigating evidence and are constitutional. *See, e.g., State v. Hill*, 331 N.C. 387, 417-18, 417 S.E.2d 765, 780 (1992), *cert. denied*, 507 U.S. 924, 122 L. Ed. 2d 684 (1993). Queen further contends that the trial court's sentencing instruction as to the

definition of "aggravation" was unconstitutionally broad. We have held that North Carolina's capital sentencing scheme contained in N.C.G.S. § 15A-2000 is constitutional on its face and as applied, and thus have approved of such instructions. *See 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), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). Queen argues that the trial court erred by instructing the jury that in considering Issues Three and Four, the jurors "may" rather than "must" consider mitigating circumstances found in Issue Two of the "Issues and Recommendation as to Punishment" form. We have approved the use of the pattern jury instructions in this regard and have upheld similar language as being consistent with the requirements of the statute. *See State v. Gregory*, 340 N.C. 365, 417-19, 459 S.E.2d 638, 668-69 (1995), *cert. denied*, 517 U.S. 1108, 134 L. Ed. 2d 478 (1996). Queen additionally contends that the trial court erred by instructing the jury that for Issues Three and Four, each juror could only consider mitigating circumstances which that particular juror had found for Issue Two. We have previously approved of similar instructions to the jury. *See State v. Skipper*, 337 N.C. 1, 50-51, 446 S.E.2d 252, 280 (1994), *cert. denied*, 513 U.S. 1134, 130 L. Ed. 2d 895 (1995).

Queen raises these issues for the purposes of urging this Court to reexamine its prior holdings and preserving the issues for federal *habeas corpus* review. We have considered Queen's arguments on these additional issues and find no compelling reason to depart from our prior holdings.

These assignments of error are overruled.

PROPORTIONALITY ISSUES

[20] Having concluded that Queen's trial and sentencing proceeding were free from prejudicial error, we 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). The jury found four aggravating circumstances: that defendant committed the murders while engaged in the commission of first-degree kidnapping, N.C.G.S. § 15A-2000(e)(5); that

he committed the murders for pecuniary gain, N.C.G.S. § 15A-2000(e)(6); that the murders were especially heinous, atrocious, or cruel, N.C.G.S. § 15A-2000(e)(9); and that the murders were part of a course of conduct in which Queen engaged and which included the commission by Queen of other crimes of violence against other persons, N.C.G.S. § 15A-2000(e)(11). After reviewing the record, transcripts, briefs, and oral arguments, we conclude that the evidence supports all four aggravating circumstances. In addition, we conclude that the death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor.

Proportionality review requires that 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 also* N.C.G.S. § 15A-2000(d)(2). In undertaking this review, which ultimately rests "upon the 'experienced judgments' of the members of this Court," *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47, *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994), we "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).

This Court has found that the death sentence was 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 the case at bar is not substantially similar to any of these cases. *See State v. Walters*, 357 N.C. 68, 113, 588 S.E.2d 344, 371, *cert. denied*, —— U.S. ——, 157 L. Ed. 2d 320 (2003).

The jury found Queen guilty of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. We have recognized that "a finding of premeditation and deliberation

indicates 'a more calculated and cold-blooded crime.' " *State v. Harris*, 338 N.C. 129, 161, 449 S.E.2d 371, 387 (1994) (quoting *State v. Lee*, 335 N.C. 244, 297, 439 S.E.2d 547, 575, *cert. denied*, 513 U.S. 891, 130 L. Ed. 2d 162 (1994)), *cert. denied*, 514 U.S. 1100, 131 L. Ed. 2d 752 (1995). This case involved two murder victims, and our review reveals that no death sentence involving multiple homicides has been determined to be disproportionate. *See State v. Brown*, 357 N.C. 382, 394, 584 S.E.2d 278, 285 (2003), (citing *State v. Gregory*, 348 N.C. 203, 213, 499 S.E.2d 753, 760, *cert. denied*, 525 U.S. 952, 142 L. Ed. 2d 952 (1998)), *cert. denied*, —— U.S. ——, 158 L. Ed. 2d 106 (2004). In addition, this Court has never found a sentence of death to be disproportionate where more than two aggravating circumstances were found, and we recently found a death sentence proportionate where the jury found the same four aggravating circumstances that were found here. *State v. Call*, 353 N.C. 400, 545 S.E.2d 190, *cert. denied*, 534 U.S. 1046, 151 L. Ed. 2d 548 (2001). Based upon the facts of the case at bar and the treatment of other similar cases, we are satisfied that the death penalty recommended by the jury and ordered by the trial court is not disproportionate. Queen received a fair trial and capital sentencing proceeding, free from prejudicial error.

TIRADO: NO ERROR GUILT-INNOCENCE PHASE; DEATH SENTENCE VACATED; REMANDED FOR NEW CAPITAL SENTENCING PROCEEDING.

QUEEN: NO ERROR.

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

HOKE COUNTY BOARD OF EDUCATION; HALIFAX COUNTY BOARD OF EDUCATION; ROBESON COUNTY BOARD OF EDUCATION; CUMBERLAND COUNTY BOARD OF EDUCATION; VANCE COUNTY BOARD OF EDUCATION; RANDY L. HASTY, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF RANDELL B. HASTY; STEVEN R. SUNKEL, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF ANDREW J. SUNKEL; LIONEL WHIDBEE, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF JEREMY L. WHIDBEE; TYRONE T. WILLIAMS, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF TREVELYN L. WILLIAMS; D.E. LOCKLEAR, JR., INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF JASON E. LOCKLEAR; ANGUS B. THOMPSON II, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF VANDALIAH J. THOMPSON; MARY ELIZABETH LOWERY, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF LANNIE RAE LOWERY; JENNIE G. PEARSON, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF SHARESE D. PEARSON; BENITA B. TIPTON, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF WHITNEY B. TIPTON; DANA HOLTON JENKINS, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF RACHEL M. JENKINS; LEON R. ROBINSON, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF JUSTIN A. ROBINSON, PLAINTIFFS AND ASHEVILLE CITY BOARD OF EDUCATION; BUNCOMBE COUNTY BOARD OF EDUCATION; CHARLOTTE-MECKLENBURG BOARD OF EDUCATION; DURHAM PUBLIC SCHOOLS BOARD OF EDUCATION; WAKE COUNTY BOARD OF EDUCATION; WINSTON-SALEM/FORSYTH COUNTY BOARD OF EDUCATION; CASSANDRA INGRAM, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF DARRIS INGRAM; CAROL PENLAND, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF JEREMY PENLAND; DARLENE HARRIS, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF SHAMEK HARRIS; NETTIE THOMPSON, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF ANNETTE RENEE THOMPSON; OPHELIA AIKEN, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* OF BRANDON BELL, PLAINTIFF-INTERVENORS V. STATE OF NORTH CAROLINA AND THE STATE BOARD OF EDUCATION, DEFENDANTS

No. 530PA02

(Filed 30 July 2004)

1. Parties— school board—motion to dismiss

The trial court did not err by denying defendants' motion to dismiss the school boards as parties to the instant case, because while the precise party designation of the school boards may not have been readily discernible at the time of the trial, the nature of the parties' claims was such that: (1) they sought a declaration of rights, status, and legal relations of and among the parties; and (2) any declaration of the rights, status, and legal relations of and among the parties would affect the role played by the school boards in providing the state's children with the opportunity to obtain a sound basic education.

2. Pleadings— amendment—lack of prekindergarten services

The trial court did not err by denying defendants' motion to strike an amendment to their complaint regarding the lack of prekindergarten services and programs, because: (1) at the point

of the trial court's order, the question of the extent of the guarantees under *Leandro v. State*, 346 N.C. 336 (1997), giving every child of this state an opportunity to receive a sound basic education in our public schools, had yet to be answered and was ripe for evidentiary proceedings and consideration by the trial court; and (2) the General Assembly has enacted legislation that affords certain rights to particular four-year-olds who would not otherwise qualify as school children, namely those four-year-olds that meet the criteria for being gifted and mature.

3. Constitutional Law; Schools and Education— sound basic education—opportunity to receive sound basic education—State allocations

The trial court did not err by concluding that the constitutional mandate of *Leandro v. State*, 346 N.C. 336 (1997), establishing the opportunity for students to receive a sound basic education, had been violated in the Hoke County School System and by requiring the State to assess its education-related allocations to the county's schools so as to correct any deficiencies that presently prevent the county from offering its students the opportunity to obtain a *Leandro*-conforming education, because the evidence demonstrated: (1) poor standardized test scores; and (2) that over the past decade an inordinate number of Hoke County students have consistently failed to match the academic performance of their statewide public school counterparts and that such failure, measured by their performance while attending Hoke County schools, their dropout rates, their graduation rates, their need for remedial help, their inability to compete in the job markets, and their inability to compete in collegiate ranks, constituted a clear showing that they have failed to obtain a *Leandro*-comporting education.

4. Constitutional Law— separation of powers—legislature—establishing age for entering public schools

The trial court erred by interfering with the province of the General Assembly by establishing the appropriate age for students entering the public school system, because: (1) our state's constitutional provisions and corresponding statutes serve to establish the issue as the exclusive province of the General Assembly; and (2) there was no evidence at trial indicating the trial court had satisfactory or manageable criteria that would justify modifying legislative efforts.

5. Constitutional Law; Schools and Education— sound basic education—expansion of pre-kindergarten educational programs—at-risk students

The trial court erred by directing the State to remedy constitutional deficiencies relating to the public school education provided to students in Hoke County by expanding pre-kindergarten educational programs so that they reach and serve all qualifying "at-risk" students, because the mandate requiring expanded pre-kindergarten programs amounts to a judicial interdiction that, under present circumstances, infringes on the constitutional duties and expectations of the legislative and executive branches of government.

6. Constitutional Law; Schools and Education— sound basic education—federal funds—State obligation

The trial court did not err by including educational services provided by federal funds in making its determination of whether the State is meeting its constitutional obligation to provide North Carolina's children with a sound basic education, because: (1) the trial court's consideration of Title I funds did not violate either the applicable federal statutory provisions or the education provisions of our state's Constitution; (2) the relevant provisions of the North Carolina Constitution do not forbid the State from including federal funds in its formula for providing the state's children with the opportunity to obtain a sound basic education; (3) the question of whether federal funds are properly being utilized by the State is one best answered by consulting the federal statutory framework that provides for such funds; and (4) as the language of the applicable statutes expressly grants the United States Secretary of Education the power to decide the question of whether state expenditures of federal education funds comports with federal law, we defer to the Secretary's judgment and note that there was no evidence at trial showing that the State's use of such funds had spurred retaliatory action by the Secretary.

On discretionary review pursuant to N.C.G.S. § 7A-31 (2003), prior to a determination by the Court of Appeals, of orders entered 24 November 1997 and 9 February 1999 and a judgment entered 4 April 2002, which explicitly incorporates memoranda of decisions dated 12 October 2000, 26 October 2000, and 26 March 2001 as amended by order dated 29 May 2001, all of which were entered by Judge Howard

E. Manning, Jr., in Superior Court, Wake County. Heard in the Supreme Court 10 September 2003.

Parker, Poe, Adams & Bernstein, L.L.P., by Robert W. Spearman, for plaintiff-appellees.

Tharrington Smith, LLP, by Ann L. Majestic and Debra R. Nickels; and Hogan & Hartson, L.L.P., by Audrey J. Anderson, pro hac vice, for plaintiff-intervenor-appellants and -appellees.

Roy Cooper, Attorney General, by Edwin M. Speas, Jr., Chief Deputy Attorney General; Grayson G. Kelley, Senior Deputy Attorney General; Thomas J. Ziko, Special Deputy Attorney General, for defendant-appellants and -appellees.

Ann W. McColl on behalf of the North Carolina Association of School Administrators, amicus curiae.

Ferguson Stein Chambers Adkins Gresham & Sumter, P.A., by S. Luke Largess; and Thomas M. Stern on behalf of the North Carolina Association of Educators, amicus curiae.

Seth H. Jaffe on behalf of The American Civil Liberties Union Foundation, Inc.; Deborah Greenblatt on behalf of Carolina Legal Assistance, Inc.; Sheria Reid and Carlene McNulty on behalf of North Carolina Justice & Community Development Center; Gregory C. Malhoit on behalf of The Rural School & Community Trust; John Charles Boger on behalf of The University of North Carolina School of Law Center for Civil Rights; and Romallus O. Murphy on behalf of the North Carolina NAACP, amici curiae.

ORR, Justice.

The State of North Carolina and the State Board of Education ("the State"), as defendants, appeal from a trial court order concluding that the State had failed in its constitutional duty to provide certain students with the opportunity to attain a sound basic education, as defined by this Court's holding in *Leandro v. State*, 346 N.C. 336, 488 S.E.2d 249 (1997). We affirm the trial court on this part of the State's appeal with modifications.

In addition, the State appeals those portions of the trial court's order that direct the State to remedy constitutional deficiencies relating to the public school education provided to students in Hoke County. In its memoranda of law, the trial court, in sum, ultimately

ordered the State to: (1) assume the responsibility for, and correct, those educational methods and practices that contribute to the failure to provide students with a constitutionally-conforming education; and (2) expand pre-kindergarten educational programs so that they reach and serve all qualifying "at-risk" students. As for the trial court's first remedy, we affirm, with modifications. As for the trial court's second remedy, we reverse, concluding that the mandate requiring expanded pre-kindergarten programs amounts to a judicial interdiction that, under present circumstances, infringes on the constitutional duties and expectations of the legislative and executive branches of government.

On cross-appeal, plaintiff-intervenors argue that the trial court erred by including educational services provided by *federal* funds in making its determination of whether the State is meeting its constitutional obligation to provide North Carolina's children with a sound basic education. We disagree with plaintiff-intervenors' contention and, therefore, affirm the trial court.

I. Introduction

This case is a continuation of the landmark decision by this Court, unanimously interpreting the North Carolina Constitution to recognize that the legislative and executive branches have the duty to provide all the children of North Carolina the opportunity for a sound basic education. This litigation started primarily as a challenge to the educational funding mechanism imposed by the General Assembly that resulted in disparate funding outlays among low wealth counties and their more affluent counterparts. With the *Leandro* decision, however, the thrust of this litigation turned from a funding issue to one requiring the analysis of the qualitative educational services provided to the respective plaintiffs and plaintiff-intervenors.

In remanding this case to the trial court in *Leandro*, this Court issued the following directive: "If . . . [the trial] court makes findings and conclusions from competent evidence to the effect that defendants in this case are denying children of the state a sound basic education, a denial of a fundamental right will have been established." 346 N.C. at 357, 488 S.E.2d at 261. The Court then went on to conclude that if such a denial [of a fundamental right] is indeed established by the evidence, and defendants are unable to justify such denial as necessary to promote a compelling government interest, "it will then be the duty of the [trial] court to enter a judgment granting

declaratory relief and such other relief as needed to correct the wrong while minimizing the encroachment upon the other branches of government." *Id.*

From the outset, we note that the ensuing trial lasted approximately fourteen months and resulted in over fifty boxes of exhibits and transcripts, an eight-volume record on appeal, and a memorandum of decision that exceeds 400 pages. The time and financial resources devoted to litigating these issues over the past ten years undoubtably have cost the taxpayers of this state an incalculable sum of money. While obtaining judicial interpretation of our Constitution in this matter and applying it to the context of the facts in this case is a critical process, one can only wonder how many additional teachers, books, classrooms, and programs could have been provided by that money in furtherance of the requirement to provide the school children of North Carolina with the opportunity for a sound basic education.

The *Leandro* decision and the ensuing trial have resulted in the thrust of the instant case breaking down into the following contingencies: (1) Does the evidence show that the State has failed to provide Hoke County school children with the opportunity to receive a sound basic education, as defined in *Leandro*; (2) if so, has the State demonstrated that its failure to provide such an opportunity is necessary to promote a compelling government interest; and (3) if the State has failed to provide Hoke County school children with the opportunity for a sound basic education *and* failed to demonstrate that its public educational shortcomings are necessary to promote a compelling government interest, does the relief granted by the trial court correct the failure with minimal encroachment on the other branches of government?

We note that defendants raise three issues on appeal. The first—whether the trial court applied the wrong standards for determining when a student has obtained a sound basic education—is essentially an argument that questions whether the evidence presented at trial adequately demonstrated a violation of the constitutional right at issue. As such, it will be addressed in this Court's substantive analysis of whether the trial court properly determined that plaintiff school children are being denied their fundamental right for an opportunity to receive a sound basic education. *See* Part IV of this opinion. Defendants' remaining issues, as argued in their brief, concern the appropriateness of the trial court's remedy of mandating pre-

kindergarten programs for "at risk" students and the question of whether the proper age at which children should be permitted to attend public school is a nonjusticiable political question reserved for the General Assembly. Both questions will be addressed in this Court's overall examination of the pre-kindergarten remedy issue. *See* Part V of this opinion.

II. Procedural History of the Case

This civil action, initiated as a declaratory judgment action pursuant to N.C.G.S. § 1-253 (2003), commenced in 1994 when select students from Cumberland, Halifax, Hoke, Robeson, and Vance Counties, their respective guardians *ad litem*, and the corresponding local boards of education, denominated as plaintiffs, sought declaratory and other relief for alleged violations of the educational provisions of the North Carolina Constitution and the North Carolina General Statutes.

Plaintiffs were subsequently joined by select students from the City of Asheville, Buncombe County, Charlotte-Mecklenburg, Durham County, Wake County, and Winston-Salem/Forsyth County, their respective guardians *ad litem*, and the corresponding local boards of education, denominated as plaintiff-intervenors, who filed an additional complaint.

At trial, defendants moved to dismiss both complaints, arguing that: (1) the issues raised were nonjusticiable, *see* N.C.G.S. § 1A-1, Rule 12(b)(6) (2003); (2) the trial court lacked personal jurisdiction over defendants, *see id.*, Rule 12(b)(2); and (3) the trial court lacked subject matter jurisdiction over the claims, *see id.*, Rule 12(b)(1). The motion was summarily denied by the trial court and defendants immediately appealed.

On appeal, the Court of Appeals reversed, unanimously concluding that because the North Carolina Constitution does not embrace a qualitative standard of education, neither plaintiffs nor plaintiff-intervenors had raised a claim upon which relief could be granted. *See Leandro v. State*, 122 N.C. App. 1, 11, 468 S.E.2d 543, 550 (1996).

Plaintiffs appealed the Court of Appeals decision to this Court, contending that their claims raised substantial constitutional questions. Plaintiffs and plaintiff-intervenors (collectively "plaintiff parties") also petitioned this Court for discretionary review. Those petitions were allowed.

Upon review of the Court of Appeals decision, this Court affirmed in part, reversed in part, and remanded the case for further proceedings in Wake County Superior Court. *Leandro*, 346 N.C. at 358, 488 S.E.2d at 261. The surviving claims for trial included the following: (1) whether the State has failed to meet its constitutional obligation to provide an opportunity for a sound basic education to plaintiff parties, *id.* at 348, 488 S.E.2d at 255; (2) whether the State has failed to meet its statutory obligation, pursuant to Chapter 115C of the General Statutes, to provide the opportunity for a sound basic education to plaintiff parties, *id.* at 354, 488 S.E.2d at 259;[1] and (3) whether the *State's* supplemental school funding system is unrelated to legitimate educational objectives and, as a consequence, is arbitrary and capricious, resulting in a denial of equal protection of the laws for plaintiff-intervenors, *id.* at 353, 488 S.E.2d at 258.[2]

Upon remand, pursuant to Rule 2.1 of the General Rules of Practice for the Superior and District Courts, the case was designated as exceptional by Chief Justice Burley B. Mitchell, who assigned Superior Court Judge Howard E. Manning, Jr. to preside over all proceedings. Prior to trial, the trial court initiated and oversaw a series of meetings among all parties. Although there was no official record kept of those pre-trial conference discussions, the record on appeal, trial transcripts, and portions of the trial court's four memoranda of

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1. In its analysis of the issues presented in *Leandro*, this Court concluded that the State's statutory educational obligations were essentially codifications of the State's educational obligations under the Constitution. As a consequence, while plaintiffs could pursue claims showing that the State violated various sections of chapter 115C, any showing of such violations must support plaintiffs' ultimate burden: to demonstrate that such violations contributed to depriving school children of the opportunity to receive a sound basic education.

In short, while *Leandro* ostensibly left three issues to be decided by the trial court, only one faces scrutiny in the instant appeal—whether the State has failed in its *constitutional* duty to provide Hoke County school children with the opportunity to receive a sound basic education. The issue of whether the State has failed in its *statutory* duty to provide Hoke County school children with a sound basic education has been subsumed, for all practical purposes, by the constitutional question. As for the third issue concerning *State* supplemental funding claims by plaintiff-intervenors, it is not yet ripe for consideration. For more on the plaintiff-intervenors' claims, *see* note 3, below.

2. This issue, concerning plaintiff-intervenors, although deemed viable by this Court in *Leandro*, is not before this Court in the appeal of the instant case. Plaintiff-intervenors will present evidence in support of their respective claims in a separate action that will commence sometime after the instant case has concluded. Thus, the Court will neither address nor decide in this opinion whether plaintiff-intervenors have shown that the *State's* supplemental school funding system is unrelated to legitimate educational objectives.

law reference key rulings made by the trial court during such meetings. We note, significantly, that two of the trial court's initial decisions limited the scope of the case before us.

First, the trial court ruled that the case should be bifurcated into two separate actions, with one addressing the claims of rural school district plaintiffs ("rural districts") and the other addressing the claims of large urban school district plaintiff-intervenors ("urban districts"). Accordingly, the first trial would be limited to plaintiffs' claims and a second trial, to be held after the first was concluded, would address the claims of plaintiff-intervenors.[3]

In its first memorandum of decision ("Memo I"), the trial court stated that all parties agreed to the bifurcated proceedings, and this Court notes that the record on appeal includes no assignment of error pertaining to the trial court's decision to bifurcate. As a result, our consideration of the case is properly limited to those issues raised in the rural districts' trial.[4]

Second, the trial court ruled that the evidence presented in the rural districts' trial should be further limited to claims as they pertain to a single district. The net effect of this ruling was two-fold: (1) that Hoke County would be designated as the representative plaintiff district, and (2) that evidence in the case would be restricted to its effect on Hoke County. In Memo I, the trial court again asserted that all parties agreed to the suggested procedure, and this Court notes that the record on appeal is devoid of any assignment of error concerning the decision. As a consequence, our consideration of the case is properly limited to the issues relating solely to Hoke County as raised at trial.[5]

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3. The Court notes that the trial court permitted plaintiff-intervenors to participate fully in both discovery and the trial of the case focusing on the rural districts.

4. Because this Court allowed plaintiff-intervenors to argue the additional issue of how *federal* educational funds may be used and/or considered in our state's educational funding scheme, we must also consider and decide the merits of that issue, which is addressed separately following our analysis of the substantive issues arising from the Hoke County proceeding. See part VI of this opinion.

5. The Court recognizes that plaintiffs from the four other original rural districts—those from or representing Cumberland, Halifax, Robeson, and Vance Counties—were not eliminated as parties as a result of the trial court's decision to confine evidence to its effect on Hoke County schools. However, because this Court's examination of the case is premised on evidence as it pertains to Hoke County in particular, our holding mandates cannot be construed to extend to the other four rural districts named in the complaint. With regard to the claims of named plaintiffs from the other four rural districts, the case is remanded to the trial court for further proceedings that include, but are not necessarily limited to, presentation of relevant evidence by the parties, and findings and conclusions of law by the trial court.

III. Procedural Developments

Before addressing the substantive issues before us, we feel it necessary to review several key procedural developments that have transpired since the case was remanded to the trial court. Plaintiffs filed their original complaint as a declaratory judgment action, seeking a declaration of their educational rights under the North Carolina Constitution and chapter 115C of the General Statutes. *See* N.C.G.S. § 1-253 (2003). In addition, once their educational rights were declared, plaintiffs sought: (1) to show that their declared rights were being violated by State-defendants and, if so demonstrated, (2) a court-imposed remedy that would correct the demonstrated violation(s). *See id.*; N.C.G.S. § 1-259 (2003).

While in *Leandro*, the issue before this Court dealt with the correctness of a Rule 12(b)(6) dismissal of plaintiffs' case, this Court, in effect, answered plaintiffs' initial inquiry under the Declaratory Judgment Act, thereby providing the "rights, status and legal relations" for the trial court's further consideration. To wit: The state Constitution guarantees plaintiffs a right to the opportunity to receive a sound basic education from the State. *Leandro*, 346 N.C. at 351, 488 S.E.2d at 257. Then, after defining the qualitative components of what constitutes a sound basic education, the Court in *Leandro* remanded the case to the trial court and, in effect, assigned that court three specific tasks: (1) to take evidence on the issue of whether defendants "are denying the children of the state a sound basic education," (2) to determine if the evidence showed plaintiff school children's education-related rights were being denied, and (3) to "enter a judgment granting declaratory relief and such other relief as needed." *Id.* at 357, 488 S.E.2d 261.

At that point in the litigation, the case included five distinct parties: (1) plaintiff school children (and their respective guardians), (2) plaintiff local school boards, (3) plaintiff-intervenors, (4) the State Board of Education, and (5) the State. At that juncture, all participants sought a decree defining what rights and obligations were at stake, which parties had obligations, and which parties had rights as a result of such obligations. In *Leandro*, this Court, in sum, decreed that the State and State Board of Education had constitutional obligations to provide the state's school children with an

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Moreover, the Court emphasizes that its holding in the instant case is not to be construed in any fashion that would suggest that named plaintiffs from the four other rural districts are precluded from pursuing their claims as presented in their complaint.

opportunity for a sound basic education, and that the state's school children had a fundamental right to such an opportunity. 346 N.C. at 351, 488 S.E.2d at 257. As a result of the decree, adversarial sides were clearly drawn for four of the five parties—plaintiff school children and plaintiff-intervenor school children (who, under the decree, enjoyed the right of educational opportunity), versus the State and State Board of Education (which, under the decree, were obligated to provide such opportunity).

Before addressing the party status of the school boards, we note that the evidence presented in this case reaches a broader constituency than the two designated plaintiff-school children in the case's caption. In fact, a far greater proportion of the evidence pertains to the circumstances of Hoke County's student population in general than it does to the named plaintiffs in particular. Thus, as a threshold question, we address whether the evidence presented concerning the plight of Hoke County's student population is relevant to the question of whether the named plaintiffs have been denied their right to an opportunity to obtain a sound basic education.

In our view, the nature of a declaratory judgment action and the mandate of *Leandro* combine to afford the trial court and the participating parties greater evidentiary leeway than in a conventional civil action. In declaratory actions involving issues of significant public interest, such as those addressing alleged violations of education rights under a state constitution, courts have often broadened both standing and evidentiary parameters to the extent that plaintiffs are permitted to proceed so long as the interest sought to be protected by the complainant is arguably within the "zone of interest" to be protected by the constitutional guaranty in question. *See, e.g., Seattle Sch. Dist. v. State*, 90 Wash. 2d 476, 490-95, 585 P.2d 71, 80-83 (1978).

Because the instant case concerns an issue of significant, if not paramount, public interest (school-aged children's rights concerning a public education), we will examine the trial court's evidentiary findings in the context of whether the supporting evidence demonstrates that a harm has occurred to those "within the zone" to be protected by the constitutional provision at issue. In our view, the instant plaintiffs, as Hoke County students, are certainly positioned within such a zone. As a consequence, evidentiary issues in this case will be scrutinized on the basis of whether there has been: (1) a clear showing of harm to those within the zone of protection afforded by the constitutional provision(s); and (2) a showing that any remedy imposed

by the court will redress the harm inflicted on those within such a zone of protection.

In our view, the unique procedural posture and substantive importance of the instant case compel us to adopt and apply the broadened parameters of a declaratory judgment action that is premised on issues of great public interest. The children of North Carolina are our state's most valuable renewable resource. If inordinate numbers of them are wrongfully being denied their constitutional right to the opportunity for a sound basic education, our state courts cannot risk further and continued damage because the perfect civil action has proved elusive. We note that the instant case commenced ten years ago. If in the end it yields a clearly demonstrated constitutional violation, ten classes of students as of the time of this opinion will have already passed through our state's school system without benefit of relief. We cannot similarly imperil even one more class unnecessarily. As a consequence, for this case, one of great public interest, we adopt the view that plaintiffs in this declaratory judgment action were entitled to proceed in their efforts towards showing that students within Hoke County have been wrongfully denied their educational rights under the North Carolina Constitution. Thus, the named plaintiffs here were not limited to presenting evidence at trial that they had suffered individual harm or that any remedy imposed specifically targeted them and them alone. Consequently, the Court will examine whether plaintiffs made a clear showing that harm had been inflicted on Hoke County students—the "zone of interest" in this declaratory judgment action—and whether the trial court's imposed remedies serve as proper redress for such demonstrated harm.

[1] In the wake of this Court's decree in *Leandro* and upon remand to the trial court, the party status of the local school boards immediately became a subject of dispute between the designated parties, and the school boards' capacity to seek redress remains an issue in this litigation. At trial, the State and State Board of Education, as defendants, argued that since the local boards had no right to an opportunity for a sound basic education, they lacked the capacity to sue as plaintiffs for an alleged violation of such a right. The trial court denied defendants' motion to dismiss the local boards as parties to the case. We conclude that the trial court was correct.

Although defendants assign error to the trial court's decision to allow the local school boards to continue as parties in the civil action at issue, they offer no arguments to that effect in their brief to this

Court. As a consequence, the issue is considered abandoned under this Court's appellate rules. N.C. R. App. P. 28(b)(6) (2004). However, because subsequent litigation in this case might properly present this issue, we will address the merits. Our examination of the issue reveals no reason to disturb the conclusion of the trial court. Throughout the trial, the school boards, as administrators and overseers of their respective districts, were positioned as interested parties who participated in providing educational services to student plaintiffs. As such, the school boards clearly held a stake in the trial court's determination of whether or not the student plaintiffs were being denied their right to an opportunity to obtain a sound basic education. At trial, defendants argued that the school boards should be dismissed as parties because, as state-created entities, they enjoyed no entitlement to the right established in *Leandro*—namely, a child's individual right of an opportunity to a sound basic education. While it is true that the school boards are not among those endowed with such a right, and thus they have no justiciable claims based on its infringement or denial, in our view, the school boards were properly maintained as parties because the ultimate decision of the trial court was likely to: (1) be based, in significant part, on their role as education providers; and (2) have an effect on that role in the wake of the proceedings.

Although the parties in this case are referred to as plaintiffs and defendants, we note that this civil action was filed as a declaratory judgment action pursuant to section 1-253 of the General Statutes. While such actions require that there be a genuine controversy to be decided, *see Lide v. Mears*, 231 N.C. 111, 117-18, 56 S.E.2d 404, 409 (1949), they do not require that the participating parties be strictly designated as having adverse interests in relation to each other. In fact, declaratory judgment actions, by definition, are premised on providing parties with a means for "[c]ourts of record . . . to declare rights, *status, and other legal relations*" among such parties. N.C.G.S. § 1-253 (emphasis added). In addition, section 1-260 of the General Statutes declares plainly that "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration." N.C.G.S. § 1-260 (2003). Thus, while the precise party designation—*i.e.*, plaintiffs—of the school boards may not have been readily discernible at the time of the trial, the nature of the parties' claims was such that: (1) they sought a declaration of rights, status, and legal relations of and among the parties; and (2) any declaration of the rights, status, and legal relations of and among the parties would affect the role played

by the school boards in providing the state's children with the opportunity to obtain a sound basic education. As a result, we conclude that the trial court did not err in denying defendants' motion to dismiss the school boards as parties to the instant case.[6]

Defendants also assign error to one of two amendments plaintiffs made to their complaint in the wake of the *Leandro* decision. On 23 January 1998, plaintiffs first amended their existing complaint to replace paragraphs 2, 4, 9, and 11, providing for substitute plaintiff-school children from Hoke, Halifax, Cumberland, and Vance Counties. The changes also included the addition of paragraph 7(a), which provided for a plaintiff-schoolchild from Robeson County. The amendments of 23 January 1998 were allowed by the trial court, without any objection by the State.

[2] However, the State did object to a subsequent amendment, which was added by plaintiffs at the behest of the trial court. The newly amended complaint, dated 15 October 1998, added paragraph 74(a), which reads as follows:

> Many children living in poverty in plaintiff districts begin public school kindergarten at a severe disadvantage. They do not have the basic skills and knowledge needed for kindergarten and as a foundation for the remainder of elementary and secondary school. In view of the lack of prekindergarten services and programs in these districts, many children living in poverty as well as other children are not receiving an opportunity for a sound basic education. The plaintiff school districts do not have sufficient resources to provide the prekindergarten and other programs and services needed for a sound basic education.

In its motion and arguments to the trial court, the State contended that "the new allegations pertain to matters that are wholly irrelevant to the question whether any plaintiff student is being denied" his or her right to an opportunity for a sound basic education. In addition, the State argued that any question concerning the proper age for public school eligibility or attendance was a purely political question, and as such was nonjusticiable under separation of powers principles. *See, e.g., Lake View Sch. Dist. v. Huckabee*, 351 Ark. 31, 82, 91 S.W.3d 472, 502 (2002) (holding that implementing pre-kindergarten programs was a policy matter reserved for the legislature and that the

6. The proper party designation of the school boards became evident in the trial court's ruling on the substantive claims raised in plaintiffs' complaint. *See* Part IV, below.

trial court had no authority to order the legislature to establish them, even as a remedy for constitutionally inadequate schools), *cert. denied*, 538 U.S. 1035, 155 L. Ed. 2d 1066 (2003).

However, in denying defendants' motion to strike the amendment, the trial court, in an order dated 9 February 1999, concluded that "under the *Leandro* doctrine and the North Carolina Constitution, the right to an opportunity to receive a sound basic education in the public schools is not to be conditioned upon age, but rather upon the need of the particular child." As a consequence, the trial court found that the added paragraph "*adequately allege[s]* that the lack of pre-kindergarten programs deprives certain children of the opportunity for a sound basic education," (emphasis added,) and ruled that such allegations raised a valid factual question to be determined upon the evidence presented.

We agree with the trial court's ruling, at least to the extent that it permitted plaintiffs to present evidence on the issue, for two reasons. In *Leandro*, this Court held that the state's Constitution "guarantee[s] every child of this state an opportunity to receive a sound basic education in our public schools." 346 N.C. at 347, 488 S.E.2d at 255. However, the extent of the guarantee, as expressed in *Leandro*, was not entirely clear. Is it limited to those children who attain school-age eligibility, as determined by the General Assembly, or does it extend to those about to enter the public school system? In other words, are four-year-olds guaranteed the right to demonstrate that they are in danger of being denied an opportunity for a sound basic education by virtue of their circumstances or are they precluded from doing so because they are not yet members of the right-bearing school children class? At the point of the trial court's order, that question had yet to be answered and, in our view, was ripe for evidentiary proceedings and consideration by the trial court. We also find persuasive the trial court's finding that the General Assembly has enacted legislation that affords certain rights to particular four-year-olds who would not otherwise qualify as school children—namely, those four-year-olds that meet the criteria for being "gifted" and "mature." Section 115C-364(d) of the General Statutes entitles such four-year olds to enroll in kindergarten. Keeping in mind that the *pre-trial* question at issue was not whether the trial court properly determined that either "at-risk" or other four-year-olds are similarly positioned in relation to their four-year-old "gifted" and "mature" counterparts, but rather whether the former group may present evidence showing they are or should be considered as similarly positioned, we conclude that

the trial court properly denied the State's motion to strike paragraph 74a of the amended complaint. Thus, any relevant evidence concerning the allegations in paragraph 74a was properly determined to be admissible at trial.

We conclude our evaluation of the case's procedural posture with a caveat concerning the trial court's characterization of this Court's holding in *Leandro*. "Under the *Leandro* doctrine and the North Carolina Constitution," the trial court concluded, "the right to an opportunity to receive a sound basic education in the public schools is not to be conditioned upon age but *rather upon the need of the particular child.*" (Emphasis added.) This Court disagrees with the italicized portion of the trial court's characterization. We read *Leandro* and our state Constitution, as argued by plaintiffs, as according the right at issue to all children of North Carolina, regardless of their respective ages or needs. Whether it be the infant Zoë, the toddler Riley, the preschooler Nathaniel, the "at-risk" middle-schooler Jerome, or the not "at-risk" seventh-grader Louise, the constitutional right articulated in *Leandro* is vested in them all. As a consequence, we note that the initial question before us is not whether that right exists but whether that right was shown to have been violated. In addition, we note that if such a violation was indeed established by the evidence at trial, this Court must then consider whether the trial court properly determined when and how the right was violated, by whom, and finally, if the remedy imposed was appropriate.

IV. Defendants' First Issue

The Court now turns its attention to the substantive issues brought forward on appeal by the State. In its first question presented to this Court, the State contends that the trial court erred by applying the wrong standards for determining: (1) when a student has obtained a sound basic education; (2) causation (for a student's failure to obtain a sound basic education); and (3) the State's liability (for a student's failure to obtain a sound basic education).[7] In further support of its initial argument, the State proffers three subarguments, which allege and target specific evidentiary lapses and flaws in the trial court's reasoning. In its argument labeled I(A), the State contends that the trial court erred by using standardized test scores as

7. Although we cannot be certain, from our reading of the State's brief, it appears that the locution "wrong standards" is a misnomer, and translates more accurately as an argument concerning evidentiary sufficiency. Thus, we approach the State's first issue from a perspective of whether the trial court utilized relevant and sufficient evidence as a basis for its conclusions.

"the exclusive measure" of whether students were obtaining a sound basic education. In argument I(B), the State argues that the trial court erred by concluding that a denial of the right to a sound basic education could be inferred from the number of socio-economically disadvantaged ("at-risk") students scoring below Level III proficiency on standardized tests. And in argument I(C), the State contends that the trial court erred when it held the State responsible for administrative decisions made by local school boards.

From a purely structural standpoint, the Court finds it difficult to construct its opinion on this issue in a fashion that strictly comports with the State's presentation. The State presents an initial question that breaks down into three separate parts, then offers three subarguments without referencing which part of the primary argument they are intended to support. Further compounding the logistical problem is—how best to say?—the "free-wheeling nature" of the trial court's order, which is composed of four separate memoranda of law that total over 400 pages. We recognize that the trial court faced a formidable task in evaluating the evidence presented at trial and emphasize that our characterization of the order is not intended to be critical of the trial court's efforts. Nevertheless, the order's relevant conclusions—those under assault by the State in its first question presented—are peppered throughout the breadth of the document and do not correspond, from any structural standpoint, to the State's arguments. As a consequence, the Court is left with no choice but to chart a course of its own. Generally, we will structure this section in line with the State's initial three-part question: Did the trial court apply the wrong standards for determining: (1) when a student has failed to obtain a sound basic education; (2) causation for any such proven failure; and (3) the State's liability for such failure? While working within that basic framework, we will also address, as appropriate, the State's three supporting subarguments.

In *Leandro*, this Court decreed that the children of the state enjoy the right to avail themselves of the opportunity for a sound basic education. 346 N.C. at 347, 488 S.E.2d at 255 ("We conclude that Article I, Section 15[8] and Article IX, Section 2[9] of the

8. "The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right." N.C. Const. art. I, § 15.

9. "The General Assembly shall provide . . . for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students." N.C. Const. art. IX, § 2(1).

North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools.") (footnotes added). The Court then proceeded to declare that "[a]n education that does not serve the purpose of preparing students to participate and compete in the society in which they live and work is devoid of substance and is constitutionally inadequate." *Id.* at 345, 488 S.E.2d at 254. Ultimately, the Court defined a sound basic education as one that provides students with at least: (1) sufficient knowledge of fundamental mathematics and physical science to enable the student to function in a complex and rapidly changing society; (2) sufficient fundamental knowledge of geography, history, and basic economic and political systems to enable the student to make informed choices with regard to issues that affect the student personally or affect the student's community, state, and nation; (3) sufficient academic and vocational skills to enable the student to successfully engage in post-secondary education or vocational training; and (4) sufficient academic and vocational skills to enable the student to compete on an equal basis with others in formal education or gainful employment in contemporary society. *Id.* at 347, 488 S.E.2d at 259.

After declaring a child's constitutional right to the opportunity to receive a sound basic education and defining the elements of such an education, the Court concluded that some of the allegations in plaintiffs' complaint stated claims upon which relief may be granted and ordered the case remanded to the trial court to permit plaintiffs to proceed on such claims. *Id.* at 355, 488 S.E.2d at 261. The Court in *Leandro* also provided instructive guidelines to the trial court, delineating a list of evidentiary factors the trial court should consider at trial. *Id.* at 355-57, 488 S.E.2d at 259-60. Among such factors were: (1) the level of performance of the children on standardized achievement tests; (2) any educational goals and standards adopted by the legislature;[10] (3) the level of the State's general educational expenditures and per-pupil expenditures; and (4) any other factors that may be relevant for consideration when determining educational adequacy issues under the Constitution. *Id.* Finally, the Court in *Leandro* established the standard of proof plaintiffs must meet in making their case. *Id.* at 357, 488 S.E.2d at 261. "[T]he courts of the state must grant every reasonable deference to the legislative and executive branches

10. The Court in *Leandro* additionally suggested that "output" measurements—such as student test scores, grades, and graduation rates—may prove more reliable than measurements of "inputs"—such as educational expenditures and program initiatives provided by the State.

when considering whether they have established and are administering a system that provides the children of the various school districts of the state a sound basic education[,]" and "a clear showing to the contrary must be made before the courts may conclude that they have not." *Id.* "Only such a clear showing will justify a judicial intrusion into an area so clearly the province, *initially at least*, of the legislative and executive branches as the determination of what course of action will lead to a sound basic education." *Id.* (emphasis added).

[3] We begin our examination under the umbrella of the State's first argument—namely, whether there was a clear showing of evidence supporting the trial court's conclusion that "the constitutional mandate of *Leandro* has been violated [in the Hoke County School System] and action must be taken by both the LEA [Local Educational Area] and the State to remedy the violation." After a comprehensive examination of the record and arguments of the parties, this Court concludes that the trial court was correct as to this issue and thus we affirm, albeit with modifications. Discussion of the trial court's imposed remedies concerning specific violation(s) will immediately follow.

At trial, plaintiffs presented evidence that, in accordance with *Leandro*, can be categorized as follows: (1) comparative standardized test score data; (2) student graduation rates, employment potential, post-secondary education success (and/or lack thereof); (3) deficiencies pertaining to the educational offerings in Hoke County schools; and (4) deficiencies pertaining to the educational administration of Hoke County schools. The first two evidentiary categories fall under the umbrella of "outputs," a term used by educators that, in sum, measures student performance. The remaining two evidentiary categories fall under the umbrella of "inputs," a term used by educators that, in sum, describes what the State and local boards provide to students attending public schools. We examine each evidentiary category in turn.

Plaintiffs presented extensive documentary evidence concerning standardized test scores of students in Hoke County and from around the state, and provided testimony from educational experts for purposes of evaluating Hoke County's tests scores and comparing them with other test scores from around the state. The aim of the standardized test score evidence was twofold. First, plaintiffs sought to demonstrate that the measure of test score constitutional compliance was whether an ample number of Hoke County students were attaining a "Level III" proficiency in the subjects tested. Second,

plaintiffs sought to demonstrate that too many Hoke County students were failing to achieve the required "Level III" proficiency. Thus, in plaintiffs' view, if "Level III" proficiency is required, and an inordinate number of Hoke County students are failing to meet it, such a finding would contribute to a clear and convincing showing that Hoke County students were being denied an opportunity to obtain a sound basic education. *See Leandro*, 346 N.C. at 355, 488 S.E.2d at 259 (stating that standardized achievement tests are one factor the trial court should consider in determining whether any of the state's children are being denied the opportunity for a sound basic education).

At trial, plaintiffs presented evidence concerning standardized End of Grade (EOG) and End of Class (EOC) test scores and argued that the scoring standard of Level III proficiency should be used as the measure of whether a student had obtained a sound basic education in the subject area being tested. The State Board of Education has defined Level III proficiency thusly: "Students performing at this level consistently demonstrate mastery of the course subject matter and skills and are well prepared to be successful at a more advanced level in the content area." In contrast, the State argued that the standards in *Leandro* are satisfied when a student achieves Level II proficiency. The State Board of Education defines Level II proficiency thusly: "Students performing at this level demonstrate inconsistent mastery of knowledge and skills of the course and are minimally prepared to be successful at a more advanced level in the content area."

After considering the evidence and arguments from both sides, the trial court ruled that Level III proficiency was the required standard. The trial court rejected the State's argument that Level II proficiency more closely describes the "minimal level of performance which is indicative of a student being on track to acquire" a *Leandro*-comporting education and concluded that: (1) "a student who is performing below grade level (as defined by Level I or Level II) is not obtaining a sound basic education under the *Leandro* standard"; and (2) "a student who is performing at grade level or above (as defined by Level III or Level IV) is obtaining a sound basic education under the *Leandro* standard."

On appeal, although the State assigned error to the trial court's conclusion concerning the Level III standard, it made no argument to that effect in its brief. As a consequence, the issue is considered abandoned under the appellate rules. N.C. R. App. P. 28(b)(6). In addition, our own examination of the issue reveals no grounds to disturb the trial court's findings and preliminary conclusions pertaining to

the question of which test score standard should be used. As a consequence, we find no error in the trial court's ruling that a showing of Level III proficiency is the proper standard for demonstrating compliance with the *Leandro* decision.

With Level III proficiency established as the standard-bearer for test score evidence, we turn our attention to whether the number of Hoke County students failing to achieve Level III proficiency is inordinate enough to be considered an appropriate factor in the trial court's determination that a large group of Hoke County students have been improperly denied their opportunity to obtain a sound basic education.

At trial, EOG and EOC test scores from across the state and from Hoke County were submitted into evidence. In addition, education and testing experts were called to testify about what the scores mean, how statewide scores compare to those of Hoke County, and what such comparisons might indicate. In its third memorandum of decision, the trial court initially assessed the quantitative elements of the test score evidence and concluded that it clearly shows that Hoke County students are failing to achieve Level III proficiency in numbers far beyond the state average. In turn, the trial court then proceeded to conclude that the failure of such a large contingent of Hoke County students to achieve Level III proficiency is indicative that they are not obtaining a sound basic education in the subjects tested. As a consequence, the trial court ultimately concluded that the test score statistics and their analysis qualified *as contributing evidence* that Hoke County students were being denied their constitutional right to the opportunity for a sound basic education. In other words, evidence tending to show Hoke County students were faring poorly in such standardized test subject areas as mathematics, English, and history was relevant to the primary inquiry: Were Hoke County students being denied the opportunity to obtain an education that comports with the *Leandro* mandate—one in which students gain sufficient knowledge of fundamental math, science, English, and history in order to function in society and/or to engage in post-secondary education or vocational training. 346 N.C. at 347, 488 S.E.2d at 255. We agree with the trial court's assessment that test score evidence indicating Hoke County student performance in subject areas that correspond to the very core of this Court's definition of a sound basic education is relevant to the inquiry at issue.[11]

11. We note that the test score evidence, in and of itself, addresses the question of whether students are obtaining a sound basic education rather than the question of

In analyzing the test score data and the opinions of those who testified about them, the trial court noted that the score statistics showed that throughout the 1990s, Hoke County students in all grades trailed their statewide counterparts for proficiency by a considerable margin. For example, in 1997-98, only 46.9% of Hoke students scored at Level III or above in algebra while the state average was 61.6%. Similar disparities occurred in other high school subjects such as Biology, English, and American History. Other test data reflected commensurate results in lower grades. For example, in grades 3-8, Hoke County students trailed the state average in each grade, with gaps ranging from 11.7% to 15.1%.

In addition, the trial court noted that Hoke County students fared poorly in comparison with the state's other students in computer skills testing (51.2% passing in Hoke, 74.8% passed statewide), and the "high school" competency test (52.7% passed in Hoke, 68.4% passed statewide). The trial court also considered the findings of a state education assistance team, who worked at South Hoke Elementary School. The team determined that test scores showed Hoke County elementary school students were deficient in higher order thinking skills, such as problem solving.

In assessing the data and associated evidence and testimony, the trial court concluded that the test results showed Hoke County students were performing throughout the 1990s at deficient academic levels. As a consequence, the trial court deemed the evidence relevant to the preliminary question of whether Hoke County students were obtaining a sound basic education and the ultimate question of whether they were being denied an opportunity to obtain such an education.

In its brief, the State contends, at great length, that the trial court erred by using test scores "as the exclusive measure of a con-

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whether they were afforded their opportunity to obtain one. The distinction is important. While a clear showing of a failure to obtain a sound basic education is a prerequisite for demonstrating a legal basis for the *designated plaintiff school children's* case, the failure to obtain such an education is not the ultimate issue in dispute.

In order to prevail, plaintiffs must show more than a failure on the part of Hoke County students to obtain a sound basic education. The failure to obtain such an education may be due to any number of reasons beyond the defendant State's control, not the least of which may be the student's lack of individual effort and a failure on the part of parents and other caregivers to meet their responsibilities. Thus, in order to show Hoke County students are being wrongfully denied their rightful opportunity for a sound basic education, plaintiffs must show that their failure to obtain such an education was due to the State's failure to provide them with the opportunity to obtain one.

stitutionally adequate education." However, as we proceed in our analysis, the Court notes that the record reflects that the trial court considered "output" evidence beyond the realm of test scores, and that evidence such as graduation rates, dropout rates, post-secondary education performance, employment rates and prospects, comports with both this Court's definition of a sound basic education *and* the factors we provided the trial court to consider upon remand. Thus, we reject the State's contention that the trial court used test scores as the "exclusive measure" of a sound basic education.

In continuing our examination of the trial court's order, we move next to the trial court's conclusion that additional "output" evidence—*e.g.*, graduation rates, dropout rates, employment potential, and post-secondary education readiness—further demonstrates that an unacceptably high number of Hoke County students are failing to obtain a sound basic education. In considering evidence concerning dropout and graduation rates, the trial court found that in the mid-1990s only 41% of Hoke County freshmen went on to graduate—a retention rate that was 19% lower than the state average and was the worst retention rate in the state's 100 counties. The trial court went on to conclude that the evidence showed that the primary reason Hoke County's dropout rate was so high was that a great number of Hoke students are "not well prepared for high school" and that "students who do not do well in the early grades are more likely than other students to later drop out of school."

As for the effect of such a high dropout rate, the trial court concluded that the failure of large percentages of Hoke County students to complete high school "not only results in those children who leave having failed to obtain a sound basic education" but is also evidence "of a systematic weakness . . . in meeting the needs of many of [Hoke County's] students."

As for those students who did graduate, the trial court's assessment was no less bleak. After considering evidence concerning the employment potential and post-secondary education potential for Hoke County graduates, the trial court concluded that many among the graduates had not obtained a sound basic education in that the evidence showed "they are poorly prepared to compete on an equal basis in gainful employment and further formal education in today's contemporary society." In support of its conclusion, the trial court cited to numerous examples of Hoke County graduates who pursued employment or who pursued further education at the college level.

For example, evidence from Hoke County employers indicated that local graduates "are not qualified to perform even basic tasks that are needed for the jobs available." At least three of Hoke County's major employers testified and/or offered evidence at trial, and all three described similar problems in considering Hoke graduates for employment. The president of a farm services company testified that he frequently received applications from Hoke graduates for entry-level positions at his firm. Such positions require the employee to read labels on products and to perform basic math skills, such as calculating chemical percentages for fertilizer mixing. According to the witness, Hoke graduate applicants often lacked such basic reading and math skills and as consequence, they had to be specially trained. A representative from Burlington Industries offered a similar perspective. Entry-level employees at his plant must be able to operate machinery and to use computers, and many of the local applicants lacked the basic skills required to learn how to run the machines or computers. As a result, the company developed a remedial program called REACH, which is a computer-based learning program that teaches reading, math, and computer literacy skills. The goal of the program is to bring new employees up to a 10.9 grade level for basic math, reading and computer skills. Nearly 180 Hoke high school graduates have participated in the program. Of those, 26 percent entered in the REACH course at below the seventh-grade level and 67 percent initially tested at the ninth-grade level or below. Hoke County high school graduates who applied to Unilever, another major local employer, yielded similar test scores, and none was hired by the company. According to a company representative, many of the Hoke County graduate applicants showed poor writing skills and an inability to follow instructions in their applications. Similar application and skills shortcomings were described by a fourth employer, who said one out of twenty-seven Hoke County high school graduates had been hired by his firm, a turkey hatchery.

As a consequence of such testimony, the trial court concluded that plaintiffs had demonstrated that even a Hoke County high school diploma failed to provide graduates with the skills necessary to compete on an equal basis with others in contemporary society's gainful employment ranks, which is one of the four measures defining a constitutionally conforming sound basic education. In our view, the trial court's conclusion is amply supported by the evidence, and further supports the trial court's ruling that a disproportionate number of Hoke County school children are failing to obtain a sound basic education.

As for Hoke County graduates who pursue post-secondary education options, the trial court concluded that Hoke County graduates "are generally not well prepared to go on to community college or into the university system." In its memoranda of law, the trial court approached the post-secondary education question thusly: "[I]n determining whether [Hoke County schools are] providing a sound basic education, it is relevant to consider college admission and performance data and whether students graduating from [Hoke County schools] need remediation in order to do post-secondary education work." In addition to considering evidence concerning Hoke County graduates' ability to perform upon entering the collegiate ranks, the trial court also weighed evidence concerning their ability to complete post-secondary education studies.

For example, the evidence presented at trial showed that 55 percent of Hoke County graduates attending community college in 1996 were placed in one or more remedial classes for core subjects such as reading and mathematics. In addition, Hoke County graduates' grades for such courses were poor; as a group, they averaged a 1.8 (D+) on a four-point scale in remedial reading and a 2.1 (C-) in remedial math. Of those Hoke County graduates taking regular math and science courses at the community college level, the average grades were, respectively, a 1.8 (D+) and a 1.8 (D+).[12]

Evidence concerning those Hoke County graduates who attended North Carolina's university (UNC) system demonstrated their prospects were even worse. Hoke County graduates in the UNC system were required to take remedial core courses at nearly double the rate of the statewide counterparts. Moreover, Hoke County graduates were placed in advanced placement English classes at half the rate (6.4%) of public school students from around the state (12.2%), and not one of Hoke County's forty-seven entering freshman enrolled in honors courses. Students from the state's other ninety-nine counties enrolled in honors courses at a 6.7% rate.

Other evidence demonstrated that Hoke County graduates fared poorly when it came to grades in core courses and that they consistently trailed behind the average grades attained by other public school graduates from around the state. Moreover, evidence con-

12. We note that there are many more examples demonstrating similar education shortcomings among Hoke County graduates (and a limited number of success stories as well). However, for the purposes of this opinion, the Court limits its evidentiary examples to those that provide the clearest snapshots of the overall picture presented at trial.

cerning college completion rates for Hoke County graduates revealed the following: (1) While 34.1% of all North Carolina public school graduates enrolled as freshman returned for a second year with a GPA of 2.0 or better, just 16.4% of Hoke County graduates did the same; (2) While 62.7% of all North Carolina public school graduates who entered the UNC system returned for their third year of college with a 2.0 GPA or better, only 44.4% of Hoke graduates did the same; and (3) From 1993-1997, 51.6% of all North Carolina high school students who entered the UNC system graduated within five years, while just 31.3% of Hoke County graduates did the same.

In assessing the evidence presented concerning Hoke County student post-secondary education prospects and achievements, the trial court concluded that Hoke graduates were "not well prepared to go on to community college or into the university system" and that such students, as a whole, performed inadequately in either collegiate environment. In addition, because obtaining the knowledge and skills needed to compete on an equal basis in post-education settings is one of the four elements defining a sound basic education, *see Leandro*, 346 N.C. at 347, 488 S.E.2d at 255, the trial court ruled that the evidence provided a clear showing that a great number of Hoke County graduates were failing to obtain such an education.

After reviewing the post-secondary education-related evidence and the trial court's conclusions concerning such evidence, this Court concludes that the trial court's ruling was premised on a clear evidentiary showing. As a consequence, we affirm the trial court on this issue.

Thus, to this point, we summarize our analysis. In the realm of "outputs" evidence, we hold that the trial court properly concluded that the evidence demonstrates that over the past decade, an inordinate number of Hoke County students have consistently failed to match the academic performance of their statewide public school counterparts and that such failure, measured by their performance while attending Hoke County schools, their dropout rates, their graduation rates, their need for remedial help, their inability to compete in the job markets, and their inability to compete in collegiate ranks, constitute a clear showing that they have failed to obtain a *Leandro*-comporting education. As a consequence of so holding, we turn our attention to "inputs" evidence—evidence concerning what the State and its agents have provided for the education of Hoke County students—in an effort to determine the following two contingencies: (1) Does the evidence support the trial court's conclusion that the State's

action and/or inaction has caused Hoke County students not to obtain a sound basic education and, if so; (2) Does such action and/or inaction by the State constitute a failure to meet its constitutional obligation to provide Hoke County students with the opportunity to obtain a sound basic education, as defined in *Leandro*?

It is one thing for plaintiffs to demonstrate that a large number of Hoke County students are failing to obtain a sound, basic public education. It is quite another for plaintiffs to show that such a failure is primarily the result of action and/or inaction of the State, which argues in this appeal that the trial court erred by concluding that a combination of State action and inaction resulted in the systematic poor performance of Hoke County students and graduates.

In defense of its educational offerings in Hoke County at trial, the State attempted to show that its combination of "inputs"—*i.e.*, expenditures, programs, teachers, administrators, etc.—added up to be an aggregate that met or exceeded this Court's definition of providing students with an opportunity for a sound basic education. In addition, both at trial and in this appeal, the State contended that the evidence showed the following: (1) That the educational offerings it provides in Hoke County have improved significantly since the mid-nineties; (2) That such improvements are part and parcel of the State's own recognition of ongoing problems and the need to address them; (3) That if a cognizable group of students within Hoke County are failing to obtain a sound basic education, it is due to factors other than the educational offerings provided by the State; and, (4) That many of the deficiencies that may exist in the educational offerings of Hoke County are due to the administrative shortcomings of the semi-autonomous local school boards.

Plaintiffs, on the other hand, contend that the evidence at trial clearly showed that the State had consistently failed to provide Hoke County schools with the resources needed to provide students with the opportunity to obtain a sound basic education. In addition, plaintiffs argue that the evidence shows that Hoke County students have consistently failed to match the achievements of their statewide counterparts (*see* "outputs" discussion, above) because the State has failed to: (1) provide adequate teachers and/or administrators; (2) provide the funding necessary to offer each student the opportunity to obtain a sound basic education; (3) recognize the failings of Hoke County students as a whole; and (4) implement alternative educational offerings that have and/or would address and correct the prob-

lems that have placed and/or place Hoke County students *at risk* of academic failure.[13]

In the portion of its order that addresses the "inputs" evidence introduced at trial, the trial court considered evidence concerning four components of the State's Educational Delivery System. In sum, the trial court found that the State's general curriculum, teacher certifying standards, funding allocation systems, and education accountability standards met the basic requirements for providing students with an opportunity to receive a sound basic education. As a consequence, the trial court concluded that "the bulk of the core" of the State's "Educational Delivery System . . . is sound, valid and meets the constitutional standards enumerated by *Leandro.*"

After so concluding, the trial court then went on to describe its next two missions: (1) to determine whether the State's Education Delivery System is providing the means for Hoke County's students to avail themselves of an opportunity to obtain a sound basic education; and (2) to determine whether the State's Education Delivery System is providing the means for "at-risk" children to avail themselves of an opportunity to obtain a sound basic education. However, at some

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13 From the outset of the trial court's introduction of the term "at risk," we take a moment to distinguish between the two uses of "at risk" within the context of this case (and which seem to have been merged into a single, interchangeable entity by all concerned).

Any student is, at least potentially, *at risk* of academic failure, without regard to his or her intellect, economic status, race, ethnic background, and/or social standing. However, a particular and identifiable subgroup of students has been singled out by experts in the education field and described as "at-risk" students. In a general sense, such students are those who, due to circumstances such as an unstable home life, poor socio-economic background, and other factors, either enter or continue in school from a disadvantaged standpoint, at least in relation to other students who are not burdened with such circumstances.

The students who are considered to be among those "at-risk" students raise distinct and separate concerns from other students. Certainly, like all students, "at-risk" students also face the risk of academic failure. However, one of the prominent issues in this case is determining whether such "at-risk" students need to be identified by the State and offered additional assistance in order to avail themselves of the opportunity for a sound basic education.

Thus, from this point on, for the sake of clarity, the Court will limit its use of the locution "at risk" to those instances where it serves as an adjective and pertains specifically to the student subgrouping described above (*e.g.*, must the State make special provisions for "at-risk" students?). As for those instances where the trial court or parties refer to students who may be *at risk of* academic failure, or who may be *at risk of* failing to integrate into society, we will substitute "faces the prospect of" for "at risk of" (*e.g.*, students who score below Level III proficiency on EOG tests *face the prospect* of academic failure).

juncture in the proceedings, it appears that the trial court combined these two discrete inquiries into a single entity—namely, whether the "at-risk" children of Hoke County are being denied the opportunity to obtain a sound basic education.[14]

The distinction is far from technical or trivial. We refer back to the "outputs" evidence described and assessed by this Court at the beginning of Part IV, above. While we have already concluded that such evidence was ample to demonstrate that an inordinate number of Hoke County students have not obtained a sound basic education over the last decade, we have no way of determining whether: (1) such failure is strictly limited only to children who were "at-risk" students; or (2) such failure extended to other children who do not meet the definition of "at-risk" students.[15] Thus, if the trial court's conclusions and/or remedies target only "at-risk" students, it cannot be assumed that all or even most non "at-risk" students are being afforded their opportunity to obtain a sound basic education. Our review of the record reveals no showing, pro or con, that the plight

14. The Court recognizes that the trial court took evidence on, and made conclusions about, student performance across the state. However, we remain mindful that the issues of the instant case pertain only to evidence, findings, and conclusions that apply to Hoke County in particular. As a consequence, any findings or conclusions that were intended to apply to the state's school children beyond those of Hoke County are not relevant to the inquiries at issue.

15. For example, hypothetically, if 60% of all of Hoke County's ninth-graders failed to demonstrate Level III proficiency in EOC tests, it is essential to know, for purposes of both identifying and rectifying the failure, how many of those students were "at-risk" students and how many were not viewed as "at-risk." In its subsequent memoranda of law—numbers three and four—the trial court concludes that too many "at-risk" students are being denied their opportunity for a sound basic education, in violation of *Leandro*. The trial court also awards relief for such "at-risk" students and imposes remedies aimed at correcting their deficiencies. However, by limiting its conclusions to "at-risk" students, the trial court fails to account for the following contingency: how many of the 60% of Hoke County ninth-graders are not "at-risk" yet are nonetheless failing to obtain a sound basic education?

Although the evidence presented at trial fails to address or account for the circumstance that an inordinate number of non "at-risk" students may well be failing to achieve Grade III proficiency, this Court cannot ignore that distinct possibility. Thus, we emphasize that while the trial court limited its conclusions and relief to the "at-risk" students of Hoke County, a broader mandate may ultimately be required. Children who are not considered "at-risk" students may well be failing to obtain a sound basic education in inordinate numbers, and their failure may well be attributable to the State's actions and/or inactions. As a consequence, we conclude that while the findings and conclusions of the instant case are confined to the circumstances of "at-risk" students, non "at risk" students are *not*: (1) held or presumed to be obtaining a sound basic education, or (2) precluded from pursuing future claims that they are not being afforded the opportunity to obtain a sound basic education.

of non "at-risk" students in Hoke County was considered by the trial court in the wake of its second memorandum. As a consequence, while we must limit our review of the trial court's order to its conclusions concerning "at-risk" students, we cannot and do not offer any opinion as to whether non "at-risk" students in Hoke County are either obtaining a sound basic education or being afforded their rightful opportunity by the State to obtain such an education.

In confining the parameters of our holding to the trial court's findings and conclusions concerning "at-risk" students within the Hoke County school system, we turn our attention back to the trial court's evidentiary findings and conclusions relating to whether the State has adequately provided for Hoke County schools and whether the State has in place an ample mechanism for dealing "with the educational needs of ['at-risk'] children."

In addition to finding that, as a general proposition, the State's Funding Delivery System for education was adequate, the trial court also concluded that it "is not yet convinced by the evidence that the State of North Carolina is not presently putting sufficient funds in place to provide each child with the equal opportunity to obtain a sound basic education." We note that the trial court went to great lengths in its efforts to convey its view that the evidence offered no definitive showing that the State's overall funding, resources, and programs scheme lacked the essentials necessary to provide a sound basic education. In addition, the trial court made clear that from an overall resources-providing perspective, the holding in *Leandro* established that a resources-providing scheme that includes local contributions is not constitutionally defective if it results in unequal funding for one LEA in comparison to another.

However, the trial court also made clear that, in its view, the applicable holding in *Leandro*, when stripped to its essence, was limited to circumstances in which such unequal funding resulted from local contributions that increased funding beyond that required to provide a sound basic education. In other words, while some LEAs may enjoy elevated funding beyond that which provides a sound basic education, no LEA may be funded in such a fashion that it fails to provide the resources required to provide the opportunity for a sound basic education. Thus, in the trial court's view, LEAs are entitled to funding by the State sufficient to provide all students, irrespective of their LEA, with at a minimum, the opportunity to obtain a sound basic education. We concur with the trial court's view.

With regard to the State's education resource allocations to Hoke County in particular, the trial court said it was convinced "that neither the State nor . . . [the Hoke County School System] are strategically allocating the available resources to see that at-risk children have the equal opportunity to obtain a sound basic education." Accordingly, the trial court initially directed the State and the school district "to conduct self-examinations of the present allocation of resources and to produce a rational[], comprehensive plan which strategically focuses available resources and funds towards meeting the needs of all children, including at-risk children[,] to obtain a sound basic education."

Concerning the State's argument that the trial court erred in concluding that the State was liable for its failings in Hoke County schools, we note that the trial court later modified this portion of its order to exclude the Hoke County School System from responsibility for correcting allocation deficiencies, reasoning that since the LEA was a subdivision of the State created solely by the State, it held no authority beyond that accorded it by the State. As a consequence of the LEA's limited authority, the trial court concluded that the State bore ultimate responsibility for the actions and/or inactions of the local school board, and that it was the State that must act to correct those actions and/or inactions of the school board that fail to provide a *Leandro*-conforming educational opportunity to students.

In the State's view, any holding that renders the State, and by the State we mean the legislative and executive branches which are constitutionally responsible for public education, accountable for local school board decisions somehow serves to undermine the authority of such school boards. This Court, however, fails to see any such cause and effect. By holding the State accountable for the failings of local school boards, the trial court did not limit either: (1) the State's authority to create and empower local school boards through legislative or administrative enactments, or (2) the extent of any powers granted to such local school boards by the State. Thus, the power of the State to create local agencies to administer educational functions is unaffected by the trial court's ruling, and any powers bestowed on such agencies are similarly unaffected. In short, the trial court's ruling simply placed responsibility for the school board's actions on the entity—the State—that created the school board and that authorized the school board to act on the State's behalf. In our view, such a conclusion bears no effect whatsoever on the local school board's ability to continue in administering those functions it currently oversees or

to be given broader and/or more independent authority. As a consequence, we hold that the State's argument concerning a diminished role for local school boards as a result of the trial court's ruling is without merit.

Although the trial court explained that it was leaving the "nuts and bolts" of the educational resources assessment in Hoke County to the other branches of government, it ultimately provided general guidelines for a *Leandro*-compliant resource allocation system, including the requirements: (1) that "every classroom be staffed with a competent, certified, well-trained teacher"; (2) "that every school be led by a well-trained competent principal"; and (3) "that every school be provided, in the most cost effective manner, the resources necessary to support the effective instructional program within that school so that the educational needs of all children, including at-risk children, to have the equal opportunity to obtain a sound basic education, can be met." Finally, the trial court ordered the State to keep the court advised of its remedial actions through written reports filed with the trial court every ninety days.

In support of its conclusions and orders for remedial action on the part of the State, the trial court declared that the evidence showed that there are many students in Hoke County schools "who are not obtaining a sound basic education." (*See* Part IV, above, pertaining to the analysis and discussion of "outputs" evidence.) In assessing whether the State's funding, resources, and programs for Hoke County schools met the needs of its students, the trial court considered evidence showing that "an unusually high number of Hoke County school children have factors" that categorize them as "at-risk" students,[16] and that such "at-risk" students have special needs in order to avail themselves of their guaranteed opportunity to obtain a sound basic education. In addition, the trial court considered evidence showing that the needs of such students were not being met, and concluded that the State's failure to meet such needs had significantly impacted such students' *opportunity* to obtain a sound basic education. Specifically, in the trial court's view, there was ample evidence demonstrating that the State was failing both to iden-

16. Although there are numerous accepted ways of defining and identifying an "at-risk" student, most educators seem in agreement that an "at-risk" student is generally described as one who holds or demonstrates one or more of the following characteristics: (1) member of low-income family; (2) participate in free or reduced-cost lunch programs; (3) have parents with a low-level education; (4) show limited proficiency in English; (5) are a member of a racial or ethnic minority group; (6) live in a home headed by a single parent or guardian.

tify "at-risk" students and to address their needs with educational resources that would provide tutoring, extra class sessions, counseling, and other programs that target "at-risk" students in an effort to enable them to compete among their non "at-risk" counterparts and thus avail themselves of their right to the opportunity to obtain a sound basic education.

In our view, the trial court conducted an appropriate and informative path of inquiry concerning the issue at hand. After determining that the evidence clearly showed that Hoke County students were failing, at an alarming rate, to obtain a sound basic education, the trial court in turn determined that the evidence presented also demonstrated that a combination of State action and inaction contributed significantly to the students' failings. Then, after concluding that the State's overall funding and resource provisions scheme was adequate on a statewide basis, the trial court determined that the evidence showed that the State's method of funding and providing for individual school districts such as Hoke County was such that it did not comply with *Leandro's* mandate of ensuring that all children of the state be provided with the opportunity for a sound basic education. In particular, the trial court concluded the State's failing was essentially twofold in that the State: (1) failed to identify the inordinate number of "at-risk" students and provide a means for such students to avail themselves of the opportunity for a sound basic education; and (2) failed to oversee how educational funding and resources were being used and implemented in Hoke County schools.

At that point, the trial court also concluded that the State's failings, as demonstrated by the evidence, needed to be rectified. As a consequence, it ordered the State to reassess both its financial allocations and its other resource provisions earmarked for Hoke County schools in order to make the schools more effective in addressing the trial court's primary concern—namely, to ensure that "at-risk" children in Hoke County are afforded a chance to take advantage of their constitutionally-guaranteed opportunity to obtain a sound basic education. In ordering the State to reassess its Hoke County educational obligations, the trial court struck a delicate balance between interests. On the one hand, it ordered the State to examine and find a resolution to a problem of constitutional proportion and imposed some general guidelines for doing so—*i.e.*, as the State reassesses its Hoke County educational obligations, it must structure its proposed solutions to ensure there are competent teachers in classrooms, compe-

tent principals in schoolhouses, and adequate resources to sustain instructional and support programs that will aid the county's school children to gain their opportunity to obtain a *Leandro*-comporting education. On the other hand, the trial court refused to step in and direct the "nuts and bolts" of the reassessment effort. Acknowledging that the state's courts are ill-equipped to conduct, or even to participate directly in, any reassessment effort, the trial court deferred to the expertise of the executive and legislative branches of government in matters concerning the mechanics of the public education process.

In short, the trial court: (1) informed the State what was wrong with Hoke County schools; (2) directed the State to reassess its educational priorities for Hoke County; and (3) ordered the State to correct any and all education-related deficiencies that contribute to a student's inability to take advantage of his right to the opportunity to obtain a sound basic education. However, we note that the trial court also demonstrated admirable restraint by refusing to dictate how existing problems should be approached and resolved. Recognizing that education concerns were the shared province of the legislative and executive branches, the trial court instead afforded the two branches an unimpeded chance, "initially at least," *see Leandro*, 346 N.C. at 357, 488 S.E.2d at 261, to correct constitutional deficiencies revealed at trial. In our view, the trial court's approach to the issue was sound and its order reflects both findings of fact that were supported by the evidence and conclusions that were supported by ample and adequate findings of fact. As a consequence, we affirm those portions of the trial court's order that conclude that there has been a clear showing of a denial of the established right of Hoke County students to gain their opportunity for a sound basic education and those portions of the order that require the State to assess its education-related allocations to the county's schools so as to correct any deficiencies that presently prevent the county from offering its students the opportunity to obtain a *Leandro*-conforming education.

V. Proper School Age/Pre-Kindergarten

[4] The next two issues of the instant appeal by the State are outgrowths of one another. As a consequence, we address them in tandem. Initially, the State contends that the trial court erred when it ruled that the proper age for school children was a justiciable issue. In the State's view, the proper age at which children should be permitted to attend public school is a nonjusticiable political question

reserved for the General Assembly. To the extent that the State argues that establishing the proper age parameters for starting and completing school—*i.e.*, kindergarten, the entering class for public school students, shall be composed of five-year-olds—we agree. Article IX, Section 3 of the North Carolina Constitution provides that "[t]he General Assembly shall provide that every child of appropriate age . . . shall attend the public schools." Pursuant to such authority, the General Assembly has determined that five-year-olds *may* attend school and that seven-year-olds *must* attend school. N.C.G.S. §§ 115C-364, -378 (2003). Our reading of the constitutional and statutory provisions leads us to conclude that the determination of the proper age for school children has indeed been squarely placed in the hands of the General Assembly. In addition, the United States Supreme Court has defined issues as nonjusticiable when either of the following circumstances are evident: (1) when the Constitution commits an issue, as here, to one branch of government; *or* (2) when satisfactory and manageable criteria or standards do not exist for judicial determination of the issue. *Baker v. Carr*, 369 U.S. 186, 210, 7 L. Ed. 2d 663, 682 (1962). In our view, not only are the applicable statutory and constitutional provisions persuasive in and of themselves, but the evidence in this case demonstrates that the trial court was without satisfactory or manageable judicial criteria that could justify mandating changes with regard to the proper age for school children. Thus, with regard to the issue of whether the trial court erred by interfering with the province of the General Assembly—establishing the appropriate age for students entering the public school system—we conclude that the trial court did so err. First, our state's constitutional provisions and corresponding statutes serve to establish the issue as the exclusive province of the General Assembly and, second, there was no evidence at trial indicating the trial court had satisfactory or manageable criteria that would justify modifying legislative efforts. As a consequence, the Court holds that any trial court rulings that infringed on the legislative prerogative of establishing school-age eligibility were in error.

[5] However, when considered in the context of the related issue of pre-kindergarten programs, the crux of this issue is less about whether school must be offered to four-year-olds than it is about whether the State must help prepare those students who enter the schools to avail themselves of an opportunity to obtain a sound basic education. While the General Assembly may be empowered to establish the actual age for beginning school, the question of whether the

General Assembly must address the particular needs of children prior to entering the school system is a distinct and separate inquiry. For example, the General Assembly, in its discretion, could establish that mandatory school attendance begins at four years of age, five years of age, or six years of age. However, the State's power to establish such an age does not answer the question of whether or not it must address the particular needs of those children who are, or are approaching, the established age for school admission. Thus, the issue before us is less about "at-risk" four-year-olds than it is about "at-risk" children approaching and/or attaining school-age eligibility as established by the General Assembly.

In our view, the evidence presented at trial clearly supported these findings and conclusions by the trial court: (1) A large number of Hoke County students had failed to obtain a sound basic education; (2) A large number of Hoke County students were being denied their rightful opportunity to a sound basic education because the State had failed in its duty to provide the necessary means for such an opportunity; (3) There were an inordinate number of "at-risk" students attending Hoke County schools; (4) The special needs attendant to such "at-risk" students were not being met; and (5) It was ultimately the State's responsibility to meet the needs of "at-risk" students in order for such students to avail themselves of their right to the opportunity to obtain a sound basic education. *See* Part IV, above. In addition to ordering the State to reassess its resource allocations to Hoke County schools in an effort to improve them for students currently in attendance, the trial court heard evidence concerning the plight of those children who were about to enter the school system. Plaintiffs essentially argued that such evidence was relevant because it would show that the problem of "at-risk" students extended beyond those students already in school and would thereby support additional remedies that specifically targeted incoming students. Once the problems of "at-risk" students had been demonstrated at trial, it was not beyond the reach of the trial court to hear evidence concerning whether preemptive action on the part of the State might assist in resolving the problems of such "at-risk" students. Thus, we conclude that because the evidence presented showed that "at-risk" students in Hoke County were being denied their right to an opportunity to obtain a sound basic education, the trial court properly admitted additional evidence intended to show that preemptive action on the part of the State should target those children about to enroll, recognizing that preemptive action affecting such children prior to their entering the public schools might well be

far more cost effective than waiting until they are actually in the educational system.

We now turn our attention to the trial court's findings and conclusions concerning "at-risk" children who are or were about to enter the Hoke County school system. In paragraph 74a of their complaint, plaintiffs alleged that "many ['at-risk'] children living in [Hoke County] begin public school kindergarten at a severe disadvantage. They do not have the basic skills and knowledge needed for kindergarten and as a foundation for the remainder of . . . school." Plaintiffs also alleged that "the lack of pre-kindergarten services and programs" offered in Hoke County deprived such students from receiving their opportunity for a sound basic education, and said that [Hoke County] schools "do not have sufficient resources to provide the pre-kindergarten and other programs and services needed for a sound basic education." As relief for the allegations raised in paragraph 74a, plaintiffs sought an order from the trial court that would, in essence, compel the State to provide remedial and preparatory pre-kindergarten services to "at-risk" four-year-olds in Hoke County.

In assessing the evidence presented at trial pertaining to the allegations of paragraph 74a, the trial court found: (1) that there was an inordinate number of "at-risk" children who were entering the Hoke County school district; (2) that such "at-risk" children were starting behind their non "at-risk" counterparts; and (3) that such "at-risk" children were likely to stay behind, or fall further behind, their non "at-risk" counterparts as they continued their education. In addition, the trial court found that the evidence showed that the State was providing inadequate resources for such "at-risk" prospective enrollees, and that the State's failings were contributing to the "at-risk" prospective enrollees' subsequent failure to avail themselves of the opportunity to obtain a sound basic education. In support of its findings, the trial court tracked and noted the number and percentage of prospective enrollees who ultimately entered Hoke County schools as "at-risk" students, and referred to other evidence demonstrating the students' lack of success as they continued through school. As for evidence concerning the State's failure to identify such "at-risk" prospective enrollees and its failure to provide remedial services so such "at-risk" students could avail themselves of a *Leandro*-conforming educational opportunity, the trial court found that the State's current remedial programs for "at-risk" prospective enrollees in Hoke County were limited to three pre-kindergarten

classes serving eighteen students each. Other testimony at trial indicated that besides the fifty-four students who were attending such remedial classes, there were over 300 more who would benefit from such classes. The trial court additionally noted that the three class offerings were funded by a combination of state "Smart Start" and federal "Title One" monies.

As a consequence of its findings, the trial court concluded that State efforts towards providing remedial aid to "at-risk" prospective enrollees were inadequate. To that point in the proceedings, we agree with the trial court, and hold that the evidence supports its findings of fact and that its findings support its conclusions of law. In our view, judging by its actions, it appears that even the State concedes that "at-risk" prospective enrollees in Hoke County are in need of assistance in order to avail themselves of their right to the opportunity for a sound basic education. Yet there is a marked difference between the State's recognizing a need to assist "at-risk" students prior to enrollment in the public schools and a court order compelling the legislative and executive branches to address that need in a singular fashion. In our view, while the trial court's findings and conclusions concerning the problem of "at-risk" prospective enrollees are well supported by the evidence, a similar foundational support cannot be ascertained for the trial court's order requiring the State to provide pre-kindergarten classes for either all of the State's "at-risk" prospective enrollees or all of Hoke County's "at-risk" prospective enrollees. Certainly, when the State fails to live up to its constitutional duties, a court is empowered to order the deficiency remedied, and if the offending branch of government or its agents either fail to do so or have consistently shown an inability to do so, a court is empowered to provide relief by imposing a specific remedy and instructing the recalcitrant state actors to implement it. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 552, 12 L. Ed. 2d 506, 521 (1964) (upholding order adopting a temporary reapportionment plan for Alabama legislature to ensure the plan complied with equal protection requirements); *Faulkner v. Jones*, 10 F.3d 226, 228-29 (4th Cir. 1993) (affirming lower court's order requiring that the Citadel, an all-male state military college, allow female plaintiff to enroll in its day program); *N.Y. State Ass'n for Retarded Children v. Rockefeller*, 357 F. Supp. 752, 768-69 (E.D.N.Y. 1973) (ordering recalcitrant state school to hire additional staff and make specific repairs as a means to ensure that the institution would meet minimum standards); *Stephenson v. Bartlett*, 357 N.C. 301, 304-05, 582 S.E.2d 247, 249-50 (2003) (referring to the Court's prior approval of a trial court's

interim redistricting maps for use in the 2002 elections). However, such specific court-imposed remedies are rare, and strike this Court as inappropriate at this juncture of the instant case for two related reasons: (1) The subject matter of the instant case—public school education—is clearly designated in our state Constitution as the shared province of the legislative and executive branches; and (2) The evidence and findings of the trial court, while supporting a conclusion that "at-risk" children require additional assistance and that the State is obligated to provide such assistance, do not support the imposition of a narrow remedy that would effectively undermine the authority and autonomy of the government's other branches.[17]

While this Court assuredly recognizes the gravity of the situation for "at-risk" prospective enrollees in Hoke County and elsewhere, and acknowledges the imperative need for a solution that will prevent existing circumstances from remaining static or spiraling further, we are equally convinced that the evidence indicates that the State shares our concerns and, more importantly, that the State has already begun to assume its responsibilities for implementing corrective measures. At the time of the trial, Smart Start, a public-private partnership that provides funds for early childhood welfare programs, was already in place. While Smart Start is not principally a pre-kindergarten education program, monies from the program often help LEAs establish and maintain pre-kindergarten classes. Hoke County and Charlotte-Mecklenburg schools were among a group of LEAs that operated such programs when this case was being heard. Although evidence at trial indicated that the State and Charlotte-Mecklenburg schools were at odds over the effectiveness of the latter's Bright Beginnings program, other testimony and evidence showed that State officials: (1) recognized the need for, and effectiveness of, early intervention programs like pre-kindergarten; and

17. In its brief and at oral argument, the State argued two points on the issue of the pre-kindergarten remedy. First, the State contended that the trial court erred *if* it ordered the pre-kindergarten remedy because this Court, in *Leandro*, established a separate constitutional right to pre-kindergarten for "at-risk" prospective enrollees in Hoke County schools. We agree with the State's contention and declare that no such attendant right was established within the parameters of *Leandro*.

The State also argued that the trial court erred *if* it imposed the pre-kindergarten remedy as relief for a violation of "at-risk" children's rights because, in the State's view, the record does not support a determination that the State has violated the constitutional rights "of any party, or of any student." While we hold that the remedy at issue was not supported by the evidence, findings, and conclusions of the trial court's order, we clearly disagree with the State's contention that the trial court did not conclude there was a State violation of Hoke County students' right to the opportunity to obtain a sound basic education. *See* Part IV, above.

(2) had authorized the establishment of such programs by LEAs that desired them.

Meanwhile, plaintiffs and even the trial court seem to suggest that the State's claims and evidence concerning the issue amounted to little more than lip service, and that the evidence at trial more accurately reflected a showing that the State, to the point of the trial, had done nothing to provide for a statewide pre-kindergarten program and had done nothing to expand pre-kindergarten services to the nearly 300 other Hoke County "at-risk" prospective enrollees who were eligible for such classes. In further support of that view, this Court notes that among all the reports submitted to the trial court by the State since the trial concluded,[18] the State makes no mention of its efforts, continuing or otherwise, on behalf of "at-risk" prospective enrollees in Hoke County. But even if this Court were to concur fully with plaintiffs' view, we note that the question before us does not concern the extent of the State's compliance with the trial court's order regarding pre-kindergarten for "at-risk" prospective enrollees in Hoke County schools, but *whether the State must comply* with that portion of the order. In our view, there is inadequate foundational support for an order that compels the State to provide pre-kindergarten services for all "at-risk" prospective enrollees in Hoke County. At this juncture, the suggestion that pre-kindergarten is the sole vehicle or, for that matter, a proven effective vehicle by which the State can address the myriad problems associated with such "at-risk" prospective enrollees is, at best, premature.

The evidence shows that the State recognizes the extent of the problem—its deficiencies in affording "at-risk" prospective enrollees their guaranteed opportunity to obtain a sound basic education—and its obligation to address and correct it. However, a single or definitive means for achieving constitutional compliance for such students has yet to surface from the depths of the evidentiary sea. Certainly, both sides have conceded that pre-kindergarten is, and can be, an effective method for preparing "at-risk" prospective enrollees for the rigors of their forthcoming education. Nevertheless, neither side has demonstrated to the satisfaction of this Court that it is either the only qualifying means or even the only known qualifying means. The state's

18. The post-trial reports from the State are the result of the trial court's order requiring that the State report every ninety days of its progress in implementing the trial court's remedies. The record in this case has been supplemented, at the request of this Court, with copies of both those reports and the responses from the trial court.

legislative and executive branches have been endowed by their creators, the people of North Carolina, with the authority to establish and maintain a public school system that ensures all the state's children will be given their chance to get a proper, that is, a *Leandro*-conforming, education. As a consequence of such empowerment, those two branches have developed a shared history and expertise in the field that dwarfs that of this and any other Court. While we remain the ultimate arbiters of our state's Constitution, and vigorously attend to our duty of protecting the citizenry from abridgments and infringements of its provisions, we simultaneously recognize our limitations in providing specific remedies for violations committed by other government branches in service to a subject matter, such as public school education, that is within their primary domain. Thus, we conclude that the trial court erred when it imposed at this juncture of the litigation and on this record the requirement that the State must provide pre-kindergarten classes for all "at-risk" prospective enrollees in Hoke County. In our view, based on the evidence presented at trial, such a remedy is premature, and its strict enforcement could undermine the State's ability to meet its educational obligations for "at-risk" prospective enrollees by alternative means. As a consequence, we reverse those portions of the trial court order that may be construed to the effect of requiring the State to provide pre-kindergarten services as the remedy for constitutional violations referenced in Part V of this opinion.

VI. Federal Funds

[6] Although plaintiff-intervenors have not yet presented their case before the trial court, this Court allowed certiorari for review of plaintiff-intervenors' issue concerning the trial court's ruling on the State's use of federal funds targeting education. We address the issue now for two reasons. First, the trial court allowed plaintiff-intervenors' motion to participate in plaintiffs' trial. Therefore, plaintiff-intervenors have a right, as party participants, to complain of errors committed during plaintiffs' proceedings. Second, the issue raised by plaintiff-intervenors will affect the scope of plaintiff-intervenors' forthcoming trial. As a consequence, we address the issue here in order to preempt the potential for error during plaintiff-intervenors' case.

Plaintiff-intervenors contend that the trial court erred by including educational services provided by federal funds, including Title I

funds,[19] as part of its calculations for determining whether the State has met its constitutional obligation to provide all North Carolina children with an equal opportunity to obtain a sound basic education. Plaintiff-intervenors' argument requires us to conduct a two-part inquiry: (1) did the trial court improperly condone the State's use of Title I funds, in violation of 20 U.S.C. § 6321(b)(1); and, (2) did the trial court improperly condone the State's use of such federal funds, in violation of the North Carolina Constitution?

For the reasons cited herein, we conclude that the trial court's consideration of Title I funds did not violate either the applicable federal statutory provisions or the education provisions of our state's Constitution. In addition, we hold that the relevant provisions of the North Carolina Constitution do not forbid the State from including federal funds in its formula for providing the state's children with the opportunity to obtain a sound basic education. While the State has a duty to provide the means for such educational opportunity, no statutory or constitutional provisions require that it is concomitantly obliged to be the exclusive source of the opportunity's funding. In fact, the State and its education agents often position themselves to augment state educational funding requirements by designing and implementing education-related programs—*i.e.*, Bright Beginnings—that qualify for federal subsidies, thereby providing education funds that contribute to the State's effort of providing a *Leandro*-conforming educational opportunity for North Carolina's children.

While the questions of whether federal funds are "supplanting" or "supplementing" state education contributions and whether they must do one or the other are debated vigorously by the parties, *see* 20 U.S.C. § 6321(b)(1) (requiring that federal funds received thereunder be used only to supplement funds that would be made available from non-federal sources and not to supplant such non-federal funds), we decline to enter the fray at this point for two reasons. First, the questions concerning the proper use of federal education funds are controlled by federal law, which specifically grants the United States Secretary of Education ("Secretary") the authority to decide how such funds are distributed. *See id.* § 1234(a) (2002) (stating that the Secretary shall establish an Office of Administrative Law Judges which shall conduct hearings on recovery of and withholding of

19. Title I is now incorporated in the "No Child Left Behind Act of 2001," Pub. L. No. 107-110, 115 Stat. 1439, 20 U.S.C. § 6301-6578. In order to remain consistent with the parties' briefs, and with the trial court's order, we refer to No Child Left Behind funds as Title I funds.

funds); *and Bell v. New Jersey*, 461 U.S. 773, 791, 76 L. Ed. 2d 312, 327 (1983) (stating that "the initial determination" that a State has misapplied Title I funds "is to be made administratively," by the Secretary). Thus, the question of deciding precisely what constitutes a supplementation or a supplantation, a complex question of federal law that this Court is ill-positioned to answer, is one that the federal statutory scheme clearly places in the hands of the Secretary. While plaintiff-intervenors argue that the facts in evidence show that certain North Carolina programs violate the "supplement-not-supplant" mandate, we note that plaintiff-intervenors point to no instance where the Secretary has either refused or withdrawn funding because such funds were being used in violation of 20 U.S.C. § 6321(b)(1). Second, we can find no evidence of clear fault on the part of the State from the funding examples presented at trial or in the plaintiff-intervenors' appellate brief. As a consequence, we can glean from the record no justification that would compel this Court to trespass on the Secretary's deeded turf.

We recognize that if the Secretary, at some point, were to determine that the State was no longer adhering to the "supplement-not-supplant" provisions governing use of federal education funds, this Court may have to reconsider the issue in order to decide: (1) if the funding in question was part of the State's effort to provide children with a sound basic education; and (2) whether the State was obliged to provide substitute funding on its own. However, because such a circumstance has not presented itself in the case at hand, any holding as to its potential effects would amount to mere speculation on the part of this Court. Therefore, in confining our view of the issue to the facts as presented at trial, we conclude that the trial court did not err when it determined that the State was making use of federal education funds in accordance with the applicable federal statutes and the applicable education provisions of the North Carolina Constitution.

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In closing, we recount in summary the Court's major conclusions and holdings concerning the issues of the case before us. Initially, this Court affirms the trial court's conclusion that plaintiffs have made a clear showing that an inordinate number of students in Hoke County are failing to obtain a sound basic education and that defendants have failed in their constitutional duty to provide such students with the opportunity to obtain a sound basic education. In addition, this Court affirms the trial court's ruling that the State must act to correct those deficiencies that were deemed by the trial court as con-

tributing to the State's failure of providing a *Leandro*-comporting educational opportunity.

As for the State's contention that it is the sole arbiter of determining the proper age for attending schools, we agree. Concerning the trial court's remedy for the State's failure to provide Hoke County prospective enrollees with an opportunity to avail themselves of a sound basic education, we reverse. In our view, the trial court's mandate requiring the State to offer pre-kindergarten services to "at-risk" prospective enrollees would be, at this juncture, a premature judicial encroachment on a core function of our state's legislative and executive branches.

In addition, we affirm the trial court's ruling concerning the State's use of federal contributions in designing and implementing an education financing scheme. In our view, the question of whether federal funds are properly being utilized by the State is one best answered by consulting the federal statutory framework that provides for such funds. As the clear language of the applicable statutes expressly grants the Secretary the power to decide the question of whether state expenditures of federal education funds comports with federal law, we defer to the Secretary's judgment and note that there was no evidence at trial showing that the State's use of such funds had spurred retaliatory action by the Secretary. As a consequence, we can find no error in the trial court's ruling that the State's use of federal education funds did not violate either federal law or our state's Constitution.

As for the pending cases involving either other rural school districts or urban school districts, we order that they should proceed, as necessary, in a fashion that is consistent with the tenets outlined in this opinion.

Finally, the Court notes that the original Constitution of our state, adopted on 18 December 1776, included the specific provision "[t]hat a school or schools shall be established by the legislature, for the convenient instruction of youth." N.C. Const. of 1776, para. 41. Some months before, William Hooper, one of North Carolina's delegates to the Continental Congress in Philadelphia, had solicited information from John Adams as to his thoughts on what should be included in a soon-to-be drafted constitution for North Carolina. Modern historians note that at the time, Adams was considered a "renowned authority on constitutionalism," John V. Orth, *The North Carolina State Constitution: A Reference Guide* 2 (1993), and that as he contemplated the future of the country, Adams became convinced that its

success rested on education, *see* David McCullough, *John Adams*, 364 (Simon & Schuster 2001).

Adams, in subsequent correspondence, wrote: "[A] memorable change must be made in the system of education[,] and knowledge must become so general as to raise the lower ranks of society nearer to the higher. The education of a nation[,] instead of being confined to a few schools and universities for the instruction of the few, must become the national care and expense for the formation of the many." *Id.*

This Court now remands to the lower court and ultimately into the hands of the legislative and executive branches, one more installment in the 200-plus year effort to provide an education to the children of North Carolina. Today's challenges are perhaps more difficult in many ways than when Adams articulated his vision for what was then a fledgling agrarian nation. The world economy and technological advances of the twenty-first century mandate the necessity that the State step forward, boldly and decisively, to see that all children, without regard to their socio-economic circumstances, have an educational opportunity and experience that not only meet the constitutional mandates set forth in *Leandro*, but fulfill the dreams and aspirations of the founders of our state and nation. Assuring that our children are afforded the chance to become contributing, constructive members of society is paramount. Whether the State meets this challenge remains to be determined.

AFFIRMED IN PART AS MODIFIED, AND REVERSED IN PART.

NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF PARKS AND RECREATION, PETITIONER v. L. CLIFTON CARROLL, RESPONDENT

No. 329PA03

(Filed 13 August 2004)

1. Public Officers and Employees— state employee—appeal of disciplinary action

A state employee appealing a disciplinary action must pursue the grievance procedures of the agency and then file a contested case with the Office of Administrative Hearings. The employee

has the right to present evidence and examine witnesses, and the Administrative Law Judge must decide the case only on the basis of evidence presented and facts officially noticed and made a part of the record. The Administrative Law Judge must issue a decision (formerly, and in this case, a recommended decision) with written findings and conclusions. Appeal is to the State Personnel Commission, which issues a final agency decision. That decision is subject to judicial review in the Superior Court, and then in the Appellate Division.

2. Administrative Law— whole record and de novo review—distinctions

Grounds for reversal or modification of an administrative agency's final decision fall into two conceptual categories: law-based inquiries and fact-based inquiries. Law-based inquires receive de novo review, in which the trial court gives the matter new consideration and may substitute its own judgment for that of the agency. Fact-based inquiries receive a whole record review, in which the court examines all of the evidence in the record for substantial evidence supporting the agency's decision, and may not substitute its judgment for that of the agency.

3. Administrative Law— de novo review—findings

Except as partially abrogated by N.C.G.S. § 150B-51(c), findings by an administrative agency supported by substantial competent evidence in view of the entire record are binding on a reviewing court conducting de novo review and the court lacks authority to make alternative findings at variance with the agency's. The court is not required to issue new findings when conducting de novo review of a question of law in a contested case (not to be confused with a de novo hearing or trial mandated by statute).

4. Administrative Law— misapprehension of law—remand not required

When an order or judgment is entered under a misapprehension of the law, an appellate court may remand for application of correct legal standards, but remand is not automatically required. Here, the trial court's erroneous application of the de novo review standard did not interfere with the Supreme Court's ability to assess how that standard should have been applied.

5. Public Officers and Employees— park ranger—speeding—not personal misconduct sufficient for demotion

In light of the circumstances, a park ranger's conduct did not rise to a level justifying the disciplinary actions taken where he sped for a brief time on an open stretch of road, with due regard for the safety of others, in the reasonable belief that it was necessary because of a medical emergency.

6. Public Officers and Employees— park ranger—demotion—use of emergency vehicles—perceived medical emergency

A park ranger's alleged willful violation of written guidelines for the use of emergency vehicles did not constitute just cause for his demotion where the whole record supported the conclusion that he was motivated by the reasonably perceived necessity of a medical emergency. The trial court, conducting a whole record review, impermissibly re-weighed the credibility of the ranger's testimony concerning his motivation. The ranger's obligation to assist those in need did not cease to be a law enforcement function because a family member was involved.

7. Administrative Law— judicial review—scope—findings on unresolved issue

The trial court exceeded its scope by making findings and resolving a conflict not addressed by the State Personnel Commission in a contested case involving a park ranger's conduct in dealing with other officers. However, remand was not necessary because the alleged conduct did not constitute just cause for demotion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 157 N.C. App. 717, 580 S.E.2d 99 (2003), affirming an order entered 4 March 2002 by Judge Orlando F. Hudson, Jr., in Superior Court, Wake County. Heard in the Supreme Court 17 February 2004.

Roy Cooper, Attorney General, by Edwin Lee Gavin II, Assistant Attorney General, for petitioner-appellee.

The McGuinness Law Firm, by J. Michael McGuinness, for respondent-appellant.

Richard Hendrix, on behalf of Southern States Police Benevolent Association and North Carolina Police Benevolent Association, amici curiae.

MARTIN, Justice.

On 13 April 1998, petitioner North Carolina Department of Environment and Natural Resources (DENR) demoted respondent Ranger L. Clifton Carroll (Ranger Carroll) from Park Ranger III to Park Ranger II and ordered a 5% reduction in his salary. Ranger Carroll filed a petition for a contested case hearing pursuant to N.C.G.S. § 126-34.1(a), and the case came on for hearing before Administrative Law Judge Beecher R. Gray on 30 July 1999. On 22 October 1999, Judge Gray entered a Recommended Decision directing that Ranger Carroll be reinstated to the position of Ranger III with back pay from the date of his demotion. In a Decision and Order signed 15 March 2000, the State Personnel Commission (SPC) unanimously adopted Judge Gray's recommended findings of fact and conclusions of law and ordered that Ranger Carroll be reinstated with back pay.

On 14 April 2000, DENR filed a petition for judicial review in Wake County Superior Court. On 4 March 2002, the trial court reversed the Decision and Order of the SPC. Ranger Carroll appealed, and the Court of Appeals affirmed the trial court's order in an unpublished opinion. *N.C. Dep't of Env't & Natural Res. v. Carroll*, 157 N.C. App. 717, 580 S.E.2d 99 (2003). We allowed Ranger Carroll's petition for discretionary review and now reverse.

I.

Ranger Carroll has served with DENR's Parks and Recreation Division (the Division) for almost twenty years. Prior to his demotion on 13 April 1998, he held the position of Park Ranger III. In that capacity, Ranger Carroll was responsible for many facets of the operation of Fort Fisher State Recreation Area (Fort Fisher), including hiring and supervising summer staff, protecting natural resources, and providing law enforcement protection. As a sworn law enforcement officer, Ranger Carroll was trained and authorized to carry a sidearm, to use deadly force, and to effect an arrest. Apart from his April 1998 demotion, Ranger Carroll has never been subject to any disciplinary action by the Division.

At 8:00 a.m. on Saturday, 21 February 1998, Ranger Carroll met with a crew of sixty volunteers at Fort Fisher to coordinate the planting of Christmas trees along the dunes of the beach. Ranger Carroll was supervising this project when, at approximately 9:20 a.m., he received a call from his wife informing him that his eighty-five-year-

old mother, who suffered from dementia and resided in the Alzheimer's unit of a nursing home in Southern Pines, had collapsed and was unresponsive. Just a week prior to his mother's collapse, the nursing home, Saint Joseph of the Pines (Saint Joseph's), had informed Ranger Carroll that his mother was showing signs of congestive heart failure. Ranger Carroll had a "very close" relationship with his mother and considered it his "obligation as her son to take care of her."

According to Ranger Carroll, his wife called to inform him that he "needed to call [Saint Joseph's] to confirm [his] permission to admit [his mother] to the hospital." Although his wife had attempted to give her permission to Saint Joseph's over the telephone, Ranger Carroll testified, "there was a question in everyone's mind . . . that [he], Clifton Carroll, her son, had to give the permission." Nurse Linda Reynolds (Nurse Reynolds), who placed the initial call to Ranger Carroll's wife, testified that she had attempted to reach Ranger Carroll to obtain any necessary authorizations, as he had the power of attorney for his mother's health care decisions. Nurse Reynolds described the situation with Ranger Carroll's mother as "very serious."

After trying unsuccessfully to reach Saint Joseph's by cellular telephone, Ranger Carroll resolved to return to his personal vehicle and either begin the long drive to Southern Pines or at least "get somewhere to contact the rest home" in order to attend to his mother's medical emergency. Accordingly, Ranger Carroll quickly relayed instructions to the volunteers in his vicinity and two coworkers who were helping to oversee the project, and then began the six-mile drive to Carolina Beach Park, where his personal vehicle was parked.

Ranger Carroll set out from Fort Fisher in his official vehicle and proceeded north on U.S. Highway 421. Upon entering the city limits of Kure Beach, however, he found himself stuck in slow traffic behind a "line of cars [traveling] bumper to bumper" in his lane. In an attempt to clear traffic, Ranger Carroll turned on his emergency flashers and dash-mounted blue lights. The cars ahead of him did not seem to notice, and soon traffic returned to the posted speed limit of thirty-five miles per hour.

As traffic cleared and he left the Kure Beach city limits, Ranger Carroll exceeded the speed limit for approximately six-tenths of a mile by driving up to forty-five miles per hour in a thirty-five mile per

hour zone. He also exceeded the speed limit for approximately one mile along a straight and open stretch of Dow Road by driving up to seventy-five miles per hour in a fifty-five mile per hour zone. Before exceeding both speed limits, Ranger Carroll confirmed that there was no traffic ahead of him and that there were no pedestrians or vehicles on either side of the road. At the time he exceeded the fifty-five mile per hour limit on Dow Road, the road ran straight and Ranger Carroll had a clear view for a long distance ahead.

Upon arrival at the Carolina Beach State Park office, Ranger Carroll parked his official vehicle near his personal vehicle and ran into the office building to call Saint Joseph's. Using the park office telephone, he successfully reached the Alzheimer's unit and within a few minutes was speaking with Nurse Reynolds, who updated him on his mother's condition.

Unbeknownst to Ranger Carroll, three Carolina Beach police officers arrived by patrol car at the park office while he was talking to Nurse Reynolds. The first to arrive was Detective William Jones, who had observed the flashing blue lights on Ranger Carroll's vehicle while engaged in a traffic stop in Kure Beach. Because the combined use of emergency flashers and blue lights, sometimes referred to as "running emergency traffic," designates an emergency situation to law enforcement officers, Detective Jones had followed Ranger Carroll to Carolina Beach to render assistance, if needed, to a state park officer. Next on the scene were Lieutenant Buck Jarman and Corporal Kurt Bartley, who arrived to provide backup for Detective Jones.

The three officers inspected Ranger Carroll's vehicle and the area around the building. Then, as Lieutenant Jarman waited in his patrol car, Detective Jones and Corporal Bartley walked to the park office building and knocked on the front door approximately four different times. Ranger Carroll heard voices outside the door but could not discern what was being said. Intent on communicating with Nurse Reynolds about his mother, he did not initially respond to the knocking at the door. Because the door to the office was solid and the blinds in the office were shut, Ranger Carroll did not see the uniformed officers standing outside the door or their patrol cars parked outside. After Detective Jones and Corporal Bartley knocked loudly for a fourth time on the office door, Ranger Carroll pulled the telephone from his mouth to respond.

The nature of Ranger Carroll's response was the subject of conflicting testimony at the 30 July 1999 hearing. Corporal Bartley and Detective Jones both testified that Ranger Carroll used profanity in telling them to wait until he was off the telephone, although neither took offense at the language used. Ranger Carroll, however, denied using profanity, testifying that he merely yelled "[w]ait a minute" in a "very loud, drawn-out manner." Nurse Reynolds, who was on the telephone with Ranger Carroll at the time, testified that she heard Ranger Carroll say something to the effect of "I'll be there in a minute" and that she "didn't hear any foul language."

After responding orally to the officers' knocks, Ranger Carroll quickly finished his conversation with Nurse Reynolds and opened the door to the office. Ranger Carroll then explained the situation to the officers and apologized for having caused them to come to the park. The officers told Ranger Carroll there was "no problem" and promptly left the premises, satisfied that their presence was not required.

After the other two officers had left, Detective Jones engaged in further discussion with Ranger Carroll. This discussion was also the subject of conflicting testimony at the 30 July 1999 hearing. Detective Jones testified that he informed Ranger Carroll that the officers had been concerned because of Ranger Carroll's speed and his use of emergency flashers and blue lights. According to Detective Jones, Ranger Carroll, who had previously been "calm," suddenly became indignant and asked in a sarcastic tone of voice, "Why, have you got a problem with me running emergency traffic?" Ranger Carroll, on the other hand, testified that he had asked Detective Jones if "there [was] a problem" in a "quiet and apologetic" manner. According to Ranger Carroll, his intent was to inquire sincerely whether he had "caused [Detective Jones] a problem." Ranger Carroll acknowledged that the words he chose "were awkward and didn't flow smoothly," but insisted that despite his use of the word "problem," he did not ask the question in a confrontational manner, as in the expression, "[H]ave you got a problem with that?" After speaking with Ranger Carroll for a few more seconds, Detective Jones reported to Lieutenant Jarman by radio "that we didn't have an incident going on there," and he too left the scene in his patrol car.

At the time Detective Jones left the park office, he had no intention to file a report about the incident or initiate a misconduct charge against Ranger Carroll. After he debriefed Lieutenant Jarman on his

conversation with Ranger Carroll, however, Detective Jones was instructed to write out a formal incident report. Lieutenant Jarman also contacted Ranger Carroll's supervisor, Carolina Beach State Park Superintendent Terri Taylor, to arrange a meeting to discuss Ranger Carroll's conduct. At the meeting, Lieutenant Jarman informed Superintendent Taylor that he had a complaint about one of the park rangers under her supervision. Lieutenant Jarman complained that the ranger had exhibited a "bad attitude" in his interaction with two Carolina Beach police officers and that Lieutenant Jarman was "concerned" with the ranger's use of his blue lights and emergency flashers.

After confirming that the ranger in question was Ranger Carroll, consulting with her supervisor, and acquiring a written statement from Ranger Carroll, Superintendent Taylor decided to discipline Ranger Carroll by demoting him from Ranger III to Ranger II with a 5% salary reduction. In accordance with departmental policy, Superintendent Taylor submitted a Disciplinary Action Routing Form setting forth the reasons for the disciplinary action taken. The principal reason offered was that Ranger Carroll had "willfully violated the Division Law Enforcement written guidelines on the use of emergency vehicles" by "willfully violat[ing] posted speed limits . . . with activated blue lights . . . while responding to a personal emergency." Superintendent Taylor also stated that Ranger Carroll's actions "constitute[d] a misuse of [his] authority, a misuse of state equipment, a violation of state traffic laws, a violation of written work rules, and caused needless endangerment to [himself] and to the general public." The form concluded that "[Ranger Carroll's] actions both during the incident and when confronted by officers of the Carolina Beach Police Department constitute[d] personal conduct unbecoming a state law enforcement officer." Ranger Carroll timely filed a petition for a contested case hearing to challenge his demotion and salary reduction.

II.

[1] To set the stage for our discussion of the issues presented on appeal, we begin with a brief overview of North Carolina's statutory framework for appeals by public employees of disciplinary actions taken against them by their employing agencies or departments. Under the State Personnel Act (SPA), "[n]o career State employee . . . shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." N.C.G.S. § 126-35(a) (2003); *see also* N.C.G.S. § 126-34.1(a)(1) (2003). A "career State employee" is

defined as a state employee who "[i]s in a permanent position appointment" and "[h]as been continuously employed by the State of North Carolina in a [non-exempt] position . . . for the immediate 24 preceding months." N.C.G.S. § 126-1.1 (2003); *see also* N.C.G.S. § 126-5 (2003) (listing exempt positions).

A career state employee who alleges he or she has been dismissed, demoted, or suspended without pay in violation of N.C.G.S. § 126-35 must first pursue any grievance procedures established by the employing agency or department. N.C.G.S. §§ 126-34, -37(a) (2003); *see also Batten v. N.C. Dep't of Corr.*, 326 N.C. 338, 343, 389 S.E.2d 35, 38-39 (1990), *overruled in part on other grounds by Empire Power Co. v. N.C. Dep't of Env't, Health & Natural Res.*, 337 N.C. 569, 447 S.E.2d 768 (1994). Once such internal grievance procedures have been exhausted, the aggrieved employee may demand a formal evidentiary hearing by filing a petition for a "contested case" with the Office of Administrative Hearings (OAH). N.C.G.S. §§ 126-34, 126-34.1(a)(1), 150B-23 (2003), 150B-25 (2003). A "contested case" is a quasi-judicial administrative proceeding to resolve the rights, duties, or privileges of a person involved in a dispute with an administrative agency. N.C.G.S. §§ 150B-2(2), -22 (2003).

A contested case hearing is presided over by an Administrative Law Judge (ALJ) and is governed by Article 3 of North Carolina's Administrative Procedure Act (APA). N.C.G.S. §§ 126-4.1(a) (2003), 126-34.1(a), 150B-23(a). Among the rights afforded to parties at a contested case hearing are the rights to present physical evidence and to examine and cross-examine witnesses. N.C.G.S. § 150B-25. The ALJ must decide the case only on the basis of the evidence presented and facts officially noticed, all of which are made part of the official record for purposes of administrative and judicial review. N.C.G.S. §§ 150B-37, -41(b), -42(a)-(b), -47 (2003). After the ALJ issues a "recommended decision,"[1] comprised of express written findings of fact and conclusions of law, each party is entitled to pursue an administrative appeal by filing exceptions and written arguments with the SPC. N.C.G.S. §§ 150B-36(a), 150B-34(a) (1999); *see also* 126-37(a).

1. We note that the General Assembly has recently enacted several significant amendments to the APA, including the deletion of the modifier "recommended" from the provisions cited above. These amendments apply to all contested cases commenced on or after 1 January 2001. *See* Act of July 12, 2000, ch. 190, secs. 4, 6-8, 2000 N.C. Sess. Laws 1284, 1285-99 (amending N.C.G.S. §§ 150B-29, -34, -36, and -37). Because Ranger Carroll's contested case was filed on 29 June 1998, they are inapplicable to the case at bar.

Upon review of the parties' arguments and the materials preserved in the official record, the SPC issues its final agency decision. N.C.G.S. §§ 150B-36(a),(b), -37. In addition to its authority under the APA to review the recommended decision of the ALJ, § 150B-36(a), the SPC is specifically authorized under the SPA to reinstate a wrongfully terminated employee and to order a salary adjustment or other suitable action to correct an improper disciplinary action. N.C.G.S. § 126-37(a). Because the SPC's decision and order constitutes a "final agency decision" for purposes of the APA, *id.*, it is subject to judicial review upon the petition of either the employee or the employing agency in the Superior Court of Wake County or the county where the petitioner resides, N.C.G.S. §§ 126-37(b2), 150B-43 (2003). Either party may then seek further review of the trial court's decision in the appellate division. N.C.G.S. § 150B-52 (2003).

III.

[2] We first consider Ranger Carroll's contention that the trial court and Court of Appeals misapplied the applicable standards of review. Specifically, Ranger Carroll asserts that the trial court "erred by engaging in erroneous and improper fact finding" in the course of conducting its "*de novo*" review of questions of law and that the Court of Appeals erred by affirming the Superior Court. We agree.

On judicial review of an administrative agency's final decision, the substantive nature of each assignment of error dictates the standard of review. *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997); *State ex rel. Utils. Comm'n. v. Bird Oil Co.*, 302 N.C. 14, 21, 273 S.E.2d 232, 236 (1981); *see also Amanini v. N.C. Dep't of Human Res.*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118 (1994) (standard of review is not determined "merely by the label an appellant places upon an assignment of error"; court must determine the "actual nature of the contended error"). Under the APA, an agency's final decision may be reversed or modified only if the reviewing court determines that the petitioner's substantial rights may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

(1) In violation of constitutional provisions;

(2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible . . . in view of the entire record as submitted; or

(6) Arbitrary or capricious.

N.C.G.S. § 150B-51(b) (1999).[2]

As one commentator has noted, these grounds for reversal or modification of an agency's final decision fall into two conceptual categories. Charles E. Daye, *Powers of Administrative Law Judges, Agencies, and Courts: An Analytical and Empirical Assessment*, 79 N.C. L. Rev. 1571, 1592 n.79 (2001) [hereinafter Daye, 79 N.C. L. Rev. 1571]. The first four grounds for reversing or modifying an agency's decision—that the decision was "in violation of constitutional provisions," "in excess of the statutory authority or jurisdiction of the agency," "made upon unlawful procedure," or "affected by other error of law," N.C.G.S. § 150B-51(b)(1)-(4)—may be characterized as "law-based" inquiries. *Id.* The final two grounds—that the decision was "unsupported by substantial evidence . . . in view of the entire record" or "arbitrary or capricious," N.C.G.S. § 150B-51(b)(5),(6)—may be characterized as "fact-based" inquiries. *Id.*

It is well settled that in cases appealed from administrative tribunals, "[q]uestions of law receive *de novo* review," whereas fact-intensive issues "such as sufficiency of the evidence to support [an agency's] decision are reviewed under the whole-record test." *In re Greens of Pine Glen Ltd. Part.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003). Thus, where the gravamen of an assigned error is that the agency violated subsections 150B-51(b)(1), (2), (3), or (4) of the APA, a court engages in *de novo* review. *See Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 665, 670, 509 S.E.2d 165, 171, 175 (1998); *Walker v. Bd. of Trs. of N.C. Local Gov'tal Employees' Ret. Sys.*, 348 N.C. 63, 65, 499 S.E.2d 429, 430 (1998); *Gainey v. N.C. Dep't of Justice*, 121 N.C. App. 253, 259, 465 S.E.2d 36, 41 (1996); *Air-A-Plane Corp. v. N.C. Dep't of Env't, Health & Natural Res.*, 118 N.C. App. 118, 124, 454 S.E.2d 297, 301 (1995). Where the substance of the alleged error implicates subsection 150B-51(b)(5) or (6), on the other hand, the reviewing court applies the "whole record test." *Meads*, 349 N.C. at

2. Subsection 150B-51(b)(6) now reads, "Arbitrary, capricious, or an abuse of discretion." *See* Ch. 190, sec. 11, 2000 N.C. Sess. Laws at 1290-91 (amending N.C.G.S. §§ 150B-51(b)(6) (1999)). Because this revision applies only to contested cases commenced on or after 1 January 2001, however, it has no application to the case at bar.

662-63, 509 S.E.2d at 170; *ACT-UP Triangle*, 345 N.C. at 706-07, 483 S.E.2d at 392; *see also Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004); *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002).

Under the *de novo* standard of review, the trial court " 'consider[s] the matter anew[] and freely substitutes its own judgment for the agency's.' " *Mann Media*, 356 N.C. at 13-14, 565 S.E.2d at 17 (quoting *Sutton v. N.C. Dep't of Labor*, 132 N.C. App. 387, 389, 511 S.E.2d 340, 341 (1999)). When the trial court applies the whole record test, however, it "may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*." *Watkins*, 358 N.C. at 199, 593 S.E.2d at 769. "Rather, a court must examine all the record evidence—that which detracts from the agency's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the agency's decision." *Id.* "Substantial evidence" is "relevant evidence a reasonable mind might accept as adequate to support a conclusion." N.C.G.S. § 150B-2(8b) (2003); *see also State ex rel. Comm'r of Ins. v. N.C. Fire Ins. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977).

[3] In the instant case, the trial court engaged in independent fact-finding in the course of conducting its "*de novo*" review of DENR's contention that Ranger Carroll "committed a job-related violation of law, which is just cause for demotion." The court explained that "[u]nder the *de novo* standard, the Court undertakes to review all the evidence of the record, and to make independent findings of fact, as though the Commission had not considered the case." On the basis of its own "*de novo*" findings of fact, the trial court concluded that Ranger Carroll had violated the Dow Road speed limit without lawful justification or excuse and that "this violation of the law of the State alone supported Ranger Carroll's demotion." The Court of Appeals affirmed, stating that "the issue of whether Carroll was authorized to exceed the speed limit" was a question of law subject to *de novo* review and that a trial court conducting *de novo* review of an agency's final decision must " ' "consider a question anew, as if not considered or decided by the agency[] previously . . . [and] must make its own findings of fact . . . and cannot defer to the agency its duty to do so." ' " *N.C. Dep't of Env't & Natural Res. v. Carroll*, No. COA02-714, 2003 N.C. App. LEXIS 953, at *11-12 (unpublished opinion) (citations omitted).

We disagree with this articulation of the *de novo* standard of appellate review. This Court has never stated that a trial court should issue new findings of fact in a contested case when conducting *de novo* review of a question of law.[3] The Court of Appeals has referred to such a rule, however, on at least five occasions, all within the past four years. *See N.C. Forestry Ass'n v. N.C. Dep't of Env't & Natural Res.*, 162 N.C. App. 467, —, 591 S.E.2d 549, 555 (February 3, 2004); *N.C. Dep't of Corr. v. Brunson*, 152 N.C. App. 430, 435, 567 S.E.2d 416, 420 (2002); *Smith v. Richmond Cty. Bd. of Educ.*, 150 N.C. App. 291, 295, 563 S.E.2d 258, 263 (2002); *In re Roberts*, 150 N.C. App. 86, 90, 563 S.E.2d 37, 41 (2002), *cert. denied*, — U.S. —, 157 L. Ed. 2d 38 (2003); *Jordan v. Civil Serv. Bd.*, 137 N.C. App. 575, 577, 528 S.E.2d 927, 929 (2000). The progenitor of this line of cases appears to be *Jordan v. Civil Service Board*, in which the Court of Appeals stated,

> Because " '*[d]e novo*' review requires a court to consider a question anew, as if not considered or decided by the agency" previously (*Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994)), the trial court must make its own findings of fact and conclusions of law and cannot defer to the agency its duty to do so.

137 N.C. App. at 577, 528 S.E.2d at 929.

Notably, *Jordan* cites no direct authority for the proposition that a court exercising *de novo* review should, as a general rule, eschew an agency's findings of fact in favor of its own. Instead, *Jordan*

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3. To be sure, a "*de novo*" hearing or trial conducted pursuant to a specific statutory mandate requires judge or jury to disregard the facts found in an earlier hearing or trial and engage in independent fact-finding. *See, e.g.*, N.C.G.S. §§ 1-301.1(b) (2003) (providing a right to a "trial or hearing de novo" in superior court of an order or judgment entered by the clerk of superior court); 7A-196(b) (2003) ("Upon appeal to superior court [of judgment in criminal case entered by district court judge without jury trial] trial shall be de novo, with jury trial as provided by law."); 7A-228(a) (2003) (judgments of magistrates in small claims cases subject to "trial de novo" in district court); 5A-21(b2) (2003) (superior court must conduct a "hearing de novo" before ordering a party imprisoned for civil contempt); 7A-290 (2003) ("Any [criminal] defendant convicted in district court before the magistrate may appeal to the district court for trial de novo before the district court judge."). A "trial de novo" is a "new trial on the entire case—that is, on both questions of fact and issues of law—conducted as if there had been no trial in the first instance." *Black's Law Dictionary* 1512 (7th ed. 1999). The "trial *de novo*" concept should not be confused with the "*de novo*" standard of review that applies when the trial court acts, as here, in the capacity of an appellate court, *see Mann Media*, 356 N.C. at 12, 565 S.E.2d at 17, and reviews an agency decision for errors of law and procedure, *see In re Greens of Pine Glen*, 356 N.C. at 647, 576 S.E.2d at 319.

appears to rely on the assumption that a court's obligation to "consider a question anew" necessarily implies an obligation to make independent findings of fact based on a review of the record evidence. *Id.* This assumption, however, distorts the very nature of the "*de novo*" standard of appellate review applicable to contested cases arising under the APA.

When the trial court exercises judicial review over an agency's final decision, it acts in the capacity of an appellate court. *Mann Media*, 356 N.C. at 12, 565 S.E.2d at 17; *Avant v. Sandhills Ctr. for Mental Health*, 132 N.C. App. 542, 545, 513 S.E.2d 79, 82 (1999). It is the traditional function of appellate courts to review the decisions of lower tribunals for errors of law or procedure, *see* N.C. Const. art. IV, § 12, N.C.G.S. § 7A-27(b) (2003), N.C. R. App. P. 16(a), while generally deferring to the latter's "unchallenged superiority" to act as finders of fact, *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233, 113 L. Ed. 2d 190, 199 (1991); *see also State v. Braxton*, 344 N.C. 702, 709, 477 S.E.2d 172, 176 (1996) ("If supported by competent evidence, the trial court's findings of fact are conclusive on appeal."). In a contested case under the APA, as in a legal proceeding initiated in District or Superior Court, "there is but one fact-finding hearing of record when witness demeanor may be directly observed." Julian Mann III, *Administrative Justice: No Longer Just a Recommendation*, 79 N.C. L. Rev. 1639, 1653 (2001) [hereinafter, Mann, 79 N.C. L. Rev. 1639]. Thus, the ALJ who conducts a contested case hearing possesses those "institutional advantages," *Salve Regina Coll.*, 499 U.S. at 233, 113 L. Ed. 2d at 199, that make it appropriate for a reviewing court to defer to his or her findings of fact. Moreover, the *Jordan* rule would render an administrative agency's statutory responsibility to find facts in contested cases a pointless formality, at least in cases where errors of law are alleged. The judicial review provisions of the APA should not be construed to substantially undermine the General Assembly's judgment that administrative agencies, not courts, should perform the primary fact-finding function in contested cases. *See* N.C.G.S. §§ 150B-34(a), -36(b) (ALJ and agency decisions to include express findings of fact); *cf. Watson v. N.C. Real Estate Comm'n*, 87 N.C. App. 637, 640, 362 S.E.2d 294, 296 (1987) (stating that "whole record" standard of review is not intended to encourage "judicial duplication" of administrative findings).

We observe that newly enacted subsection 150B-51(c) requires a reviewing court to engage in independent "*de novo*" fact-finding in all contested cases commenced on or after 1 January 2001 where

the agency fails to adopt the ALJ's initial decision. Ch. 190, sec. 11, 2000 N.C. Sess. Laws at 1290-91 (codified as N.C.G.S. § 150B-51(c) (2003)); *Cape Med. Transp., Inc. v. N.C. Dep't of Health & Human Servs.*, 162 N.C. App. 14, 21, 590 S.E.2d 8, 13 (2004); *Town of Wallace v. N.C. Dep't of Env't & Natural Res.*, 160 N.C. App. 49, 54 n.1, 584 S.E.2d 809, 813-14 n.1 (2003). Subsection 150B-51(c) provides, in pertinent part:

> In reviewing a final decision in a contested case in which an administrative law judge made a decision, in accordance with G.S. 150B-34(a), and the agency does not adopt the administrative law judge's decision, the court *shall review the official record, de novo, and shall make findings of fact* and conclusions of law. In reviewing the case, the court shall not give deference to any prior decision made in the case and shall not be bound by the findings of fact or the conclusions of law contained in the agency's final decision.

N.C.G.S. § 150B-51(c) (2003) (emphasis added). This subsection requires courts to engage in independent fact-finding but only when the agency rejects the ALJ's decision. *Id.* It does not redefine the "*de novo*" standard governing judicial review over questions of law. *See* Mann, 79 N.C. L. Rev. 1639, 1654-55 (describing the addition of section 150B-51(c) as a "substantial departure from previous statutory law," but noting that "[w]hen the agency adopts the ALJ decision, there is very little change in the appellate review standards"); Daye, 79 N.C. L. Rev. 1571, 1589 ("When the agency adopts the ALJ's decision, the scope of the review will be the traditional one: limited substantial evidence review of facts and de novo review of questions of law."). Moreover, because subsection 150B-51(c) applies only to contested cases commenced on or after 1 January 2001, it has no application to the instant case.

Prior to the enactment of N.C.G.S. § 150B-51(c), this Court consistently held that where the findings of fact of an administrative agency are supported by substantial competent evidence in view of the entire record, they are binding on the reviewing court, and that court lacks authority to make alternative findings at variance with the agency's. *In re Appeal of AMP, Inc.*, 287 N.C. 547, 561, 215 S.E.2d 752, 761 (1975); *In re Appeal of Reeves Broad. Corp.*, 273 N.C. 571, 579, 160 S.E.2d 728, 733 (1968); *In re Property of Pine Raleigh Corp.*, 258 N.C. 398, 404-05, 128 S.E.2d 855, 860 (1963); *In re Berman*, 245 N.C. 612, 616-17, 97 S.E.2d 232, 235 (1957). Except insofar as it has been partially abrogated by N.C.G.S. § 150B-51(c), we now reaffirm

this longstanding principle. To the extent that cases such as *Jordan* and its progeny suggest otherwise, they are overruled.

[4] When an " 'order or judgment appealed from was entered under a misapprehension of the applicable law,' " an appellate court may remand for application of the correct legal standards. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 469, 597 S.E.2d 674, 693 (2004) (quoting *Concerned Citizens of Brunswick Cty. Taxpayers Ass'n v. Holden Beach Enters.*, 329 N.C. 37, 54-55, 404 S.E.2d 677, 688 (1991)); *see also State v. McDowell*, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984), *habeas proceeding at McDowell v. Dixon*, 858 F.2d 945 (4th Cir. 1988). This Court has also recognized, however, that in cases appealed from administrative tribunals, the trial court's erroneous application of the appropriate standard of review does not automatically necessitate remand. *See, e.g.*, *Mann Media*, 356 N.C. at 15-16, 565 S.E.2d at 18-19 (declining to remand for proper application of the appropriate standard of review in the interests of judicial economy); *Brooks v. McWhirter Grading Co.*, 303 N.C. 573, 579-80, 281 S.E.2d 24, 28-29 (1981) (applying the appropriate provisions of N.C.G.S. § 150A-51(b) based on the nature of the errors alleged on appeal without considering the standards of review applied by the trial court and Court of Appeals); *N.C. Savings & Loan League v. N.C. Credit Union Comm'n*, 302 N.C. 458, 464-65, 276 S.E.2d 404, 409-10 (1981) (exercising *de novo* review pursuant to N.C.G.S. § 150A-51(4) based on the nature of the issues presented on appeal, despite the fact the proper standard of review "has nowhere been addressed in the lower courts"); *Bird Oil Co.*, 302 N.C. at 19-22, 273 S.E.2d at 234-36 (reviewing issues on appeal from administrative agency under the standard of review the Court of Appeals and trial court *should have* applied).

In *Capital Outdoor, Inc. v. Guilford County Board of Adjustment*, a divided panel of the Court of Appeals remanded to the trial court because it could not determine what standard of review the trial court had utilized to review the decision of the Guilford County Board of Adjustment. 146 N.C. App. 388, 391-92, 552 S.E.2d 265, 268 (2001). In explaining this disposition, the Court of Appeals majority stated that "to speculate which standard of review the superior court utilized presents a dangerous path which we are not inclined to travel." *Id.* at 391, 552 S.E.2d at 268. In dissent, Judge Greene stated that remand was unnecessary because an appellate court's obligation to review for errors of law, *see* N.C.G.S. §§ 7A-27(b), 150B-52, N.C. R. App. P. 16(a), "can be accomplished by addressing the dispositive issue(s) before the agency and the su-

perior court" and determining how the trial court *should have* decided the case upon application of the appropriate standards of review. *Id.* at 392, 552 S.E.2d at 268 (Greene, J., dissenting). On appeal, this Court "reverse[d] the decision of the Court of Appeals as to the standard of review" for the reasons stated in Judge Greene's dissenting opinion, thereby adopting Judge Greene's analysis of the standard of review issue for precedential purposes. *Capital Outdoor, Inc. v. Guilford Cty. Bd. of Adjust.*, 355 N.C. 269, 559 S.E.2d 547 (2002). Accordingly, in cases appealed from an administrative tribunal under the APA, it is well settled that the trial court's erroneous application of the standard of review does not automatically necessitate remand, provided the appellate court can reasonably determine from the record whether the petitioner's asserted grounds for challenging the agency's final decision warrant reversal or modification of that decision under the applicable provisions of N.C.G.S. § 150B-51(b). *Shackleford-Moten v. Lenoir Cty. DSS*, 155 N.C. App. 568, 572, 573 S.E.2d 767, 770 (2002).

In the present case, the trial court's erroneous articulation and application of the *de novo* standard of review in no way interferes with our ability to assess how that standard *should have been applied* to the particular facts of this case. Moreover, the status of Ranger Carroll's employment and salary has remained unsettled during the past six years of ongoing litigation. Thus, in the interests of judicial economy and fairness to the parties, we proceed to consider the substantive issues on appeal.

IV.

[5] The dispositive issue before this Court is whether the Court of Appeals erred in affirming the trial court's judgment that Ranger Carroll had engaged in "unacceptable personal conduct" constituting "just cause" for his demotion under N.C.G.S. § 126-35 and 25 NCAC 1J .0604(b) (June 2004).

Determining whether a public employer had just cause to discipline its employee requires two separate inquiries: first, "whether the employee engaged in the conduct the employer alleges," and second, "whether that conduct constitutes just cause for [the disciplinary action taken]." *Sanders v. Parker Drilling Co.*, 911 F.2d 191, 194 (9th Cir. 1990), *cert. denied*, 500 U.S. 917, 114 L. Ed. 2d 101 (1991). Because the first of these inquiries is a question of fact, the SPC's factual findings as to the conduct alleged are reviewed under the whole record test. *See Skinner v. N.C. Dep't of Corr.*, 154 N.C. App.

270, 274-78, 572 S.E.2d 184, 188-90 (2002); *Kea v. Department of Health & Human Servs.*, 153 N.C. App. 595, 606, 570 S.E.2d 919, 926 (2002), *aff'd per curiam*, 357 N.C. 654, 588 S.E.2d 467 (2003). Because the latter inquiry is a question of law, the SPC's conclusion as to whether the employee's conduct gave rise to "just cause" for the disciplinary action taken is reviewed *de novo*. *See Skinner*, 154 N.C. App. at 280, 572 S.E.2d at 191; *Gainey*, 121 N.C. App. at 259 n.2, 465 S.E.2d at 41 n.2; *Daye*, 79 N.C. L. Rev. 1571, 1592-93. In all contested cases commenced prior to 1 January 2001, the aggrieved employee bears the burden of proving that he was disciplined without just cause. *See Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 328, 507 S.E.2d 272, 281 (1998) (noting that the burden of proof was not expressly addressed in the SPA and " 'judicially allocat-[ing]' " that burden to the employee " 'on considerations of policy, fairness, and common sense' " (quoting 1 Kenneth S. Broun, Brandis & Broun on North Carolina Evidence § 37 (4th ed. 1993)). *But see* Ch. 190, sec. 13, 2000 N.C. Sess. Laws at 1292 (codified as N.C.G.S. § 126-35(d) (2003)) (providing that for all contested cases commenced on or after 1 January 2001, the burden of proving that an employee was disciplined for "just cause" shall "rest[] with the department or agency employer").

By statute, "just cause" for the dismissal, suspension, or demotion of a career state employee may be established only on the basis of "unsatisfactory job performance" or "unacceptable personal conduct." N.C.G.S. § 126-35(a),(b); *see also* 25 NCAC 1J .0604, .0612 (June 2004). Here, it is undisputed that Ranger Carroll is a "career state employee" subject to the protections of N.C.G.S. § 126-35(a), and at no stage of these proceedings has DENR alleged that his job performance with the Division has been anything but satisfactory. Accordingly, Ranger Carroll's demotion can be sustained only on the ground of "unacceptable personal conduct."

Neither "just cause" nor "unacceptable personal conduct" is defined by statute. Pursuant to its rule-making authority, however, the SPC has defined "unacceptable personal conduct" to include, in pertinent part,

> (1) conduct for which no reasonable person should expect to receive prior warning; or
>
> (2) job-related conduct which constitutes a violation of state or federal law; or
>
> . . . .

(4) the willful violation of known or written work rules; or

(5) conduct unbecoming a state employee that is detrimental to state service.

25 NCAC 1J .0614(i)(1),(2),(4),(5) (June 2004).

In the present case, the ALJ and the SPC both concluded that Ranger Carroll had demonstrated that DENR lacked "just cause" for imposing discipline on the basis of "unacceptable personal conduct." Specifically, the SPC concluded that Ranger Carroll's "reasonable belief" that he could treat the medical emergency with his mother "as one of necessity" authorizing him to use his vehicle's emergency devices and to exceed the speed limit along an open section of road prevented his actions from constituting "conduct for which no reasonable person should expect to receive prior warning." 25 NCAC 1J .0614(i)(1). The SPC further concluded that Ranger Carroll did not engage in "unacceptable personal conduct" on the basis of his alleged "violations of State law" and "willful violation of written work rules." The SPC stated that "[w]hile this may be a close question, justice would appear to support the proposition that [Ranger Carroll] could, under the immediate press of what he had been told about his mother's collapse, proceed under the same privilege or exception to [the Division's] policies and guidelines as he could for some other person involved in a health related situation deemed an emergency . . . ."

The trial court reversed the SPC's final decision, concluding that Ranger Carroll had engaged in unacceptable personal conduct by (1) violating the posted speed limit on Dow Road without lawful justification or excuse, (2) willfully violating the Division's written guidelines for the use of emergency vehicles, and (3) engaging in "conduct unbecoming a State employee, and . . . detrimental to State service" in his interaction with Detective Jones and Corporal Bartley. The Court of Appeals affirmed the trial court's judgment on the first ground alone, holding that Ranger Carroll's violation of the speed limit on Dow Road constituted unacceptable personal conduct providing "just cause" for his demotion pursuant to 25 NCAC 1J .0614(i)(2). In the interest of achieving finality in the instant case, we consider each of the asserted grounds for DENR's demotion of Ranger Carroll.

First, DENR argues, and the Court of Appeals held, that Ranger Carroll violated state law by exceeding the speed limit on Dow Road,

thus engaging in "unacceptable personal conduct" constituting "just cause" for his demotion. *See* 25 NCAC 1J .0614(i)(2). The Court of Appeals stated that section 20-145 of the Motor Vehicle Act suspends application of speed limitations to law enforcement officers only when an officer is "in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violation." N.C.G.S. § 20-145 (2003). Because Ranger Carroll was neither chasing nor apprehending violators of the law at the time he exceeded the Dow Road speed limit, the Court of Appeals reasoned, his decision to exceed the speed limit violated state law, thus constituting "unacceptable personal conduct" under N.C.G.S. § 126-35 and 25 NCAC 1J .0614(i)(2).

We disagree, however, with the premise that N.C.G.S. § 20-145 necessarily sets forth the *exclusive* conditions under which a law enforcement officer may be legally entitled to exceed a posted speed limit. *See Parish v. Hill*, 350 N.C. 231, 238, 513 S.E.2d 547, 551 (1999) (noting that N.C.G.S. § 20-145 establishes "a general standard of care" for police officers involved in motor vehicle pursuits "rather than an exemption from speed laws"); *cf. Collins v. Christenberry*, 6 N.C. App. 504, 509, 170 S.E.2d 515, 518 (1969) (rejecting argument that specificity of N.C.G.S. § 20-145 reflects legislative intent *not* to exempt law enforcement officers, under any circumstances, from other provisions of the Motor Vehicle Act). The speed limit laws of this state were enacted "for the protection of persons and property and in the interest of public safety, and the preservation of human life." *State v. Norris*, 242 N.C. 47, 53, 86 S.E.2d 916, 920 (1955). Following the Court of Appeals' reasoning, a police officer who exceeds the speed limit while rushing a wounded partner to a nearby emergency room, or while racing to render assistance at the scene of a fire, would necessarily be in violation of state law and subject to demotion or termination at the election of his or her public employer. We do not believe the General Assembly intended to impose such a rigid restriction on law enforcement officers' vital discretion to make split-second decisions in matters affecting public safety. *Cf. Whitley v. Albers*, 475 U.S. 312, 320, 89 L. Ed. 2d 251, 261 (1986) (noting that courts are appropriately hesitant "to critique in hindsight [law enforcement] decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance").

We need not decide, however, under what circumstances a law enforcement officer may legally exceed the speed limit, or whether Ranger Carroll was legally entitled to do so on the facts of the instant

case. Even assuming Ranger Carroll lacked legal justification or excuse for exceeding the Dow Road speed limit, in light of all the facts and circumstances of this case, his conduct did not warrant demotion under the "just cause" standard. We acknowledge that SPC regulations define "just cause" to include "unacceptable personal conduct" and "unacceptable personal conduct" to include "job-related conduct which constitutes a violation of state or federal law." 25 NCAC 1J .0604(b)(2), .0614(i)(2). Nonetheless, the fundamental question in a case brought under N.C.G.S. § 126-35 is whether the disciplinary action taken was "just." Inevitably, this inquiry requires an irreducible act of judgment that cannot always be satisfied by the mechanical application of rules and regulations.

"Just cause," like justice itself, is not susceptible of precise definition. *See, e.g.*, 1 Isidore Silver, *Public Employee Discharge and Discipline*, § 3.01, at 237 (3d ed. 2001); Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 Duke L.J. 594, 599 (1985); Warren Martin, *Employment at Will: Just Cause Protection through Mandatory Arbitration*, 62 Wash. L. Rev. 151, 164 (1987). It is a " 'flexible concept, embodying notions of equity and fairness,' " that can only be determined upon an examination of the facts and circumstances of each individual case. *Crider v. Spectrulite Consortium, Inc.*, 130 F.3d 1238, 1242 (7th Cir. 1997) (quoting *Arch of Ill. v. Dist. 12, UMW*, 85 F.3d 1289, 1294 (7th Cir. 1996)); *see also IMC-Agrico Co. v. Int'l Chem. Workers Council*, 171 F.3d 1322, 1327-28 (11th Cir. 1999) (employee's infraction of work rules did not automatically establish "just cause" for termination under collective bargaining agreement; arbitrator acted within his discretion in considering "seriousness of the offense and the employee's work record"). Thus, not *every* violation of law gives rise to "just cause" for employee discipline. *See Steeves v. Scotland Cty. Bd. of Health*, 152 N.C. App. 400, 408-09, 567 S.E.2d 817, 822-23 (2002) (rejecting contention that any violation of state law necessarily constitutes "unacceptable personal conduct" for purposes of the SPA), *disc. rev. denied*, 356 N.C. 444, 573 S.E.2d 512 (2002); *accord State ex rel. Ashley v. Civil Serv. Comm'n*, 183 W. Va. 364, 367-68, 395 S.E.2d 787, 790-91 (1990) (per curiam) (stating that "just cause" provision in state civil service act requires " 'misconduct of a substantial nature' " and does not encompass " 'technical violations of statute or official duty without a wrongful intention' " (citations omitted)).

In the instant case, we cannot conclude that DENR had "just cause" to demote Ranger Carroll.[4] It is undisputed that Ranger Carroll has been a reliable and valued employee of DENR's Division of Parks and Recreation for almost twenty years with no prior history of disciplinary actions against him. Superintendent Taylor, his direct supervisor, testified that Ranger Carroll had always been a "very good employee" who comported himself with honesty, integrity, and respect for others. When asked whether he "set a good example as a law enforcement officer," Superintendent Taylor responded that she "kn[ew] of no situations where he has been anything other than what he was supposed to be." Moreover, the SPC found that Ranger Carroll "was told that his permission was needed to admit [his mother] to the hospital" and that he exceeded the speed limit because of his reasonable belief that he could treat the emergency situation with his mother as "one of necessity." Finally, it is undisputed that Ranger Carroll exceeded the speed limit on Dow Road for just over one mile, and only after he had determined that the road ran straight and there were no vehicles or pedestrians ahead of him. The fact that Ranger Carroll employed the blue lights and emergency flashers on his vehicle during this brief interval further demonstrates his concern for public safety. In light of these somewhat unusual facts and circumstances, Ranger Carroll's decision to exceed the posted speed limit for a brief period on an open stretch of road, while exercising due regard for the safety of others and in the reasonable belief that such action was necessitated by a medical emergency, did not rise to the level of personal misconduct that would justify the substantial disciplinary actions taken against him.

[6] We next address whether Ranger Carroll's alleged "willful violation" of the Division's written guidelines for the use of emergency vehicles constituted "just cause" for his demotion. By SPC regulation, "unacceptable personal conduct" may be predicated upon a "willful violation of known or written work rules." 25 NCAC 1J .0614(i)(4). Citing this rule, DENR asserts that Ranger Carroll willfully violated the Division's written work guidelines for the use of emergency vehicles. The relevant portions of these guidelines are excerpted below:

4. We emphasize that we do not necessarily *condone* Ranger Carroll's conduct; nor do we hold that his decision to exceed the speed limit was legally justified or excused. Indeed, public employees entrusted with the maintenance or operation of state vehicles should always be mindful of "the interests of the public in not being subjected to unreasonable risks of injury." *Parish*, 350 N.C. at 236, 513 S.E.2d at 550; *see also Norris v. Zambito*, 135 N.C. App. 288, 293-95, 520 S.E.2d 113, 117-18 (1999). Our inquiry here, however, is limited to the issue of whether DENR had "just cause," under all the facts and circumstances, to demote Ranger Carroll.

12.1.1 Operation of an emergency vehicle with emergency devices activated may occur:

12.1.1.1 Only when the vehicle is operated by a commissioned employee performing law enforcement functions. At such times, when in the reasonable belief of the operator, an emergency is imminent or exists and the activation of emergency warning devices is necessary in order to protect life or render assistance.

. . . .

12.1.4 Emergency vehicles may be operated to a maximum of 30 MPH in excess of the posted or prima facie speed limit.

Guideline 12.1.1.1 permits a law enforcement officer to use emergency warning devices when the officer has a "reasonable belief" that an emergency situation exists. The guidelines do not demand certainty; nor do they provide any objective definition of the word "emergency." Thus, it is immaterial whether Ranger Carroll's permission was in fact required to admit his mother to the hospital, so long as he had a "reasonable belief" that his assistance was required to "protect life or render assistance." In the present case, the SPC found as a fact that Ranger Carroll had such a "reasonable belief." On the basis of this finding, the SPC concluded that Ranger Carroll's conduct did not constitute a willful violation of work rules.

The trial court reviewed the SPC's findings regarding Ranger Carroll's motivations for his conduct under the whole record test. Because Ranger Carroll's subjective state of mind is manifestly a question of fact, this was the correct standard of review to apply. *See Kea*, 153 N.C. App. at 606, 570 S.E.2d at 926 (applying whole record test to factual issues in public employee discipline case). The trial court erred, however, in its application of that test.

Based on its own review of the record evidence, the trial court rejected the SPC's finding that Ranger Carroll had a "reasonable belief" that he could treat the situation as one of medical necessity. The court observed that (1) Ranger Carroll's wife did not testify at the hearing and (2) other evidence in the record suggested that his mother was already being transported to the hospital by the time Saint Joseph's attempted to contact him. In light of this evidence, the court concluded that "Ranger Carroll's hearing testimony, that he was required to give permission for his mother to be admitted to the hos-

pital, [was] of insubstantial weight" to support [the SPC's] finding. The court then stated, "Under the whole record review standard, the Court is authorized to find, and finds that the facts are that Ranger Carroll, when he exceeded the Dow Road speed limit [and used his blue lights and emergency flashers], did so because he desired to obtain further information on his mother." Because this purpose did not give Ranger Carroll authority to exceed the speed limit or employ the emergency devices on his vehicle, the trial court concluded, Ranger Carroll's "willful" noncompliance with the guidelines justified DENR's decision to demote him.

On appeal, the Court of Appeals declined to uphold Ranger Carroll's demotion on these grounds, stating that the trial court "incorrectly performed whole record review" by making unwarranted new findings of fact. We agree.

It is well settled that "it is for the administrative body, in an adjudicatory proceeding, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence[,] if any." *State ex rel. Utils. Comm'n v. Duke Power Co.*, 305 N.C. 1, 21, 287 S.E.2d 786, 798 (1982). Accordingly, a reviewing court applying the whole record test may not independently weigh the evidence of record or substitute its evaluation of the evidence for that of the adjudicating agency. *In re Appeal of AMP, Inc.*, 287 N.C. at 561-62, 215 S.E.2d at 761. Rather, a court must review all the evidence of record to determine whether the agency's findings have a "rational basis" in the record. *In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979).

In the present case, the trial court impermissibly re-weighed the credibility of Ranger Carroll's testimony concerning his motivations for speeding and operating the blue lights and emergency flashers on his vehicle. Although the trial court, reviewing a cold record, did not find Ranger Carroll's testimony credible, the ALJ, who had the opportunity to observe witness demeanor, apparently did. In addition, the trial court ignored the corroborating testimony of Nurse Reynolds, who testified that she sought to contact Ranger Carroll in order to obtain any necessary authorizations, as well as Ranger Carroll's written statement that he held the power of attorney for his mother's health care decisions. In sum, the evidence of record, taken as a whole, supports a reasonable conclusion that Ranger Carroll was motivated by his "reasonable belief" that his conduct was necessitated by a medical emergency. Accordingly, the trial court's indepen-

dent findings of fact concerning Ranger Carroll's motivation for his conduct, and the conclusions of law based thereon, were in error.[5]

DENR argues, however, that even if Ranger Carroll reasonably believed that an emergency existed, he was not authorized under Guideline 12.1.1.1 to exceed the speed limit or to use the emergency devices on his vehicle. Guideline 12.1.1.1 permits the use of emergency devices "[o]nly when the vehicle is operated by a commissioned employee performing law enforcement functions." According to DENR, the emergency situation with Ranger Carroll's mother was a "personal" emergency, not a work-related one, and thus Ranger Carroll's actions in tending to his mother's needs were not a "law enforcement function." We disagree.

Aiding citizens in distress is one of the many important ways in which law enforcement officers serve the citizens of this state. Indeed, North Carolina law enforcement officers are specifically trained to render assistance to persons in need of medical attention. *See* N.C. Justice Acad., *Basic Law Enforcement Training: Instructor Notebook*, § .09.01A, at 1-44 (1985). While the circumstances presented here certainly imparted a personal dimension to Ranger Carroll's concerns, his professional obligation to assist those in need of emergency medical care did not cease to be a "law enforcement function" simply because the person in distress happened to be a member of his family.

In addition, a reasonable officer could interpret guideline 12.1.4, concerning the maximum speed at which an emergency vehicle may be operated, to authorize an officer to exceed the speed limit by up to thirty miles per hour whenever, in the officer's reasonable belief, an emergency situation was present. Because the SPC found that Ranger Carroll had such a reasonable belief, Ranger Carroll's decision to speed, even assuming it was technically in violation of

5. We observe that there is some authority for the proposition that a reviewing court may make independent findings of fact once it has properly determined that an agency's findings are not supported by substantial evidence. *See Beaufort Cty. Sch. v. Roach*, 114 N.C. App. 330, 335, 443 S.E.2d 339, 341 (1994), *disc. rev. denied*, 336 N.C. 602, 447 S.E.2d 384 (1994) *and cert. denied*, 513 U.S. 989, 130 L. Ed. 2d 398 (1994); *Scroggs v. N.C. Criminal Justice Educ. & Training Standards Comm'n*, 101 N.C. App. 699, 702-03, 400 S.E.2d 742, 745 (1991). *But see State ex rel. Utils. Comm'n v. Mead Corp.*, 238 N.C. 451, 465, 78 S.E.2d 290, 300 (1953) (remanding to Utilities Commission for new findings of fact where trial court correctly determined that agency's initial findings were not supported by substantial evidence in view of the entire record). Because we do not agree with the trial court's conclusion that the SPC's findings were unsupported by substantial evidence, we need not resolve this question here.

the Division's guidelines, was not a "willful" violation for purposes of 25 NCAC 1J .0614(i)(4).

[7] Finally, we consider the trial court's conclusion that DENR had just cause to demote Ranger Carroll because Ranger Carroll engaged in "conduct unbecoming a state employee that is detrimental to state service," 25 NCAC 1J .0614(i)(5), in his interaction with Detective Jones and Corporal Bartley.

The trial court purported to apply the whole record test in reviewing DENR's contention that Ranger Carroll "engaged in unprofessional behavior towards members of the Carolina Beach Police Department." Although the SPC made no express finding as to whether Officer Carroll had behaved inappropriately in his interaction with Officer Jones, the trial court found that "Ranger Carroll lashed out at Officer Jones, because he was angry and embarrassed that he was reminded that he had improperly run emergency traffic." On this basis, the court concluded that Ranger Carroll's "lashing out was conduct unbecoming a State employee, and . . . detrimental to State service" upon which the SPC should have sustained Ranger Carroll's demotion.

As we stated in *In re Rogers*, "the 'whole record' test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." 297 N.C. at 65, 253 S.E.2d at 922. In the instant case, the ALJ and the SPC set out the conflicting testimony concerning Ranger Carroll's interaction with Detective Jones and Corporal Bartley, but made no express findings as to whether Ranger Carroll had used profanity or otherwise "lashed out" at the two officers. It is for the agency, not a reviewing court, "to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence[,] if any." *Duke Power Co.*, 305 N.C. at 21, 287 S.E.2d at 798. Thus, the trial court exceeded the scope of its reviewing power by reaching out *sua sponte* to resolve a conflict in the record evidence not addressed by the SPC. *See Dunlap v. Clarke Checks, Inc.*, 92 N.C. App. 581, 584-85, 375 S.E.2d 171, 174 (1989); *In re Bolden*, 47 N.C. App. 468, 471, 267 S.E.2d 397, 398-99 (1980).

Ordinarily, when an agency fails to make a material finding of fact or resolve a material conflict in the evidence, the case must be remanded to the agency for a proper finding. *Dunlap*, 92 N.C. App. at

584-85, 375 S.E.2d at 174. In the instant case, however, further proceedings are neither necessary nor advisable. Even assuming Ranger Carroll briefly "lashed out" at Detective Jones and Corporal Bartley in the stress of the moment, such a momentary lapse in judgment does not, under all the circumstances presented, constitute "just cause" for his demotion and attendant salary reduction.

Although there is no bright line test to determine whether an employee's conduct establishes "unacceptable personal conduct" and thus "just cause" for discipline, we draw guidance from those prior cases where just cause has been found. Our survey of the relevant cases indicates that "unacceptable personal conduct" implies misconduct of a much more serious nature than that alleged here. *See, e.g., Kea*, 153 N.C. App. 595, 570 S.E.2d 919 (employee violated known and written work rules, disobeyed direct order from superior, and made crude and offensive sexual advances to a co-worker); *Davis v. N.C. Dep't of Crime Control & Pub. Safety*, 151 N.C. App. 513, 565 S.E.2d 716 (2002) (highway patrol officer was stopped for speeding and driving while intoxicated); *N.C. Dep't of Corr. v. McNeely*, 135 N.C. App. 587, 521 S.E.2d 730 (1999) (correctional officer abandoned post without authorization and failed to remain alert while on duty); *Gray v. Orange Cty. Health Dep't*, 119 N.C. App. 62, 457 S.E.2d 892 (1995) (health department inspector engaged in inappropriate sexually oriented behavior during inspections of catering businesses owned by women), *disc. rev. denied*, 341 N.C. 649, 462 S.E.2d 511 (1995); *Leiphart v. N.C. Sch. of the Arts*, 80 N.C. App. 339, 342 S.E.2d 914 (1986) (division director at North Carolina School of the Arts surreptitiously organized meetings with other division directors to discuss complaints against their superior), *cert. denied*, 318 N.C. 507, 349 S.E.2d 862 (1986). In addition, assuming Ranger Carroll used profanity or otherwise "lashed out" at two fellow law enforcement officers, he did so under the extreme emotional stress of knowing that his mother, who suffered from Alzheimer's disease and had recently shown signs of congestive heart failure, was being transported to the hospital following a sudden collapse. In determining whether this alleged "lashing out" constitutes "conduct unbecoming a state employee," we cannot wholly ignore the influence of the natural bonds of filial devotion on Ranger Carroll's emotional state. Finally, we note that Detective Jones testified that he felt sympathy for Ranger Carroll, and both he and Corporal Bartley testified that they did not take personal offense with anything Ranger Carroll said or did. In light of these facts and circumstances, the trial court's findings of fact, even if they had been properly made, would not support

a conclusion that Ranger Carroll engaged in unacceptable personal conduct based on "conduct unbecoming a state employee."

In conclusion, we hold that, on the specific facts and circumstances of the present case, DENR did not have "just cause" to demote Ranger Carroll and reduce his salary. Accordingly, the decision of the Court of Appeals is reversed, and the case is remanded to that court for further remand to the Superior Court with instructions to affirm the State Personnel Commission's final agency decision.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. TODD CHARLES BOGGESS

No. 310A97

(Filed 13 August 2004)

1. Jury— peremptory challenges—voir dire reopened

The trial court erred in a first-degree murder and robbery with a dangerous weapon case by failing to allow defendant to exercise one of his remaining peremptory challenges to excuse a juror after the trial court permitted counsel to question the juror upon finding out that after completing her individual voir dire the juror learned that defendant's mother would be staying at the home of one of the juror's friends during the trial, because: (1) if the judge at any point allows the attorneys to question the juror directly, voir dire has necessarily been reopened and the procedures set out in N.C.G.S. § 15A-1214(g)(1)-(3) are triggered; and (2) once the examination of a juror has been reopened, the parties have an absolute right to exercise any remaining peremptory challenges to excuse such a juror.

2. Criminal Law— recordation and transcription— reconstruction

The trial court did not err in a first-degree murder and robbery with a dangerous weapon case by allegedly failing to ensure the complete recordation and transcription of all critical stages of his trial, because: (1) although defendant contends the trial court improperly denied his pretrial motions for a bill of particulars, this issue is moot since the case is being remanded for

retrial, defendant has now heard the evidence in the case, and the transcript of the first trial is available; (2) the trial court's reconstruction accurately cited the notices that defendant had filed prior to trial concerning his mental state, and other than the ultimate fact that the judge allowed the State's motion to have defendant evaluated, defendant has not shown any prejudice alleged to have arisen from the loss of the content of these arguments; and (3) although defendant contends that he cannot know the reasons why the trial court denied his objection to being arraigned in Durham County, denied his contention that Durham County was not a proper venue for the trial, and denied his motion to continue the arraignment, defendant failed to set out any way in which he was prejudiced by the loss of the recording of the arguments as to these motions.

3. Confessions and Incriminating Statements— motion to suppress—ambiguous request for counsel

The trial court did not err in a first-degree murder and robbery with a dangerous weapon case by denying defendant's motion to suppress his custodial statements, because: (1) in regard to defendant's interview on 24 August 1995 at the sheriff's department, defendant's words that "[i]f y'all going to treat me this way, then I would probably want a lawyer" did not constitute a request for an attorney, and thus, his voluntary statements after a knowing waiver of his rights were admissible; (2) investigators did not violate defendant's Fifth Amendment rights when they responded to his 25 August 1995 request to discuss his case, and defendant waived his Sixth Amendment right to counsel; and (3) in regard to defendant's 17 October 1995 statement, defendant knowingly waived his Fifth and Sixth Amendment rights to counsel when he gave this statement since he initiated this conference.

4. Sentencing— capital—instructions—meaning of life sentence

The trial court erred in a first-degree murder case by its reinstruction to the jury pertaining to the meaning of a life sentence when it inserted extraneous language that the jury should decide the question of punishment according to the issues submitted by the trial court wholly uninfluenced by consideration of what another arm of the government might or might not do in the future.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge Orlando F. Hudson, Jr., on 20 March 1997 in Superior Court, Durham County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 13 April 2004.

Roy Cooper, Attorney General, by William B. Crumpler and Robert C. Montgomery, Assistant Attorneys General, for the State.

Office of the Appellate Defender, by Staples Hughes, Appellate Defender; and Daniel K. Shatz, for defendant-appellant.

EDMUNDS, Justice.

In August 1995, Todd Boggess (defendant) and his girlfriend, Melanie Gray (Gray), a fourteen-year-old runaway, were staying together at Wrightsville Beach. The victim in this case, Danny Pence (Pence), lived with his parents in Wilmington and was a rising senior at Laney High School. He owned a 1987 Ford Mustang automobile that his parents had given him about the time he turned sixteen. Although Pence customized his Mustang by repainting it, improving the sound system, and changing the wheels, at the time of his death he was considering selling it and purchasing a motorcycle.

Pence was employed at Philly Steak and Sub in Murrayville. On the evening of 21 August 1995, Pence went home after completing his day's work, and then, at about 10:00 p.m., drove his Mustang to Johnny Mercer's Pier, a hangout for teenagers at Wrightsville Beach. Defendant and Gray were also at Johnny Mercer's Pier that night. Defendant asked Adam Fredericks if he knew anyone who was selling a car. After checking with Pence, Fredericks told defendant that Pence was interested in such a sale. Pence showed his Mustang to defendant, and they left together on a test ride. Defendant was driving, while Pence was in the front passenger seat and Gray was in one of the rear seats. When Pence did not return home that evening, his increasingly-worried mother searched unsuccessfully for him and then filed a missing person's report with the New Hanover County Sheriff's Department.

The next morning, 22 August 1995, a male and female matching the descriptions of defendant and Gray were observed driving Pence's Mustang on Terry Road in Durham County. At approximately 10:30 a.m., defendant and Gray pawned in Durham speakers from

Pence's car and a socket set that Pence's father had given him to keep in the car. Around noon, several teenage boys who were gathered in a wooded area along Terry Road found a body and notified the police. The body was subsequently determined to be Pence's. During an autopsy performed the next day, the forensic pathologist observed multiple injuries to the victim's head and body. Based on the number of wounds, the pathologist's opinion was that Pence had been beaten over a period of time. He testified that the cause of Pence's death was "blunt-force trauma, multiple blows, but most importantly the blows that struck him in the head and caused injury to the skull and the brain."

Connecting Pence's disappearance from Wilmington with the discovery of a body in Durham County, Beaufort County Sheriff's deputies began surveillance of the home of defendant's parents in Chocowinity. On 24 August 1995, investigators spotted Pence's Mustang, which had been repainted, in front of the Boggess residence. Following a brief and unsuccessful attempt to evade capture by fleeing into a cornfield, defendant and Gray surrendered.

Defendant made several post-arrest statements in which he admitted stealing Pence's car and beating him. All these statements were introduced as evidence at trial. Details of the statements will be discussed below.

Defendant was tried capitally at the 13 January 1997 Criminal Session of Superior Court, Durham County. The jury found defendant guilty of first-degree murder on the basis of premeditation and deliberation; felony murder, with kidnapping and robbery with a dangerous weapon serving as the underlying felonies; and murder by torture. He was also convicted of first-degree kidnapping and robbery with a dangerous weapon. At defendant's sentencing proceeding, the jury found three aggravating circumstances: that the murder was committed while defendant was engaged in kidnapping; that the murder was committed for pecuniary gain; and that the murder was especially heinous, atrocious, or cruel. The jury also found nine of twenty-two submitted mitigating circumstances. The jury then found that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and recommended a sentence of death. The trial court arrested judgment as to the conviction of first-degree kidnapping, imposed a sentence of death as to the murder, and sentenced defendant to a 69 to 92 months' imprisonment for the conviction of robbery with a dangerous weapon. The appeal of this case was

delayed substantially because of a dispute between the State and the court reporter over payment for a transcript of the trial.

JURY SELECTION ISSUE

[1] Defendant first claims that the trial court erred when it would not allow him to exercise one of his peremptory challenges to excuse juror Nita Gladstone. Jurors in this case were selected after individual *voir dire*. After juror Gladstone was selected, she was allowed to go home, subject to the court's call to return once all the jurors had been selected. However, when juror Gladstone was contacted and told to report back to court, she advised the clerk that, after completing her individual *voir dire*, she had learned that Mrs. Pence, who was both the mother of the victim and a witness for the prosecution, would be staying with one of juror Gladstone's friends during the trial. At this point, the jury had not been impaneled and defendant had not exhausted his peremptory challenges.

The clerk reported this information to the trial judge, who advised counsel in open court what had happened. The judge and counsel recognized that the pertinent statute is N.C.G.S. § 15A-1214(g), which states:

> (g) If at any time after a juror has been accepted by a party, and before the jury is impaneled, it is discovered that the juror has made an incorrect statement during voir dire or that some other good reason exists:
>
> (1) The judge may examine, or permit counsel to examine, the juror to determine whether there is a basis for challenge for cause.
>
> (2) If the judge determines there is a basis for challenge for cause, he must excuse the juror or sustain any challenge for cause that has been made.
>
> (3) If the judge determines there is no basis for challenge for cause, any party who has not exhausted his peremptory challenges may challenge the juror.
>
> Any replacement juror called is subject to examination, challenge for cause, and peremptory challenge as any other unaccepted juror.

N.C.G.S. § 15A-1214(g) (2003). The attorneys and the judge discussed both the potential significance of this new information and the proper

response. The district attorney suggested that the judge could either find the information was insufficient to warrant further inquiry or ask juror Gladstone questions without formally reopening *voir dire*. Defense counsel argued that any inquiry of juror Gladstone would reopen jury selection. The judge, observing that N.C.G.S. § 15A-1214(g) did not give specific guidance as to the procedure a court must follow under the circumstances presented here, remarked:

> The issue is, what does reopen it mean? I don't know. If the juror comes out here and tells us some information, I mean, can the Court decide it wants to reopen after it hears that information, or is the fact of the juror coming out here telling us . . . is that reopening?

After thoughtful discussion with counsel, the judge declared:

> I'm going to bring the juror out and ask her to go ahead and state what it is she wants to be heard about. After the juror tells us that, the Court will make some decision about whether or not the Court should reopen the voir dire under our [s]tatutes . . . .

When juror Gladstone was brought into the courtroom, the judge asked a very few questions about the situation. Her statement in response was consistent with the report originally made by the clerk. The judge excused juror Gladstone from the courtroom and continued his discussion with counsel. Both the district attorney and defense counsel asked the judge to pose additional questions. Defense counsel also advised the court that if he had known this information while he was originally questioning juror Gladstone, he would have excused her peremptorily. Despite defense counsel's continued argument that *voir dire* was reopened as soon as any questions were asked of juror Gladstone, the judge determined that he had not found that good cause existed to reopen *voir dire*. The judge then had juror Gladstone returned to the court for additional inquiry. She advised that Mrs. Pence was friends with the daughter of one of juror Gladstone's friends and would be staying at the home of juror Gladstone's friend during the trial. After receiving this information, the judge allowed counsel to question juror Gladstone.

The next day, citing *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986), *overruled in part 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),

the judge concluded that a trial court has the authority to question a juror before determining whether good cause exists to reopen *voir dire*. The judge then found, "based on the hearing that was held, based on all your arguments, that good cause does not exist to reopen voir dire and allow the lawyers an additional time to question Ms. Gladstone." Defendant renewed his objection and noted for the record that he would have exercised a peremptory challenge on juror Gladstone if the *voir dire* had been reopened.

Although the parties and the trial judge here spoke of "reopening" *voir dire*, that term is not found in N.C.G.S. § 15A-1214(g). Nevertheless, we agree that the statute can be interpreted logically only when it is read as permitting a judge to reopen *voir dire* if the initial conditions specified in that statute are found to exist. Accordingly, the key question is the nature of the initial inquiry a court may appropriately conduct before making a determination whether a juror has made an incorrect statement or whether a good reason to reopen *voir dire* has been discovered.

Earlier decisions of this Court that address related issues reveal guiding principles. In *State v. Freeman*, 314 N.C. 432, 333 S.E.2d 743 (1985), before the jury was impaneled, a juror who had been passed by both parties spontaneously admitted that she had provided incorrect information. The trial judge allowed the attorneys to ask additional questions of the juror. We held that the trial court committed reversible error in not allowing the defendant to exercise his final peremptory challenge at that time. *Id.* at 437-38, 333 S.E.2d at 746-47. In *State v. Rogers*, after both sides passed a juror, but before the jury was impaneled, the district attorney discovered that the juror could have provided false information during *voir dire*. The trial judge conducted a hearing during which a witness verified that the information was false. The judge then called the juror and asked additional questions. When the juror admitted giving inaccurate information, the prosecutor exercised a peremptory challenge. We found that this procedure comported with N.C.G.S. § 15A-1214(g). *State v. Rogers*, 316 N.C. at 215-16, 341 S.E.2d at 720-21. In *State v. Willis*, 332 N.C. 151, 420 S.E.2d 158 (1992), the trial judge received allegations that family members of one of the parties had been in contact with a juror. The judge stated on the record that when he had asked the juror if any contact had taken place, the juror denied it. The judge conducted no further inquiry. Determining that the trial court had discretion as to what inquiry to make, we found no error. *Id.* at 172-74, 420 S.E.2d at 168.

When read with the statute, these cases indicate that a trial judge has leeway to make an initial inquiry when allegations are received before a jury has been impaneled that would, if true, establish grounds for reopening *voir dire* under N.C.G.S. § 15A-1214(g). As part of this initial investigation, the judge may question any involved juror and may consult with counsel out of the juror's presence. Based on information thus developed, the judge has discretion to reopen *voir dire* or take other steps suggested by the circumstances. Because the jury has not been impaneled and other potential jurors are still available, minimal disruption occurs if the judge resolves any doubts in favor of reopening *voir dire* and accords counsel the right to exercise any remaining peremptory challenges. If the judge at any point allows the attorneys to question the juror directly, *voir dire* has necessarily been reopened and the procedures set out in N.C.G.S. § 15A-1214(g)(1)-(3) are triggered. "[O]nce the examination of a juror has been reopened, 'the parties have an absolute right to exercise any remaining peremptory challenges to excuse such a juror.' " *State v. Rogers*, 316 N.C. at 216, 341 S.E.2d at 721 (quoting *State v. Freeman*, 314 N.C. at 438, 333 S.E.2d at 747). Accordingly, the trial judge erred when he permitted counsel to question juror Gladstone but did not allow defendant thereafter to exercise one of his remaining peremptory challenges.

ADDITIONAL ISSUES

Although defendant's conviction must be reversed because of the error in jury selection, we will address additional issues that may arise upon retrial.

I. Pretrial Motions

[2] Defendant argues that the trial court erred by failing to ensure the complete recordation and transcription of all critical stages of his trial. On 2 April 1996, defendant filed a number of pre-trial motions, including a "Motion for Complete Recordation of All Proceedings." The trial court allowed the motion on 13 November 1996. On that same date, the court also ruled on several other pre-trial motions that defendant had filed. Years later, when the record of the case was being settled preparatory to appeal, the trial court determined that the hearing on those motions had been tape recorded but never transcribed, and that the tape had been irretrievably lost. The trial judge conducted a hearing on 9 February 2001, and on 7 June 2002, entered a "Reconstruction of Hearing" (Reconstruction) in which he set out the motions that had been heard and the resolution of those motions.

Defendant generally contends that because the record does not contain the arguments made at the hearing on the motions, he has been prejudiced because he cannot reconstruct the showings made as to each motion. Moreover, in his brief, defendant specifically objects to the trial court's treatment of certain motions and argues that the failure to provide complete transcription of the 13 November 1996 hearing has made it impossible for him to obtain "full and fair appellate review" of these issues.

First, defendant argues that the trial court improperly denied his pre-trial motions for a bill of particulars. Because the case is being remanded for retrial, this issue is moot. Defendant has now heard the evidence in the case and the transcript of the first trial is available. Thus, it is immaterial whether the trial court abused its discretion in denying the motions for a bill of particulars. *State v. Garcia*, 358 N.C. 382, 597 S.E.2d 724 (2004).

Defendant next claims that the arguments relating to the State's motion to have his mental competence evaluated are important to his appeal. The trial court found in its Reconstruction

> [t]hat the Court then heard the State's Motion to Evaluate Defendant at Dorothea Dix. District Attorney James E. Hardin, Jr. argued that this was appropriate due to the defendant's attorneys previously filed notices of insanity and diminished capacity defenses. The Court granted this motion. The Court ordered that any documents from Dorothea Dix regarding this defendant's evaluation be sealed.

Although defendant maintains that the contested mental evaluation constitutes a substantial issue on appeal, the trial court's Reconstruction accurately cited the notices that defendant had filed prior to trial concerning his mental state. Accordingly, defendant had placed his mental competence at issue.

> Where a defendant gives notice of his intent to pursue a defense of insanity, it is not only reasonable, but necessary, that the prosecution be permitted to obtain an expert examination of him. Otherwise there would be no means by which the State could confirm a well-founded claim of insanity, discover fraudulent mental defenses, or offer expert psychiatric testimony to rebut the defendant's evidence where insanity is genuinely at issue. Thus, we believe that the trial court has the authority to order such an examination as a part of its inherent power to oversee the proper administration of justice.

State v. Jackson, 77 N.C. App. 491, 498, 335 S.E.2d 903, 907-08 (1985); *see also State v. Huff*, 325 N.C. 1, 49, 381 S.E.2d 635, 663 (1989), *judgment vacated on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990). We acknowledge that defendant's argument is not so much that the order requiring that he be evaluated was incorrect as it is that his appeal is hampered because he cannot now know the arguments that were made in support of and in opposition to this motion. Nevertheless, we have held in the context of unrecorded bench conferences in a capital case that "it is the trial court's evidentiary rulings, and not the arguments of counsel during a bench conference, that facilitate effective appellate review." *State v. Blakeney*, 352 N.C. 287, 307, 531 S.E.2d 799, 814 (2000), *cert. denied*, 531 U.S. 1117, 148 L. Ed. 2d 780 (2001). In addition, a defendant must establish that he was prejudiced by the failure to record the proceedings. *See State v. Pittman*, 332 N.C. 244, 251-53, 420 S.E.2d 437, 441-42 (1992). Other than the ultimate fact that the judge allowed the State's motion, defendant has not specified, nor can we see, any prejudice alleged to have arisen from the loss of the content of the arguments. Because the trial court's decision ordering the examination was fully supported by the holdings both of this Court and of the Court of Appeals and is reviewed for abuse of the trial court's inherent power, we do not perceive that defendant has been denied effective appellate review of this issue or that the trial court erred in ordering the evaluation.

Finally, defendant argues that he cannot know the reasons why the trial court denied his objection to being arraigned in Durham County, denied his contention that Durham County was not a proper venue for the trial, and denied his motion to continue the arraignment. Again, defendant has not set out any way in which he was prejudiced by the loss of the recording of the arguments as to these motions. *See id.* The trial court correctly set out in its Reconstruction that Durham County was a proper venue for the trial. *See* N.C.G.S. § 15-133 (2003). Moreover, rulings on motions to continue are ordinarily within the discretion of the trial court. *State v. Williams*, 355 N.C. 501, 540, 565 S.E.2d 609, 632 (2002), *cert. denied*, 537 U.S. 1125, 154 L. Ed. 2d 808 (2003). Therefore, we hold that defendant has not been denied effective appellate review as to these issues and that the trial court did not err in its ruling on these matters.

We have also carefully reviewed the trial court's Reconstruction of the other motions heard and resolved at the 13 November 1996 hearing and have determined that defendant has not been prejudiced

because arguments made at the hearing cannot be recovered. Accordingly, this assignment of error is overruled.

II. Defendant's Statement

[3] Defendant's next claim is that the trial court erred in denying his motion to suppress his custodial statements. Defendant's "Motion to Suppress Any In-Custody Statement of Defendant" and accompanying affidavit recite that defendant made an oral statement to detectives of the Durham County Sheriff's Department on 25 August 1995, and that trial counsel were appointed to represent defendant on 28 August 1995. Defendant further alleges that when he was questioned again on 17 October 1995, investigators only advised him of his Fifth Amendment right to counsel, but not his Sixth Amendment right to counsel. The trial court conducted an evidentiary hearing on 16 December 1996 and at the conclusion of the hearing orally denied defendant's motion to suppress. The trial court later entered a written order dated 11 December 2000, effective *nunc pro tunc* 16 December 1995, making extensive findings of fact and conclusions of law.

We will address each of defendant's statements separately. Defendant was first interviewed by New Hanover County Sheriff's Detective Marcus Benson on 24 August 1995 while at the Beaufort County Sheriff's Department. Defendant was read his *Miranda* rights and signed a written waiver of those rights. He then gave a somewhat disjointed statement in which he claimed that he had stolen Pence's Mustang but left the victim unharmed in Durham. After completing his narration, defendant provided a written version of this statement. Detective Benson told defendant that he did not believe this statement, and a heated exchange ensued. When one of the investigators told defendant that he was a "lying piece of s—," defendant responded, "I'm not lying. I'm telling the truth. If y'all going to treat me this way, then I probably would want a lawyer."

The investigators then terminated the interview and Detective Benson, along with New Hanover County Sheriff's Detective Douglas Vredenburgh, transported defendant to Wilmington. Although the detectives had some desultory conversation with defendant during the trip, they did not discuss the case under investigation. Upon their arrival at the New Hanover County Law Enforcement Center, Detective Vredenburgh began filling out an arrest report. Defendant spontaneously spoke up and said that what he had told the investigators earlier was not correct and that he had hit the victim with a

stick. When asked, defendant said he had no objection to the investigators recording any further conversation. Defendant stated that he recalled his rights and acknowledged that no promises or threats had been made to him. Defendant then admitted taking Pence's car at knifepoint, tying him up, and taking him to a site in Durham where he beat Pence in the head with a board and a rock.

Although defendant argues that this statement was inadmissible because he had asked for a lawyer, we agree with the trial court's conclusion that defendant's words, "[i]f y'all going to treat me this way, then I probably would want a lawyer," do not constitute a request for an attorney. We have held that a request for counsel must be unambiguous. *State v. Hyatt*, 355 N.C. 642, 655, 566 S.E.2d 61, 70 (2002) (citing *Davis v. United States*, 512 U.S. 452, 459, 129 L. Ed. 2d 362, 371 (1994)), *cert. denied*, 537 U.S. 1133, 154 L. Ed. 2d 823 (2003). "Unless the in-custody suspect 'actually requests' an attorney, lawful questioning may continue." *Id.* (quoting *Davis v. United States*, 512 U.S. at 462, 129 L. Ed. 2d at 373). Defendant's conditional statement was not an actual and unambiguous request. Instead, his words reflect that he understood perfectly well his right to an attorney and was threatening to exercise it unless the investigators improved their behavior. Because defendant's 24 August 1995 statement was made voluntarily after a knowing waiver of his rights, it was admissible at his trial. *See Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966).

Defendant's next statement was made on 25 August 1995. Defendant was taken before a judge in New Hanover County early that morning, and counsel was appointed to represent him. After defendant spoke briefly with the attorney, he was transported to Durham County, where he was booked. Defendant asked Durham County Sheriff's Detective O. A. Clayton, Jr., if they would have a chance to talk later. After defendant appeared before a Durham County magistrate, he was taken to an interview room. There Detective Clayton formally introduced himself and asked defendant if he had an attorney. When defendant responded affirmatively, Detective Clayton gave him a business card and told defendant that he was available if defendant needed anything. Defendant then told Detective Clayton that he wanted to talk with him. Detective Clayton made arrangements to transport defendant to his office. They proceeded to a conference room, where, with Detective Gordon, the interview was recorded. Detective Clayton began by readvising defendant of all of his *Miranda* rights, including defendant's right to

talk to a lawyer and have the lawyer present. After acknowledging each right individually, defendant stated that he did not want counsel and that he desired to talk with Detective Clayton. Defendant also executed a written waiver of his rights. Defendant then provided an inculpatory statement in which he admitted taking Pence's car and beating him.

Defendant argues that this statement was inadmissible because it was taken in violation of his right to counsel under both the Fifth and Sixth Amendments to the United States Constitution and under Article I, Sections 19, 23, and 27 of the North Carolina Constitution. Although defendant was unrepresented and did not ask for counsel when advised of his rights on 24 August 1995, counsel had been appointed in New Hanover County when defendant made his 25 August 1995 statement in Durham County. Accordingly, for this analysis, we will assume that defendant invoked his right to counsel for all purposes when an attorney was appointed.

As to defendant's rights under the Fifth Amendment, because counsel had been appointed, any subsequent statement resulting from interrogation initiated by law enforcement investigators would be inadmissible as a violation of his Fifth Amendment rights. *See Edwards v. Arizona*, 451 U.S. 477, 484-87, 68 L. Ed. 2d 378, 386-88 (1981). However, the record here reflects that the genesis of this statement was defendant's request to speak with the investigators on 25 August 1995. When "the accused himself initiates further communication, exchanges, or conversations with the police," a represented defendant may waive his or her Fifth Amendment right to counsel. *Id.* at 485, 68 L. Ed. 2d at 386. *See also Patterson v. Illinois*, 487 U.S. 285, 291, 101 L. Ed. 2d 261, 271 (1988). Therefore, we conclude that the investigators did not violate defendant's Fifth Amendment rights when they responded to his 25 August 1995 request to discuss his case.

A similar analysis applies to defendant's right to counsel under the Sixth Amendment. Although the State correctly points out that the right under this amendment is offense-specific and argues that defendant was not represented for all the crimes under investigation at the time this statement was made, we conclude that, in any event, defendant waived his Sixth Amendment right to counsel. "[N]othing in the Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his own, to speak with police in the absence of an attorney." *Michigan v. Harvey*, 494 U.S. 344, 352, 108 L. Ed. 2d 293, 303 (1990); *see also State*

v. Williams, 355 N.C. at 545, 565 S.E.2d at 635. The waiver was also effective to waive defendant's rights to counsel under the North Carolina Constitution. *See State v. Palmer*, 334 N.C. 104, 109-10, 431 S.E.2d 172, 175 (1993). Accordingly, we hold that defendant's statement to investigators made on 25 August 1995 was properly admitted into evidence.

Defendant's third statement was made on 17 October 1995. The record reflects that when defendant made his first appearance in District Court, Durham County, on 28 August 1995, new counsel were appointed. Between that date and 17 October 1995, defendant made several attempts to contact investigators. On 17 October 1995, Detective Clayton met defendant at a magistrate's office to serve indictments on him. Because of the number of calls he had received from defendant, Detective Clayton brought Detective Gordon along as a witness. Defendant told Detective Clayton that he wanted to talk about Melanie Gray. When Detective Clayton responded that defendant "would have to speak to his attorneys," defendant asked if he "could ignore his attorney's advice and talk to [Detective Clayton] anyway." Detective Clayton told defendant that it was up to him, and defendant said that he wanted to talk to the detectives. As defendant executed a new waiver of rights, one of the investigators reminded defendant that his attorneys might be angry with him for making a statement. Defendant said he understood, but declined the offer to call counsel. Defendant then provided a statement that was substantially consistent with the statements he had given earlier. Because defendant initiated this conference, he knowingly waived his Fifth and Sixth Amendment rights to counsel when he gave this statement. *See, e.g., Michigan v. Harvey*, 494 U.S. at 352, 108 L. Ed. 2d at 303; *State v. Williams*, 355 N.C. at 545, 565 S.E.2d at 635. Accordingly, defendant's 17 October 1995 statement was properly admitted into evidence. This assignment of error is overruled.

III. Jury Instructions

[4] Defendant next claims that the trial court erred in its instructions to the jury pertaining to the meaning of a life sentence. During the sentencing proceeding, the prosecutor's cross-examination of one of defendant's expert witnesses elicited testimony that defendant believed he might be paroled if he received a life sentence. When the court later instructed the jury, it began by stating that "[i]f you unanimously recommend a sentence of life imprisonment, the Court will impose a sentence of life imprisonment without parole." At least twice more in the instructions, the court specifically referred to "life

imprisonment without parole." However, during its deliberations, the jury sent out a note asking, "Please define life imprisonment for us." After discussing with counsel the various ramifications of this inquiry, including the governor's pardon power and whether the jury was indirectly asking whether defendant could be paroled, the court gave the jury the following instruction:

> In considering whether to recommend death or life imprisonment, you should determine the question as though life imprisonment means exactly what the statute says: "Imprisonment in the state's prison for life without parole." You should decide the question of punishment according to the issues submitted to you by the Court, wholly uninfluenced by consideration of what another arm of the government might or might not do in the future.

Shortly thereafter the jury returned with its sentencing recommendation of death.

Pursuant to N.C.G.S. § 14-17, first-degree murder is punishable by death "or imprisonment in the State's prison for life without parole." N.C.G.S. § 14-17 (2003). Similarly, N.C.G.S. § 15A-1370.1 provides that "[a] prisoner serving a sentence of life imprisonment without parole shall not be eligible for parole at any time." N.C.G.S. § 15A-1370.1 (2003). In accordance with these statutes, the North Carolina Pattern Jury Instructions contain the following admonition to trial judges: "*NOTE WELL: Where a jury makes an inquiry about the meaning of Life Imprisonment, in those cases that the offense occurred on or after 10/1/94, the jury should be instructed as follows:* A sentence of life imprisonment means a sentence of life without parole." 1 N.C.P.I.—Crim. 150.13 (2000). Although the judge and counsel were aware of legal nuances raised by the question, the additional extraneous language that the judge inserted in the instruction to address those issues contained the ineluctable suggestion that "life without parole" was not the absolute alternative to death that the General Assembly intended jurors to consider when weighing the appropriate sentence to impose in a capital case. Accordingly, the instruction given was erroneous.

IV. Conduct of Counsel

Finally, defendant objects to certain questions that the prosecutor asked of his mental health experts and to particular closing arguments made by the prosecutor. Because we reverse for other reasons, we need not address these issues in detail. However, we encourage

counsel to review our holdings in *State v. Jones*, 355 N.C. 117, 558 S.E.2d 97 (2002), and *State v. Rogers*, 355 N.C. 420, 562 S.E.2d 859 (2002), prior to any retrial of this case.

NEW TRIAL.

MELISSA REGISTER v. STEVE ALLEN WHITE

No. 579PA03

(Filed 13 August 2004)

Insurance— UIM—motion to compel arbitration—timeliness

A de novo review revealed that the trial court erred by concluding that plaintiff's motion to compel arbitration to resolve an underinsured motorist (UIM) coverage dispute under the terms of the pertinent insurance policy was time-barred, because: (1) the general rule guiding courts in the construction of insurance policies is that all doubt or uncertainty as to the meaning of the contract shall be resolved in favor of the insured, and further, public policy requires that the courts resolve any doubts concerning the scope of arbitrable issues in favor of arbitration; (2) in light of the UIM statute and the UIM provision in the policy, a reasonable insured would likely believe that the three-year time limit referenced in the policy begins to run when the right to demand arbitration arises, which occurs when the applicable liability policies have been exhausted and a dispute concerning UIM coverage has arisen; and (3) in the present case, plaintiff's right to demand arbitration of her UIM claim could not have arisen prior to 8 August 2001 when defendant's insurance company tendered the full limits of its policy, and thus, plaintiff's 24 September 2001 demand for arbitration fell within the three-year time limit referenced in the policy.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 160 N.C. App. 657, 587 S.E.2d 95 (2003), reversing an order filed by Judge Benjamin G. Alford on 5 August 2002 in Superior Court, Craven County, and remanding for an order compelling arbitration. Heard in the Supreme Court 16 March 2004.

Harris, Creech, Ward and Blackerby, P.A., by Charles E. Simpson, Jr. and Joseph E. Elder, for unnamed defendant-appellant North Carolina Farm Bureau Mutual Insurance Company.

Duffus & Associates, P.A., by J. David Duffus, Jr., for plaintiff-appellee.

MARTIN, Justice.

On 30 June 1998, at approximately 6:15 p.m., plaintiff Melissa Register was injured in an automobile accident. At the time of the accident, plaintiff was riding as a passenger in a vehicle driven by defendant Steve Allen White.

The automobile driven by defendant was owned by Jimmy White (Mr. White). Mr. White held a $50,000.00 liability insurance policy provided by State Farm Insurance Company (State Farm). Plaintiff's father, Terry Register, Sr. (Mr. Register), owned a policy of insurance issued by unnamed defendant North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau). The Farm Bureau policy (the policy) provided underinsured motorist (UIM) coverage in the amount of $100,000.00 per person, $300,000.00 per accident, for bodily injury claims.

On 28 July 2000, plaintiff filed a complaint against defendant White in Craven County Superior Court, alleging that she suffered various spinal injuries as a result of the accident. On 5 September 2000, Farm Bureau filed a request for monetary relief sought, to which plaintiff responded that she was seeking $400,000.00 in damages for her personal injuries. On or about 20 September 2000, Farm Bureau filed an answer generally denying the liability and damage allegations in plaintiff's complaint and reserving its right to defend the case in its name or in the name of defendant.

On 3 November 2000, the trial court ordered a mediated settlement conference, which resulted in an impasse on 27 February 2001. The case was subsequently calendered for trial the week of 13 August 2001. Mr. White's liability carrier, State Farm, tendered its liability limits of $50,000.00 on 8 August 2001.

In a letter to Farm Bureau dated 24 September 2001, plaintiff demanded arbitration pursuant to the UIM provision in Mr. Register's insurance policy. Farm Bureau acknowledged receipt of plaintiff's arbitration demand in a letter dated 2 October 2001, asking plaintiff's

attorney, "[h]ow do you want to do it?" Approximately two weeks later, on 15 October 2001, Farm Bureau stated in a letter to plaintiff that it was "tak[ing] the position that the demand for arbitration is now time barred, and arbitration is no longer an alternative dispute resolution mechanism available."

Plaintiff filed a complaint on 24 January 2002, seeking a declaration obligating Farm Bureau to arbitrate the matter. Farm Bureau filed an answer on 2 April 2002. On 24 May 2002, with the declaratory judgment action still pending, plaintiff filed a motion to compel arbitration. Farm Bureau filed a response on 31 May 2002. Plaintiff voluntarily dismissed the declaratory judgment action without prejudice on 10 June 2002.

The trial court filed an order denying plaintiff's motion to compel on 5 August 2002. In its order, the trial court stated that, by the terms of the policy, plaintiff could demand arbitration only "within the time limit allowed for bodily injury or death actions in the State where the accident occurred." The trial court found that the accident occurred on 30 June 1998 and that plaintiff demanded arbitration on 24 September 2001. Thus, the trial court concluded, plaintiff's motion to compel arbitration was time-barred. Plaintiff appealed.

On appeal, the Court of Appeals reversed and remanded with instructions to enter an order compelling arbitration. *Register v. White*, 160 N.C. App. 657, 587 S.E.2d 95 (2003). On 15 December 2003, we allowed Farm Bureau's petition for discretionary review.

The sole issue before this Court is whether, under the terms of the policy, plaintiff's contractual right to demand arbitration became time-barred over one month before it accrued. Questions concerning the meaning of contractual provisions in an insurance policy are reviewed *de novo* on appeal. *See Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980); *Parker v. State Capital Life Ins. Co.*, 259 N.C. 115, 117, 130 S.E.2d 36, 38 (1963).

In a section titled "ARBITRATION," Part C2 of the policy provides an insured with a contractual right to demand arbitration under specified circumstances. The arbitration provision states, in pertinent part:

If we and an **insured** do not agree:

1. Whether that **insured** is legally entitled to recover compensatory damages from the owner or driver of an . . . **underinsured motor vehicle**; or

2. As to the amount of such damages; the **insured** may demand to settle the dispute by arbitration.

The following procedures will be used:

. . . .

5. Any arbitration action against the company must begin within the time limit allowed for **bodily injury** or death actions in the state where the accident occurred.

According to Farm Bureau, the arbitration provision's "time limit allowed for bodily injury or death actions" incorporates by reference North Carolina's statute of limitations for bodily injury actions, N.C.G.S. § 1-52(16). N.C.G.S. § 1-52(16) imposes a three-year statutory limitations period on bodily injury actions, and further provides that "the cause of action . . . shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs." N.C.G.S. § 1-52(16) (2003). In the instant case, Farm Bureau contends that the bodily harm to plaintiff became apparent on the date of the accident, 30 June 1998. Thus, Farm Bureau argues, the three-year limitations period commenced on that date, and plaintiff's 24 September 2001 demand for arbitration was contractually time-barred.

The Court of Appeals agreed that a three-year limitations period applied to plaintiff's right to demand arbitration, but concluded that the limitations period had not expired at the time plaintiff made such a demand. *Register*, 160 N.C. App. at 661-62, 587 S.E.2d at 97-98. The court stated that because plaintiff had no right to seek UIM coverage before 8 August 2001, her right to demand arbitration to resolve a UIM dispute could not expire before that date. *Id.* at 662, 587 S.E.2d at 98. Thus, the Court of Appeals reasoned, the arbitration provision was ambiguous as to when the "time limit" for plaintiff's contractual right to demand arbitration began to run. *Id.* The Court of Appeals concluded that the arbitration "time limit" provided a three-year limitations period that began on the date plaintiff acquired a contractual right to demand arbitration—in this case, 8 August 2001. *Id.* Accordingly, the Court of Appeals held that plaintiff's 24 September 2001 demand for arbitration was within the contractual time limit. *Id.*

Before this Court, Farm Bureau contends the arbitration provision in the policy is plain and unambiguous as to when the three-year

"time limit" begins to run, and the Court of Appeals erred in construing it other than according to its plain meaning. We disagree.

The primary goal in interpreting an insurance policy is to discern the intent of the parties at the time the policy was issued. *See Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 505, 246 S.E.2d 773, 777 (1978); *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 266 N.C. 430, 438, 146 S.E.2d 410, 416 (1966). If the terms of the policy are " 'plain, unambiguous, and susceptible of only one reasonable construction, the courts will enforce the contract according to its terms.' " *Klein v. Avemco Ins. Co.*, 289 N.C. 63, 66, 220 S.E.2d 595, 597 (1975) (quoting *Walsh v. United Ins. Co.*, 265 N.C. 634, 639, 144 S.E.2d 817, 820 (1965)). " 'If, however, the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company and in favor of the policyholder.' " *C.D. Spangler Constr. Co. v. Indus. Crankshaft & Eng'g Co.*, 326 N.C. 133, 142, 388 S.E.2d 557, 563 (1990) (quoting *Woods*, 295 N.C. at 506, 246 S.E.2d at 777).

An ambiguity exists in a contract when either the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations. *See Woods*, 295 N.C. at 506, 246 S.E.2d at 777; *see also Dawes v. Nash Cty.*, 357 N.C. 442, 448-49, 584 S.E.2d 760, 764 (2003); *Gaston Cty. Dyeing Mach. Co. v. Northfield Ins. Co.*, 351 N.C. 293, 299-300, 524 S.E.2d 558, 563 (2000); *Lanning v. Allstate Ins. Co.*, 332 N.C. 309, 317, 420 S.E.2d 180, 185 (1992); *C.D. Spangler*, 326 N.C. at 142, 388 S.E.2d at 563; *Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 295, 378 S.E.2d 21, 25 (1989). An ambiguity can exist when, even though the words themselves appear clear, the specific facts of the case create more than one reasonable interpretation of the contractual provisions. *See Pleasant v. Motors Ins. Co.*, 280 N.C. 100, 102, 185 S.E.2d 164, 166 (1971); *Miller v. Green*, 183 N.C. 652, 654, 112 S.E. 417, 418 (1922). In interpreting the language of an insurance policy, courts must examine the policy from the point of view of a reasonable insured. *Grant v. Emmco Ins. Co.*, 295 N.C. 39, 43, 243 S.E.2d 894, 897 (1978). "Where the immediate context in which words are used is not clearly indicative of the meaning intended, resort may be had to other portions of the policy and all clauses of it are to be construed, if possible, so as to bring them into harmony." *Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 355, 172 S.E.2d 518, 522 (1970).

In the instant case, we cannot conclude that a reasonable person in plaintiff's position would understand the contractual phrase "the

time limit allowed for bodily injury or death actions in the state where the accident occurred" to be plain and unambiguous when applied to the facts at hand. The arbitration provision lists the applicable "time limit" among the "procedures [to] be used" when insurer and insured "do not agree" as to the existence or extent of liability on the part of the underinsured motorist. Similarly, the Uniform Arbitration Act (UAA), which was in effect at the time the parties entered into this contract, provides that two or more parties "may include in a written contract a provision for the settlement by arbitration of any *controversy* thereafter arising between them relating to such contract." N.C.G.S. § 1-567.2 (Supp. 1998) (repealed 2003) (emphasis added). Although the controversy need not be "justiciable" in order to be arbitrable, *id.*, both the policy and the UAA presuppose the existence of some disagreement or "controversy" to serve as the subject of arbitration. On Farm Bureau's interpretation, however, the three-year "time limit" would run against an insured from the moment his or her injury became apparent, whether or not a "disagree[ment]" then existed or the insured had any reason to anticipate a future "controversy" with his or her UIM insurer. This construction is difficult to square with the contractual language describing the time limit as a "procedure" to be followed "if [the UIM insurer] and an insured do not agree" about a third-party underinsured motorist's liability to the insured.

Moreover, the arbitration provision's oblique reference to "the time limit" for bodily injury actions in the state where the accident occurred does not necessarily compel incorporation of the accrual provision of N.C.G.S. § 1-52(16). We agree that this contractual language incorporates by reference the applicable *limitations period* for personal injury actions—here, the three-year limitations period of N.C.G.S. § 1-52. It is far from clear, however, that the parties also intended to import the accrual scheme of N.C.G.S. § 1-52(16), which provides that the statutory limitations period for personal injury actions begins to run when the bodily injury "becomes apparent or ought reasonably to have become apparent to the claimant." N.C.G.S. § 1-52(16). On its face, the arbitration provision is silent as to when the contractual "time limit" begins to run. Thus, the arbitration provision is ambiguous not as to the *duration* of the applicable "time limit," but as to when that "time limit" *begins to run*. An ambiguity exists because the arbitration provision is reasonably susceptible of at least two different constructions: (1) that the three-year "time limit" begins to run at the time the bodily injury becomes or should

become apparent to the injured insured, or (2) that the three-year "time limit" begins to run *at the time the right to demand arbitration arises.*

The application of any statutory or contractual time limit requires an initial determination of when that limitations period begins to run. "A cause of action generally accrues when 'the right to institute and maintain a suit arises.' " *Ocean Hill Joint Venture v. N.C. Dep't of Env't, Health & Natural Res.*, 333 N.C. 318, 323, 426 S.E.2d 274, 277 (1993) (quoting *Thurston Motor Lines, Inc. v. General Motors Corp.*, 258 N.C. 323, 325, 128 S.E.2d 413, 415 (1962)). Thus, a statutory limitations period on a cause of action necessarily cannot begin to run before a party acquires a right to maintain a lawsuit. *See Raftery v. Wm. C. Vick Constr. Co.*, 291 N.C. 180, 186-87, 230 S.E.2d 405, 408 (1976) (until there is a legal right to maintain the underlying action, "the statute of limitations cannot run").

In the instant case, plaintiff's right of action *in tort* against defendant White unquestionably arose on 30 June 1998, the date her injury "bec[ame] apparent." N.C.G.S. § 1-52(16). Thus, the statutory limitations period on plaintiff's tort claim began to run on that date. It is well settled, however, that a UIM claim is independent of the underlying tort action and does not necessarily accrue at the time an injury becomes apparent. *See Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 576-77, 573 S.E.2d 118, 122 (2002) (UIM claim not barred by three-year limitations period in N.C.G.S. § 1-52(16)); *see also Oanes v. Allstate Ins. Co.*, 617 N.W.2d 401, 406 (Minn. 2000) (UIM claim accrues on date of settlement with or judgment against the tortfeasor, not date of injury); *Wille v. Geico Cas. Co.*, 2 P.3d 888, 892 (Okla. 2000) (cause of action to recover UIM benefits does not accrue on date of injury); *cf. N.C. Ins. Guar. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 115 N.C. App. 666, 672-73, 446 S.E.2d 364, 369 (1994) (cause of action against UM carrier accrued at time insured was "at liberty" to sue insurer, not date of insured's injury). Indeed, under the terms of the policy, plaintiff's *contractual right to UIM coverage* did not arise until the liability limits of any applicable bonds or insurance policies were exhausted by settlement or the payment of judgments. The UIM provision of the policy provides:

> We will . . . pay compensatory damages which an **insured** is legally entitled to recover from the owner or operator of an **underinsured motor vehicle** because of **bodily injury** sustained by an **insured** caused by an accident. The owner's or oper-

> ator's liability for these damages must arise out of the ownership, maintenance or use of the **underinsured motor vehicle**. We will pay for these damages only after the limits of liability under any applicable liability bonds or polices have been exhausted by payments of judgments or settlements, unless we:
>
> 1. Have been given written notice in advance of settlement between an **insured** and the owner or operator of the **underinsured motor vehicle**; and
>
> 2. Consent to advance payment to the **insured** in the amount equal to the tentative settlement.

N.C.G.S. § 20-279.21(b)(4), the terms of which are incorporated into all UIM agreements, *see Nationwide Mut. Ins. Co. v. Mabe*, 342 N.C. 482, 494, 467 S.E.2d 34, 41 (1996), *corrected by* 342 N.C. 899 (1996), also requires the exhaustion of liability limits before UIM coverage will apply. The statute provides:

> Underinsured motorist coverage is deemed to apply when, by reason of payment of judgment or settlement, all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured highway vehicle have been exhausted. Exhaustion of that liability coverage for the purpose of any single liability claim presented for underinsured motorist coverage is deemed to occur when either (a) the limits of liability per claim have been paid upon the claim, or (b) by reason of multiple claims, the aggregate per occurrence limit of liability has been paid.

N.C.G.S. § 20-279.21(b)(4) (2001). Thus, under both the policy and the governing statute, an insured's contractual right to UIM coverage is expressly conditioned on the exhaustion of the liability carrier's policy limits. *Id.* Exhaustion occurs when the liability carrier has tendered the limits of its policy in a settlement offer or in satisfaction of a judgment. *Id.* Once this exhaustion requirement is satisfied, but not before, an insured may seek UIM benefits from a UIM carrier. *Cf. Johnson v. N.C. Farm Bureau Ins. Co.*, 112 N.C. App. 623, 624-25, 436 S.E.2d 265, 267 (1993) ("Underinsured insurance is derivative in nature and depends [in part] upon . . . the exhaustion of the underinsured operator's liability insurance.").

As a corollary of this principle, an insured's contractual right *to demand arbitration* of a UIM claim is also unavailable until the liability carrier's policy limits have been exhausted. *See Hackett v.*

Bonta, 113 N.C. App. 89, 97, 437 S.E.2d 687, 692 (1993) (right to demand arbitration of a UIM claim does not arise until the antecedent right to UIM coverage has arisen); *see also* George L. Simpson, III, *North Carolina Uninsured and Underinsured Motorist Insurance: A Handbook* § 4:2, at 266-67 (2003) ("[I]t seems clear that the insured may not demand arbitration" if such demand occurs "before the liability insurer tenders its limits" because there has not "been an exhaustion of the liability policy by payment of judgment or settlement and, as a consequence, the insured [is] not yet . . . entitled to recover from the UIM insurer."). Thus, if the three-year "time limit" referenced in the arbitration provision is deemed to commence at the time of an insured's injury, the right to demand arbitration may expire—paradoxically—before it ever accrues. If, on the other hand, the applicable "time limit" is understood to commence at the time the right to demand arbitration arises, it begins to run no earlier than the time when the liability carrier's policy limits are exhausted.

In support of the former construction, Farm Bureau argues that the right to UIM coverage and the right to demand arbitration to settle a UIM dispute are wholly independent and that "[o]nce the time limitation [for arbitration] has expired, arbitration ceases to be available, regardless of whether plaintiff had a right to seek payment of UIM benefits." We agree that the contractual rights to seek UIM coverage and to demand arbitration of a UIM dispute are not necessarily coextensive and that an insurance policy may impose a more restrictive time limit on the latter. *Cf. Adams v. Nelsen*, 313 N.C. 442, 447-48, 329 S.E.2d 322, 325 (1985) (enforcing contractual time limit on insured's right to demand arbitration). The issue presented here, however, is not whether a contractual right to demand arbitration to resolve a UIM dispute may expire before the right to UIM coverage itself expires. Rather, the issue is whether the specific provisions of this particular policy should be construed to create a right that may be time-barred *before it ever accrues.*

"[A] contract of insurance should be given that construction which a reasonable person in the position of the insured would have understood it to mean and, if the language . . . is reasonably susceptible of different constructions, it must be given the construction most favorable to the insured . . . ." *Grant*, 295 N.C. at 43, 243 S.E.2d at 897; *see also Henderson v. United States Fid. & Guar. Co.*, 346 N.C. 741, 745, 488 S.E.2d 234, 237 (1997) ("Any ambiguity as to the meaning of words used in an insurance policy must be construed in the policyholder's favor."); *Brown v. Lumbermans Mut. Cas. Co.*, 326

N.C. 387, 392, 390 S.E.2d 150, 153 (1990); *cf.* Restatement (Second) of Contracts § 206 (1979) ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds."). Indeed, we have stated that " '[p]robably the most important general rule guiding the courts in the construction of insurance policies is that all doubt or uncertainty, as to the meaning of the contract, shall be resolved in favor of the insured.' " *Jones v. Cas. Co.*, 140 N.C. 262, 264, 52 S.E. 578, 579 (1905) (citations omitted); *accord Walsh*, 265 N.C. at 638, 144 S.E.2d at 820 ("[C]ourts construe [insurance] contracts most strongly against the insurer and most liberally in favor of the insured."). In addition, public policy "requires that the courts resolve any doubts concerning the scope of arbitrable issues in favor of arbitration." *Johnston Cty. v. R.N. Rouse & Co.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992).

Applying these canons of construction, we conclude that a reasonable insured would construe the arbitration provision at issue to impose a three-year "time limit" within which the insured may exercise his or her contractual right to demand arbitration. We further conclude that, in light of the UIM statute and the UIM provision in the policy, a reasonable insured would likely believe that the three-year "time limit" begins to run when the right to demand arbitration arises; that is, when the applicable liability policies have been exhausted and a dispute concerning UIM coverage has arisen. *Cf. Heil v. United Ohio Ins. Co.*, 66 Ohio App. 3d 307, 309-12, 584 N.E.2d 19, 21-22 (1990) (holding that time limitation clause barring insured's right to demand arbitration after twelve months had elapsed from "the date of the accident" was ambiguous when read in conjunction with the UIM exhaustion provision, because "it would not be unreasonable for a policyholder to conclude that he must pursue the [liability] coverage to conclusion prior to filing his . . . arbitration demand against [the UIM insurer]"). To the extent that there may be some doubt concerning the intended meaning of the arbitration provision, we must resolve those doubts in favor of the insured and in favor of arbitration. *See Jones*, 140 N.C. at 264-65, 52 S.E. at 579; *R.N. Rouse*, 331 N.C. at 91, 414 S.E.2d at 32. Accordingly, we hold that the three-year "time limit" referenced in the arbitration provision begins to run at the time an insured acquires a contractual right to demand arbitration. To hold otherwise would require us to assume that a reasonable insured would read the arbitration provision to vest insured persons with a

right that could become time-barred before it ever accrued. We do not believe that such a paradoxical construction can be deemed a "plain meaning" of the policy at issue.

In the present case, plaintiff's right to demand arbitration of her UIM claim could not have arisen prior to 8 August 2001, when defendant White's insurance company tendered the full limits of its policy. Thus, plaintiff's 24 September 2001 demand for arbitration fell within the three-year "time limit" referenced in the policy, and the trial court erred in determining that plaintiff's demand was time-barred. Accordingly, the decision of the Court of Appeals is affirmed.

AFFIRMED.

WILLIE B. JOHNSON, EMPLOYEE v. SOUTHERN TIRE SALES AND SERVICE, EMPLOYER, CASUALTY RECIPROCAL EXCHANGE, CARRIER

No. 514A02

(Filed 13 August 2004)

1. Workers' Compensation— disability—burden of proof—findings

The Industrial Commission erred by holding that a workers' compensation plaintiff was entitled to a presumption of disability where defendants failed to accept or deny the claim within the statutory time period after filing a Form 63. This improperly shifted to defendants the burden of producing evidence that suitable jobs were available. Additionally, the Commission was obligated to make specific findings about the existence and extent of any disability suffered by plaintiff.

2. Workers' Compensation— disability—availability of suitable employment—findings

A work-related disability case was remanded to the Industrial Commission for additional findings where the testimony of defendant's vocational rehabilitation counselor about the availability of suitable jobs raised an issue of fact; the Commission's findings were insufficient or not legally adequate; and the Commission's findings about plaintiff's efforts to find employment were not sufficient to cure the error.

3. Workers' Compensation— Commission as fact finder— deputy commissioner disregarded

The Commission is the ultimate fact finder, whether from a cold record or live testimony, and it may choose to disregard a deputy commissioner's determination that a disability plaintiff was exaggerating his pain.

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. 323, 567 S.E.2d 773 (2002), affirming an opinion and award entered 6 February 2001 by the North Carolina Industrial Commission. Heard in the Supreme Court 7 April 2003.

Schiller & Schiller PLLC, by Marvin Schiller and David G. Schiller, for plaintiff-appellee.

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

EDMUNDS, Justice.

This case arises from proceedings before the North Carolina Industrial Commission (the Commission) and raises the issue of whether the Commission erred in awarding Willie B. Johnson (plaintiff) ongoing total disability compensation as a result of his 24 October 1996 work-related injury.

The evidence in this case showed that plaintiff was employed by Southern Tire Sales and Service (defendant-employer) as a mechanic. On 24 October 1996, plaintiff sustained a work-related injury to his back while replacing a vehicle's lower ball joint. When an iron pry bar that plaintiff was using slipped unexpectedly, he experienced pain in his lower back. Defendants initially issued compensation benefits pursuant to a Form 63, Notice to Employee of Payment of Compensation Without Prejudice to Later Deny the Claim, which was dated 23 December 1996. Thereafter, pursuant to N.C.G.S. § 97-18(d), defendants accepted liability for plaintiff's injury by failing to contest the compensability of plaintiff's claim or their liability therefor within the statutory period. *See* N.C.G.S. § 97-18(d) (2003). Plaintiff continued to work for defendant-employer and sought medical treatment on 27 November 1996.

In March 1997 plaintiff came under the care of Michael D. Gwinn, M.D. (Dr. Gwinn), a board-certified expert in physical medicine and

rehabilitation. Tests revealed that plaintiff suffered from "multi-level lumbar degenerative disk disease." On 23 April 1997, Dr. Gwinn released plaintiff to light-duty work, restricting him from lifting more than fifteen to twenty pounds occasionally. Dr. Gwinn also recommended that plaintiff avoid frequent bending and twisting. On 6 August 1997, Dr. Gwinn assigned plaintiff permanent restrictions, including avoidance of frequent bending and twisting at the waist and limitations on the number of pounds plaintiff could lift or carry. Dr. Gwinn was of the opinion that plaintiff had "likely" reached maximum medical improvement and, if so, he would assign to plaintiff a ten percent permanent partial disability rating. However, defendant-employer did not have work available that met plaintiff's physical restrictions. Consequently, in August 1997 Ronald Alford (Alford), a Certified Rehabilitation Counselor with Southern Rehabilitation Network, Inc., was assigned to assist plaintiff in finding suitable employment.

Although Alford secured approximately twelve leads for jobs that were within plaintiff's restrictions, plaintiff did not receive an offer of employment from any of these potential employers. Alford testified by deposition that plaintiff was not hired because he either failed to appear at scheduled interviews or attended the interviews but effectively sabotaged his chances of being hired with complaints of being in pain. As a result of plaintiff's alleged unwillingness to cooperate with recommended treatment and his refusal to attend a scheduled evaluation for an in-patient treatment program, defendants filed with the Commission a motion requesting that plaintiff be ordered to cooperate with rehabilitation efforts. On 17 August 1998, the Deputy Commissioner ordered plaintiff to, among other things, "cooperate with efforts at rehabilitation."

On 11 December 1998, defendants filed a Form 24, Application to Terminate or Suspend Payment of Compensation, on the ground that plaintiff was still not cooperating with efforts at rehabilitation. After conducting a hearing on 5 May 1999, the Deputy Commissioner on 27 April 2000 entered an opinion and award that included findings of fact consistent with Alford's deposition testimony as to plaintiff's failure to attend some job interviews and his behavior at the interviews he did attend. Based on these findings, the Deputy Commissioner made conclusions of law entitling defendants to suspend compensation payments as of 9 February 1999 because "[p]laintiff unjustifiably refused to cooperate with defendant[-employer]'s rehabilitative efforts." The Deputy Commissioner also denied plaintiff's claim for permanent and total disability.

On 6 February 2001, the Full Commission reconsidered the record in the case and reversed the Deputy Commissioner. Although defendants submitted, and the Commission accepted, additional evidence prior to the reconsideration, no mention of this evidence is made in the Commission's opinion and award. The Commission made the following pertinent findings of fact:

> 3. On 24 October 1996, plaintiff sustained an injury arising out of his employment when the iron bar he was using to replace a lower ball joint suddenly gave way, and he experienced the immediate onset of pain in his lower back. This injury was deemed compensable when defendants failed to accept or deny the claim within the statutory time period after filing an Industrial Commission Form 63.
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> . . . .
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> 12. In August 1997, Mr. Ronald Alford, a Certified Rehabilitation Counselor with Southern Rehabilitation Network, was assigned to assist plaintiff in finding suitable employment. Mr. Alford located approximately twelve (12) job leads for plaintiff who attended many interviews. However, no job was ever officially offered to plaintiff due to his physical condition and restrictions resulting from his 24 October 1996 compensable injury. Furthermore, in no manner were plaintiff's actions regarding these job leads inappropriate and he did not constructively refuse suitable employment.
>
> 13. In addition to Mr. Alford's efforts, plaintiff located a job lead on his own in December 1997, but was not offered the position due to his physical condition and symptoms.
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> 14. Plaintiff has made a reasonable effort to locate suitable employment on his own and through the leads provided to him by Mr. Alford since he was first medically removed from work by Dr. Adomonis on 27 January 1997.
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> . . . .
>
> 18. Because no job was ever offered to plaintiff, it cannot be found that he unjustifiably refused suitable employment.

Based upon these findings, the Commission concluded that plaintiff was entitled to ongoing total disability compensation. Defendants appealed the Commission's decision to the North Carolina Court of Appeals.

On 20 August 2002, a divided panel of the Court of Appeals held that competent evidence supported the Commission's determination that plaintiff did not constructively refuse suitable employment because no job was ever offered to plaintiff. The dissenting judge, citing *Burwell v. Winn-Dixie Raleigh, Inc.*, 114 N.C. App. 69, 441 S.E.2d 145 (1994), stated that the test for determining whether plaintiff constructively refused suitable employment "is not whether a job was actually offered, but whether suitable jobs are available and whether plaintiff is capable of getting one." *Johnson v. Southern Tire Sales & Serv.*, 152 N.C. App. 323, 333, 567 S.E.2d 773, 780 (2002). Defendants appealed to this Court on the basis of the dissent.

The Commission, having exclusive original jurisdiction over workers' compensation proceedings, is required to hear the evidence and file its award, "together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue." N.C.G.S. § 97-84 (2003). While the Commission is not required to make findings as to each fact presented by the evidence, it must find those crucial and specific facts upon which the right to compensation depends so that a reviewing court can determine on appeal whether an adequate basis exists for the Commission's award. *Guest v. Brenner Iron & Metal Co.*, 241 N.C. 448, 451, 85 S.E.2d 596, 599 (1955). *See also Singleton v. Durham Laundry Co.*, 213 N.C. 32, 34-35, 195 S.E. 34, 35-36 (1938) (requiring the Commission to make specific findings of fact upon the evidence).

The Commission's findings of fact "are conclusive on appeal when supported by competent evidence even though" evidence exists that would support a contrary finding. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982). As a result, appellate review of an award from the Commission is generally limited to two issues: (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact. *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986). "[W]hen the findings are insufficient to determine the rights of the parties, the court may remand to the Industrial Commission for additional findings." *Hilliard v. Apex Cabinet Co.*, 305 N.C. at 595, 290 S.E.2d at 684. In addition, if the findings of the Commission are based on a misapprehension of the law, the case should be remanded so "that the evidence [may] be considered in its true legal light." *McGill v. Town of Lumberton*, 215 N.C. 752, 754, 3 S.E.2d 324, 326 (1939).

[1] Defendants raise three issues on appeal. First, defendants contend the Commission erred in finding that, when defendants failed to accept or deny plaintiff's claim within the statutory time period after the Form 63 was filed, a presumption of continuing disability was established and attached in plaintiff's favor.

An employee seeking compensation under the Workers' Compensation Act for an injury arising out of and in the course of employment bears "the burden of proving the existence of his disability and its extent." *Hendrix v. Linn-Corriher Corp.*, 317 N.C. at 185, 345 S.E.2d at 378. This Court has recognized that a presumption of disability in favor of an employee arises only in limited circumstances. First, the employer and employee may execute a Form 21, Agreement for Compensation for Disability, that stipulates to a continuing disability and is subsequently approved by the Industrial Commission. *See Saums v. Raleigh Cmty. Hosp.*, 346 N.C. 760, 764, 487 S.E.2d 746, 749-50 (1997). Second, the employer and employee may execute a Form 26, Supplemental Agreement as to Payment of Compensation, that stipulates to a continuing disability and is later approved by the Commission. *See Saunders v. Edenton Ob/Gyn Ctr.*, 352 N.C. 136, 140, 530 S.E.2d 62, 65 (2000). Third, an employee may prove to the Industrial Commission the existence of a disability. *See Watkins v. Central Motor Lines, Inc.*, 279 N.C. 132, 137-38, 181 S.E.2d 588, 592-93 (1971).

> [T]o support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this [plaintiff's] incapacity to earn was caused by [his] injury.

Hilliard v. Apex Cabinet Co., 305 N.C. at 595, 290 S.E.2d at 683. This Court has never held that a presumption of disability is created when a Form 63 is executed by the parties, followed by payments to the employee by the employer beyond the ninety-day period without contesting the compensability of or the liability for a claim. Moreover, the Court of Appeals has held that no presumption is created in those circumstances. *See Sims v. Charmes/Arby's Roast Beef*, 142 N.C. App. 154, 159-60, 542 S.E.2d 277, 281-82, *disc. rev. denied*, 353 N.C. 729, 550 S.E.2d 782 (2001). Accordingly, we hold that no presumption of disability in plaintiff's favor arose here.

As a consequence, the Commission erred when it found that plaintiff was entitled to a presumption of disability once his injury "was deemed compensable when defendants failed to accept or deny the claim within the statutory time period after filing an Industrial Commission Form 63." With this erroneous finding, the Commission improperly shifted to defendants the burden of producing evidence that suitable jobs were available to plaintiff. Because the burden remained on plaintiff to prove his disability, the Commission was obligated to make specific findings regarding the existence and extent of any disability suffered by plaintiff. The Commission found: "On 24 October 1996, plaintiff sustained an injury arising out of his employment when the iron bar he was using to replace a lower ball joint suddenly gave way, and he experienced the immediate onset of pain in his lower back." Although the Commission also found that "[m]ultiple MRI's and other testing revealed that plaintiff had a multi-level lumbar degenerative disk disease which had been aggravated" and that "Dr. Lestini found bulging discs," it made no findings as to the nature or extent of the alleged injury or the degree to which the alleged injury exacerbated a pre-existing condition.

In addition, the Commission made findings that "[p]laintiff's pain is constant and severe" and that "plaintiff continues to experience debilitating pain as the result of his 24 October 1996 injury." Although pain can be part of a finding of disability, *see Fleming v. K-Mart Corp.*, 312 N.C. 538, 546, 324 S.E.2d 214, 218-19 (1985), the term "disability" in the context of workers' compensation is defined as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C.G.S. § 97-2(9) (2003). Consequently, a determination of whether a worker is disabled focuses upon impairment to the injured employee's earning capacity rather than upon physical infirmity. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 434-35, 342 S.E.2d 798, 804 (1986). In light of the fact that evidence was presented that plaintiff could still perform some types of work, these findings are inadequate to establish that plaintiff is disabled because of his pain.

The Commission's final finding of fact, that "[a]s the result of his 24 October 1996 injury by accident, plaintiff has been incapable of earning wages in his former position with defendant-employer or in any other employment for the period of 27 January 1997 through the present and continuing," is no more than a conclusory synopsis of its preceding findings.

> [T]he court cannot ascertain whether the findings of fact are supported by the evidence unless the Industrial Commission reveals with at least a fair degree of positiveness what facts it finds. It is likewise plain that the court cannot decide whether the conclusions of law and the decision of the Industrial Commission rightly recognize and effectively enforce the rights of the parties upon the matters in controversy if the Industrial Commission fails to make specific findings as to each material fact upon which those rights depend.

Thomason v. Red Bird Cab Co., 235 N.C. 602, 606, 70 S.E.2d 706, 709 (1952). Because the Commission improperly allocated the burden of proof as to the issue of disability and because, as a result of this misallocation, the Commission failed to make specific comprehensive findings as to the existence and extent of plaintiff's injury, its conclusion of law that plaintiff was totally disabled as a result of his work-related injury is unsupported by sufficient evidence. Therefore, we remand to the Commission for the purpose of making adequate findings of fact.

[2] In their second assignment of error, defendants contend that the Commission applied an incorrect legal standard in determining whether plaintiff constructively refused suitable employment. Defendants argue that the appropriate legal standard for a determination of such constructive refusal is not whether a job was ever offered to plaintiff, but rather whether the jobs identified by the rehabilitation consultant were suitable and whether plaintiff was capable of obtaining such a job if he had diligently sought employment.

If an injured employee establishes a compensable injury, the burden shifts to the employer to rebut the employee's evidence. *Gayton v. Gage Carolina Metals, Inc.*, 149 N.C. App. 346, 349, 560 S.E.2d 870, 872 (2002). As to the injured employee's ability to work, this burden "requires the employer to 'come forward with evidence to show not only that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations.' " *Burwell v. Winn-Dixie Raleigh, Inc.*, 114 N.C. App. at 73, 441 S.E.2d at 149 (quoting *Kennedy v. Duke Univ. Med. Ctr.*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990)) (emphasis omitted). The United States Fourth Circuit Court of Appeals has defined a "suitable job" as being one that is available to the employee and that the employee is capable of performing considering, among other things, his physical limitations. *Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d 199, 201 (4th Cir. 1984). An employee is "capable of get-

ting" a suitable job when " 'there exists a reasonable likelihood . . . that he would be hired if he diligently sought the job.' " *Id.* at 201 (quoting *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1043 (5th Cir. 1981)).

An employer need not show that the employee was specifically offered a job by some other employer in order to prove that the employee was capable of obtaining suitable employment. *Trans-State Dredging v. Benefits Review Bd.*, 731 F.2d at 201. Instead, the crucial question is whether the employee can obtain a job. *Bridges v. Linn-Corriher Corp.*, 90 N.C. App. 397, 400-01, 368 S.E.2d 388, 390-91, *disc. rev. denied*, 323 N.C. 171, 373 S.E.2d 104 (1988). If the employer successfully rebuts the employee's evidence of disability by producing evidence that the employee has refused suitable employment without justification, compensation can be denied. N.C.G.S. § 97-32 (2003) ("If an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified."). *See also Branham v. Denny Roll & Panel Co.*, 223 N.C. 233, 236, 25 S.E.2d 865, 867-68 (1943), *limited by Peoples v. Cone Mills Corp.*, 316 N.C. 426, 342 S.E.2d 798 (1986). However, if an employer makes a showing that the employee refused a suitable job, the employee may respond by "producing evidence that either contests the availability of other jobs or his suitability for those jobs, or establishes that he has unsuccessfully sought the employment opportunities located by his employer." *Burwell v. Winn-Dixie Raleigh, Inc.*, 114 N.C. App. at 74, 441 S.E.2d at 149 (citing *Tyndall v. Walter Kidde Co.*, 102 N.C. App. 726, 732, 403 S.E.2d 548, 551, *disc. rev. denied*, 329 N.C. 505, 407 S.E.2d 553 (1991)).

Here, defendants endeavored to meet their burden of proving that suitable jobs were available by introducing the deposition of Ronald Alford, a vocational rehabilitation and employment counselor. As set out in the Deputy Commissioner's findings of fact, Alford testified that he identified approximately twelve jobs that, given plaintiff's vocational background and physical limitations, were suitable for him. Alford's testimony included not only descriptions of what these jobs entailed, but also detailed plaintiff's failure to keep appointments for some job interviews that were arranged for him and his balky behavior at the job interviews he did attend. In addition, Alford testified that in his opinion plaintiff could have found work if he had made a diligent effort to do so.

Alford's evidence raised an issue of fact with respect to the compensability of plaintiff's injury. As a result, relevant findings by the Commission were required. The Commission made two findings of fact as to whether plaintiff refused work. First, after noting that plaintiff had received no job offers despite attending "many interviews," the Commission found: "Furthermore, in no manner were plaintiff's actions regarding these job leads inappropriate and he did not constructively refuse suitable employment." However, this finding is not supported by any evidence cited in the Commission's opinion and award. It appears that the Commission inserted this conclusory finding merely to refute the numerous specific findings to the contrary made by the Deputy Commissioner. The Commission's opinion and award should have contained specific findings as to what jobs plaintiff is capable of performing and whether jobs are reasonably available for which plaintiff would have been hired had he diligently sought them. Because the Commission's opinion and award is devoid of any recitation of any such evidence, this finding is unsupported by sufficient evidence.

The Commission's second related finding was that "[b]ecause no job was ever offered to plaintiff, it cannot be found that he unjustifiably refused suitable employment." If, as this finding suggests, an injured employee must be offered a job before there can be any consideration whether the employee's refusal to take that job was justified, there would be no need for the doctrine of constructive refusal. Accordingly, the Commission's second finding was legally inadequate.

On the other hand, the Commission made findings regarding plaintiff's efforts to find employment. The Commission found that "plaintiff located a job lead on his own" and that "[p]laintiff has made a reasonable effort to locate suitable employment." Although relevant, these findings alone are insufficient to support the Commission's conclusions of law and do not cure the error resulting from the lack of findings concerning the suitability of alternative employment. Accordingly, we remand with instructions that the Commission make necessary findings of fact on which the rights of the parties can be determined.

[3] Finally, defendants contend the Commission erred by failing to consider the Deputy Commissioner's personal observations that plaintiff was exaggerating any pain he was experiencing at the hearing before the Deputy and by failing to place sufficient weight on Dr.

Gwinn's opinion that plaintiff had reached maximum medical improvement. However, this Court has held that " '[t]he Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.' " *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). "Whether the full Commission conducts a hearing or reviews a cold record, N.C.G.S. § 97-85 places the ultimate fact-finding function with the Commission—not the hearing officer. It is the Commission that ultimately determines credibility, whether from a cold record or from live testimony." *Id.* at 681, 509 S.E.2d at 413. Accordingly, the Commission here was permitted to make the determinations about which defendants complain. These assignments of error are overruled.

We reverse the decision of the Court of Appeals and remand this case to that court for further remand to the Industrial Commission with directions to make additional specific findings of fact.

REVERSED AND REMANDED.

IN RE: INQUIRY CONCERNING A JUDGE, NO. 276, SHIRLEY H. BROWN, RESPONDENT

No. 650A03

(Filed 13 August 2004)

1. Judges— Code of Judicial Conduct—adoption of new limitations clause—authority of Supreme Court

The Supreme Court did not exceed its authority by adopting the Limitation of Proceedings clause in the current Code of Judicial Conduct.

2. Judges— disciplinary action—limitations clause

A disciplinary action before the Judicial Standards Commission was not barred by the limitations clause in the Code of Judicial Conduct where the action was pending when the clause became effective.

3. Judges— censure rejected—conduct not prejudicial to administration of justice

A recommended censure of a judge was rejected where the conduct of the judge in sanctioning an attorney and conducting a rehearing of that order (at which the judge both presided and testified) was not so egregious as to be conduct prejudicial to the administration of justice.

This matter is before the Court upon a recommendation entered 2 December 2003 by the Judicial Standards Commission, that respondent, Judge Shirley H. Brown, a judge of the General Court of Justice, District Court Division, Twenty-Eighth 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., 3A.(5), 3C.(1)(a), and 3C.(1)(d)(iv) of the North Carolina Code of Judicial Conduct. Heard in the Supreme Court 13 April 2004.

William N. Farrell, Jr. and James J. Coman, Special Counsel, for the Judicial Standards Commission.

Long, Parker, Warren & Jones, P.A., by Robert B. Long, Jr. and William A. Parker, for respondent.

ORDER REJECTING CENSURE.

This matter is before the Court upon a recommendation of censure from the Judicial Standards Commission (Commission) regarding the conduct of Judge Shirley H. Brown (respondent).

Preliminarily, we address respondent's contention that the Limitation of Proceedings clause of the North Carolina Code of Judicial Conduct bars disciplinary action in the present case because the conduct for which the Commission recommended censure occurred in 1996, more than three years before the commencement of the disciplinary proceeding at issue here. In response, the Commission contends that this Court exceeded its authority by adopting the Limitation of Proceedings clause. In the alternative, the Commission contends that even if the Court properly adopted the clause, it does not apply to the disciplinary proceeding against respondent because those proceedings were instituted before the effective date of the current Code of Judicial Conduct.

[1] On 2 April 2003, this Court revised the North Carolina Code of Judicial Conduct, adopting a clause entitled Limitation of Proceedings. Code of Judicial Conduct, 2004 Ann. R. N.C. 377, 389. The limitation clause states in pertinent part: "Disciplinary proceedings to redress alleged violations of . . . this Code must be commenced within three years of the act or omission allegedly giving rise to the violation." *Id.*

Article IV, section 13(2) of the North Carolina Constitution mandates that "[t]he Supreme Court shall have *exclusive authority to make rules of procedure* and practice for the Appellate Division." N.C. Const. art. IV, § 13(2) (emphasis added). To that end, the General Assembly enacted N.C.G.S. § 7A-33, which states, "The Supreme Court *shall prescribe rules of* practice and *procedure* designed to procure the expeditious and inexpensive disposition of all litigation in the appellate division." N.C.G.S. § 7A-33 (2003) (emphasis added). Taken together, Article IV, section 13(2) of the North Carolina Constitution and N.C.G.S. § 7A-33 charge this Court with the constitutional authority and the statutory duty to adopt rules of procedure for the administration of justice in the appellate courts of this state. Moreover, this Court is the sole entity authorized by the General Assembly "to prescribe standards of judicial conduct for the guidance of all justices and judges of the General Court of Justice." N.C.G.S. § 7A-10.1 (2003). Given the unique constitutional and statutory responsibilities of this Court to promulgate rules of appellate procedure, as well as rules and standards of conduct for the judiciary, the Court did not exceed its authority in adopting the Limitation of Proceedings clause of the Code of Judicial Conduct.

[2] However, we do not agree with respondent's contention that the limitations clause bars disciplinary action in the present case. Here, the Commission filed a formal complaint against respondent on 13 February 2003, several weeks before this Court's 2 April 2003 adoption of the current Code of Judicial Conduct. Because disciplinary action was already pending against respondent at the time the Limitation of Proceedings clause came into effect, that action is not barred by the limitations clause. *Cf. Bolick v. Am. Barmag Corp.*, 306 N.C. 364, 293 S.E.2d 415 (1982) (holding that statutes of limitations are generally employed prospectively only); *Flippin v. Jarrell*, 301 N.C. 108, 270 S.E.2d 482 (1980) (same); *Blevins v. N.W. Carolina Utils., Inc.*, 209 N.C. 683, 184 S.E. 517 (1936) (same).

[3] Concerning the recommendation of censure, special counsel for the Commission filed a complaint against respondent on 13 February 2003, alleging misconduct involving four matters over which she presided. The Commission concluded that respondent's actions regarding only one of the four matters warranted a recommendation of censure. After reviewing the record, briefs, and all other evidence adduced at the hearing before the Commission, this Court concludes that respondent's conduct for which the Commission recommended censure may be described as follows:

In February 1995, Buncombe County District Court Judge Gary S. Cash presided over the adjudication hearing of juvenile C.P. Represented by assistant public defender Haley Haynes (now Haley Haynes Montgomery), C.P. admitted to the offense for which he was charged. Judge Cash found C.P. to be delinquent and continued the matter until 16 May 1995 for disposition pending the results of an assessment and psychological evaluation. On 16 May 1995, Judge Peter L. Roda further continued the matter until 12 September 1995. On the day of the scheduled disposition proceeding, Judge Cash consulted with Montgomery about rescheduling C.P.'s disposition for another date in the near future. Following that discussion, the disposition was calendared for 21 September 1995 and reassigned to respondent, who was the judge presiding over juvenile matters during that week.

Montgomery received the results of C.P.'s mental evaluation approximately a week before the 21 September disposition proceeding. Based upon her review of those results, Montgomery concluded that there might be grounds to question C.P.'s competency. On 20 September 1995, the day before the disposition proceeding, Montgomery learned from a colleague that she could raise the issue of C.P.'s competency at any time during the juvenile proceeding. Montgomery then prepared a "Motion and Order Committing Defendant to Dorothea Dix Hospital" for a competency evaluation.

On 20 September 1995, rather than seeking out respondent, whom Montgomery knew was assigned to hear C.P.'s disposition, she presented the motion *ex parte* to emergency Judge Robert L. Harrell. Montgomery was appearing before Judge Harrell that day in criminal court regarding another matter. Testimony before the Commission indicated some disagreement as to what Montgomery told Judge Harrell concerning the date of C.P.'s disposition. Nonetheless, based upon his discussion with Montgomery, Judge Harrell ordered that C.P.

be transported to Dorothea Dix Hospital for a competency evaluation. Montgomery served Judge Harrell's order by leaving a copy with an administrative assistant at the office of the prosecutor and filed the order with the clerk's office at 4:31 p.m. that day.

The disposition hearing was held before respondent the following day, 21 September 1995. Several individuals, including a prosecutor, an attorney representing the Department of Social Services (DSS), and various mental health professionals from Broughton Hospital, the Juvenile Evaluation Center (now Swan Mental Health Academy), and Blue Ridge Mental Health Center were in the courtroom waiting for the case. Montgomery handed up Judge Harrell's order. Neither the prosecutor nor the DSS attorney was aware that the order had been entered. Respondent testified before the Commission that the common practice in Buncombe County District Court had been that only judges who were assigned to hear a case would issue *ex parte* orders in those matters, absent an emergency. Based upon her understanding of this common practice, respondent became upset and left the courtroom. At that time, respondent sought out Judge Harrell and explained that the order had effectively delayed the disposition hearing for which several parties were present. Following this discussion, Judge Harrell rescinded his order.

Respondent returned to the courtroom, informed the parties of the action taken by Judge Harrell, and ordered a competency evaluation of C.P. by a local mental health professional. Respondent held over the matter until the afternoon session, pending results of that evaluation. Based upon the results of that evaluation, respondent concluded that C.P. was competent and moved forward with the hearing. Ultimately, respondent ordered that C.P. be sent to training school.

On 6 December 1995, respondent entered an administrative order regarding what she believed to be inappropriate conduct by Montgomery in relation to C.P.'s case. In the order respondent made findings of fact as to Montgomery's actions including a finding that Judge Harrell was "not aware, and he was not told, that the matter was set for disposition the next day." Based upon her findings of fact, respondent concluded that there was "no proper motive" for Montgomery's actions. Respondent noted that C.P. had already been committed to one state hospital for evaluation and that had Judge Harrell's order not been rescinded, C.P. would have been "transported to yet another state mental institution." Respondent further con-

cluded that "[t]he facts and circumstances stated herein appear to demonstrate a transparent effort by an officer of the court to circumvent the proper scheduling of a juvenile case without regard to the juvenile's welfare nor for the proper administration of justice." According to respondent, Montgomery's conduct "clearly" violated the North Carolina Rules of Professional Conduct. Montgomery was ordered to present all future "motions in juvenile matters to the judge actually presiding in juvenile court, absent a true emergency when such judge is unavailable." Respondent allowed Montgomery thirty days to file written objections and to request a hearing based upon the order. The order was placed in the confidential juvenile file on C.P.'s case.

Montgomery retained counsel, Jack W. Stewart, who filed an objection to the 6 December 1995 order on Montgomery's behalf and requested a meeting with then Chief District Court Judge Earl J. Fowler, Jr. A meeting was subsequently held on 25 January 1996 between Stewart, Chief Judge Fowler, and respondent. After Stewart and respondent were unable to find a mutually acceptable solution, Chief Judge Fowler entered an order setting a hearing before respondent to allow respondent to address Montgomery's objections to the 6 December 1995 order. The hearing was originally scheduled for 16 April 1996.

On or about 16 April 1996, Stewart submitted a motion requesting that respondent recuse herself from further hearings related to C.P.'s case. In support of the motion, Stewart cited a "patent conflict of interest" in permitting respondent to review her own order. Stewart based the conflict of interest charge on respondent's previous actions consisting of receiving evidence, deciding findings of fact, and preparing the contested order now at issue. At the hearing, subsequently held on 18 April 1996, respondent heard argument on the motion for recusal and denied it. In so doing, respondent stated,

> I want to tell you that this was my order. It wasn't an order of any other judge. And the reason I put the last paragraph, that if she disputed facts found, that she'd have thirty days to file written objections, and I sort of anticipated they'd be specific instead of a general objection . . . and request for a hearing, it was certainly not anticipated that that hearing would be held before anyone else except me.

Thereafter, Stewart began enumerating specific objections to respondent's 6 December 1995 order. First, Stewart objected to that

portion of the order which stated that respondent "was still in the courthouse in chambers and available to hear juvenile matters" at the time Judge Harrell signed the order for competency evaluation. Respondent then stated, "I guess we could deal with [that] just by taking my testimony under oath." Respondent later testified before the Commission that until this point in the hearing, she never anticipated that she would be a witness at the hearing. Stewart then lodged other objections to the order, including that portion noting that "[w]hen he signed the order, Judge Harrell was not aware, and he was not told, that the matter was set for disposition the next day." Respondent offered to strike that portion of the order; however, Stewart preferred to have Judge Harrell testify to the conversation under oath.

After Stewart listed Montgomery's remaining objections to the order, respondent asked Stewart, "Do you want sworn testimony from me as to my whereabouts on the afternoon of September the 20th?" Stewart responded, "I have no preference how your Honor chooses to proceed." Thereafter, respondent was sworn in and testified that she remained in the courthouse until at least 5:00 p.m. on 20 September 1995.

Stewart called three witnesses, each of whom was questioned by respondent, and respondent called and questioned one witness. Stewart lodged four objections to respondent's questioning of the witnesses, two of which respondent sustained, one of which was essentially withdrawn by Stewart, and one of which was overruled. Notably, when respondent sustained Stewart's first objection, she acknowledged, "How can I rule on an—I guess if you object, I have to sustain it because I'm the presiding judge, so I'll sustain it."

The witness called by respondent, DSS attorney Charlotte Wade, testified that respondent had previously informed her of the 18 April 1996 proceedings, that she was present in the courtroom of her own volition, and that she decided to testify only after hearing the other testimony presented. Stewart never objected to respondent's calling Wade as a witness, and when he objected to one of Wade's answers to respondent's question, respondent sustained the objection.

Respondent never announced a decision orally or filed a written order based upon the 18 April 1996 hearing. Respondent testified before the Commission that she had decided the 6 December 1995 order should stand and therefore "left the order in effect" without taking further action.

Based upon this evidence, the Commission made the following findings of fact, in pertinent part:

> 7. The respondent presided over a hearing in the action *In The Matter of* [*C.P.*], Buncombe County file number 97 J 9001 on April 18, 1996. The said hearing was held pursuant to Notice of Objection and Exception to Ex Parte Order and Application for Hearing filed on December 28, 1995 by Jack W. Stewart (Stewart), attorney for Haley Haynes (Haynes) (now Haley Haynes Montgomery), who was the Assistant Public [D]efender representing [C.P.]. Stewart also filed a Motion for Recusal in the matter on April 16, 1996 requesting that the respondent recuse herself from hearing the matter as she was the Judge who issued the order imposing sanctions against Haynes that was the subject of the April 18, 1996 hearing. The respondent denied the Motion for Recusal.
>
> 8. While presiding over the April 18, 1996 hearing described in paragraph 7. above, the respondent personally testified under oath; conducted and ruled on objections to her own voir dire examination of witnesses called to testify by Stewart; and ruled on objections to respondent's voir dire examination of a witness called by respondent.
>
> 9. The respondent has never announced a decision nor entered any order as a result of the April 18, 1996 hearing described in paragraphs 7. and 8. above.

The Commission concluded as a matter of law that respondent's conduct violated Canons 2A., 3A.(5), 3C.(1)(a), and 3C.(1)(d)(iv) of the North Carolina Code of Judicial Conduct. The Commission further concluded that this conduct constituted "conduct prejudicial to the administration of justice that brings the judicial office into disrepute" and recommended that respondent be censured by this Court.

The Commission's "recommendations are not binding upon the Supreme Court, which will consider the evidence of both sides and exercise its independent judgment as to whether it should censure, remove or decline to do either." *In re Nowell*, 293 N.C. 235, 244, 237 S.E.2d 246, 252 (1977); *see also* N.C.G.S. § 7A-377 (2003); Rules for Supreme Court Review of Recommendations of the Jud'l Standards Comn'n 3, 2004 Ann. R. N.C. 371, 372. After careful consideration, we

conclude that respondent's conduct was not so egregious as to amount to conduct prejudicial to the administration of justice within the meaning of N.C.G.S. § 7A-376. N.C.G.S. § 7A-376 (2003) (setting forth grounds for censure and removal of judges). In so holding, we do not address the question of whether respondent violated specific provisions of the North Carolina Code of Judicial Conduct. Although helpful in applying the statutory and constitutional prohibitions on judicial behavior, a finding as to whether a judge has violated codes of judicial conduct is not determinative of the central issue of whether her conduct was prejudicial to the administration of justice. *In re Edens*, 290 N.C. 299, 306, 226 S.E.2d 5, 9 (1976). In *Edens*, we stated that:

> Conduct prejudicial to the administration of justice that brings the judicial office into disrepute has been defined as "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office."

Id. at 305, 226 S.E.2d at 9 (quoting *Geiler v. Comm'n on Jud'l Qualifications*, 10 Cal. 3d 270, 284, 515 P.2d 1, 9 (1973), *cert. denied*, 417 U.S. 932, 41 L. Ed. 2d 235 (1974)).

Without addressing whether respondent's conduct violated the Judicial Code, we hold that respondent's conduct was not such that it would be, to an objective observer, prejudicial to public esteem for the judicial office.

Respondent's 6 December 1995 order was tantamount to a sanction against Montgomery based upon what respondent believed to be inappropriate conduct. Notably, respondent expressed concern in the order for Montgomery's juvenile client, who, by his own attorney's actions, would have been subjected to confinement in a second state facility several hours away for further evaluation. In sanctioning Montgomery, respondent merely instructed her to abide by a standard practice in Buncombe County District Court. Respondent even fashioned a remedy for Montgomery by giving her an opportunity to object to the order.

When Montgomery filed an objection to the order, essentially requesting a reconsideration, respondent, and to some extent Chief Judge Fowler, logically assumed that respondent was the appropriate judge to reconsider her own order. In Montgomery's subsequently

filed motion for recusal, she provided no actual grounds to support a recusal, arguing only that there was a patent conflict of interest based upon respondent's making findings of fact and entering the 6 December 1995 order. The motion gave no indication that resolution of the matter would necessitate testimony from respondent, and respondent herself never anticipated that she would need to testify at the subsequent hearing. Respondent offered to testify as to her whereabouts on 20 September 1995 only after that issue arose at the 18 April 1996 hearing. Stewart did not object to respondent's offer to testify, stating only, "I have no preference how your Honor chooses to proceed." Thereafter, respondent gave testimony limited to her whereabouts on the date in question.

Respondent did rule on objections to her own examination of witnesses and did call one witness, Wade, to testify. However, the majority of those rulings were in Montgomery's favor, and it appears from Wade's own testimony that she, not respondent, decided her testimony was necessary. Furthermore, Montgomery did not object to respondent's calling Wade as a witness. While respondent never entered an order following the hearing, it appears from the record that respondent's conduct had no impact on the underlying juvenile case nor on any other case pending before her.

Respondent's conduct simply does not rise to the level of those instances of conduct that we have previously determined to be prejudicial to the administration of justice. *See, e.g., In re Hill*, 357 N.C. 559, 591 S.E.2d 859 (2003) (censuring judge for verbally abusing an attorney and sexual comments and horseplay); *In re Brown*, 356 N.C. 278, 570 S.E.2d 102 (2002) (censuring judge when on two occasions, the judge caused his signature to be stamped on orders for which he did not ascertain the contents); *In re Stephenson*, 354 N.C. 201, 552 S.E.2d 137 (2001) (same outcome where the judge solicited votes from the bench); *In re Brown*, 351 N.C. 601, 527 S.E.2d 651 (2000) (censure appropriate where the judge consistently issued improper verdicts in DWI cases).

In conclusion, we hold that it was within this Court's authority to adopt the Limitation of Proceedings clause and that the clause does not apply retroactively to bar disciplinary action in this matter. We also conclude that respondent's actions do not constitute conduct prejudicial to the administration of justice. Therefore, pursuant to N.C.G.S. §§ 7A-376 and 7A-377(a) and to Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, it is ordered that the recommen-

dation of the Commission that Judge Shirley H. Brown be censured is hereby rejected.

By order of the Court in Conference, this the 12th day of August, 2004.

s/Brady, J.
Brady, J.
For the Court

IN RE: INQUIRY CONCERNING A JUDGE, NO. 278, JERRY BRASWELL, RESPONDENT

No. 556A03

(Filed 13 August 2004)

Judges— censure—refusal to recuse—pending lawsuit by plaintiff against 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 his refusal to recuse himself from hearing a case when the plaintiff in that case had an unrelated lawsuit pending against the judge.

This matter is before the Supreme Court pursuant to N.C.G.S. § 7A-376 upon a recommendation by the Judicial Standards Commission entered 11 September 2003 that respondent Jerry Braswell, a judge of the General Court of Justice, Superior Court Division, Judicial District Eight B of the State of North Carolina, be censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute based upon a violation of Canons 2A and 3C(1) of the North Carolina Judicial Code of Conduct. Considered in the Supreme Court 17 February 2004.

William N. Farrell, Jr., Special Counsel, for the Judicial Standards Commission.

The Honorable Jerry Braswell, pro se.

ORDER OF CENSURE

The Judicial Standards Commission (Commission) notified Judge Jerry Braswell (respondent) on 11 March 2002 that it had ordered a

preliminary investigation to determine whether formal proceedings under Commission Rule 9 should be instituted against him. The subject matter of the investigation included allegations that respondent presided over a hearing in the case of *R. Walt Willingham and Nathaniel Willingham v. Interbay Funding, L.L.C. and David Craig as substitute trustee* on 22 January 2002 in Onslow County when the plaintiff in that case had an unrelated lawsuit pending against Judge Braswell.

On 29 April 2003, special counsel for the Commission filed a complaint alleging respondent "engaged in conduct inappropriate to his judicial office by failing to recuse himself, both initially and after a motion for recusal in open court, from presiding over a hearing . . . while a party or attorney . . . was a party in a civil lawsuit that had not been dismissed against the respondent." The complaint filed by the special counsel for the Commission further alleged that respondent's actions "constitute[d] willful misconduct in office and conduct prejudicial to the administration of justice that brings the judicial office into disrepute and are in violation of Canons 2A and 3C(1) of the North Carolina Code of Judicial Conduct and the respondent's oath of office."

In his response to the complaint filed 30 May 2003, respondent answered, *inter alia*, "[t]hat at no time, during either the chamber discussions or the court hearing, did the Respondent believe that a conflict of interest existed, thereby requiring his recusal."

On 1 July 2003 the Commission served respondent with a notice of formal hearing concerning the charges alleged. The Commission conducted the hearing on 14 August 2003 at which time special counsel for the Commission presented evidence supporting the allegations in the complaint. In its recommendation to this Court dated 11 September 2003 the Commission found, *inter alia*, the following: "The matter of *R. Walt Willingham and Nathaniel Willingham v. Interbay Funding, L.L.C. and David Craig, as substitute trustee*, . . . was set for hearing on January 22, 2002 before the respondent. At the same time, the matter of *Nathaniel Willingham v. Jerry Braswell* . . . was still pending and had not been concluded."

The Commission further found "Nathaniel Willingham made an informal motion in chambers and thereafter a formal motion on the record for the respondent to disqualify himself in the case of *R. Walt Willingham and Nathaniel Willingham v. Interbay Funding, L.L.C. and David Craig, as substitute trustee*, . . . based on Nathaniel

Jerome Willingham's and respondent's adversarial relationships." Judge Braswell denied Willingham's motions for disqualification and immediately thereafter presided over the hearing on 22 January 2002 in the case of *R. Walt Willingham and Nathaniel Willingham v. Interbay Funding, L.L.C. and David Craig, as substitute trustee.*

Based on its findings of fact the Commission concluded on the basis of the clear and convincing evidence presented at the hearing that respondent's conduct constituted:

a. conduct in violation of Canons 2A and 3C(1) of the North Carolina Code of Judicial Conduct;

b. conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

Based on the foregoing findings of fact and conclusions of law the Commission recommended that this Court censure the respondent. *See* N.C.G.S. §§ 7A-376 and 7A-377 (2003).

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). "In reviewing the recommendations of the Commission, the recommendations are not binding upon this Court. We consider the evidence on both sides and then exercise independent judgment as to whether to censure, to remove, or to decline to do either." *In re Inquiry Concerning a Judge (Brown)*, 356 N.C. 278, 284, 570 S.E.2d 102, 105 (2002).

The quantum of proof in proceedings before the Commission is proof by clear and convincing evidence. *In re Nowell*, 293 N.C. 235, 247, 237 S.E.2d 246, 254 (1977). Such proceedings are not meant "to punish the individual but to maintain the honor and dignity of the judiciary and the proper administration of justice." *Nowell*, 293 N.C at 241, 237 S.E.2d at 250. After thoroughly examining the evidence presented to the Commission, we conclude the Commission's findings of fact are supported by clear and convincing evidence and adopt them as our own. *See In re Harrell*, 331 N.C. 105, 110, 414 S.E.2d 36, 38 (1992).

In the case at bar, the Commission found that Judge Braswell improperly failed to recuse himself in the matter of *R. Walt Willingham and Nathaniel Willingham v. Interbay Funding, L.L.C.*

and David Craig, as substitute trustee. " '[T]he 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. Fie*, 320 N.C. 626, 627, 359 S.E.2d 774, 775 (1987). "Thus, the standard is whether 'grounds for disqualification actually exist.' " *Lange v. Lange*, 357 N.C. 645, 649, 588 S.E.2d 877, 880 (2003) (quoting *Scott*, 343 N.C. at 325, 471 S.E.2d at 612). We conclude that the pending case against Judge Braswell created grounds for disqualification because Judge Braswell's "impartiality [could] reasonably be questioned." Code of Judicial Conduct Canon 3C(1), 2004 N.C. R. Ct. 308.

In light of the foregoing, we conclude that respondent's actions constitute violations of Canons 2A and 3C(1) of the North Carolina Code of Judicial Conduct and thus a violation of N.C.G.S. § 7A-376 (conduct prejudicial to the administration of justice that brings the judicial office into disrepute). 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, Jerry Braswell, be and he is hereby, censured.

By order of the Court in Conference, this 12th day of August 2004.

s/Brady, J.
Brady, J.
For the Court.

DR. JOHN A. SMITH, D/B/A HIGHWOOD CHIROPRACTIC v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

NO. 318A03

(Filed 13 August 2004)

Liens— medical services—settlement proceeds—notice to insurer

The decision of the Court of Appeals that the trial court erred by denying plaintiff chiropractor's motion for summary judgment in an action against defendant insurer for failure to retain sufficient funds from settlement proceeds received by a pro se injured party to satisfy plaintiff's lien for medical services is reversed and remanded for the entry of summary judgment in favor of defendant insurer for the reason stated in the dissenting opinion in the Court of Appeals that the injured party's submission to defendant insurer of an HCFA health insurance claim form was insufficient to give the insurer notice that plaintiff was asserting a claim against the settlement proceeds or was otherwise asserting a lien pursuant to N.C.G.S. §§ 44-49 and 44-50.

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. 596, 580 S.E.2d 46 (2003), affirming in part and reversing in part orders entered 1 August 2001 and 30 January 2002 by Judge James R. Fullwood in District Court, Wake County, and remanding to the trial court with instructions. Heard in the Supreme Court 10 December 2003.

E. Gregory Stott for plaintiff-appellee.

Haywood, Denny & Miller, L.L.P., by John R. Kincaid, for defendant-appellant.

Patterson, Dilthey, Clay, Bryson & Anderson, L.L.P., by Mary McHugh Webb and Matthew A. Fisher, on behalf of the North Carolina Association of Defense Attorneys, amicus curiae.

PER CURIAM.

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

REVERSED.

HOME BUILDERS ASSOCIATION OF FAYETTEVILLE NORTH CAROLINA, INC., JAMES EDWARD GRAVES, JIM GRAVES & ASSOCIATES, INC., JOHN McNATT GILLIS, GILLIS DEVELOPMENT CORPORATION, INC., CHARLES A. GORE, GORE BUILT HOMES, INC., EDGAR CLAY BULLARD, REGAL INDUSTRIES, INC., WATSON G. CAVINESS, CAVINESS & CATES BUILDING AND DEVELOPMENT COMPANY, RALPH D. HUFF, III, H&H CONSTRUCTORS, INC., GEORGE ARMSTRONG, CRA HOME BUILDERS, INC., HAROLD KIDD, KIDD CONSTRUCTION CO., INC., LAWRENCE WAYNE HARDIN, HARDIN BUILDERS, INC., JACKIE HAIRR, HCC INVESTMENTS, LLC, MIKE HOWARD, HOWARD BUILDERS LLC, RONALD W. SMITH, R.W.S. GENERAL BUILDERS, LLC, THOMAS L. BRADFORD, ELMWOOD PARTNERS, LLC., TAMI SCHALLER,	)	
v.	)	
CITY OF FAYETTEVILLE	)	ORDER

No. 343P04

This Court allowed a temporary stay in this case on 12 July 2004. As to the other motions filed in the cause, the Court orders as follows:

Petitioners' Petition for Writ of Supersedeas is allowed. The portion of Judge Locklear's Order of 28 June 2004 that provides that "neither [petitioners'] Petition or Amended Petition, nor any other aspect of this proceeding, shall modify the June 30, 2004 effective date of the City's Annexation Ordinance" is stayed pending appeal.

Petitioners' Petition for Writ of Certiorari to review the Court of Appeals' Order entered 7 July 2004 dissolving the temporary stay of the Annexation Ordinance and denying petitioners' Petition for Writ of Supersedeas to the Court of Appeals is denied.

Petitioners' Petition for Discretionary Review (prior to determination by the North Carolina Court of Appeals) to consider petitioners' appeal from the Cumberland County Superior Court Order dismissing their underlying petition is denied.

Petitioners' application for an order staying the portions of Judge Locklear's Order to the effect that respondent's Annexation Ordinance is effectively amended to make the effective date of the ordinance the last day of the next full calendar month following the date of the final judgment in connection with petitioners' appeal to the appellate division, is allowed.

Respondent's Urgent Motion to Dissolve Temporary Stay or, Alternatively, to Expedite Review, is denied.

By order of the Court in Conference, this 13th day of July, 2004.

s/Brady, J.
For the Court

IN RE HONEYCUTT

[358 N.C. 728 (2004)]

IN RE HONEYCUTT) ORDER

No. 317P04

Petitioners' Petition for Writ of Mandamus is allowed. Pursuant to Article IV of the Constitution of North Carolina, Article 7A of the General Statutes of North Carolina, and the inherent supervisory authority of the Supreme Court of North Carolina, District Court Judge James M. Honeycutt is ordered to comply with North Carolina General Statute Sections 11-1 through 11-11 in the administration of oaths. Pursuant to that same authority, District Court Judge James M. Honeycutt is ordered to permit court to be opened with a proclamation which shall include the customary phrase, "God save the state and this honorable court."

By order of the Court in Conference, this 28th day of June, 2004.

s/Lake, Jr., C.J.

KEGLEY v. CITY OF FAYETTEVILLE

[358 N.C. 729 (2004)]

KEITH KEGLEY AND KIMBER KEGLEY, CECIL HAMMONDS AND MAGGIE HAMMONDS, AND CHADWICK McKEOWN	)	
v.	)	ORDER
CITY OF FAYETTEVILLE, A NORTH CAROLINA MUNICIPALITY	)	

No. 342P04

This Court allowed a temporary stay in this case on 12 July 2004. As to the other motions filed in this cause, the Court orders as follows:

Petitioners' Petition for Writ of Supersedeas is allowed. The portion of Judge Locklear's Order of 28 June 2004 that provides that "neither [petitioners'] Petition or Amended Petition, nor any other aspect of this proceeding, shall modify the June 30, 2004 effective date of the City's Annexation Ordinance" is stayed pending appeal.

Petitioners' Petition for Writ of Certiorari to review the Court of Appeals' Order entered 7 July 2004 dissolving the temporary stay of the Annexation Ordinance and denying Petitioners' Petition for Writ of Supersedeas to the Court of Appeals is denied.

Petitioners' Application for Discretionary Review (prior to determination by the North Carolina Court of Appeals) by this Court of Judge Locklear's Order Granting Respondent's Motion to Dismiss is denied.

Petitioners' application for an order staying the portions of Judge Locklear's Order to the effect that respondent's Annexation Ordinance is effectively amended to make the effective date of the ordinance the last day of the next full calendar month following the date of the final judgment in connection with petitioners' appeal to the appellate division, is allowed.

Respondent's Urgent Motion to Dissolve the Temporary Stay or, Alternatively, to Expedite Review, is denied.

By order of the Court in Conference, this 13th day of July, 2004.

s/Brady, J.
For the Court

STATE v. SPRUILL

[358 N.C. 730 (2004)]

STATE OF NORTH CAROLINA	)	
v.	)	ORDER
JOHNNIE LEE SPRUILL	)	

No. 404A92-5

Defendant's Petition for Writ of Mandamus is allowed. The trial court concluded as a matter of law that defendant satisfied N.C.G.S. § 15A-2006 by proving that he was mentally retarded, as defined in N.C.G.S. § 15A-2005(a), at the time of the commission of the capital crime in 1984. This Court finds no basis for disturbing such conclusion of law and holds that a defendant who satisfied N.C.G.S. § 15A-2006 is lawfully entitled to appropriate relief pursuant to N.C.G.S. § 15A-2006. Accordingly, the Superior Court, Northampton County, is hereby ordered to grant defendant appropriate relief pursuant to N.C.G.S. § 15A-2006.

By order of the Court in Conference, this 23rd day of July, 2004.

s/Brady, J.
For the Court

Upon consideration of the petition filed by Defendant on the 9th day of July 2004 in this matter for a writ of certiorari to review the order of the Superior Court, Northampton County, the following order was entered and is hereby certified to the Superior Court of that County:

"Dismissed as moot by order of the Court in conference, this the 23rd day of July 2004.

s/Brady, J.
For the Court

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

Beatenhead v. Lincoln Cty. Case below: 162 N.C. App. 547	No. 105PA04	Def's (Martin Eaddy) PDR Under N.C.G.S. § 7A-31 (COA02-1610-2)	Allowed 08/12/04
Cameron v. Merisel, Inc. Case below: 163 N.C. App. 224	No. 227PA04	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA02-1330) 2. Plts' Conditional PDR 3. Plts' PWC to Review the COA Decision	1. Allowed 08/12/04 2. Allowed 08/12/04 3. Denied
Clark Stone Co. v. N.C. Dep't of Env't & Natural Res. Case below: 164 N.C. App. 24	No. 273P04	1. Petitioner's NOA Based Upon a Constitutional Question (COA03-526) 2. Respondents' (State) Motion to Dismiss Appeal 3. Respondent/Intervenors' Motion to Dismiss Appeal (Appalachian Trail Conf., et al.) 4. Petitioner's PDR Under N.C.G.S. § 7A-31	1. — 2. Allowed 08/12/04 3. Allowed 08/12/04 4. Denied 08/12/04
Dove v. Wil-O-Wisp Apartments Owner(s) Case below: 163 N.C. App. 610 358 N.C. 542	No. 186P04	Plt's Petition for Rehearing of PDR (COA03-1219)	Dismissed 08/12/04
Elliott v. Estate of Elliott Case below: 163 N.C. App. 577	No. 226P04	Def's PWC to Review the Decision of the COA (COA03-775)	Denied 08/12/04
Farrior v. State Farm Mut. Auto. Ins. Co. Case below: 164 N.C. App. 384	No. 266P04	Plts' PDR Under N.C.G.S. § 7A-31 (COA03-730)	Denied 08/12/04
Huber v. N.C. State Univ. Case below: 163 N.C. App. 638	No. 255P04	AG's PDR Under N.C.G.S. § 7A-31 (COA03-145)	Denied 08/12/04

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

In re Appeal of Schwarz & Schwarz, Inc. Case below: 163 N.C. App. 358	No. 182P04	Appellant's (Schwarz & Schwarz, Inc.) PDR Under N.C.G.S. § 7A-31 (COA03-641)	Denied 08/12/04
In re C.B. Case below: 165 N.C. App. 274	No. 368P04	Respondent-Father's PDR Under N.C.G.S. § 7A-31 (COA03-644)	Denied 08/12/04
In re J.D. Case below: 164 N.C. App. 176	No. 240P04	Petitioner's (Buncombe Co. DSS) PDR Under N.C.G.S. § 7A-31 (COA03-71-2)	Denied 08/12/04
In re Q.V. Case below: 164 N.C. App. 737	No. 373P04	Respondent's PWC to Review the Decision of the COA (COA03-738)	Denied 08/12/04
Jones v. N.C. Ins. Guar. Ass'n Case below: 163 N.C. App. 105	No. 164P04	1. Def's (Traveler's Indemnity Company) Motion for Review of the Court of Appeals' Judgment in this Case, Pursuant to Article IV, Section 12(1) of the North Carolina Constitution (COA03-158) 2. Def's (N.C. Insurance Guaranty Ass'n) Motion for Award of Costs and Reasonable Attorneys' Fees as a Sanction	1. Dismissed 08/12/04 2. Denied 08/12/04
Jonesboro United Methodist Church v. Mullins-Sherman Architects, LLP Case below: 162 N.C. App. 547	No. 170PA04	Def's (J.H. Batten, Inc.) PDR Under N.C.G.S. § 7A-31 (COA03-273)	Allowed 08/12/04
Keel v. Private Bus., Inc. Case below: 163 N.C. App. 703	No. 253P04	1. Joint Motion of Plt. and Def. to Dismiss PDR (COA03-703) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed 08/12/04 2. Dismissed as moot 08/12/04
Kelly v. Advanced Homecare, Inc. Case below: 164 N.C. App. 410	No. 314P04	Plt's PWC to Review the Decision of the COA (COA03-887)	Denied 08/12/04

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

Lee v. O'Brien Case below: 151 N.C. App. 748	No. 377P04	1. Plt's PWC to Review the Decision of the COA (COA01-1231) 2. Plt's Motion to Amend PWC 3. Plt's Amended PWC	1. Dismissed as moot 08/12/04 2. Allowed 08/12/04 3. Denied 08/12/04
Lyons v. N.C. Court of Appeals Case below: 162 N.C. App. 722	No. 099P04-2	Plt's Petition for Writ of Mandamus (COA03-208)	Denied 08/12/04
Northcross Land & Dev. Ltd. P'ship v. Lake Norman Castaldi's, Inc. Case below: 163 N.C. App. 204	No. 114P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-395)	Denied 08/12/04
PharmaResearch Corp. v. Nash Case below: 163 N.C. App. 419	No. 215P04	1. Def's PDR Under N.C.G.S. § 7A-31 (COA03-213-2) 2. Plt's Conditional PDR	1. Denied 08/12/04 2. Dismissed as moot 08/12/04
Reep v. Beck Case below: 164 N.C. App. 779	No. 345PA04	Def's motion for Temporary Stay (COA03-961)	Allowed **07/14/04**
State v. Anderson Case below: Wilkes County Superior Court	No. 060A97-3	1. District Attorney's PWC to Review the Order of the Superior Court 2. Def's Motion to Dismiss PWC	1. Denied 08/12/04 2. Dismissed as moot 08/12/04
State v. Bailey Case below: 163 N.C. App. 84	No. 163P04	1. Def's NOA Based Upon a Substantial Constitutional Question (COA03-431) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 08/12/04 2. Denied 08/12/04
State v. Becton Case below: 163 N.C. App. 592	No. 214A04	1. Def's NOA Based Upon a Constitutional Question (COA03-682) 2. AG's Motion to Dismiss Appeal	1. — 2. Allowed 08/12/04
State v. Bell Case below: 159 N.C. App. 151	No. 237P04	Def's PWC to Review the Decision of the COA (COA02-1260)	Denied 08/12/04

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

State v. Blakeley Case below: 164 N.C. App. 411	No. 308A04	1. Def's NOA Based Upon a Constitutional Question (COA03-106) 2. AG's Motion to Dismiss Appeal	1. —— 2. Allowed 08/12/04
State v. Bryant Case below: 163 N.C. App. 478	No. 173PA04	1. AG's Petition for Writ of Supersedeas (COA02-1706) 2. AG's NOA Based Upon a Constitutional Question 3. AG's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Dismiss Petition for Discretionary Review Under N.C.G.S. § 7A-31	1. Allowed 08/12/04 2. Dismissed *ex mero motu* 08/12/04 3. Allowed 08/12/04 4. Denied 08/12/04
State v. Burke Case below: Iredell County Superior Court	No. 181A93-2	Def's PWC to Review the Order of the Superior Court	Denied 08/12/04
State v. Christmas Case below: 165 N.C. App. 544	No. 382P04	1. AG's Motion for Temporary Stay (COA04-362) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Denied **08/05/04** 2. Denied **08/05/04** 3. Denied **08/05/04**
State v. Clark Case below: 165 N.C. App. 279	No. 383P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-652)	Denied 08/12/04
State v. Cole Case below: Camden County Superior Court	No. 324A94-3	1. Def's PWC to Review the Order of the Superior Court 2. Def's Motion to Defer Consideration of PWC (pending decision in State v. Poindexter) 3. Def's Motion to Supplement PWC	1. Denied 08/12/04 2. Denied 08/12/04 3. Allowed 08/12/04
State v. Crawford Case below: 163 N.C. App. 122	No. 155P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-485)	Denied 08/12/04
State v. Davis Case below: 164 N.C. App. 780	No. 324P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-1037)	Denied 08/12/04

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

State v. Drew Case below: 162 N.C. App. 682	No. 132P04	1. Def's NOA Based Upon a Constitutional Question (COA02-1481) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. — 2. Allowed 08/12/04 3. Denied 08/12/04
State v. Dubar Case below: 165 N.C. App. 276	No. 378P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-506)	Denied 08/12/04
State v. Edwards Case below: 164 N.C. App. 130	No. 276P04	1. Def's NOA Based Upon a Constitutional Question (COA03-736) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. — 2. Allowed 08/12/04 3. Denied 08/12/04
State v. Frazier Case below: 164 N.C. App. 599	No. 350P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-1146)	Denied 08/12/04
State v. Freeman Case below: 164 N.C. App. 412	No. 307P04	1. Def's NOA Based Upon a Constitutional Question (COA03-1162) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31 4. Def's Alternative Motion to Defer Decision on PDR Pending Ruling of U.S. Supreme Court in *Blakely v. Washington*	1. — 2. Allowed 08/12/04 3. Denied 08/12/04 4. Dismissed as moot 08/12/04
State v. Gaines Case below: 163 N.C. App. 784	No. 233P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-330)	Denied 08/12/04
State v. Gonzales Case below: 164 N.C. App. 512	No. 339PA04	Def's PWC to Review the Decision of the COA (COA03-606)	Allowed 08/12/04
State v. Graham Case below: 164 N.C. App. 229	No. 264P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-822)	Denied 08/12/04

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

State v. Harrison Case below: 164 N.C. App. 412	No. 281P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-84)	Denied 08/12/04
State v. Haylock Case below: 163 N.C. App. 612	No. 204P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-799)	Denied 08/12/04
State v. Haywood Case below: 164 N.C. App. 780	No. 357P04	Def-Appellant's PDR Under N.C.G.S. § 7A-31 (COA03-1277)	Denied 08/12/04
State v. Heath Case below: 164 N.C. App. 412	No. 305P04	1. Def's PDR Under N.C.G.S. § 7A-31 (COA03-1229) 2. Def's Motion for Appropriate Relief	1. Denied 08/12/04 2. Denied 08/12/04
State v. Johnson Case below: 164 N.C. App. 230	No. 516P96-2	Def's PWC to Review the Decision of the COA (COA03-832)	Denied 08/12/04
State v. Jones Case below: 163 N.C. App. 612	No. 217P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-623)	Denied 08/12/04
State v. Jones Case below: 165 N.C. App. 540	No. 389PA04	AG's Motion for Temporary Stay (COA02-1633)	Allowed 08/12/04
State v. Little Case below: 163 N.C. App. 235	No. 183A04	1. Def's NOA Based Upon a Dissent (COA03-38) 2. Def's PDR as to Additional Issues 3. AG's Motion to Dismiss Appeal	1. — 2. Denied 08/12/04 3. Denied 08/12/04
State v. Lyons Case below: 162 N.C. App. 722	No. 129P04-2	1. Def's PDR Under N.C.G.S. § 7A-31 (COA03-208) 2. Def's MAR Pursuant to N.C.G.S. § 15A-1411	1. Dismissed 08/12/04 2. Dismissed 08/12/04

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

State v. Maniego Case below: 163 N.C. App. 676	No. 231P04	1. Def's NOA Based Upon a Constitutional Question (COA03-340) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31 4. Def-Appellant's Motion for Appropriate Relief	1. — 2. Allowed 08/12/04 3. Denied 08/12/04 4. Denied 08/12/04
State v. McLaughlin Case below: Bladen County Superior Court	No. 637A84-6	Def-Appellant's PWC to Review the Order of the Superior Court	Denied 08/12/04
State v. McNair Case below: 150 N.C. App. 440	No. 239P04	Def's PWC to Review the Decision of the COA (COA01-706)	Denied 08/12/04
State v. Nivens Case below: 164 N.C. App. 600	No. 338P04	Def's PDR Under N.C.G.S. § 7A-31 (COA02-1601)	Denied 08/12/04
State v. Nye Case below: 164 N.C. App. 230	No. 245P04	1. Def's NOA Based Upon a Constitutional Question (COA03-35) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. — 2. Allowed 08/12/04 3. Denied 08/12/04
State v. Penland Case below: 163 N.C. App. 613	No. 243P04	1. Def's PDR (PWC) to Review the Decision of the COA (COA03-665) 2. AG's Motion to Dismiss Appeal	1. Denied 08/12/04 2. Dismissed as moot 08/12/04
State v. Pope Case below: 163 N.C. App. 486	No. 212A04	Def's (Pope) NOA Based Upon a Constitutional Question (COA03-557)	Dismissed *ex mero motu* 08/12/04
State v. Scanlon Case below: Durham County Superior Court	No. 480A99-4	1. Def's Motion for Clarification 2. Def's Motion for Writ of Prohibition	1. Denied 08/12/04 2. Denied 08/12/04
State v. Shaw Case below: 164 N.C. App. 723	No. 326P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-917)	Denied 08/12/04

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

State v. Shuford Case below: 162 N.C. App. 182	No. 064P04	1. Def's PDR Under N.C.G.S. § 7A-31 (COA03-92) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Denied 08/12/04 2. Denied 08/12/04
State v. Sinnott Case below: 163 N.C. App. 268	No. 159A04	1. Defs' NOA Based Upon a Constitutional Question (COA03-187) 2. AG's Motion to Dismiss Appeal	1. — 2. Allowed 08/12/04
State v. Smith Case below: 164 N.C. App. 231	No. 265P04	Def's (Ashley Smith) PDR Under N.C.G.S. § 7A-31 (COA03-428)	Denied 08/12/04
State v. Spencer Case below: 164 N.C. App. 601	No. 325P04	1. Def's PDR Under N.C.G.S. § 7A-31 (COA03-729) (Thorsen) 2. Def's PDR Under N.C.G.S. § 7A-31 (COA03-729) (Cunningham)	1. Denied 08/12/04 2. Denied 08/12/04
State v. Taylor Case below: 163 N.C. App. 785	No. 224P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-737)	Denied 08/12/04
State v. Tirado Case below: Cumberland County Superior Court	No. 005A01	Def's (Tirado) Motion to Hold Decision Pending the U.S. Supreme Court's Decision in *Roper v. Simmons*	Dismissed as moot 08/12/04
State v. White Case below: 163 N.C. App. 765	No. 252P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-742)	Denied 08/12/04
State v. Wilburn Case below: 164 N.C. App. 601	No. 349P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-1347)	Denied 08/12/04
State v. Williams Case below: 164 N.C. App. 638	No. 333P04	1. AG's Motion for Temporary Stay (COA03-503) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Denied **07/08/04** 2. Denied **07/08/04** 3. Denied **07/08/04**
State v. Williamson Case below: 163 N.C. App. 785	No. 246P04	Def's PDR Under N.C.G.S. § 7A-31 (COA03-554)	Denied 08/12/04

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

State v. Wood Case below: 164 N.C. App. 601	No. 295P04	1. Def's NOA Based Upon a Constitutional Question (COA03-551) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. — 2. Allowed 08/12/04 3. Denied 08/12/04
State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n Case below: 163 N.C. App. 46	No. 134P04	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA03-457) 2. Respondent's (State of North Carolina, ex rel. North Carolina Utilities Commission) Conditional Petition for Discretionary Review Under N.C.G.S. § 7A-31	1. Denied 08/12/04 2. Dismissed as moot 08/12/04
State ex rel. Utils. Comm'n v. Carolina Util. Customers Ass'n Case below: 163 N.C. App. 1	No. 135P04	1. Respondent-Intervenors' NOA Based Upon a Constitutional Question (COA03-440) 2. Petitioners' (State of N.C. ex rel. the N.C. Utilities Commission and the Public Staff of the N.C. Utilities Commission) Motion to Dismiss Notice of Appeal 3. Cross-Appellee's (Duke Energy Corporation) Motion to Dismiss Appeal 4. Respondent-Intervenors' PDR Under N.C.G.S. § 7A-31 5. Petitioners' (State of N.C. ex rel. the N.C. Utilities Commission and the Public Staff of the N.C. Utilities Commission) Conditional PDR Under N.C.G.S. § 7A-31 6. Cross-Appellee's (Duke Energy Corporation) Conditional Petition for Discretionary Review Under N.C.G.S. § 7A-31	1. — 2. Allowed 08/12/04 3. Allowed 08/12/04 4. Denied 08/12/04 5. Dismissed as moot 08/12/04 6. Dismissed as moot 08/12/04
Tarrant v. Freeway Foods of Greensboro, Inc., Case below: 163 N.C. App. 504	No. 219P04	Def's (Freeway Foods of Greensboro, Inc., d/b/a Waffle House) PDR Under N.C.G.S. § 7A-31 (COA03-210)	1. Denied 08/12/04
White (Davis) v. Davis Case below: 163 N.C. App. 21	No. 136P04	Plt's PDR Under N.C.G.S. § 7A-31 (COA03-359)	Denied 08/12/04

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

PETITION TO REHEAR

Luhmann v. Hoenig Case below: 358 N.C. 529	No. 664A03	Defs' Petition for Rehearing of the decision of this Court	Denied 08/12/04

APPENDIXES

ORDER ADOPTING AMENDMENT TO RULES OF CONTINUING JUDICIAL EDUCATION

ORDER ADOPTING AMENDMENT TO NORTH CAROLINA SUPREME COURT LIBRARY RULES

ORDER ADOPTING AMENDMENTS TO RULE 3.1 OF THE GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS SUPPLEMENTAL TO THE RULES OF CIVIL PROCEDURE

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AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

IN THE SUPREME COURT OF NORTH CAROLINA

Order Adopting Amendment to Rules of Continuing Judicial Education

Rule II(C), Requirements is hereby amended by adding a new paragraph at the end of the section to read as follows:

> "For District Court Judges designated as Family Court Judges, at least twenty-four (24) of the thirty (30) hours shall be continuing judicial education courses designed especially for Family Court."

This amendment to the Rules of Continuing Judicial Education shall be effective upon adoption by the Supreme Court.

Adopted by the Court in Conference this the 5th day of February 2004. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. This amendment shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

s/Brady, J.
For the Court

ORDER ADOPTING AMENDMENT TO NORTH CAROLINA SUPREME COURT LIBRARY RULES

As directed by the Supreme Court, and by authority of N.C. Gen. Stat. § 7A-13(d)(2003), the North Carolina Supreme Court Library Rules, as promulgated December 20, 1967 (275 N.C. 729), and amended November 28, 1972 (281 N.C. 772), April 14, 1975 (286 N.C. 731), July 24, 1980 (299 N.C. 745), July 19, 1982 (*eff.* September 1, 1982) (305 N.C. 784), November 8, 1983 (*eff.* January 1, 1984) (309 N.C. 829), June 21, 1984 (311 N.C. 773), March 18, 1986 (313 N.C. 755), and September 12, 1988 (322 N.C. 870), are hereby amended:

Rule 3 is hereby amended to read as follows:

"Rule 3. Hours.

Except when the Library Committee authorizes that it be closed, the Library shall be open for public use on Monday through Friday from eight-thirty o'clock in the morning until four-thirty o'clock in the afternoon."

This amendment to the North Carolina Supreme Court Library Rules shall become effective on the 1st day of March, 2004.

Adopted by the Court in Conference this the 5th day of February 2004. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. This amendment shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (http://www.nccourts.org).

s/Brady, J.
For the Court

Order Adopting Amendments to Rule 3.1 of the General Rules Of Practice For The Superior and District Courts Supplemental To The Rules of Civil Procedure

WHEREAS, section § 7A-32 of the North Carolina General Statutes provides that the Supreme Court has the power to supervise and control the proceedings of any courts of the General Court of Justice, and

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-32, Rule 3.1 of the General Rules Of Practice For The Superior And District Courts Supplemental To Rules Of Civil Procedure is hereby amended to read as in the following pages. These amended Rules shall be effective on the 4th of March, 2004.

Adopted by the Court in conference the 4th day of March, 2004. The Appellate Division Reporter shall publish Rule 3.1 of the General Rules Of Practice For The Superior and District Courts Supplemental to Rules of Civil Procedure in its entirety, as amended through this action, at the earliest practicable date.

I. Beverly Lake, C.J.
For the Court

Rule 3.1 Guidelines for Resolving Scheduling Conflicts

(a) In resolving scheduling conflicts when an attorney has conflicting engagements in different courts, the following priorities should ordinarily prevail:

1. Appellate courts should prevail over trial courts.

2. Any of the trial court matters listed in this subdivision, regardless of trial division, should prevail over any trial court matter not listed in this subdivision, regardless of trial division; there is no priority among the matters listed in this subdivision:

— any trial or hearing in a capital case;

— the trial in any case designated pursuant to Rules 2.1 of these Rules;

— the trial in a civil action that has been peremptorily set as the first case for trial at a session of superior court;

— the trial of a criminal case in superior court, when the defendant is in jail or when the defendant is charged with a Class A through E felony and the trial is reasonably expected to last for more than one week;

— the trial in an action or proceeding in district court in which any of the following is contested:

— termination of parental rights,

— child custody,

— adjudication of abuse, neglect or dependency or disposition following adjudication

— interim or final equitable distribution

— alimony or post-separation support

3. When none of the above priorities applies, priority shall be as follows: superior court, district court, magistrate's court.

(b) When an attorney learns of a scheduling conflict between matters in the same priority category, the attorney shall promptly give written notice to opposing counsel, the clerk of all courts and the appropriate judges in all cases, stating

therein the circumstances relevant to resolution of the conflict under these guidelines. When the attorney learns of the conflict before the date on which the matters are scheduled to be heard, the appropriate judges are Senior Resident Superior Court Judges for matters pending in the Superior Court Division and Chief District Court Judges for matters pending in the District Court Division; otherwise the appropriate judges are the judges presiding over those matters. The appropriate judges should promptly confer, resolve the conflict, and notify counsel of the resolution.

(c) In resolving scheduling conflicts between court proceedings ~~matters~~ in the same priority category the presiding judges should give consideration to the following:

— the comparative age of the cases;

— the order in which the trial dates were set by published calendar, order or notice;

— the complexity of the cases;

— the estimated trial time;

— the number of attorneys and parties involved;

— whether the trial involves a jury;

— the difficulty or ease of rescheduling;

— the availability of witnesses, especially a child witness, an expert

witness or a witness who must travel a long distance;

— whether the trial in one of the cases had already started when the other was scheduled to begin.

(d) When settlement proceedings have been ordered in superior or district court cases, only trials, hearings upon dispositive motions, and hearings upon motions scheduled for counties with less than one court session per month shall have precedence over settlement proceedings.

(e) When a mediator, other neutral, or attorney learns of a scheduling conflict between a court proceeding and a settlement proceeding, the mediator, other neutral, unrepresented parties or attorneys shall **promptly** give written notice to the appropriate judges and request them to resolve the conflict; stating therein the circumstances relevant to a determination under (d) above.

(f) Nothing in these guidelines is intended to prevent courts from voluntarily yielding a favorable scheduling position, and judges of all courts are urged to communicate with each other in an effort to lessen the impact of conflicts and continuances on all courts.

Order Adopting Amendments to the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions

WHEREAS, section § 7A-38.1 of the North Carolina General Statutes establishes a statewide system of court-ordered mediated settlement conferences to facilitate the settlement of superior court civil actions, and

WHEREAS, N.C.G.S. § 7A-38.1(c) enables this Court to implement section 7A-38.1 by adopting rules and amendments to rules concerning said mediated settlement conferences,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.1(c), the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions are hereby amended to read as in the following pages. These amended Rules shall be effective on the 4th of March, 2004.

Adopted by the Court in conference the 4th day of March, 2004. The Appellate Division Reporter shall publish the Rules Implementing Statewide Mediated Settlement Conferences in Superior Court Civil Actions in their entirety, as amended through this action, at the earliest practicable date.

I. Beverly Lake, C.J.
For the Court

REVISED RULES IMPLEMENTING STATEWIDE MEDIATED SETTLEMENT CONFERENCES AND OTHER SETTLEMENT PROCEDURES IN SUPERIOR COURT CIVIL ACTIONS

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RULE 1. INITIATING SETTLEMENT EVENTS

A. PURPOSE OF MANDATORY SETTLEMENT PROCEDURES.

Pursuant to G.S. 7A-38.1, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the Court pursuant to these Rules.

B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES.

In furtherance of this purpose, counsel, upon being retained to represent any party to a superior court case, shall advise

his or her client(s) regarding the settlement procedures approved by these Rules and shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

B.C. INITIATING THE MEDIATED SETTLEMENT CONFERENCE IN EACH ACTION BY COURT ORDER.

(1) **Order by Senior Resident Superior Court Judge.** The Senior Resident Superior Court Judge of any judicial district may, by written order, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in a civil action except an action in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license.

(2) **Motion to authorize the use of other settlement procedures.** The parties may move the Senior Resident Superior Court Judge to authorize the use of some other settlement procedure allowed by these rules or by local rule in lieu of a mediated settlement conference, as provided in G.S. 7A-38.1(i). Such motion shall be filed within 21 days of the order requiring a mediated settlement conference on an AOC form, and shall include:

(a) the type of other settlement procedure requested;

(b) the name, address and telephone number of the neutral selected by the parties;

(c) the rate of compensation of the neutral;

(d) that the neutral and opposing counsel have agreed upon the selection and compensation of the neutral selected;

(e) that all parties consent to the motion.

If the parties are unable to agree to each of the above, then the Senior Resident Superior Court Judge shall deny the motion and the parties shall attend the mediated settlement conference as originally ordered by the Court. Otherwise, the court may order the use of any agreed upon settlement procedures authorized by Rules 10-12 herein or by local rules of the Superior Court in the county or district where the action is pending.

(3) **Timing of the order.** The Senior Resident Superior Court Judge shall issue the order requiring a mediated settlement conference as soon as practicable after the time for the filing of answers has expired. Rules 1.C.(4) and 3.B. herein shall govern the content of the order and the date of completion of the conference.

(4) **Content of order.** The court's order shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator as provided by Rule 2; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator pursuant to Rule 2; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court. The order shall be on an AOC form.

(5) **Motion for court ordered mediated settlement conference.** In cases not ordered to mediated settlement conference, any party may file a written motion with the Senior Resident Superior Court Judge requesting that such conference be ordered. Such motion shall state the reasons why the order should be allowed and shall be served on non-moving parties. Objections to the motion may be filed in writing with the Senior Resident Superior Court Judge within 10 days after the date of the service of the motion. Thereafter, the Judge shall rule upon the motion without a hearing and notify the parties or their attorneys of the ruling.

(6) **Motion to dispense with mediated settlement conference.** A party may move the Senior Resident Superior Court Judge to dispense with the mediated settlement conference ordered by the Judge. Such motion shall state the reasons the relief is sought. For good cause shown, the Senior Resident Superior Court Judge may grant the motion.

D. INITIATING THE MEDIATED SETTLEMENT CONFERENCE BY LOCAL RULE.

(1) **Order by local rule.** In judicial districts in which a system of scheduling orders or scheduling confer-

ences is utilized to aid in the administration of civil cases, the Senior Resident Superior Court Judge of said districts may, by local rule, require all persons and entities identified in Rule 4 to attend a pre-trial mediated settlement conference in any civil action except an action in which a party is seeking the issuance of an extraordinary writ or is appealing the revocation of a motor vehicle operator's license.

(2) **Scheduling orders or notices.** In judicial districts in which scheduling orders or notices are utilized to manage civil cases and for all cases ordered to mediated settlement conference by local rule, said order or notice shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator and the deadline by which that selection should be made; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

(3) **Scheduling conferences.** In judicial districts in which scheduling conferences are utilized to manage civil cases and for cases ordered to mediated settlement conferences by local rule, the notice for said scheduling conference shall (1) require that a mediated settlement conference be held in the case; (2) establish a deadline for the completion of the conference; (3) state clearly that the parties have the right to select their own mediator and the deadline by which that selection should be made; (4) state the rate of compensation of the court appointed mediator in the event that the parties do not exercise their right to select a mediator; and (5) state that the parties shall be required to pay the mediator's fee at the conclusion of the settlement conference unless otherwise ordered by the court.

(4) **Application of Rule 1.C.** The provisions of Rule 1.C.(2), (5) and (6) shall apply to Rule 1.D. except for the time limitations set out therein.

(5) **Deadline for completion.** The provisions of Rule 3.B. determining the deadline for completion of the mediated settlement conference shall not apply to mediated settlement conferences conducted pursuant to Rule 1.D. The deadline for completion shall be set by the Senior Resident Superior Court Judge or designee at the scheduling conference or in the scheduling order or notice, whichever is applicable. However, the completion deadline shall be well in advance of the trial date.

(6) **Selection of mediator.** The parties may select and nominate, or the Senior Resident Superior Court Judge may appoint, mediators pursuant to the provisions of Rule 2., except that the time limits for selection, nomination, and appointment shall be set by local rule. All other provisions of Rule 2. shall apply to mediated settlement conferences conducted pursuant to Rule 1.D.

(7) **Use of other settlement procedures.** The parties may utilize other settlement procedures pursuant to the provisions of Rule 1.C.(2) and Rule 10. However, the time limits and method of moving the court for approval to utilize another settlement procedure set out in those rules shall not apply and shall be governed by local rule.

RULE 2. SELECTION OF MEDIATOR

A. **SELECTION OF CERTIFIED MEDIATOR BY AGREEMENT OF PARTIES.** The parties may select a mediator certified pursuant to these Rules by agreement within 21 days of the court's order. The plaintiff's attorney shall file with the court a Notice of Selection of Mediator by Agreement within 21 days of the court's order, however, any party may file the notice. Such notice shall state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules. The notice shall be on an AOC form.

B. **NOMINATION AND COURT APPROVAL OF A NON-CERTIFIED MEDIATOR.** The parties may select a mediator who does not meet the certification requirements of these Rules but who, in the opinion of the par-

ties and the Senior Resident Superior Court Judge, is otherwise qualified by training or experience to mediate the action and who agrees to mediate indigent cases without pay.

If the parties select a non-certified mediator, the plaintiff's attorney shall file with the court a Nomination of Non-Certified Mediator within 21 days of the court's order. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience or other qualifications of the mediator; state the rate of compensation of the mediator; and state that the mediator and opposing counsel have agreed upon the selection and rate of compensation.

The Senior Resident Superior Court Judge shall rule on said nomination without a hearing, shall approve or disapprove of the parties' nomination and shall notify the parties of the court's decision. The nomination and approval or disapproval of the court shall be on an AOC form.

C. **APPOINTMENT OF MEDIATOR BY THE COURT.** If the parties cannot agree upon the selection of a mediator, the plaintiff or plaintiff's attorney shall so notify the court and request, on behalf of the parties, that the Senior Resident Superior Court Judge appoint a mediator. The motion must be filed within 21 days after the court's order and shall state that the attorneys for the parties have had a full and frank discussion concerning the selection of a mediator and have been unable to agree. The motion shall be on an AOC form.

Upon receipt of a motion to appoint a mediator, or in the event the plaintiff's attorney has not filed a Notice of Selection or Nomination of Non-Certified Mediator with the court within 21 days of the court's order, the Senior Resident Superior Court Judge shall appoint a mediator, certified pursuant to these Rules, under a procedure established by said Judge and set out in Local Rules. Only mediators who agree to mediate indigent cases without pay shall be appointed.

The Dispute Resolution Commission shall furnish for the consideration of Senior Resident Superior Court Judge(s) a list of those certified superior court mediators who request appointments in said district. Said list shall con-

tain the mediators' names, addresses and telephone numbers and shall be provided in writing or on the Commission's web site.

D. MEDIATOR INFORMATION DIRECTORY. To assist the parties in the selection of a mediator by agreement, the Senior Resident Superior Court Judge having authority over any county participating in the mediated settlement conference program shall prepare and keep current for such county a central directory of information on all certified mediators who wish to mediate cases in that county. Such information shall be collected on loose leaf forms provided by the Dispute Resolution Commission and be kept in one or more notebooks made available for inspection by attorneys and parties in the office of the Clerk of Superior Court in such county.

E. DISQUALIFICATION OF MEDIATOR. Any party may move the Senior Resident Superior Court Judge of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

A. WHERE CONFERENCE IS TO BE HELD. Unless all parties and the mediator otherwise agree, the mediated settlement conference shall be held in the courthouse or other public or community building in the county where the case is pending. The mediator shall be responsible for reserving a place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys, unrepresented parties and other persons and entities required to attend.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date.

The court's order issued pursuant to Rule 1.C.(1) shall state a deadline for completion for the conference which shall be not less than 120 days nor more than 180 days after issuance of the court's order. The mediator shall set

a date and time for the conference pursuant to Rule 6.B.(5).

C. REQUEST TO EXTEND DEADLINE FOR COMPLETION. A party, or the mediator, may request the Senior Resident Superior Court Judge to extend the deadline for completion of the conference. Such request shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the request, said party shall promptly communicate its objection to the office of the Senior Resident Superior Court Judge.

The Senior Resident Superior Court Judge may grant the request by setting a new deadline for the completion of the conference, which date may be set at any time prior to trial. Notice of the Judge's action shall be served immediately on all parties and the mediator by the person who sought the extension and shall be filed with the court.

D. RECESSES. The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set before the conference is recessed, no further notification is required for persons present at the conference.

E. THE MEDIATED SETTLEMENT CONFERENCE IS NOT TO DELAY OTHER PROCEEDINGS. The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Senior Resident Superior Court Judge.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATED SETTLEMENT CONFERENCES

A. ATTENDANCE.

(1) The following persons shall attend a mediated settlement conference:

(a) Parties.

(i) All individual parties;

(ii) Any party that is not a natural person or a governmental entity shall be represented at

the conference by an officer, employee or agent who is not such party's outside counsel and who has been authorized to decide on behalf of such party whether and on what terms to settle the action;

(iii) Any party that is a governmental entity shall be represented at the conference by an employee or agent who is not such party's outside counsel and who has authority to decide on behalf of such party whether and on what terms to settle the action; provided, if under law proposed settlement terms can be approved only by a board, the representative shall have authority to negotiate on behalf of the party and to make a recommendation to that board.

(b) **Insurance company representatives.** A representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier which may be obligated to pay all or part of any claim presented in the action. Each such carrier shall be represented at the conference by an officer, employee or agent, other than the carrier's outside counsel, who has the authority to make a decision on behalf of such carrier or who has been authorized to negotiate on behalf of the carrier and can promptly communicate during the conference with persons who have such decision-making authority.

(c) **Attorneys.** At least one counsel of record for each party or other participant, whose counsel has appeared in the action.

(2) Any party or person required to attend a mediated settlement conference shall physically attend until an agreement is reduced to writing and signed as provided in Rule 4.C. or an impasse has been declared. Any such party or person may have the attendance requirement excused or modified, including the allowance of that party's or person's participation without physical attendance:

(a) By agreement of all parties and persons required to attend and the mediator; or

(b) By order of the Senior Resident Superior Court Judge, upon motion of a party and notice to all parties and persons required to attend and the mediator.

(3) **Scheduling.** Participants required to attend shall promptly notify the mediator after selection or appointment of any significant problems they may have with dates for conference sessions before the completion deadline, and shall keep the mediator informed as to such problems as may arise before an anticipated conference session is scheduled by the mediator. After a conference session has been scheduled by the mediator, and a scheduling conflict with another court proceeding thereafter arises, participants shall promptly attempt to resolve it pursuant to Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina June 20, 1985.

B. NOTIFYING LIEN HOLDERS. Any party or attorney who has received notice of a lien or other claim upon proceeds recovered in the action shall notify said lien holder or claimant of the date, time, and location of the mediated settlement conference and shall request said lien holder or claimant to attend the conference or make a representative available with whom to communicate during the conference.

C. FINALIZING AGREEMENT.

(1) If an agreement is reached at the conference, parties to the agreement shall reduce its terms to writing and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically ~~or stenographically~~ recorded. If an agreement is upon all issues, a ~~A~~ consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.

(2) If the agreement is upon all issues at the conference, the person(s) responsible for filing closing documents with the court shall also sign the mediator's report to the court. The parties shall give a copy of their signed agreement, consent judgment, or voluntary dismissal(s) to the mediator and all parties at the conference and shall file a consent judgment or voluntary dismissal(s) with the court within fourteen (14) days or before expiration of the mediation deadline, whichever is longer. In all cases, consent judgments or voluntary dismissals shall be filed prior to the scheduled trial.

(3) If an agreement is reached upon all issues prior to the conference or finalized while the conference is in recess, the parties shall reduce its terms to writing and sign it along with their counsel and shall file a consent judgment or voluntary dismissal(s) disposing of all issues with the court within fourteen (14) days or before the expiration of the mediation deadline, whichever is longer.

(4) When a case is settled upon all issues, all attorneys of record must notify the Senior Resident Judge within four business days of the settlement and advise who will file the consent judgment or voluntary dismissal(s), *and when.*

D. PAYMENT OF MEDIATOR'S FEE. The parties shall pay the mediator's fee as provided by Rule 7.

E. RELATED CASES. Upon application by any party or person, the Senior Resident Superior Court Judge may order that an attorney of record or a party in a pending Superior Court Case or a representative of an insurance carrier that may be liable for all or any part of a claim pending in Superior Court shall, upon reasonable notice, attend a mediation conference that may be convened in another pending case, regardless of the forum in which the other case may be pending, provided that all parties in the other pending case consent to the attendance ordered pursuant to this rule. Any such attorney, party or carrier representative that properly attends a mediation conference pursuant to this rule shall not be required to pay any of the mediation fees or costs related to that mediation conference. Any disputed issues concerning an order entered pursuant to this rule shall be determined by the Senior Resident Superior Court Judge who entered the order.

DRC COMMENTS TO RULE 4

DRC Comment to Rule 4.C.

N.C.G.S. § 7A-38.1(1) provides that no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall be sure its terms are reduced to writing and signed by the parties and their attorneys before ending the conference.

Cases in which agreement upon all issues has been reached should be disposed of as expeditiously as possible. This rule is intended to assure that the mediator and the parties move the case toward dispo-

sition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep confidential the terms of their settlement, they may timely file with the court closing documents which do not contain confidential terms, i.e., voluntary dismissal(s) or a consent judgment resolving all claims. Mediators will not be required by local rules to submit agreements to the court.

DRC Comment to Rule 4.E.

Rule 4.E. was adopted to clarify a Senior Resident Superior Court Judge's authority in those situations where there may be a case related to a Superior Court case pending in a different forum. For example, it is common for there to be claims asserted against a third-party tortfeasor in a Superior Court case at the same time that there are related workers' compensation claims being asserted in an Industrial Commission case. Because of the related nature of such claims, the parties in the Industrial Commission case may need an attorney of record, party, or insurance carrier representative in the Superior Court case to attend the Industrial Commission mediation conference in order to resolve the pending claims in that case. Rule 4.E. specifically authorizes a Senior Resident Superior Court Judge to order such attendance provided that all parties in the related Industrial Commission case consent and the persons ordered to attend receive reasonable notice. The Industrial Commission's Rules for Mediated Settlement and Neutral Evaluation Conferences contain a similar provision that provides that persons involved in an Industrial Commission case may be ordered to attend a mediation conference in a related Superior Court Case.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCES. If a party or other person required to attend a mediated settlement conference fails to attend without good cause, a resident or presiding Superior Court Judge, may impose upon the party or person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against another party or person shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. The court may initiate sanction proceedings upon its own motion by the entry of a show cause order. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by

substantial evidence and conclusions of law. (See also Rule 7.G. and the Comment to Rule 7.G.)

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

(1) **Control of conference.** The mediator shall at all times be in control of the conference and the procedures to be followed. However, the mediator's conduct shall be governed by standards of conduct promulgated by the Supreme Court which shall contain a provision prohibiting mediators from prolonging a conference unduly.

(2) **Private consultation.** The mediator may communicate privately with any participant or counsel prior to and during the conference. The fact that private communications have occurred with a participant shall be disclosed to all other participants at the beginning of the conference.

(3) **Scheduling the conference.** The mediator shall make a good faith effort to schedule the conference at a time that is convenient with the participants, attorneys and mediator. In the absence of agreement, the mediator shall select the date for the conference.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) That the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1;

(h) The duties and responsibilities of the mediator and the participants; and

(i) That any agreement reached will be reached by mutual consent.

(2) **Disclosure.** The mediator has a duty to be impartial and to advise all participants of any circumstances bearing on possible bias, prejudice or partiality.

(3) **Declaring impasse.** It is the duty of the mediator to determine in a timely manner that an impasse exists and that the conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) **Reporting results of conference.**

(a) The mediator shall report to the court on an AOC form within 10 days of the conference whether or not an agreement was reached by the parties. ~~If an agreement was reached, the report shall state whether the action will be concluded by consent judgment or voluntary dismissal and shall identify the person designated to file such consent judgment or dismissals.~~ The mediator's report shall also inform the court of the absence of any party, attorney, or insurance representative known to the mediator to have been absent from the mediated settlement conference without permission. The Dispute Resolution Commission or the Administrative Office of the Courts may require the mediator to provide statistical data for evaluation of the mediated settlement conference program. Local rules shall not require the mediator to send a copy of the parties' agreement to the court.

(b) If an agreement upon all issues is reached, the mediator's report shall state whether the action will be concluded by consent judgment or voluntary dismissal(s), when it shall be filed with the court, and the name, address and telephone number of the person(s) designated by the parties to file such consent judgment or dis-

missal(s) with the court as required by Rule 4.C.(1). If an agreement upon all issues is reached at the conference, the mediator shall have the person(s) designated sign the mediator's report acknowledging acceptance of the duty to timely file the closing documents with the court.

Mediators who fail to report as required pursuant to this rule shall be subject to the contempt power of the court and sanctions.

(5) **Scheduling and holding the conference.** It is the duty of the mediator to schedule the conference and conduct it prior to the conference completion deadline set out in the court's order. The mediator shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless said time limit is changed by a written order of the Senior Resident Superior Court Judge.

(6) **Distribution of mediator evaluation form.** At the mediated settlement conference, the mediator shall distribute a mediator evaluation form approved by the Dispute Resolution Commission. The mediator shall distribute one copy per party with additional copies distributed upon request. The evaluation is intended for purposes of self-improvement and the mediator shall review returned evaluation forms.

RULE 7. COMPENSATION OF THE MEDIATOR

A. **BY AGREEMENT.** When the mediator is stipulated by the parties, compensation shall be as agreed upon between the parties and the mediator.

B. **BY COURT ORDER.** When the mediator is appointed by the court, the parties shall compensate the mediator for mediation services at the rate of $125 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of $125 that is due upon appointment.

C. **CHANGE OF APPOINTED MEDIATOR.** Pursuant to Rule 2.A., the parties have twenty-one (21) days to select a mediator. Parties who fail to select a mediator within

that time frame and then desire a substitution after the court has appointed a mediator, shall obtain court approval for the substitution. If the court approves the substitution, the parties shall pay the court's original appointee the $125 one time, per case administrative fee provided for in Rule 7.B.

D. INDIGENT CASES. No party found to be indigent by the court for the purposes of these rules shall be required to pay a mediator fee. Any mediator conducting a settlement conference pursuant to these rules shall waive the payment of fees from parties found by the court to be indigent. Any party may move the Senior Resident Superior Court Judge for a finding of indigence and to be relieved of that party's obligation to pay a share of the mediator's fee.

Said motion shall be heard subsequent to the completion of the conference or, if the parties do not settle their case, subsequent to the trial of the action. In ruling upon such motions, the Judge shall apply the criteria enumerated in G.S. 1-110(a), but shall take into consideration the outcome of the action and whether a judgment was rendered in the movant's favor. The court shall enter an order granting or denying the party's request.

E. POSTPONEMENTS AND FEES.

(1) As used herein, the term "postponement" shall mean reschedule or not proceed with a settlement conference once a date for a session of the settlement conference has been ~~*agreed upon and*~~ scheduled by ~~*the parties and*~~ the mediator. After a settlement conference has been scheduled for a specific date, a party may not unilaterally postpone the conference.

(2) conference session may be postponed by the mediator for good cause beyond the control of the moving participant(s) only after notice by the movant to all parties of the reasons for the postponement~~, *payment of a postponement fee to the mediator*~~, and ~~*consent of*~~ a finding of good cause by the mediator ~~*and the opposing attorney*~~.

(3) ~~If a mediation is postponed within seven (7) business days of the scheduled date, the fee shall be $125. If the settlement conference is postponed~~

~~within three (3) business days of the scheduled date, the fee shall be $250.~~ Without a finding of good cause, a mediator may also postpone a scheduled conference session with the consent of all parties. A fee of $125 shall be paid to the mediator if the postponement is allowed, or if the request is within five (5) business days of the scheduled date the fee shall be $250. The p~~P~~ostponement fee~~s~~ shall be paid by the party requesting the postponement unless otherwise agreed to between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B.

(4) If all parties select or nominate the mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

F. PAYMENT OF COMPENSATION BY PARTIES. Unless otherwise agreed to by the parties or ordered by the court, the mediator's fee shall be paid in equal shares by the parties. For purposes of this rule, multiple parties shall be considered one party when they are represented by the same counsel. Parties obligated to pay a share of the fees shall pay them equally. Payment shall be due upon completion of the conference.

G. SANCTIONS FOR FAILURE TO PAY MEDIATOR'S FEE. Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case, administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status to promptly move the Senior Resident Superior Court Judge for a finding of indigency, shall constitute contempt of court and may result, following notice, in a hearing and the imposition of any and all lawful sanctions by a Resident or Presiding Superior Court Judge.

DRC COMMENTS TO RULE 7

DRC Comment to Rule 7.B.

Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a court-ordered mediation.

DRC Comment to Rule 7.E.

~~Though MSC Rule 7.E. provides that mediators "shall" assess the postponement fee, it is understood there may be rare situations where the circumstances occasioning a request for a postponement are beyond the control of the parties, for example, an illness, serious accident, unexpected and unavoidable trial conflict. When the party or parties take steps to notify the mediator as soon as possible in such circumstances, the mediator, may, in his or her discretion, waive the postponement fee.~~

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

DRC Comment to Rule 7.F.

If a party is found by a Senior Resident Superior Court Judge to have failed to attend a mediated settlement conference without good cause, then the Court may require that party to pay the mediator's fee and related expenses.

DRC Comment to Rule 7.G.

If the Mediated Settlement Conference Program is to be successful, it is essential that mediators, both party-selected and court-appointed, be compensated for their services. MSC Rule 7.G. is intended to give the court express authority to enforce payment of fees owed both court-appointed and party-selected mediators. In instances where the mediator is party-selected, the court may enforce fees which exceed the caps set forth in 7.B. (hourly fee and administrative fee) and 7.E. (postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 7 but agreed to among the parties, for example, payment for travel time or mileage.

RULE 8 MEDIATOR CERTIFICATION AND DECERTIFICATION

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as Superior Court mediators. For certification, a person shall:

A. Have completed a minimum of 40 hours in a trial court mediation training program certified by the Dispute Resolution Commission, or have completed a 16 hour sup-

plemental trial court mediation training certified by the Commission after having been certified by the Commission as a family financial mediator;

B. Have the following training, experience and qualifications:

(1) An attorney may be certified if he or she:

(a) is either:

(i) member in good standing of the North Carolina State Bar, pursuant to Title 27, N.C. Administrative Code, The N.C. State Bar, Chapter 1, Subchapter A, Section .0201(b) or Section .0201(c)(1), as those rules existed January 1, 2000, or

(ii) member similarly in good standing of the Bar of another state; demonstrates familiarity with North Carolina court structure, legal terminology and civil procedure; and provides to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's practice as an attorney; and

(b) has at least five years of experience as a judge, practicing attorney, law professor and/or mediator, or equivalent experience.

Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule 8.B.(1) or Rule 8.B.(2).

(2) non-attorney may be certified if he or she has completed the following:

(a) a six hour training on North Carolina court organization, legal terminology, civil court procedure, the attorney-client privilege, the unauthorized practice of law, and common legal issues arising in Superior Court cases, provided by a trainer certified by the Dispute Resolution Commission;

(b) provide to the Dispute Resolution Commission three letters of reference as to the applicant's

good character, including at least one letter from a person with knowledge of the applicant's experience claimed in Rule 8.B.(2)(c);

(c) one of the following; (i) a minimum of 20 hours of basic mediation training provided by a trainer acceptable to the Dispute Resolution Commission; and after completing the 20 hour training, mediating at least 30 disputes, over the course of at least three years, or equivalent experience, and either a four year college degree or four years of management or administrative experience in a professional, business, or governmental entity; or (ii) ten years of management or administrative experience in a professional, business, or governmental entity.

(d) Observe three mediated settlement conferences meeting the requirements of Rule 8.C. conducted by at least two different certified mediators, in addition to those required by Rule 8.C.

C. Observe two mediated settlement conferences conducted by a certified Superior Court mediator;

(1) at least one of which must be court ordered by a Superior Court,

(2) the other may be a mediated settlement conference conducted under rules and procedures substantially similar to those set out herein, in cases pending in the North Carolina Industrial Commission, the North Carolina Office of Administrative Hearings, North Carolina Superior Court or the United States District Courts for North Carolina.

D. Demonstrate familiarity with the statute, rules, and practice governing mediated settlement conferences in North Carolina;

E. Be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court. Applicants for certification and re-certification and all certified Superior Court mediators shall report to the Commission any criminal convictions, disbarments or other disciplinary complaints and actions as soon as the applicant or mediator has notice of them;

F. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission;

G. Pay all administrative fees established by the Administrative Office of the Courts upon the recommendation of the Dispute Resolution Commission;

H. Agree to accept as payment in full of a party's share of the mediator's fee, the fee ordered by the Court pursuant to Rule 7; and,

I. Comply with the requirements of the Dispute Resolution Commission for continuing mediator education or training. (These requirements may include completion of training or self-study designed to improve a mediator's communication, negotiation, facilitation or mediation skills; completion of observations; service as a mentor to a less experienced mediator; being mentored by a more experienced mediator; or serving as a trainer. Mediators shall report on a Commission approved form.)

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators seeking only certification as Superior Court mediators shall consist of a minimum of 40 hours instruction. The curriculum of such programs shall include:

(1) Conflict resolution and mediation theory;

(2) Mediation process and techniques, including the process and techniques of trial court mediation;

(3) Communication and information gathering skills;

(4) Standards of conduct for mediators including, but not limited to the Standards of Professional Conduct adopted by the Supreme Court;

(5) Statutes, rules, and practice governing mediated settlement conferences in North Carolina;

(6) Demonstrations of mediated settlement conferences;

(7) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty; and

(8) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing mediated settlement conferences in North Carolina.

B. Certified training programs for mediators who are already certified as family financial mediators shall consist of a minimum of sixteen hours. The curriculum of such programs shall include the subjects in Rule 9.A. and discussion of the mediation and culture of insured claims. There shall be at least two simulations as specified in subsection (7).

C. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule.

D. To complete certification, a training program shall pay all administrative fees established by the Administrative Office of the Courts upon the recommendation of the Dispute Resolution Commission.

RULE 10. OTHER SETTLEMENT PROCEDURES

A. ORDER AUTHORIZING OTHER SETTLEMENT PROCEDURES. Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the Senior Resident Superior Court Judge may order the use of the procedure requested under these rules or under local rules unless the court finds that the parties did not agree upon all of the relevant details of the procedure, (including items a-e in Rule 1.C.(2)); or that for good cause,

the selected procedure is not appropriate for the case or the parties.

B. OTHER SETTLEMENT PROCEDURES AUTHORIZED BY THESE RULES. In addition to mediated settlement conferences, the following settlement procedures are authorized by these Rules:

(1) **Neutral Evaluation (Rule 11).** Neutral evaluation in which a neutral offers an advisory evaluation of the case following summary presentations by each party,

(2) **Arbitration (Rule 12).** Non-Binding Arbitration, in which a neutral renders an advisory decision following summary presentations of the case by the parties and Binding Arbitration, in which a neutral renders a binding decision following presentations by the parties.

(3) **Summary Trials (Jury or Non-Jury) (Rule 13).** Non-binding summary trials, in which a privately procured jury or presiding officer renders an advisory verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer; and binding summary trials, in which a privately procured jury or presiding officer renders a binding verdict following summary presentations by the parties and, in the case of a summary jury trial, a summary of the law presented by a presiding officer.

C. GENERAL RULES APPLICABLE TO OTHER SETTLEMENT PROCEDURES.

(1) **When proceeding is conducted.** Other settlement procedures ordered by the court pursuant to these rules shall be conducted no later than the date of completion set out in the court's original mediated settlement conference order unless extended by the Senior Resident Superior Court Judge.

(2) **Authority and duties of neutrals.**

(a) **Authority of neutrals.**

(i) **Control of proceeding.** The neutral evaluator, arbitrator, or presiding officer shall at all times be in control of the proceeding and the procedures to be followed.

(ii) Scheduling the proceeding. The neutral evaluator, arbitrator, or presiding officer shall attempt to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral(s) In the absence of agreement, ~~the~~ such neutral shall select the date for the proceeding.

(b) Duties of neutrals.

(i) The neutral evaluator, arbitrator, or presiding officer shall define and describe the following at the beginning of the proceeding.

(a) The process of the proceeding;

(b) The differences between the proceeding and other forms of conflict resolution;

(c) The costs of the proceeding;

(d) The inadmissibility of conduct and statements as provided by G. S. 7A-38.1(l) and Rule 10.C.(6) herein; and

(e) The duties and responsibilities of the neutral(s) and the participants.

(ii) Disclosure. ~~The~~ Each neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice, or partiality.

(iii) Reporting results of the proceeding. The neutral evaluator, arbitrator, or presiding officer shall report the result of the proceeding to the court ~~in writing in accordance with the provisions of Rules 11 and 12~~, ~~herein,~~ on an AOC form. The Administrative Office of the Courts may require the neutral to provide statistical data for evaluation of other settlement procedures on forms provided by it.

(iv) Scheduling and holding the proceeding. It is the duty of the neutral evaluator, arbitrator, or presiding officer to schedule

the proceeding and conduct it prior to the completion deadline set out in the court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral evaluator, arbitrator, or presiding officer unless said time limit is changed by a written order of the Senior Resident Superior Court Judge.

(3) **Extensions of time.** A party or a neutral may request the Senior Resident Superior Court Judge to extend the deadlines for completion of the settlement procedure. A request for an extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. If the court grants the motion for an extension, this order shall set a new deadline for the completion of the settlement procedure. Said order shall be delivered to all parties and the neutral by the person who sought the extension.

(4) **Where procedure is conducted.** The neutral evaluator, arbitrator, or presiding officer shall be responsible for reserving a place agreed to by the parties, setting a time, and making other arrangements for the proceeding, and for giving timely notice to all attorneys and unrepresented parties in writing of the time and location of the proceeding.

(5) **No delay of other proceedings.** Settlement proceedings shall not be cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Senior Resident Superior Court Judge.

(6) **Inadmissibility of settlement proceedings.** Evidence of statements made and conduct occurring in a settlement proceeding shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other actions on the same claim, except in proceedings for sanctions or proceedings to enforce a settlement of the action. However, no evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No neutral shall be compelled to testify or produce evidence concerning statements made and conduct occurring in a settlement proceeding in any civil proceeding for any purpose, including proceedings to enforce a settlement of the action, except to attest to the signing of any such agreements, and except proceedings for sanctions under this section, disciplinary proceedings of the State Bar, disciplinary proceedings of any agency established to enforce standards of conduct for mediators or other neutrals, and proceedings to enforce laws concerning juvenile or elder abuse.

(7) **No record made.** There shall be no record made of any proceedings under these Rules unless the parties have stipulated to binding arbitration or binding summary trial in which case any party after giving adequate notice to opposing parties may record the proceeding.

(8) **Ex parte communication prohibited.** Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.

(9) **Duties of the parties.**

(a) **Attendance.** All persons required to attend a mediated settlement conference pursuant to Rule 4 shall attend any other settlement procedure which is non-binding in nature, authorized by these rules, and ordered by the court except those persons to whom the parties agree and the Senior Resident Superior Court judge excuses. Those persons required to attend other settlement procedures which are binding in nature, authorized by these rules, and ordered by the court shall be those persons to whom the parties agree.

Notice of such agreement shall be given to the court and to the neutral through the filing of a motion to authorize the use of other settlement procedures within 21 days after entry of the Order requiring a mediated settlement conference. The notice shall be on an AOC form.

(b) Finalizing agreement. ~~If an agreement is reached in the proceeding, the parties to the agreement shall reduce its terms to writing, and sign it along with their counsel. By stipulation of the parties and at their expense, the agreement may be electronically or stenographically recorded. A consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate.~~

(i) If an agreement is reached on all issues at the neutral evaluation, arbitration, or summary trial, the parties to the agreement shall reduce its terms to writing and sign it along with their counsel. A consent judgment or one or more voluntary dismissals shall be filed with the court by such persons as the parties shall designate within fourteen (14) days of the conclusion of the proceeding or before the expiration of the deadline for its completion, whichever is longer. The person(s) responsible for filing closing documents with the court shall also sign the report to the court. The parties shall give a copy of their signed agreement, consent judgment, or voluntary dismissal(s) to the neutral evaluator, arbitrator, or presiding officer and all parties at the proceeding.

(ii) If an agreement is reached upon all issues prior to the evaluation, arbitration, or summary trial or while the proceeding is in recess, the parties shall reduce its terms to writing and sign it along with their counsel and shall file a consent judgment or voluntary dismissal(s) disposing of all issues with the court within fourteen (14) days or before the expiration of the deadline for completion of the proceeding whichever is longer.

(iii) When a case is settled upon all issues, all attorneys of record must notify the Senior Resident Judge within four business days of the settlement and advise who will sign the consent judgment or voluntary dismissal(s), *and when.*

(c) **Payment of neutral's fee.** The parties shall pay the neutral's fee as provided by Rule 10.C.(12).

(10) **Selection of neutrals in other settlement procedures.** The parties may select any individual to serve as a neutral in any settlement procedure authorized by these rules. For arbitration, the parties may select either a single arbitrator or a panel of arbitrators. Notice of such selection shall be given to the court and to the neutral through the filing of a motion to authorize the use of other settlement procedures within 21 days after entry of the Order requiring a mediated settlement conference.

The notice shall be on an AOC form. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

(11) **Disqualification.** Any party may move a Resident or Presiding Superior Court Judge of the district in which an action is pending for an order disqualifying the neutral; and for good cause, such order shall be entered. Cause shall exist if the selected neutral has violated any standard of conduct of the State Bar or any standard of conduct for neutrals that may be adopted by the Supreme Court.

(12) **Compensation of the neutral.** A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparing for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time.

Unless otherwise ordered by the court or agreed to by the parties, the neutral's fees shall be paid in equal shares by the parties. For purposes of this section, multiple parties shall be considered one party when they are represented by the same counsel. The presiding officer and jurors in a summary jury trial are neutrals within the meaning of these Rules and shall be compensated by the parties.

(13) **Sanctions for failure to attend other settlement procedures.** If any person required to attend a set-

tlement procedure fails to attend without good cause, a Resident or Presiding Judge may impose upon the person any appropriate monetary sanction including but not limited to, the payment of fines, reimbursement of a party's attorney fees, expenses, and share of the neutral's fee and loss of earnings incurred by persons attending the conference.

A party seeking sanctions against a person, or a Resident or Presiding Judge upon his/her own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

RULE 11. RULES FOR NEUTRAL EVALUATION

A. NATURE OF NEUTRAL EVALUATION. Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing candid assessment of liability, settlement value, and a dollar value or range of potential awards if the case proceeds to trial. The evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the neutral evaluation conference should be held at an early stage of the case after the time for the filing of answers has expired but in advance of the expiration of the discovery period.

C. PRE-CONFERENCE SUBMISSIONS. No later than twenty (20) days prior to the date established for the neutral evaluation conference to begin, each party shall furnish the evaluator with written information about the case, and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder shall be a summary of the significant facts and issues in the party's case, shall

not be more than five (5) pages in length, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the evaluator and to the other parties pursuant to this paragraph shall not be filed with the Court.

D. REPLIES TO PRE-CONFERENCE SUBMISSIONS. No later than ten (10) days prior to the date established for the neutral evaluation conference to begin any party may, but is not required to, send additional written information not exceeding three (3) pages in length to the evaluator, responding to the submission of an opposing party. The response shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the Court.

E. CONFERENCE PROCEDURE. Prior to a neutral evaluation conference, the evaluator may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

F. MODIFICATION OF PROCEDURE. Subject to approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation.

G. EVALUATOR'S DUTIES.

(1) **Evaluator's opening statement.** At the beginning of the conference the evaluator shall define and describe the following points to the parties in addition to those matters set out in Rule 10.C.(2)(b):

(a) The fact that the neutral evaluation conference is not a trial, the evaluator is not a judge, the evaluator's opinions are not binding on any party, and the parties retain their right to trial if they do not reach a settlement.

(b) The fact that any settlement reached will be only by mutual consent of the Parties.

(2) **Oral report to parties by evaluator.** In addition to the written report to the Court required under these rules at the conclusion of the neutral evaluation conference the evaluator shall issue an oral report to the parties advising them of his or her opin-

ions of the case. Such opinion shall include a candid assessment of liability, estimated settlement value, and the strengths and weaknesses of each party's claims if the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefore. The evaluator shall not reduce his or her oral report to writing, and shall not inform the Court thereof.

(3) **Report of evaluator to court.** Within ten (10) days after the completion of the neutral evaluation conference, the evaluator shall file a written report with the Court using an AOC form.~~, stating when and where the conference was held, the names of those persons who attended the conference, whether or not an agreement was reached by the parties and the name of the person designated to file judgments or dismissals concluding the action.~~ The evaluator's report shall inform the court when and where the evaluation was held, the names of those who attended, and the names of any party, attorney, or insurance company representative known to the evaluator to have been absent from the neutral evaluation without permission. The report shall also inform the court whether or not an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with the court. Local rules shall not require the evaluator to send a copy of any agreement reached by the parties to the court.

H. **EVALUATOR'S AUTHORITY TO ASSIST NEGOTIATIONS.** If all parties to the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions.

I. ~~**FINALIZING AGREEMENT.** If before the conclusion of the neutral evaluation conference and the evaluator's report to the Court the parties are able to reach a settlement of their claims, the parties shall reduce the agreement to writing and sign it along with their counsel. A consent judgment or one or more voluntary dismissals shall be filed with the Court by such persons as the parties shall designate.~~

RULE 12. RULES FOR ARBITRATION

In this form of settlement procedure the parties select an arbitrator who shall hear the case and enter an advisory decision. The arbitrator's decision is made to facilitate the parties' negotiation of a settlement and is non-binding, unless neither party timely requests a trial *de novo*, in which case the decision is entered by the Senior Resident Superior Court Judge as a judgment, or the parties agree that the decision shall be binding.

A. ARBITRATORS.

(1) **Arbitrator's Canon of Ethics.** Arbitrators shall comply with the Canons of Ethics for Arbitrators promulgated by the Supreme Court of North Carolina. Arbitrators shall be disqualified and must recuse themselves in accordance with the Canons.

B. EXCHANGE OF INFORMATION.

(1) **Pre-hearing exchange of information.** At least 10 days before the date set for the arbitration hearing the parties shall exchange in writing:

(a) Lists of witnesses they expect to testify.

(b) Copies of documents or exhibits they expect to offer into evidence.

(c) A brief statement of the issues and contentions of the parties.

Parties may agree in writing to rely on stipulations and/or statements, sworn or unsworn, rather than a formal presentation of witnesses and documents, for all or part of the hearing. Each party shall bring to the hearing and provide to the arbitrator a copy of these materials. These materials shall not be filed with the court or included in the case file.

(2) **Exchanged documents considered authenticated.** Any document exchanged may be received in the hearing as evidence without further authentication; however, the party against whom it is offered may subpoena and examine as an adverse witness anyone who is the author, custodian, or a witness through whom the document might otherwise have been introduced. Documents not so exchanged may not be received if to do so would, in the arbitrator's opinion, constitute unfair, prejudicial surprise.

(3) **Copies of exhibits admissible.** Copies of exchanged documents or exhibits are admissible in arbitration hearings, in lieu of the originals.

C. ARBITRATION HEARINGS.

(1) **Witnesses.** Witnesses may be compelled to testify under oath or affirmation and produce evidence by the same authority and to the same extent as if the hearing were a trial. The arbitrator is empowered and authorized to administer oaths and affirmations in arbitration hearings.

(2) **Subpoenas.** Rule 45 of the North Carolina Rules of Civil Procedure shall apply to subpoenas for attendance of witnesses and production of documentary evidence at an arbitration hearing under these rules.

(3) **Motions.** Designation of an action for arbitration does not affect a party's right to file any motion with the court.

(a) The court, in its discretion, may consider and determine any motion at any time. It may defer consideration of issues raised by motion to the arbitrator for determination in the award. Parties shall state their contentions regarding pending motions referred to the arbitrator in the exchange of information required by Rule 12.B.(1).

(b) Pendency of a motion shall not be cause for delaying an arbitration hearing unless the court so orders.

(4) **Law of evidence used as guide.** The law of evidence does not apply, except as to privilege, in an arbitration hearing but shall be considered as a guide toward full and fair development of the facts. The arbitrator shall consider all evidence presented and give it the weight and effect the arbitrator determines appropriate.

(5) **Authority of arbitrator to govern hearings.** Arbitrators shall have the authority of a trial Judge to govern the conduct of hearings, except for the power to punish for contempt. The arbitrator shall refer all matters involving contempt to the Senior Resident Superior Court Judge.

(6) **Conduct of hearing.** The arbitrator and the parties shall review the list of witnesses, exhibits and written statements concerning issues previously exchanged by the parties pursuant to Rule 12.B.(1), above. The order of the hearing shall generally follow the order at trial with regard to opening statements and closing arguments of counsel, direct and cross examination of witnesses and presentation of exhibits. However, in the arbitrator's discretion the order may be varied.

(7) **No Record of hearing made.** No official transcript of an arbitration hearing shall be made. The arbitrator may permit any party to record the arbitration hearing in any manner that does not interfere with the proceeding.

(8) **Parties must be present at hearings; Representation.** Subject to the provisions of Rule 10.C.(9), all parties shall be present at hearings in person or through representatives authorized to make binding decisions on their behalf in all matters in controversy before the arbitrator. All parties may be represented by counsel. Parties may appear *pro se* as permitted by law.

(9) **Hearing concluded.** The arbitrator shall declare the hearing concluded when all the evidence is in and any arguments the arbitrator permits have been completed. In exceptional cases, the arbitrator has discretion to receive post-hearing briefs, but not evidence, if submitted within three days after the hearing has been concluded.

D. THE AWARD.

(1) **Filing the award.** ~~The award shall be in writing, signed by the arbitrator and filed with the Clerk of the Superior Court in the County where the action is pending, with a copy to the Senior Resident Superior Court Judge within twenty (20) days after the hearing is concluded or the receipt of post hearing briefs, whichever is later. An award form, which shall be an AOC form, shall be used by the arbitrator as its report to the court and may be used to record its award.~~ The arbitrator shall file a written award signed by the arbitrator and filed with the Clerk of

Superior Court in the County where the action is pending, with a copy to the Senior Resident Superior Court Judge within twenty (20) days after the hearing is concluded or the receipt of post-hearing briefs whichever is later. The award shall inform the court of the absence of any party, attorney, or insurance company representative known to the arbitrator to have been absent from the arbitration without permission. An award form, which shall be an AOC form, shall be used by the arbitrator as the report to the court and may be used to record its award. The report shall also inform the court in the event that an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with the court. Local rules shall not require the arbitrator to send a copy of any agreement reached by the parties to the court.

(2) **Findings; Conclusions; Opinions.** No findings of fact and conclusions of law or opinions supporting an award are required.

(3) **Scope of award.** The award must resolve all issues raised by the pleadings, may be in any amount supported by the evidence, shall include interest as provided by law, and may include attorney's fees as allowed by law.

(4) **Costs.** The arbitrator may include in an award court costs accruing through the arbitration proceedings in favor of the prevailing party.

(5) **Copies of award to parties.** The arbitrator shall deliver a copy of the award to all of the parties or their counsel at the conclusion of the hearing or the arbitrator shall serve the award after filing. A record shall be made by the arbitrator of the date and manner of service.

E. TRIAL DE NOVO.

(1) **Trial de *novo* as of right.** Any party not in default for a reason subjecting that party to judgment by default who is dissatisfied with an arbitrator's award may have a trial *de novo* as of right upon filing a written demand for trial *de novo* with the court,

and service of the demand on all parties, on an AOC form within 30 days after the arbitrator's award has been served. Demand for jury trial pursuant to N.C.R.Civ.P. 38(b) does not preserve the right to a trial *de novo*. A demand by any party for a trial *de novo* in accordance with this section is sufficient to preserve the right of all other parties to a trial *de novo*. Any trial *de novo* pursuant to this section shall include all claims in the action.

(2) **No reference to arbitration in presence of jury.** A trial *de novo* shall be conducted as if there had been no arbitration proceeding. No reference may be made to prior arbitration proceedings in the presence of a jury without consent of all parties to the arbitration and the court's approval.

F. JUDGMENT ON THE ARBITRATION DECISION.

(1) **Termination of action before judgment.** Dismissals or a consent judgment may be filed at any time before entry of judgment on an award.

(2) **Judgment entered on award.** If the case is not terminated by dismissal or consent judgment, and no party files a demand for trial *de novo* within 30 days after the award is served, the Senior Resident Superior Court Judge shall enter judgment on the award, which shall have the same effect as a consent judgment in the action. A copy of the judgment shall be served on all parties or their counsel.

G. AGREEMENT FOR BINDING ARBITRATION.

(1) **Written agreement.** The arbitrator's decision may be binding upon the parties if all parties agree in writing. Such agreement may be made at any time after the order for arbitration and prior to the filing of the arbitrator's decision. The written agreement shall be executed by the parties and their counsel, and shall be filed with the Clerk of Superior Court and the Senior Resident Superior Court Judge prior to the filing of the arbitrator's decision.

(2) **Entry of judgment on a binding decision.** The arbitrator shall file the decision with the Clerk of Superior Court and it shall become a judgment in the same manner as set out in G.S. 1-567.1 ff.

H. MODIFICATION PROCEDURE.

Subject to approval of the arbitrator, the parties may agree to modify the procedures required by these rules for court ordered arbitration.

RULE 13. RULES FOR SUMMARY TRIALS

In a summary bench trial, evidence is presented in a summary fashion to a presiding officer, who shall render a verdict. In a summary jury trial, evidence is presented in summary fashion to a privately procured jury, which shall render a verdict. The goal of summary trials is to obtain an accurate prediction of the ultimate verdict of a full civil trial as an aid to the parties and their settlement efforts.

Rule 23 of the General Rules of Practice also provide for summary jury trials. While parties may request of the Court permission to utilize that process, it may not be substituted in lieu of mediated settlement conferences or other procedures outlined in these rules.

A. PRE-SUMMARY TRIAL CONFERENCE.

Prior to the summary trial, counsel for the parties shall attend a conference with the presiding officer selected by the parties pursuant to Rule 10.C.(10). That presiding officer shall issue an order which shall:

(1) Confirm the completion of discovery or set a date for the completion;

(2) Order that all statements made by counsel in the summary trial shall be founded on admissible evidence, either documented by deposition or other discovery previously filed and served, or by affidavits of the witnesses;

(3) Schedule all outstanding motions for hearing;

(4) Set dates by which the parties exchange:

(a) A list of parties' respective issues and contentions for trial;

(b) A preview of the party's presentation, including notations as to the document (e.g. deposition, affidavit, letter, contract) which supports that evidentiary statement;

(c) All documents or other evidence upon which each party will rely in making its presentation; and

(d) All exhibits to be presented at the summary trial.

(5) Set the date by which the parties shall enter a stipulation, subject to the presiding officer's approval, detailing the time allowable for jury selection, opening statements, the presentation of evidence, and closing arguments (total time is usually limited to one day);

(6) Establish a procedure by which private, paid jurors will be located and assembled by the parties if a summary jury trial is to be held and set the date by which the parties shall submit agreed upon jury instructions, jury selection questionnaire, and the number of potential jurors to be questioned and seated;

(7) Set a date for the summary jury trial; and

(8) Address such other matters as are necessary to place the matter in a posture for summary trial.

B. PRESIDING OFFICER TO ISSUE ORDER IF PARTIES UNABLE TO AGREE. If the parties are unable to agree upon the dates and procedures set out in Section A. of this Rule, the presiding officer shall issue an order which addresses all matters necessary to place the case in a posture for summary trial.

C. STIPULATION TO A BINDING SUMMARY TRIAL. At any time prior to the rendering of the verdict, the parties may stipulate that the summary trial be binding and the verdict become a final judgment. The parties may also make a binding high/low agreement, wherein a verdict below a stipulated floor or above a stipulated ceiling would be rejected in favor of the floor or ceiling.

D. EVIDENTIARY MOTIONS. Counsel shall exchange and file motion in limine and other evidentiary matters, which shall be heard prior to the trial. Counsel shall agree prior to the hearing of said motions as to whether the presiding officer's rulings will be binding in all subsequent hearings or non-binding and limited to the summary trial.

E. JURY SELECTION. In the case of a summary jury trial, potential jurors shall be selected in accordance with the procedure set out in the pre-summary trial order. These

jurors shall complete a questionnaire previously stipulated to by the parties. Eighteen jurors or such lesser number as the parties agree shall submit to questioning by the presiding officer and each party for such time as is allowed pursuant to the Summary Trial Pre-trial Order. Each party shall then have three peremptory challenges, to be taken alternately, beginning with the plaintiff. Following the exercise of all peremptory challenges, the first twelve seated jurors, or such lesser number as the parties may agree, shall constitute the panel.

After the jury is seated, the presiding officer in his/her discretion, may describe the issues and procedures to be used in presenting the summary jury trial. The jury shall not be informed of the non-binding nature of the proceeding, so as not to diminish the seriousness with which they consider the matter and in the event the parties later stipulate to a binding proceeding.

F. PRESENTATION OF EVIDENCE AND ARGUMENTS OF COUNSEL.

Each party may make a brief opening statement, following which each side shall present its case within the time limits set in the Summary Trial Pre-trial Order. Each party may reserve a portion of its time for rebuttal or surrebuttal evidence. Although closing arguments are generally omitted, subject to the presiding officer's discretion and the parties' agreement, each party may be allowed to make closing arguments within the time limits previously established.

Evidence shall be presented in summary fashion by the attorneys for each party without live testimony. Where the credibility of a witness is important, the witness may testify in person or by video deposition. All statements of counsel shall be founded on evidence that would be admissible at trial and documented by prior discovery.

Affidavits offered into evidence shall be served upon opposing parties far enough in advance of the proceeding to allow time for affiants to be deposed. Counsel may read portions of the deposition to the jury. Photographs, exhibits, documentary evidence and accurate summaries of evidence through charts, diagrams, evidence notebooks, or other visual means are encouraged, but shall be

stipulated by both parties or approved by the presiding officer.

G. JURY CHARGE. In a summary jury trial, following the presentation of evidence by both parties, the presiding officer shall give a brief charge to the jury, relying on predetermined jury instructions and such additional instructions as the presiding officer deems appropriate.

H. DELIBERATION AND VERDICT. In a summary jury trial, the presiding officer shall inform the jurors that they should attempt to return a unanimous verdict. The jury shall be given a verdict form stipulated to by the parties or approved by the presiding officer. The form may include specific interrogatories, a general liability inquiry and/or an inquiry as to damages. If, after diligent efforts and a reasonable time, the jury is unable to reach a unanimous verdict, the presiding officer may recall the jurors and encourage them to reach a verdict quickly, and/or inform them that they may return separate verdicts, for which purpose the presiding officer may distribute separate forms.

In a summary bench trial, at the close of the presentation of evidence and arguments of counsel and after allowing time for settlement discussions and consideration of the evidence by the presiding officer, the presiding officer shall render a decision. Upon a party's request, the presiding officer may allow three business days for the filing of post-hearing briefs. If the presiding officer takes the matter under advisement or allows post-hearing briefs, the decision shall be rendered no later than ten days after the close of the hearing or filing of briefs whichever is longer.

I. JURY QUESTIONNING. In a summary jury trial the presiding officer may allow a brief conference with the jurors in open court after a verdict has been returned, in order to determine the basis of the jury's verdict. However, if such a conference is used, it should be limited to general impressions. The presiding officer should not allow counsel to ask detailed questions of jurors to prevent altering the summary trial from a settlement technique to a form of pre-trial rehearsal. Jurors shall not be required to submit to counsels' questioning and shall be informed of the option to depart.

J. SETTLEMENT DISCUSSIONS. Upon the retirement of the jury in summary jury trials or the presiding officer in summary bench trials, the parties and/or their counsel shall meet for settlement discussions. Following the verdict or decision, the parties and/or their counsel shall meet to explore further settlement possibilities. The parties may request that the presiding officer remain available to provide such input or guidance as the presiding officer deems appropriate.

K. MODIFICATION OF PROCEDURE. Subject to approval of the presiding officer, the parties may agree to modify the procedures set forth in these Rules for summary trial.

L. ~~SETTLEMENT OF THE CASE.~~ ~~In the event that the parties settle the case in the course of the summary trial, the presiding officer shall direct the parties to immediately prepare and sign a memorandum of settlement which shall be filed with the Clerk of Superior Court.~~ **REPORT OF PRESIDING OFFICER.** The presiding officer shall file a written report no later than ten (10) days after the verdict. The report shall be signed by the presiding officer and filed with the Clerk of the Superior Court in the County where the action is pending, with a copy to the Senior Resident Court Judge. The presiding officer's report shall inform the court of the absence of any party, attorney, or insurance company representative known to the presiding officer to have been absent from the summary jury or summary bench trial without permission. The report may be used to record the verdict. The report shall also inform the court in the event that an agreement upon all issues was reached by the parties and, if so, state the name of the person(s) designated to file the consent judgment or voluntary dismissal(s) with the court. Local rules shall not require the presiding officer to send a copy of any agreement reached by the parties.

RULE 14. LOCAL RULE MAKING.

The Senior Resident Superior Court Judge of any district conducting mediated settlement conferences under these Rules is authorized to publish local rules, not inconsistent with these Rules and G.S. 7A-38.1, implementing mediated settlement conferences in that district.

RULE 15. DEFINITIONS.

A. The term, Senior Resident Superior Court Judge, as used throughout these rules, shall refer both to said judge or said judge's designee.

B. The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by the Administrative Office of the Courts. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution Commission.

RULE 16. TIME LIMITS.

Any time limit provided for by these Rules may be waived or extended for good cause shown. Service of papers and computation of time shall be governed by the Rules of Civil Procedure.

Order Adopting Amendments to the Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases

WHEREAS, section § 7A-38.4 of the North Carolina General Statutes establishes a program in district court to provide for settlement procedures in equitable distribution and other family financial cases, and

WHEREAS, N.C.G.S. § 7A-38.4A(o) provides for this Court to implement section 7A-38.4A by adopting rules,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.4A(o), Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases are hereby amended to read as in the following pages. These amended Rules shall be effective on the 4th of March, 2004.

Adopted by the Court in conference the 4th day of March, 2004. The Appellate Division Reporter shall publish the Rules Implementing Settlement Procedures in Equitable Distribution and Other Family Financial Cases in their entirety, as amended through this action, at the earliest practicable date.

I. Beverly Lake, C.J.
For the Court

RULES OF THE NORTH CAROLINA SUPREME COURT IMPLEMENTING SETTLEMENT PROCEDURES IN EQUITABLE DISTRIBUTION AND OTHER FAMILY FINANCIAL CASES

RULE 1. INITIATING SETTLEMENT PROCEDURES

A. PURPOSE OF MANDATORY SETTLEMENT PROCEDURES.

Pursuant to G.S. 7A-38.4A, these Rules are promulgated to implement a system of settlement events which are designed to focus the parties' attention on settlement rather than on trial preparation and to provide a structured opportunity for settlement negotiations to take place. Nothing herein is intended to limit or prevent the parties from engaging in settlement procedures voluntarily at any time before or after those ordered by the Court pursuant to these Rules.

B. DUTY OF COUNSEL TO CONSULT WITH CLIENTS AND OPPOSING COUNSEL CONCERNING SETTLEMENT PROCEDURES.

In furtherance of this purpose, counsel, upon being retained to represent any party to a district court case involving family financial issues, including equitable distribution, child support, alimony, post-separation support action, or claims arising out of contracts between the parties under G.S. 50-20(d), 52-10, 52-10.1 or 52 B shall advise his or her client regarding the settlement procedures approved by these Rules and, at or prior to the scheduling conference mandated by G.S. 50-21(d), shall attempt to reach agreement with opposing counsel on the appropriate settlement procedure for the action.

C. ORDERING SETTLEMENT PROCEDURES.

(1) **Equitable Distribution Scheduling Conference**. At the scheduling conference mandated by G.S. 50-21(d) in an equitable distribution action, or at such earlier time as specified by local rule, the Court shall include in its scheduling order a requirement that the parties and their counsel attend a mediated settlement conference or, if the parties agree, other settlement procedure conducted pursuant to these rules, unless excused by the Court pursuant to Rule 1.C.(6) or by the Court or mediator pursuant to Rule 4.A.(2).

(2) Scope of Settlement Proceedings. All other financial issues existing between the parties when the equitable distribution settlement proceeding is ordered, or at any time thereafter, may be discussed, negotiated or decided at the proceeding. In those districts where a child custody and visitation mediation program has been established pursuant to G.S. 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules only in those cases in which the parties and the mediator have agreed to include them and in which the parties have been exempted from, or have fulfilled the program requirements. In those districts where a child custody and visitation mediation program has not been established pursuant to G.S. 7A-494, child custody and visitation issues may be the subject of settlement proceedings ordered pursuant to these Rules with the agreement of all parties and the mediator.

(3) Authorizing Settlement Procedures Other Than Mediated Settlement Conference. The parties and their attorneys are in the best position to know which settlement procedure is appropriate for their case. Therefore, the Court shall order the use of a settlement procedure authorized by Rules 10-12 herein or by local rules of the District Court in the county or district where the action is pending if the parties have agreed upon the procedure to be used, the neutral to be employed and the compensation of the neutral. If the parties have not agreed on all three items, then the Court shall order the parties and their counsel to attend a mediated settlement conference conducted pursuant to these Rules.

The motion for an order to use a settlement procedure other than a mediated settlement conference shall be submitted on an AOC form at the scheduling conference and shall state:

(a) the settlement procedure chosen by the parties;

(b) the name, address and telephone number of the neutral selected by the parties;

(c) the rate of compensation of the neutral;

(d) that all parties consent to the motion.

(4) Content of Order. The Court's order shall (1) require the mediated settlement conference or other settlement

proceeding be held in the case; (2) establish a deadline for the completion of the conference or proceeding; and (3) state that the parties shall be required to pay the neutral's fee at the conclusion of the settlement conference or proceeding unless otherwise ordered by the Court. Where the settlement proceeding ordered is a judicial settlement conference, the parties shall not be required to pay for the neutral.

The order shall be contained in the Court's scheduling order, or, if no scheduling order is entered, shall be on an AOC form. Any scheduling order entered at the completion of a scheduling conference held pursuant to local rule may be signed by the parties or their attorneys in lieu of submitting the forms referred to hereinafter relating to the selection of a mediator.

(5) Court-Ordered Settlement Procedures in Other Family Financial Cases. Any party to an action involving family financial issues not previously ordered to a mediated settlement conference may move the Court to order the parties to participate in a settlement procedure. Such motion shall be made in writing, state the reasons why the order should be allowed and be served on the non-moving party. Any objection to the motion or any request for hearing shall be filed in writing with the Court within 10 days after the date of the service of the motion. Thereafter, the Judge shall rule upon the motion and notify the parties or their attorneys of the ruling. If the Court orders a settlement proceeding, then the proceeding shall be a mediated settlement conference conducted pursuant to these Rules. Other settlement procedures may be ordered if the circumstances outlined in subsection (3) above have been met.

(6) Motion to Dispense With Settlement Procedures. A party may move the Court to dispense with the mediated settlement conference or other settlement procedure. Such motion shall be in writing and shall state the reasons the relief is sought. For good cause shown, the Court may grant the motion. Such good cause may include, but not be limited to, the fact that the parties have participated in a settlement procedure such as nonbinding arbitration or early neutral evaluation prior to the court's order to participate in a mediated settlement conference or have elected to resolve their case through

arbitration under the Family Law Arbitration Act (G.S. 50-41 et seq.) or that one of the parties has alleged domestic violence. The Court may also dispense with the mediated settlement conference for good cause upon its own motion or by local rule.

RULE 2. SELECTION OF MEDIATOR

A. SELECTION OF CERTIFIED FAMILY FINANCIAL MEDIATOR BY AGREEMENT OF THE PARTIES. The parties may select a certified family financial mediator certified pursuant to these Rules by agreement by filing with the Court a Designation of Mediator by Agreement at the scheduling conference. Such designation shall: state the name, address and telephone number of the mediator selected; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation; and state that the mediator is certified pursuant to these Rules.

In the event the parties wish to select a mediator who is not certified pursuant to these Rules, the parties may nominate said person by filing a Nomination of Non-Certified Family Financial Mediator with the Court at the scheduling conference. Such nomination shall state the name, address and telephone number of the mediator; state the training, experience, or other qualifications of the mediator; state the rate of compensation of the mediator; state that the mediator and opposing counsel have agreed upon the selection and rate of compensation, if any. The Court shall approve said nomination if, in the Court's opinion, the nominee is qualified to serve as mediator and the parties and the nominee have agreed upon the rate of compensation.

Designations of mediators and nominations of mediators shall be made on an AOC form. A copy of each such form submitted to the Court and a copy of the Court's order requiring a mediated settlement conference shall be delivered to the mediator by the parties.

B. APPOINTMENT OF CERTIFIED FAMILY FINANCIAL MEDIATOR BY THE COURT. If the parties cannot agree upon the selection of a mediator, they shall so notify the Court and request that the Court appoint a mediator. The motion shall be filed at the scheduling conference and shall state that the attorneys for the parties have had a full and frank discus-

sion concerning the selection of a mediator and have been unable to agree. The motion shall be on an AOC form.

Upon receipt of a motion to appoint a mediator, or in the event the parties have not filed a designation or nomination of mediator, the Court shall appoint a certified family financial mediator certified pursuant to these Rules under a procedure established by said Judge and set out in local order or rule.

The Dispute Resolution Commission shall furnish for the consideration of the District Court Judges of any district where mediated settlement conferences are authorized to be held a list of those certified family financial mediators who request appointments in said district. Said list shall contain the mediators' names, addresses and phone numbers and shall be provided in writing or on the Commission's web site.

C. **MEDIATOR INFORMATION DIRECTORY.** To assist the parties in the selection of a mediator by agreement, the Chief District Court Judge having authority over any county participating in the mediated settlement conference program shall prepare and keep current for such county a central directory of information on all mediators certified pursuant to these Rules who wish to mediate in that county. Such information shall be collected on loose leaf forms provided by the Dispute Resolution Commission and be kept in one or more notebooks made available for inspection by attorneys and parties in the office of the Clerk of Court in such county and the office of the Chief District Court Judge or Trial Court Administrator in such county or, in a single county district, in the office of the Chief District Court Judge or said judge's designee.

D. **DISQUALIFICATION OF MEDIATOR.** Any party may move a Court of the district where the action is pending for an order disqualifying the mediator. For good cause, such order shall be entered. If the mediator is disqualified, a replacement mediator shall be selected or appointed pursuant to Rule 2. Nothing in this provision shall preclude mediators from disqualifying themselves.

RULE 3. THE MEDIATED SETTLEMENT CONFERENCE

A. **WHERE CONFERENCE IS TO BE HELD.** The mediated settlement conference shall be held in any location agreeable to the parties and the mediator. If the parties cannot agree to

a location, the mediator shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the conference should be held after the parties have had a reasonable time to conduct discovery but well in advance of the trial date. The mediator is authorized to assist the parties in establishing a discovery schedule and completing discovery.

The Court's order issued pursuant to Rule 1.C.(1) shall state a deadline for completion of the conference which shall be not more than 150 days after issuance of the Court's order, unless extended by the Court. The mediator shall set a date and time for the conference pursuant to Rule 6.B.(5).

C. REQUEST TO EXTEND DEADLINE FOR COMPLETION. A party, or the mediator, may move the Court to extend the deadline for completion of the conference. Such motion shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the mediator. If any party does not consent to the motion, said party shall promptly communicate its objection to the Court.

The Court may grant the request by entering a written order setting a new deadline for completion of the conference, which date may be set at any time prior to trial. Said order shall be delivered to all parties and the mediator by the person who sought the extension.

D. RECESSES. The mediator may recess the conference at any time and may set times for reconvening. If the time for reconvening is set during the conference, no further notification is required for persons present at the conference.

E. THE MEDIATED SETTLEMENT CONFERENCE IS NOT TO DELAY OTHER PROCEEDINGS. The mediated settlement conference shall not be cause for the delay of other proceedings in the case, including the completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Court.

RULE 4. DUTIES OF PARTIES, ATTORNEYS AND OTHER PARTICIPANTS IN MEDIATED SETTLEMENT CONFERENCES

A. ATTENDANCE.

(1) The following persons shall attend a mediated settlement conference:

(a) **Parties.**

(b) **Attorneys.** At least one counsel of record for each party whose counsel has appeared in the action.

(2) Any person required to attend a mediated settlement conference shall physically attend until such time as an agreement has been reached or the mediator, after conferring with the parties and their counsel, if any, declares an impasse. No mediator shall prolong a conference unduly.

Any such person may have the attendance requirement excused or modified, including allowing a person to participate by phone, by agreement of both parties and the mediator or by order of the Court. Ordinarily, attorneys for the parties may be excused from attending only after they have appeared at the first session.

(3) **Scheduling**. Participants required to attend shall promptly notify the mediator after selection or appointment of any significant problems they may have with dates for conference sessions before the completion deadline, and shall keep the mediator informed as to such problems as may arise before an anticipated conference session is scheduled by the mediator. After a conference session has been scheduled by the mediator, and a scheduling conflict with another court proceeding thereafter arises, participants shall promptly attempt to resolve it pursuant to Rule 3.1 of the General Rules of Practice for the Superior and District Courts, or, if applicable, the Guidelines for Resolving Scheduling Conflicts adopted by the State-Federal Judicial Council of North Carolina June 20, 1985.

B. ~~FINALIZING BY NOTARIZED AGREEMENT, CONSENT ORDER AND/OR DISMISSAL.~~ FINALIZING AGREEMENT.

(1) The essential terms of the parties' agreement shall be reduced to writing as a summary memorandum at the

conclusion of the conference unless the parties have reduced their agreement to writing, have signed it and in all other respects have complied with the requirements of Chapter 50 of the General Statutes. The parties and their counsel shall use the summary memorandum as a guide to drafting such agreements and orders as may be required to give legal effect to its terms. In the event the parties fail to agree on the wording or terms of a final agreement or court order, the mediator may schedule another session if the mediator determines that it would assist the parties.

~~Within thirty (30) days of reaching agreement at the conference, all final agreements and other dispositive documents shall be executed by the parties and notarized, and judgments or voluntary dismissals shall be filed with the Court by such persons as the parties or the Court shall designate. In the event the parties fail to agree on the wording or terms of a final agreement or court order, the mediator may schedule another session if the mediator determines that it would assist the parties.~~

(2) If the agreement is upon all issues at the conference, the person(s) responsible for filing closing documents with the court shall also sign the mediator's report to the court. The parties shall give a copy of their signed memorandum of agreement, agreement, consent judgment or voluntary dismissals to the mediator and all parties at the conference and shall file their consent judgment or voluntary dismissal with the court within thirty (30) days or before expiration of the mediation deadline, whichever is longer.

(3) If an agreement is reached upon all issues prior to the conference or finalized while the conference is in recess, the parties shall reduce its terms to writing, sign it along with their counsel and file the consent judgment or voluntary dismissal(s) with the court within thirty (30) days or before the expiration of the mediation deadline, whichever is longer.

(4) When a case is settled upon all issues, all attorneys of record must notify the Court within four business days of the settlement and advise who will file the consent judgment or voluntary dismissal(s), *and when.*

C. PAYMENT OF MEDIATOR'S FEE. The parties shall pay the mediator's fee as provided by Rule 7.

DRC Comments to Rule 4.

DRC Comment to Rule 4.B.

N.C.G.S. § 7A-38.4A(j) provides that no settlement shall be enforceable unless it has been reduced to writing and signed by the parties. When a settlement is reached during a mediated settlement conference, the mediator shall be sure its terms are reduced to writing and signed by the parties and their attorneys before ending the conference.

Cases in which agreement on all issues has been reached should be disposed of as expeditiously as possible. This rule is intended to assure that the mediator and the parties move the case toward disposition while honoring the private nature of the mediation process and the mediator's duty of confidentiality. If the parties wish to keep confidential the terms of their settlement, they may timely file with the court closing documents which do not contain confidential terms, i.e., voluntary dismissal(s) or a consent judgment resolving all claims. Mediators will not be required by local rules to submit agreements to the court.

RULE 5. SANCTIONS FOR FAILURE TO ATTEND MEDIATED SETTLEMENT CONFERENCES

If any person required to attend a mediated settlement conference fails to attend without good cause, the Court may impose upon that person any appropriate monetary sanction including, but not limited to, the payment of attorneys fees, mediator fees, expenses and loss of earnings incurred by persons attending the conference.

A party to the action seeking sanctions, or the Court on its own motion, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the Court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law. (See also Rule 7.F. and the Comment to Rule 7.F.)

RULE 6. AUTHORITY AND DUTIES OF MEDIATORS

A. AUTHORITY OF MEDIATOR.

(1) Control of Conference. The mediator shall at all times be in control of the conference and the procedures to be

followed. However, the mediator's conduct shall be governed by standards of conduct promulgated by the Supreme Court which shall contain a provision prohibiting mediators from prolonging a conference unduly.

(2) Private Consultation. The mediator may communicate privately with any participant during the conference. However, there shall be no *ex parte* communication before or outside the conference between the mediator and any counsel or party on any matter touching the proceeding, except with regard to scheduling matters. Nothing in this rule prevents the mediator from engaging in *ex parte* communications, with the consent of the parties, for the purpose of assisting settlement negotiations.

B. DUTIES OF MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the conference:

(a) The process of mediation;

(b) The differences between mediation and other forms of conflict resolution;

(c) The costs of the mediated settlement conference;

(d) That the mediated settlement conference is not a trial, the mediator is not a judge, and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.4A(j);

(h) The duties and responsibilities of the mediator and the participants; and

(i) The fact that any agreement reached will be reached by mutual consent.

(2) **Disclosure.** The mediator has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(3) **Declaring Impasse.** It is the duty of the mediator to determine in a timely manner that an impasse exists and that the conference should end. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the conference.

(4) **Reporting Results of Conference.**

(a) The mediator shall report to the ~~C~~court, ~~or its designee, using~~ on an A.O.C. form~~,~~ within 10 days of the conference whether or not an agreement was reached by the parties. ~~If the case is settled or otherwise disposed of prior to the conference, the mediator shall file the report indicating the disposition of the case, the person who informed the mediator that settlement had been reached, and the person who will present final documents to the court.~~

~~If an agreement was reached at the conference, the report shall state whether the action will be concluded by consent judgment or voluntary dismissal and shall identify the person designated to file such consent judgment or dismissals. If partial agreements are reached at the conference, the report shall state what issues remain for trial. The mediator's report shall inform the Court of the absence without permission of any party or attorney from the mediated settlement conference. The Administrative Office of the Courts, in consultation with the Dispute Resolution Commission, may require the mediator to provide statistical data in the report for evaluation of the mediated settlement conference program.~~

The mediator's report shall inform the court of the absence of any party or attorney known by the mediator to be absent from the mediated settlement conference without permission. If partial agreements are reached at the conference, the report shall state what issues remain for trial. The Dispute Resolution Commission or the Administrative Office of the Courts may require the mediator to

provide statistical data for evaluation of the mediated settlement conference program. Local rules shall not require the mediator to send a copy of the parties' agreement to the court.

(b) If an agreement upon all issues was reached, the mediator's report shall state whether the action will be concluded by consent judgment or voluntary dismissal(s), when it shall be filed with the court, and the name, address and telephone number of the person(s) designated by the parties to file such consent judgment or dismissal(s) with the court as required by Rule 4.B.2. If an agreement upon all issues is reached at the conference, the mediator shall have the person(s) designated sign the mediator's report acknowledging acceptance of the duty to timely file the closing documents with the court.

Mediators who fail to report as required pursuant to this rule shall be subject to the contempt power of the court and sanctions.

(5) Scheduling and Holding the Conference. The mediator shall schedule the conference and conduct it prior to the conference completion deadline set out in the Court's order. The mediator shall make an effort to schedule the conference at a time that is convenient with all participants. In the absence of agreement, the mediator shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the mediator unless changed by written order of the Court.

(6) Informational Brochure. Before the conference, the mediator shall distribute to the parties or their attorneys a brochure prepared by the Dispute Resolution Commission explaining the mediated settlement conference process and the operations of the Commission.

(7) Evaluation Forms. At the mediated settlement conference, the mediator shall distribute a mediator evaluation form approved by the Dispute Resolution Commission. The mediator shall distribute one copy per party with additional copies distributed upon request. The evaluation is intended for purpose of self-improvement and the mediator shall review returned evaluation forms.

RULE 7. COMPENSATION OF THE MEDIATOR AND SANCTIONS

A. BY AGREEMENT. When the mediator is selected by agreement of the parties, compensation shall be as agreed upon between the parties and the mediator.

B. BY COURT ORDER. When the mediator is appointed by the Court, the parties shall compensate the mediator for mediation services at the rate of $125 per hour. The parties shall also pay to the mediator a one-time, per case administrative fee of $125, which accrues upon appointment and shall be paid if the case settles prior to the mediated settlement conference or if the court approves the substitution of a mediator selected by the parties for a court appointed mediator.

C. PAYMENT OF COMPENSATION BY PARTIES. Unless otherwise agreed to by the parties or ordered by the Court, the mediator's fee shall be paid in equal shares by the parties. Payment shall be due and payable upon completion of the conference.

D. INABILITY TO PAY. No party found by the Court to be unable to pay a full share of a mediator's fee shall be required to pay a full share. Any party required to pay a share of a mediator fee pursuant to Rule 7.B. and C. may move the Court to pay according to the Court's determination of that party's ability to pay.

In ruling on such motions, the Judge may consider the income and assets of the movant and the outcome of the action. The Court shall enter an order granting or denying the party's motion. In so ordering, the Court may require that one or more shares be paid out of the marital estate.

Any mediator conducting a settlement conference pursuant to these rules shall accept as payment in full of a party's share of the mediator's fee that portion paid by or on behalf of the party pursuant to an order of the Court issued pursuant to this rule.

E. POSTPONEMENTS AND FEES.

(1) As used herein, the term "postponement" shall mean reschedule~~ing~~ or not proceed~~ing~~ with a settlement conference once a date for a session of the settlement conference has been scheduled by the mediator. After a settlement conference has been scheduled for a specific

date, a party may not unilaterally postpone the conference ~~*without good cause*~~.

(2) A conference session may be postponed by the mediator for good cause beyond the control of the moving participant(s) only after notice by the movant to all parties of the reasons for the postponement~~, *payment to the mediator of a postponement fee as provided below or as agreed when the mediator is selected,*~~ and ~~*consent of*~~ a finding of good cause by the mediator ~~*and the opposing attorney*~~.

(3) ~~*In cases in which the court appoints the mediator, if a settlement conference is postponed without good cause*~~ within seven ~~*(7) business days of the scheduled date, the fee shall be $125. If the settlement conference is postponed without good cause within three (3) business days of the scheduled date, the fee shall be $250.*~~ Without a finding of good cause, a mediator may also postpone a scheduled conference session with the consent of all parties. A fee of $125 shall be paid to the mediator if the postponement is allowed, or if the request is within five (5) business days of the scheduled date the fee shall be $250. The p~~P~~ostponement fee~~s~~ shall be paid by the party requesting the postponement unless otherwise agreed to ~~*by*~~ between the parties. Postponement fees are in addition to the one time, per case administrative fee provided for in Rule 7.B.

(4) If all parties select or nominate the mediator and they contract with the mediator as to compensation, the parties and the mediator may specify in their contract alternatives to the postponement fees otherwise required herein.

F. SANCTIONS FOR FAILURE TO PAY MEDIATOR'S FEE.

Willful failure of a party to make timely payment of that party's share of the mediator's fee (whether the one time, per case administrative fee, the hourly fee for mediation services, or any postponement fee) or willful failure of a party contending indigent status or the inability to pay his or her full share of the fee to promptly move the Court for a determination of indigency or the inability to pay a full share, shall constitute contempt of court and may result, following notice, in a hearing and the imposition of any and all lawful sanctions by the court.

DRC COMMENTS TO RULE 7

DRC Comment to Rule 7.B.

Court-appointed mediators may not be compensated for travel time, mileage, or any other out-of-pocket expenses associated with a court-ordered mediation.

DRC Comment to Rule 7.C.

If a party is found by the Court to have failed to attend a family financial settlement conference without good cause, then the Court may require that party to pay the mediator's fee and related expenses.

DRC Comment to Rule 7.E.

~~Though FFS Rule 7.E. provides that mediators "shall" assess the postponement fee, it is understood there may be rare situations where the circumstances occasioning a request for a postponement are beyond the control of the parties, for example, an illness, serious accident, unexpected and unavoidable trial conflict. When the party or parties take steps to notify the mediator as soon as possible in such circumstances, the mediator, may, in his or her discretion, waive the postponement fee.~~

Non-essential requests for postponements work a hardship on parties and mediators and serve only to inject delay into a process and program designed to expedite litigation. As such, it is expected that mediators will assess a postponement fee in all instances where a request does not appear to be absolutely warranted. Moreover, mediators are encouraged not to agree to postponements in instances where, in their judgment, the mediation could be held as scheduled.

DRC Comment to Rule 7.F.

If the Family Financial Settlement Program is to be successful, it is essential that mediators, both party-selected and court-appointed, be compensated for their services. FFS Rule 7.F. is intended to give the court express authority to enforce payment of fees owed both court-appointed and party-selected mediators. In instances where the mediator is party-selected, the court may enforce fees which exceed the caps set forth in 7.B. (hourly fee and administrative fee) and 7.E. (postponement/cancellation fee) or which provide for payment of services or expenses not provided for in Rule 7 but agreed to among the parties, for example, payment for travel time or mileage.

RULE 8. MEDIATOR CERTIFICATION AND DECERTIFICATION

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as family

financial mediators. For certification, a person must have complied with the requirements in each of the following sections.

A. Training and Experience.

1. Be an Advanced Practitioner member of the Association for Conflict Resolution who is subject to requirements equivalent to those in effect for Practitioner Members of the Academy of Family Mediators immediately prior to its merger with other organizations to become the Association for Conflict Resolution; or

2. Be an attorney and/or judge for at least five years who is either:

(a) a member in good standing of the North Carolina State Bar, pursuant to Title 27, N.C. Administrative Code. The N.C. State Bar, Chapter 1, Subchapter A, Section .0201(b) or Section .0201(c)(1), as those rules existed January 1, 2000; or

(b) a member similarly in good standing of the Bar of another state; demonstrates familiarity with North Carolina court structure, legal terminology and civil procedure; and provides to the Dispute Resolution Commission three letters of reference as to the applicant's good character, including at least one letter from a person with knowledge of the applicant's practice as an attorney;

and who has completed either:

(c) a 40 hour family and divorce mediation training approved by the Dispute Resolution Commission pursuant to Rule 9; or

(d) a 16 hour supplemental family and divorce mediation training approved by the Dispute Resolution Commission pursuant to Rule 9, after having been certified as a Superior Court mediator by that Commission.

B. If not licensed to practice law in one of the United States, have completed a six hour training on North Carolina legal terminology, court structure and civil procedure provided by a trainer certified by the Dispute Resolution Commission; and have observed with the permission of the parties as a neutral observer two mediated settlement conferences ordered by a Superior Court, the North Carolina Office of Administrative

Hearings, Industrial Commission or the US District Courts for North Carolina, and conducted by a certified Superior Court mediator.

C. Be a member in good standing of the State Bar of one of the United States as required by Rule 8.A. or have provided to the Dispute Resolution Commission three letters of reference as to the applicant's good character and experience.

D. Have observed with the permission of the parties two mediated settlement conferences as a neutral observer which involve custody or family financial issues and which are conducted by a mediator who is certified pursuant to these rules, who is an Advanced Practitioner Member of the Association for Conflict Resolution and subject to requirements equivalent to those in effect for Practitioner Members of the Academy of Family Mediators immediately prior to its merger with other organizations to become the Association for Conflict Resolution, or who is an A.O.C. mediator.

E. Demonstrate familiarity with the statutes, rules, and standards of practice and conduct governing mediated settlement conferences conducted pursuant to these Rules.

F. Be of good moral character and adhere to any standards of practice for mediators acting pursuant to these Rules adopted by the Supreme Court. Applicants for certification and recertification and all certified family financial mediators shall report to the Commission any criminal convictions, disbarments or other disciplinary complaints and actions as soon as the applicant or mediator has notice of them. Any current or former attorney who is disqualified by the attorney licensing authority of any state shall be ineligible to be certified under this Rule.

G. Submit proof of qualifications set out in this section on a form provided by the Dispute Resolution Commission.

H. Pay all administrative fees established by the Administrative Office of the Court in consultation with the Dispute Resolution Commission.

I. Agree to accept as payment in full of a party's share of the mediator's fee as ordered by the Court pursuant to Rule 7.

J. Comply with the requirements of the Dispute Resolution Commission for continuing mediator education or training. (These requirements may include advanced divorce mediation

training, attendance at conferences or seminars relating to mediation skills or process, and consultation with other family and divorce mediators about cases actually mediated. Mediators seeking recertification beyond one year from the date of initial certification may also be required to demonstrate that they have completed 8 hours of family law training, including tax issues relevant to divorce and property distribution, and 8 hours of training in family dynamics, child development and interpersonal relations at any time prior to that recertification.) Mediators shall report on a Commission approved form.

Certification may be revoked or not renewed at any time if it is shown to the satisfaction of the Dispute Resolution Commission that a mediator no longer meets the above qualifications or has not faithfully observed these rules or those of any district in which he or she has served as a mediator. Any person who is or has been disqualified by a professional licensing authority of any state for misconduct shall be ineligible to be certified under this Rule.

Certification of mediators who have been certified as family financial mediators by the Dispute Resolution Commission prior to the adoption of these Rules may not be revoked or not renewed solely because they do not meet the experience and training requirements in Rule 8.

RULE 9. CERTIFICATION OF MEDIATION TRAINING PROGRAMS

A. Certified training programs for mediators certified pursuant to Rule 8.A.2.(c) shall consist of a minimum of forty hours of instruction. The curriculum of such programs shall include the subjects in each of the following sections:

(1) Conflict resolution and mediation theory.

(2) Mediation process and techniques, including the process and techniques typical of family and divorce mediation.

(3) Communication and information gathering skills.

(4) Standards of conduct for mediators including, but not limited to the Standards of Professional Conduct adopted by the Supreme Court.

(5) Statutes, rules, and practice governing mediated settlement conferences conducted pursuant to these Rules.

(6) Demonstrations of mediated settlement conferences with and without attorneys involved.

(7) Simulations of mediated settlement conferences, involving student participation as mediator, attorneys and disputants, which simulations shall be supervised, observed and evaluated by program faculty.

(8) An overview of North Carolina law as it applies to custody and visitation of children, equitable distribution, alimony, child support, and post separation support.

(9) An overview of family dynamics, the effect of divorce on children and adults, and child development.

(10) Protocols for the screening of cases for issues of domestic violence and substance abuse.

(11) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing family financial settlement procedures in North Carolina.

B. Certified training programs for mediators certified pursuant to Rule 8.A.2.(d) shall consist of a minimum of sixteen hours of instruction. The curriculum of such programs shall include the subjects listed in Rule 9.A. There shall be at least two simulations as specified in subsection (7).

C. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be used for compliance with Rule 8.A. Certification need not be given in advance of attendance.

Training programs attended prior to the promulgation of these rules or attended in other states or approved by the Association for Conflict Resolution (ACR) with requirements equivalent to those in effect for the Academy of Family Mediators immediately prior to its merger with other organizations to become the Association for Conflict Resolution may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule. The Dispute Resolution Commission may require attendees of an ACR approved program to demonstrate compliance with the requirements of Rule 9.A.(5) and 9.A.(8). either in the ACR approved training or in some other acceptable course.

D. To complete certification, a training program shall pay all administrative fees established by the Administrative Office

of the Courts in consultation with the Dispute Resolution Commission.

RULE 10. OTHER SETTLEMENT PROCEDURES

A. ORDER AUTHORIZING OTHER SETTLEMENT PROCEDURES.

Upon receipt of a motion by the parties seeking authorization to utilize a settlement procedure in lieu of a mediated settlement conference, the Court may order the use of those procedures listed in Rule 10.B. unless the Court finds: that the parties did not agree upon the procedure to be utilized, the neutral to conduct it, or the neutral's compensation; or that the procedure selected is not appropriate for the case or the parties. Judicial settlement conferences may be ordered only if permitted by local rule.

B. OTHER SETTLEMENT PROCEDURES AUTHORIZED BY THESE RULES.

In addition to mediated settlement conferences, the following settlement procedures are authorized by these Rules:

(1) **Neutral Evaluation** (Rule 11), in which a neutral offers an advisory evaluation of the case following summary presentations by each party.

(2) **Judicial Settlement Conference** (Rule 12), in which a District Court Judge assists the parties in reaching their own settlement, if allowed by local rules.

(3) **Other Settlement Procedures** described and authorized by local rule pursuant to Rule 13.

The parties may agree to use arbitration under the Family Law Arbitration Act (G.S. 50-41 et seq.) which shall constitute good cause for the court to dispense with settlement procedures authorized by these rules (Rule 1.C.6).

C. GENERAL RULES APPLICABLE TO OTHER SETTLEMENT PROCEDURES.

(1) **When Proceeding is Conducted.** The neutral shall schedule the conference and conduct it no later than 150 days from the issuance of the Court's order or no later than the deadline for completion set out in the Court's order, unless extended by the Court. The neutral shall make an effort to schedule the conference at a time that

is convenient with all participants. In the absence of agreement, the neutral shall select a date and time for the conference. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the Court.

(2) **Extensions of Time.** A party or a neutral may request the Court to extend the deadlines for completion of the settlement procedure. A request for an extension shall state the reasons the extension is sought and shall be served by the moving party upon the other parties and the neutral. The Court may grant the extension and enter an order setting a new deadline for completion of the settlement procedure. Said order shall be delivered to all parties and the neutral by the person who sought the extension.

(3) **Where Procedure is Conducted.** Settlement proceedings shall be held in any location agreeable to the parties. If the parties cannot agree to a location, the neutral shall be responsible for reserving a neutral place and making arrangements for the conference and for giving timely notice of the time and location of the conference to all attorneys and *pro se* parties.

(4) **No Delay of Other Proceedings.** Settlement proceedings shall not be cause for delay of other proceedings in the case, including but not limited to the conduct or completion of discovery, the filing or hearing of motions, or the trial of the case, except by order of the Court.

(5) **Inadmissibility of Settlement Proceedings.** Evidence of statements made and conduct occurring in a settlement proceeding conducted under this section shall not be subject to discovery and shall be inadmissible in any proceeding in the action or other actions on the same claim, except in proceedings for sanctions or proceedings to enforce a settlement of the action. No settlement agreement reached at a settlement proceeding conducted pursuant to these Rules shall be enforceable unless it has been reduced to writing and signed by the parties and in all other respects complies with the requirements of Chapter 50 of the General Statutes. However, no evidence otherwise discoverable shall be inadmissible merely because it is presented or discussed in a settlement proceeding.

No mediator, or other neutral conducting a settlement proceeding under this section, shall be compelled to testify or produce evidence concerning statements made and conduct occurring in a mediated settlement conference or other settlement procedure in any civil proceeding for any purpose, including proceedings to enforce a settlement of the action, except to attest to the signing of any of these agreements, and except proceedings for sanctions under this section, disciplinary hearings before the State Bar or any agency established to enforce standards of conduct for mediators, and proceedings to enforce laws concerning juvenile or elder abuse.

(6) No Record Made. There shall be no stenographic or other record made of any proceedings under these Rules.

(7) Ex Parte Communication Prohibited. Unless all parties agree otherwise, there shall be no *ex parte* communication prior to the conclusion of the proceeding between the neutral and any counsel or party on any matter related to the proceeding except with regard to administrative matters.

(8) Duties of the Parties.

(a) Attendance. All parties and attorneys shall attend other settlement procedures authorized by Rule 10 and ordered by the Court.

(b) Finalizing Agreement. ~~If agreement is reached during the proceeding, the essential terms of the agreement shall be reduced to writing as a summary memorandum unless the parties have reduced their agreement to writing, signed it and in all other respects have complied with the requirements of Chapter 50 of the General Statutes. The parties and their counsel shall use the summary memorandum as a guide to drafting such agreements and orders as may be required to give legal effect to the its terms. Within 30 days of the proceeding, all final agreements and other dispositive documents shall be executed by the parties and notarized, and judgments or voluntary dismissals shall be filed with the Court by such persons as the parties or the Court shall designate.~~

(i) If agreement is reached on all issues at the neutral evaluation, judicial settlement conference, or other settlement procedure, the essential terms of the agreement shall be reduced to writing as a summary memorandum unless the parties have reduced their agreement to writing, signed it and in all other respects have complied with the requirements of Chapter 50 of the General Statutes. The parties and their counsel shall use the summary memorandum as a guide to drafting such agreements and orders as may be required to give legal effect to its terms. Within thirty (30) days of the proceeding, all final agreements and other dispositive documents shall be executed by the parties and notarized, and judgments or voluntary dismissals shall be filed with the Court by such persons as the parties or the Court shall designate.

(ii) If an agreement is reached upon all issues prior to the neutral evaluation, judicial settlement conference, or other settlement procedure or finalized while the proceeding is in recess, the parties shall reduce its terms to writing and sign it along with their counsel, shall comply in all respects with the requirements of Chapter 50 of the General Statutes, and shall file a consent judgment or voluntary dismissals(s) disposing of all issues with the Court within thirty (30) days, or before the expiration of the deadline for completion of the proceeding, whichever is longer.

(iii) When a case is settled upon all issues, all attorneys of record must notify the Court within four business days of the settlement and advise who will sign the consent judgment or voluntary dismissal(s), *and when.*

(c) Payment of Neutral's Fee. The parties shall pay the neutral's fee as provided by Rule 10.C.(12), except that no payment shall be required or paid for a judicial settlement conference.

(9) Sanctions for Failure to Attend Other Settlement Procedures. If any person required to attend a settlement proceeding fails to attend without good cause, the

Court may impose upon that person any appropriate monetary sanction including, but not limited to, the payment of fines, attorneys fees, neutral fees, expenses and loss of earnings incurred by persons attending the conference.

A party to the action, or the Court on its own motion, seeking sanctions against a party or attorney, shall do so in a written motion stating the grounds for the motion and the relief sought. Said motion shall be served upon all parties and on any person against whom sanctions are being sought. If the Court imposes sanctions, it shall do so, after notice and a hearing, in a written order, making findings of fact supported by substantial evidence and conclusions of law.

(10) Selection of Neutrals in Other Settlement Procedures.

Selection By Agreement. The parties may select any person whom they believe can assist them with the settlement of their case to serve as a neutral in any settlement procedure authorized by these rules, except for judicial settlement conferences.

Notice of such selection shall be given to the Court and to the neutral through the filing of a motion to authorize the use of other settlement procedures at the scheduling conference or the court appearance when settlement procedures are considered by the Court. The notice shall be on an AOC form as set out in Rule 2 herein. Such notice shall state the name, address and telephone number of the neutral selected; state the rate of compensation of the neutral; and state that the neutral and opposing counsel have agreed upon the selection and compensation.

If the parties are unable to select a neutral by agreement, then the Court shall deny the motion for authorization to use another settlement procedure and the court shall order the parties to attend a mediated settlement conference.

(11) Disqualification of Neutrals. Any party may move a Court of the district in which an action is pending for an order disqualifying the neutral; and, for good cause, such order shall be entered. Cause shall exist, but is not lim-

ited to circumstances where, if the selected neutral has violated any standard of conduct of the State Bar or any standard of conduct for neutrals that may be adopted by the Supreme Court.

(12) Compensation of Neutrals. A neutral's compensation shall be paid in an amount agreed to among the parties and the neutral. Time spent reviewing materials in preparation for the neutral evaluation, conducting the proceeding, and making and reporting the award shall be compensable time. The parties shall not compensate a settlement judge.

(13) Authority and Duties of Neutrals.

(a) Authority of Neutrals.

(i) Control of Proceeding. The neutral shall at all times be in control of the proceeding and the procedures to be followed.

(ii) Scheduling the Proceeding. The neutral shall make a good faith effort to schedule the proceeding at a time that is convenient with the participants, attorneys and neutral. In the absence of agreement, the neutral shall select the date and time for the proceeding. Deadlines for completion of the conference shall be strictly observed by the neutral unless changed by written order of the Court.

(b) Duties of Neutrals.

(i) The neutral shall define and describe the following at the beginning of the proceeding:

(a) The process of the proceeding;

(b) The differences between the proceeding and other forms of conflict resolution;

(c) The costs of the proceeding;

(d) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1(l) and Rule 10.C.(6) herein; and

(e) The duties and responsibilities of the neutral and the participants.

(ii) Disclosure. The neutral has a duty to be impartial and to advise all participants of any circumstance bearing on possible bias, prejudice or partiality.

(iii) Reporting Results of the Proceeding. The neutral evaluator, settlement judge, or other neutral shall report the result of the proceeding to the Court in writing within ten (10) days in accordance with the provisions of Rules 11, and 12 ~~and 13~~ herein on an AOC form. The Administrative Office of the Courts, in consultation with the Dispute Resolution Commission, may require the neutral to provide statistical data for evaluation of other settlement procedures.

(iv) Scheduling and Holding the Proceeding. It is the duty of the neutral to schedule the proceeding and conduct it prior to the completion deadline set out in the Court's order. Deadlines for completion of the proceeding shall be strictly observed by the neutral unless said time limit is changed by a written order of the Court.

RULE 11. RULES FOR NEUTRAL EVALUATION

A. NATURE OF NEUTRAL EVALUATION. Neutral evaluation is an informal, abbreviated presentation of facts and issues by the parties to an evaluator at an early stage of the case. The neutral evaluator is responsible for evaluating the strengths and weaknesses of the case, providing a candid assessment of the merits of the case, settlement value, and a dollar value or range of potential awards if the case proceeds to trial. The evaluator is also responsible for identifying areas of agreement and disagreement and suggesting necessary and appropriate discovery.

B. WHEN CONFERENCE IS TO BE HELD. As a guiding principle, the neutral evaluation conference should be held at an early stage of the case, after the time for the filing of answers has expired but in advance of the expiration of the discovery period.

C. PRE-CONFERENCE SUBMISSIONS. No later than twenty (20) days prior to the date established for the neutral evalua-

tion conference to begin, each party shall furnish the evaluator with written information about the case, and shall at the same time certify to the evaluator that they served a copy of such summary on all other parties to the case. The information provided to the evaluator and the other parties hereunder shall be a summary of the significant facts and issues in the party's case, and shall have attached to it copies of any documents supporting the parties' summary. Information provided to the evaluator and to the other parties pursuant to this paragraph shall not be filed with the Court.

D. REPLIES TO PRE-CONFERENCE SUBMISSIONS. No later than ten (10) days prior to the date established for the neutral evaluation conference to begin, any party may, but is not required to, send additional written information to the evaluator responding to the submission of an opposing party. The response furnished to the evaluator shall be served on all other parties and the party sending such response shall certify such service to the evaluator, but such response shall not be filed with the Court.

E. CONFERENCE PROCEDURE. Prior to a neutral evaluation conference, the evaluator, if he or she deems it necessary, may request additional written information from any party. At the conference, the evaluator may address questions to the parties and give them an opportunity to complete their summaries with a brief oral statement.

F. MODIFICATION OF PROCEDURE. Subject to approval of the evaluator, the parties may agree to modify the procedures required by these rules for neutral evaluation.

G. EVALUATOR'S DUTIES.

(1) Evaluator's Opening Statement. At the beginning of the conference the evaluator shall define and describe the following points to the parties in addition to those matters set out in Rule 10.C.(2)(b):

(a) The fact that the neutral evaluation conference is not a trial, the evaluator is not a judge, the evaluator's opinions are not binding on any party, and the parties retain their right to trial if they do not reach a settlement.

(b) The fact that any settlement reached will be only by mutual consent of the parties.

(2) **Oral Report to Parties by Evaluator.** In addition to the written report to the Court required under these rules, at the conclusion of the neutral evaluation conference the evaluator shall issue an oral report to the parties advising them of his or her opinions of the case. Such opinion shall include a candid assessment of the merits of the case, estimated settlement value, and the strengths and weaknesses of each party's claims if the case proceeds to trial. The oral report shall also contain a suggested settlement or disposition of the case and the reasons therefor. The evaluator shall not reduce his or her oral report to writing and shall not inform the Court thereof.

(3) **Report of Evaluator to Court.** Within ten (10) days after the completion of the neutral evaluation conference, the evaluator shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, and the names of any party or attorney known to the evaluator to have been absent from the neutral evaluation without permission. The report shall also inform the court whether or not any agreement was reached by the parties. If partial agreement(s) are reached at the evaluation conference, the report shall state what issues remain for trial. In the event of a full or partial agreement, the report shall state ~~and~~ the name of the person(s) designated to file the consent judgments or voluntary dismissals ~~concluding the action~~ with the court. Local rules shall not require the evaluator to send a copy of any agreement reached by the parties to the court.

H. EVALUATOR'S AUTHORITY TO ASSIST NEGOTIATIONS. If all parties at the neutral evaluation conference request and agree, the evaluator may assist the parties in settlement discussions. If the parties do not reach a settlement during such discussions, however, the evaluator shall complete the neutral evaluation conference and make his or her written report to the Court as if such settlement discussions had not occurred. If the parties reach agreement at the conference, they shall reduce their agreement to writing as required by Rule 10.C.(8)(b).

RULE 12. JUDICIAL SETTLEMENT CONFERENCE

A. Settlement Judge. A judicial settlement conference shall be conducted by a District Court Judge who shall be selected by the Chief District Court Judge. Unless specifically approved by the Chief District Court Judge, the District Court Judge who presides over the judicial settlement conference shall not be assigned to try the action if it proceeds to trial.

B. Conducting the Conference. The form and manner of conducting the conference shall be in the discretion of the settlement judge. The settlement judge may not impose a settlement on the parties but will assist the parties in reaching a resolution of all claims.

C. Confidential Nature of the Conference. Judicial settlement conferences shall be conducted in private. No stenographic or other record may be made of the conference. Persons other than the parties and their counsel may attend only with the consent of all parties. The settlement judge will not communicate with anyone the communications made during the conference, except that the judge may report that a settlement was reached and, with the parties' consent, the terms of that settlement.

D. Report of Judge. Within ten (10) days after the completion of the judicial settlement conference, the settlement judge shall file a written report with the Court using an AOC form, stating when and where the conference was held, the names of those persons who attended the conference, and the names of any party or attorney known to the settlement judge to have been absent from the settlement conference without permission. The report shall also inform the court whether or not any agreement was reached by the parties. If partial agreement(s) are reached at the settlement conference, the report shall state what issues remain for trial. In the event of a full or partial agreement, the report shall state and the name of the person(s) designated to file the consent judgments or voluntary dismissals concluding the action with the court. Local rules shall not require the settlement judge to send a copy of any agreement reached by the parties to the court.

RULE 13. LOCAL RULE MAKING

The Chief District Court Judge of any district conducting settlement procedures under these Rules is authorized to publish local rules, not inconsistent with these Rules and G.S. 7A-38.4, implementing settlement procedures in that district.

RULE 14. DEFINITIONS

A. The word, Court, shall mean a judge of the District Court in the district in which an action is pending who has administrative responsibility for the action as an assigned or presiding judge, or said judge's designee, such as a clerk, trial court administrator, case management assistant, judicial assistant, and trial court coordinator.

B. The phrase, AOC forms, shall refer to forms prepared by, printed, and distributed by the Administrative Office of the Courts to implement these Rules or forms approved by local rule which contain at least the same information as those prepared by AOC. Proposals for the creation or modification of such forms may be initiated by the Dispute Resolution Commission.

C. The term, Family Financial Case, shall refer to any civil action in district court in which a claim for equitable distribution, child support, alimony, or post separation support is made, or in which there are claims arising out of contracts between the parties under GS 50-20(d), 52-10, 52-10.1 or 52B.

RULE 15. TIME LIMITS

Any time limit provided for by these rules may be waived or extended for good cause shown. Time shall be counted pursuant to the Rules of Civil Procedure.

IN THE SUPREME COURT OF NORTH CAROLINA

Order Adopting Amendments to the North Carolina Rules of Appellate Procedure

Appendix B of the North Carolina Rules of Appellate is hereby amended as described below:

APPENDIX B. FORMAT AND STYLE

All documents for filing in either Appellate Court are prepared on 8½ x 11 inch, plain, white unglazed paper of 16 to 20 pound weight. Typing is done on one side only, although the document will be reproduced in two-sided format. No vertical rules, law firm marginal return addresses, or punched holes will be accepted. The papers need not be stapled; a binder clip or rubber bands are adequate to secure them in order.

Papers shall be prepared using at least 12-point type so as to produce a clear, black image. Documents shall be set either in nonproportional type or in proportional type, defined as follows: Nonproportional type is defined as 10-character-per-inch Courier (or an equivalent style of Pica) type that devotes equal horizontal space to each character. Proportional type is defined as any non-italic, nonscript font, other than nonproportional type, that is 14-point or larger. Under Appellate Rule 28(j), briefs in nonproportional type are governed by a page limit, and briefs in proportional type are governed by a word-count limit. To allow for binding of documents, a margin of approximately one inch shall be left on all sides of the page. The formatted page should be approximately 6½ inches wide and 9 inches long. Tabs are located at the following distances from the left margin: ½", 1", 1½", 2", 4¼" (center), and 5".

CAPTIONS OF DOCUMENTS.

All documents to be filed in either appellate court shall be headed by a caption. The caption contains: the number to be assigned the case by the Clerk; the Judicial District from which the case arises; the appellate court to whose attention the document is addressed; the style of the case showing the names of all parties except as provided by Rule 3(b) to the action; the county from which the case comes; the indictment or docket numbers of the case below (in records on appeal and in motions and petitions in the cause filed prior to the filing of the record); and the title of the document. The caption shall be placed beginning at the top margin of a cover page and, again, on the first textual page of the document.

No. _____ (Number) DISTRICT

(SUPREME COURT OF NORTH CAROLINA)
(or)
(NORTH CAROLINA COURT OF APPEALS)
****

STATE OF NORTH CAROLINA	)	
or	)	
(Name of Plaintiff)	)	From (Name) County
	)	No. ____
v)		
	)	
(Name of Defendant)	)	

****
(TITLE OF DOCUMENT)
****

The caption should reflect the title of the action (all parties named except as provided by Rule 3(b)) as it appeared in the trial division. The appellant or petitioner is not automatically given top-side billing; the relative position of the plaintiff and defendant should be retained.

The caption of a record on appeal and of a notice of appeal from the Trial Division should include directly below the name of the county, the indictment or docket numbers of the case in the trial division. Those numbers, however, should not be included in other documents except for a petition for writ of certiorari or other petitions and motions where no record on appeal has yet been created in the case. In notices of appeal or petitions to the Supreme Court from decisions of the Court of Appeals, the caption should show the Court of Appeals' docket number in similar fashion.

Immediately below the caption of each document, centered and underlined, in all capital letters, should be the title of the document, e.g., PETITION FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31, or DEFENDANT-APPELLANT'S BRIEF. A brief filed in the Supreme Court in a case previously heard and decided by the Court of Appeals is entitled NEW BRIEF.

INDEXES

A brief or petition which is 10 pages or more in length and all Appendixes to briefs (Rule 28) and Records on Appeal (Rule 9) must contain an index to the contents.

The index should be indented approximately ¾" from each margin, providing a five-inch line. The form of the index for a record on appeal should be as follows (indexes for briefs are addressed in Appendix E):

(Record)

INDEX

USE OF THE TRANSCRIPT OF EVIDENCE WITH RECORD ON APPEAL

Those portions asterisked (*) in the sample index above would be omitted if the transcript option were selected under Appellate Rule 9(c). In their place in the record, counsel should place a statement in substantially the following form:

> "Per Appellate Rule 9(c) the transcript of proceedings in this case, taken by (name), court reporter, from (date) to (date) and consisting of (# of pages) pages, numbered (1) through (last page#), and bound in (# of volumes) volumes is filed contemporaneously with this record."

The transcript should be prepared with a clear, black image on 8½ x 11 paper of 16-20 pound substance. Enough copies should be

reproduced to assure the parties of a reference copy, and file one copy in the Appellate Court. In criminal appeals, the District Attorney is responsible for conveying a copy to the Attorney General (App. Rule 9(c)).

The transcript should not be inserted into the record on appeal, but, rather, should be separately bound and submitted for filing in the proper appellate court with the record. Transcript pages inserted into the record on appeal will be treated in the manner of a narration and will be printed at the standard page charge. Counsel should note that the separate transcript will not be reproduced with the record on appeal, but will be treated and used as an exhibit.

In termination of parental rights and juvenile matters, the entire verbatim transcript must be sealed pursuant to Rule 9(c); if individual transcript pages are inserted in the record on appeal, the pages must be modified to comply with Rule 3(b).

TABLE OF CASES AND AUTHORITIES

Immediately following the index and before the inside caption, all briefs, petitions, and motions greater than five pages in length shall contain a table of cases and authorities. Cases should be arranged alphabetically, followed by constitutional provisions, statutes, regulations, and other textbooks and authorities. The format should be similar to that of the index. Citations should be made according to A Uniform System of Citation (14th ed.).

FORMAT OF BODY OF DOCUMENT

The body of the document of records on appeal should be single-spaced with double- spaces between paragraphs. The body of the document of petitions, notices of appeal, responses, motions, and briefs should be double-spaced, with captions, headings, and long quotes single-spaced.

Adherence to the margins is important since the document will be reproduced front and back and will be bound on the side. No part of the text should be obscured by that binding.

Quotations of more than three lines in length should be indented ¾ inch from each margin and should be single-spaced. The citation should immediately follow the quote.

References to the record on appeal should be made through a parenthetic entry in the text. (R. pp. 38-40) References to the transcript, if used, should be made in similar manner. (T. p. 558, line 21)

TOPICAL HEADINGS

The various sections of the brief or petition should be separated (and indexed) by topical headings, centered and underlined, in all capital letters.

Within the argument section, the issues presented should be set out as a heading in all capital letters and in paragraph format from margin to margin. Sub-issues should be presented in similar format, but block indented ½ inch from the left margin.

NUMBERING PAGES

The cover page containing the caption of the document (and the index in Records on Appeal) is unnumbered. The index and table of cases and authorities are on pages numbered with lower case roman numerals, e.g., i, ii, iv.

While the page containing the inside caption and the beginning of the substance of the petition or brief bears no number, it is page 1. Subsequent pages are sequentially numbered by arabic numbers, flanked by dashes, at the center of the top margin of the page, e.g. -4-.

An appendix to the brief should be separately numbered in the manner of a brief.

SIGNATURE AND ADDRESS

All original papers filed in a case will bear the original signature of at least one counsel participating in the case, as in the example below. The name, address, telephone number, and e-mail address of the person signing, together with the capacity in which he signs the paper will be included. Where counsel or the firm is retained, the firm name should be included above the signature; however, if counsel is appointed in an indigent criminal appeal, only the name of the appointed counsel should appear, without identification of any firm affiliation. Counsel participating in argument must have signed the brief in the case prior to that argument.

(Retained) ATTORNEY, COUNSELOR, LAWYER & HOWE

By: _____
John Q. Howe

By: _____
M. R. N. Associate
Attorneys for Plaintiff Appellants
P. O. Box 0000
Raleigh, NC 27600
(919) 999-9999
howe@aclh.web

(Appointed)

John Q. Howe
Attorney for Defendant Appellant
P. O. Box 0000
Raleigh, NC 27600
(919) 999-9999
howe@aclh.web

These amendments to the North Carolina Rules of Appellate Procedure shall be effective on the 12th day of May, 2004.

Adopted by the Court in Conference this the 6th day of May, 2004. 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 North Carolina Rules of Appellate Procedure

Rules 3, 26, 30, 37, and 41 of the North Carolina Rules of Appellate are hereby amended as described below:

Rule 3(b) is amended to read 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. 7B-1113.

(2) Juvenile matters, G.S. 7B-~~1001.~~1001 or 7B-2602.

For appeals filed pursuant to these provisions and for extraordinary writs filed in cases to which these provisions apply, the name of the juvenile who is the subject of the action, and of any siblings or other household members under the age of eighteen, shall be referenced by the use of initials only in all filings, documents, exhibits, or arguments submitted to the appellate court with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). In addition, the juvenile's address, social security number, and date of birth shall be

excluded from all filings, documents, exhibits, or arguments with the exception of sealed verbatim transcripts submitted pursuant to Rule 9(c). Appeals filed pursuant to these provisions shall specifically comply, if applicable, with Rules 9(b), 9(c), 26(g), 28(d), 28(k), 30, 37, 41 and Appendix B.

Rule 26(g) is amended to add new subsection (4):

(4) *Termination of Parental Rights and Juvenile Matters.* All documents and exhibits filed with the appellate court shall not include the name of a juvenile or any other identifying information, in compliance with Rule 3(b).

Rule 30 is amended to read as follows:

(a) Order and Content of Argument.

(1) ~~**(a) Order and Content of Argument.**~~ The appellant is entitled to open and conclude the argument. The opening argument shall include a fair statement of the case. Oral arguments should complement the written briefs, and counsel will therefore not be permitted to read at length from briefs, records, and authorities.

(2) To the extent practicable, counsel shall refrain from using a juvenile's name in oral argument and, instead, refer to the juvenile consistent with the provisions of Rule 3(b).

Rule 37 is amended to add subsection (c):

(c) Termination of Parental Rights and Juvenile Matters. Any motion or response to a motion filed in the appellate courts shall not include the name of a juvenile, in compliance with Rule 3(b).

Rule 41(b)(2) is amended to read as follows:

(2) Each appellant shall complete and file the APPEAL INFORMATION STATEMENT with the Clerk of the Court of Appeals at or before the time his or her appellant's brief is due and shall serve a copy of the statement upon all other parties to the appeal pursuant to Rule 26. The APPEAL INFORMATION STATEMENT may be filed by mail addressed to the clerk and, if first class mail is utilized, is deemed filed on the date of mailing as evidenced by the proof of service. For cases arising out of termination of parental rights and juvenile matters, the name of the juvenile shall not be included in the APPEAL INFORMATION STATEMENT, in compliance with Rule 3(b).

These amendments to the North Carolina Rules of Appellate Procedure shall be effective on the 12th day of May, 2004.

Adopted by the Court in Conference this the 6th day of May, 2004. 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 North Carolina Rules of Appellate Procedure

Rule 9 of the North Carolina Rules of Appellate is hereby amended as described below:

Rule 9(a) is amended to read as follows:

(a) **Function; Composition of Record.** In appeals from the trial division of the General Court of Justice, review is solely upon the record on appeal ~~and~~, the verbatim transcript of proceedings, if one is designated, constituted in accordance with this Rule ~~9.~~9, and any items filed with the record on appeal pursuant to Rule 9(c) and 9(d). Parties may cite any of these items in their briefs and arguments before the appellate courts.

Rule 9(a)(1)(l) is amended to read as follows:

(l) a statement, where appropriate, that the record of ~~proceeding~~proceedings was made with an electronic recording device.

Rule 9(a) is amended to add new subsection (4):

(4) *Exclusion of Social Security Numbers from Record on Appeal.* Social security numbers shall be deleted or redacted from any document before including the document in the record on appeal.

Rule 9(b) is amended to read as follows:

Rule 9(b) Form of Record; Amendments. The record on appeal shall be in the format prescribed by Rule 26(g) and the appendixes to these rules.

(1) *Order of Arrangement.* The items constituting the record on appeal should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal.

(2) *Inclusion of Unnecessary Matter; Penalty.* It shall be the duty of counsel for all parties to an appeal to avoid including in the record on appeal matter not necessary for an understanding of the errors assigned, such as social security numbers referred to in Rule 9(a)(4). The cost of including such matter may be charged as costs to the party or counsel who caused or permitted its inclusion.

(3) *Filing Dates and Signatures on Papers.* Every pleading, motion, affidavit, or other paper included in the record on appeal shall show the date on which it was filed and, if verified, the date of verification and the person who verified. Every judgment, order, or other determination shall show the date on which it was entered. The typed or printed name of the person signing a paper shall be entered immediately below the signature.

(4) *Pagination; Counsel Identified.* The pages of the record on appeal shall be numbered consecutively, be referred to as "record pages" and be cited as "(R p _____)." Pages of the verbatim transcript of proceedings filed under Rule 9(c)(2) shall be referred to as "transcript pages" and cited as "(T p _____)." At the end of the record on appeal shall appear the names, office addresses, and telephone numbers of counsel of record for all parties to the appeal.

(5) *Additions and Amendments to Record on Appeal.* On motion of any party or on its own initiative, the appellate court may order additional portions of a trial court record or transcript sent up and added to the record on appeal. On motion of any party the appellate court may order any portion of the record on appeal or transcript amended to correct error shown as to form or content. Prior to the filing of the record on appeal in the appellate court, such motions may be made by any party to the trial tribunal.

(6) *Appeals from Termination of Parental Rights and Juvenile Matters.* The record on appeal shall comply with the provisions to protect the confidentiality of juveniles by redacting the juvenile's name and other identifying information as set out in Rule 3(b) from any documents included in the record on appeal.

Rule 9(c) is amended to read as follows:

(c) Presentation of Testimonial Evidence and Other Proceedings. Testimonial evidence, voir dire, and other trial proceedings necessary to be presented for review by the appellate court may be included either in the record on appeal in the form specified in Rule 9(c)(1) or by designating the verbatim transcript of proceedings of the trial tribunal as provided in Rule 9(c)(2) and (c)(3). Where

error is assigned to the giving or omission of instructions to the jury, a transcript of the entire charge given shall be included in the record on appeal. Verbatim transcripts in an appeal of a termination of parental rights or a juvenile matter, as identified by Rule 3(b), shall be submitted to the appellate court in a signed, sealed envelope or other appropriate container on which is noted a case caption that complies with the confidentiality provisions of Rule 3(b), including the District Court case number. The transcript shall be available to the public only with permission from the appellate court.

Rule 9(c)(2) is amended to read as follows:

(2) *Designation that Verbatim Transcript of Proceedings in Trial Tribunal Will Be Used.* Appellant may designate in the record on appeal that the testimonial evidence will be presented in the verbatim transcript of the evidence in the trial tribunal in lieu of narrating the evidence as permitted by Rule 9(c)(1). Appellant may also designate that the verbatim transcript will be used to present voir dire or other trial proceedings where those proceedings are the basis for one or more assignments of error and where a verbatim transcript of those proceedings has been made. Any such designation shall refer to the page numbers of the transcript being designated. Appellant need not designate all of the verbatim transcript which has been made, provided that when the verbatim transcript is designated to show the testimonial evidence, so much of the testimonial evidence must be designated as is necessary for an understanding of all errors assigned. When appellant has narrated the evidence and trial proceedings under Rule 9(c)(1), the appellee may designate the verbatim transcript as a proposed alternative record on appeal.

Rule 9(c)(3)(c) is amended to read as follows:

(c) in criminal appeals, the district attorney, upon settlement of the record on appeal, shall forward one copy of the settled transcript to the Attorney General of North Carolina; and

Rule 9(d)(1) is amended to read as follows:

(1) *Exhibits.* Maps, plats, diagrams and other documentary exhibits filed as portions of or attachments to items required to be included in the record on appeal shall be included as part of such items in the record on appeal. Where such exhibits are not necessary to an understanding of the errors assigned, they may by agreement of counsel or by order of the trial court upon motion be excluded from the record on appeal. Social security numbers shall be deleted or redacted from exhibits prior to filing the exhibits in the appellate court.

Rule 9(d)(3) is amended to read as follows:

(3) *Removal of Exhibits from Appellate Court.* All models, diagrams, and exhibits of material placed in the custody of the Clerk of the appellate court must be taken away by the parties within 90 days after the mandate of the Court has issued or the case has otherwise been closed by withdrawal, dismissal, or other order of the Court, unless notified otherwise by the Clerk. When this is not done, the Clerk shall notify counsel to remove the articles forthwith; and if they are not removed within a reasonable time after such notice, the Clerk shall destroy them, or make such other disposition of them as to ~~him~~the Clerk may seem best.

These amendments to the North Carolina Rules of Appellate Procedure shall be effective on the 12th day of May, 2004.

Adopted by the Court in Conference this the 6th day of May, 2004. 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 North Carolina Rules of Appellate Procedure

Rule 11 of the North Carolina Rules of Appellate is hereby amended as described below:

Rule 11(b) is amended to read as follows:

(b) **By Appellee's Approval of Appellant's Proposed Record on Appeal.** If the record on appeal is not settled by agreement under Rule 11(a), the appellant shall, within the same times provided, serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 9. Within ~~21~~30 days (35 days in capitally tried cases) after service of the proposed record on appeal upon ~~him~~ an appellee, that appellee may serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal in accordance with Rule 11(c). If all appellees within the times

allowed them either serve notices of approval or fail to serve either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

Rule 11(c) is amended to read as follows:

(c) **By ~~Judicial Order or~~ Agreement, by Operation of Rule, or by Court Order After ~~Appellant's~~ Appellee's ~~Failure to Request Judicial Settlement~~Objection or Amendment.** Within ~~21~~30 days (35 days in capitally tried cases) after service upon ~~him~~appellee of appellant's proposed record on appeal, ~~an~~that appellee may serve upon all other parties specific amendments or objections to the proposed record on appeal, or a proposed alternative record on appeal. Amendments or objections to the proposed record on appeal shall be set out in a separate paper.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, the record on appeal shall consist of each item that is either among those items required by Rule 9(a) to be in the record on appeal or that is requested by any party to the appeal and agreed upon for inclusion by all other parties to the appeal. If a party requests that an item be included in the record on appeal but not all other parties to the appeal agree to its inclusion, then that item shall not be included in the printed record on appeal, but shall be filed with the record on appeal, along with any verbatim transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to Rule 9(c) or 9((d); provided that any item not filed, served, submitted for consideration, admitted, or for which no offer of proof was tendered, shall not be included.

If any party to the appeal contends that materials proposed ~~alternative~~for inclusion in the record ~~on appeal~~or for filing therewith pursuant to Rule 9(c) or 9(d) were not filed, served, submitted for consideration, admitted, or made the ~~appellant or any other appellees~~subject of an offer of proof, then that party, within 10 days after expiration of the time within which the appellee last served with the appellant's proposed record on appeal might have served amendments, objections, or a proposed alternative record on appeal, may in writing request the judge from whose judgment, order, or other determination appeal was taken to settle the record on appeal. A copy of the request, endorsed with a certificate showing service on the judge, shall be filed forthwith in the office of the clerk of the superior court, and served upon all other parties. Each party shall promptly provide to the judge a reference copy of the record items, amendments, or objections served by that party in the case. ~~If only one appellee or only one set of appellees proceeding jointly have so served, and no~~

~~other party makes timely request for judicial settlement, the record on appeal is thereupon settled in accordance with the appellee's objections, amendments or proposed alternative record on appeal. If more than one appellee proceeding separately have so served, failure of the appellant to make timely request for judicial settlement results in abandonment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.~~

The functions of the judge in the settlement of the record on appeal are to settle narrations of proceedings under Rule 9(c)(1) and to determine whether the record accurately reflects material filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, but not to decide whether material desired in the record by either party is relevant to the issues on appeal, non-duplicative, or otherwise suited for inclusion in the record on appeal.

The judge shall send written notice to counsel for all parties setting a place and a time for a hearing to settle the record on appeal. The hearing shall be held not later than 15 days after service of the request for hearing upon the judge. The judge shall settle the record on appeal by order entered not more than 20 days after service of the request for hearing upon the judge. If requested, the judge shall return the record items submitted for reference during the judicial settlement process with the order settling the record on appeal.

Provided, that nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by judicial order.

Rule 11(d) is amended to read as follows:

(d) Multiple Appellants; Single Record on Appeal. When there are multiple appellants (2 or more), whether proceeding separately or jointly, as parties aligned in interest, or as cross-appellants, there shall nevertheless be but one record on appeal, and the appellants shall attempt to agree to the procedure for constituting a proposed record on appeal. The assignments of error of the several appellants shall be set out separately in the single record on appeal and ~~related~~attributed to the several appellants by any clear means of reference. In the event multiple appellants cannot agree to the procedure for constituting a proposed record on appeal, the judge from whose judgment, order, or other determination the appeals are taken shall, on motion of any appellant with notice to all other appellants, enter an order settling the procedure, including the allocation of costs.

These amendments to the North Carolina Rules of Appellate Procedure shall be effective on the 12th day of May, 2004.

Adopted by the Court in Conference this the 6th day of May, 2004. 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 North Carolina Rules of Appellate Procedure

Rule 18 of the North Carolina Rules of Appellate is hereby amended as described below:

Rule 18(c)(1) is amended to read as follows:

(1) an index of the contents of the record on appeal, which shall appear as the first page thereof;

Rule 18(d)(2) is amended to read as follows:

(2) *By Appellee's Approval of Appellant's Proposed Record on Appeal.* If the record on appeal is not settled by agreement under Rule 18(d)(1), the appellant shall, within 35 days after filing of the notice of appeal or after production of the transcript if one is ordered pursuant to Rule 18(b)(3), ~~file in the office of the agency head and~~ serve upon all other parties a proposed record on appeal constituted in accordance with the provisions of Rule 18(c). Within 30 days after service of the proposed record on appeal upon ~~him,~~ an appellee, that appellee may ~~file in the office of the agency head and~~ serve upon all other parties a notice of approval of the proposed record on appeal, or objections, amendments, or a proposed alternative record on appeal. If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

Rule 18(d)(3) is amended to read as follows:

(3) *By ~~Conference or Agency~~ Agreement, by Operation of Rule, or by Court Order; ~~Failure to Request Settlement~~ After Appellee's Objection or Amendment.* If any appellee timely files amendments,

objections, or a proposed alternative record on appeal, the ~~appellant~~ record on appeal shall consist of each item that is either among those items required by Rule 9(a) to be in the record on appeal or that is requested by any party to the appeal and agreed upon for inclusion by all other ~~appellee~~parties to the appeal, in the absence of contentions that the item was not filed, served, or offered into evidence. If a party requests that an item be included in the record on appeal but not all parties to the appeal agree to its inclusion, then that item shall not be included in the printed record on appeal but shall be filed with the record on appeal along with any verbatim transcripts, narrations of proceedings, documentary exhibits, and other items that are filed pursuant to Rule 9(c) or 9(d); provided that any item not filed, served, submitted for consideration, admitted, or for which no offer of proof was tendered, shall not be included.

If any party to the appeal contends that materials proposed for inclusion in the record or for filing therewith pursuant to Rule 9(c) or 9(d) were not filed, served, submitted for consideration, admitted, or offered into evidence, then that party, within 10 days after expiration of the time within which the appellee last served with the appellant's proposed record on appeal might have filed amendments, objections, or a proposed alternative record on appeal, may in writing request that the agency head ~~to~~ convene a conference to settle the record on appeal. A copy of that request, endorsed with a certificate showing service on the agency head, shall be served upon all other parties. Each party shall promptly provide to the agency head a reference copy of the record items, amendments, or objections served by that party in the case. ~~If only one appellee or only one set of appellees proceeding jointly have so filed and no other party makes timely request for agency conference or settlement by order, the record on appeal is thereupon settled in accordance with the one appellee's, or one set of appellees', objections, amendments, or proposed alternative record on appeal. If more than one appellee proceeding separately have so filed, failure of the appellant to make timely request for agency conference or for settlement by order results in abandonment of the appeal as to those appellees, unless within the time allowed an appellee makes request in the same manner.~~

The functions of the agency head in the settlement of the record on appeal are to settle narrations of proceedings under Rule 9(c)(1) and to determine whether the record accurately reflects material filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, but not to decide whether material desired in the record by either party is relevant to the issues on appeal, non-duplicative, or otherwise suited for inclusion in the record on appeal.

Upon receipt of a request for settlement of the record on appeal, the agency head shall send written notice to counsel for all parties setting a place and time for a conference to settle the record on appeal. The conference shall be held not later than 15 days after service of the request upon the agency head. The agency head or a delegate appointed in writing by the agency head shall settle the record on appeal by order entered not more than 20 days after service of the request for settlement upon the agency. If requested, the settling official shall return the record items submitted for reference during the settlement process with the order settling the record on appeal.

When the agency head is a party to the appeal, the agency head shall forthwith request the Chief Judge of the Court of Appeals or the Chief Justice of the Supreme Court, as appropriate, to appoint a referee to settle the record on appeal. The referee so appointed shall proceed after conference with all parties to settle the record on appeal in accordance with the terms of these Rules and the appointing order.

Nothing herein shall prevent settlement of the record on appeal by agreement of the parties at any time within the times herein limited for settling the record by agency order.

These amendments to the North Carolina Rules of Appellate Procedure shall be effective on the 12th day of May, 2004.

Adopted by the Court in Conference this the 6th day of May, 2004. 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 North Carolina Rules of Appellate Procedure

Rule 28 of the North Carolina Rules of Appellate is hereby amended as described below:

Rule 28(d) is amended to read as follows:

(d) Appendixes to Briefs. Whenever the transcript of proceedings is filed pursuant to Rule 9(c)(2), the parties must file verbatim portions of the transcript as appendixes to their briefs, if required by this Rule 29(d). Verbatim portions of the transcript filed pursuant to this rule in an appeal of a termination of parental rights or juvenile matter must be modified to comply with the confidentiality provisions of Rule 3(b).

Rule 28(h) is amended to read as follows:

(h) Reply Briefs. ~~Unless the court,~~ No reply brief will be received or considered by the Court, except in the following circumstances:

(1) The Court, upon its own initiative, ~~orders~~may order a reply brief to be filed and served~~, none will be received or considered by the court, except as herein provided.~~.

(~~1~~2) If the appellee has presented in its brief new or additional questions as permitted by Rule 28(c), an appellant may, within 14 days after service of such brief, file and serve a reply brief limited to those new or additional questions.

(~~2~~3) If the parties are notified under Rule 30(f) that the case will be submitted without oral argument on the record and briefs, an appellant may, within 14 days after service of such notification, file and serve a reply brief limited to a concise rebuttal to arguments set out in the brief of the appellee which were not addressed in the appellant's principal brief or in a reply brief filed pursuant to Rule 28(h)(~~1~~2).

(4) If the parties are notified that the case has been scheduled for oral argument, an appellant may file with the Court, within 14 days after the notice of argument is mailed, a motion for leave to file a reply brief. The motion shall state concisely the reasons why a reply brief is believed to be desirable or necessary and the issues to be addressed in the reply brief. The proposed reply brief may be submitted with the motion for leave and shall be limited to a concise rebuttal to arguments set out in the brief of the appellee which were

not addressed in the appellant's principal brief. Unless otherwise ordered by the Court, the motion for leave will be determined solely upon the motion and without responses thereto or oral argument. The clerk of the appellate court will notify the parties of the Court's action upon the motion, and, if the motion is granted, the appellant shall file and serve the reply brief within ten days of such notice.

(5) Motions for extensions of time in relation to reply briefs are disfavored.

Rule 28(j) is amended to read as follows:

(j) Page Limitations Applicable to Briefs Filed in the Court of Appeals. Each brief filed in the North Carolina Court of Appeals, whether filed by an appellant, appellee, or amicus curiae, formatted according to Rule 26 and the Appendixes to these Rules, shall have either a page limit or a word-count limit, depending on the type style used in the brief:

(1) *Type.*

(A) *Type style.* Documents must be set in a plain roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined. Documents may be set in either proportionally spaced or nonproportionally spaced (monospaced) type.

(B) *Type size.*

1. Nonproportionally spaced type (e.g., Courier or Courier New) may not contain more than 10 characters per inch (12-point).

2. Proportionally spaced type (e.g., Times New Roman), must be 14-point or larger.

3. Documents set in Courier New 12-point type, or Times New Roman 14-point type will be deemed in compliance with these type-size requirements.

(2) *Document length.*

(A) *Length limitations on briefs filed in the Court of Appeals.* Every brief filed in the Court of Appeals, whether filed by an appellant, appellee, or amicus curiae, shall be subject to either a page limit or a word-count limit, depending on the type style used in the brief.

1. *Page limits for briefs using nonproportional type.* The page limit for a principal brief that uses nonproportional (e.g.,

Courier) type is 35 pages. The page limit for a reply brief permitted by Rule 28(h)(1), (2), or (3) is 15 pages, and the page limit for a reply brief ~~if~~ permitted by ~~Appellate~~ Rule 28(h)(4) is ~~15~~12 pages. A page shall contain no more than 27 lines of double-spaced text of no more than 65 characters per line. Covers, indexes, tables of authorities, certificates of service, and appendixes do not count toward these page limits. The Court may strike or require resubmission of briefs with excessive single-spaced passages or footnotes that are used to circumvent these page limits.

2. *Word-count limits for briefs in proportional type.* A principal brief that uses proportional type may contain no more than 8,750 words~~, and a~~. A reply brief ~~if~~ permitted by ~~Appellate~~ Rule 28(h)(1), (2), or (3) may contain no more than 3,750 words, and a reply brief permitted by Rule 28(h)(4) may contain no more than 3,000 words. Covers, indexes, tables of authorities, certificates of service, certificates of compliance with this rule, and appendixes do not count against these word-count limits. Footnotes and citations in the text, however, do count against these word-count limits. Parties who file briefs in proportional type shall submit along with the brief, immediately before the certificate of service, a certification, signed by counsel of record, or, in the case of parties filing briefs pro se, by the party, that the brief contains no more than the number of words allowed by this rule. For purposes of this certification, counsel and parties may rely on word counts reported by word-processing software, as long as footnotes and citations are included in those word counts.

Rule 28 is amended to add new subsection (k):

(k) Termination of Parental Rights and Juvenile Matters. No brief shall include the name of a juvenile or other identifying information, in compliance with Rule 3(b).

These amendments to the North Carolina Rules of Appellate Procedure shall be effective on the 12th day of May, 2004.

Adopted by the Court in Conference this the 6th day of May, 2004. 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

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONDITIONAL REINSTATEMENT

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 22, 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. 1D, Section .0900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .0900 Procedures for Administrative Committee

.0902 Reinstatement from Inactive Status

(a) Eligibility to Apply for Reinstatement

Any member who has been transferred to inactive status may petition the council for an order reinstating the member as an active member of the North Carolina State Bar.

. . . .

(e) ~~Response by~~ Recommendation of Administrative Committee

After any investigation of the petition by the counsel is complete, the Administrative Committee will consider the petition at its next meeting and shall make a recommendation to the council regarding whether the petition should be granted.

(1) Conditions Precedent to Reinstatement. Upon a determination that the petitioner has failed to demonstrate competence to return to the practice of law, the committee may require the petitioner to complete a specified number of hours of continuing legal education, which shall be in addition to the requirements set forth in Rule .0902(b)(2) and (4) above, as a condition precedent to the committee's recommendation that the petition be granted,

(2) Conditions Subsequent to Reinstatement. Upon a determination that the petitioner is fit to return to the practice of law pursuant to the reasonable management of his or her substance abuse, addiction, or debilitating mental condition, the

committee may recommend to the council that the reinstatement petition be granted with reasonable conditions to which the petitioner consents. Such conditions may include, but are not limited to, an evaluation by a mental health professional approved by the Lawyer Assistance Program (LAP), compliance with the treatment recommendations of the mental health professional, periodic submission of progress reports by the mental health professional to LAP, and waiver of confidentiality relative to diagnosis and treatment by the mental health professional.

(3) Failure of Conditions Subsequent to Reinstatement. In the event the petitioner fails to satisfy the conditions of the reinstatement order, the committee shall issue a notice directing the petitioner to show cause, in writing, why the petitioner should not be suspended from the practice of law. Notice shall be served and the right to request a hearing shall be as provided in Rule .0902(f) below. The hearing shall be conducted as provided in Section .1000 of this subchapter provided, however, the burden of proof shall be upon the petitioner to show by clear, cogent, and convincing evidence that he or she has satisfied the conditions of the reinstatement order.

(f) Hearing Upon Denial of Petition for Reinstatement

(1) Notice of Council Action and Request for Hearing. If the council denies a petition for reinstatement ~~from inactive status~~, the petitioner ~~the member~~ shall be notified in writing within 14 days after such action ~~by the council~~. The notice shall be served upon the ~~member~~ petitioner pursuant to Rule 4 of the N.C. Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the N.C. Rules of Civil Procedure to serve process.

(2) The ~~member~~ petitioner shall have 30 days from the date of service of the notice to file a written request for hearing upon the secretary. The request shall be served upon the secretary pursuant to Rule 4 of the N.C. Rules of Civil Procedure.

(3) Hearing Procedure

The procedure for the hearing shall be as provided in Section .1000 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 October 22, 2004.

Given over my hand and the Seal of the North Carolina State Bar, this the 21st day of February, 2005.

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 3rd day of March, 2005.

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 3rd day of March, 2005.

s/Newby, J.
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PLAN OF LEGAL SPECIALIZATION

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 21, 2005.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the Plan of Legal Specialization, as particularly set forth in 27 N.C.A.C. 1D Section .1700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1700 The Plan of Legal Specialization

.1720 Minimum Standards for Certification of Specialists

(a) To qualify for certification as a specialist, a lawyer applicant must pay any required fee, comply with the following minimum standards, and meet any other standards established by the board for the particular area of specialty.

(1) The applicant must be licensed in a jurisdiction of the United States for at least five years immediately preceding his or her application and must be licensed in North Carolina for at least three years immediately preceding his or her application. The applicant must be currently in good standing to practice law in this state.

(2) . . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 21, 2005.

Given over my hand and the Seal of the North Carolina State Bar, this the 21st day of February, 2005.

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 3rd day of March, 2005.

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 3rd day of March, 2005.

s/Newby, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING PARALEGAL CERTIFICATION

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 15, 2005.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning paralegal certification, as particularly set forth in 27 N.C.A.C. 1G, Section .0200, be amended by adding the following provisions:

Section .0200, Rules Governing Continuing Paralegal Education

.0201 Continuing Paralegal Education (CPE)

(1) Each active certified paralegal subject to these rules shall complete 6 hours of approved continuing education during each year of certification.

(2) Of the 6 hours, at least 1 hour shall be devoted to the areas of professional responsibility or professionalism or any combination thereof.

(a) A professional responsibility course or segment of a course shall be devoted to (1) the substance, the underlying rationale, and the practical application of the Rules of Professional Conduct; (2) the professional obligations of the lawyer to the client, the court, the public, and other lawyers, and the paralegal's role in assisting the lawyer to fulfill those obligations; or (3) the effects of substance abuse and chemical dependency, or debilitating mental condition on a lawyer's or a paralegal's professional responsibilities.

(b) A professionalism course or segment of a course shall be devoted to the identification and examination of, and the encouragement of adherence to, non-mandatory aspirational standards of professional conduct that transcend the requirements of the Rules of Professional Conduct. Such courses address principles of competence and dedication to the service of clients, civility, improvement of the justice system, advancement of the rule of law, and service to the community.

.0202 Accreditation Standards

The Board of Paralegal Certification shall approve continuing education activities in compliance with the following standards and provisions.

(1) An approved activity shall have significant intellectual or practical content and the primary objective of increasing the participant's professional competence and proficiency as a paralegal.

(2) An approved activity shall constitute an organized program of learning dealing with matters directly related to the practice of law, professional responsibility, professionalism, or ethical obligations of paralegals.

(3) Credit may be given for continuing education activities where live instruction is used or mechanically or electronically recorded or reproduced material is used, including videotape or satellite transmitted programs. A minimum of five certified paralegals must physically attend the presentation of a prerecorded program. This requirement does not apply to participation from a remote location in the presentation of a live broadcast by telephone, satellite, or video conferencing equipment.

(4) Continuing education materials are to be prepared, and activities conducted, by an individual or group qualified by practical or academic experience in a setting physically suitable to the educational activity of the program and, when appropriate, equipped with suitable writing surfaces or sufficient space for taking notes.

(5) Thorough, high quality, and carefully prepared written materials should be distributed to all attendees at or before the time the course is presented. These may include written materials printed from a computer presentation, computer website, or CD-ROM. A written agenda or outline for a presentation satisfies this requirement when written materials are not suitable or readily available for a particular subject. The absence of written materials for distribution should, however, be the exception and not the rule.

(6) Any continuing legal education activity approved for lawyers by the North Carolina State Bar's Board of Continuing Legal Education meets these standards.

(7) In-house continuing legal education and self-study shall not qualify for continuing paralegal education (CPE) credit.

.0203 General Course Approval

(1) Approval—Continuing education activities, not otherwise approved or accredited by the North Carolina State Bar Board of

Continuing Legal Education, may be approved upon the written application of a sponsor, or of a certified paralegal on an individual program basis. An application for continuing paralegal education (CPE) approval shall meet the following requirements:

(a) If advance approval is requested by a sponsor, the application and supporting documentation (*i.e.*, the agenda with timeline, speaker information and a description of the written materials) shall be submitted at least 45 days prior to the date on which the course or program is scheduled. If advance approval is requested by a certified paralegal, the application need not include a complete set of supporting documentation.

(b) In all other cases, the application and supporting documentation shall be submitted not later than 45 days after the date the course or program was presented.

(c) The application shall be submitted on a form furnished by the Board of Paralegal Certification.

(d) The application shall contain all information requested on the form.

(e) The application shall be accompanied by a course outline or brochure that describes the content, identifies the teachers, lists the time devoted to each topic and shows each date and location at which the program will be offered.

(f) The application shall include a detailed calculation of the total continuing paralegal education (CPE) hours and the hours of professional responsibility for the program.

(g) If the sponsor has not received notice of accreditation within 15 days prior to the scheduled date of the program, the sponsor should contact the Board of Paralegal Certification via telephone or e-mail.

(2) Announcement—Sponsors who have advance approval for courses from the Board of Paralegal Certification may include in their brochures or other course descriptions the information contained in the following illustration:

This course [or seminar or program] has been approved by the North Carolina State Bar Board of Paralegal Certification for continuing paralegal education credit in the amount of ____ hours, of which ____ hours will also apply in the area of professional responsibility. This course is not sponsored by the Board of Paralegal Certification.

.0204 Fees

Accredited Program Fee—Sponsors seeking accreditation for a particular program (whether or not the sponsor itself is accredited by the North Carolina State Bar Board of Continuing Legal Education), that has not already been approved or accredited by the North Carolina State Bar Board of Continuing Legal Education, shall pay a nonrefundable fee of $75.00. The program must be approved in accordance with Rule .0203(1). An accredited program may be advertised by the sponsor in accordance with Rule .0203(2).

.0205 Computation of Hours of Instruction

(1) Hours of continuing paralegal education (CPE) will be computed by adding the number of minutes of actual instruction, dividing by 60 and rounding the results to the nearest one-tenth of an hour.

(2) Only actual instruction will be included in computing the total hours. The following will be excluded:

(a) introductory remarks;

(b) breaks;

(c) business meetings.

(3) Teaching—Continuing paralegal education (CPE) credit may be earned for teaching an approved continuing education activity. Three CPE credits will be awarded for each thirty (30) minutes of presentation. Repeat live presentations will qualify for one-half of the credit available for the initial presentation. No credit will be awarded for video replays.

(4) Teaching at a Qualified Paralegal Studies Program—Continuing paralegal education (CPE) credit may be earned for teaching a course at a qualified paralegal studies program, which program shall be qualified pursuant to Rule .0119(a) of this subchapter. Two CPE credits will be awarded for each semester credit (or its equivalent) awarded to the course.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing 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 15, 2005.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of August, 2005.

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 18th day of August, 2005.

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 18th day of August, 2005.

s/Newby, J.
For the Court

AMENDMENTS TO THE 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 15, 2005.

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 4.4, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 2, Rule 4.4

Rule 4.4 Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a writing relating to the representation of the lawyer's client and knows or reasonably should know that the writing was inadvertently sent shall promptly notify the sender.

Comment

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive writings that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a writing was sent inadvertently, then this rule requires the lawyer promptly to notify the sender in order to permit that person to take protective measures. This duty is imputed to all lawyers in a firm. Whether the lawyer who receives the writing is required to take additional steps, such as returning the original writing, is a matter of law beyond the scope of these rules, as is the question of whether the privileged status of a writing has been waived. Similarly, this ~~This~~ Rule does not address the legal duties of a lawyer who receives a ~~document~~ writing that the lawyer knows or reasonably should know

may have been wrongfully obtained by the sending person. *See* Rule 1.0(o) for the definition of "writing."

[3] Some lawyers may choose to return a writing unread, for example, when the lawyer learns before receiving the writing that it was inadvertently sent to the wrong address. Whether the lawyer is required to do so is a matter of law. When return of the writing is not required by law, the decision voluntarily to return such a writing is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

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 15, 2005.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of August, 2005.

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 18th day of August, 2005.

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 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 18th day of August, 2005.

s/Newby, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 22, 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 continuing legal education program, as particularly set forth in 27 N.C.A.C. 1D, Sections .1500 and .1600, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Sections .1500 and .1600, Rules and Regulations Governing the Administration of the Continuing Legal Education Program

.1501 Scope, Purpose, and Definitions

(a) Scope

Except as provided herein, these rules shall apply to every active member of the North Carolina State Bar.

(b) ~~(a)~~ Purpose

...

(c)~~(b)~~ Definitions

. . .

.1516 Powers, ~~and~~ Duties, and Organization of the Board

(a) The board shall have the following powers and duties:

. . . .

(b) The board shall be organized as follows:

(1) Quorum—Five members shall constitute a quorum of the board.

(2) The Executive Committee—The executive committee of the board shall be comprised of the chairperson, a vice-chairperson elected by the members of the board, and a member to be appointed by the chairperson. Its purpose is to conduct all necessary business of the board that may arise between meetings of

the full board. In such matters it shall have complete authority to act for the board.

(3) Other Committees—The chairperson may appoint committees as established by the board for the purpose of considering and deciding matters submitted to them by the board.

(c) Appeals—Except as otherwise provided, the board is the final authority on all matters entrusted to it under Section .1500 and Section .1600 of this subchapter. Therefore, any decision by a committee of the board pursuant to a delegation of authority may be appealed to the full board and will be heard by the board at its next scheduled meeting. A decision made by the staff pursuant to a delegation of authority may also be reviewed by the full board but should first be appealed to any committee of the board having jurisdiction on the subject involved. All appeals shall be in writing. The board has the discretion to, but is not obligated to, grant a hearing in connection with any appeal regarding the accreditation of a program.

.1517 ~~Scope and~~ Exemptions

(a) Notification of Board. ~~Except as provided herein, these rules shall apply to every active member licensed by the North Carolina State Bar.~~To qualify for an exemption for a particular calendar year, a member shall notify the board of the exemption in the annual report for that calendar year sent to the member pursuant to Rule .1522 of this subchapter. All active members who are exempt are encouraged to attend and participate in legal education programs.

(b) Government Officials and Members of Armed Forces.

. . . .

(c) Judiciary and Clerks.

. . .

(d) Nonresidents. Any active member residing outside of North Carolina ~~or any active member residing inside North Carolina who is a full time teacher at the Institute of Government of the University of North Carolina at Chapel Hill or at a law school in North Carolina accredited by the American Bar Association and who in each case neither practices~~ who does not practice in North Carolina ~~nor~~ and does not represent ~~represents~~ North Carolina clients on matters governed by North Carolina law shall be exempt from the requirements of these rules.

(e) Law Teachers. An exemption from the requirements of these rules shall be given to any active member who does not practice in North Carolina or represent North Carolina clients on matters governed by North Carolina law and who is:

(1) A full-time teacher at the School of Government (formerly the Institute of Government) of the University of North Carolina;

(2) A full-time teacher at a law school in North Carolina that is accredited by the American Bar Association; or

(3) A full-time teacher of law-related courses at a professional school accredited by its respective professional accrediting agency.

(~~e~~f) Special Circumstances Exemptions.

. . .

(~~f~~g) Pro Hac Vice Admissions.

. . .

(~~g~~h) Senior Status Exemption

. . . .

(~~h~~i) CLE Record During Exemption Period.

. . . .

(j) Permanent Disability. Attorneys who have a permanent disability that makes attendance at CLE programs inordinately difficult may file a request for a permanent substitute program in lieu of attendance and shall therein set out continuing legal education plans tailored to their specific interests and physical abilities. The board shall review and approve or disapprove such plans on an individual basis and without delay.

(k) Application for Substitute Compliance and Exemptions. Other requests for substitute compliance, partial waivers, and other exemptions for hardship or extenuating circumstances may be granted by the board on a yearly basis upon written application of the attorney.

(l) Bar Examiners. Credit is earned through service as a bar examiner of the North Carolina Board of Law Examiners. The board will award 12 hours of CLE credit for the preparation and grading of a bar examination by a member of the North Carolina Board of Law Examiners.

.1520 Accreditation of Sponsors and Programs

(a) Accreditation of Sponsors.

. . . .

(c) Unaccredited Sponsor Request for Program Approval.

(1) . . . .

(2) The board may at any time decline to accredit CLE programs offered by a non-accredited sponsor for a specified period of time, as determined by the board, for failure to comply with the requirements of Rule .1512, Rule .1519 and Section .1600 of this subchapter.

. . .

.1522 Annual Report and Compliance Period

(a) Annual Written Report. Commencing in 1989, each active member of the North Carolina State Bar shall ~~make~~ provide an annual written report to the North Carolina State Bar in such form as the board shall prescribe by regulation concerning compliance with the continuing legal education program for the preceding year or declaring an exemption under Rule .1517 of this subchapter. The annual report form shall be corrected, if necessary, signed by the member, and promptly returned to the State Bar. Upon receipt of a signed annual report form, appropriate adjustments shall be made to the member's continuing legal education record with the State Bar. No further adjustments shall thereafter be made to the member's continuing legal education record.

(b) Compliance Period. The period for complying with the requirements of Rule .1518 of this subchapter is January 1 to December 31. A member may complete the requirements for the year on or by the last day of February of the succeeding year provided, however, that this additional time shall be considered a grace period and no extensions of this grace period shall be granted. All members are encouraged to complete the requirements within the appropriate calendar year.

(c) Report. Prior to January 31 of each year, the prescribed report form concerning compliance with the continuing legal education program for the preceding year shall be mailed to all active members of the North Carolina State Bar.

(d) Late Filing Penalty. Any attorney who, for whatever reasons, files the report showing compliance or declaring an exemption

after the due date of the last day of February shall pay a $75.00 late filing penalty. This penalty shall be submitted with the report. A report that is either received by the board or postmarked on or before the due date shall be considered timely filed. An attorney who complies with the requirements of the rules during the probationary period under Rule .1523(c) of this subchapter shall pay a late compliance fee of $125.00 pursuant to Rule .1523(e) of this subchapter. The board may waive the late filing penalty or the late compliance fee upon a showing of hardship or serious extenuating circumstances.

.1524 Reinstatement

(a) Reinstatement Within 30 Days of Service of Suspension Order.

. . . .

(d) Reinstatement Fee.

In lieu of the $125.00 reinstatement fee required by Rule .0904(c)(4)(A), the petition shall be accompanied by a reinstatement fee payable to the board in the amount of $250.00 ~~as required by Rule .1600(a) of this subchapter~~.

. . . .

Section .1600 Regulations Governing the Administration of the Continuing Legal Education Program

.1601 General Requirements for Course Approval ~~Organization~~

~~(a) Quorum. Five members shall constitute a quorum of the board.~~

~~(b) The Executive Committee. The executive committee of the board shall be comprised of the chairperson, a vice chairperson elected by the members of the board, and a member to be appointed by the chairperson. Its purpose is to conduct all necessary business of the board that may arise between meetings of the full board. In such matters it shall have complete authority to act for the board.~~

~~(c) Other Committees. The chairperson may appoint committees as established by the board for the purpose of considering and deciding matters submitted to them by the board.~~

~~(d) Definitions. As used herein, "board" means the Board of Continuing Legal Education, "CLE" means continuing legal edu-~~

~~cation, and "rules" means the rules for the continuing legal education program adopted by the Supreme Court of North Carolina (Section .1500 of this subchapter). All other definitions shall be as set forth in the rules.~~

(a) Approval. CLE activities may be approved upon the written application of a sponsor, other than an accredited sponsor, or of an active member on an individual program basis. An application for such CLE course approval shall meet the following requirements:

(1) If advance approval is requested by a sponsor, the application and supporting documentation, including two substantially complete sets of the written materials to be distributed at the course or program, shall be submitted at least 45 days prior to the date on which the course or program is scheduled. If advance approval is requested by an active member, the application need not include a complete set of written materials.

(2) In all other cases, the application and supporting documentation shall be submitted not later than 45 days after the date the course or program was presented or prior to the end of the calendar year in which the course or program was presented, whichever is earlier.

(3) The application shall be submitted on a form furnished by the board.

(4) The application shall contain all information requested on the form.

(5) The application shall be accompanied by a course outline or brochure that describes the content, identifies the teachers, lists the time devoted to each topic, and shows each date and location at which the program will be offered.

(6) The application shall include a detailed calculation of the total CLE hours and hours of professional responsibility.

(b) Course Quality and Materials. The application and materials provided shall reflect that the program to be offered meets the requirements of Rule .1519 of this subchapter. Sponsors, including accredited sponsors, and active members seeking credit for an approved activity shall furnish, upon request of the board, a copy of all materials presented and distributed at a CLE course or program. Written materials consisting merely of an outline without citation or explanatory notations generally will not be sufficient for approval. Any sponsor, including an accredited

sponsor, who expects to conduct a CLE activity for which suitable written materials will not be made available to all attendees may obtain approval for that activity only by application to the board at least 45 days in advance of the presentation showing why written materials are not suitable or readily available for such a program.

(c) Facilities. Sponsors must provide a facility conductive to learning with sufficient space for taking notes.

(d) Computer-Based CLE: Verification of Attendance. The sponsor of an on-line course must have a reliable method for recording and verifying attendance. The sponsor of a CD-ROM course must demonstrate that there is a reliable method for the user or the sponsor to record and verify participation in the course. A participant may periodically log on and off of a computer-based CLE course provided the total time spent participating in the course is equal to or exceeds the credit hours assigned to the program. A copy of the record of attendance must be forwarded to the board within 30 days after a member completes his or her participation in the course.

(e) Records. Sponsors, including accredited sponsors, shall within 30 days after the course is concluded

(1) furnish to the board a list in alphabetical order, in an electronic format if available, of the names of all North Carolina attendees and their North Carolina State Bar membership numbers;

(2) remit to the board the appropriate sponsor fee; and

(3) furnish to the board a complete set of all written materials distributed to attendees at the course or program.

(f) Announcement. Accredited sponsors and sponsors who have advance approval for courses may include in their brochures or other course descriptions the information contained in the following illustration:

This course [or seminar or program] has been approved by the Board of Continuing Legal Education of the North Carolina State Bar for continuing legal education credit in the amount of ____ hours, of which ____ hours will also apply in the area of professional responsibility. This course is not sponsored by the board.

(g) Notice. Sponsors not having advance approval shall make no representation concerning the approval of the course for CLE

credit by the board. The board will mail a notice of its decision on CLE activity approval requests within 30 days of their receipt when the request for approval is submitted before the program and within 30 days when the request is submitted after the program. Approval thereof will be deemed if the notice is not timely mailed. This automatic approval will not operate if the sponsor contributes to the delay by failing to provide the complete information requested by the board or if the board timely notifies the sponsor that the matter has been tabled and the reason therefore.

.1602 ~~General Course Approval~~Course Content Requirements

~~(a) Law School Courses – Courses offered by an ABA accredited law school with respect to which academic credit may be earned may be approved activities. Computation of CLE credit for such courses shall be as prescribed in Rule .1605(a) of this subchapter. No more than 12 CLE hours in any year may be earned by such courses. No credit is available for law school courses attended prior to becoming an active member of the North Carolina State Bar.~~

~~(b) Bar Review/Refresher Course – Courses designed to review or refresh recent law school graduates or attorneys in preparation for any bar exam shall not be approved for CLE credit.~~

~~(c)~~ (a) Professional Responsibility Courses on Substance Abuse, Chemical Dependency and Debilitating Mental Conditions.

. . . .

(b) Law School Courses. Courses offered by an ABA accredited law school with respect to which academic credit may be earned may be approved activities. Computation of CLE credit for such courses shall be as prescribed in Rule .1605(a) of this subchapter. No more than 12 CLE hours in any year may be earned by such courses. No credit is available for law school courses attended prior to becoming an active member of the North Carolina State Bar.

~~(d) Approval – CLE activities may be approved upon the written application of a sponsor, other than an accredited sponsor, or of an active member on an individual program basis. An application for such CLE course approval shall meet the following requirements:~~

~~(1) If advance approval is requested by a sponsor, the application and supporting documentation, including two substantially~~

~~complete sets of the written materials to be distributed at the course or program, shall be submitted at least 45 days prior to the date on which the course or program is scheduled. If advance approval is requested by an active member, the application need not include a complete set of written materials.~~

~~(2) In all other cases, the application and supporting documentation shall be submitted not later than 45 days after the date the course or program was presented or prior to the end of the calendar year in which the course or program was presented, whichever is earlier.~~

~~(3) The application shall be submitted on a form furnished by the board.~~

~~(4) The application shall contain all information requested on the form.~~

~~(5) The application shall be accompanied by a course outline or brochure that describes the content, identifies the teachers, lists the time devoted to each topic and shows each date and location at which the program will be offered.~~

~~(6) The application shall include a detailed calculation of the total CLE hours and hours of professional responsibility.~~

~~(e) Course Quality. The application and materials provided shall reflect that the program to be offered meets the requirements of Rule .1510 of this subchapter. Written materials consisting merely of an outline without citation or explanatory notations generally will not be sufficient for approval. Any sponsor, including an accredited sponsor, who expects to conduct a CLE activity for which suitable written materials will not be made available to all attendees may obtain approval for that activity only by application to the board at least 45 days in advance of the presentation showing why written materials are not suitable or readily available for such a program.~~

~~(f) Records. Sponsors, including accredited sponsors, shall within 30 days after the course is concluded~~

~~(1) furnish to the board a list in alphabetical order, on magnetic tape if available, of the names of all North Carolina attendees and their North Carolina State Bar membership numbers;~~

~~(2) remit to the board the appropriate sponsor fee;~~

~~(3) furnish to the board a complete set of all written materials distributed to attendees at the course or program.~~

~~(g) Announcement. Accredited sponsors and sponsors who have advanced approval for courses may include in their brochures or other course descriptions the information contained in the following illustration:~~

~~This course [or seminar or program] has been approved by the Board of Continuing Legal Education of the North Carolina State Bar for continuing legal education credit in the amount of ____ hours, of which ____ hours will also apply in the area of professional responsibility. This course is not sponsored by the board.~~

~~(h) Notice. Sponsors not having advanced approval shall make no representation concerning the approval of the course for CLE credit by the board. The board will mail a notice of its decision on CLE activity approval requests within 15 days of their receipt when the request for approval is submitted before the program and within 30 days when the request is submitted after the program. Approval thereof will be deemed if the notice is not timely mailed. This automatic approval will not operate if the sponsor contributes to the delay by failing to provide the complete information requested by the board or if the board timely notifies the sponsor that the matter has been tabled and the reason therefore.~~

~~(i) In-House CLE and Self-Study. No approval will be provided for in-house CLE or self-study by attorneys, except those programs exempted by the board under Rule .1501(b)(9) of this subchapterA0or as provided in Rule .1611 of this subchapter.~~

~~(j) Facilities. Sponsors must provide a facility conductive to learning with sufficient space for taking notes.~~

~~(k) Course Materials. In addition to the requirements of Rule .1602(d) and (f) above, sponsors, including accredited sponsors, and active members seeking credit for an approved activity shall furnish upon request of the board a copy of all materials presented and distributed at a CLE course or program.~~

~~(l)~~ (c) Nonlegal Educational Activities. A course or segment of a course presented by a bar organization may be granted up to three hours of credit if the bar organization's course trains volunteer attorneys in service to the profession, and if such course or course segment meets the requirements of Rule .1519(2)-(7) and Rule ~~.1602(e), (h)-(j)~~.1601(b), (c) and (g) of this subchapter; if appropriate, up to three hours of professional responsibility credit may be granted for such course or course segment. . . . .

(d) In-House CLE and Self-Study. No approval will be provided for in-house CLE or self-study by attorneys, except those pro-

grams exempted by the board under Rule .1501(b)(10) of this subchapter or as provided in Rule .1604 of this subchapter.

(e) Bar Review/Refresher Course. Courses designed to review or refresh recent law school graduates or attorneys in preparation for any bar exam shall not be approved for CLE credit.

.1604 Accreditation of Prerecorded~~, Programs and Live~~ Simultaneous Broadcast, and Computer-Based Programs ~~Broadcast to Remote Locations by Telephone, Satellite, or Video Conferencing Equipment~~

(a) Presentation Including Prerecorded Material. . . . .

(b) Simultaneous Broadcast. . . . .

(c) Accreditation Requirements. A member attending a simultaneously broadcast or prerecorded presentation is entitled to credit hours if

(1) the live presentation or the presentation from which the program is recorded would, if attended by an active member, be an accredited course; and

(2) all other conditions imposed by the rules in Section .1600 of this subchapter, or by the board in advance, are met.

~~(d) A member attending a presentation broadcast by telephone, satellite, or video conferencing equipment is entitled to credit if~~

~~(1) the live presentation of the program would, if attended by an active member, (2) there is a question and answer session with the presenter or presenters subject to the limitations set forth in Rule .1605(b)(5) of the subchapter; and(3) all other conditions imposed by the rules in Section .1600 of this subchapter, or by the board in advance, are met.~~

~~(e) To receive approval for attendance at programs described in paragraphs (a) and (b) above, the following conditions must be met:~~

~~(1) Unless the entire program was produced by an accredited sponsor, the person or organization sponsoring the program must receive advance approval and accreditation from the board. Board Form 2 may be utilized for this purpose.~~

~~(2) The person or organization sponsoring the program must have a reliable method for recording and verifying attendance. Attendance at a telephone broadcast may be verified by assign-~~

~~ing a personal identification number to a member. If attendance is recorded by a person, the person may not earn credit hours by virtue of attendance at that presentation. A copy of the record of attendance of active members must be forwarded to the board within 30 days after the presentation of the program is completed. Proof of attendance may be made by the verifying person on Board Form 5.~~

~~(3) Unless clearly inappropriate for the particular course, detailed papers, manuals, study materials, or written outlines are presented to the persons attending the program which substantially pertain to the subject matter of the program. Any materials made available to persons attending the original or live program must be made available to those persons attending the prerecorded or broadcast program who desire to receive credit under these regulations.~~

~~(4) A suitable room must be available for viewing the program and taking of notes.~~

~~(f)~~ (d) Minimum Attendance and Verification of Attendance. A minimum of ~~five~~ two active members must physically attend the presentation of a prerecorded program. This requirement does not apply to participation from a remote location in the presentation of a live broadcast by telephone, satellite, or video conferencing equipment. Attendance at a prerecorded or simultaneously broadcast (by telephone, satellite, or video conferencing) program must be verified by the execution of an affidavit of attendance by the participant.

~~(g) EXAMPLES.~~

~~EXAMPLE (1): Attorney X, an active member, attends a videotape seminar sponsored by an accredited sponsor. If a person attending the program from which the videotape is made would receive credit, Attorney X is also entitled to receive credit, if the additional conditions under this Rule .1604 are also met.~~

~~EXAMPLE (2): Attorney Y, an active member, desires to attend a videotape program. However, the proposed videotape program (a) is not presented by an accredited sponsor, and (b) has not received individual course approval from the board. Attorney Y may not receive any credit hours for attending that videotape presentation without advance approval from the board.~~

~~EXAMPLE (3): Attorney Z, an active member, attends a videotape program. The presentation of the program from which the~~

~~videotape was made has already been held and approved by the board for credit. However, no person is present at the videotape program to record attendance. Attorney Z may not obtain credit for viewing the videotape program unless it is viewed in the presence of a person who is not attending the videotape program for credit and who verifies the attendance of Attorney Z and of other attorneys at the program. All other conditions of this Rule .1604 must also be met.~~

~~EXAMPLE (4): Attorney Q, an active member, listens to a live telephone seminar using the telephone in the conference room of her law firm. To record her attendance, Attorney Q was assigned a person identification number (PIN) by the seminar sponsor. Once connected, Attorney Q punched in the PIN number on her touch tone phone and her attendance was recorded. The seminar received individual course approval from the board. Attorney Q may receive credit if the additional conditions under this Rule .1604 are also met.~~

(e) Computer-Based CLE. Effective for courses attended on or after July 1, 2001, a member may receive up to four (4) hours of credit annually for participation in a course on CD-ROM or on-line. A CD-ROM course is an educational seminar on a compact disk that is accessed through the CD-ROM drive of the user's personal computer. An on-line course is an educational seminar available on a provider's website reached via the Internet.

(1) A member may apply up to four credit hours of computer-based CLE to a CLE deficit from a preceding calendar year. Any computer-based CLE credit hours applied to a deficit from a preceding year will be included in calculating the maximum of four (4) hours of computer-based CLE allowed in the preceding calendar year. A member may carry over to the next calendar year no more than four credit hours of computer-based CLE pursuant to Rule .1518(c) of this subchapter. Any credit hours carried-over pursuant to Rule .1518(c) of this subchapter will not be included in calculating the four (4) hours of computer-based CLE allowed in any one calendar year.

(2) To be accredited, a computer-based CLE course must meet all of the conditions imposed by the rules in Section .1600 of this subchapter, or by the board in advance, except where otherwise noted, and be interactive, permitting the participant to communicate, via telephone, electronic mail, or a website bulletin board, with the presenter and/or other participants.

.1607 ~~Special Cases and Exemptions~~ Reserved

~~(a) Attorneys who have a permanent disability which makes attendance at CLE programs inordinately difficult may file a request for a permanent substitute program in lieu of attendance and shall therein set out continuing legal education plans tailored to their specific interests and physical ability. The board shall review and approve or disapprove such plans on an individual basis and without delay.~~

~~(b) Other requests for substitute compliance, partial waivers, other exemptions for hardship or extenuating circumstances may be granted by the board on a yearly basis upon written application of the attorney.~~

~~(c) Credit is earned through service as a bar examiner of the North Carolina Board of Law Examiners. The board will award 12 hours of CLE credit for the preparation and grading of a bar examination by a member of the North Carolina Board of Law Examiners.~~

.1608 ~~General Compliance Procedures~~ Reserved

~~(a) Compliance Period. The period for complying with the requirements of Rule .1518 of this subchapter is January 1 to December 31. A member may complete the requirements for the year on or by February 28 of the succeeding year provided, however, that this additional time shall be considered a grace period and no extensions of this grace period shall be granted. All members are encouraged to complete the requirements within the appropriate calendar year.~~

~~(b) Affidavit. Prior to January 31 of each year, commencing in 1990, the prescribed affidavit form shall be mailed to all active members of the North Carolina State Bar concerning compliance with the continuing legal education program for the preceding year.~~

~~(c) Late Filing Penalty. Any attorney who, for whatever reasons, files the affidavit showing compliance or declaring an exemption after the February 28 due date shall pay a $75.00 late filing penalty. This penalty shall be submitted with the affidavit. An affidavit that is either received by the board or postmarked on or before February 28 shall be considered to have been timely filed. An attorney who complies with the requirements of the rules during the probationary period under Rule .1523(c) of this subchapter shall pay a late compliance fee of $125.00 pursuant to Rule .1524 of this subchapter.~~

.1609 ~~Noncompliance Procedures~~ Reserved

~~(a) Reinstatement Fee~~

~~The uniform reinstatement fee is $250 and must accompany the reinstatement petition.~~

~~(b) Petition~~

~~The attachment to the petition for reinstatement required by Rule .1524(b) of this subchapter shall list the CLE activities according to a form provided by the board.~~

.1610 ~~Authority For Appeals~~ Reserved

~~(a) Appeals Except as otherwise provided, the board is the final authority on all matters entrusted to it under Section .1500 and Section .1600 of this subchapter. Therefore, any decision by a committee of the board pursuant to a delegation of authority may be appealed to the full board.~~

~~(b) Procedure A decision made by the staff of the board pursuant to a delegation of authority may also be reviewed by the full board but should first be appealed to any committee of the board having jurisdiction on the subject involved. All appeals shall be in writing. The board has the discretion to, but is not obligated to, grant a hearing in connection with any appeal regarding the accreditation of a program.~~

.1611 ~~Accreditation of Computer Based CLE~~ Reserved

~~(a) Effective for courses attended on or after July 1, 2001, a member may receive up to four (4) hours of credit annually for participation in a course on CD ROM or on line. A CD ROM course is an educational seminar on a compact disk that is accessed through the CD ROM drive of the user's personal computer. An on line course is an educational seminar available on a provider's website reached via the Internet.~~

~~(b) A member may apply up to four credit hours of computer based CLE to a CLE deficit from a preceding calendar year. Any computer based CLE credit hours applied to a deficit from a preceding year will be included in calculating the maximum of four (4) hours of computer based CLE allowed in the preceding calendar year. A member may carry over to the next calendar year no more than four credit hours of computer based CLE pursuant to Rule .1518(c) of this subchapter. Any credit hours carried over pursuant to Rule .1518(c) of this subchapter will not be included in calculating the four (4) hours of computer based CLE allowed in any one calendar year.~~

~~(c) To be accredited, a computer based CLE course must meet all of the conditions imposed by the rules in Section .1600 of this subchapter, or by the board in advance, except where otherwise noted, and be interactive, permitting the participant to communicate, via telephone, electronic mail, or a website bulletin board, with the presenter and/or other participants.~~

~~(d) The sponsor of an on line course must have a reliable method for recording and verifying attendance. The sponsor of a CD ROM course must demonstrate that there is a reliable method for the user or the sponsor to record and verify participation in the course. A participant may periodically log on and off of a computer based CLE course provided the total time spent participating in the course is equal to or exceeds the credit hours assigned to the program. A copy of the record of attendance must be forwarded to the board within 30 days after a member completes his or her participation in the course.~~

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 22, 2004.

Given over my hand and the Seal of the North Carolina State Bar, this the 24th day of February, 2005.

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 3rd day of March, 2005.

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 3rd day of March, 2005.

s/Newby, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 22, 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 continuing legal education program, as particularly set forth in 27 N.C.A.C. 1D, Section .1600, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1600, Rules and Regulations Governing the Administration of the Continuing Legal Education Program

.1604 **Accreditation of Prerecorded~~, Programs and Live~~ Simultaneous Broadcast, and Computer-Based Programs ~~Broadcast to Remote Locations by Telephone, Satellite, or Video Conferencing Equipment~~**

(a) Presentation Including Prerecorded Material. . . . .

(b) Simultaneous Broadcast. . . . .

(c) Accreditation Requirements. A member attending a ~~simultaneously broadcast or~~ prerecorded presentation is entitled to credit hours if

(1) the live presentation or the presentation from which the program is recorded would, if attended by an active member, be an accredited course; and

(2) all other conditions imposed by the rules in Section .1600 of this subchapter, or by the board in advance, are met.

~~(d) A member attending a presentation broadcast by telephone, satellite, or video conferencing equipment is entitled to credit if~~

~~(1) the live presentation of the program would, if attended by an active member, (2) there is a question and answer session with the presenter or presenters subject to the limitations set forth in Rule .1605(b)(5) of the subchapter; and(3) all other conditions imposed by the rules in Section .1600 of this subchapter, or by the board in advance, are met.~~

~~(e) To receive approval for attendance at programs described in paragraphs (a) and (b) above, the following conditions must be met:~~

~~(1) Unless the entire program was produced by an accredited sponsor, the person or organization sponsoring the program must receive advance approval and accreditation from the board. Board Form 2 may be utilized for this purpose.~~

~~(2) The person or organization sponsoring the program must have a reliable method for recording and verifying attendance. Attendance at a telephone broadcast may be verified by assigning a personal identification number to a member. If attendance is recorded by a person, the person may not earn credit hours by virtue of attendance at that presentation. A copy of the record of attendance of active members must be forwarded to the board within 30 days after the presentation of the program is completed. Proof of attendance may be made by the verifying person on Board Form 5.~~

~~(3) Unless clearly inappropriate for the particular course, detailed papers, manuals, study materials, or written outlines are presented to the persons attending the program which substantially pertain to the subject matter of the program. Any materials made available to persons attending the original or live program must be made available to those persons attending the prerecorded or broadcast program who desire to receive credit under these regulations.~~

~~(4) A suitable room must be available for viewing the program and taking of notes.~~

~~(f)~~ (d) Minimum Attendance and Verification of Attendance. A minimum of five active members must physically attend the presentation of a prerecorded program. This requirement does not apply to participation from a remote location in the presentation of a live broadcast by telephone, satellite, or video conferencing equipment. Attendance at a prerecorded or simultaneously broadcast (by telephone, satellite, or video conferencing) program must be verified by the execution of an affidavit of attendance by the participant.

~~(g) EXAMPLES:~~

~~EXAMPLE (1): Attorney X, an active member, attends a videotape seminar sponsored by an accredited sponsor. If a person~~

~~attending the program from which the videotape is made would receive credit, Attorney X is also entitled to receive credit, if the additional conditions under this Rule .1604 are also met.~~

~~EXAMPLE (2): Attorney Y, an active member, desires to attend a videotape program. However, the proposed videotape program (a) is not presented by an accredited sponsor, and (b) has not received individual course approval from the board. Attorney Y may not receive any credit hours for attending that videotape presentation without advance approval from the board.~~

~~EXAMPLE (3): Attorney Z, an active member, attends a videotape program. The presentation of the program from which the videotape was made has already been held and approved by the board for credit. However, no person is present at the videotape program to record attendance. Attorney Z may not obtain credit for viewing the videotape program unless it is viewed in the presence of a person who is not attending the videotape program for credit and who verifies the attendance of Attorney Z and of other attorneys at the program. All other conditions of this Rule .1604 must also be met.~~

~~EXAMPLE (4): Attorney Q, an active member, listens to a live telephone seminar using the telephone in the conference room of her law firm. To record her attendance, Attorney Q was assigned a person identification number (PIN) by the seminar sponsor. Once connected, Attorney Q punched in the PIN number on her touch-tone phone and her attendance was recorded. The seminar received individual course approval from the board. Attorney Q may receive credit if the additional conditions under this Rule .1604 are also met.~~

(e) Computer-Based CLE. Effective for courses attended on or after July 1, 2001, a member may receive up to four (4) hours of credit annually for participation in a course on CD-ROM or on-line. A CD-ROM course is an educational seminar on a compact disk that is accessed through the CD-ROM drive of the user's personal computer. An on-line course is an educational seminar available on a provider's website reached via the Internet.

(1) A member may apply up to four credit hours of computer-based CLE to a CLE deficit from a preceding calendar year. Any computer-based CLE credit hours applied to a deficit from a preceding year will be included in calculating the maximum of four (4) hours of computer-based CLE allowed in the preceding cal-

endar year. A member may carry over to the next calendar year no more than four credit hours of computer-based CLE pursuant to Rule .1518(c) of this subchapter. Any credit hours carried-over pursuant to Rule .1518(c) of this subchapter will not be included in calculating the four (4) hours of computer-based CLE allowed in any one calendar year.

(2) To be accredited, a computer-based CLE course must meet all of the conditions imposed by the rules in Section .1600 of this subchapter, or by the board in advance, except where otherwise noted, and be interactive, permitting the participant to communicate, via telephone, electronic mail, or a website bulletin board, with the presenter and/or other participants.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 22, 2004. An earlier version of these amendments was approved by the North Carolina Supreme Court on March 3, 2005. It subsequently became apparent that this version included an error with respect to Rule .1604(d). The correct version is set forth above and the Court is asked to approve it in lieu of the earlier version.

Given over my hand and the Seal of the North Carolina State Bar, this the 4th day of May, 2005.

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 17th day of May, 2005.

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 approved in lieu of the amendments of the same rules

previously approved by order dated March 3, 2005, and that they 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 17th day of May, 2005.

s/Newby, J.
For the Court

CLIENT SECURITY FUND

The Client Security Fund of the North Carolina State Bar ("the Fund"), the purpose of which is to reimburse, subject to certain limitations, clients who have suffered financial loss resulting from dishonest conduct of lawyers engaged in the private practice of law in North Carolina, was established by order of the North Carolina Supreme Court on October 10, 1984. In establishing the Fund, the Court retained the authority to enter orders necessary to accomplish the purpose of the Fund, including the authority to assess each active member of the North Carolina State Bar an amount sufficient to cover the cost of administering the Fund and the payment of reimbursable claims.

Upon the recommendation of the Client Security Fund Board of Trustees and the Officers of the North Carolina State Bar, and after consideration of the projected receipts and expenditures by the Fund for fiscal year 2006, the Court finds that an assessment of Fifty Dollars ($50) from each active lawyer for the year 2006 is necessary to accomplish the purpose of the Fund.

NOW, THEREFORE, it is ORDERED that each active member of the North Carolina State Bar be assessed the sum of Fifty Dollars ($50) for the year 2006 as a contribution to the Client Security Fund.

So ordered by the Court in conference this 3rd day of November, 2005.

s/Newby, J.
For the Court

The following rules and regulations of the North Carolina State Bar were inadvertently omitted from publication in the North Carolina Reports at the time they were approved by the North Carolina Supreme Court:

Amendment to the Revised Rules of Professional Conduct of the North Carolina State Bar

Amendments to the Rules and Regulations of the North Carolina State Bar Concerning Discipline and Disability

Amendments to the Rules and Regulations of the North Carolina State Bar Concerning Discipline & Disability

Amendments to the Rules and Regulations of the North Carolina State Bar Governing the Administration of the Continuing Legal Education Program

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AMENDMENT TO THE REVISED RULES OF PROFESSIONAL CONDUCT OF THE NORTH CAROLINA STATE BAR

The following amendment to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar was adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 17, 1998.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Revised Rules of Professional Conduct of the North Carolina State Bar, as particularly set forth in 27 NCAC 2, Rule 8.3, be amended as follows (new language in bold type):

27 NCAC 2

Rule 8.3 Reporting Professional Misconduct

. . .

(d) A lawyer who has been disciplined in any state or federal court for a violation of the Rules of Professional Conduct in effect in such state or federal court will inform the secretary of such action in writing no later than 30 days after entry of the order of discipline.

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 Revised Rules of Professional Conduct of the North Carolina State Bar was duly adopted by the Council of the North Carolina Stale Bar at a regularly called meeting on July 17, 1998.

Given over my hand and the Seal of the North Carolina State Bar, this the 17th day of November, 1998.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, Il, Secretary

After examining the foregoing amendment to the Revised Rules of Professional Conduct of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 30th day of December 1998.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr., Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendment to the Revised Rules of Professional Conduct 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.

This the 30th day of December, 1998.

s/Orr, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE & DISABILITY

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 17, 1998.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning discipline and disability, as particularly set forth in 27 NCAC 1B, Sections .0100, .0105, .0112, .0114, .0115, .0116, and .0125, be amended as follows (additions in bold type, deletions interlined):

27 NCAC 1B, Section .0100,

Discipline and Disability of Attorneys

Rule .0103 Definitions

. . .

~~(40) Serious crime~~ **(17) Criminal offense showing professional unfitness**—the commission of, attempt to commit, conspiracy to commit, solicitation or subornation of any felony or any crime that involves false swearing, misrepresentation, deceit, extortion, theft, bribery, embezzlement, false pretenses, fraud, interference with the judicial or political process, larceny, misappropriation of funds, or property, overthrow of the government, perjury, willful failure to file a tax return, or any other offense involving moral turpitude or showing professional unfitness.

[renumber succeeding sections]

. . .

(40) Revised Rules of Professional Conduct—the Rules of Professional Conduct adopted by the Council of the North Carolina State Bar and approved by the North Carolina Supreme Court effective July 24, 1997.

(41) Rules of Professional Conduct—the Rules of Professional Conduct adopted by the Council of the North Carolina State Bar and approved by the North Carolina Supreme Court and which were in effect from Oct. 7, 1985 through July 23, 1997.

[renumber succeeding sections]

. . .

Rule .0105 Chairperson of the Grievance Committee: Powers and Duties

(a) The chairperson of the Grievance Committee will have the power and duty . . . .

(16) in his or her discretion, to refer grievances primarily attributable to unsound law office management to ~~the Board of Continuing Legal Education~~ **a program of law office management training approved by the State Bar** accordance with Rule .0112(~~h~~ **I**) of this subchapter and to so notify the complainant.

. . .

Rule .0112 Investigations: Initial Determination

. . .

(I) If at any time prior to a finding of probable cause, the chairperson of the Grievance Committee, upon the recommendation of the counsel or the Grievance Committee, determines that the alleged misconduct is primarily attributable to the respondent's failure to employ sound law office management techniques and procedures, the chairperson of the Grievance Committee may, with the respondent's consent, refer the case to **a program of law office management training approved by the State Bar** ~~the Board of Continuing Legal Education~~. The respondent will then be required to complete~~, under the supervision of the board,~~ a course of training in law office management prescribed by the chairperson of the Grievance Committee which may include a comprehensive site audit of the respondent's records and procedures as well as continuing legal education seminars. Upon the respondent's successful completion of the prescribed training, the ~~board will report the~~ same **will be reported to** the chairperson of the Grievance Committee, who will order the dismissal of the grievance. If the respondent fails to cooperate with the **training program's employees** ~~board~~ or fails to complete the prescribed training, that will be reported to the chairperson of the Grievance Committee and the investigation of the original grievance shall resume.

Rule .0114 Formal Hearing

. . .

(z) Posttrial Motions

. . .

(2) New Trials and Amendment of Judgments

. . .

(B) A motion for a new trial or amendment of judgment will be served, in writing, on the chairperson of the hearing committee which heard the disciplinary case no later than 20 days after service of the final order ~~of discipline~~ upon the defendant. Supporting affidavits, if any, and a memorandum setting forth the basis of the motion together with supporting authorities, will be filed with the motion.

Rule .0115 Effect of a Finding of Guilt in any Criminal Case

(a) Any member who has been convicted of or has tendered and has had accepted a plea of guilty or no contest to a criminal offense showing professional unfitness in any state or federal court, may be suspended from the practice of law as set out in Rule .0115(d) below.

. . .

(c) Upon the receipt of a certificate of the conviction of a member of a ~~serious crime~~ **criminal offense showing professional unfitness** or a certificate of the judgment entered against an attorney where a plea of nolo contendere or no contest has been accepted by a court, the Grievance Committee, at its next meeting following notification of the conviction, will authorize the filing of a complaint if one is not pending. In the hearing on such complaint, the sole issue to be determined will be the extent of the discipline to be imposed. The attorney may be disciplined based upon the conviction without awaiting the outcome of any appeals of the conviction or judgment, unless the attorney has obtained a stay of the disciplinary action as set out in G.S. 84-24(d1). Such a stay shall not prevent the North Carolina State Bar from proceeding with a disciplinary proceeding against the attorney based upon the same underlying facts or events that were the subject of the criminal proceeding.

.0116 Reciprocal Discipline **& Disability Proceedings**

(a) All members who have been disciplined in any state or federal court **for a violation of the Rules of Professional Conduct in effect in such state or federal court or who have been transferred to disability inactive status or its equivalent by any state or federal court** ~~in any state or federal court for professional misconduct~~ will inform the secretary of such action in writing no

later than 30 days after entry of the order of discipline **or transfer to disability inactive status. Failure to make the report required in this section may subject the member to professional discipline as set out in Rule 8.3 of the Revised Rules of Professional Conduct.**

(b) Except as provided in subsection (c) below **which applies to disciplinary proceedings in certain federal courts**, reciprocal discipline **and disability proceedings** will be administered as follows:

(1) Upon receipt of a certified copy of an order demonstrating that a member has been disciplined **or transferred to disability inactive status or its equivalent** in another jurisdiction, state or federal, the Grievance Committee will forthwith issue a notice directed to the member containing a copy of the order from the other jurisdiction and an order directing that the member inform the committee within 30 days from service of the notice of any claim by the member that imposition of the identical discipline **or an order transferring the member to disability inactive status** in this state would be unwarranted and the reasons therefor. This notice is to be served on the member in accordance with the provisions of Rule 4 of the North Carolina Rules of Civil Procedure.

(2) **If** ~~In the event~~ the discipline **or transfer order** imposed in the other jurisdiction has been stayed, any reciprocal discipline **or transfer to disability inactive status** imposed in this state will be deferred until such stay expires.

(3) Upon the expiration of 30 days from service of the notice issued pursuant to the provisions of Rule .0116(b)(1) above, the chairperson of the Grievance Committee will impose the identical discipline **or enter an order transferring the member to disability inactive status** unless the Grievance Committee concludes

(A) that the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; **or**

(B) there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Grievance Committee could not, consistent with its duty, accept as final the conclusion on that subject; or

(C) that the imposition of the same discipline would result in grave injustice; or

(D) that the misconduct established warrants substantially different discipline in this state.**; or**

(E) that the reason for the original transfer to disability inactive status no longer exists.

(4) Where the Grievance Committee determines that any of the elements listed in Rule .0116(b)(3) above exist, the committee will dismiss the case or direct that a complaint be filed.

(5) **If** ~~In the event~~ the elements listed in Rule .0116(b)(3) above are found not to exist, a final adjudication in another jurisdiction that an attorney has been guilty of misconduct **or should be transferred to disability inactive status** will establish the misconduct **or disability** for purposes of reciprocal discipline **or disability proceedings in this state**.

. . .

.0125 Reinstatement

. . .

(b) After suspension

. . .

(3) Any suspended attorney seeking reinstatement must file a verified petition with the secretary, a copy of which the secretary will transmit to the counsel. ~~The petitioner must have satisfied the following requirements to be eligible for reinstatement, and will set forth facts demonstrating the following in the petition:~~ **The petitioner will have the burden of proving the following by clear, cogent and convincing evidence:**

. . .

(d) The hearing committee may impose reasonable conditions on a lawyer's reinstatement from disbarment, suspension or disability inactive status in any case in which the hearing committee concludes that such conditions are necessary for the protection of the public.

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 were duly adopted by the Council of the North Carolina Stale Bar at a regularly called meeting on July 17, 1998.

Given over my hand and the Seal of the North Carolina State Bar, this the 17th day of November, 1998.

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 are not inconsistent with Article 4, Chapter 84, of the General Statutes.

This the 30th day of December 1998.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, 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 they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 30th day of December, 1998.

s/Orr, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING DISCIPLINE & DISABILITY

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 16, 1998.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning discipline and disability, as particularly set forth in 27 NCAC 1B, Sections .0111, .0112, .0114, and .0125, be amended as follows (additions in bold type, deletions interlined):

27 NCAC 1B, Section .0100,

Discipline and Disability of Attorneys

Rule .0111 Grievances: Form and Filing

(a) A grievance may be filed by any person against a member of the North Carolina State Bar. Such grievance may be written or oral, verified or unverified, and may be made initially to the counsel. The counsel may require that a grievance be reduced to writing in affidavit form and may prepare and distribute standard forms for this purpose. ~~Such standard forms will be available from the counsel, secretary and the offices of the clerks of court of this state. Grievance reduced to writing on such standard forms will be transmitted by the complainant to the secretary.~~

. . .

(e) Grievances must be instituted by the filing of a written or oral grievance with the North Carolina State Bar Grievance Committee or a district bar Grievance Committee within six years from the accrual of the offense, provided that grievances alleging fraud by a lawyer or an offense the discovery of which was prevented by concealment by the accused lawyer shall not be barred until six years from the accrual of the offense or one year after discovery of the offense by the aggrieved party or by the North Carolina State Bar counsel, whichever is later. **Notwithstanding the foregoing, grievances which allege felonious criminal misconduct may be filed with the Grievance Committee at any time.**

Rule .0112 Investigations: Initial Determination

. . .

(g) As soon as practicable after the receipt of the final report of counsel or the termination of an investigation, the chairperson will convene the Grievance Committee to consider the grievance. **except as otherwise provided in these rules.**

. . .

~~(j) No reference of a case pursuant to the procedure set forth in Rule .0112(I) above can be made unless the respondent expressly waives any right that he or she might otherwise have to confidential communications with persons acting under the supervision of the Board of Continuing Legal Education in regard to the prescribed course of training.~~

Rule .0114 Formal Hearing

. . .

(b) Service of complaints **and summonses** and other documents or papers will be accomplished as set forth in ~~Rule 4~~ of the North Carolina Rules of Civil Procedure.

. . .

(y) All reports and orders of the hearing committee will be signed by the members of the committee, or by the chairperson of the committee on behalf of the committee, and will be filed with the secretary. The copy to the defendant will be served ~~by certified mail, return receipt requested. If the defendant's copy is returned as unclaimed or undeliverable, then service will be as provided in Rule 4 of the North Carolina Rules of Civil Procedure.~~ **by certified mail, return receipt requested or personal service. A defendant who cannot, with due diligence, be served by certified mail or personal service shall be deemed served by the mailing of a copy of the order to the defendant's last known address on file with the N.C. State Bar. Service by mail shall be deemed complete upon deposit of the report or order enclosed in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.**

Rule .0125 Reinstatement

. . .

(e) After entry of a reciprocal order of suspension or disbarment:

No member whose license to practice law has been suspended or who has been disbarred by any state or federal

court and who is the subject of a reciprocal discipline order in North Carolina may seek reinstatement of his or her North Carolina law license until the member provides to the Secretary a certified copy of an order reinstating the member to the active practice of law in the state or federal court which entered the original order of discipline.

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 Stale Bar at a regularly called meeting on October 16, 1998.

Given over my hand and the Seal of the North Carolina State Bar, this the 17th day of November, 1998.

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 30th day of December 1998.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, 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.

This the 30th day of December, 1998.

s/Orr, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

The following amendments to the Rules, Regulations, and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 16, 1998.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar Governing the Administration of the Continuing Legal Education Program, as particularly set forth in 27 NCAC 1 D, Sections .1501, .1513, .1518, .1519, and .1606, be amended as follows (additions in bold type, deletions interlined):

27 NCAC 1D, Sections .1500, .1600

Rule .1501 Purpose and Definitions

(a) Purpose

. . .

(b) Definitions

. . .

(15) "Professionalism" courses are courses or segments of courses devoted to the identification and examination of, and the encouragement of adherence to, non-mandatory aspirational standards of professional conduct which transcend the requirements of the Revised Rules of Professional Conduct. Such courses address principles of competence and dedication to the service of clients, civility, improvement of the justice system, advancement of the rule of law, and service to the community.

~~(15)~~**(16)** . . .

~~(16)~~**(17)** . . .

~~(17)~~**(18)** . . .

Rule .1513 Fiscal Responsibility

All funds of the board shall be considered funds of the North Carolina State Bar and shall be administered and disbursed accordingly.

. . .

(d) All revenues resulting from the CLE program, including fees received from attendees and sponsors, late filing penalties, late compliance fees, reinstatement fees, and interest on a reserve fund shall be applied first to the expense of the CLE program including an adequate reserve fund~~.~~; **provided, however, that a portion of each sponsor or attendee fee, in an amount to be determined by the council but not to exceed $1.00 for each credit hour, shall be paid to the Chief Justice's Commission on Professionalism for administration of the activities of the commission.** Excess funds may be expended by the council on lawyer competency programs approved by the council.

Rule .1518 Continuing Legal Education Program (Effective January 1, 1999)

(a) Each active member subject to these rules shall complete 12 hours of approved continuing legal education during each calendar year beginning January 1, 1988, as provided by these rules and the regulations adopted thereunder.

(b) Of the 12 hours

(1) at least 2 hours shall be devoted to the areas of professional responsibility **or professionalism or any combination thereof**; and

(2) at least once every three calendar years, each member shall be required to attend a specially designed three-hour block course of instruction devoted exclusively to the areas of professional responsibility **or professionalism or any combination thereof** which will satisfy the requirement of Rule .1518(b)(1).

(c) During each of the first three years of admission, newly admitted active members shall be required to take a minimum of 9 of the 12 hours of continuing legal education in practical skills courses. The board may provide by regulation for exempting newly admitted members with prior experience as practicing lawyers from the requirements of this paragraph.

(d) Members may carry over up to 12 credit hours earned in one calendar year to the next calendar year, which may include those hours required by Rule .1518(b)(1) above, but may not include those hours required by Rule .1518(b)(2) above. Additionally, a newly admitted active member may include as credit hours which may be carried over to the next succeeding year, any approved CLE hours earned after that member's graduation from law school.

Rule .1519 Accreditation Standards

The board shall approve continuing legal education activities which meet the following standards and provisions.

. . .

(2) They shall constitute an organized program of learning dealing with matters directly related to the practice of law, professional responsibility, **professionalism,** or ethical obligations of lawyers.

. . .

Rule .1606 Fees

(a) Sponsor Fee . . . The amount of the fee, **per approved CLE hour per active member of the North Carolina State Bar in attendance,** is ~~set at~~ **$1.25 plus such additional amount as determined by the council as necessary to support the Chief Justice's Commission on Professionalism but not to exceed $1.00** ~~per approved CLE hour per active member of the North Carolina State Bar in attendance~~. The fee is computed as shown in the following formula and example which assumes a 6-hour course attended by 100 North Carolina lawyers seeking CLE credit **and further assumes that the fee-per-hour is $2.25 which includes an assessment of $1.00 for the Chief Justice's Commission on Professionalism**:

Fee: ~~$1.25~~ **$2.25** x Total Approved CLE Hours (6) x number of NC Attendees (100) = Total Sponsor Fee ~~($750)~~ **($1350)**

(b) Attendee Fee—The attendee fee is paid by the North Carolina attorney who requests credit for a program for which no sponsor fee was paid. An attorney should remit the fees along with his or her affidavit before February 28 following the calendar year for which the report is being submitted. The amount of the fee, **per approved CLE hour for which the attorney claims credit,** is set at $1.25 ~~per approved CLE hour for which the attorney claims credit~~ **plus such additional amount as determined by the council as necessary**

to support the Chief Justice's Commission on Professionalism but not to exceed $1.00. It is computed as shown in the following formula and example which assumes that the attorney attended an activity approved for 3 hours of CLE credit **and that the fee-per-hour is $2.25 which includes an assessment of $1.00 for the Chief Justice's Commission on Professionalism:**

Fee: ~~$1.25~~ **$2.25** x Total Approved CLE hours (3.0) = Total Attendee Fee **($6.75)**

(c) Fee Review—The board will review the level of the fee at least annually and adjust it as necessary to maintain adequate finances for prudent operation of the board in a nonprofit manner. The fee of **$1.25** charged to sponsors and attendees will be increased only to the extent necessary for those fees to pay the costs of administration of the CLE program. **The council shall annually review the assessment for the Chief Justice's Commission on Professionalism and adjust it as necessary to maintain adequate finances for the operation of the commission.**

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 Governing the Administration of the Continuing Legal Education Program of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 16, 1998.

Given over my hand and the Seal of the North Carolina State Bar, this the 17th day of November, 1998.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations Governing the Administration of the Continuing Legal Education Program 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 30th day of December 1998.

s/Burley B. Mitchell, Jr.
Burley B. Mitchell, Jr., Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations Governing the Administration of the Continuing Legal Education Program of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 30th day of December, 1998.

s/Orr, J.
For the Court

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WORD AND PHRASE INDEX

HEADNOTE INDEX

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Effective assistance of counsel—trial strategy—Defendant did not receive ineffective assistance of counsel in a multiple murder prosecution based on defense counsel's admission during opening arguments of a murder for which defendant was not on trial before the trial court had the chance to rule on defendant's motion to suppress that crime, his concession that defendant was involved in a conspiracy to commit armed robbery, his acknowledgment of an aggravating circumstance by admitting the murder was brutal, and his allegedly undermining the trial strategy now claimed by defendant that defendant lacked the capability to make rational choices about his actions on the night in question. **State v. Roache, 243.**

Indigent defendants—court-appointed counsel—appointment fee-constitutionality—The appointment fee required by N.C.G.S. § 7A-455.1 in order for an indigent defendant to obtain court-appointed counsel regardless of the outcome of the criminal proceeding is a cost of prosecution that violates the language of Art. I, § 23 of the N.C. Constitution prohibiting the assessment of costs against acquitted defendants. However, the unconstitutional portions of the statute requiring payment of the fee "at the time of appointment" and "regardless of the outcome of the proceedings" and granting a credit to any defendant who pays the fee prior to the final determination of the action may be servered so that the rest of the statute remains enforceable and constitutionally permits the State to continue collecting the fee from indigent defendants after they have been convicted or pled guilty or nolo contendere. **State v. Webb, 92.**

North Carolina—statutory limitation on punitive damages—due process—equal protection—The limitation on punitive damages under N.C.G.S. § 1D-25 does not violate due process and equal protection principles under Article I, Section 19 of the North Carolina Constitution. **Rhyne v. K-Mart Corp., 160.**

North Carolina—statutory limitation on punitive damages—Open Courts Clause—The limitation on punitive damages under N.C.G.S. § 1D-25 does not violate the Open Courts Clause of our state Constitution under Article I, Section 18. **Rhyne v. K-Mart Corp., 160.**

North Carolina—statutory limitation on punitive damages—right to a trial by jury—N.C.G.S. § 1D-25, which places a limitation on the award of punitive damages, is not violative of plaintiffs' right to a trial by jury as guaranteed by the North Carolina Constitution. **Rhyne v. K-Mart Corp., 160.**

North Carolina—statutory limitation on punitive damages—separation of powers—N.C.G.S. § 1D-25, which places a limitation on the award of punitive

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Judicial—distinguished from collateral estoppel—Judicial estoppel and collateral estoppel are closely related, but differ in that judicial estoppel protects the integrity of the judicial process rather than the parties. Judicial estoppel does not require that an issue have been litigated in the prior proceeding and does not require mutuality of the parties. **Whitacre P'ship v. Biosignia, Inc., 1.**

Judicial—distinguished from election of remedies—Judicial estoppel and election of remedies overlap, but not perfectly. Judicial estoppel exists to protect the integrity of the judicial process rather than the redress of a single wrong, and it is based upon an inconsistency of position rather than a selection of means of enforcing a right. **Whitacre P'ship v. Biosignia, Inc., 1.**

Judicial—distinguished from equitable estoppel—Judicial estoppel and equitable estoppel may be distinguished in that judicial estoppel does not require mutuality of parties, does not require detrimental reliance, and protects the integrity of judicial proceedings rather than fairness between parties. **Whitacre P'ship v. Biosignia, Inc., 1.**

Judicial—distinguished from quasi-estoppel—Judicial estoppel, unlike quasi-estoppel, does not require mutuality of parties. Neither requires detrimental reliance. **Whitacre P'ship v. Biosignia, Inc., 1.**

Judicial—factors—flexible—The doctrine of judicial estoppel is applied in North Carolina with a weighing of discretionary factors rather than a rote application of inflexible prerequisites. The only essential factor is that the party's subsequent position must be clearly inconsistent with its earlier position. Courts also look at whether the earlier court accepted the earlier position and whether the party asserting the inconsistent position would derive an unfair advantage. It may be appropriate to resist application of judicial estoppel when the prior position was based on inadvertence or mistake. **Whitacre P'ship v. Biosignia, Inc., 1.**

Judicial—inconsistent legal theories—no application—Judicial estoppel is limited to inconsistent factual assertions and should not be applied to prevent the assertion of inconsistent legal theories. **Whitacre P'ship v. Biosignia, Inc., 1.**

Judicial—intent to deceive—not required—permitted as a factor—A court applying judicial estoppel is not required to specifically determine that the party to be estopped intended to mislead the court. While intent to deceive would weigh heavily in favor of invoking the doctrine, courts should carefully balance the equities and it is possible that a reasonable justification for a change in position may militate against its application. **Whitacre P'ship v. Biosignia, Inc., 1.**

Judicial—privity of parties—not required—A rigid judicial estoppel rule requiring the party to be estopped to be identical with the party in the earlier proceeding would necessarily diminish the protective function of the doctrine of judicial estoppel. So long as the party to be judicially estopped is a privy of the party who made the prior inconsistent statement before a tribunal, due process is not offended. **Whitacre P'ship v. Biosignia, Inc., 1.**

Judicial—privity of partners and partnership—not determined—Whether general partners were in privity with the partnership for judicial estoppel purposes was for the trial court to determine on remand where the Supreme Court could not discern whether the trial court had made the privity determination. **Whitacre P'ship v. Biosignia, Inc., 1.**

EVIDENCE—Continued

chiatry to testify about an on-call physician's observations of defendant's mental state on the night of the murders, or about his own observations of defendant's mental state when he was admitted to Dorothea Dix Hospital. An expert may testify about the information he relied upon in forming his opinion so long as that information is of a type reasonably relied upon by experts in the field. **State v. Jones, 330.**

Expert scientific testimony—Daubert approach rejected—The Court of Appeals erred in a products liability case by affirming the trial court's grant of summary judgment in favor of defendant on the issue of causation based on its conclusion that plaintiff's expert scientific testimony was excluded by the federal Daubert standard. **Howerton v. Arai Helmet, Ltd., 440.**

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Hearsay—tape of defendant arguing with victims—offered to show malice—An audiotape of a first-degree murder defendant arguing with his victims was not inadmissible hearsay because it was offered to show malice rather than that the truth of the statements. **State v. Jones, 330.**

Hearsay—unavailable witness—testimony given under oath—The trial court erred in a first-degree rape case by refusing to allow defendant to introduce the victim's voir dire testimony in which the victim blamed her fragile emotional state on the harassment leveled at her by the district attorney rather than her alleged rape by defendant. **State v. Finney, 79.**

Murder for which defendant was not on trial—instructions—intent—The trial court did not commit plain error in a multiple murder prosecution by its instruction to the jury regarding evidence of a murder for which defendant was not on trial that allegedly allowed the jury to consider the evidence too broadly, and defendant did not receive ineffective assistance of counsel based on a failure to object to this instruction, because the instruction was consistent with Rule 404(b) which allows the State to introduce evidence of other crimes to show motive, intent, preparation or a plan. **State v. Roache, 243.**

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HOMICIDE

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Felony murder—attempted rape—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of felony murder based on attempted rape. **State v. Garcia, 382.**

Felony murder—diminished capacity—instructions—The trial court did not err in a multiple murder prosecution by failing to give an instruction on diminished capacity when instructing the jury on felony murder for the murder of one of the victims and by failing to refer to diminished capacity based on mental illness for the mandate given with reference to the felony murder of that victim. **State v. Roache, 243.**

Felony murder—instructions—intent—The trial court did not err in a multiple murder prosecution by its instruction to the jury on intent with respect to the murder of one of the victims because the instruction meant that whether the felonies were committed by defendant or by his coparticipant, if defendant had the intent to commit any one of the felonies, he would be guilty of first-degree murder. **State v. Roache, 243.**

Felony murder—instructions—unanimous jury—The trial court did not err in a multiple murder prosecution by failing to instruct the jury on felony murder that the jury had to be unanimous in determining whether defendant was guilty of felony murder based on defendant's commission of an underlying felony or based on acting in concert with his coparticipant in committing an underlying felony, and defendant did not receive ineffective assistance of counsel based on a failure to object to this instruction. **State v. Roache, 243.**

First-degree murder—pretrial conference required—The prosecutor violated Rule 24 of the North Carolina General Rules of Practice for Superior and District Courts by failing to hold a special pretrial conference in a capital first-degree murder case. **State v. Matthews, 102.**

First-degree murder—short-form indictment—bill of particulars—notice—The trial court did not err by denying defendant's motion to dismiss the charge of first-degree murder under the felony murder rule with attempted rape as the underlying felony, or in the alternative, by denying his motion for a bill of particulars even though defendant contended that the short-form indictment lacked adequate notice of the specific underlying felony. **State v. Garcia, 382.**

First-degree murder—short-form indictment—constitutionality—The short-form indictment used to charge defendant with first-degree murder was sufficient. **State v. Maske, 40; State v. Roache, 243.**

SENTENCING—Continued

cruel aggravating circumstance did not completely overlap the course of conduct aggravating circumstance. Ample evidence existed to support each circumstance. **State v. Jones, 330.**

Aggravating circumstances—especially heinous, atrocious, or cruel—family killing—The trial court did not err by submitting the especially heinous, atrocious, or cruel circumstance in a capital sentencing proceeding for the murder of defendant's stepson where defendant killed his wife and then his stepson. This circumstance is proper when a parental relationship exists between the victim and the accused; moreover, defendant's stepson was in close proximity to the horrific murder of his mother, being sprayed with her blood after a shotgun blast, and he was aware of but helpless to prevent his own impending death. **State v. Jones, 330.**

Aggravating circumstances—murder committed during commission of kidnapping—murder committed for pecuniary gain—murder part of course of conduct—The trial court did not commit plain error in a capital sentencing proceeding by submitting as separate aggravating circumstances under N.C.G.S. § 15A-2000(e)(5) that the murders were committed while defendant was engaged in the commission of kidnapping, under N.C.G.S. § 15A-2000(e)(6) that the murders were committed for pecuniary gain, and under N.C.G.S. § 15A-2000(e)(11) that the murders were part of a course of conduct. **State v. Tirado, 551.**

Aggravating circumstances—murder especially heinous, atrocious, or cruel—The trial court did not err in a capital sentencing proceeding by submitting to the jury under the pattern jury instructions the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murders were especially heinous, atrocious, or cruel. **State v. Tirado, 551.**

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Death penalty—proportionate—A death sentence was proportionate for a defendant who murdered his wife and stepson with a shotgun in their home. **State v. Jones, 330.**

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Death penalty—proportionate—The trial court did not err by sentencing defendant to the death penalty for two first-degree murders. **State v. Tirado, 551.**

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Mitigating circumstances—peremptory instruction—mental or emotional disturbance—impaired capacity—The trial court did not commit plain error in a multiple murder sentencing proceeding by failing to give peremptory instructions on the N.C.G.S. § 15A-2000(f)(2) mitigating circumstance that the murders were committed while defendant was under the influence of a mental or emotional disturbance and the N.C.G.S. § 15A-2000(f)(6) mitigating circumstance that defendant's capacity to appreciate the criminality of his conduct was impaired, and defense counsel did not provide ineffective assistance by failing to request such instructions. **State v. Roache, 243.**

Mitigating circumstances—remorse—Although the trial court erred during a first-degree murder capital sentencing proceeding by excluding evidence of defendant's remorse, the error was harmless beyond a reasonable doubt. **State v. Garcia, 382.**

Nonstatutory mitigating circumstances—peremptory instructions—The trial court did not err in a multiple murder sentencing proceeding by refusing to give peremptory instructions for two of the forty-four nonstatutory mitigating

SENTENCING—Continued

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workers' compensation case by concluding that defendant employer met its burden of providing competent evidence that plaintiff employee's failure to perform her UPC labeling duties was not related to her prior compensable injury under workers' compensation, which thereby led to her termination for misconduct and denial of additional workers' compensation benefits based on an alleged failure to accept a suitable position reasonably offered by her employer. **McRae v. Toastmaster, Inc., 488.**

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Disability—burden of proof—findings—The Industrial Commission erred by holding that a workers' compensation plaintiff was entitled to a presumption of disability where defendants failed to accept or deny the claim within the statutory time period after filing a Form 63. This improperly shifted to defendants the burden of producing evidence that suitable jobs were available. Additionally, the Commission was obligated to make specific findings about the existence and extent of any disability suffered by plaintiff. **Johnson v. Southern Tire Sales & Serv., 701.**

Seagraves test—injured employee's right to continuing benefits—termination for misconduct—Our Supreme Court adopts the test in *Seagraves*, 123 N.C. App. 228 (2003), for determining an injured employee's right to continuing workers' compensation benefits after being terminated for misconduct. **McRae v. Toastmaster, Inc., 488.**

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