NORTH CAROLINA REPORTS

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SUPREME COURT OF NORTH CAROLINA

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THE SUPREME COURT
OF
NORTH CAROLINA

Chief Justice
SARAH PARKER

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ROBERT H. EDMUNDS, JR.
EDWARD THOMAS BRADY
PAUL MARTIN NEWBY
PATRICIA TIMMONS-GOODSON
ROBIN E. HUDSON[1]

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JAMES G. EXUM, JR.
BURLEY B. MITCHELL, JR.
HENRY E. FRYE
I. BEVERLY LAKE, JR.

Former Justices

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ROBERT R. BROWNING
J. PHIL CARLTON
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KIMBERLY WOODELL SIEREDZKI

1. Elected and sworn in 1 January 2007 to replace George L. Wainwright, Jr., who retired 31 December 2006.

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.	Greenville
4A	Russell J. Lanier, Jr.	Kenansville
4B	Charles H. Henry	Jacksonville
5	W. Allen Cobb, Jr.	Wilmington
	Jay D. Hockenbury	Wilmington
	Phyllis M. Gorham	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
	Abraham P. Jones	Raleigh
	Howard E. Manning, Jr.	Raleigh
	Michael R. Morgan	Raleigh
	Paul C. Gessner	Raleigh
	Paul C. Ridgeway	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	Carl Fox	Chapel Hill
	R. Allen Baddour	Chapel Hill

DISTRICT	JUDGES	ADDRESS
	Fourth Division	
11A	Franklin F. Lanier	Buies Creek
11B	Thomas H. Lock	Smithfield
12	E. Lynn Johnson	Fayetteville
	Gregory A. Weeks	Fayetteville
	Jack A. Thompson	Fayetteville
	James F. Ammons, Jr.	Fayetteville
13	Ola M. Lewis	Southport
	Douglas B. Sasser[1]	Whiteville
16A	Richard T. Brown	Laurinburg
16B	Robert F. Floyd, Jr.	Lumberton
	Gary L. Locklear	Pembroke
	Fifth Division	
17A	Edwin Graves Wilson, Jr.	Eden
	Richard W. Stone	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	Greensboro
19B	Vance Bradford Long	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	Edgar B. Gregory	North Wilkesboro
	Sixth Division	
19A	W. Erwin Spainhour	Concord
19C	John L. Holshouser, Jr.	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	Morganton
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
29A	Laura J. Bridges	Marion
29B	Mark E. Powell	Rutherfordton
30A	James U. Downs	Franklin
30B	Janet Marlene Hyatt	Waynesville

SPECIAL JUDGES

Karl Adkins	Charlotte
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Steve A. Balog[3]	Burlington
Albert Diaz	Charlotte
Richard L. Doughton	Sparta
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Jack W. Jenkins	Morehead City
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Calvin E. Murphy[5]	Charlotte
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Larry G. Ford	Salisbury
Ernest B. Fullwood	Wilmington
Howard R. Greeson, Jr.	High Point

DISTRICT	JUDGES	ADDRESS
	ZORO J. GUICE, JR.	Rutherfordton
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	CLARENCE E. HORTON, JR.	Kannapolis
	DONALD M. JACOBS	Raleigh
	JOSEPH R. JOHN, SR.	Raleigh
	CHARLES C. LAMM, JR.	Boone
	JAMES E. LANNING	Charlotte
	JOHN B. LEWIS, JR.	Farmville
	JERRY CASH MARTIN	King
	JAMES E. RAGAN III	Oriental
	DONALD L. SMITH	Raleigh
	GEORGE L. WAINWRIGHT	Morehead City

RETIRED/RECALLED JUDGES

GILES R. CLARK	Elizabethtown
JAMES C. DAVIS	Concord
MARVIN K. GRAY	Charlotte
KNOX V. JENKINS	Smithfield
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 29 October 2007 to replace William C. Gore, Jr., who retired 31 July 2007.
2. Appointed and sworn in 23 April 2007. Appointed to the Court of Appeals by Governor Michael F. Easley and sworn in 7 September 2007.
3. Retired 31 December 2007.
4. Sworn in 7 September 2007 after having served as interim District Attorney in District 14.
5. Appointed and sworn in 31 October 2007 to replace John S. Arrowood who was appointed to the Court of Appeals.
6. Appointed and sworn in 2 January 2008.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	C. Christopher Bean (Chief)	Edenton
	J. Carlton Cole	Hertford
	Edgar L. Barnes	Manteo
	Amber Davis	Wanchese
	Eula E. Reid	Elizabeth City
2	Samuel G. Grimes (Chief)	Washington
	Michael A. Paul	Washington
	Regina Rogers Parker	Williamston
	Christopher B. McLendon	Williamston
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	Morehead City
	Karen A. Alexander	New Bern
	Peter Mack, Jr.	New Bern
	L. Walter Mills	New Bern
4	Leonard W. Thagard (Chief)	Clinton
	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
	James L. Moore, Jr.	Jacksonville
5	J. H. Corpening II (Chief)[1]	Wilmington
	John J. Carroll III	Wilmington
	Shelly S. Holt[2]	Wilmington
	Rebecca W. Blackmore	Wilmington
	James H. Faison III	Wilmington
	Sandra Criner	Wilmington
	Richard Russell Davis	Wilmington
	Melinda Haynie Crouch[3]	Wilmington
6A	Harold Paul McCoy, Jr. (Chief)	Halifax
	W. Turner Stephenson III	Halifax
	Brenda G. Branch	Halifax
6B	Alfred W. Kwasikpui (Chief)	Jackson
	Thomas R. J. Newbern	Aulander
	William Robert Lewis II	Winton
7	William Charles Farris (Chief)	Wilson
	Joseph John Harper, Jr.	Tarboro
	John M. Britt	Tarboro
	Pell C. Cooper	Tarboro
	Robert A. Evans	Rocky Mount
	William G. Stewart	Wilson
	John J. Covolo	Rocky Mount

DISTRICT	JUDGES	ADDRESS
8	Joseph E. Setzer, Jr. (Chief)	Goldsboro
	David B. Brantley	Goldsboro
	Lonnie W. Carraway	Goldsboro
	R. Leslie Turner	Kinston
	Timothy I. Finan	Goldsboro
	Elizabeth A. Heath	Kinston
9	Charles W. Wilkinson, Jr. (Chief)	Oxford
	H. Weldon Lloyd, Jr.[4]	Henderson
	Daniel Frederick Finch	Oxford
	J. Henry Banks	Henderson
	John W. Davis	Louisburg
	Randolph Baskerville	Warrenton
	S. Quon Bridges[5]	Oxford
9A	Mark E. Galloway (Chief)	Roxboro
	L. Michael Gentry	Pelham
10	Robert Blackwell Rader (Chief)[6]	Raleigh
	James R. Fullwood	Raleigh
	Anne B. Salisbury	Raleigh
	Kristin H. Ruth	Raleigh
	Craig Croom	Raleigh
	Jennifer M. Green	Raleigh
	Monica M. Bousman	Raleigh
	Jane Powell Gray	Raleigh
	Shelly H. Desvouges	Raleigh
	Jennifer Jane Knox	Raleigh
	Debra Ann Smith Sasser	Raleigh
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	Christine M. Walczyk	Raleigh
	Eric Craig Chasse	Raleigh
	Ned Wilson Mangum[7]	Raleigh
11	Albert A. Corbett, Jr. (Chief)	Smithfield
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	Jimmy L. Love, Jr.	Sanford
	Addie M. Harris-Rawls	Clayton
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	Resson O. Faircloth II	Lillington
	Robert W. Bryant, Jr.	Lillington
	R. Dale Stubbs	Lillington
	O. Henry Willis, Jr.	Smithfield
	Charles Patrick Bullock[8]	Lillington
12	A. Elizabeth Keever (Chief)	Fayetteville
	Robert J. Stiehl III	Fayetteville
	Edward A. Pone	Fayetteville
	Kimbrell Kelly Tucker	Fayetteville
	John W. Dickson	Fayetteville
	Cheri Beasley	Fayetteville
	Talmage Baggett	Fayetteville
	George J. Franks	Fayetteville
	David H. Hasty	Fayetteville
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DISTRICT	JUDGES	ADDRESS
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	Nancy C. Phillips	Elizabethtown
	Marion R. Warren	Exum
	William F. Fairley[9]	Whiteville
14	Elaine M. Bushfan (Chief)	Durham
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	Ann E. McKown	Durham
	Marcia H. Morey	Durham
	James T. Hill	Durham
	Nancy E. Gordon	Durham
	William Andrew Marsh III	Durham
15A	James K. Roberson (Chief)	Graham
	Bradley Reid Allen, Sr.	Graham
	G. Wayne Abernathy	Graham
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15B	Joseph M. Buckner (Chief)	Hillsborough
	Alonzo Brown Coleman, Jr.	Hillsborough
	Charles T. L. Anderson	Hillsborough
	M. Patricia DeVine	Hillsborough
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16A	William G. McIlwain (Chief)	Wagram
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	John B. Carter, Jr.	Lumberton
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17A	Fredrick B. Wilkins, Jr. (Chief)	Wentworth
	Stanley L. Allen	Wentworth
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17B	Charles Mitchell Neaves, Jr. (Chief)	Elkin
	Spencer Gray Key, Jr.	Elkin
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18	Joseph E. Turner (Chief)	Greensboro
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	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
	Polly D. Sizemore	Greensboro
19A	William G. Hamby, Jr. (Chief)	Concord
	Donna G. Hedgepeth Johnson	Concord

DISTRICT	JUDGES	ADDRESS
	Martin B. McGee	Concord
	Michael Knox	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.	Asheboro
	Donald W. Creed, Jr.	Asheboro
19C	Charles E. Brown (Chief)	Salisbury
	Beth Spencer Dixon	Salisbury
	William C. Kluttz, Jr.	Salisbury
	Kevin G. Eddinger	Salisbury
	Roy Marshall Bickett, Jr.	Salisbury
20A	Tanya T. Wallace (Chief)	Albemarle
	Kevin M. Bridges	Albemarle
	Lisa D. Thacker	Wadesboro
	Scott T. Brewer	Monroe
20B	Christopher W. Bragg (Chief)	Monroe
	Joseph J. Williams	Monroe
	Hunt Gwyn	Monroe
	William F. Helms	Monroe
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
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	L. Dale Graham	Taylorsville
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	Theodore S. Royster, Jr.	Lexington
	April C. Wood	Statesville
	Mary F. Covington	Mocksville
	H. Thomas Church	Statesville
	Carlton Terry	Lexington
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	David V. Byrd	Wilkesboro
	Jeanie Reavis Houston	Wilkesboro
	Michael D. Duncan	Wilkesboro
24	Alexander Lyerly (Chief)	Banner Elk
	William A. Leavell III	Bakersville
	Kyle D. Austin	Pineola
	R. Gregory Horne	Newland
25	Robert M. Brady (Chief)	Lenoir
	Gregory R. Hayes	Hickory
	L. Suzanne Owsley	Hickory

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	John R. Mull	Morganton
	Amy R. Sigmon	Newton
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26	Fritz Y. Mercer, Jr. (Chief)	Charlotte
	H. William Constangy	Charlotte
	Phillip F. Howerton, Jr.[11]	Charlotte
	Rickye McKoy-Mitchell	Charlotte
	Lisa C. Bell	Charlotte
	Louis A. Trosch, Jr.	Charlotte
	Regan A. Miller	Charlotte
	Nancy Black Norelli	Charlotte
	Hugh B. Lewis	Charlotte
	Nathaniel P. Proctor[12]	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	Charlotte
	Timothy M. Smith	Charlotte
	Ronald C. Chapman	Charlotte
27A	Ralph C. Gingles, Jr. (Chief)	Gastonia
	Angela G. Hoyle	Gastonia
	John K. Greenlee	Gastonia
	James A. Jackson	Gastonia
	Thomas Gregory Taylor	Belmont
	Michael K. Lands	Gastonia
	Richard Abernethy	Gastonia
27B	Larry James Wilson (Chief)	Shelby
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	K. Dean Black	Denver
	Ali B. Paksoy, Jr.	Shelby
	Meredith A. Shuford	Shelby
28	Gary S. Cash (Chief)	Asheville
	Shirley H. Brown	Asheville
	Rebecca B. Knight	Asheville
	Marvin P. Pope, Jr.	Asheville
	Patricia Kaufmann Young	Asheville
	Sharon Tracey Barrett	Asheville
	J. Calvin Hill	Asheville
29A	C. Randy Pool (Chief)	Marion
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	Laura Anne Powell	Rutherfordton
	J. Thomas Davis	Rutherfordton
29B	Robert S. Cilley (Chief)	Pisgah Forest
	Mark E. Powell	Hendersonville
	David Kennedy Fox	Hendersonville
30	Danny E. Davis (Chief)	Waynesville

DISTRICT	JUDGES	ADDRESS
	STEVEN J. BRYANT	Bryson City
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	BRADLEY B. LETTS	Sylva
	MONICA HAYES LESLIE	Waynesville
	RICHARD K. WALKER	Waynesville

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GRAFTON G. BEAMAN	Elizabeth City
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JAMES THOMAS BOWEN III	Lincolnton
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RICHARD G. CHANEY	Durham
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J. PATRICK EXUM	Kinston
J. KEATON FONVIELLE	Shelby
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EARL J. FOWLER, JR.	Asheville
RODNEY R. GOODMAN	Kinston
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JANE V. HARPER	Charlotte
JAMES A. HARRILL, JR.	Winston-Salem
RESA HARRIS	Charlotte
ROBERT E. HODGES	Morganton
SHELLY S. HOLT[14]	Wilmington
JAMES M. HONEYCUTT	Lexington
ROBERT W. JOHNSON	Statesville
WILLIAM G. JONES	Charlotte
LILLIAN B. JORDAN	Asheboro
ROBERT K. KEIGER	Winston-Salem
DAVID Q. LABARRE	Durham
WILLIAM C. LAWTON	Raleigh
C. JEROME LEONARD, JR.	Charlotte
JAMES E. MARTIN	Ayden
EDWARD H. MCCORMICK	Lillington
OTIS M. OLIVER	Dobson
DONALD W. OVERBY	Raleigh
WARREN L. PATE	Raeford
DENNIS J. REDWING	Gastonia
J. LARRY SENTER	Raleigh
MARGARET L. SHARPE	Winston-Salem
RUSSELL SHERRILL III	Raleigh
CATHERINE C. STEVENS	Gastonia
J. KENT WASHBURN	Graham

DISTRICT	JUDGES	ADDRESS

RETIRED/RECALLED JUDGES

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
Samuel M. Tate	Morganton
John L. Whitley	Wilson

1. Appointed and sworn in as Chief Judge 7 August 2007.
2. Retired 31 December 2007.
3. Appointed and sworn in 13 September 2007 to replace Phyllis Gorham who was appointed to the Superior Court.
4. Deceased 20 June 2007.
5. Appointed and sworn in 12 October 2007 to replace H. Weldon Lloyd, Jr.
6. Appointed as Chief Judge to replace Joyce A. Hamilton who retired 1 November 2007.
7. Appointed and sworn in 10 January 2008.
8. Appointed and sworn in 7 February 2008.
9. Appointed and sworn in 31 December 2007 to replace Douglas B. Sasser who was appointed to the Superior Court.
10. Appointed and sworn in 30 August 2007 to replace Ernest J. Harviel who retired 31 July 2007.
11. Retired 1 January 2008.
12. Retired 1 January 2008.
13. Appointed and sworn in 6 November 2007.
14. Appointed and sworn in 4 January 2008.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General
ROY COOPER

Chief of Staff
KRISTI HYMAN

Deputy Chief of Staff
NELS ROSELAND

General Counsel
J. B. KELLY

Senior Policy Advisor
JULIA WHITE

Chief Deputy Attorney General
GRAYSON G. KELLEY

Solicitor General
CHRIS BROWNING, JR.

Senior Deputy Attorneys General

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JOSHUA H. STEIN
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DENNIS P. MYERS
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SHARON PATRICK-WILSON
ALEXANDER M. PETERS
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LEANN RHODES
GERALD K. ROBBINS
BUREN R. SHIELDS III
RICHARD E. SLIPSKY
TIARE B. SMILEY
VALERIE B. SPALDING
W. DALE TALBERT
DONALD R. TEETER
PHILIP A. TELFER
MELISSA L. TRIPPE
VICTORIA L. VOIGHT
JOHN H. WATTERS
KATHLEEN M. WAYLETT
EDWIN W. WELCH
JAMES A. WELLONS
THEODORE R. WILLIAMS
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Glenn Edward Miller, Jr. . . . . Kernersville
Kathleen Laural Miller . . . . . Carolina Beach
Mark Edward Miller . . . . . Raleigh
Scott Robert Miller . . . . . Charlotte
Susan Catlin Miller . . . . . Charlotte
William Michael Miller . . . . . Charlotte
David Pipes Milling, Jr. . . . . Charlotte
Wesley Aaron Misson . . . . . Charlotte
Adam S. Mitchell . . . . . Raleigh
Grant Stephen Mitchell . . . . . Fayetteville
Matthew Rostan Mitchell . . . . . Valdese
Amy Prakash Mody . . . . . Cary
Stefanie Lauren Moody . . . . . Atlanta, Georgia
Chara Michelle Moore . . . . . Pineville
Christopher Scott Morden . . . . . Raleigh
Brian Gene Morrison . . . . . Asheville
Matthew James Morrison . . . . . Hillsborough
Daniel Paul Mosteller . . . . . Chapel Hill
Kristie Lynne Muller . . . . . Greenville
Alexandru Virgil Muntean . . . . . Charlotte
Thomas Otis Murry . . . . . Morrisville
Aubrey Kristine Myers . . . . . Sanford
Jason Rudolph Navari . . . . . Durham
Tracy Nayer . . . . . Durham
Matthew Joshua Neil . . . . . Nevada, Missouri
Tiffany Renee Nevel . . . . . Huntersville
Ellen Ashby Newby . . . . . Winston-Salem
Joshua Allyn Newell . . . . . Durham
My Trung Ngo . . . . . Raleigh
Justin Robert Nifong . . . . . Lexington
Anna Brooke Nisbet . . . . . Charlotte
John Sayer Nixon . . . . . Chapmansboro, Tennessee
Kristen Jean Northrup . . . . . Morrisville
Daniel Gene O'Boyle . . . . . Cadillac, Michigan
Gertrude Opoku-Mensah . . . . . Charlotte
Joshua James Otto . . . . . Raleigh
Jon Scott Overbey . . . . . Carrboro
Bradley Keith Overcash . . . . . Thomasville

Kristin Leigh Packard . . . . . Belmont
Michael Robert Paduchowski . . . . . Durham
Hugh Brock Page . . . . . Chapel Hill
Kathryn Heneroty Paradise . . . . . Cary
Keesta Danielle Pass . . . . . Durham
Ankit Ashvin Patel . . . . . Chapel Hill
Mudit Jagdish Patel . . . . . Indian Trail
Sejal Vinod Patel . . . . . Cary
Katherine Elizabeth Payerle . . . . . San Diego, California
Martha Nance Peed . . . . . Chapel Hill
Canon Pence . . . . . Chapel Hill
Christopher Putnam Perkins . . . . . Mebane
Christian Lee Perrin . . . . . Charlotte
Jennifer Diane Phillips . . . . . Carrboro
Matthew Pate Phillips . . . . . Beaufort
Benjamin Michael Pickett . . . . . Carrboro
Allyson Denise Pierce . . . . . Chapel Hill
Shalanna Lee Pirtle . . . . . Charlotte
Jon Stephen Player . . . . . Charlotte
James Bradford Polk . . . . . Greensboro
Joseph Andrew Ponzi . . . . . Greensboro
Michael Raymond Porter . . . . . Fuquay-Varina
Curtis Scott Potter . . . . . Cary
Caroline Hardesty Powell . . . . . Chapel Hill
Elizabeth Maxwell Prewitt . . . . . Raleigh
Amanda Brooke Prince . . . . . Tabor City
Jessica Lynn Pyle . . . . . Winston-Salem
Joshua Dwain Quidley . . . . . Elizabeth City
Nathaniel Thomas Quirk . . . . . Gainesville, Florida
Christopher Patrick Raab . . . . . Durham
Michael Scott Rainey . . . . . Buies Creek
Amanda Gayle Ray . . . . . Chapel Hill
Nikki Dawn Reason . . . . . Buies Creek
Rebecca Finch Redwine . . . . . Raleigh
Sarah Kathryn Reid . . . . . Iron Station
Paul Benton Reynolds . . . . . Redondo Beach, California
Ryan George Rich . . . . . Charlotte
Summer Rose Rich . . . . . Apex
Drew Alan Richards . . . . . Cornelius
Emily Ruth Richardson . . . . . Stokesdale
Benjamin Davis Ridings . . . . . Greensboro
Courtney Piercy Ritchie . . . . . Charlotte
April Danyelle Roaden . . . . . Cary
Jonathan Neal Robbins . . . . . Winston-Salem
Daire Elizabeth Roebuck . . . . . Raleigh
Andrew Michael Rogers . . . . . Chapel Hill
Morgan Hunter Rogers . . . . . Charlotte
Patrick John Rogers . . . . . Charlotte
Quinn Renee Rosborough . . . . . Chesapeake, Virginia
George Edward Rouco . . . . . Rockville, Maryland
Alan Michael Roughton . . . . . Greenville

William Thomas Rozell, II . . . . . Tarboro
Kelly Anne Rutan . . . . . Gaithersburg, Maryland
Gemma Lilian Saluta . . . . . Winston-Salem
Sarah Elizabeth Saunders . . . . . Atlanta, Georgia
Matthew Moore Schofield . . . . . Durham
Jamie Sittig Schwedler . . . . . Durham
Kia Narissa Scott . . . . . Raleigh
Marie Coridalia Scott . . . . . Greensboro
Sharon Griffin Scudder . . . . . Raleigh
Natalie Michele Scurry . . . . . Charlotte
James Linville Senter . . . . . Chapel Hill
Michael David Shaffer . . . . . Batavia, New York
Anup M. Shah . . . . . Charlotte
Chandan Yajaman Shankar . . . . . Apex
Benjamin Patrick Shankle . . . . . Winston-Salem
Brooke Elizabeth Shepherd . . . . . Chapel Hill
Adam Maher Shestak . . . . . Durham
Heather Michelle Shirley . . . . . Carrboro
Jessica Jane Sibley . . . . . Durham
Neil Michael Sicarelli . . . . . Raleigh
Amanda Kay Sifford . . . . . Nashville, Tennessee
Matthew Vernon Silva . . . . . Winston-Salem
Michael Trevin Silver . . . . . Durham
Deborah Blake Simpson . . . . . Raleigh
Jasmine Michele Singh . . . . . Lexington
Laura Ann Slaughter . . . . . Pittsboro
Richard Colby Slaughter . . . . . Huntersville
Kirsten Elena Small . . . . . Greenville, South Carolina
Joshua Bryant Smith . . . . . Dania Beach, Florida
Peter Charles Smith . . . . . Mooresville
Timothy Carl Smith, Jr. . . . . Rocky Mount
William Blount Snyder, Jr. . . . . Chapel Hill
Edward Charles Sopp, Jr. . . . . Raleigh
Nathan Walter Spanheimer . . . . . Charlotte
Deborah Hill Spencer . . . . . Chapel Hill
James Williams Spicer III . . . . . Goldsboro
Michael Louis Spicer . . . . . Charlotte
Drew Stuart Sprague . . . . . Raleigh
Katherine Strayer Stafford . . . . . Wrightsville Beach
Stephen Adam Stallings . . . . . Winston-Salem
James Allen Steele . . . . . Winston-Salem
Leslie Jean Stephens . . . . . Carrboro
Mark Douglas Stewart . . . . . Kenly
Kyle R. Still . . . . . Bahama
Meredith Grey Stone . . . . . Charlotte
Shandra Nanette Stout . . . . . Winston-Salem
Jason Philip Stratmoen . . . . . Nashville, Tennessee
Edward Taylor Stukes . . . . . Chapel Hill
Colleen Theresa Sullivan . . . . . Greensboro
Jason Gene Sullivan . . . . . Dunn
Kara Shemae Sullivan . . . . . Lexington

Lisa Gail Sullivan . . . . . Charlotte
Teresa Nichole Swanhorst . . . . . Durham
Michael Joseph Sweikar . . . . . Chapel Hill
Jeremy Ross Swindlehurst . . . . . Greensboro
Kimberly Jean Tacy . . . . . Chapel Hill
Robert Lester Tan . . . . . Chapel Hill
Gene Brentley Tanner . . . . . Lillington
Adam Patrick McInnis Tarleton . . . . . Greensboro
Tyler Mattew Tarrant . . . . . South Arlington, Virginia
Joshua James Teague . . . . . Boone
Sheila Njonchop Tegomoh . . . . . Durham
Aaron Joseph Terry . . . . . Plantation, Florida
Jonathan Caleb Thomas . . . . . London, Kentucky
Aminah Malikah Thompson . . . . . Durham
Curtis Keith Thompson . . . . . Cary
Kelly Elizabeth Thompson . . . . . Raleigh
Layton Carter Thompson . . . . . Carrboro
Leah Monique Thompson . . . . . Durham
William A. Tobin . . . . . Durham
Melvin Lorenzo Todd, Jr. . . . . Midlothian, Virginia
Emily Gretchen Tomczak . . . . . Raleigh
Frank Louis Tortora III . . . . . Raleigh
Jenna Marie Turner . . . . . Raleigh
Kimberly Anne Turner . . . . . Fuquay-Varina
Luke Joseph Umstetter . . . . . Greenville, South Carolina
Matthew Lee Underwood . . . . . Charlotte
Michael Leonard Urschel . . . . . Charlotte
Carol Lynn Vandenbergh . . . . . Fuquay-Varina
Emily Marie Vanderweide . . . . . Arlington, Virginia
Lauren May Vaughn . . . . . Chapel Hill
Sara Elizabeth Ventura . . . . . Williamsburg, Virginia
Kara Colleen Vey . . . . . Huntersville
Daniel Brandt Vorhaus . . . . . Chapel Hill
Allison Clarice Wagner . . . . . Winston-Salem
Leslie Erin Wagstaff . . . . . Charlotte
Whitney Sarah Waldenberg . . . . . Winston-Salem
Christopher John Waldon . . . . . Chapel Hill
John Albert Walker III . . . . . Charlotte
Mary Charles Wall . . . . . Raleigh
Sarah Elizabeth Wallace . . . . . Winston-Salem
Jill Christine Walters . . . . . Raleigh
Jonathan Paul Ward . . . . . Greensboro
Lori B. Warlick . . . . . Raleigh
Gregory W. Warren . . . . . Apex
Amanda Marie Wease . . . . . Durham
Joel Ray Weaver . . . . . Palm Harbor, Florida
Patrick Benton Weede . . . . . Chapel Hill
Matthew Patrick Weiner . . . . . Chapel Hill
Kathleen Cloud Wendell . . . . . Charlotte
Alexander Conrad Wharton . . . . . Durham
Quinn Barbara White . . . . . Cary

Farah Lisa Whitley-Sebti . . . . . Chapel Hill
Alicia Dawn Jurney Whitlock . . . . . Buies Creek
Mark Steven Wierman . . . . . Davidson
Lindsay Celeste Wilkes . . . . . Chapel Hill
Terrance Lee Williams . . . . . Clinton
James Timothy Wilson . . . . . Raleigh
Melanie Rachael Wilson . . . . . Edmond, Oklahoma
Brian Eugene Wise . . . . . Apex
Derek Michael Wisniewski . . . . . Durham
Thomas Lightburn Woodrum, II . . . . . Wilmington
Wesley Allen Wooten . . . . . Burgaw
Richard Charles Worf . . . . . Macon, Georgia
Mary Eva Hayes Yoost . . . . . Charlotte
Hollie Christine Young . . . . . Efland
Laura Elizabeth Young . . . . . New Hill
Caroline Semmes Youngblade . . . . . Dunn
Geneva Long Yourse . . . . . Apex
Benjamin Oren Zellinger . . . . . Chapel Hill
Artrese Nicole Ziglar . . . . . Durham

Given over my hand and seal of the Board of Law Examiners on this the 18th day of September, 2007.

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

I, Fred P. Parker III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 7th day of September 2007, and said persons have been issued a certificate of this Board:

Akindele Adepoju . . . . . Durham
Christopher Bengt Anderson . . . . . Lake Forest, Illinois
John Joseph Banaghan . . . . . Greensboro
Ross Ritter Barton . . . . . Charlotte
Jennifer Kathleen Bennington . . . . . Cary
Meredith Monti Boehm . . . . . Raleigh
Galen Edward Boerema . . . . . Raleigh
Roger Peter Bonenfant . . . . . Charlotte
Jeffrey Dana Bradford . . . . . Cary
Gary Lee Capps, Jr. . . . . Marietta, South Carolina
Robert Gordon Chambers . . . . . Charlotte
Damon James Circosta . . . . . Raleigh
Tamara Alexis Crepet . . . . . Ithaca, New York
Jean M. Croughan . . . . . Stuart, Florida
Melissa Erin Dilks . . . . . Charlotte
Thomas Andrew Gigliotti . . . . . Raleigh
Thomas Edward Holsten . . . . . Cary
Carly Elizabeth Howard . . . . . Charlotte

Christina Rampey Hunoval . . . . . Charlotte
John Thomas Langston IV . . . . . Charlotte
Carlos Andres Lopez . . . . . Chapel Hill
Jose Manuel Luis . . . . . Fort Mill, South Carolina
Jefferson Van Daele Mabrito . . . . . Charlotte
James Matthew Markham . . . . . Durham
Victorianne Maxwell . . . . . Durham
Stuart Leighton Mills . . . . . Pinehurst
Carrie Elizabeth Snow Miranda . . . . . Charlotte
Peter Sands Moeller . . . . . New Bern
Steven Craig Morrison . . . . . Apex
Bobby Ray Mosely, Jr. . . . . Durham
Jacob Matthew Norris . . . . . Chapel Hill
Janna Marie Nuzum . . . . . Winston-Salem
Alexander Miller Pearce . . . . . Cary
Kimberly A. Richards . . . . . Cary
Christopher Harrison Roede . . . . . Cary
Erin Elizabeth Rozzelle . . . . . Charlotte
Makila A. Sands . . . . . Charlotte
Priya Tupil Sarathy . . . . . Raleigh
Andrew Thomas Scales . . . . . Charlotte
Bonnie Beth Silcox . . . . . Matthews
Julia Blue Singh . . . . . Gastonia
John Steward Slosson . . . . . Charleston, South Carolina
Elesha M. Smith . . . . . Durham
William Albert Smith, V . . . . . Raleigh
Anthony Bernard Taylor . . . . . Charlotte
Glenn Clark Thompson . . . . . Charlotte
Molly Berentd Widener Thompson . . . . . Charlotte
Keith Tinnille Tinneny . . . . . Charlotte
Patrick Jude Togni . . . . . Chapel Hill
Daniel Rocco Visalli . . . . . Charlotte
Denis Volkov . . . . . Greensboro
La Donna Maria Webster . . . . . Durham
Eric Francis Wert . . . . . Jacksonville
Richard Gerard Wheelahan . . . . . Charlotte
James Courtney Williams . . . . . Dunn
Omowunmi Olaitan Williams . . . . . Greensboro
Virginia Hope Williams . . . . . Durham

Given over my hand and seal of the Board of Law Examiners on this the 18th day of September, 2007.

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

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

the 7th day of September 2007, and said persons have been issued a certificate of this Board:

Peter Stewart Adolf . . . . . .Huntersville
Jodi Rene Anderson . . . . . .Charlotte
Susan Pfleeger Andre . . . . . .Holly Springs
Hal LaVaughn Beverly, Jr. . . . . .Surfside Beach, South Carolina
Nathan Brooks . . . . . .Charlotte
Walter James Devins . . . . . .Wake Forest
Arin Briana Jones . . . . . .Morrisville
John C. Kuzenski . . . . . .Apex
Miguel Antonio Manna . . . . . .Charlotte
James Almond Merritt, Jr. . . . . .Coumbia, South Carolina
Tin Thanh Nguyen . . . . . .Durham
Paige Hadtke Pease . . . . . .Charlotte
Kathleen Marie Richards . . . . . .Harrisburg, Pennsylvania
Christine Marie Robbins . . . . . .Sherrills Ford
Anthony Christopher Robinson . . . . . .Charlotte
Cassandra Stubbs . . . . . .Durham
Adam Gavin Tarsitano . . . . . .Youngsville
Tatjana Vujic . . . . . .Chapel Hill
Allison Shoshana Wexler . . . . . .Greenville

Given over my hand and seal of the Board of Law Examiners on this the 18th day of September, 2007.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 7th day of September 2007, and said person has been issued a certificate of this Board:

Raquel Kathy Wilson . . . . . .Asheville

Given over my hand and seal of the Board of Law Examiners on this the 3rd day of October, 2007.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 7th day of September 2007, and said person has been issued a certificate of this Board:

Caroline Elizabeth Wainright . . . . . .Charlotte

Given over my hand and seal of the Board of Law Examiners on this the 24th day of October, 2007.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 14th day of September 2007, and said persons have been issued a certificate of this Board:

Frances Marie Clement . . . . . .Applied from the State of Illinois
Peter Fitzgerald Dwyer . . . . . .Applied from the State New York
Afi S. Johnson-Parris . . . . . .Applied from the State of Georgia
Jane Ellen Nohr . . . . . .Applied from the State of Kansas

Given over my hand and seal of the Board of Law Examiners on this the 17th day of October, 2007.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 14th day of September 2007, and said persons have been issued a certificate of this Board:

Tanzania Chevin Cannon-Eckerle . . . . . .Charlotte
Sonya Pfeiffer . . . . . .Charlotte
William B. Smith, Jr. . . . . .Statesville
John Joseph Sullivan . . . . . .Woodbridge, Connecticut

Given over my hand and seal of the Board of Law Examiners on this the 24th day of October, 2007.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 21st day of September 2007, and said persons have been issued a certificate of this Board:

Kyle Alexander Fletcher . . . . . .Charlotte
Tobias Horne . . . . . .Charlotte

Svend Hewitt Deal . . . . . .Charlotte
Kristopher Colorado Jones . . . . . .Charlotte
Karen Diane Washington . . . . . .Charlotte

Given over my hand and seal of the Board of Law Examiners on this the 17th day of October, 2007.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 21st day of September 2007, and said person has been issued a certificate of this Board:

Gayle Linda Kemp . . . . . .Applied from the State of Michigan

Given over my hand and seal of the Board of Law Examiners on this the 17th day of October, 2007.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 21st day of September 2007, and said person has been issued a certificate of this Board:

Greg Lumelsky . . . . . .Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners on this the 17th day of October, 2007.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 21st day of September 2007, and said person has been issued a certificate of this Board:

Douglas R. Wilner . . . . . .Applied from the State of Missouri

Given over my hand and seal of the Board of Law Examiners on this the 17th day of October, 2007.

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

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 21st day of September 2007, and said persons have been issued a certificate of this Board:

Robert P. Edwards, Jr. . . . . .Applied from the State of Georgia
Daniel Jeremiah Spillman . . . . . .Applied from the State of Illinois

Given over my hand and seal of the Board of Law Examiners on this the 17th day of October, 2007.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 21st day of September 2007, and said persons have been issued a certificate of this Board:

Brooklyn Joy Bunch-Adkins . . . . . .Raleigh
Glenn Eric Emery . . . . . .Chapel Hill
Jordan Jarreau Qualls . . . . . .Cary
Neil Wilton Scarborough . . . . . .Wanchese
LiBria R. Stephens . . . . . .Durham
Kendra DeShea White . . . . . .Fayetteville

Given over my hand and seal of the Board of Law Examiners on this the 24th day of October, 2007.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 5th day of October 2007, and said persons have been issued a certificate of this Board:

Nikki Rita Beyer . . . . . .Glenville
Tiffany Kathryn Elliot . . . . . .Apex
Wayne Aydlett Hollowell . . . . . .Clinton
Blair Macfarland Pettis . . . . . .Belmont

Given over my hand and seal of the Board of Law Examiners on this the 17th day of October, 2007.

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

LICENSED ATTORNEYS

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 5th day of October 2007, and said persons have been issued a certificate of this Board:

Jordan Nathan Bodner . . . . . .Applied from the District of Columbia
Thomas Lloyd Cetta . . . . . .Applied from the State of Wisconsin
Stephen George Court . . . . . .Applied from the State of New York
Barry Friedlich . . . . . .Applied from the State of New York
B. P. Oliverio . . . . . .Applied from the State of New York
Annette Michelle Willis . . . . . .Applied from the State of Georgia

Given over my hand and seal of the Board of Law Examiners on this the 17th day of October, 2007.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 5th day of October 2007, and said persons have been issued a certificate of this Board:

Malcolm G. Schaefer . . . . . .Applied from the State of Georgia
Francisco Javier Velasco . . . . . .Applied from the State of New York
Suzanne D. Benoit . . . . . .Applied from the State of Massachusetts
Georgette Wanda Rosario . . . . . .Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners on this the 13th day of December, 2007.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 26th day of October 2007, and said persons have been issued a certificate of this Board:

Aminda Byrd . . . . . .Salisbury
Michael Weiland Chen . . . . . .Pineville
David Donovan . . . . . .Hillsborough
Nancy Peryn Harmon . . . . . .Raleigh
Henry Thomas Hunt . . . . . .Charlotte
Thomas Arrowood Kellis II . . . . . .New Bern
Matthew Thomas Marcellino . . . . . .Charlotte
Thomas DuBose McClure . . . . . .Huntersville
Guy Milhalter . . . . . .Hillsborough

Jason Austin Morton . . . . . .Southern Pines
Jeffrey William O'Neale . . . . . .Charlotte
Millicent Henry Sanders . . . . . .Raleigh
Linda Ann Spagnola . . . . . .Fuquay-Varina
Jeffrey Scott Thompson . . . . . .Youngsville
Jonathan Perry Watson . . . . . .Concord
Steven Michael Webster . . . . . .Greensboro

Given over my hand and seal of the Board of Law Examiners on this the 13th day of December, 2007.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 12th day of October, and said person has been issued a certificate of this Board:

Lois Grossman . . . . . .Applied from the State of New York

Given over my hand and seal of the Board of Law Examiners on this the 13th day of December, 2007.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 2nd day of November 2007, and said person has been issued a certificate of this Board:

David A. Coolidge, Jr. . . . . .Cary

Given over my hand and seal of the Board of Law Examiners on this the 13th day of December, 2007.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 2nd day of November, and said persons have been issued a certificate of this Board:

David Brian Pevney . . . . . .Applied from the State of New York
Geoffrey B. Ginn . . . . . .Applied from the State of Massachusetts

Given over my hand and seal of the Board of Law Examiners on this the 13th day of December, 2007.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 2nd day of November 2007, and said persons have been issued a certificate of this Board:

Sidney P. Alexander . . . . . .Applied from the State of Tennessee
Robert L. Cavallo . . . . . .Applied from the State of New York
Kevin John Coenen . . . . . .Applied from the State of Illinois
Joseph P. Covelli . . . . . .Applied from the State of Pennsylvania
Amy Christina de La Lama . . . . . .Applied from the State of Colorado
Christine R. Farrell . . . . . .Applied from the State of Illinois
Barbara Fedders . . . . . .Applied from the State of Massachusetts
Laurie K. Miller . . . . . .Applied from the State of West Virginia
Edward P. O'Keefe . . . . . .Applied from the State of New York
William J. Robinson . . . . . .Applied from the State of New Hampshire
Blake Edward Vande Garde . . . . . .Applied from the State of Kansas

Given over my hand and seal of the Board of Law Examiners on this the 21st day of December, 2007.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 9th day of November 2007, and said person has been issued a certificate of this Board:

Michael William Hennen III . . . . . .Applied from the State of Pennsylvania

Given over my hand and seal of the Board of Law Examiners on this the 13th day of December, 2007.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners

on the 9th day of November 2007, and said person has been issued a certificate of this Board:

William Andrew LeLiever . . . . . .Raleigh

Given over my hand and seal of the Board of Law Examiners on this the 21st day of December, 2007.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by comity by the Board of Law Examiners on the 7th day of December 2007, and said persons have been issued a certificate of this Board:

Lotta Ann Crabtree . . . . . .Applied from the State of Pennsylvania
James M. Dedman IV . . . . . .Applied from the State of Texas
John Thomas Holden . . . . . .Applied from the State of New York
Hilary Karen Hughes . . . . . .Applied from the State of New York
Patrick L. Robson . . . . . .Applied from the State of New York
Henry W. Sappenfield . . . . . .Applied from the State of Massachusetts
Jason Dunlap Stevens . . . . . .Applied from the State of West Virginia
Jacob Steven Wharton . . . . . .Applied from the State of Missouri

Given over my hand and seal of the Board of Law Examiners on this the 8th day of January, 2008.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named person was admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 7th day of December 2007, and said person has been issued a certificate of this Board:

Clayton Paul Gladd . . . . . .Reidsville

Given over my hand and seal of the Board of Law Examiners on this the 10th day of January, 2008.

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

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

admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 7th day of December 2007, and said persons have been issued a certificate of this Board:

Ross Hall Richardson . . . . . Charlotte
Anthony Mitch Walker . . . . . Taylorsville
Lynn Airasian . . . . . Cary
Mia Briann Bass . . . . . Durham
Cynthia Ann Bullock Faucett . . . . . New Bern
William Douglas Keith . . . . . Naples, Florida
Christina Ellen Baker . . . . . Raeford
Kathleen Maher Lynch . . . . . Cary
David Thomas Miller . . . . . Charlotte
Wyatt Benjamin Orsbon . . . . . Charlotte
Jill Lauren Perhach . . . . . Apex
James Owen Reynolds . . . . . Asheville
Heather Heath Ryan . . . . . Charlotte
William Henry Shipley . . . . . Walkertown
David Jonathan Taube . . . . . Rockville, Maryland

Given over my hand and seal of the Board of Law Examiners on this the 10th day of January, 2008.

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

I, FRED P. PARKER III, Executive Director of the Board of Law Examiners of the State of North Carolina, do hereby certify that the following named persons were admitted to the North Carolina Bar by examination by the Board of Law Examiners on the 28th day of December 2007, and said persons have been issued a certificate of this Board:

Omari Menka Wilson . . . . . Mebane
Christian Bennett Felden . . . . . Cary

Given over my hand and seal of the Board of Law Examiners on this the 10th day of January, 2008.

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

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

DEPARTMENT OF TRANSPORTATION v. M.M. FOWLER, INC.

No. 305PA05

(Filed 15 December 2006)

Eminent Domain— fair market value—lost business profits

The trial court erred by allowing quantified lost business profits testimony in a condemnation action, and an appraisal based on that evidence, for determining the fair market value of the land on which a business is located, and the case is reversed and remanded, because: (1) when evidence of income is used to valuate property, care must be taken to distinguish between income from the property and income from the business conducted on the property; (2) the longstanding rule in North Carolina is that evidence of lost business profits is inadmissible in condemnation actions, and this rule comports with the federal rule; (3) when government takes property, the damages are confined to the diminished pecuniary value of the property incident to the wrong; (4) just compensation is not the value to the owner for his particular purposes since awarding damages for lost profits would provide excess compensation for a successful business owner while a less prosperous one or an individual landowner without a business would receive less money for the same taking; (5) if business revenues were considered in determining land values, an owner whose business is losing money could receive less than the land is worth; (6) limiting damages to the fair market value of the land prevents unequal treatment based upon the use of the real estate at the time of condemnation; (7) paying business owners for lost business profits in a partial taking results in

inequitable treatment of the business owner whose entire property is taken; (8) the speculative nature of profits makes them improper bases for condemnation awards, and the uncertain character of lost business profits evidence could burden taxpayers with inflated jury awards bearing little relationship to the condemned land's fair market value; (9) any determination of fair market value must be based on the diminution in value, not just for the current owner of the property, but for any owner who would put the property to its highest and best use; (10) there is no difference between using lost profits to determine the fair market value of the land and awarding them as a separate item of damages when by either improper calculation, the business receives compensation for its lost profits; (11) allowing the jury to consider that the land may be less valuable due to the condemnation's effect on the landowner's business does not require that quantified evidence of lost profits also be admitted; and (12) a limiting instruction is insufficient to overcome the error resulting from introduction of quantified evidence of lost business profits.

Justice MARTIN dissenting.

Justices WAINWRIGHT and TIMMONS-GOODSON join in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 170 N.C. App. 162, 611 S.E.2d 448 (2005), affirming a judgment entered on 8 October 2003 by Judge Robert H. Hobgood in Superior Court, Durham County. Heard in the Supreme Court 13 February 2006.

Roy Cooper, *Attorney General*, *by Richard A. Graham and James M. Stanley, Jr.*, *Assistant Attorneys General*, *and W. Richard Moore and E. Burke Haywood*, *Special Deputy Attorneys General*, *for plaintiff-appellant.*

Hutson Hughes & Powell, *P.A.*, *by James H. Hughes*, *for defendant-appellee.*

NEWBY, Justice.

The issue is whether, in a condemnation action, the jury may consider quantified lost business profits in determining the fair market value of the land on which the business is located. Applying our well-

established case law, we hold it may not, and accordingly, we reverse the Court of Appeals and order a new trial.

I. BACKGROUND

To safely accommodate increased traffic and promote public safety, the North Carolina Department of Transportation ("DOT") proposed improvements at the intersection of Garrett Road and Durham-Chapel Hill Road in Durham County. When DOT and landowner M.M. Fowler, Inc. ("MMFI") were unable to agree on a purchase price, DOT filed an eminent domain action to condemn a portion of MMFI's land for the construction project. MMFI's property, originally 47,933 square feet, contains a gasoline station and convenience store, which MMFI pays an independent contractor to operate. The DOT improvement project necessitated a 13,039-square-foot right-of-way as well as a 1,664-square-foot slope easement and a 6,166-square-foot temporary construction easement. After the permanent taking, the remaining property totaled 34,894 square feet.

In its complaint, DOT requested a determination of just compensation for the taking in accordance with Article 9 of Chapter 136 of the General Statutes. Concurrently, DOT deposited $166,850 with the Durham County Superior Court as its estimate of just compensation. MMFI answered and demanded a jury trial.

Prior to trial, DOT filed a motion *in limine* asking the court to exclude, *inter alia*, "[e]vidence concerning loss of profits or income, loss of business, loss of goodwill, or interruption of business." The trial court initially allowed the motion "until [it] should rule otherwise." At trial, the court heard arguments from both parties on the issues and ultimately denied DOT's motion *in limine*. However, the trial court gave the following limiting instruction purportedly derived from *Kirkman v. State Highway Commission*, 257 N.C. 428, 432, 126 S.E.2d 107, 110 (1962):

> "[L]oss of profits or injury to a growing business conducted on property or connected therewith are not elements of recoverable damages in an award for the taking under the power of eminent domain. However, when the taking renders the remaining land unfit or less valuable for any use to which it is adapted, that factor is a proper item to be considered in determining whether the taking has diminished the value of the land itself."

MMFI's witnesses estimated the loss in value caused by the taking to be between $500,000 and $540,000. These estimates were based

solely on capitalization of the company's alleged lost business profits. DOT's evidence indicated MMFI was entitled to approximately $169,000 to $225,700. The jury returned a verdict awarding $375,000 as damages for the permanent taking and $75,000 for the temporary construction and slope easements. On 8 October 2003, the trial court entered a judgment awarding MMFI a total of $450,000 plus interest from the date of the complaint until the date of judgment.

DOT appealed the jury's verdict on the permanent taking, arguing the trial court improperly admitted lost profits evidence. The Court of Appeals affirmed the trial court, holding that, although our case law generally forbids evidence of lost profits, *Kirkman* creates a limited exception in a partial taking when access to the remaining property is restricted or denied. *DOT v. M.M. Fowler, Inc.*, 170 N.C. App. 162, 165-66, 611 S.E.2d 448, 450-51 (2005). We allowed DOT's petition for discretionary review to determine whether the Court of Appeals erred in affirming the trial court's admission of lost profits evidence.

II. CONDEMNATION PROCEEDINGS

Our Court has stated:

> The right to take private property for public use, the power of eminent domain, is one of the prerogatives of a sovereign state. The right is inherent in sovereignty; it is not conferred by constitutions. Its exercise, however, is limited by the constitutional requirements of due process and payment of just compensation for property condemned.

State v. Core Banks Club Props., Inc., 275 N.C. 328, 334, 167 S.E.2d 385, 388 (1969) (citing *Redevelopment Comm'n v. Hagins*, 258 N.C. 220, 128 S.E.2d 391 (1962)). Both the state and federal constitutions limit the State's power of eminent domain. North Carolina's Constitution protects the rights of property owners through the "Law of the Land Clause," which provides that "[n]o person shall be . . . deprived of his . . . property, but by the law of the land." N.C. Const. art. I, § 19; *see also McKinney v. Deneen*, 231 N.C. 540, 542, 58 S.E.2d 107, 109 (1950) (citing N.C. Const. of 1868, art. I, § 17, the predecessor of the current N.C. Const. art. I, § 19). In other words, although the State can condemn land for public use, the owner must be justly compensated. As Professor John V. Orth has noted: " 'Notwithstanding there is no clause in the Constitution of North Carolina which expressly prohibits private property from being taken for public use without compensation . . ., yet the principle is so

grounded in natural equity that it has never been denied to be a part of the law of North Carolina.' " John V. Orth, *The North Carolina State Constitution* 58 (Univ. of N.C. Press 1995) (1993) (quoting *Johnston v. Rankin*, 70 N.C. 441, 442, 70 N.C. 550, 555 (1874) (alterations in original)). Similarly, the Federal Constitution guards the due process rights of property owners through the Fourteenth Amendment. U.S. Const. amend. XIV, § 1 ("[N]or shall any State . . . deprive any person of life, liberty, or property, without due process of law . . . ."); *see also Sale v. State Highway & Pub. Works Comm'n*, 242 N.C. 612, 617, 89 S.E.2d 290, 295 (1955).

Although the State possesses the power of eminent domain by virtue of its sovereignty, "the right . . . lies dormant . . . until the legislature, by statute, confers the power and points out the occasion, mode, conditions and agencies for its exercise." *Core Banks*, 275 N.C. at 334, 167 S.E.2d at 389. Chapter 136 of the General Statutes codifies the statutory scheme authorizing condemnation by DOT for our state's system of roadways. Section 136-18 permits DOT to acquire land necessary for highways "by gift, purchase, or otherwise." N.C.G.S. § 136-18(2) (2005). Article 9 sets forth the procedure for acquiring land by condemnation. These proceedings commence when DOT files a complaint and declaration of taking accompanied by a deposit of the estimated just compensation in the superior court in the county where the land is located. *Id.* § 136-103(a) (2005). DOT must include in its complaint, *inter alia*, a prayer for determination of just compensation. *Id.* § 136-103(c) (2005). Upon filing and deposit, title to the land vests in DOT. *Id.* § 136-104 (2005). The right to just compensation vests in the landowner, who may apply to the court for disbursement of the deposit, file an answer requesting a determination of just compensation, or both. *Id.* §§ 136-104, -105, -106 (2005).

The statutes provide that just compensation includes damages for the taking of property rights plus interest on the amount by which the damages exceed DOT's deposit. *Id.* §§ 136-112, -113 (2005). When DOT condemns only part of a tract of land, just compensation consists of the difference between the fair market value of the entire tract immediately before the taking ("before value") and the fair market value of the land remaining immediately after the taking ("after value"). *Id.* § 136-112(1).

Although Chapter 136 offers no guidance on the calculation of fair market value, this Court has recognized:

> [T]he well established rule is that in determining fair market value the essential inquiry is, "what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted—that is to say, what is it worth from its availability for all valuable uses?"

State v. Johnson, 282 N.C. 1, 14, 191 S.E.2d 641, 651 (1972) (quoting *Barnes v. Highway Comm'n*, 250 N.C. 378, 387, 109 S.E.2d 219, 227 (1959) (alteration in original)); *see also Black's Law Dictionary* 1587 (8th ed. 2004) (defining "fair market value" as "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction"). In most instances, landowners seek to prove fair market value through the testimony of the owners themselves and that of appraisers offered as expert witnesses. *See*, *e.g.*, *N.C. State Highway Comm'n v. Helderman*, 285 N.C. 645, 207 S.E.2d 720 (1974). An opinion concerning property's fair market value must not rely in material degree on factors that cannot legally be considered. *Id.* at 655-56, 207 S.E.2d at 727. Likewise, regardless of professional qualifications, an expert's opinion must be reasonably reliable. *DOT v. Haywood Cty.*, 360 N.C. 349, 352, 626 S.E.2d 645, 647 (2006) (holding the trial court properly excluded the testimony of three "experienced" expert appraisers because "the testimony lacked sufficient reliability"). To resolve this case, we must decide whether MMFI's witnesses improperly based their opinions on alleged lost business profits and if so, whether the trial court erred in permitting the introduction of such evidence despite its limiting instruction.

III. ADMISSIBILITY OF LOST BUSINESS PROFITS EVIDENCE

A. The *Pemberton* Framework

During a proceeding to determine just compensation in a partial taking, the trial court should admit any relevant evidence that will assist the jury in calculating the fair market value of property and the diminution in value caused by condemnation. *Abernathy v. S. & W. Ry. Co.*, 150 N.C. 80, 89, 150 N.C. 97, 108-09, 63 S.E. 180, 185 (1908). Admission of evidence that does not help the jury calculate the fair market value of the land or diminution in its value may "confuse the minds of the jury, and should be excluded." *Id.* at 89, 150 N.C. at 109, 63 S.E. at 185. In particular, specific evidence of a landowner's noncompensable losses following condemnation is inadmissible. *Templeton v. State Highway Comm'n*, 254 N.C. 337, 339-40, 118 S.E.2d 918, 920-21 (1961) (finding trial court erred in admitting evi-

dence of the cost of silt and mud removal because "it [was] possible that the jury could have gotten the impression that the removal . . . was compensable as a separate item of damage").

Injury to a business, including lost profits, is one such noncompensable loss. It is important to note that revenue derived directly from the condemned property itself, such as rental income, is distinct from profits of a business located on the property. *Compare* 5 Julius L. Sackman et al., *Nichols on Eminent Domain* § 19.02-.05 (rev. 3d ed. 2006) [hereinafter 5 *Nichols*] (discussing rental income and the capitalization thereof as a permissible appraisal method for determining the fair market value of condemned land), *with id.* § 19-06 (devoting a separate section of the treatise to "Income from a Business" and articulating the general rule that "the amount of profit earned from a business conducted on the condemned property is ordinarily not admissible in evidence"); *see also id.* § 19.02, at 19-11 ("While rents are within the broad category of business profits, they are not subject to the general rule denying admission of business profits as evidence on the issue of property value."). This case is concerned with lost business profits. When evidence of income is used to valuate property, "care must be taken to distinguish between income from the property and income from the business conducted on the property." 4 Julius L. Sackman et al., *Nichols on Eminent Domain* § 12B.09, 12B-56 to -59 (rev. 3d ed. 2006) [hereinafter 4 *Nichols*]. The dissent fails to make this distinction throughout its discussion of the law and analysis of the case *sub judice*.

The longstanding rule in North Carolina is that evidence of lost business profits is inadmissible in condemnation actions, as this Court articulated in *Pemberton v. City of Greensboro*, 208 N.C. 466, 470-72, 181 S.E. 258, 260-61 (1935). In *Pemberton*, the plaintiffs brought an action seeking damages for wrongful appropriation of land containing their dairy farm. *Id.* at 467, 181 S.E. at 258. Overflow and runoff from the city's newly constructed sewage treatment plant infected the plaintiffs' cows with anthrax, destroying their entire dairy business. *Id.* At trial, the plaintiffs introduced evidence of milk production and approximate monthly earnings before the incident. 208 N.C. at 468, 181 S.E. at 259.

The trial court overruled the city's objections to this testimony but did give multiple limiting instructions. *Id.* at 467-69, 181 S.E. at 258-59. In particular, the trial court told the jury not to consider the plaintiffs' evidence " 'as any measure of damages' " and specified that the testimony was allowed only for the jury to have the " 'entire situ-

ation' " before it. *Id.* at 468, 181 S.E. at 259. In the jury charge, the trial court instructed that " 'evidence tending to show the earnings and production of plaintiffs' dairying proposition . . . is not admissible as tending to show the measure of damages, but to aid . . . in estimating the extent of the injury sustained.' "[1] *Id.* Despite the trial court's admonitions, our Court concluded it was "manifest from the court's rulings and the jury's verdict that plaintiffs [were] awarded compensation for the loss of their dairy business." 208 N.C. at 470, 181 S.E. at 260. Thus, the city was entitled to a new trial. *Id.* at 472, 181 S.E. at 261.

In holding the limiting instructions were insufficient, this Court specifically noted the trial court's efforts to place the " 'entire situation' " before the jury were "at variance with the rule for the []measurement of damages in compensation cases." *Id.* at 470, 181 S.E. at 260 (citing *Gray v. City of High Point*, 203 N.C. 756, 166 S.E. 911 (1932)). Leading up to *Pemberton*, our Court had consistently stated that when government takes property, "the damages are confined to the diminished pecuniary value *of the property* incident to the wrong." *Moser v. City of Burlington*, 162 N.C. 116, 118, 162 N.C. 141, 144, 78 S.E. 74, 75 (1913) (emphasis added) (citing *Metz v. City of Asheville*, 150 N.C. 613, 150 N.C. 748, 64 S.E. 881 (1909)); *see Gray v. City of High Point*, 203 N.C. 756, 764, 166 S.E. 911, 915 (1932); *Cook v. Town of Mebane*, 191 N.C. 1, 11, 131 S.E. 407, 412 (1926); *Metz v. City of Asheville*, 150 N.C. 613, 615-16, 150 N.C. 748, 751, 64 S.E. 881, 882 (1909); *Williams v. Town of Greenville*, 130 N.C. 65, 68, 130 N.C. 93, 97, 40 S.E. 977, 978 (1902).

In *Pemberton*, this Court adopted the reasoning behind the rule prohibiting lost business profits evidence articulated by U.S. Supreme Court Justice Oliver Wendell Holmes when he served on the Supreme Judicial Court of Massachusetts:

> "It generally has been assumed, we think, that injury to a business is not an appropriation of property which must be paid for. There are many serious pecuniary injuries which may be inflicted without compensation. It would be impracticable to forbid all laws which might result in such damage, unless they provided a *quid pro quo*. No doubt a business may be property in a broad sense of the word, and property of great value. It may be assumed for the purposes of this case that there might be such a taking of it as required compensation. But a business is less tangible in

1. This jury charge, found erroneous by our Court in *Pemberton*, is essentially the theory of the dissent.

> nature and more uncertain in its vicissitudes than the rights which the Constitution undertakes absolutely to protect. It seems to us, in like manner, that the diminution of its value is a vaguer injury than the taking or appropriation with which the Constitution deals. A business might be destroyed by the construction of a more popular street into which travel was diverted, as well as by competition, but there would be as little claim in the one case as in the other."

Pemberton, 208 N.C. at 470, 181 S.E. at 260 (quoting *Sawyer v. Commonwealth*, 182 Mass. 245, 247, 65 N.E. 52, 53 (1902)). Justice Holmes's words underscore why excluding damages for lost business profits is sound policy. Constitutional mandates require that the government pay *just* compensation. *Sale*, 242 N.C. at 617, 89 S.E.2d at 295. They do not require expenditure of taxpayer funds for losses remote from governmental action or too speculative to calculate with certainty. *See Pemberton*, 208 N.C. at 471, 181 S.E. at 260-61.

Just compensation " 'is not the value to the owner for his particular purposes.' " *Williams v. State Highway Comm'n*, 252 N.C. 141, 146, 113 S.E.2d 263, 267 (1960) (quoting *United States v. Petty Motor Co.*, 327 U.S. 372, 377, 66 S. Ct. 596, 599, 90 L. Ed. 729, 734 (1946)). Awarding damages for lost profits would provide excess compensation for a successful business owner while a less prosperous one or an individual landowner without a business would receive less money for the same taking. Indeed, if business revenues were considered in determining land values, an owner whose business is losing money could receive less than the land is worth. Limiting damages to the fair market value of the land prevents unequal treatment based upon the use of the real estate at the time of condemnation. Further, paying business owners for lost business profits in a partial taking results in inequitable treatment of the business owner whose entire property is taken, in which case lost profits clearly are not considered. *See Williams*, 252 N.C. at 148, 113 S.E.2d at 269.

Evidence of lost business profits is impermissible because recovery of the same is not allowed. 5 *Nichols* § 19.06[1], at 19-36. Additionally, the speculative nature of profits makes them improper bases for condemnation awards as they

> depend on too many contingencies to be accepted as evidence of the usable value of the property upon which the business is carried on. Profits depend upon the times, the amount of capital invested, the social, religious and financial position in the com-

> munity of the one carrying it on, and many other elements which might be suggested. What one man might do at a profit, another might only do at a loss. Further, even if the owner has made profits from the business in the past it does not necessarily follow that these profits will continue in the future.

Id. § 19.06[1], at 19-37 to -38 (footnotes omitted). Recognizing that profits can rarely be traced to a single factor, business executives rely on complex models to determine profitability. *See, e.g.*, Michael E. Porter, *How Competitive Forces Shape Strategy*, 57 Harv. Bus. Rev. 137 (1979) (detailing Porter's widely accepted "five forces model" that asserts profitability is affected by five factors, each of which includes myriad subfactors). Further, the uncertain character of lost business profits evidence could burden taxpayers with inflated jury awards bearing little relationship to the condemned land's fair market value.

Moreover, our well-established North Carolina rule prohibiting lost business profits evidence comports with the federal rule. *See United States v. Petty Motor Co.*, 327 U.S. 372, 377-78, 66 S. Ct. 596, 599, 90 L. Ed. 729, 734-35 (1946) ("Since 'market value' does not fluctuate with the needs of condemnor or condemnee but with general demand for the property, evidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are refused in federal condemnation proceedings."); *see also Mitchell v. United States*, 267 U.S. 341, 344-45, 45 S. Ct. 293, 294, 69 L. Ed. 644, 648 (1925); *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 675, 43 S. Ct. 684, 688, 67 L. Ed. 1167, 1174 (1923).

Notwithstanding the dissent's contention to the contrary, this Court's rule also accords with the holdings of the majority of states applying the common law in condemnation proceedings. *See* 4 *Nichols* § 12B.09[1], at 12B-59 ("It is . . . well settled that evidence of the profits of a business conducted upon land taken for the public use is not admissible in proceedings for the determination of the compensation which the owner of the land shall receive.").

In summary, the prevailing rule excluding lost business profits evidence in condemnation actions is firmly rooted in our jurisprudence.[2] As a case that comprehensively discussed and applied this

2. The Court of Appeals opinions that the dissent cites in opposition to our holding are in fact consistent with the rule we uphold today. These cases, like our opinion, distinguish between valuations based on income from the business and income from the land itself, such as rental income. *See City of Fayetteville v. M.M. Fowler, Inc.*, 122

enduring rule, *Pemberton* provides the framework upon which we base our decision today.[3]

B. Application of *Pemberton*

In the present case, the only issue for the jury was the amount of damages DOT owed MMFI. To establish its estimate of fair market value, MMFI offered the testimony of two witnesses: (1) Marvin Barnes, MMFI's president, who detailed the business's lost profits; and (2) Frank Ward, the company's real estate appraiser, who used MMFI's lost business profits to develop a valuation of the land. Both witnesses stated the highest and best use of the property in question was and is its present use as a convenience store and gasoline station both before and after the taking. Mr. Barnes opined that DOT's condemnation impaired the remaining property and made it less valuable for these purposes. MMFI's evidence showed that DOT relocated one of the driveways providing access to its property from Garrett Road

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N.C. App. 478, 479-80, 470 S.E.2d 343, 345 (allowing valuation based on "impact of the [partial] taking on the rental income generated by the property"), *disc. rev. denied*, 344 N.C. 435, 476 S.E.2d 113 (1996); *City of Statesville v. Cloaninger*, 106 N.C. App. 10, 16-17, 415 S.E.2d 111, 115 (allowing appraisal based on income approach without discussion when utilization of other valuation approaches was inadequate and the testimony challenged on appeal was admitted without objection), *appeal dismissed and disc. rev. denied*, 331 N.C. 553, 418 S.E.2d 664 (1992); *Raleigh-Durham Airport Auth. v. King*, 75 N.C. App. 121, 123-24, 330 S.E.2d 618, 619-20 (1985) (allowing valuation based in part on rental revenues); *Raleigh-Durham Airport Auth. v. King*, 75 N.C. App. 57, 62-63, 330 S.E.2d 622, 625-26 (1985) (allowing valuation based in part on hypothetical rental income derived from rental rates charged for other property in the same area). Furthermore, the dissent ignores the Court of Appeals decisions in *Department of Transportation v. Fleming*, 112 N.C. App. 580, 436 S.E.2d 407 (1993) and *Department of Transportation v. Byrum*, 82 N.C. App. 96, 345 S.E.2d 416 (1986), both of which faithfully apply the prevailing rule. *See Fleming*, 112 N.C. App. at 583, 436 S.E.2d at 410 (excluding appraisal based on income from landowners' plumbing and heating business "and not from any rental value attributable to the land"); *Byrum*, 82 N.C. App. at 99, 345 S.E.2d at 418 (excluding lost business profits evidence and noting the landowner "could have offered evidence of the rents received" but did not).

3. The General Assembly is empowered to change this well-established rule and indeed, as of the time of the issuance of this opinion, is studying the issue. The House Select Committee on Eminent Domain Powers was created on 8 December 2005 to study "issues related to the use of the power of eminent domain." N.C. H. Select Comm. on Eminent Domain Powers, *Interim Report to the 2006 Regular Session of the 2005 General Assembly of North Carolina* 9 (2006). In its interim report the Committee indicated it planned to consider "[p]ayment of damages to persons who operate businesses on condemned property that is affected by a condemnation action" when it resumed its work. *Id.* Of course, we cannot know if any legislation will be enacted. Our duty, however, is not to change the law but to apply it as it currently exists. *See Smith v. Norfolk & S. R.R. Co.*, 114 N.C. 445, 464, 114 N.C. 729, 757, 19 S.E. 863, 871 (1894) ("If such a revolutionary change is to be made in the law . . . , it should be done by the Legislature and not by the Court. *Jus dicere non dare.*").

to Durham-Chapel Hill Road. The other two driveways were left in essentially the same location, although one was shorter and steeper after completion of the roadway project.[4]

Following the trial court's limiting instruction, Mr. Barnes testified that MMFI lowered the price of gasoline, and consequently, the profit margin on each gallon sold dropped four cents in the five months following completion of construction. He believed the price reduction was necessary because of decreased customer access to the property resulting from DOT's alterations of the driveways. Mr. Barnes multiplied MMFI's alleged profit decrease by the number of gallons of gasoline sold each year at the station and arrived at a figure of $90,000 as the lost profits MMFI would suffer in the year following the taking. Mr. Barnes then assigned a before value of $1.3 million to the property and an after value of $800,000. He calculated the after value using what he considered to be a "conservative factor" of six times his estimate of yearly lost profits, which resulted in a $540,000 reduction in value.

Although the trial court properly admitted Mr. Barnes's testimony that DOT's condemnation made it more difficult for customers to enter MMFI's service station, it should have excluded the quantified estimate of lost profits and any valuation based solely on this evidence. One factor in determining the value of condemned property is the highest and best use of the land. *Kirkman*, 257 N.C. at 432, 126 S.E.2d at 111. If the condemnation renders the remaining property "unfit or less valuable" for its highest and best use or any use to which it is adapted, the jury may consider the injury to the remaining land in its assessment of fair market value. *Id.* at 432, 126 S.E.2d at 110. Further, a landowner may express an opinion as to the fair market value of the property for the jury to weigh because "it is generally understood that the opinion of the owner is so far affected by bias that it amounts to little more than a definite statement of the maximum figure of his contention." *Helderman*, 285 N.C. at 652, 207 S.E.2d at 725 (citation and internal quotations omitted). However, a landowner may not supplement this opinion with detailed evidence of lost business profits. *Williams*, 252 N.C. at 147-48, 113 S.E.2d at 268. Doing so suggests to the jury that the property owner is entitled to those losses. *See Templeton*, 254 N.C. at 340, 118 S.E.2d at 921 (finding error in trial court's admission of evidence of "loss of rev-

4. The Court of Appeals erroneously stated that DOT reduced the number of entrances to the property from two to one. DOT changed the location of one entrance but did not reduce the total of three driveways serving the property.

enue from fishing as a separate item of damage without taking into account what [e]ffect, if any, this had on the fair market value of the land after the taking").

Any determination of fair market value must be based on the diminution in value—not just for the current owner of the property, but for any owner who would put the property to its highest and best use. In this case, MMFI attempted to recover for harm to its business rather than damage to the land itself.

Like Mr. Barnes's testimony, Mr. Ward's appraisal testimony was improperly admitted to the extent it was based on lost business profits. Mr. Ward testified he used the capitalization of income approach to assess the value of MMFI's land. Although not the preferable method of valuation, applying the income approach was permissible in this case.[5] This appraisal method relies on "actual or projected [income, such as rental income,] . . . earned from the property itself or comparable property." 5 *Nichols* § 19.01, at 19-1; *see id.* § 19.02, at 19-11. However, with the income approach, the appraisal must differentiate between income directly from the property and profits of the business located on the land. 4 *Nichols* § 12B.09, at 12B-56 to -59.

Here, the commercial nature of the property lent itself to appraisals based on comparable rental values even though MMFI did not receive rent from the property. Mr. Ward used his estimate of the rental value of the site in his appraisal of the before value. However, Mr. Ward computed the after value of the real estate by multiplying MMFI's estimate of its lost profits by factors of five and six, averaging the two results, and then subtracting the average from a before value of $1.2 million. Because he based his estimate of the after value solely on MMFI's alleged lost profits, it was improper to allow Mr. Ward's testimony concerning diminution in value.

C. Application of *Kirkman*

We disagree with the Court of Appeals analysis of *Kirkman* in this case. *Kirkman* simply applied our holding in *Pemberton* to its facts and did not, as the Court of Appeals held, create an exception to *Pemberton* allowing admission of specific lost business profits when partial takings result in restricted access to the land. In

5. Methods of appraisal acceptable in determining fair market value include: (1) comparable sales, (2) capitalization of income, and (3) cost. *See* 5 *Nichols* § 19.01, at 19-2. While the comparable sales method is the preferred approach, the next best method is capitalization of income when no comparable sales data are available. 4 *Nichols* § 12B.08, at 12B-47 to -48.

Kirkman, the State Highway Commission took a portion of the landowners' property containing a motel and restaurant, eliminating direct access to the land from the highway. 257 N.C. at 430, 126 S.E.2d at 109. The landowners' expert witness testified he had considered the loss in value of the site as used for a motel and restaurant in assessing the fair market value after the taking. *Id.* at 431-32, 126 S.E.2d at 110. Although he took into account that restricting access to the property resulted in a loss of business, the expert did not "[attempt] to measure the loss of business in percentage or in money." *Id.* at 432, 126 S.E.2d at 110. Rather than looking at the particular losses of the business located on the property, the expert broadly considered the way in which eliminating access to the site made it less valuable for anyone who wished to use it to operate a motel and restaurant. *Id.* The dissent wrongly asserts, "*Kirkman* instructs that using lost revenue evidence to inform market value is distinct from recovering lost revenue itself." *Kirkman* clearly does not permit quantified evidence of lost business profits. There is no difference between using lost profits to determine the fair market value of the land and awarding them as a separate item of damages. By either improper calculation, the business receives compensation for its lost profits.

Thus, in *Kirkman*, we did not approve the use of quantified evidence of lost profits. To the contrary, this Court held unquantified lost business profits are a fact that can be *generally* considered in determining whether there has been a diminution in value in the land that remains after a partial taking. *Id.* Our decision in *Kirkman* must be read with our other cases, which clarify that although the jury may consider adverse effects resulting from condemnation that decrease the value of the remaining property, these effects "are not separate items of damage, recoverable as such, but are relevant only as circumstances tending to show a diminution in the over-all fair market value of the property." *Gallimore v. State Highway & Pub. Works Comm'n*, 241 N.C. 350, 355, 85 S.E.2d 392, 396 (1955) (citing *Raleigh, Charlotte & S. Ry. Co. v. Mecklenburg Mfg. Co.*, 169 N.C. 204, 169 N.C. 156, 85 S.E. 390 (1915)); *see also Pemberton*, 208 N.C. at 471, 181 S.E. at 261 ("[D]iminished value of [condemned] land . . . constitutes a proper item for inclusion in the award, but a business *per se* is not 'property' . . . requiring compensation for its taking under the power of eminent domain." (citing *State v. Suncrest Lumber Co.*, 199 N.C. 199, 154 S.E. 72 (1930))). Allowing the jury to consider that the land may be less valuable due to the condemnation's effect on the landowner's business does not require quantified evidence of lost

profits also be admitted. This is an important distinction which unifies our analysis in both *Kirkman* and *Pemberton*. Neither opinion sanctions admission of quantified lost profits evidence.

Furthermore, the trial court's limiting instruction, based on a misreading of *Kirkman*, did not cure the incorrect admission of lost profits testimony and appraisal testimony based on this evidence. Our Court has expressly held a limiting instruction is insufficient to overcome the error resulting from introduction of quantified evidence of lost business profits. *Pemberton*, 208 N.C. at 470, 472, 181 S.E. at 260, 261. Like *Pemberton*, in this case, "[i]t is manifest from . . . the jury's verdict" that MMFI has been awarded compensation for its alleged loss in business profits. *Id.* at 470, 181 S.E. at 260. Thus, the trial court's use of a limiting instruction failed to remedy the admission of such evidence.

IV. DISPOSITION

Because the trial court erroneously allowed quantified lost business profits testimony and an appraisal based on that evidence, we reverse the Court of Appeals and remand to that court with instructions to further remand this case to the trial court for a new trial.

REVERSED AND REMANDED; NEW TRIAL.

Justice MARTIN dissenting.

"[W]hen the taking renders the remaining land . . . less valuable for any use to which it is adapted, that fact is a proper item to be considered in determining whether the taking has diminished the value of the land itself." *Kirkman v. State Highway Comm'n*, 257 N.C. 428, 432, 126 S.E.2d 107, 110 (1962). Specifically, "[t]he amount of fuel sold at a service station is . . . significant to a buyer and a seller of the property in setting a purchase price." 5 Julius L. Sackman et al., *Nichols on Eminent Domain* § 19.06[2] at 19-44 (rev. 3d ed. 2006). Here, evidence was admitted tending to show that the taking rendered defendant's remaining land less valuable for use as a gasoline station. Accordingly, such evidence was a proper item to be considered by the jury in determining whether the taking has diminished the value of the remaining property. *Id.* § 19.01[1] at 19-5 to 19-6.

I agree with the learned and experienced Superior Court Judge, Robert H. Hobgood, who admitted the *Kirkman* evidence, and our Court of Appeals, which unanimously affirmed Judge Hobgood's

admission of this evidence. The majority opinion differs, overruling *sub silentio* our decision in *Kirkman*, 257 N.C. 428, 126 S.E.2d 107.

In eminent domain proceedings under North Carolina law, " '[a]ny evidence which aids the jury in fixing a fair market value of the land and its diminution by the burden put upon it is relevant and should be heard.' " *Templeton v. State Highway Commission*, 254 N.C. 337, 339, 118 S.E.2d 918, 920 (1961) (quoting *Gallimore v. State Highway & Pub. Works Comm'n*, 241 N.C. 350, 354, 85 S.E.2d 392, 396 (1955) (internal quotation marks omitted)). In the instant case, defendant had the right to present relevant valuation evidence to the jury under this Court's decision in *Kirkman*. Because the majority opinion disregards well settled rules of law in overturning the jury's assessment of fair market value, I respectfully dissent.

The majority opinion essentially characterizes the issue in terms of whether lost profits are directly recoverable, as a separate element of damages, in an eminent domain proceeding. That is not the issue before this Court. Rather, the issue is whether the jury may consider, in its determination of fair market value under N.C.G.S. § 136-112, the diminution in value caused by a taking that renders a tract less valuable for the highest and best use to which it is adapted and used.

In excluding the owner's evidence, which showed how the taking by the North Carolina Department of Transportation (DOT) rendered the property less valuable for use as a gasoline station and convenience store, the majority departs from our forty-four year old landmark decision in *Kirkman*. We explained in *Kirkman* that a jury may consider evidence of lost revenue in determining its assessment of fair market value when the property itself contributes in a direct way to the revenue derived from a tract adapted to its highest and best use. 257 N.C. at 432, 126 S.E.2d at 110-11. North Carolina cases since *Kirkman* have consistently followed this rule of law. *See*, *e.g.*, *City of Fayetteville v. M. M. Fowler, Inc.*, 122 N.C. App. 478, 479-80, 470 S.E.2d 343, 344-45, *disc. rev. denied*, 344 N.C. 435, 476 S.E.2d 113-14 (1996); *City of Statesville v. Cloaninger*, 106 N.C. App. 10, 15-17, 415 S.E.2d 111, 114-16, *appeal dismissed and disc. rev. denied*, 331 N.C. 553, 418 S.E.2d 664 (1992); *Raleigh-Durham Airport Auth. v. King*, 75 N.C. App. 121, 123-25, 330 S.E.2d 618, 619-21 (1985); *Raleigh-Durham Airport Auth. v. King*, 75 N.C. App. 57, 62-64, 330 S.E.2d 622, 625-26 (1985). The majority opinion places North Carolina squarely within a small minority of jurisdictions nationwide that employ a per se ban on the admission of this type of evidence in eminent domain proceedings.

Our General Statutes provide that when DOT's exercise of eminent domain power results in a partial taking of a tract of land, the measure of damages is the difference between the fair market value of the entire tract before the taking and the value of the remainder after the taking. *See* N.C.G.S. § 136-112 (2005). As indicated, "[a]ny evidence which aids the jury in fixing a fair market value of the land and its diminution by the burden put upon it is relevant and should be heard." *Templeton*, 254 N.C. at 339, 118 S.E.2d at 920 (quoting *Gallimore*, 241 N.C. at 354, 85 S.E.2d at 396 (internal quotation marks omitted)). To that end, "[a]ll factors pertinent to a determination of what a buyer, willing to buy but not under compulsion to do so, would pay and what a seller, willing to sell but not under compulsion to do so, would take for the property must be considered." *City of Charlotte v. Charlotte Park & Recreation Comm'n*, 278 N.C. 26, 34, 178 S.E.2d 601, 606 (1971).

The majority's exclusion of evidence showing how the taking rendered the remainder less valuable is fundamentally inconsistent with the statutory requirement that the owner receive fair market value for involuntarily taken property. As Mr. Marvin Barnes, defendant's owner, explained during his testimony, a "willing buyer" would have valued the fair market value of this tract immediately prior to the taking at $1.3 million: "[A]ny person who is knowledgeable about convenience stores and gasoline sales, who knew, in fact, exactly what that store was doing in terms of gallons sold, if he had that information, if there was no store there, he would pay that willingly and in a heartbeat." (t 86) In excluding this evidence, the majority opinion prevents the jury from knowing what a "buyer, willing to buy but not under compulsion to do so, would pay." *City of Charlotte*, 278 N.C. at 34, 178 S.E.2d at 606.

In so doing, the majority's result is fundamentally at odds with the statutory objective of N.C.G.S. § 136-112: To compensate the "unwilling" seller with fair market value. That is, since the income potential of revenue-producing property is the most important characteristic in establishing the value for a voluntary exchange, the majority opinion excludes, as a matter of law, the very information that a willing buyer would want to know about this property. *See* 5 Julius L. Sackman et al., *Nichols on Eminent Domain* § 19.01[1] at 19-6 (rev. 3d ed. 2006) [hereinafter *Nichols*] ("Income derived from the property is recognized as a prime consideration of buyers and sellers in establishing a purchase price, and is therefore admissible as probative of a property's fair market value."). Consequently, despite

the statutory commitment expressed by our General Assembly that owners receive fair market value, we can be assured of one thing on remand of this case: Defendant will not receive fair market value for DOT's involuntary taking of this property.

As the majority recognizes, "injury to a business is not an appropriation of property which must be paid for." *Pemberton v. City of Greensboro*, 208 N.C. 466, 470, 181 S.E. 258, 260 (1935) (quoting *Sawyer v. Commonwealth*, 182 Mass. 245, 247, 65 N.E. 52, 53 (1902)). The Court reaffirmed this rule in *Kirkman*, explaining that "[l]oss of profits or injury to a growing business conducted on property or connected therewith are not elements of recoverable damages in an award for the taking under the power of eminent domain." 257 N.C. at 432, 126 S.E.2d at 110.

But the majority misconstrues *Kirkman's* immediate qualification of this principle: "However, when the taking renders the remaining land unfit or less valuable for any use to which it is adapted, that fact is a proper item to be considered in determining whether the taking has diminished the value of the land itself. If it is found to do so, the diminution is a proper item for inclusion in the award." *Id.* (emphasis added). In the next paragraph, the Court engaged in a more detailed discussion of property use, elaborating: "The highest and most profitable use for which property is adaptable is one of the factors properly considered in arriving at its market value." 257 N.C. at 432, 126 S.E.2d at 111 (emphasis added) (citing *Williams v. State Highway Comm'n of N.C.*, 252 N.C. 514, 114 S.E.2d 340 (1960)).

Kirkman instructs that using lost revenue evidence to inform market value is distinct from recovering lost revenue itself. By analogy, with respect to an aggrieved party's attempt to introduce evidence of lost rents, the Court commented: "When rental property is condemned the owner may not recover for lost rents, but rental value of property is competent upon the question of the fair market value of the property at the time of the taking." 257 N.C. at 432, 126 S.E.2d at 110 (emphasis added) (citing *Palmer v. N.C. State Highway Comm'n*, 195 N.C. 1, 141 S.E. 338 (1928)); *see also Ross v. Perry*, 281 N.C. 570, 575, 189 S.E.2d 226, 229 (1972) ("In determining [a property's] fair market value the rental value, or income, of the property is merely one of the factors to be considered. Income from the property is material only insofar as it throws light upon its market value."). As noted by a leading treatise: "Loss of rents or profits may . . . be admitted to prove diminution in value of remaining

property caused by a taking." *Nichols*, § 19.01[1] at 19-5 to 19-6 (emphasis added).

Despite the critical distinction that *Kirkman* draws between permissible and impermissible use of lost revenue or lost income evidence, the majority opinion misconstrues prior decisions in which landowners in eminent domain proceedings were barred from seeking compensation for lost profits. In *Pemberton*, for example, this Court disallowed the landowners' evidence regarding loss to their dairy business. The Court ruled that the trial judge had improperly instructed the jury to consider such evidence "to estimat[e] the extent of the injury sustained," resulting in an improper award of "compensation for the loss of their dairy business." 208 N.C. at 470, 181 S.E. at 260. Likewise, in *Williams v. State Highway Commission*, the leaseholder alleged that "moving his grocery business to another location cost him business, customers, and good will," and sought to recover therefor. 252 N.C. 141, 145, 113 S.E.2d 263, 267 (1960). The Court found that such damages were noncompensable in condemnation proceedings. *Id.* at 148, 113 S.E.2d at 268-69. In *Williams*, the Court stated: "[L]oss where made up of the profits which might have been made by the business but of which the owner was deprived by reason of the necessary interruption of such business by the condemnor is under the prevailing rule excluded from consideration in determining the damages to which the owner is entitled." *Id.* at 147, 113 S.E.2d at 268. The Court's decisions in *Pemberton* and *Williams* reiterated that evidence of lost profits is not admissible as a direct measure of the "loss . . . made up of the profits," *Williams*, 252 N.C. at 147, 113 S.E.2d at 268, or as an "estimat[e] [of] the injury sustained," *Pemberton*, 208 N.C. at 470, 181 S.E. at 260. These courts, however, did not address the use of lost revenue in appraising a property's market value. As such, they are inapposite to the instant case.

The careful balance struck by this Court in *Kirkman* comports with modern principles of economics in the real estate market. Under the widely accepted income capitalization approach to real estate appraisal, the income derived from a tract of land is relevant to the property's fair market value. *See Nichols* § 19.01[2] at 19-8, § 19.02 at 19-11 to -16; Appraisal Inst., *The Appraisal of Real Estate* 449-68 (11th ed. 1996) [hereinafter *Appraisal*]. Under this approach, land value is appraised by taking the property's projected income stream over several years and capitalizing it by applying a market rate of interest. *See Nichols* § 19.01 at 19-3, 19-8, § 19.02 at 19-11; *Appraisal*

at 462 ("Yield Capitalization"). Alternatively, the property's fair market value may be determined by multiplying its income for a single year by an "income factor." *Appraisal* at 461-62 ("Direct Capitalization").

In valuing location-dependent commercial properties like gas stations, the most effective appraisal technique is often the income capitalization approach. Indeed, at trial in the present case, DOT conceded that the income capitalization approach was "basically the best way to value a property, an income producing property, such as [defendant's property]." (t 57) As this Court has emphasized: "In condemnation proceedings our decisions are to the effect that damages are to be awarded to compensate for loss sustained by the landowner. 'The compensation must be full and complete and include everything which affects the value of the property and in relation to the entire property affected.' " *State Highway Comm'n v. Phillips*, 267 N.C. 369, 374, 148 S.E.2d 282, 286 (1966) (internal citation omitted) (quoting *Abernathy v. S. & W. Ry. Co.*, 150 N.C. 80, 88-89, 150 N.C. 97, 108, 63 S.E. 180, 185 (1908)).

In the present case, the evidence showed that the property upon which the convenience store and gas station was located contributed in a unique way to the revenue derived by the owner based on adaptation of the property to its highest and best use. Witnesses for both DOT and defendant agreed that the highest and best use of the property was as a gas station and convenience store. Mr. Marvin Barnes, defendant's owner, stated that the property in question had been adapted and developed for use as a gas station. Mr. Barnes testified that over the past thirty years he had evaluated and purchased approximately thirty to thirty-five properties for use as gasoline stations or combined gasoline station and convenience stores. Mr. Barnes indicated that convenience is one of the most important factors in determining the value of land used for a gas station. He testified at trial:

> Q In evaluating a piece of property for purchase as a gas station site or a convenience store site, what factors do you look at to determine what the value of that site should be?
>
> A Well, we look at all the surrounding demographics, traffic count and influx and whether the site lays well. Whether or not it will be or can be made convenient for people to buy gasoline there.

Q And what are the—Do you look at the orientation of the building . . . to the road?

A Well we decide which roads. Generally we build on corner sites and we decide which way we want the store to face, which road it will face. And then we try to work out a configuration that will make the store easy for the public to come in to do business and then leave.

Q And is the orientation of the driveways that go in and out of the site, does that have any impact when you're evaluating the site for value?

A Well, it's one of the most important factors. It's crucial. Gasoline is a commodity. And so people won't go out of their way to purchase it. You've got to make it easy for them.

Q When you are evaluating a piece of property for, or making a determination about a potential value of a piece of property for purchase as a service—gas station or convenience store, do you take into or make any projections as to what you believe the potential sales volume of gasoline that that site might be able to make?

A I do. I have to decide how many units or gallons a particular site can sell on an annual basis.

Mr. Barnes also gave extensive testimony detailing why, as a result of the taking, it was less convenient for customers to access the gas station. Before the taking, the property was served by three driveways that were very convenient for customers. The first driveway, which faced Old Chapel Hill Road and centered on the four gasoline dispensers and the convenience store itself, "allow[ed] people to come in, get gas, [and then] either exit on Garrett Road or return to Old Chapel Hill Road." A second driveway, located on Garrett Road near its intersection with Old Chapel Hill Road, "allowed people coming toward Durham on Old Chapel Hill Road to make a left-hand turn and go directly into the station in front of the [gasoline] dispensers to get gas and then leave by [a third driveway located farther from the intersection] on Garrett Road." Alternatively, customers entering on the second driveway "who wanted to continue on down Old Chapel Hill Road toward South Square and Durham after getting gas again could turn around and go back out to Old Chapel Hill Road" on the first driveway.

Everything changed when DOT condemned a substantial portion of defendant's lot. The second pre-taking driveway, located on Garrett Road near its intersection with Old Chapel Hill Road, "was done away with entirely." The other driveway on Garrett Road became "more steep" and less convenient to customers because it was shortened and the resulting grade became more severe. After the taking, the two driveways established by DOT on Old Chapel Hill Road were "not as well positioned." According to Barnes, "As you come up to the store from Durham . . . there is a gradual grade of a crest . . . just on the Durham side of the store. The truth is cars coming there can't see cars coming out of this lower driveway because it's down below them" due to the new grade. Mr. Barnes also stated that the "after taking" driveway layout often forced customers to "make a u-turn to go back out the way they came."

Mr. Barnes testified that this lack of convenience "directly caused" a drop in the margin that this particular property achieved of "four cents" per gallon of gasoline. Based upon this "quantified" data, Mr. Barnes could accurately calculate that gasoline revenues would fall $90,000 in the first full year after completion of the DOT project. Based on the income capitalization approach, which the state conceded was appropriate for income-producing property such as defendant's, Mr. Barnes gave his opinion as to the fair market value of the property before the taking, $1.3 million, and after the taking, $800,000.

Similarly, defendant's expert appraiser, Mr. Frank Ward, testified that the property was worth $1.2 million before the taking and $700,000 after the taking. Mr. Ward stated that "the reduction in income [caused by the taking] had diminished the value of the property." Mr. Barnes and Mr. Ward both testified that they based their "after value" on the loss in revenue directly caused by the impact of the taking on the property itself.

Accordingly, defendant's witnesses gave their opinion as to the before and after value of the property as required by N.C.G.S. § 136-112. They explained the bases of their opinions, which included the "certain" reduction in revenue resulting from DOT's taking.

Twice, Judge Hobgood gave a cautionary instruction, admonishing the jury that it was not to award damages for any loss in business income. The language carefully selected by Judge Hobgood for this instruction was a mirror image of the language of *Kirkman*, far from the "misreading of *Kirkman*" asserted by the majority:

> Loss of profits or injury to a growing business conducted on property or connected therewith are not elements of recoverable damages and an award for the taking under the power of eminent domain. However, when the taking renders the remaining land unfit or less valuable for any use to which it is adapted, that fact is a proper item to be consider[ed] in determining whether the taking has diminished the value of the land itself.

Having been properly charged under *Kirkman*, *see* 257 N.C. at 432, 126 S.E.2d at 110, it was the jury's exclusive role to weigh the evidence, assess credibility where the evidence conflicted, and determine damages. *See Williams*, 252 N.C. at 519, 114 S.E.2d at 343. Nothing in the facts of the instant case differentiates it from cases in which we have allowed evidence of lost rents or lost revenue to inform the market value determination. As noted by our Court of Appeals in the instant case, "[t]he holding in *Kirkman* is not limited to instances where rental property is involved, as it was not a case involving rental property." *Dep't of Transp. v. M.M. Fowler, Inc.*, 170 N.C. App. 162, 164, 611 S.E.2d 448, 450 (2005).

Notably, in the instant case, the majority's opinion aligns North Carolina with a minority of states which apply a per se ban on this type of evidence in eminent domain proceedings. As a leading treatise observes, a majority of states follow the rule that "[r]ents and profits derived from the use to which property is applied are generally admissible as evidence which may properly be considered in ascertaining the market value of property taken by eminent domain." *Nichols* § 19.01[1] at 19-4 to -5, and cases cited therein. Moreover, the same treatise notes the federal courts' adherence to this general rule and cites four federal cases—one of which decided by a federal court in North Carolina, *id.* at 19-5 n.11. *See United States v. 179.26 Acres of Land*, 644 F.2d 367, 371-72 (10th Cir. 1981) ("The major factors to be considered in determining the market value of real estate in condemnation proceedings are: . . . (h) the net income from the land, if the property is devoted to one of the uses to which it could be most advantageously and profitably applied." (internal citation and quotation marks omitted)); *Spitzer v. Stichman*, 278 F.2d 402, 410 (2d Cir. 1960) ("In the absence of a market value, [the award] may properly be determined by what the property brings in the way of earnings to its owner." (citation and internal quotation marks omitted)); *United States v. 298.31 Acres of Land*, 413 F.Supp. 571, 573 (S.D. Iowa 1976) ("To determine the value of property by the capitalization of income method, the following is required: the future net income to be

expected from the property is discounted to the present to provide for both a return on the investment and an amortization of the investment." (citation and internal quotation marks omitted)); *United States v. 121.20 Acres of Land*, 333 F.Supp. 21, 32-34 (E.D.N.C. 1971) (utilizing, in part, an income capitalization approach to value condemned land). Thus, the majority's categorical assertion that federal courts unanimously follow its minority approach is simply inaccurate.

Moreover, although not mentioned by the majority, the methodology and evidence relied upon by appraisal witnesses are subject to few limitations under the law of this state. *See Bd. of Transp. v. Jones*, 297 N.C. 436, 438, 255 S.E.2d 185, 187 (1979) (holding that N.C.G.S. § 136-112 does not restrict expert real estate appraisers to "any particular method of determining the fair market value of property"); *State Highway Comm'n v. Conrad*, 263 N.C. 394, 399, 139 S.E.2d 553, 557 (1965) (holding that an expert real estate appraiser may base his opinion on and testify to a broad range of sources, including those not otherwise admissible). Again, "[a]ll factors pertinent to a determination of what a buyer, willing to buy but not under compulsion to do so, would pay and what a seller, willing to sell but not under compulsion to do so, would take for the property must be considered." *City of Charlotte*, 278 N.C. at 34, 178 S.E.2d at 606.

The majority concedes that evidence of lost revenue or lost profits may be considered broadly in determining the fair market value of condemned land, but objects to the admissibility of "quantified" evidence of lost revenue. Specifically, the majority acknowledges that "the trial court properly admitted Mr. Barnes's testimony that DOT's condemnation made it more difficult for customers to enter MMFI's service station," but objects to the introduction of a "quantified estimate" of lost revenue directly caused by DOT's taking.

If the majority is truly concerned about speculative evidence, then it makes little sense to allow *unquantifiable* evidence while excluding quantifiable evidence based on expert appraisal testimony. It was undisputed in this case that the real estate appraiser's qualifications were impeccable: he testified that he had been in the real estate appraising business for forty-two years, had been certified by the state ever since 1990, the first year certification was required, and had regularly appraised property for the State Department of Transportation for three decades. Given the reliability of the real estate appraisal here—which the state never challenged—it is difficult to find the logic or wisdom in a rule that would exclude the

"hard" evidence provided by Mr. Ward, while allowing more speculative "soft" evidence of unquantifiable (and thus, largely unverifiable) losses.

The majority further hypothesizes: "[I]f business revenues were considered in determining land values, an owner whose business is losing money could receive less than the land is worth." This is a red herring. According to *Nichols*:

> If . . . the condemnor . . . seeks to bring out the actual income from the property, it should first be obliged to offer evidence that the use to which the land was actually put was one of the uses to which the land was best adapted . . . . It would, of course, be absurd to admit evidence of the income to be derived from raising potatoes on a valuable city lot, or renting it for a tennis court or for one-story booths, as evidence of the price it would bring as a real estate investment.

Nichols, § 19.01 at 19-3.

Perhaps most importantly, the General Assembly has not acted to amend the eminent domain statutes even after repeated decisions from this Court and the Court of Appeals over the course of many years indicating that evidence of lost revenue or lost profits may be used under these facts to inform market value. When, as here, the General Assembly has acquiesced in judicial construction of a statute, we must presume that it approves of the interpretation accorded to the statute by the courts. *See Rowan Cty. Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 9, 418 S.E.2d 648, 654 (1992) ("The legislature's inactivity in the face of the Court's repeated pronouncements [on an issue] can only be interpreted as acquiescence by, and implicit approval from, that body."); *see also State v. Jones*, 358 N.C. 473, 484, 598 S.E.2d 125, 132 (2004) ("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 . . . at no time did the General Assembly amend [the relevant] section . . . ."). Thus, the majority opinion not only alters a rule of law that has been in place for nearly half a century, but it also subverts legislative intent. If the General Assembly desired to change our law as the majority does today, it could easily do so. Indeed, as the majority itself points out, the General Assembly is in fact currently studying this issue. *See* N.C. H. Select Comm. on Eminent Domain Powers, *Interim Report to the 2006 Regular Session of the 2005 General Assembly of North Carolina* 9 (2006).

The jury in the present case should be entitled to consider how DOT's taking rendered defendant's property less valuable for use as a gas station and convenience store. In my view, the majority opinion will preclude many owners from receiving their statutory right to fair market value for involuntarily taken property. Far from "inflating" awards, adhering to the well-settled *Kirkman* rule simply ensures that when citizens find themselves in the path of the latest DOT project, they receive "just compensation" for their lost property—as the United States Constitution and Constitution of North Carolina both require. Put simply, the majority's departure from *Kirkman* withholds essential valuation information from the jury. Because the majority decision impairs the jury's ability to perform its duty of assessing fair market value under N.C.G.S. § 132-112, I respectfully dissent.

Justices WAINWRIGHT and TIMMONS-GOODSON join in this dissenting opinion.

W.D. GOLDSTON, JR., JAMES E. HARRINGTON, AND CITIZENS, TAXPAYERS, AND BONDHOLDERS SIMILARLY SITUATED v. STATE OF NORTH CAROLINA AND MICHAEL F. EASLEY, GOVERNOR, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY

No. 328PA04-2

(Filed 15 December 2006)

Declaratory Judgments; Jurisdiction— standing—individual taxpayers—diverting tax levies appropriated for one purpose but disbursed for another

The trial court erred by concluding that individual taxpayers did not have standing to seek relief when they allege government officials violated statutory and constitutional provisions by diverting tax levies appropriated for one purpose but disbursed for another (plaintiffs alleged the transfers of $80,000,000 by the Governor and $125,000,000 by the General Assembly from the Highway Trust Fund to the General Fund were unlawful diversions of Highway Trust Fund assets since disbursement of those funds is not allowed for any projects other than those specified by statute), and a declaratory judgment was the proper remedy for such a claim, because: (1) a declaratory judgment would serve to clarify and settle the legal rights and responsibilities of the

Governor and the General Assembly, as well as the legal status of the taxpayer funds in the Highway Trust Fund; (2) a declaratory judgment would terminate the uncertainty and controversy giving rise to the action; (3) a declaration on the legality and constitutionality of the Governor and the General Assembly's diversions from the Highway Trust Fund may well be the most assured and effective remedy available since if plaintiffs ultimately prevail, their point is made, similar future diversions will be obviated without requiring that the State undertake substantial and undoubtedly disruptive budgetary gyrations necessary to return immediately the funds at issue, and if plaintiffs do not prevail, the Governor and the General Assembly will have done no harm; and (4) while federal standing doctrine can be instructive as to general principles and for comparative analysis, the nuts and bolts of North Carolina standing doctrine are not coincident with federal standing doctrine.

Chief Justice PARKER dissenting.

Justices MARTIN and TIMMONS-GOODSON 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, 173 N.C. App. 416, 618 S.E.2d 785 (2005), affirming a judgment allowing summary judgment for defendants and dismissing plaintiffs' complaint entered 29 January 2004 by Judge Joseph R. John, Sr. in Superior Court, Wake County. Heard in the Supreme Court 16 October 2006.

Boyce & Isley, PLLC, by G. Eugene Boyce and Philip R. Isley, for plaintiff-appellants.

Roy Cooper, Attorney General, by Grayson G. Kelley, Chief Deputy Attorney General; John F. Maddrey, Assistant Solicitor General; and Norma S. Harrell, Special Deputy Attorney General, for defendant-appellees.

Ellis & Winters LLP, by Julia F. Youngman and Thomas H. Segars, and Robert F. Orr for the North Carolina Institute for Constitutional Law, amicus curiae.

EDMUNDS, Justice.

In this case, we must determine whether individual taxpayers have standing to seek relief when they allege government officials

violated statutory and constitutional provisions by diverting tax levies appropriated for one purpose but disbursed for another. If so, we next must decide whether a declaratory judgment is a proper remedy for such a claim. We reaffirm our long-standing holdings that taxpayers have standing to challenge unlawful or unconstitutional government expenditures and conclude that taxpayers are entitled to seek equitable relief in the form of a declaratory judgment. Accordingly, we reverse the opinion of the Court of Appeals.

The General Assembly created the North Carolina Highway Trust Fund in 1989, establishing a special account within the State Treasury to provide multiyear funding for highway construction and maintenance. Act of July 27, 1989, ch. 692, secs. 1.1-2.3, 1989 N.C. Sess. Laws 1933, 1933-97 (codified at N.C.G.S. §§ 136-175 to -184.) The Trust Fund is funded through several revenue streams, including motor vehicle title and registration fees; motor fuels excise taxes; alternative fuels excise taxes; motor vehicle use taxes; and interest and income earned by the Trust Fund. As originally enacted, Trust Fund revenues were to be used only for specified projects of the Intrastate Highway System, for specific urban loop highways, and to provide supplemental appropriations for specific secondary roads and for city streets, with a small portion of the Trust Fund allotted for administrative expenses. In addition, the 1989 statute creating the Trust Fund directed that a portion of motor vehicle use taxes be transferred each year from the Trust Fund to the State's General Fund. *Id.*, sec. 4.1 at 1982-83. In 1989, $279,400,000 was transferred to the General Fund. *Id.*, sec. 4.3 at 1983-84. That sum has been adjusted each succeeding fiscal year in accordance with fluctuations in motor vehicle use tax collections, N.C.G.S. § 105-187.9(b)(2), resulting in a total transfer of $252,400,000 for the 2002-2003 fiscal year.

During the 2001-2002 fiscal year, the State faced a budget shortfall. Because Article III, Section 5(3) of the North Carolina Constitution does not allow a deficit for any fiscal period, on 5 February 2002, the Governor, as administrator of the budget, issued Executive Order Number 19. Exec. Or. 19, 16 N.C. Reg. 1866 (Mar. 1, 2002). Among other measures, this Executive Order stated that the Office of State Budget and Management could "transfer, as necessary, funds from the Highway Trust Fund Account for support of General Fund appropriation expenditures." *Id.* Accordingly, on 8 February 2002, the State Budget Officer directed that $80,000,000 be debited from the Highway Trust Fund and credited to the General Fund.

The State faced another budget shortfall for the 2002-2003 fiscal year, and, effective 1 July 2002, the General Assembly transferred an additional $125,000,000 from the Trust Fund to the General Fund. Current Operations, Capital Improvements, and Finance Act of 2002, ch. 126, sec. 2.2(g), 2001 N.C. Sess. Laws (Extra Sess. 2002) 291, 298-99. The General Assembly treated this transfer as a loan from the Trust Fund to the General Fund, with the General Assembly committing itself to returning the $125,000,000, including interest, to the Trust Fund during fiscal years 2004-2005 through 2008-2009. *Id.*, secs. 2.2(g) at 298-99, 26.14 at 457.

Plaintiffs Goldston and Harrington, as North Carolina citizens and taxpayers, brought suit against the State and Governor in November 2002. Plaintiffs alleged the transfers of $80,000,000 by the Governor and $125,000,000 by the General Assembly from the Trust Fund to the General Fund were unlawful diversions of Trust Fund assets because disbursement of those funds is not allowed for any projects other than those specified by statute. The pertinent statute states that the "special objects" of the Trust Fund are the intrastate highways, urban loops, city streets, secondary roads, debt service, and Department of Transportation administrative expenses. N.C.G.S. § 136-176(b) (2005). In addition, plaintiffs also contended these transfers violated the North Carolina Constitution, which mandates that "[e]very act of the General Assembly levying a tax shall state the special object to which it is to be applied, and it shall be applied to no other purpose." N.C. Const. art. V, § 5. Plaintiffs asserted that the statutorily defined "special objects" of the Trust Fund preclude use of Trust Fund assets for General Fund expenditures. Finally, plaintiffs alleged the Governor exceeded his constitutional authority under Article III, Section 5(3). This provision requires the Governor to administer the budget and to ensure that the State does not incur a deficit for any fiscal period, but does not, plaintiffs contend, authorize the Governor to order transfers from the Trust Fund to the General Fund because the Trust Fund is separate from the General Fund and the annual budget process.

Filing suit both as individual taxpayers and on behalf of other citizens similarly situated, plaintiffs alleged they were injured because they had paid motor fuel taxes, title and registration fees, and other highway taxes which by law were collected expressly for application to the Highway Trust Fund but had been diverted for other uses. They argued defendants' actions constituted both a current and future threat of illegal and unconstitutional depletion of Trust Fund assets.

Plaintiffs requested injunctive and declaratory relief, seeking both a declaration that defendants' actions were illegal and unconstitutional and an immediate return of the monies at issue to the Trust Fund. Plaintiffs later abandoned their prayer for relief in the nature of mandamus through which they had requested return of the funds, but they continued to maintain that they faced the threat of future illegal and unconstitutional disbursements from the Trust Fund. In response, the State and the Governor filed a motion to dismiss, arguing that plaintiffs lacked standing "in that they have failed to allege the necessary facts to bring this suit: based on their status as citizens or taxpayers or bondholders; based on any alleged contractual or impairment claim; or on any other basis establishing their right to bring such claim against defendants." In addition, defendants also claimed that plaintiffs failed to state a claim for relief. Plaintiffs and defendants both filed motions for summary judgment.

The trial court merged its consideration of defendants' motion to dismiss and motion for summary judgment, then granted summary judgment for defendants while denying summary judgment for plaintiffs. Plaintiffs appealed, and on 20 September 2005, a unanimous panel of the Court of Appeals affirmed the trial court "to the extent that the trial court's order is a dismissal for lack of standing." *Goldston v. State*, 173 N.C. App. 416, 422, 618 S.E.2d 785, 790 (2005). Plaintiffs appealed to this Court, and on 2 March 2006, we allowed defendants' motion to dismiss plaintiffs' appeal based on a constitutional question but allowed plaintiffs' petition for discretionary review of the Court of Appeals decision as to the issue of standing. 360 N.C. 363, 629 S.E.2d 850 (2006).

In their briefs, the parties discuss distinctions between "constitutional standing," "direct standing," and "derivative standing" that have never been recognized by this Court. While we do not now pass on the validity of these classifications, we believe that the issue presented in this case can be resolved by reference to our existing case law.

This Court has stated that " '[t]he "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." ' " *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973) (quoting *Flast v. Cohen*, 392 U.S. 83, 99, 20 L. Ed. 2d 947, 961 (1968) (citation omitted)). We rec-

ognized as early as the nineteenth century that taxpayers have standing to challenge the allegedly illegal or unconstitutional disbursement of tax funds by local officials. In *Stratford v. City of Greensboro*, a taxpayer sought to enjoin Greensboro city authorities from street construction that the taxpayer alleged was undertaken for the benefit of a private citizen rather than for the benefit of the public. 124 N.C. 110, 111-12, 124 N.C. 127, 128-30, 32 S.E. 394, 395 (1899). We found " 'no serious question' " that a taxpayer had an equitable right to sue " 'to prevent an illegal disposition of the moneys of the county.' " *Id.* at 114, 124 N.C. at 134, 32 S.E. at 396-97 (quoting *Crampton v. Zabriskie*, 101 U.S. 601, 609, 25 L. Ed. 1070, 1071 (1879)). We observed that "[i]f such rights were denied to exist against municipal corporations, then taxpayers and property owners who bear the burdens of government would not only be without remedy, but be liable to be plundered whenever irresponsible men might get into the control of the government of towns and cities." *Id.* at 114, 124 N.C. at 133-34, 32 S.E. at 396.

Later, in *Freeman v. Board of County Commissioners*, we considered taxpayer actions against county officials. 217 N.C. 209, 7 S.E.2d 354 (1940). In that case, two taxpayers sought an injunction to prevent a board of county commissioners from "making illegal disbursements of public funds by the payment of salaries to unauthorized persons." *Id.* at 212, 7 S.E.2d at 357. Before addressing the merits, we determined that "[f]or this purpose the plaintiffs have a standing in court as parties with a legal interest in the controversy." *Id.* Similarly, in *McIntyre v. Clarkson*, a taxpayer challenged the constitutionality of a statute providing for the appointment of justices of the peace and for payment of their salaries from the general fund of the county. 254 N.C. 510, 513, 119 S.E.2d 888, 890 (1961). Although the defendants argued that the taxpayer did not have a sufficient interest in the controversy to maintain an action for himself and others similarly situated, we concluded the taxpayer had standing, observing that "this Court has in numerous cases determined the constitutionality of statutes upon suit for injunctive relief by taxpayers where the expenditure of public funds is involved." *Id.*

More recently, in *Lewis v. White*, we addressed taxpayer actions against state officials. 287 N.C. 625, 216 S.E.2d 134 (1975), *superceded by statute*, Environmental Policy Act, N.C.G.S. § 113A-4, *as recognized in Charlotte-Mecklenburg Hosp. Auth. v. N.C. Indus. Comm'n*, 336 N.C. 200, 443 S.E.2d 716 (1994). There, taxpayers sued the Art Museum Building Commission, a state agency, alleging that

the Commission's members exceeded their statutory authority in numerous ways, including failure to comply with the Executive Budget Act in expending funds related to constructing a proposed State Art Museum Building. *Id.* at 629, 216 S.E.2d at 137. Although the defendants claimed sovereign immunity should protect them from suit, we held "[t]he proceeds of State tax levies appropriated by the General Assembly for one purpose may not lawfully be disbursed by State officers for a different purpose and a citizen and taxpayer of the State may sue to restrain such illegal diversion of public funds." *Id.* at 644, 216 S.E.2d at 146. A taxpayer's right to seek equitable relief " 'to enjoin the governing body of a municipal corporation *from transcending their lawful powers* or violating their legal duties in any mode which will injuriously affect the taxpayers—such as making an unauthorized appropriation of the corporate funds, or an illegal or wrongful disposition of the corporate property, etc.,—is well settled.' " *Id.* (quoting *Merrimon v. S. Paving & Constr. Co.*, 142 N.C. 427, 431-32, 142 N.C. 539, 545-46, 55 S.E. 366, 367-68 (1906) (comparing the right of taxpayers to sue government officials for illegal disbursements with right of shareholders of a corporation to bring *ultra vires* shareholder suits)).

In a case strikingly similar to the case at bar, we found taxpayer standing when the challenge involved the allegedly illegal diversion of public funds away from highway construction. In *Teer v. Jordan*, the defendants were members of the State Highway and Public Works Commission. 232 N.C. 48, 59 S.E.2d 359 (1950). The General Assembly authorized and the voters approved the issuance of $200,000,000 in State bonds " 'exclusively for . . . secondary roads.' " *Id.* at 49, 59 S.E.2d at 360. The plaintiff was a "resident and taxpayer of Durham County" who operated motor vehicles "over and along the roads of the County and State" and was "subject to the gallonage tax on motor fuels." *Id.* Alleging that the defendants, as chairman and members of the State Highway and Public Works Commission, were "illegally diverting the proceeds of the bond issue, which was to be devoted exclusively to the construction or improvement of secondary roads, to the purchase of machinery and equipment in the amount of $5,000,000," the plaintiff sought a restraining order. *Id.* at 49-50, 59 S.E.2d at 361.

The defendants argued the plaintiff lacked standing to bring the suit. *Id.* at 50, 59 S.E.2d at 361. We disagreed. "[W]e are not disposed to deny the right of an individual who is one of those for whose benefit the law was enacted to be heard on allegations of an illegal diver-

sion of public funds which may in some degree injuriously affect his rights as a citizen, taxpayer, and user of secondary public roads." *Id.* at 51, 59 S.E.2d at 362. An unlawful diversion of funds "might result in the diminution of the amount allocated" to the roads in the taxpayer's county. *Id.* Although we cautioned that government agencies should not be hindered by lawsuits from taxpayers who merely disagree with the policy decisions of government officials, we concluded that "the right of a citizen and taxpayer to maintain an action in the courts to restrain the unlawful use of public funds to his injury cannot be denied." *Id.* (citing, *inter alia*, *Freeman*, 217 N.C. 209, 7 S.E.2d 354 (1940)).

Thus, our cases demonstrate that a taxpayer has standing to bring an action against appropriate government officials for the alleged misuse or misappropriation of public funds. Accordingly, plaintiffs were properly before the trial court.

We next consider the form of relief sought by plaintiffs, who filed a declaratory judgment action under the North Carolina Uniform Declaratory Judgment Act (NCUDJA). N.C.G.S. §§ 1-253 to -267 (2005). The North Carolina Constitution provides that "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law." N.C. Const. Art. I, § 18. Consistent with this mandate, the NCUDJA provides "[a]ny person . . . whose rights, status or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder." N.C.G.S. § 1-254. "A declaratory judgment may be used to determine the construction and validity of a statute." *Town of Emerald Isle v. State*, 320 N.C. 640, 646, 360 S.E.2d 756, 760 (1987).

Although a declaratory judgment action must involve an "actual controversy between the parties," plaintiffs are "not required to allege or prove that a traditional 'cause of action' exists against defendant[s] in order to establish an actual controversy." *Id.* (citations omitted). "[A] declaratory judgment should issue '(1) when [it] will serve a useful purpose in clarifying and settling the legal relations at issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding." *Augur v. Augur*, 356 N.C. 582, 588, 573 S.E.2d 125, 130 (2002) (quoting Edwin Borchard, *Declaratory Judgments* 299 (2d ed. 1941)) (alterations in original); *see also* N.C.G.S. § 1-257 (2005).

Taxpayers in this state have a valid interest in the building and maintenance of roads and highways across North Carolina. Plaintiffs here are similar to the taxpayer plaintiffs in *Teer*, *Lewis*, and other cases discussed above. Their claim of illegal and unconstitutional diversion of funds derived from taxes paid by plaintiffs and others similarly situated is an actual controversy between the parties. A declaratory judgment would serve to clarify and settle the legal rights and responsibilities of the Governor and the General Assembly, as well as the legal status of the taxpayer funds in the Highway Trust Fund. A declaratory judgment also would terminate the uncertainty and controversy giving rise to the action. Accordingly, taxpayers have standing to seek equitable relief and a declaratory judgment when alleging government officials violated statutory or constitutional provisions by diverting tax levies appropriated for one purpose but disbursed for another.

Although plaintiffs originally sought to compel return of the challenged assets to the Trust Fund, they later abandoned that portion of their claim. In other words, plaintiffs are now seeking to obtain a declaration by a court that defendants acted illegally without also seeking additional redress for the wrong. In so doing, plaintiffs contend they will deter future similar actions by the State. We now consider whether plaintiffs may seek only this limited remedy.

Declaratory relief "does not seek execution or performance from the defendant or opposing party." *Declaratory Judgments* at 25 (citing, *inter alia*, N.C.G.S. § 1-253) (noted to be the "preeminent treatise on declaratory judgments," *Auger*, 356 N.C. at 588, 573 S.E.2d at 130). Although a declaratory judgment can seek an executory or coercive decree, *id.* at 26, in some instances "the simple declaratory adjudication of the illegality of the act complained of [is] the most assured and effective remedy available," *id.* at 884. Indeed, "a citizen seeking a declaration of the illegality" of a governmental act "often finds himself enmeshed in the intricacies of certiorari, injunction, mandamus, quo warranto, habeas corpus, or prohibition" and "has often been forced into a mystic maze," when the citizen sought nothing more than to ascertain whether a government action "is valid or not, or, if valid, what it means." *Id.* at 875. "The reluctance of courts to mandamus or enjoin officials, often for sound reasons, is an indication of their special position—a fact which makes a declaration of their duty as effective as a command to perform it or an injunction not to transgress." *Id.* at 876.

Accordingly, declaratory judgment remains an appropriate remedy here. A declaration as to the legality and constitutionality of the Governor's and the General Assembly's diversions from the Trust Fund may well be "the most assured and effective remedy available." If plaintiffs ultimately prevail, their point is made. Similar future diversions will be obviated without requiring that the State undertake substantial and undoubtedly disruptive budgetary gyrations necessary to return immediately the funds at issue. If plaintiffs do not prevail, the Governor and the General Assembly will have done no harm.

We observe that, in finding plaintiffs lack standing to bring their claims against the Governor and the General Assembly, the Court of Appeals relied upon federal standing doctrine. *Goldston*, 173 N.C. App. 416 *passim*, 618 S.E.2d 785 *passim* (citing *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 574 S.E.2d 48 (2002) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 119 L. Ed. 2d 351 (1992)), *disc. rev. denied*, 356 N.C. 675, 577 S.E.2d 628 (2003); *id.* at 419, 618 S.E.2d at 788 (quoting *Neuse River Found.*, 155 N.C. App. at 114, 574 S.E.2d at 52 (quoting *Lujan*, 504 U.S. at 550-61, 119 L. Ed. 2d at 364)). This reliance was misplaced. While federal standing doctrine can be instructive as to general principles (as in our previous reference to *Flask v. Cohen*) and for comparative analysis, the nuts and bolts of North Carolina standing doctrine are not coincident with federal standing doctrine. *Compare Piedmont Canteen Serv., Inc. v. Johnson*, 256 N.C. 155, 166, 123 S.E.2d 582, 589 (1962) ("Only those persons may call into question the validity of a statue who have been *injuriously affected* thereby in their persons, property or constitutional rights." (emphasis added)), *with Lujan v. Defenders of Wildlife*, 504 U.S. at 560, 119 L. Ed. 2d at 364 (noting that one of the three elements of federal standing is an " 'injury in fact' " that is "concrete and particularized").

Finally, we express no opinion as to the legality or constitutionality of the Governor's and the General Assembly's diversions of a total of $205,000,000 from the Trust Fund to the General Fund. Instead, we hold only that these taxpayers, like the taxpayers in *Teer* and *Lewis*, have standing to challenge the government expenditures as illegal or unconstitutional. "The burden is upon the plaintiffs to prove the alleged violations or proposed violations of the law by the defendants. When given the opportunity to present their evidence in support of their allegations, they may or may not 'get to first base,' but they are entitled to their turn at bat, which right the judgment of

the Superior Court erroneously denied them." *Lewis*, 287 N.C. at 644-45, 216 S.E.2d at 147.

The Court of Appeals is reversed. The case is remanded to the Court of Appeals for further remand to the trial court.

REVERSED and REMANDED.

Justices MARTIN and TIMMONS-GOODSON did not participate in the consideration or decision of this case.

Chief Justice PARKER dissenting.

In my view, plaintiffs lack standing to maintain an action under the Uniform Declaratory Judgment Act, N.C.G.S. §§ 1-253 to -267.

This Court has noted that jurisdiction under the Declaratory Judgment Act

> may be invoked "only in a case in which there is an actual or real existing controversy between parties having adverse interests in the matter in dispute." *Lide v. Mears*, 231 N.C. 111, 56 S.E.2d 404, and cases cited. It must appear that "a real controversy, arising out of their opposing contentions as to their respective legal rights and liabilities under a deed, will or contract in writing, or under a statute, municipal ordinance, contract or franchise, exists between or among the parties, . . ." *Light Co. v. Iseley*, 203 N.C. 811, 167 S.E. 56. The existence of such genuine controversy between parties having conflicting interests is a "jurisdictional necessity." *Tryon v. Power Co.*, 222 N.C. 200, 22 S.E.2d 450.
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> "It is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, to give advisory opinions, . . ." *Stacy, C.J.*, in *Poore v. Poore*, 201 N.C. 791, 161 S.E. 532. "The statute (G.S. 1-253 *et seq.*) does not require the Court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise." *Seawell, J.*, in *Tryon v. Power Co.*, *supra*. "The Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice." *Ervin, J.*, in *Lide v. Mears*, *supra*. Also, see *Calcutt v. McGeachy*, 213 N.C. 1, 195 S.E. 49; *Trust Co. v. Whitfield*, 238 N.C. 69, 76 S.E.2d 334, and *NASCAR, Inc. v. Blevins*, 242 N.C. 282, 87 S.E.2d 490.

> The validity of a statute, when *directly and necessarily* involved, *Person v. Watts*, 184 N.C. 499, 115 S.E. 336, may be determined in a properly constituted action under G.S. 1-253 *et seq.*, *Calcutt v. McGeachy*, *supra*; but this may be done only when some specific provision(s) thereof is challenged by a person who is directly and adversely affected thereby. Compare *Fox v. Comrs. of Durham*, 244 N.C. 497, 94 S.E.2d 482.

City of Greensboro v. Wall, 247 N.C. 516, 519-20, 101 S.E.2d 413, 416 (1958). Further,

> a declaratory judgment should issue "(1) when [it] will serve a useful purpose in clarifying and settling the legal relations at issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding." When these criteria are not met, no declaratory judgment should issue. Thus, declaratory judgments should not be made " 'in the air,' or in the abstract, *i.e.* without definite concrete application to a particular state of facts which the court can by the declaration control and relieve and thereby settle the controversy."

Augur v. Augur, 356 N.C. 582, 588, 573 S.E.2d 125, 130 (2002) (citing and quoting Edwin Borchard, *Declaratory Judgments* 299, 306 (2d ed. 1941)). The Court in *Augur* also noted the language in N.C.G.S. § 1-257 allowing a trial court the discretion to refuse to issue a declaratory judgment when such relief " 'would not terminate the uncertainty or controversy giving rise to the proceeding.' " *Id.* at 587-88, 573 S.E.2d at 130 (quoting N.C.G.S. § 1-257 (2001)). Although the Declaratory Judgment Act does not include a specific requirement of an actual controversy between the parties, as the above cited cases amply demonstrate, North Carolina case law imposes such a requirement. *See Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 583, 347 S.E.2d 25, 29 (1986) (citing *Gaston Bd. of Realtors, Inc. v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984)).

Generally,

> [a] case is considered moot when "a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison Cty. Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996). Courts will not entertain such cases because it is not the responsibility of courts to decide "abstract propositions of law." *In re*

Peoples, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978), *cert. denied*, 442 U.S. 929, 61 L. Ed. 2d 297 (1979).

Lange v. Lange, 357 N.C. 645, 647, 588 S.E.2d 877, 879 (2003). A controversy must exist between the parties both at the time the complaint is filed and at the time of hearing. *See Sharpe*, 317 N.C. at 585-86, 347 S.E.2d at 30. Although "[i]t is not necessary for one party to have an actual right of action against another for an actual controversy to exist which would support declaratory relief[,] it is necessary that the Courts be convinced that the litigation appears to be unavoidable." *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 450, 206 S.E.2d 178, 189 (1974) (citing 22 Am. Jur. 2d *Declaratory Judgments* § 11 (1965)).

The cases cited by plaintiffs to support standing involve challenges to *prospective* misuse of tax money or public property. *See Lewis v. White*, 287 N.C. 625, 644-45, 216 S.E.2d 134, 146-47 (1975) (holding that citizens could bring an action to prevent the construction of a "Cultural Complex" with tax funds appropriated solely for the purpose of building an art museum), *superseded on other grounds by statute*, North Carolina Environmental Policy Act of 1971, *codified as* N.C.G.S. §§ 113A-1 to -10, *as recognized in Corum v. Univ. of N.C.*, 330 N.C. 761, 786, 413 S.E.2d 276, 292, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992); *Shaw v. City of Asheville*, 269 N.C. 90, 95-96, 152 S.E.2d 139, 143-44 (1967) (holding that citizens and taxpayers of a municipality had standing to bring a suit challenging the validity of an agreement between a municipality and a cable company because the taxpayers could incur significant expense to repair uncompleted work if the agreement was later determined to be void); *Wishart v. City of Lumberton*, 254 N.C. 94, 96, 118 S.E.2d 35, 36 (1961) (holding that a municipality's citizens and taxpayers had standing to seek an injunction prohibiting the municipality from abandoning and converting to a different use land set aside as a public park).

In this case, however, the challenged governmental action has already occurred. Plaintiffs' complaint alleges that two transfers from the Highway Trust Fund to the General Fund constituted unlawful disbursements contrary to the stated purposes in the relevant statute. Plaintiffs initially sought mandamus relief ordering all transfers be returned to the Highway Trust Fund but withdrew this claim and presently seek only a declaration of the illegality of those *past* transfers.

This Court has previously addressed taxpayer standing to challenge a legislative act. *See Nicholson v. State Educ. Assistance Auth.*, 275 N.C. 439, 168 S.E.2d 401 (1969). In *Nicholson*, this Court noted that it

> will not determine the constitutionality of a legislative provision in a proceeding in which there is no "actual antagonistic interest in the parties." *Bizzell v. Insurance Co.*, 248 N.C. 294, 103 S.E.2d 348. "Only one who is in immediate danger of sustaining a direct injury from legislative action may assail the validity of such action. It is not sufficient that he has merely a general interest common to all members of the public." *Charles Stores v. Tucker*, 263 N.C. 710, 140 S.E.2d 370.

Id. at 447, 168 S.E.2d at 406. The Court also addressed the standing of taxpayers generally:

> A taxpayer, as such, does not have standing to attack the constitutionality of any and all legislation. *Wynn v. Trustees*, 255 N.C. 594, 122 S.E.2d 404; *Carringer v. Alverson*, 254 N.C. 204, 118 S.E.2d 408; *Fox v. Commissioners of Durham*, *supra*; *Turner v. Reidsville*, *supra*. A taxpayer, as such, may challenge, by suit for injunction, the constitutionality of a tax levied, or proposed to be levied, upon him for an illegal or unauthorized purpose. *See*: *Wynn v. Trustees*, *supra; Barbee v. Comrs. of Wake*, 210 N.C. 717, 188 S.E. 314. The constitutionality of a provision of a statute may not, however, be tested by a suit for injunction unless the plaintiff alleges, and shows, that the carrying out of the provision he challenges will cause him to sustain, personally, a direct and irreparable injury, apart from his general interest as a citizen in good government in accordance with the provisions of the Constitution. *D & W, Inc. v. Charlotte*, 268 N.C. 577, 151 S.E.2d 241; *Watkins v. Wilson*, *supra*; *Fox v. Commissioners of Durham*, *supra*; *Sprunt v. Comrs. of New Hanover*, 208 N.C. 695, 182 S.E. 655; *Newman v. Comrs. of Vance*, 208 N.C. 675, 182 S.E. 453.

Id. at 447-48, 168 S.E.2d at 406.

In *Stanley*, cited in the majority, this Court distinguished the case before it from *Nicholson* on "factual and procedural differences," specifically that the plaintiff in *Nicholson* sought an injunction and nullification of prior transactions involving the defendant agency, and that the Court there ruled that plaintiff "showed no threat of

immediate irremediable injury to him," and was, therefore, not entitled to injunctive relief. *Stanley v. Department of Conservation & Dev.*, 284 N.C. 15, 30-31, 199 S.E.2d 641, 651-52 (1973). Thus, the plaintiffs in *Stanley*, a case in which the allegedly unconstitutional actions had not yet occurred, had standing.

Although plaintiffs alleged that defendants "threatened" future withdrawals from the Trust Fund, they acknowledged the General Assembly's authority to "enact new legislation relating to collection [of] taxes prospectively and appropriate prospectively expenditures." Plaintiffs alleged that their claims related to "unlawful and unconstitutional spending of Highway Trust Funds for purposes not specified by tax laws *at the time of collection* as required by the Constitution and the threat of future misappropriation." (Emphasis added.)

Nothing in the record, however, suggests that future action by the Governor or the General Assembly would give rise to a controversy rendering litigation unavoidable. If any future transfers from the Highway Trust Fund to the General Fund are contemplated, the General Assembly could, as conceded by plaintiffs, enact legislation authorizing such transfers. The judgment sought by plaintiffs will do nothing to settle any existing controversy, and any judgment issued in this matter constitutes an advisory opinion. The Declaratory Judgment Act does "not undertake to convert judicial tribunals into counsellors and impose upon them the duty of giving advisory opinions to any parties who may come into court and ask for either academic enlightenment or practical guidance concerning their legal affairs." *Lide v. Mears*, 231 N.C. 111, 117, 56 S.E.2d 404, 409 (1949).

The Court of Appeals below correctly held that the authority cited by plaintiffs as grounds for what they termed "constitutional standing" does "not authorize citizens to sue for a court declaration that past government action, and unthreatened recurrences, are unlawful." *Goldston v. State*, 173 N.C. App. 416, 420, 618 S.E.2d 785, 789 (2005).

For the foregoing reasons, I respectfully dissent.

STATE OF NORTH CAROLINA v. TIMOTHY EARL BLACKWELL

No. 490PA04-2

(Filed 15 December 2006)

1. Sentencing— aggravating factors—submitted by special verdict

The trial court had the authority to submit to the jury the aggravating factor in N.C.G.S. § 15A-1340.16(d)(12) (offense committed while on pretrial release) using a special verdict, in compliance with constitutional limitations. Defendant's argument that *Blakely* error occurred because the trial court allegedly lacked a procedural mechanism by which to submit the aggravating factor to the jury was rejected.

2. Sentencing— *Blakely* error—harmless

A *Blakely* error (the aggravating factor of commission of the offense while on pretrial release was found by the judge, not the jury) was harmless beyond a reasonable doubt where there was uncontroverted and overwhelming evidence of the factor.

3. Constitutional Law— North Carolina—trial by jury—aggravating factors

A trial judge's determination of aggravating factors does not violate Article I, Section 24 of the North Carolina Constitution (conviction of a crime must be by a jury) because aggravating factors are not elements of a crime for these purposes. Because there is no violation, the question of whether harmless error or structural error would apply is not reached.

Upon consideration of the order of the United States Supreme Court entered 30 June 2006 vacating the judgment of this Court in *North Carolina v. Speight*, 548 U.S. ——, 165 L. Ed. 2d 983 (2006) and remanding that case to this Court for further consideration in light of *Washington v. Recuenco*, 548 U.S. ——, 165 L. Ed. 2d 466 (2006). To the extent opinion at 359 N.C. 814, 618 S.E.2d 213, ordered remand for resentencing, it is vacated. Heard on reconsideration in the Supreme Court 17 October 2006.

Roy Cooper, Attorney General, by Amy C. Kunstling, Assistant Attorney General, and Robert C. Montgomery, Special Deputy Attorney General, for the state-appellant.

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

MARTIN, Justice.

In *Washington v. Recuenco*, 548 U.S. ——, 165 L. Ed. 2d 466 (2006), the United States Supreme Court concluded that error under *Blakely v. Washington*, 542 U.S. 296 (2004), was subject to federal harmless error analysis. We therefore review the *Blakely* violation which occurred at defendant's second trial for harmlessness. We also address defendant's argument that federal *Blakely* error violates the Constitution of North Carolina (the State Constitution). We conclude that the trial court's finding of an aggravating factor at defendant's second trial was harmless beyond a reasonable doubt, and did not violate Article I, Section 24 of the State Constitution.

The facts giving rise to the instant criminal prosecution arose over nine years ago. On 27 February 1997, Sherry and Greg Dail made plans to run errands together in Durham with their three young children: Megan, age four; Austin, age two; and Joshua, age one. Because Sherry had to drive to work later that afternoon, they drove separate vehicles but followed one another traveling south on Guess Road. Defendant, Timothy Earl Blackwell, was traveling in his truck in the opposite direction. Defendant had used cocaine and heroin the night before and was intoxicated from drinking beer that morning. Defendant's blood alcohol content was 0.13 grams of alcohol per one hundred milliliters of whole blood, and his blood tested positive for cocaine metabolites and opiates. Police officers later found hypodermic needles and beer cans in defendant's truck.

Several witnesses observed defendant's erratic and dangerous driving, which included driving at speeds estimated to be as high as seventy-five miles per hour. After running a red light and swerving back and forth across the road, defendant's truck jumped a curb, knocked over several trash cans and a mailbox, then crossed several lanes and headed directly into oncoming traffic. After managing to get back into the northbound lane, defendant repeatedly crossed the center line again, forcing several cars off the road. Shortly thereafter, defendant hit the Dails head-on as they approached the intersection of Guess Road and Rose of Sharon Road. Defendant crossed the cen-

ter line, sideswiped Sherry's car, and collided with Greg's van. As a result of the crash, Sherry, Greg, Austin, and Joshua all suffered severe injuries. Megan was killed.

Based on these events, defendant was indicted for the felonies of murder and habitual impaired driving, as well as four counts of felonious assault with a deadly weapon inflicting serious injury. He was also indicted for the following misdemeanors: driving while license revoked, driving left of center, possession of drug paraphernalia, and possession of an open container. Pursuant to a plea agreement, defendant pled guilty to all charges except the murder charge and the four assault charges. At trial, the jury convicted defendant of first-degree murder and all four felony assault charges. Defendant appealed, and the Court of Appeals ordered a new trial. *State v. Blackwell*, 135 N.C. App. 729, 522 S.E.2d 313 (1999). The state appealed to this Court, and we remanded to the Court of Appeals for reconsideration in light of our decision in *State v. Jones*, 353 N.C. 159, 538 S.E.2d 917 (2000), which held that culpable negligence could not be used to satisfy the intent requirements for first-degree murder. *State v. Blackwell*, 353 N.C. 259, 538 S.E.2d 929 (2000) (per curiam) (*Blackwell I*). The Court of Appeals further remanded the case for a new trial. *State v. Blackwell*, 142 N.C. App. 388, 542 S.E.2d 675 (2001).

During his second trial, the jury convicted defendant of one count of second-degree murder, one count of felonious habitual impaired driving, one count of felonious assault with a deadly weapon inflicting serious injury, three counts of misdemeanor assault with a deadly weapon, and assorted other misdemeanors not pertinent to this appeal. The trial court found as an aggravating factor that defendant committed each felony while he was on pretrial release for another charge. The trial court also found the following factors in mitigation with respect to the felonies: (1) defendant participated in a drug or alcohol treatment program; (2) he supported his family; (3) he had a support system in the community; (4) he was a model prisoner while in custody; (5) he completed his GED while in custody; and (6) he was remorseful. After finding that the aggravating factor outweighed the mitigating factors, the trial court sentenced defendant on 13 November 2002 to consecutive sentences in the aggravated range as follows: for second-degree murder, 353 to 461 months; for felony assault, 66 to 89 months; and for habitual impaired driving, 26 to 32 months. Defendant also received sentences for various misdemeanor convictions.

Defendant again appealed to the Court of Appeals, and his case was heard on 30 March 2004, seven days after the United States Supreme Court heard oral arguments in *Blakely v. Washington*, 542 U.S. 296 (2004). The Supreme Court issued its decision in *Blakely* on 24 June 2004, while the Court of Appeals was still considering defendant's case. *Blakely* held that a trial judge's sentencing of a defendant beyond the statutory maximum, based on the trial judge's finding that defendant had acted with deliberate cruelty, violated the defendant's right to trial by jury under the Sixth Amendment to the United States Constitution. In response to *Blakely*, defendant filed a motion for appropriate relief (MAR) in the Court of Appeals. In September 2004, the Court of Appeals granted defendant's MAR and held that defendant had otherwise received a trial free of prejudicial error. The Court of Appeals remanded defendant's case to the trial court for resentencing under *Blakely*. *See State v. Blackwell*, 166 N.C. App. 280, 603 S.E.2d 168 (2004) (unpublished).

In December 2004, this Court allowed the state's petition for discretionary review. While *Blackwell* was pending in this Court, we decided the case of *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), *withdrawn*, 360 N.C. 569, 635 S.E.2d 899 (2006). *Allen* held that *Blakely* error was structural error under the United States Constitution. *Id.* at 444, 615 S.E.2d at 269. In August 2005, this Court modified and affirmed the Court of Appeals decision in *Blackwell*, based on the *Allen* decision. 359 N.C. 814, 618 S.E.2d 213 (2005) (*Blackwell II*). In *Blackwell II*, we ordered remand of defendant's case for resentencing.

In September 2005, this Court allowed the state's motion to stay the issuance of our mandate in *Blackwell II*, 359 N.C. 823, 620 S.E.2d 528 (2005), based on the state's petition for writ of certiorari to the United States Supreme Court in *State v. Speight*, 359 N.C. 602, 614 S.E.2d 262 (2005), *vacated and remanded*, 548 U.S. ——, 165 L. Ed. 2d 983 (2006). Both *Blackwell II* and *Speight* raised the common legal issue of whether *Blakely* error was subject to federal harmless error review. In *Washington v. Recuenco*, 548 U.S. ——, 165 L. Ed. 2d 466, the United States Supreme Court answered this question in the affirmative. Four days after issuing its decision in *Recuenco*, the United States Supreme Court vacated this Court's decision in *Speight* and remanded the case to this Court for further consideration in light of *Recuenco*. *Speight*, 548 U.S. ——, 165 L. Ed. 2d 983.

After the United States Supreme Court issued *Recuenco* and *Speight*, this Court ordered supplemental briefing from the parties

"limited to the questions of whether there was error in this case pursuant to *Washington v. Recuenco* and, if so, whether any error can be found to be harmless beyond a reasonable doubt." 360 N.C. 570, 570, 635 S.E.2d 900, 901 (2006).

Before considering the merits, we pause to consider recent jurisprudential and legislative developments affecting this state's sentencing procedures. In *Apprendi v. New Jersey*, the United States Supreme Court held that a twelve-year sentence based on a judicial finding that the defendant committed a hate crime was unconstitutional when the statutory range for the offense was five to ten years. 530 U.S. 466 (2000). The Court explained that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. In 2004, *Blakely* clarified this rule by holding that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." 542 U.S. at 303 (emphasis omitted). Thus, after *Blakely*, trial judges may not enhance criminal sentences beyond the statutory maximum absent a jury finding of the alleged aggravating factors beyond a reasonable doubt.

In June 2005, the General Assembly amended Chapter 15A of the General Statutes to require the submission of aggravating factors to a jury, which must make its findings using a reasonable doubt standard. *See* Act to Amend State Law Regarding the Determination of Aggravating Factors in a Criminal Case to Conform with the United States Supreme Court Decision in *Blakely v. Washington*, ch. 145, 2005 N.C. Sess. Laws 253 (codified at N.C.G.S. §§ 15A-924(a), -1022.1, -1340.14, -1340.16 (2005)) (the *Blakely* Act).

[1] Mindful of this historical context, we now consider whether the state has carried its burden of proving that the *Blakely* error which occurred at defendant's second trial was harmless beyond a reasonable doubt. In support of his contention that the trial court's failure to submit the aggravating factor in N.C.G.S. § 15A-1340.16(d)(12) to the jury was not harmless, defendant makes two arguments. Defendant first argues that the *Blakely* error which occurred at his second trial was not harmless beyond a reasonable doubt because the trial court allegedly lacked a procedural mechanism by which to submit the challenged aggravating factor to the jury. In support of his contention, defendant cites the following sentence from *Recuenco*:

> If respondent is correct that [state] law does not provide for a procedure by which his jury could have made a finding pertaining to [the aggravating factor at issue], that merely suggests that respondent will be able to demonstrate that the *Blakely* violation in this particular case was not harmless.

Recuenco, 548 U.S. at ——, 165 L. Ed. 2d at 474 (emphasis omitted).

As an initial matter, defendant does not demonstrate why the absence of a statutory mechanism to submit aggravating factors to the jury complicates our task in applying federal harmless error analysis under *Neder v. United States*, 527 U.S. 1, 9 (1999) (holding that the prosecution's failure to submit an element of offense to the jury was harmless error when evidence establishing the element was "overwhelming" and "uncontroverted" (internal quotation marks omitted)). Perhaps defendant's omission stems from the fact that it logically makes no difference whether the trial judge could submit the issue to the jury, because in every instance of *Blakely* error, the judge did not properly do so. *Recuenco* itself emphasizes this point in the sentence immediately following the language on which defendant so heavily relies: "*Blakely* error . . . is of the same nature, whether it involves a fact that state law permits to be submitted to the jury or not . . . ." *Recuenco*, 548 U.S. at ——, 165 L. Ed. 2d at 474. In other words, as a practical matter, it is the same *Blakely* error to which a defendant is subjected, regardless of whether a statutory procedure exists. There is no meaningful difference between having a procedural mechanism and not using it, and not having a procedural mechanism at all. In either event, whether the absence of a procedural mechanism is *Blakely* error in the first place is wholly separate from our duty to weigh the evidence supporting the aggravating factor and determine whether the evidence was so "overwhelming" and "uncontroverted" as to render any error harmless, *see Neder*, 527 U.S. at 9 (internal quotation marks omitted). Defendant offers no compelling argument to connect the two, and we do not believe that the Court in *Recuenco* intended—through a single sentence of dicta—to fundamentally transform otherwise harmless error into reversible error.

Moreover, even assuming this language in *Recuenco* was intended to limit the scope of federal harmless error analysis, it is of no practical consequence, as North Carolina law independently permits the submission of aggravating factors to a jury using a special verdict. A special verdict is a common law procedural device by which the jury may answer specific questions posed by the trial judge that are sepa-

rate and distinct from the general verdict. *See Walker v. N.M. & S. Pac. R.R. Co.*, 165 U.S. 593, 594-95 (1897) (recognizing the use of special verdicts at common law); *see also* Suja A. Thomas, *The Seventh Amendment, Modern Procedure, and the English Common Law*, 82 Wash. U. L.Q. 687, 732-35 (2004) (describing various permutations of special verdicts). Despite the fact that the General Statutes do not specifically authorize the use of special verdicts in criminal trials, it is well-settled under our common law that " 'special verdicts are permissible in criminal cases.' " *State v. Underwood*, 283 N.C. 154, 163, 195 S.E.2d 489, 494 (1973) (quoting *State v. Straughn*, 197 N.C. 691, 692, 150 S.E. 330, 330 (1929)); *see also, e.g.*, *State v. Rick*, 342 N.C. 91, 101, 463 S.E.2d 182, 187 (1995); *State v. Batdorf*, 293 N.C. 486, 494, 238 S.E.2d 497, 503 (1977); *State v. Allen*, 166 N.C. 242, 243, 166 N.C. 265, 266-67, 80 S.E. 1075, 1075-76 (1914); *State v. Holt*, 90 N.C. 749 *passim* (1884); *State v. Watts*, 32 N.C. 266, 268, 10 Ired. 369, 372 (1849).

Special verdicts, however, are subject to certain limitations. After the United States Supreme Court decision in *United States v. Gaudin*, a special verdict in a criminal case must not be a "true" special verdict—one by which the jury only makes findings on the factual components of the essential elements alone—as this practice violates a criminal defendant's Sixth Amendment right to a jury trial. 515 U.S. 506, 511-15 (1995); Kate H. Nepveu, *Beyond "Guilty" or "Not Guilty": Giving Special Verdicts in Criminal Jury Trials*, 21 Yale L. & Pol'y Rev. 263, 263 (2003) [hereinafter Nepveu]; *cf.* N.C. R. Civ. P. 49(a) (allowing a "true" special verdict in civil cases, defining it as "that by which the jury finds the facts only."). Thus, trial courts using special verdicts in criminal cases must require juries to apply law to the facts they find, in some cases "straddl[ing] the line between facts and law" as a "mini-verdict" of sorts. *See* Nepveu at 276 (noting the "most common and widely recognized" use of "special verdicts that combine facts and law" is in RICO and continuing criminal enterprise prosecutions).

Furthermore, requests for criminal special verdicts must require the jury to arrive at its decision using a "beyond a reasonable doubt" standard, since a lesser standard such as "preponderance of the evidence" would violate a defendant's right to a jury trial. *See Blakely*, 542 U.S. at 301. Aside from these limitations, however, we are aware of no limits on our trial courts' broad discretion to utilize special verdicts in criminal cases when appropriate. *See generally* 75B Am. Jur. 2d *Trial* § 1842 (1992 & Supp. 2006) ("A trial court has discretion in

framing a special verdict, which will not be disturbed if the material issues of fact in the case are addressed.").

It is difficult to imagine a more appropriate set of circumstances for the use of a special verdict than those existing in the instant case, in which a special verdict in compliance with the above limitations would have safeguarded defendant's right to a jury trial under *Blakely*. Indeed, our precedent reflects this sentiment, as do decisions from other jurisdictions. Following *Apprendi's* holding that any fact increasing the statutory maximum sentence must be submitted to the jury and found beyond a reasonable doubt, 530 U.S. at 490, we held in *State v. Lucas* that N.C.G.S. § 15A-1340.16A needed reinterpretation because it permitted trial judges to unilaterally enhance a defendant's sentence for firearm use. 353 N.C. 568, 597-98, 548 S.E.2d 712, 731-32 (2001). Notwithstanding the lack of express statutory authority for a jury to find facts supporting the firearm enhancement, this Court held that trial courts had the authority to submit the issue to the jury so that it could deliver a verdict beyond a reasonable doubt as to the firearm enhancement. *Id.* Though we did not specifically refer to such a procedural mechanism as a "special verdict," we described the procedure as follows: "If the jury returns a guilty verdict that includes these factors, the trial judge shall make the finding set out in the statute and impose an enhanced sentence." *Id.* at 598, 548 S.E.2d at 731.

Lucas illustrates the propriety of the special verdict as a procedural mechanism by which a criminal defendant's right to trial by jury may be scrupulously protected. Not surprisingly, other courts have reached similar conclusions. *See*, *e.g.*, *United States v. Flaharty*, 295 F.3d 182, 196 (2d Cir.) (holding that a special verdict and proper jury instructions made any *Apprendi* error in the indictment harmless), *cert. denied*, 537 U.S. 936 (2002); *United States v. Trennell*, 290 F.3d 881, 890 (7th Cir.) (same), *cert. denied*, 537 U.S. 1014 (2002); *United States v. Borders*, 270 F.3d 1180, 1184-85 (8th Cir. 2001) (observing that use of a special verdict contributed to *Apprendi* requirements being satisfied); *State v. Watson*, 346 N.J. Super. 521, 534, 788 A.2d 812, 820 (N.J. Super. Ct. App. Div. 2002) ("However, until [*Apprendi's* application to the Graves Act, which provides for mandatory parole ineligibility for firearms use, is determined], we urge trial judges to try Graves Act cases as if [the jury was required to find the factors relating to the parole disqualifier]. In other words, if use or possession of a firearm is not an element of the offense, a special verdict should be presented to the jury on that issue . . . ."), *cert. denied*, 176

N.J. 278, 822 A.2d 608 (2003); *cf. United States v. Strickland*, 245 F.3d 368, 376 (4th Cir.) (holding that failure to request special interrogatories on drug quantity limits review to plain error), *cert. denied*, 534 U.S. 894, 930 (2001); *United States v. Swatzie*, 228 F.3d 1278, 1281 (11th Cir. 2000) (same), *cert. denied*, 533 U.S. 953 (2001); *Keels v. United States*, 785 A.2d 672, 686 n.10 (D.C. 2001) (noting that "[i]n some instances, [*Apprendi*] may cause the trial judge to utilize special interrogatories or a special verdict form"); *Poole v. State*, 846 So. 2d 370, 388 (Ala. Crim. App. 2001) (per curiam) ("To comply with . . . *Apprendi*, the trial court should submit [a special verdict] . . . that addresses whether the sale [of drugs] occurred within a three-mile radius of a school and/or a housing project."). *See generally* Nepveu at 264 (noting that special verdicts are frequently used to find aggravating factors). Given that *Apprendi* and *Blakely* both implicate the right of a defendant to a trial by jury, these decisions from other courts reinforce that special verdicts are a widely accepted method of preventing *Blakely* error.

Accordingly, prior to the *Blakely* Act, special verdicts were the appropriate procedural mechanism under state law to submit aggravating factors to a jury. Significantly, defendant fails to submit any compelling reason why the use of a special verdict to submit aggravating factors to the jury at his trial would have resulted in prejudice, and our research reveals none. *See generally* David A. Lombardero, *Do Special Verdicts Improve the Structure of Jury Decision-Making?*, 36 Jurimetrics J. 275, 277 (1996) ("The predominant view seems to be that special verdicts benefit the defendant . . . ."). The trial court possessed the authority to submit the aggravating factor in N.C.G.S. § 15A-1340.16(d)(12) to the jury using a special verdict in compliance with the aforementioned constitutional limitations. Defendant's argument is therefore without merit.

[2] Next, we undertake our duty under *Recuenco* to determine whether the trial court's failure to submit the challenged aggravating factor to the jury in the present case was harmless beyond a reasonable doubt. In conducting harmless error review, we must determine from the record whether the evidence against the defendant was so "overwhelming" and "uncontroverted" that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt. *Neder*, 527 U.S. at 9 (internal quotation marks omitted); *see* N.C.G.S. § 15A-1443(b) (2005); *State v. Heard*, 285 N.C. 167, 172, 203 S.E.2d 826, 829 (1974) ("[B]efore a court can find a Constitutional error to be harmless it must be able to declare a belief that such error

was harmless beyond a reasonable doubt."). The defendant may not avoid a conclusion that evidence of an aggravating factor is "uncontroverted" by merely raising an objection at trial. *See*, *e.g.*, *Neder*, 527 U.S. at 19. Instead, the defendant must "bring forth facts contesting the omitted element," and must have "raised evidence sufficient to support a contrary finding." *Id.*

In the instant case, the aggravating factor at issue was the statutory (d)(12) aggravator: "defendant committed the offense while on pretrial release on another charge." N.C.G.S. § 15A-1340.16(d)(12) (2005). Defendant has never disputed, at trial or on appeal, that he was on pretrial release when he committed the present crimes. The evidence presented at defendant's second trial, showing that he committed the underlying crime while on pretrial release, was both uncontroverted and overwhelming. Former State Trooper S.D. Davis testified that he arrested defendant on 4 May 1996 in Pender County and charged him with driving while impaired (DWI) and driving while license revoked. On direct examination, the District Attorney elicited the following testimony from Trooper Davis:

> Q Looking on the front of the citation. Do you see a judgment in the area designated for judgment?
>
> A No, I do not.
>
> Q And that's with respect to the driving while impaired charge, isn't it?
>
> A Yes.
>
> Q With respect to the driving while license revoked charge, do you see a judgment?
>
> A No, I do not.
>
> Q If there is no judgment would it then have been pending at the time of February 27 of 1997?
>
> A Yes, sir.

The citation completed by Trooper Davis was admitted into evidence. It is readily apparent from Trooper Davis's testimony and the physical evidence of the citation itself that defendant's charges for DWI and driving while license revoked were pending at the time of the fatal collision that gave rise to the instant charges. Defendant failed to object to the colloquy set out above and failed to present any evidence or argument to rebut Trooper Davis's testimony that defendant

was on pretrial release at the time he committed the present offenses. In fact, defendant did not even object to the following statement by the District Attorney during sentencing:

> With respect to this single aggravating factor, the defendant committed the offense while on pretrial release for another charge, that being another DWI in Pender County as described by Trooper Davis, if the Court looks at this defendant's history, that's a pretty typical pattern over the last twenty-five years that this defendant has been involved with driving offenses and other violations.

At no point during sentencing did defendant object to the District Attorney's assertion that defendant was on pretrial release at the time of the instant crimes. Nor did defendant present any contrary evidence or argue that the (d)(12) aggravator should not be found or that it lacked aggravating value. Indeed, defendant's only arguments at sentencing related to the presence of various statutory and nonstatutory mitigating factors, all of which the trial court found to exist.

Taken together, Trooper Davis's testimony, the 4 May 1996 citation, defendant's failure to object, and defendant's failure to present any arguments or evidence contesting the sole aggravating factor constitute uncontroverted and overwhelming evidence that defendant committed the present crimes while on pretrial release for another offense. There can be no serious question that if the instant case were remanded to the trial court for a jury determination of the sole aggravating factor presented, the state would offer identical evidence in support of that aggravator in the form of official state documents and the testimony of state record-keepers. Accordingly, the *Blakely* error which occurred at defendant's second trial was harmless beyond a reasonable doubt.

[3] Having completed our review of the federal constitutional question arising from defendant's second trial, we now consider defendant's argument that the trial court's failure to submit an aggravated sentencing factor to the jury is reversible per se under Article I, Section 24 of the State Constitution. Defendant alleges the State Constitution provides additional protection to criminal defendants above and beyond *Recuenco*, and therefore, *Blakely*-type error is reversible per se under state law.

Defendant's argument overlooks, however, that aggravating factors are not, and have never been, elements of a "crime" for purposes

of Article I, Section 24 analysis. This section of the State Constitution provides: "No person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. I, § 24. This Court has held that the finding of aggravating factors by a trial judge instead of a jury does not implicate, and is permissible under, Article I, Section 24 of the State Constitution. *E.g.*, *State v. Denning*, 316 N.C. 523, 524, 342 S.E.2d 855, 856 (1986) ("We hold that because the factors before the trial judge in determining sentencing are not elements of the offense, their consideration for purposes of sentencing is a function of the judge and therefore not susceptible to constitutional challenge based upon . . . article I, section 24 of the North Carolina Constitution."); *State v. Williams*, 295 N.C. 655, 670, 249 S.E.2d 709, 719-20 (1978) ("That the judge rather than the jury makes the crucial factual determinations upon which the ultimate sentence is based does not contravene [the State Constitution] . . . ."), *superseded by statute on other grounds*, *State v. Jerrett*, 309 N.C. 239, 307 S.E.2d 339 (1983). Therefore, because a trial judge's determination of aggravating factors does not violate Article I, Section 24, we do not reach the question of whether harmless error or structural error would apply under this provision of the State Constitution.

In so holding, we acknowledge our duty to fully vindicate defendant's rights under *Blakely*, *see De Canas v. Bica*, 424 U.S. 351, 357-58 n.5 (1976) (observing that, under the Supremacy Clause, state law is preempted only to the extent necessary to effectuate federal law), and to apply the federal rule that aggravating factors are to be treated as elements of the underlying substantive offense for purposes of the Sixth Amendment. *Blakely*, 542 U.S. at 303-04. Having done so, we observe that defendant now seeks greater protection under the State Constitution than what is provided by the Sixth Amendment as interpreted in *Blakely*. In resolving defendant's argument under the State Constitution, we decline to superimpose *Blakely's* definition of aggravator upon the well recognized definition of "crime" under Article I, Section 24 of the State Constitution. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 293 (1982) ("[A] state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, *or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee*." (emphasis added)); *State v. McClendon*, 350 N.C. 630, 635, 517 S.E.2d 128, 132 (1999) (" 'Whether rights guaranteed by the Constitution of North Carolina have been provided and the proper tests to be used in resolving such

issues are questions which can only be answered with finality by this Court.' " (quoting *State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260 (1984))). Accordingly, defendant's claim is without merit.

In summary, the *Blakely* error which occurred at defendant's second trial was harmless beyond a reasonable doubt. Moreover, the trial court's finding of an aggravating factor did not violate Article I, Section 24 of the State Constitution. To the extent the Court of Appeals ordered remand of defendant's case for resentencing, it is reversed. The Court of Appeals opinion, as affirmed at 359 N.C. 814, 618 S.E.2d 213, remains undisturbed in all other respects. The stay entered by this Court on 6 September 2005 is dissolved.

AFFIRMED IN PART AND REVERSED IN PART.

STATE OF NORTH CAROLINA v. GLENN DEVON McKINNEY

No. 622PA05

(Filed 15 December 2006)

1. Search and Seizure— standing to object to search—findings not sufficient

The standing of defendant to challenge the search of a murder victim's house was not clear, and the case was remanded, where the court did not make the requisite findings concerning any reasonable expectation of privacy by defendant in the house at the time of the search.

2. Search and Seizure— illegal entry into murder victim's house—independent probable cause—findings not sufficient

A trial court order denying a murder defendant's motion to suppress evidence was remanded where police officers gathered outside the house which defendant shared with the missing victim; the victim's brother removed an air conditioner, entered the house, and invited officers inside; bloodstains were noted and a search warrant was obtained; and the body was found during the subsequent search. The Court of Appeals correctly found that there was no immediate need of entry and that the trial court erred to the extent that it relied on exigent circumstances. However, the Court of Appeals did not consider whether there

was independent probable cause and the trial court did not specify the factual or legal basis for its decision.

Justices BRADY and TIMMONS-GOODSON 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, 174 N.C. App. 138, 619 S.E.2d 901 (2005), reversing defendant's conviction and the resulting judgment entered 16 April 2004 by Judge L. Todd Burke in Superior Court, Guilford County, and ordering a new trial. Heard in the Supreme Court 19 April 2006.

Roy Cooper, Attorney General, by William B. Crumpler, Assistant Attorney General, for the state-appellant.

Paul F. Herzog for defendant-appellee.

MARTIN, Justice.

Defendant was convicted of first-degree murder in the death of his roommate, Jerry Louis Alston. We affirm in part, reverse in part, and remand with instructions.

On 17 May 2003, Amy Millikan (Amy) advised Greensboro Police Sergeant D.S. Morgan that her roommate, Aja Snipes (Aja), had confided in her that Aja's friend, "Phoenix," had killed his roommate. Amy provided an address on Drexel Road where she believed "Phoenix" lived, although the house number was later determined to be incorrect. Sergeant Morgan relayed this information to Sergeant Jane Allen and dispatched two other officers to the scene. "Phoenix" was later identified as defendant, Glenn Devon McKinney.

Sergeant Morgan drove to Amy and Aja's apartment to interview Aja about her knowledge of the crime. Aja's description of the house where the victim and defendant lived was relayed to Sergeant Allen, who by that time had arrived at Drexel Road. Two other officers were knocking on doors and checking with neighbors to see if they were aware of two males living on Drexel Road. The officers focused on 1917 Drexel Road because "that's the house that seemed to match the description that was being given."

When Sergeant Allen arrived at 1917 Drexel Road, the residence was locked and secured. Sergeant Morgan informed Sergeant Allen that defendant was reportedly driving the victim's blue Jeep

Cherokee, and Sergeant Allen noted that the Jeep was not in the driveway. The victim's sister, Irma Alston (Irma), arrived and informed Sergeant Allen that her brother lived at 1917 Drexel Road. Irma called her brother, Ricky Alston (Ricky), because she believed that he had a key to the house, although when he arrived on the scene he did not have a key with him. Neither Irma nor Ricky had heard from the victim in several days. Sergeant Allen contacted the victim's employer and learned that the victim had not reported for work the day before as scheduled, which was very unusual.

Sergeant Allen continued to gather information, speaking by telephone with the officers who were interviewing Aja and Amy and hearing conversations between other officers and the victim's family members, who had begun to congregate on the sidewalk outside the residence. Sergeant Allen learned that defendant had told Aja that the victim "pulled a knife on me. I didn't know what else to do," and defendant added that the victim "wouldn't be coming back." When Sergeant Allen returned to the residence after briefly leaving the scene, she found that Ricky had entered defendant's house. After removing an air conditioning unit and climbing through the window, Ricky invited the officers into the house. Accompanied by Sergeant Morgan, who by this time had arrived on the scene, Sergeant Allen entered the residence. The officers later testified that they entered the house to look for "a victim who [might] be in need of assistance" and "for any sign that . . . there may in fact have been an assault there, and perhaps . . . a victim somewhere else that [they] needed to continue a search for." As they went through the house, the officers saw what appeared to be blood spatter in the front bedroom. After this discovery, they left the house, instructed other officers to secure the scene, and went to obtain a search warrant.

After securing a search warrant, Sergeant Allen returned to the residence with Detective David Spagnola. While crime scene specialists investigated the front bedroom, Sergeant Allen and Detective Spagnola noticed a large, city-issued trash can in the laundry room. A towel and two candles were on the lid of the can. The officers believed it was unusual for the trash can to be inside the house, and because Detective Spagnola was unable to lift it, they realized it might contain a victim. The officers asked one of the crime scene specialists to photograph the trash can and its contents. Underneath the towel on the lid of the can was a computer-generated note that said "Glenn Devon McKinney did this." When the officers opened the trash can, they discovered the victim's body inside.

Defendant was tried non-capitally, convicted of first-degree murder, and sentenced to life imprisonment without parole. Before trial, defendant filed a motion to suppress the evidence obtained from 1917 Drexel Road. His motion challenged not only the officers' initial warrantless entry into the residence at that address, but also the validity of the subsequent search warrant. Defendant contended that the search warrant was invalid because probable cause for issuing the warrant was based in part on the blood spatter evidence obtained by police during their initial entry into the residence. He argued that all evidence seized during the subsequent search should be suppressed, including the victim's body. In response, the state argued that defendant lacked standing to object to the initial warrantless entry of the house, and, in the alternative, that exigent circumstances authorized law enforcement officials to enter the residence. The trial court denied defendant's motion to suppress.

On appeal, the Court of Appeals reversed defendant's conviction, holding that the trial court erred in denying defendant's motion to suppress because the initial police entry into the residence was unlawful and therefore the subsequent search warrant was "fruit of the poisonous tree." *State v. McKinney*, 174 N.C. App. 138, 141, 619 S.E.2d 901, 904 (2005). This Court allowed the state's petition for discretionary review.

[1] We first examine whether defendant had standing to contest the police searches of the victim's house. When the competency of evidence is challenged and the trial court conducts a *voir dire* to determine admissibility, the general rule is that it should make findings of fact to show the basis of its ruling. *State v. Steen*, 352 N.C. 227, 237, 536 S.E.2d 1, 7 (2000), *cert. denied*, 531 U.S. 1167 (2001). If there is a material conflict in the evidence on *voir dire*, the trial court is required to make findings in order to resolve the conflict. *State v. Smith*, 278 N.C. 36, 41, 178 S.E.2d 597, 601, *cert. denied*, 403 U.S. 934 (1971). In the instant case, the trial court failed to make the requisite findings on the issue of whether defendant had standing to challenge the searches of the victim's house.

A defendant has standing to contest a search if he or she has a reasonable expectation of privacy in the property to be searched. *See State v. Mlo*, 335 N.C. 353, 378, 440 S.E.2d 98, 110-11, *cert denied*, 512 U.S. 1224 (1994). A reasonable expectation of privacy in real property may be surrendered, however, if the property is permanently abandoned. *See, e.g.*, *United States v. Stevenson*, 396 F.3d 538, 544-47 (4th

Cir.) (holding defendant lacked standing to contest search of apartment when evidence "strongly suggest[ed] that he did not intend to return to it"), *cert. denied*, 544 U.S. 1067 (2005); *see also Abel v. United States*, 362 U.S. 217, 240-41 (1960) (upholding search of hotel room because "at the time of the search [defendant] had vacated the room"). When a defendant temporarily abandons property, an intent to return will give rise to a reasonable expectation of privacy. *See United States v. Mulder*, 808 F.2d 1346, 1348 (9th Cir. 1987) (holding defendant had standing to challenge search of hotel room where he returned to hotel only forty-eight hours later than originally intended, hotel billed his credit card for an extra day, and he contacted police to inquire about items later seized); *United States v. Robinson*, 430 F.2d 1141, 1143-44 (6th Cir. 1970) (holding that prosecution failed to establish abandonment of apartment justifying warrantless search thereof when the only admissible evidence of abandonment was premised on defendant's absence and nonpayment of rent for over a month, which shed no light on whether he intended to return). "[A]bandonment will not be presumed . . . [and] must be clearly shown." *Robinson*, 430 F.2d at 1143.

During the suppression hearing in the instant case, the prosecutor raised and properly preserved the issue of defendant's standing to contest the search. Conflicting evidence was presented as to whether defendant maintained a reasonable expectation of privacy in the premises. The trial court did not resolve this conflicting evidence or issue any conclusions as to whether such facts gave rise to a reasonable expectation by defendant of privacy in the victim's residence at the time the search was conducted. Because of this omission, defendant's standing to contest the validity of the search is unclear, and, though we express no opinion on this question, our standard of review compels us to remand the case for findings of fact on this issue.

[2] We now consider the propriety of the initial, warrantless search and the existence of probable cause to support the search warrant. The Fourth Amendment to the United States Constitution protects individuals "against unreasonable searches and seizures" and provides that search warrants may only be issued "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." U.S. Const. amend. IV; *see also* N.C. Const. art. I, § 20 ("General warrants . . . are dangerous to liberty and shall not be granted."). " '[S]earches and seizures inside a home without a warrant are presumptively

unreasonable.' " *State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997) (quoting *Payton v. New York*, 445 U.S. 573, 586 (1980)). "The governing premise of the Fourth Amendment is that a governmental search and seizure of private property unaccompanied by prior judicial approval in the form of a warrant is *per se* unreasonable unless the search falls within a well-delineated exception to the warrant requirement involving exigent circumstances." *State v. Cooke*, 306 N.C. 132, 135, 291 S.E.2d 618, 620 (1982).

Fourth Amendment rights are enforced primarily through the "exclusionary rule," which provides that evidence derived from an unconstitutional search or seizure is generally inadmissible in a criminal prosecution of the individual subjected to the constitutional violation. *See, e.g.*, *State v. Colson*, 274 N.C. 295, 306, 163 S.E.2d 376, 384 (1968) ("Evidence unconstitutionally obtained is excluded in both state and federal courts as an essential to due process—not as a rule of evidence but as a matter of constitutional law."), *cert. denied*, 393 U.S. 1087 (1969). In short, evidence obtained in violation of an individual's Fourth Amendment rights cannot be used by the government to convict him or her of a crime.

The "fruit of the poisonous tree doctrine," a specific application of the exclusionary rule, provides that "[w]hen evidence is obtained as the result of illegal police conduct, not only should that evidence be suppressed, but all evidence that is the 'fruit' of that unlawful conduct should be suppressed." *State v. Pope*, 333 N.C. 106, 113-14, 423 S.E.2d 740, 744 (1992). Only evidence discovered as a result of unconstitutional conduct constitutes "fruit of the poisonous tree." *See Murray v. United States*, 487 U.S. 533, 542 (1988) ("[W]hile the government should not profit from its illegal activity, neither should it be placed in a worse position than it would otherwise have occupied."). This limitation on the "fruit of the poisonous tree" doctrine is known as the "independent source rule," which applies when "a later, lawful seizure is genuinely independent of an earlier, tainted one." *Id.* Under such circumstances, the independent source rule provides that evidence obtained illegally should not be suppressed if it is later acquired pursuant to a constitutionally valid search or seizure. *See, e.g.*, *State v. Phifer*, 297 N.C. 216, 224-26, 254 S.E.2d 586, 590-91 (1979) (upholding the admission of evidence despite an illegal search when "the officers, through lawful means, had independently obtained probable cause to suspect that the [area searched] contained contraband").

United States Supreme Court Justice Lewis Powell explained the interplay between the independent source rule and the constitutional validity of a search warrant:

> The independent-source rule has as much vitality in the context of a search warrant as in any other. Thus, for example, unlawfully discovered facts may serve as the basis for a valid search warrant if knowledge of them is obtained from an independent and lawful source. The obvious and well-established corollary is that the inclusion in an affidavit of indisputably tainted allegations does not necessarily render the resulting warrant invalid. *The ultimate inquiry on a motion to suppress evidence seized pursuant to a warrant is not whether the underlying affidavit contained allegations based on illegally obtained evidence, but whether, putting aside all tainted allegations, the independent and lawful information stated in the affidavit suffices to show probable cause.*

United States v. Giordano, 416 U.S. 505, 554-55 (1974) (Powell, J., concurring in part, dissenting in part) (emphasis added) (citation omitted).

The "excise and re-examine" corollary to the independent source rule, as explained by Justice Powell in *Giordano*, qualifies the cardinal principle that if "information used to obtain [a search] warrant was procured through an unconstitutional seizure[,] . . . the warrant and the search conducted under it were illegal and the evidence obtained from them was 'fruit of the poisonous tree.' " *State v. Lombardo*, 306 N.C. 594, 597-98, 295 S.E.2d 399, 402 (1982) (citing *Wong Sun v. United States*, 371 U.S. 471, 484-88 (1963)). If facts in the affidavit independent of the unlawful police conduct created probable cause to issue the warrant, the warrant is valid. *See, e.g.*, *United States v. Wright*, 991 F.2d 1182, 1186 (4th Cir. 1993) ("The inclusion of tainted evidence does not invalidate a search warrant if enough untainted evidence supports it . . . ."); *United States v. Restrepo*, 966 F.2d 964, 970 (5th Cir. 1992) (noting that a warrant is valid under the independent source rule so long as the "warrant affidavit, once purged of tainted facts . . . contains sufficient evidence to constitute probable cause"), *cert. denied sub nom. Pulido v. United States*, 506 U.S. 1049 (1993); *United States v. Herrold*, 962 F.2d 1131, 1141, 1144 (3rd Cir.) (applying the independent source rule to uphold a warrant because the application contained probable cause apart from the improper information), *cert. denied*, 506 U.S. 958 (1992);

United States v. Johnston, 876 F.2d 589, 592 (7th Cir.) ("[W]e must consider whether 'the untainted information, considered by itself, establishes probable cause for the warrant to issue.' " (quoting *United States v. Alexander*, 761 F.2d 1294, 1300 (9th Cir. 1985))), *cert. denied*, 493 U.S. 953 (1989); *Alexander*, 761 F.2d at 1300 (" '[W]hen an affidavit in support of a search warrant contains information which is in part unlawfully obtained, the validity of a warrant and search depends on whether the untainted information, considered by itself, establishes probable cause for the warrant to issue.' " (quoting *James v. United States*, 418 F.2d 1150, 1151 (D.C. Cir. 1969))); *United States v. Williams*, 633 F.2d 742, 745 (8th Cir. 1980) (" '[I]f the lawfully obtained information amounts to probable cause and would have justified issuance of the warrant apart from the tainted information, the evidence seized pursuant to the warrant is admitted.' " (quoting *James*, 418 F.2d at 1152)); *cf. Franks v. Delaware*, 438 U.S. 154, 155-56 (1978) (holding that when *false statements* are knowingly or recklessly made by an officer in a warrant application, they must be "set to one side, [and if] the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded"); *United States v. Veillette*, 778 F.2d 899, 904 (1st Cir. 1985) (holding that knowingly including a *false statement* in a warrant affidavit is "the functional equivalent" of including illegally obtained information, and the appropriate analysis in either circumstance is to set aside the tainted information and determine if the remaining content supports probable cause), *cert. denied*, 476 U.S. 1115 (1986); *State v. Louchheim*, 296 N.C. 314, 321, 250 S.E.2d 630, 635 ("[T]here was probable cause to support the search warrant on the face of the affidavit when [the] false information is disregarded."), *cert. denied*, 444 U.S. 836 (1979).

In light of these well-settled Fourth Amendment principles, we examine two distinct issues: (1) whether the officers' initial, warrantless entry into the residence at 1917 Drexel Road was constitutionally permissible under a recognized exception[1] to the warrant requirement; and (2) if not, whether sufficient untainted evidence not derived from the unreasonable warrantless search provided probable cause to issue the search warrant. The Court of Appeals properly decided the first issue, but failed to address the second.

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1. The parties and the Court of Appeals have variously labeled the alleged exception to the warrant requirement in the instant case as "exigent circumstances," "emergency activities," and "emergency response." *See generally* Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 6.6(a)-(c), at 451-79 (4th ed. 2004).

The officers' initial search of defendant's house was conducted without a warrant and was therefore presumptively unreasonable. *See Smith*, 346 N.C. at 798, 488 S.E.2d at 213 (noting that searches "inside a home without a warrant are presumptively unreasonable" (citation omitted)). To overcome this presumption, the state had to establish that the officers' initial, warrantless entry fell within a recognized exception to the warrant requirement. *See generally Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978) ("[W]arrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." (citations omitted)); *Vale v. Louisiana*, 399 U.S. 30, 34 (1970) ("[O]nly in a few specifically established and well-delineated situations may a warrantless search of a dwelling withstand constitutional scrutiny . . . . The burden rests on the State to show the existence of such an exceptional situation." (citation and internal quotation marks omitted)). The Court of Appeals found that the circumstances surrounding the initial entry into defendant's house, "when viewed in [their] entirety, d[id] not establish an immediate need of entry into [the] residence." *McKinney*, 174 N.C. App. at 146, 619 S.E.2d at 906-07. Applying established Fourth Amendment law, the Court of Appeals properly concluded "that the State failed to establish any exigent circumstances authorizing the officers' warrantless entry." *Id.* at 146, 619 S.E.2d at 907. We affirm that portion of the Court of Appeals decision which held that "to the extent that the trial court relied upon exigent circumstances in reaching its decision, . . . the trial court erred." *Id.*

Because the officers' initial entry was unlawful, the Court of Appeals concluded that "the subsequent search warrant was based upon 'fruit of the "poisonous" tree.' " *Id.* at 141, 619 S.E.2d at 904. However, the Court of Appeals did not undertake a necessary step in ascertaining the constitutional validity of a search warrant: It did not consider whether the detective's warrant application to the issuing magistrate established probable cause for the warrant independent of the illegally obtained evidence.

If the affidavit supporting a warrant application includes information obtained illegally, "[a] reviewing court should excise the tainted evidence and determine whether the remaining, untainted evidence would provide a neutral magistrate with probable cause to issue a warrant." *United States v. Vasey*, 834 F.2d 782, 788 (9th Cir. 1987) (citation omitted); *see also United States v. Cusumano*, 83 F.3d

1247, 1250 (10th Cir. 1996) (noting that a reviewing court "may disregard allegedly tainted material in the affidavit and ask whether sufficient facts remain to establish probable cause"); *United States v. Korman*, 614 F.2d 541, 547 (6th Cir.) (indicating that the court can "examine the balance of the underlying search warrant affidavit for probable cause in order to determine whether the evidence lawfully obtained was sufficient to [uphold] the search and seizure"), *cert. denied*, 446 U.S. 952 (1980).

Thus, the admissibility of the evidence defendant sought to suppress turns on whether the *untainted* evidence in the supporting affidavit established probable cause to search his residence. Any information in the warrant affidavit that was acquired during the illegal warrantless entry must be excised. Specifically, the following portion of the affidavit must be disregarded, as it was derived exclusively from the officers' unlawful warrantless search:

> Rick Alston then entered the residence, concerned for his brother's well being, and allowed Detective J.F. Allen to walk through it with him. What appears to be blood spatters on the walls of a bedroom, blood smudges in the carpet of the bedroom and bloodstains on one chair were located in the residence. No one was located inside.

With this tainted information excised, the validity of the search warrant (and consequently, the admissibility of the physical evidence seized thereunder) depends on whether the remaining information set forth in the warrant affidavit was sufficient to establish probable cause to search defendant's house.

The existence of probable cause is a "commonsense, practical question" that should be answered using a "totality-of-the-circumstances approach." *Illinois v. Gates*, 462 U.S. 213, 230-31 (1983); *State v. Arrington*, 311 N.C. 633, 637, 319 S.E.2d 254, 257 (1984). " '*Probable cause is a flexible, common-sense standard.* It does not demand any showing that such a belief be correct or more likely true than false.' " *State v. Sinapi*, 359 N.C. 394, 399, 610 S.E.2d 362, 365 (2005) (quoting *State v. Zuniga*, 312 N.C. 251, 262, 322 S.E.2d 140, 146 (1984)). "Reviewing courts should give great deference to the magistrate's determination of probable cause and should not conduct a de novo review of the evidence to determine whether probable cause existed at the time the warrant was issued." *State v. Greene*, 324 N.C. 1, 9, 376 S.E.2d 430, 436 (1989), *judgment vacated on other grounds*, 494 U.S. 1022 (1990).

In the instant case, however, the trial court's order denying defendant's motion to suppress did not specify the factual or legal basis for the decision. *See McKinney*, 174 N.C. App. at 143, 619 S.E.2d at 905 ("[I]n its order denying defendant's motion to suppress, the trial court merely summarized the evidence presented at *voir dire* and offered a blanket conclusion regarding the ultimate issue before it."). Rather, the trial court's order contained limited findings of fact. None of these findings indicates whether the trial court would have found the evidence seized pursuant to the warrant admissible even if the tainted evidence had been excised from the warrant application. As such, the record in this case does not reveal the extent to which consideration of the illegally obtained information affected the trial court's determination that the evidence seized pursuant to the warrant should not be suppressed.

The United States Supreme Court has safeguarded the role of trial courts in making "independent source" determinations with respect to evidence challenged on Fourth Amendment grounds. In *Murray v. United States*, federal agents had entered a warehouse without a warrant, wherein they observed in plain view bales of what they believed to be marijuana. 487 U.S. at 535. They immediately left the premises and obtained a search warrant. *Id.* The agents' warrant application "did not mention the prior entry, and did not rely on any observations made during that entry." *Id.* at 536. Before trial, petitioners Murray and several co-conspirators sought to suppress the evidence seized from the warehouse pursuant to the warrant, arguing that the warrant was tainted by the prior warrantless entry. *Id.* On appeal from the district court's denial of petitioner's motion to suppress, the First Circuit found no error in the trial court's decision, concluding that " '[t]his is as clear a case as can be imagined where the discovery of the contraband . . . was totally irrelevant to the later securing of a warrant . . . . [T]here was no causal link whatever between the illegal entry and the discovery of the challenged evidence . . . .' " *Id.* at 542-43 (quoting *United States v. Moscatiello*, 771 F.2d 589, 604 (1st Cir. 1985)). The Supreme Court disagreed, admonishing: "[I]t is the function of the District Court rather than the Court of Appeals to determine the facts, and we do not think the Court of Appeals' conclusions are supported by adequate findings." *Id.* The Supreme Court ordered that the case be remanded "to the District Court for determination whether the warrant-authorized search of the warehouse was an independent source of the challenged evidence in the sense we have described." *Id.* at 543-44.

Under circumstances similar to the instant case, the United States Court of Appeals for the Ninth Circuit explained why remand to the trial court was more appropriate than unilateral appellate court determination of the warrant's validity:

> The [trial] court . . . never made an inquiry as to whether the search warrant was based upon independent evidence. . . .
>
> While in the present case, there appears to be sufficient independent evidence to have prompted the issuance of a search warrant despite some reference to the illegal entry, this is essentially the duty of the district court to make the appropriate finding. We therefore vacate and remand to the district court to inquire into the basis for the search warrant.

United States v. Driver, 776 F.2d 807, 812 (9th Cir. 1985) (footnote omitted). Other federal circuit courts which have addressed this issue have generally reached the same conclusion: When illegally obtained information was presented in a warrant application and it is unclear whether the trial court would have upheld the validity of the warrant based on the untainted information alone, the appropriate action is to remand the case so that the trial court may determine whether probable cause exists absent the tainted evidence. *See*, *e.g.*, *id.*; *United States v. Runyan*, 275 F.3d 449, 468 (5th Cir. 2001) (remanding to the trial court for a determination whether, absent a reference to illegal pre-warrant search activities, the magistrate would have issued the warrants); *United States v. Richardson*, 949 F.2d 851, 859-60 (6th Cir. 1991) (remanding to the trial court for determination of whether an independent basis supported the search warrant or if discovery of the evidence was inevitable). *But see United States v. Thomas*, 757 F.2d 1359, 1368 (2d Cir.) ("A determination of whether probable cause existed must be made by us independently, as the deference usually accorded to a magistrate's finding of probable cause is not appropriate when the magistrate relied in part on improper information." (citations omitted)), *cert denied. sub nom. Fisher v. United States*, 474 U.S. 819 (1985).

This Court has generally followed the same remedial course of action when "the conclusion [of law] is based upon such a careful assessment of the facts, and actually constitutes the application of a standard to the facts." *State v. McDowell*, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984), *cert. denied*, 476 U.S. 1165 (1986). In such cases, "we believe it is appropriate to hold that the conclusion should, in the first instance, be made by the trial court." *Id.* This

rule recognizes the "trial courts' 'institutional advantages' over appellate courts in the 'application of facts to fact-dependent legal standards.' " *Whitacre P'ship v. BioSignia, Inc.*, 358 N.C. 1, 38, 591 S.E.2d 870, 894 (2004) (quoting *Augur v. Augur*, 356 N.C. 582, 586, 573 S.E.2d 125, 129 (2002)). Thus, we decline to speculate as to the probable outcome in the instant case had the trial court analyzed the validity of the search warrant based only on the legally obtained information in the affidavit. We therefore should afford the trial court an opportunity to evaluate the validity of the warrant using the appropriate legal standard.

Accordingly, the decision of the Court of Appeals is affirmed in part and reversed in part, and the portion of that Court's judgment reversing defendant's conviction is vacated. We therefore remand this case to the Court of Appeals with instructions to remand to the trial court for further proceedings consistent with this opinion. As to the additional questions presented by the state, we conclude that discretionary review of those issues was improvidently allowed.

JUDGMENT VACATED; AFFIRMED IN PART, REVERSED IN PART, AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

Justices BRADY and TIMMONS-GOODSON did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. ALEXANDER CHARLES POLKE

No. 412A05

(Filed 15 December 2006)

1. Sentencing— jury selection—question concerning relative cost of punishments

The trial court did not abuse its discretion at a capital sentencing proceeding by denying defendant's pretrial motion to ask prospective jurors whether they had formed a belief about the relative cost of life imprisonment versus the cost of execution. Defendant was allowed to ask this question after renewing the motion during jury selection.

2. Sentencing— capital—mitigating circumstance—request by defendant—invited error

The trial court in a capital sentencing proceeding did not commit plain error by instructing jurors on the mitigating circumstance of no significant history of prior criminal activity (N.C.G.S. § 15A-2000(f)(1)). The defendant requested the instruction and invited any error; the doctrine of invited error cannot apply when this instruction is erroneously withheld at defendant's request (because the jurors then consider fewer mitigating factors than required by N.C.G.S. § 15A-2000(b)), but it applies when the trial court erroneously submits the mitigating circumstance at defendant's request.

3. Sentencing— mitigating circumstances—emotional disturbance and impaired capacity from pepper spray—not submitted—insufficient evidence

The trial court in a capital sentencing proceeding did not commit plain error by not submitting the mitigating circumstances that defendant was under the influence of mental or emotional disturbance (N.C.G.S. § 15A-2000(f)(2)) and that his capacity to appreciate the criminality of his conduct was impaired (N.C.G.S. § 15A-2000(f)(6)) after he was subjected to pepper spray. Defendant did not call any witnesses on his behalf at sentencing and did not present any additional evidence concerning the effect of pepper spray on him, while the State's evidence tended to show that defendant shot a deputy to evade arrest, although he was angry about being sprayed.

4. Sentencing— aggravating circumstances—failure to submit—no structural error

There was no structural error in a capital sentencing proceeding in the failure to submit the aggravating circumstance that defendant was engaged in the commission or attempt to commit a homicide (N.C.G.S. § 15A-2000(e)(5)). The error cited by defendant is not similar in type or degree to the group of errors that the United States Supreme Court has determined to be structural.

5. Sentencing— prosecutor's argument—no mercy—intervention ex mero motu not required

There was no plain error in a capital sentencing proceeding where the court did not intervene ex mero motu when the prose-

cutor argued to the jurors that their decision should not be motivated by mercy but by the evidence and the law.

6. Sentencing— death—proportionality

A death sentence for a defendant who murdered a law enforcement office to evade arrest was proportionate where the evidence supported the three aggravating circumstances which were found, the sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor, and the case was not substantially similar to any case in which a death penalty was found disproportionate.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge Steve A. Balog on 7 February 2005 in Superior Court, Randolph County, following defendant's plea of guilty to first-degree murder. Heard in the Supreme Court 12 September 2006.

Roy Cooper, *Attorney General*, *by William B. Crumpler*, *Assistant Attorney General*, *for the State.*

Staples S. Hughes, *Appellate Defender*, *by Barbara S. Blackman*, *Assistant Appellate Defender*, *for defendant-appellant.*

WAINWRIGHT, Justice.

On 27 April 2003, defendant Alexander Charles Polke fatally shot Randolph County Sheriff's Deputy Toney Clayton Summey (Deputy Summey) in the neck and abdomen at close range. At the time of the shooting, Deputy Summey and Deputy Nathan Hollingsworth were on the front porch of defendant's home attempting to serve warrants for defendant's arrest. Defendant resisted and shot Deputy Summey with his own service pistol during the ensuing struggle. Defendant next shot and injured Deputy Hollingsworth, who was able to take cover behind his vehicle. Defendant surrendered at the scene to Deputy Lieutenant Johnnie Hussey, who responded to a call for assistance from Deputy Hollingsworth. While repeatedly telling Lieutenant Hussey that Deputy Summey had used pepper spray on him, defendant angrily stated, "[H]e shouldn't have pepper sprayed me," and asked, "Why did he pepper spray me"? While being transported to the Randolph County Sheriff's Department, defendant further stated: "I shouldn't have shot him[;] he was just doing his job."

A Randolph County Grand Jury indicted defendant for first-degree murder on 5 May 2003, and defendant pleaded guilty to the

first-degree murder charge on 31 January 2005. A capital sentencing proceeding was held at the 31 January 2005 Criminal Session of Superior Court, Randolph County, during which defendant called no witnesses and presented no evidence. On 7 February 2005, the sentencing jury returned its verdict, finding three aggravating factors and no mitigating factors, and recommending a capital sentence. Judge Steve A. Balog sentenced defendant to death by order dated that same day.

Additional relevant facts will be provided when necessary to resolve the issues on appeal.

Defendant raises nine assignments of error on appeal. Four assignments concern questions of law that have previously been determined by this Court. Defendant raises these arguments for purposes of preservation. The five remaining assignments of error concern defendant's capital-sentencing proceeding: (1) whether the trial court abused its discretion by denying defendant's pretrial motion to question prospective jurors about the relative cost of executions versus life imprisonment, (2) whether the trial court committed plain error by submitting the N.C.G.S. § 15A-2000(f)(1) mitigating factor to the jury, (3) whether the trial court committed plain error by failing to submit the N.C.G.S. § 15A-2000(f)(2) and (f)(6) mitigating factors to the jury, (4) whether the trial court committed structural error by failing to submit the N.C.G.S. § 15A-2000(e)(5) aggravating factor to the jury, and (5) whether the trial court committed plain error by failing to intervene *ex mero motu* during the State's closing argument.

PRETRIAL MOTIONS

[1] First, defendant argues that the trial court abused its discretion by denying his pretrial motion to ask prospective jurors whether they had formed a belief about the relative cost of life imprisonment versus the cost of execution. Defendant contends that the question was necessary to ensure an impartial jury. We note that the trial court did, in fact, permit defendant to ask this question after defendant renewed his motion during jury selection. In so doing, the trial court asked defense counsel whether he was making a strategic decision to raise this issue, which the prospective jurors may not previously have thought about and which is improper for jurors to consider in a capital case. When defense counsel confirmed that he wanted to ask the question, the court allowed counsel's renewed motion.

Trial courts have broad discretionary power to regulate the manner and extent of jury *voir dire*. *State v. Rogers*, 316 N.C. 203, 218,

341 S.E.2d 713, 722 (1986), *overruled in part on other grounds by State v. Gaines*, 345 N.C. 647, 676-77, 483 S.E.2d 396, 414, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997), *and by State v. Vandiver*, 321 N.C. 570, 573-74, 364 S.E.2d 373, 375-76 (1988). A trial court's discretionary ruling governing *voir dire* will not be overruled on appeal unless it is " 'manifestly unsupported by reason' " or " 'so arbitrary that it could not have been the result of a reasoned decision.' " *State v. T.D.R.*, 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998) (defining the term "abuse of discretion") (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)); *See also State v. Elliott*, 360 N.C. 400, 409, 628 S.E.2d 735, 742, *cert. denied*, —— U.S. ——, 166 L. Ed. 2d 378 (2006) (applying a clear abuse of discretion standard to the trial court's regulation of *voir dire* questioning). We have recently determined that a trial court did not abuse its discretion by denying a defendant's request to ask an identical question in *State v. Elliott*. 360 N.C. at 409-10, 628 S.E.2d at 742. In *Elliott*, this Court explained that "a trial court's discretion is properly used to ensure that a juror can put aside any personal beliefs in the propriety of capital punishment and recommend a sentence in accordance with the trial court's instructions and the law." *Id.* at 410, 628 S.E.2d at 742 (citations omitted).

After thorough review of the record we are satisfied that defendant was permitted to question jurors about their ability to apply the law as given by the trial court. The trial court did not abuse its discretion in denying defendant's pretrial motion. This assignment of error is overruled.

CAPITAL SENTENCING PROCEEDING

[2] Second, defendant argues that the trial court committed plain error by instructing jurors on a statutory mitigating circumstance that was not supported by the evidence: "The defendant has no significant history of prior criminal activity." N.C.G.S. § 15A-2000(f)(1) (2005). The record shows that the court decided to submit the (f)(1) mitigating circumstance at defense counsel's request, after substantial discussion between the court, defense counsel, and the district attorney. Now defendant assigns plain error to the trial court's submission of the N.C.G.S. § 15A-2000(f)(1) mitigating circumstance. Defendant argues that evidence of defendant's prior criminal activity was significant and that improper "submission of the [N.C.G.S. § 15A-2000(f)(1) mitigating] factor skews the entire deliberative process" because "[a] jury improperly presented with the (f)(1) miti-

gating factor may view all [mitigating] factors submitted with cynicism and skepticism and conclude they are unworthy of belief."

In a capital case, mitigating circumstances extenuate or reduce a defendant's moral culpability for a first-degree murder, making the crime less deserving of a capital sentence. *State v. Irwin*, 304 N.C. 93, 104, 282 S.E.2d 439, 446-47 (1981). The North Carolina General Assembly has determined that certain facts, including that a defendant has no significant history of prior criminal activity, have mitigating value as a matter of law. N.C.G.S. § 15A-2000(f) (2005); *State v. Wilson*, 322 N.C. 117, 143-44, 367 S.E.2d 589, 604-05 (1988). Once a mitigating circumstance is found by the jury to exist, jurors must determine the degree to which the circumstance mitigates the crime. N.C.G.S. § 15A-2000(b) (2005). It is not appropriate for jurors to assign no weight to an existing statutory mitigating circumstance. *State v. Howell*, 343 N.C. 229, 240, 470 S.E.2d 38, 44 (1996).

If a defendant produces substantial evidence supporting the (f)(1) mitigating circumstance, the trial judge must submit this circumstance to the jury. N.C.G.S. § 15A-2000(b); *State v. Daniels*, 337 N.C. 243, 272-73, 446 S.E.2d 298, 316 (1994), *cert. denied*, 513 U.S. 1135, 130 L. Ed. 2d 895 (1995). This is true even when the defendant objects to its submission. *State v. Hurst*, 360 N.C. 181, 194, 624 S.E.2d 309, 320, *cert. denied*, —— U.S. ——, 166 L. Ed. 2d 131 (2006). By ensuring that jurors consider all relevant mitigating evidence, N.C.G.S. § 15A-2000(f) thereby protects a capital defendant's right to individualized sentencing. *Kansas v. Marsh*, —— U.S. ——, ——, 165 L. Ed. 2d 429, 440 (2006).

N.C.G.S. § 15A-2000(b) provides:

> In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

N.C.G.S. § 15A-2000(b) (emphases added). Because the language of N.C.G.S. § 15A-2000(b) is mandatory, this Court recently determined that "the doctrine of invited error cannot apply when the [(f)(1)] instruction is [erroneously] withheld at the defendant's request." *Hurst*, 360 N.C. at 194, 624 S.E.2d at 320 (emphasis added). When the

(f)(1) instruction is erroneously withheld, jurors consider fewer mitigating factors than required by N.C.G.S. § 15A-2000(b), and the defendant does not receive the full benefit of all relevant mitigating evidence presented on his behalf. Correspondingly, when the (f)(1) circumstance is erroneously submitted at defendant's request, jurors are presented with more mitigating factors than required by N.C.G.S. § 15A-2000(b). The latter error does not violate the mandate of N.C.G.S. § 15A-2000(b) because the jury considers every mitigating circumstance supported by substantial evidence. Accordingly, we conclude that the doctrine of invited error does apply when the trial court erroneously submits the N.C.G.S. § 15A-2000(f)(1) mitigating factor at defendant's request.

N.C.G.S. § 15A-1443(c) provides that "[a] defendant is not prejudiced by . . . error resulting from his own conduct." N.C.G.S. § 15A-1443(c) (2005). Here, defendant requested that the trial court instruct the jury on the N.C.G.S. § 15A-2000(f)(1) mitigating circumstance. For this reason, we conclude that defendant invited any error resulting from submission of the N.C.G.S. § 15A-2000 (f)(1) mitigating circumstance to the jury. This assignment of error is overruled.

[3] Third, defendant argues that the trial court committed plain error by failing to submit two statutory mitigating circumstances that were supported by the evidence. Defendant contends that evidence tending to show he shot Deputy Summey in response to being sprayed with pepper spray was sufficient to support the N.C.G.S. § 15A-2000(f)(2) and (f)(6) mitigating circumstances. N.C.G.S. § 15A-2000(f)(2) states that "[t]he capital felony was committed while the defendant was under the influence of mental or emotional disturbance," and N.C.G.S. § 15A-2000 (f)(6) states that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired." Defendant argues that the pain and disabling effects caused by the pepper spray resulted in a mental or emotional disturbance and impaired his mental capacity during the shooting. After examining the evidence presented during sentencing, we determine that the trial court did not commit plain error by choosing not to submit these mitigating circumstances to the jury.

A trial court must instruct the jury on every statutory mitigating circumstance that is supported by substantial evidence. *Id.* § 15A-2000(b); *State v. Lloyd*, 321 N.C. 301, 311-12, 364 S.E.2d 316, 323, *judgment vacated on other grounds*, 488 U.S. 807, 102 L. Ed. 2d 18 (1988). This is true even when the defendant fails to request the

instruction or objects to its submission. *State v. Watts*, 357 N.C. 366, 377, 584 S.E.2d 740, 748 (2003), *cert. denied*, 541 U.S. 944, 158 L. Ed. 2d 370 (2004). Substantial evidence is evidence from which "a juror could reasonably find that the circumstance exists." *Id.* (citations and internal quotation marks omitted). Defendant carries the burden to produce substantial evidence that a mitigating circumstance exists, *id.*, and mere speculation or conjecture is not sufficient to satisfy this requirement. *State v. Anderson*, 350 N.C. 152, 183, 513 S.E.2d 296, 315, *cert. denied*, 528 U.S. 973, 145 L. Ed. 2d 326 (1999).

Upon submission of the N.C.G.S. § 15A-2000(f)(2) mitigating circumstance, jurors must consider whether "[t]he capital felony was committed while the defendant was under the influence of mental or emotional disturbance." N.C.G.S. § 15A-2000(f)(2). "Although expert testimony is not always necessary to support a finding of this [N.C.G.S. § 15A-2000(f)(2)] mitigator, the absence of such testimony may be considered when determining whether the (f)(2) mitigator is supported by substantial evidence." *State v. Strickland*, 346 N.C. 443, 463, 488 S.E.2d 194, 206 (1997) (citation omitted), *cert. denied*, 522 U.S. 1078, 139 L. Ed. 2d 757 (1998). "Sheer anger or the inability to control one's temper 'is neither mental nor emotional disturbance as contemplated by this mitigator.' " *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000) (quoting *Strickland*, 346 N.C. at 464, 488 S.E.2d at 206), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001).

Upon submission of the N.C.G.S. § 15A-2000(f)(6) mitigating circumstance, jurors must consider whether "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired." N.C.G.S. § 15A-2000(f)(6). A defendant's actions after killing the victim may demonstrate that he was aware that his acts were criminal. *State v. Gainey*, 355 N.C. 73, 104, 558 S.E.2d 463, 483, *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002).

The record shows that Deputy Summey's pepper spray canister was seventy-one percent full after the shooting. Defendant repeatedly told Lieutenant Hussey that Deputy Summey had used pepper spray on him, angrily stating "He should not have pepper sprayed me" and asking, "Why did he pepper spray me"? Defendant stated in his confession that he took the deputy's service revolver after the deputy sprayed defendant with pepper spray and while the deputy was attempting to administer more spray. However, Lieutenant Hussey testified during sentencing that he did not detect any sign of pepper spray on defendant when defendant was apprehended. Defendant

did not call any witnesses on his behalf at sentencing and did not present any additional evidence concerning the effect of pepper spray on him personally.

After thorough review of the record, we conclude that the evidence presented by the State tends to show that, although defendant was angry about being sprayed with pepper spray, he shot Deputy Summey for the purpose of evading arrest. Defendant did not produce substantial evidence to support the submission of either mitigating circumstance. For these reasons, the trial court did not err by failing to submit these mitigating circumstances *ex mero motu*. This assignment of error is overruled.

[4] Fourth, defendant argues that the trial court committed structural error by failing to submit an aggravating circumstance to the jury: "The capital felony was committed while the defendant was engaged . . . in the commission of, or an attempt to commit . . . any homicide . . . ." N.C.G.S. § 15A-2000(e)(5) (2005). Defendant contends that this aggravating circumstance was supported by the evidence and that failure to submit it rendered the jury's recommended sentence " 'arbitary and, therefore, unconstitutional,' " citing *State v. Case*, 330 N.C. 161, 163, 410 S.E.2d 57, 58 (1991). Thus, defendant concludes that the assigned error is structural and he is entitled to a new sentencing hearing. We make no decision as to whether the trial court should have submitted the N.C.G.S. § 15A-2000(e)(5) aggravating circumstance in this case; rather, we determine that a trial court's failure to submit an aggravating circumstance is not structural error.

The United States Supreme Court has identified only six instances of structural error to date: (1) complete deprivation of right to counsel, *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 at trial, *McKaskle v. Wiggins*, 465 U.S. 168, 79 L. Ed. 2d 122, 104 S. Ct. 944 (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 v. United States*, 520 U.S. 461, 468-69, 137 L. Ed. 2d 718, 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 are subject to harmless error review. *See, e.g.*, *Washington v. Recuenco*, ––– U.S. –––, –––, 165 L. Ed. 2d 466, 474-77 (2006) (applying harmless error analysis to a trial court's failure to submit a sentencing factor to the jury); *Neder v. United States*, 527 U.S. 1, 15, 144 L. Ed. 2d 35, 51 (1999) (applying harmless error analysis to a trial court's omission of an element of the offense from the jury charge); *Arizona v. Fulminante*, 499 U.S. 279, 295, 113 L. Ed. 2d 302, 322 (1991) (applying harmless error analysis to trial court's admission of a coerced confession); and *Rose v. Clark*, 478 U.S. 570, 579, 92 L. Ed. 2d 460, 471 (1986) ("Placed in context, the erroneous malice [jury] instruction [at issue] does not compare with the kinds of errors that automatically require reversal of an otherwise valid conviction.") 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 ("[I]f 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 the designation "structural error" is reserved for errors that "necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence," *Neder*, 527 U.S. at 9, 144 L. Ed. 2d at 47 (emphasis omitted).

The error cited by defendant is not similar in type or degree to the group of errors that the United States Supreme Court has determined to be structural. Accordingly, we decline to apply structural error analysis to the trial court's failure to submit an aggravating circumstance. This assignment of error is overruled.

[5] Fifth, defendant argues that the trial court committed plain error by failing to intervene *ex mero motu* during the State's closing argument. Defendant contends that the district attorney improperly told jurors that their decision should not be motivated by mercy; rather, jurors should consider the evidence and the law. This Court has previously upheld similar closing arguments in *State v. Hoffman*, *State v. Bishop*, and *State v. Frye*. *State v. Hoffman*, 349 N.C. 167, 191, 505 S.E.2d 80, 94 (1998), *cert. denied*, 526 U.S. 1053, 143 L. Ed. 2d 522 (1999); *State v. Bishop*, 343 N.C. 518, 553-54, 472 S.E.2d 842, 861 (1996), *cert. denied*, 519 U.S. 1097, 136 L. Ed. 2d 723 (1997); *State v. Frye*, 341 N.C. 470, 505-06, 461 S.E.2d 664, 682-83 (1995), *cert. denied*, 517 U.S. 1123, 134 L. Ed. 2d 526 (1996). We determine that these pre-

vious decisions govern the issue *sub judice* and that, in context, the district attorney's argument was not grossly improper. This assignment of error is overruled.

PRESERVATION ISSUES

Defendant has briefed four additional assignments of error for purposes of preservation. These assignments concern questions of law that this Court has previously resolved contrary to defendant's position: (1) whether the trial court subjected defendant to double jeopardy by submitting both the N.C.G.S. § 15A-2000 (e)(4) and (e)(8) aggravating circumstances, (2) whether the trial court committed plain error by instructing the jury pursuant to the North Carolina pattern jury instruction on mitigating circumstances, (3) whether the absence of aggravating circumstances in the indictment deprived the trial court of jurisdiction to enter a death sentence, and (4) whether a short-form indictment is sufficient to charge defendant with first-degree murder. This Court has carefully considered defendant's arguments on these issues and we find no compelling reason to depart from our prior holdings. For this reason, defendant's assignments of error are overruled.

PROPORTIONALITY

[6] Having found no error in defendant's capital sentencing proceeding, we must now determine: (1) whether the evidence presented during sentencing supports the aggravating circumstances found by the jury, (2) whether the jury's imposition of the death penalty was influenced by "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) (2005).

Here, jurors found that three aggravating circumstances existed beyond a reasonable doubt: (1) the murder was committed for the purpose of preventing a lawful arrest, (2) the murder was committed against a law enforcement officer while in the performance of his official duties, and (3) the murder was part of a course of conduct in which the defendant engaged and the course of conduct included the commission by defendant of other crimes of violence against other persons. *Id.* § 15A-2000(e)(4), (e)(8), and (e)(11). The trial court also submitted one statutory and seven nonstatutory mitigating circumstances to the jury for consideration, but jurors did not find any of these mitigating circumstances to exist.

After reviewing the records, transcripts, briefs, and oral arguments, we conclude that the evidence supports the jury's finding of all three aggravating circumstances. Additionally, we conclude, based on a thorough review of the record, that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor. Thus, the final statutory duty of this Court is to conduct proportionality review.

The purpose of proportionality review is "to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *State v. Holden*, 321 N.C. 125, 164-65, 362 S.E.2d 513, 537 (1987) (citing *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713), *cert. denied*, 486 U.S. 1061, 100 L. Ed. 2d 935 (1988). Proportionality review also acts "[a]s a check against the capricious or random imposition of the death penalty." *State v. Barfield*, 298 N.C. 306, 354, 259 S.E.2d 510, 544 (1979), *cert. denied*, 448 U.S. 907, 65 L. Ed. 2d 1137 (1980), *overruled in part on other grounds by State v. Johnson*, 317 N.C. 193, 203-04, 344 S.E.2d 775, 782 (1986). In conducting proportionality review, we compare the present case with other cases in which this Court has concluded that the death penalty was disproportionate. *State v. McCollum*, 334 N.C. 208, 240, 433 S.E.2d 144, 162 (1993), *cert. denied*, 512 U.S. 1254, 129 L. Ed. 2d 895 (1994).

We have found the death sentence disproportionate in eight cases. *State v. Kemmerlin*, 356 N.C. 446, 573 S.E.2d 870 (2002); *State v. Benson*, 323 N.C. 318, 372 S.E.2d 517 (1988); *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987); *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

We conclude that this case is not substantially similar to any case in which this Court has found the death penalty disproportionate. The evidence shows that defendant murdered a law enforcement officer for the purpose of evading lawful arrest. "[T]he N.C.G.S. § 15A-2000(e)(4) and (e)(8) aggravating circumstances reflect the General Assembly's recognition that 'the collective conscience requires the most severe penalty for those who flout our system of law enforcement.' " *State v. Golphin*, 352 N.C. 364, 487, 533 S.E.2d 168, 247 (2000) (quoting *State v. Brown*, 320 N.C. 179, 230, 358 S.E.2d 1, 33, *cert. denied*, 484 U.S. 970, 98 L. Ed. 2d 406 (1987)), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

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

State v. Nicholson, 355 N.C. 1, 72, 558 S.E.2d 109, 155 (quoting *State v. Hill*, 311 N.C. at 488, 319 S.E.2d at 177 (Mitchell (later C.J.), concurring in part and dissenting in part), *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002). Additionally, this Court has never found a death sentence to be disproportionate when the jury found more than two aggravating circumstances to exist, and we have found the N.C.G.S. § 15A-2000 (e)(11) aggravating circumstance, standing alone, sufficient to support a death sentence. *See State v. Bacon*, 337 N.C. 66, 110 n.8, 446 S.E.2d 542, 566 n.8 (1994), *cert. denied*, 513 U.S. 1159, 115 S. Ct. 1120, 130 L. Ed. 2d 1083 (1995).

Although we compare this case with the cases in which this Court has found the death penalty to be proportionate, *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164, "we will not undertake to discuss or cite all of those cases each time we carry out that duty." *Id.*; *accord State v. Gregory*, 348 N.C. 203, 213, 499 S.E.2d 753, 760, *cert. denied*, 525 U.S. 952, 142 L. Ed. 2d 315, (1998). Whether a sentence of death is "disproportionate in a particular case ultimately rest[s] upon the 'experienced judgments' of the members of this Court." *State v. Green*, 336 N.C. 142, 198, 443 S.E.2d 14, 47 (citation omitted), *cert. denied*, 513 U.S. 1046, 130 L. Ed. 2d 547 (1994). Based upon the crime defendant committed and the record in this case, we are convinced the sentence of death, recommended by the jury and ordered by the trial court, is not disproportionate or excessive.

Accordingly, we conclude defendant received a fair capital sentencing proceeding, free from prejudicial error. The sentence entered by the trial court is left undisturbed.

NO ERROR.

STATE OF NORTH CAROLINA v. GARY ANTHONY WILLIAMS

No. 118A06

(Filed 15 December 2006)

Criminal Law— recess to decide whether to present evidence—5 minutes—abuse of discretion

The trial court abused its discretion by allowing a defendant only five minutes at the end of the State's evidence to decide whether to present his evidence, and his convictions for first-degree murder (noncapital) and discharging a firearm into occupied property were reversed and remanded. The defendant was facing life in prison and had to make a decision of paramount importance; the five-minute limitation was in no way justified by administrative efficiency.

Justice EDMUNDS dissenting.

Chief Justice PARKER and Justice NEWBY join in the dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 175 N.C. App. 640, 625 S.E.2d 147 (2006), finding no prejudicial error in judgments entered 30 June 2004 by Judge Ernest B. Fullwood in Superior Court, Wayne County. Heard in the Supreme Court 12 September 2006.

Roy Cooper, Attorney General, by Francis W. Crawley, Special Deputy Attorney General, for the State.

Marilyn G. Ozer for defendant-appellant.

TIMMONS-GOODSON, Justice.

Gary Anthony Williams ("defendant") appeals his convictions for first-degree murder and discharging a firearm into occupied property. For the reasons discussed herein, we hold that the trial court erred in granting defendant and his counsel a mere five minutes to decide whether to present evidence in defendant's trial. Therefore, we reverse the Court of Appeals and remand this case to that court with instructions to vacate defendant's convictions and to further remand this case to the trial court for a new trial.

On 6 October 2003, defendant was indicted for first-degree murder and discharging a firearm into occupied property. Defendant was

tried non-capitally at the 28 June 2004 session of Wayne County Superior Court. Before the matter came on for trial, the parties argued several motions, including a motion filed by defendant demanding a list of witnesses the State intended to call during the trial. The following colloquy took place:

> MR. DELBRIDGE [DISTRICT ATTORNEY]: I think what Mr. Spence [defense counsel] is asking me to give him is a list of the witnesses in order in which I intend to call them specifically and I've given notice to all potential witnesses and I think that's sufficient at this juncture.
>
> MR. SPENCE: I don't need list of order but which ones he'll call. I have a group of 20 or 30 that he has and unless he'll call all 20 or 30 . . .
>
> THE COURT: Well, as I understand it what he said was he intends to call the witnesses that he gave you, the names he gave you. Now, whether or not they in fact are called, of course you know that's a subject—that's subject to change. You understand that.
>
> MR. SPENCE: I understand, Judge.
>
> THE COURT: I don't know anything else we can do with that, Mr. Spence.
>
> MR. SPENCE: Specifically what I want to know is what witness he'll actually call to the witness stand during the trial of this case.
>
> THE COURT: Well, you know, I don't think you can confine him to require him to call witnesses. He can tell you which witnesses he intends to call. He's done that. I don't think the law requires him to do more than that. So to the extent that your motion requires more than that, then it's denied.

Defendant's case proceeded to trial later that morning.

After presenting the testimony of twelve witnesses, the State rested its case at 4:08 p.m. on Tuesday, 29 June 2004. At that time, the following exchange took place between defense counsel and the trial court:

> MR. SPENCE: . . . I would like to adjourn for the day or at least give us some time to make a decision to offer any evidence at all. We have talked about this, family has talked about this

but couldn't make a decision until we heard everything. We just heard everything.

THE COURT: Give you five minutes, Mr. Spence.

MR. SPENCE: Can you give me 15 minutes?

THE COURT: No. No, sir. You've got five minutes. You knew we'd be at this point.

MR. SPENCE: Judge, I did but we truly didn't know what all the evidence would be.

THE COURT: You've got five minutes.

After the short recess, defense counsel indicated to the court that defendant would present no evidence. The trial court then sent the jurors home for the day and conducted the charge conference. The next morning, after closing arguments and a brief deliberation, the jury found defendant guilty of first-degree murder and discharging a firearm into occupied property. The trial court sentenced defendant to life imprisonment without parole for the murder conviction and a term of twenty-nine to forty-four months for discharging a firearm into occupied property.

Defendant appealed his conviction, and on 7 February 2006, a majority of the Court of Appeals found no prejudicial error, with one judge concurring in part but dissenting as to the five minute recess issue. *State v. Gary A. Williams*, 175 N.C. App. 640, 625 S.E.2d 147. On 10 March 2006, defendant filed notice of appeal to this Court based on the dissent.

The issue presented by this appeal is whether the trial court abused its discretion by granting defense counsel five minutes to confer with his client about whether to present evidence.

"Matters relating to the actual conduct of a criminal trial are left largely to the sound discretion of the trial judge so long as defendant's rights are scrupulously afforded him." *State v. Goode*, 300 N.C. 726, 729, 268 S.E.2d 82, 84 (1980) (citing *State v. Perry*, 277 N.C. 174, 176 S.E.2d 729 (1970)). This Court has held, however, that "such discretion is not unlimited and, when abused, is subject to review." *Id.* To establish that a trial court's exercise of discretion is reversible error, a defendant "must show harmful prejudice as well as clear abuse of discretion." *Id.* (citing *State v. Young*, 287 N.C. 377, 214 S.E.2d 763 (1975), *judgment vacated in part on other grounds*, 428

U.S. 903 (1976) and *State v. Moses*, 272 N.C. 509, 158 S.E.2d 617 (1968)). A trial court's actions constitute abuse of discretion "upon a showing that [the] actions 'are manifestly unsupported by reason' " and " 'so arbitrary that [they] could not have been the result of a reasoned decision.' " *State v. T.D.R.*, 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

This Court reviewed the practice of granting a recess to a defendant at the close of the State's case in *Goode*. 300 N.C. at 730, 268 S.E.2d at 84.

> It is generally recognized, by Bench and Bar alike, that the decision whether a defendant in a criminal case will present evidence or will testify in his own behalf is a matter of paramount importance. Such matters can and should be discussed generally prior to trial, but the actual decision cannot intelligently be made until the close of the State's evidence.
>
> . . . [S]uch recesses at the close of the State's evidence are deeply ingrained in the course and practice of our courts and, when requested, have been granted as a matter of course so long that "the memory of man runneth not to the contrary." The recess enables defendant and his counsel to evaluate their position.

Id.

In *Goode*, the defendant faced felony charges for breaking and entering and larceny. 300 N.C. at 726, 268 S.E.2d at 82. He was convicted on both counts and sentenced to consecutive terms of imprisonment for eight to ten years for each count. *Id.* at 726-27, 268 S.E.2d at 82. During trial, the trial court summarily denied defense counsel's request for a recess at the close of the State's evidence. *Id.* at 728, 268 S.E.2d at 83. After finding no reason for the trial court's decision to deny the defendant and his counsel the "opportunity to weigh these important matters together and reach a considered judgment," the Court in *Goode* held that the judge abused his discretion. *Id.* at 730, 268 S.E.2d at 84.

With regard to the abuse of discretion standard that governs here, we can find no reasonable basis for the trial court's decision to limit the requested recess to five minutes. Defendant was on trial for first-degree murder. If convicted, he faced imprisonment for the remainder of his life with no opportunity for parole. Because of the gravity of the murder charge and its possible consequences,

defendant's decision whether to put on evidence in his defense was arguably more important than that faced by the defendant in *Goode*. In the present case, the only explanation in the record is the following statement by the trial court to defense counsel: "You knew we'd be at this point." However, defense counsel may not have expected the State to rest its case shortly after 4:00 p.m. on the second day of trial. While arguing motions on the morning of the first day of trial, defense counsel noted that he had a list of twenty or thirty witnesses that the State might call. The State rested, however, after having called only twelve witnesses.

Defense counsel also argued to the trial court that he and defendant "truly didn't know what all the evidence would be." This Court indeed recognized in *Goode* that an "actual decision" about whether to present evidence "cannot intelligently be made until the close of the State's evidence." *Id.* Here, defendant and his counsel had a great deal to consider. Each of the State's three primary witnesses was not initially forthcoming with police about defendant's identity. In fact, two of the witnesses did not identify defendant until after police informed them that they might be charged with murder. Furthermore, the testimony of one of the State's primary witnesses repeatedly contradicted the statement she gave to police.[1] Additional complexity was introduced by a change in the composition of the jury after lunch on the second day of trial. We agree with defendant that the trial court's decision to grant a mere five minutes in which to consider all of these factors and make an intelligent decision about such an important matter was manifestly unsupported by reason.

When judges make decisions about the conduct of a trial, they essentially balance the defendant's interest in a fair trial against the court's interest in administrative efficiency and the proper management of judicial resources. *Cf. State v. Roper*, 328 N.C. 337, 352, 402 S.E.2d 600, 608 (reviewing the denial of a continuance for constitutional error), *cert. denied*, 502 U.S. 902 (1991). In the instant case, the balance unquestionably tips toward granting a reasonable amount of time for the requested recess. Defendant, facing life in prison without parole, must make a decision about "a matter of paramount importance." *Goode*, 300 N.C. at 730, 268 S.E.2d at 84. The court's limitation of the recess to five minutes, on the other hand, is in no reasonable

1. The State itself recognized that its case was not strong, as evidenced by the fact that before the court reconvened for closing arguments on the morning of the third day, the district attorney "offered [defendant] second degree murder straight up." Defendant turned down the offer.

way justified by an interest in administrative efficiency. While that interest is important in theory, in the context of the decision rendered by the trial court in this particular case, it is irrelevant. In an already short first-degree murder trial, the trial court's desire to save a little time is clearly outweighed by defendant's interest in having sufficient time to make one of the most important decisions of his life. This "myopic insistence upon expeditiousness in the face of a justifiable request for delay," *Ungar v. Sarafite*, 376 U.S. 575, 589, (1964), was " 'arbitrary' " and " 'manifestly unsupported by reason,' " *T.D.R.*, 347 N.C. at 503, 495 S.E.2d at 708 (quoting *White*, 312 N.C. at 777, 324 S.E.2d at 833).

Both the Court of Appeals majority and the State cite *State v. Haywood*, 144 N.C. App. 223, 550 S.E.2d 38, *appeal dismissed and disc. rev. denied*, 354 N.C. 72, 553 S.E.2d 206 (2001), in support of their arguments. In *Haywood*, the trial court's refusal to grant an overnight recess at the close of the State's case was not deemed reversible error. *Id.* at 233, 550 S.E.2d at 45. In overruling the defendant's assignment of error on this issue, the Court of Appeals noted that the defendant decided to testify and in doing so, presented evidence crucial to his defense. *Id.* In the instant case, defendant presented no evidence. Therefore, we are unable to say that defendant was not prejudiced by the trial court's decision.

In light of the foregoing conclusions, we hold that the trial court erred when it arbitrarily limited defendant and his counsel to five minutes in which to decide whether to put on evidence in defendant's first-degree murder trial. Therefore, we reverse the Court of Appeals and remand this case to that court with instructions to vacate defendant's convictions and to further remand this case to the trial court for a new trial.

REVERSED AND REMANDED; NEW TRIAL.

Justice EDMUNDS dissenting.

The majority holds that the trial judge abused his discretion by allowing a recess that the majority concludes was too short. I believe the majority is substituting its judgment for that of the trial judge and, in so doing, will cause confusion in the trial bench as judges attempt to determine how long such a recess must be to be long enough. Accordingly, I respectfully dissent.

In *State v. Goode*, cited by the majority, we found that the trial court abused its discretion when it refused to allow the defendant a recess at the conclusion of the State's evidence. 300 N.C. 726, 730, 268 S.E.2d 82, 84 (1980). In *Goode*, the defendant's request for a recess was made in the presence of the jury. *Id.* When the trial judge summarily denied the request, the jury watched as a dispute erupted between the defendant and his attorney over whether defendant would testify. *Id.* at 728, 268 S.E.2d at 83. Although we concluded that, under these facts, the judge in *Goode* abused his discretion by denying the request for a recess, we went on to observe that "[n]o defendant is *automatically* entitled to a recess at the close of the State's evidence because such motion is addressed to the sound discretion of the trial court." *Id.* at 730, 268 S.E.2d at 84. That statement is still good law.

Goode provides little guidance for the case at bar. Here, the State allowed open-file discovery so that defendant began trial knowing the State's theory of prosecution, the witnesses who might be called, and the substance of those witnesses' anticipated testimony. Although defendant's offense was grave, the State's presentation of the evidence was short, lasting from approximately 3:40 p.m. the first day until approximately 4:00 p.m. the second. The transcript does not suggest that there were any surprises. Defendant and his counsel thus knew that the decision whether or not to present evidence was imminent, and, as defense counsel later stated, he and defendant on numerous occasions had discussed "the pluses and the negatives" of defendant's decision whether to testify. Defendant's request for a recess, made outside the presence of the jury, was allowed, albeit for a period shorter than requested. Counsel then advised the court after the recess that he and defendant had talked with defendant's family and agreed that defendant would not present evidence.

Reviewing courts should not be quick to find abuse of discretion, which results when "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. 279, 285, 372 S.E.2d 523, 527 (1988). A trial court is in a better position than we to observe what is happening in court and to control proceedings, *see State v. Little*, 270 N.C. 234, 240, 154 S.E.2d 61, 66 (1967), and appellate courts should be "loth to review or to disturb" the trial court's exercise of discretion, *State v. Sauls*, 190 N.C. 810, 814, 130 S.E. 848, 850 (1925).

> Because the reviewing court does not in the first instance make the judgment, the purpose of the reviewing court is not to substitute its judgment in place of the decision maker. Rather, the reviewing court sits only to insure that the decision could, in light of the factual context in which it is made, be the product of reason.

Little v. Penn Ventilator Co., 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986).

I do not disagree with the majority that the cold record suggests a longer recess might have been advisable. However, we were not in the courtroom. We did not see what the trial judge saw and we did not hear what the trial judge heard. The trial judge gave defendant what he asked; our only question is the duration of the recess. I am unwilling to substitute my judgment for that of the learned and experienced trial judge in this case. Accordingly, I believe defendant has failed to establish that the trial judge abused his discretion in allowing only a short recess after the State rested its case.

Because I can discern no abuse of discretion, there is no need to consider possible prejudice to defendant.

Chief Justice PARKER and Justice NEWBY join in this dissent.

BUILDERS MUTUAL INSURANCE COMPANY v. NORTH MAIN CONSTRUCTION, LTD., GAJENDRA SIROHI, AND WIFE, POONAM SIROHI

No. 155A06

(Filed 15 December 2006)

Insurance— commercial general liability policy—automobile exclusion—negligent hiring, retention, and supervision claims—auto accident sole source of injury—exclusion applicable

As a general rule, an insurance policy will not provide coverage where an excluded cause is the sole cause of liability, but coverage extends when damage results from more than one cause, even if one of those is excluded. Here, an auto exclusion in a commercial general liability policy applied, and summary judgment was correctly granted for plaintiff insurer in a declara-

tory judgment action to determine liability for claims of negligent hiring, retention, and supervision, where the injuries in the case arose from the use of a company van.

Justice TIMMONS-GOODSON dissenting.

Justice MARTIN joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 176 N.C. App. 83, 625 S.E.2d 622 (2006), reversing an order entered 19 October 2004 by Judge Howard E. Manning, Jr. in Superior Court, Wake County, and remanding for entry of summary judgment in plaintiff's favor. Heard in the Supreme Court 16 October 2006.

Pinto Coates Kyre & Brown, P.L.L.C., by Richard L. Pinto and John I. Malone, Jr., for plaintiff-appellee.

Pulley, Watson, King & Lischer, P.A., by Guy W. Crabtree, for defendant-appellants Gajendra and Poonam Sirohi.

WAINWRIGHT, Justice.

This is a declaratory judgment action brought by plaintiff Builders Mutual Insurance Company (Builders Mutual) against defendants North Main Construction, Ltd. (North Main) and Gajendra and Poonam Sirohi (the Sirohis). Builders Mutual insures North Main under a Commercial General Liability Insurance Policy (the policy), which contains the following exclusionary clause:

> This insurance does not apply to:
>
> . . .
>
> g. Aircraft, Auto Or Watercraft.
>
> "Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading."

The sole question before this Court is whether Builders Mutual has a duty under the policy to defend or indemnify North Main in a negligence suit filed by the Sirohis.[1]

1. The record reflects that Builders Mutual also insured North Main under a separate business automobile liability policy, the scope and coverage of which is not at issue on appeal.

In a complaint dated 20 September 2002 and filed in Superior Court, Wake County, the Sirohis asserted multiple causes of action against North Main and its employee, Ronald F. Exware, Jr. (Exware), including claims for negligent driving, negligent entrustment, negligent hiring, negligent retention, and negligent supervision. The Sirohis' complaint alleges that Poonam Sirohi was injured on 29 November 2001 when Exware drove the company van across the median of Interstate 40 and collided with her vehicle. Exware was cited for driving while intoxicated and careless and reckless driving in connection with the wreck. At that time, Exware already had multiple moving violations on his seven-year driving record, including one previous conviction for driving North Main's van on the wrong side of the road, three speeding charges, and one charge of transporting an open container of alcoholic beverage.

The Sirohis' complaint alleged that North Main was negligent in the following ways:

> (a) North Main allowed Exware to drive a company vehicle, even though it knew that he had received a citation for driving on the wrong side of the road in a company vehicle several months before the wreck;
>
> (b) North Main knew that Exware's driving record was extremely poor, to the extent that his operation of a motor vehicle would likely cause great risk and danger to others, such as Mrs. Sirohi;
>
> (c) North Main failed to properly hire, supervise, and retain its employees;
>
> (d) North Main participated in and condoned conduct that was likely to lead to death or injury to others;
>
> (e) North Main created and fostered an atmosphere among its employees and officers that the consumption of alcohol and illegal drugs and the use of company vehicles was permissible.

On 12 April 2004, Builders Mutual filed this declaratory judgment action seeking a determination that it does not have a duty to defend or indemnify North Main against the Sirohis' suit because its policy with North Main does not provide liability coverage for injuries arising out of the use or entrustment of an automobile. Although North Main failed to respond to Builders Mutual's complaint, the Sirohis

filed an answer on 24 May 2004. Thereafter, the Sirohis moved for summary judgment and Builders Mutual moved for judgment on the pleadings, which the trial court also considered as a motion for summary judgment. On 19 October 2004, the trial court entered an order allowing each motion in part and denying each motion in part. The court ruled that the policy does not provide coverage for the claims of negligent entrustment and negligent driving, but that the policy does provide coverage for claims of negligent hiring, negligent supervision, and negligent retention. Builders Mutual appealed, and on 21 February 2006, a divided panel of the Court of Appeals reversed the trial court and remanded the case for entry of summary judgment in favor of Builders Mutual.

This Court must now determine whether the Sirohis' claims for negligent hiring, retention, and supervision are covered by Builders Mutual's policy with North Main. In so doing, the Court will review the trial court's order allowing summary judgment de novo. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). Summary judgment is appropriate when "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) (2005).

An insurer's duty to defend a policy holder against a lawsuit is determined by the facts alleged in the pleadings. *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377 (1986). If the pleadings "state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable." *Id.* If the pleadings "allege facts indicating that the event in question is not covered, and the insurer has no knowledge that the facts are otherwise, then it is not bound to defend." *Id.*

Insurance contracts commonly contain exclusionary clauses that list sources of liability the policy does not cover. In the case *sub judice*, Builders Mutual's policy with North Main excludes " '[b]odily injury' or 'property damage' arising out of the ownership, maintenance, use or entrustment to others of any . . . 'auto' . . . owned . . . by . . . any insured [North Main]." (Emphasis added.) An injury "arises out of" an excluded source of liability when it is proximately caused by that source. *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 547, 350 S.E.2d 66, 73-74 (1986).

"As a general rule, coverage will extend when damage results from more than one cause even though one of the causes is specifi-

cally excluded," *Avis v. Hartford Fire Ins. Co.*, 283 N.C. 142, 150, 195 S.E.2d 545, 549 (1973) (citations omitted), but if an excluded source of liability is the "sole cause of the injury" then the policy does not provide coverage, *State Capital*, 318 N.C. at 546, 350 S.E.2d at 73. This Court has previously determined that the use of an automobile was not the "sole cause of the injury" when an insured party accidently shot his passenger while retrieving a loaded shotgun from the storage compartment of his pickup truck. *State Capital*, 318 N.C. at 536, 547, 350 S.E.2d at 67-68, 74. In that case, "negligent mishandling of the rifle" was "a non-automobile proximate cause" of injury. *Id.* at 547, 350 S.E.2d at 74. Accordingly, the Court concluded that the insured party's homeowners insurance policy covered the accident, even though the policy contained an automobile exclusion similar to the exclusion in the policy *sub judice*. *Id.*

Here, Poonam Sirohi was injured when Exware drove North Main's van into her vehicle; therefore, her injuries "arise[] out of" the use of a vehicle owned by North Main. Although the Sirohis allege that North Main was negligent in hiring, retaining, and supervising Exware, these actions were harmful to Poonam Sirohi only because Exware was required to drive the company van in the course of his employment, and the collision was the sole cause of Sirohi's injury. For this reason, we determine that negligent hiring, negligent retention, and negligent supervision are not "non-automobile proximate cause[s]" of Poonam Sirohi's injuries for the purpose of determining the scope of Builders Mutual's liability under the policy.

Because the facts alleged by the Sirohis in their pleadings indicate that their injuries are not covered by Builders Mutual's policy with North Main, Builders Mutual does not have a duty to defend or indemnify North Main against the Sirohis' negligence action. Accordingly, the decision of the North Carolina Court of Appeals is affirmed.

AFFIRMED.

Justice TIMMONS-GOODSON dissenting.

Because I believe the Sirohis have forecast evidence that establishes as a matter of law the presence of a non-automobile proximate cause, I would hold that the automobile exclusion contained in North Main's Commercial General Liability Insurance Policy does not apply. Therefore, I respectfully dissent.

The sole issue before us is whether Builders Mutual has a duty to defend North Main Construction and Ronald Exware against the Sirohis' claims that North Main engaged in negligent hiring, supervision, and retention. Because an insurer's duty to defend is broader than its duty to provide coverage, we need not determine whether North Main will ultimately be held liable or whether Builders Mutual will be required to provide coverage. *Waste Management of Carolinas, Inc. v. Peerless Insurance Co.*, 315 N.C. 688, 691, 340 S.E.2d 374, 377 (1986). Rather, we must determine whether the pleadings contain any facts demonstrating that "the alleged injury is covered by the policy." *Id.* If such facts are present, "then the insurer has a duty to defend." *Id.* Finally, "[a]ny doubt as to coverage is to be resolved in favor of the insured." *Id.* at 693, 340 S.E.2d at 378.

In *State Capital Insurance Co. v. Nationwide Mutual Insurance Co.*, 318 N.C. 534, 547, 350 S.E.2d 66, 74 (1986), we held that "exclusionary language . . . should be interpreted as excluding accidents for which the sole proximate cause involves the use of an automobile. If there is *any* non-automobile proximate cause, then the automobile use exclusion does not apply." *Id.* at 547, 350 S.E.2d at 74 (emphasis added). As the majority recognizes, under the facts of *State Capital*, "negligent mishandling of [a] rifle" was a non-automobile proximate cause. *Id.* Therefore, the homeowners policy in question provided coverage. *Id.*

The *State Capital* decision is in line with our long-standing general rule that "[e]xclusions from and exceptions to undertakings by [an insurance company] are not favored, and are to be strictly construed to provide the coverage which would otherwise be afforded by the policy." *Maddox v. Colonial Life & Accident Ins. Co.*, 303 N.C. 648, 650, 280 S.E.2d 907, 908 (1981); *see also Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 355, 172 S.E.2d 518, 522-23 (1970); *Allstate Ins. Co. v. Shelby Mut. Ins. Co.*, 269 N.C. 341, 346, 152 S.E.2d 436, 440 (1967); *Thompson v. Mut. Benefit Health & Accident Ass'n*, 209 N.C. 678, 682, 184 S.E. 695, 698 (1936). The majority in the instant case misapplies *State Capital*.

We have defined proximate cause as "a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed." *Mattingly v. N.C. R.R. Co.*, 253 N.C. 746, 750, 117 S.E.2d 844, 847 (1961) (citing *Ramsbottom v. Atl. Coast Line R.R. Co.*, 138 N.C. 38, 50 S.E. 448 (1905)). In a claim for negligent hiring

and retention, two separate inquiries must be conducted as to causation: First, did the employee's actions cause the injury? Second, did the employer's hiring and retention of the employee cause the injury? *See*, *e.g.*, *Waddle v. Sparks*, 331 N.C. 73, 87, 414 S.E.2d 22, 29 (1992) ("An essential element of a claim for negligent retention of an employee is that the employee committed a tortious act resulting in plaintiffs' injuries."); *Medlin v. Bass*, 327 N.C. 587, 591, 398 S.E.2d 460, 462 (1990) (noting that the essential elements of a claim for negligent employment or retention include proof of both the underlying negligent act and that the injury resulted from the employer's negligent hiring and retention).

Though the majority in the instant case cites *State Capital*, it applies that case's proximate cause standard incorrectly when it concludes that North Main's "actions were harmful to Poonam Sirohi only because Exware was required to drive the company van in the course of his employment." The Sirohis claim that North Main's negligent hiring, retention, and supervision of employees regarding the use of drugs and alcohol was a proximate cause of Poonam Sirohi's injuries. These causes of action impose *direct* liability for North Main's negligence, as opposed to *vicarious* liability for Exware's use of the vehicle. *See* Charles E. Daye & Mark W. Morris, *North Carolina Law of Torts* § 23.10, at 453 (2d ed. 1999). As such, a proximate cause of the harm for the negligent hiring, retention, and supervision claims is North Main's negligence in hiring, retaining, and supervising Exware, this negligence concurring with Exware's negligent use of the automobile. North Main's decision to hire and retain Exware predates the tortious activity that is the subject of this case and is wholly separate from that activity. Thus, while Exware's operation of a vehicle was a proximate cause of Poonam Sirohi's injuries, it was not the sole one.

The facts of *Nationwide Mutual Insurance Co. v. Davis* provide a helpful comparison to the present case. 118 N.C. App. 494, 455 S.E.2d 892, *disc. rev. denied*, 341 N.C. 420, 461 S.E.2d 759 (1995). In *Davis*, a young girl was hit by a car after leaving her grandmother's van to follow her grandmother across the street. *Id.* at 495-96, 455 S.E.2d at 893. The Court of Appeals found that "the 'use' of the van was not the *sole proximate cause* of the accident; a concurrent cause was [the grandmother's] negligent supervision of [the girl] when [she] exited the van." *Id.* at 501, 455 S.E.2d at 896. Because there was a non-automobile proximate cause, the Court of Appeals held that the automobile exclusion did not apply. *Id.* In the same way, the automo-

bile that Exware was driving was not the sole proximate cause of Poonam Sirohi's injuries. Here, North Main's negligent hiring, retention, and supervision of its employees regarding the use of drugs and alcohol is a concurrent proximate cause.

Whether the Sirohis can ultimately prove that North Main's negligent hiring, retention, and supervision caused Poonam Sirohi's injuries is a question for the jury. I would hold, however, that because the Sirohis have forecast sufficient evidence of a non-automobile proximate cause as a matter of law, Builders Mutual must defend North Main under its Commercial General Liability Insurance Policy. Therefore, I respectfully dissent.

Justice MARTIN joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. ERIC MARSHALL HAMMETT

No. 83A06

(Filed 15 December 2006)

1. Evidence— expert testimony—sexual abuse—victim's history combined with physical findings

The trial court did not err by admitting a medical expert's opinion that a child had been sexually abused based on the child's statements and physical evidence found during an examination, because: (1) the expert's opinion never implicated the defendant as the perpetrator, and thus, the opinion that the trauma was consistent with the victim's story was not the same as an opinion that the witness was telling the truth; (2) the interlocking factors of the victim's history combined with the physical findings constituted a sufficient basis for the expert opinion that sexual abuse had occurred; and (3) in light of the expert's specialized knowledge in pediatrics and child physical and sexual abuse, her opinion testimony assisted the jury in understanding the evidence presented.

2. Evidence— expert opinion—belief of sexual abuse absent physical evidence—plain error analysis

The trial court did not commit plain error by admitting an expert's opinion that she would believe the child and diagnose

abuse even in the absence of physical evidence, because while the expert's statements vouching for the minor child were improper, the jury would not have acquitted defendant if the challenged statements had been excluded when: (1) the case at bar did not rest solely on the victim's credibility; and (2) in addition to the minor child's consistent statements and testimony that defendant had abused her sexually, the jury was able to consider properly admitted evidence that the child exhibited physical signs of repeated sexual abuse, defendant's admissions of bizarre bathing habits with the child, and defendant's thoroughly impeached denials that his showers with the child had any sexual aspect.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 175 N.C. App. 597, 625 S.E.2d 168 (2006), reversing a judgment entered 11 February 2004 by Judge Steve A. Balog in Superior Court, Cabarrus County and granting defendant a new trial. Heard in the Supreme Court 13 September 2006.

Roy Cooper, Attorney General, by Kelly L. Sandling, Assistant Attorney General, for the State-appellant.

Mark Montgomery for defendant-appellee.

EDMUNDS, Justice.

In this case, we consider whether the trial court committed error in admitting a medical expert's opinion that a child had been sexually abused, based on the child's statements and physical evidence found during an examination. We also consider whether admission of the expert's additional opinion that she would believe the child and diagnose abuse even in the absence of physical evidence constitutes plain error. Because we conclude that admission of the former was proper and admission of the latter did not rise to the level of plain error, we reverse the Court of Appeals decision, vacate its order for a new trial, and remand to that court for consideration of defendant's remaining issues.

On 9 June 2003, defendant was indicted in Cabarrus County for three counts of sexual offense against a thirteen-year-old child, in violation of N.C.G.S. § 14-27.7(a), and seven counts of taking indecent liberties with a child, in violation of N.C.G.S. § 14-202.1(a)(2). In each case, the victim was C.H., who is defendant's daughter. The

offenses were alleged to have occurred between late January and early April 2003.

Defendant was tried at the 9 February 2004 criminal session of Cabarrus County Superior Court. The State's evidence included testimony from C.H.; E.O., C.H.'s friend to whom she first described the abuse; Sherry Cook, the nurse at the Children's Advocacy Center where C.H. was taken for evaluation; Rosalina Conroy, M.D. (Dr. Conroy), the pediatrician who examined C.H.; and Detective Larissa Cook, the arresting officer. C.H. testified that, before going to live with defendant, she had been sexually abused by her mother's former boyfriend. However, this early abuse had not involved any penetration of her vagina. C.H. later went to live with defendant. She testified that defendant had committed various sexual acts on her while she lived with him between January and April 2003, including, *inter alia*, fondling her breasts, putting his tongue into her vagina, shaving her pubic hair, having her wash his genitals, and twice penetrating her vagina with his fingers while taking a shower with her. Defendant testified in his own defense and denied most of C.H.'s allegations. However, he acknowledged that he had showered with C.H. on two occasions and washed her "private areas" while his hand was covered by a wash cloth.

On the first day of trial, Dr. Conroy was accepted by the court as an expert in pediatric medicine specializing in child physical and sexual abuse. She testified that she met C.H. on 28 April 2003. Dr. Conroy obtained a medical history from C.H., then conducted a physical examination. During the examination, she observed a notch in the six o'clock position of C.H.'s hymenal ring. She stated that sexual abuse is "one of the only things" that will cause that kind of injury at that location. In addition, Dr. Conroy discovered an irregular scar on C.H.'s posterior fourchette, at the bottom of the hymenal ring. She explained that only ten percent of the sexually abused children she sees show physical signs of the abuse. Dr. Conroy testified that it was her opinion that these physical findings resulted from repeated abuse and were caused by penetration of C.H.'s vagina with a hard object.

Over defendant's objection, the trial court allowed the State to recall Dr. Conroy as a witness the following day to clarify her medical findings. Dr. Conroy repeated her testimony that, based on the physical findings, she believed C.H.'s vagina had been penetrated and that it happened more than once. When asked if C.H.'s account was "consistent with the two injuries" that Dr. Conroy had found and whether C.H.'s case was "consistent of [sic] sexual abuse," she answered affir-

matively. Dr. Conroy then added that she "based the bulk of [her] conclusion on [C.H.'s] history" and "even if there were absolutely no physical findings, [her] conclusion would still be the same, based on [C.H.'s] history . . . [and] plenty of details in that history . . . that she has been sexually abused."

The jury found defendant guilty on all counts and defendant appealed his conviction to the Court of Appeals. On 7 February 2006, a divided panel of that court held that the trial court committed plain error in admitting portions of Dr. Conroy's second day of testimony. Accordingly, the Court of Appeals ordered that defendant receive a new trial on all counts. *State v. Hammett*, 175 N.C. App. 597, 625 S.E.2d 168 (2006). In so ruling, the Court of Appeals did not address other issues raised by defendant on appeal. The dissent argued that the trial court had not erred in admitting the statements. The State appealed to this Court based on the dissent.

[1] Before this Court, defendant does not challenge Dr. Conroy's physical findings but argues that all of her opinion testimony was improperly admitted. In response, the State argues that Dr. Conroy's testimony was admissible or, in the alternative, that its admission did not constitute plain error.

As to Dr. Conroy's testimony on the first day of trial, she stated without objection that she reached her conclusion that C.H. had been abused on the twin bases of C.H.'s history and the physical symptoms consistent with that history. The facts of the case control our determination of whether these two factors are sufficient to support an expert opinion that abuse has occurred. For example, in *State v. Trent*, the defendant was convicted of first-degree rape and taking indecent liberties with a minor. 320 N.C. 610, 359 S.E.2d 463 (1987). The victim told the examining pediatrician that her father had sexual intercourse with her. *Id.* at 613, 359 S.E.2d at 465. The pediatrician testified that a pelvic examination of the victim revealed that her hymen was not intact, but no lesions, tears, abrasions, bleeding, or other abnormal conditions had been found. *Id.* The expert acknowledged that the condition of the hymen would justify a conclusion that the victim had been sexually active, but would not by itself support a diagnosis of abuse. *Id.* at 614, 359 S.E.2d at 465-66. Noting that the examination had been conducted four years after the alleged abuse, we concluded that the State had failed to establish a sufficient basis for the pediatrician's expert opinion that the victim had been abused. *Id.* at 614-15, 359 S.E.2d at 465-66.

In *State v. Aguallo*, we held that an expert's opinion that the victim in a sexual abuse case was "believable" was erroneously admitted when the examination finding physical evidence of penetration had been conducted more than six months after the alleged offense, the victim's credibility was questioned, and the defendant denied any physical or sexual contact with the victim. 318 N.C. 590, 593, 599, 350 S.E.2d 76, 78, 82 (1986). On retrial, the expert testified that a physical examination revealed a "lacerational cut" in the victim's hymen. *State v. Aguallo*, 322 N.C. 818, 822, 370 S.E.2d 676, 678 (1988). The expert then confirmed this physical finding was consistent with the victim's pre-examination statement to the expert that the defendant had vaginal intercourse with her. *Id.* Because the expert's opinion never implicated the defendant as the perpetrator, we held the opinion that the trauma was consistent with the victim's story was not the same as an opinion that the witness was telling the truth. *Id.* at 822-23, 370 S.E.2d at 678. Accordingly, the opinion was admissible. *Id.*

In the case at bar, Dr. Conroy obtained C.H.'s history, then conducted a physical examination shortly after the last alleged act of abuse. Dr. Conroy described the results of the examination as evidence of sexual abuse:

> [Dr. Conroy] Sexual abuse is generally the—one of the only things that will cause [a hymenal notch], especially in the position where she's—where that is, which is at the six o'clock position, and that's the position that we spent a lot of time looking at because if there is penetrating trauma, that's where we're going to see it.
>
> Q So you see a notch and then you also see it at a specific point that meant something to you?
>
> A Right, exactly.

Thus, Dr. Conroy testified that her findings were consistent with abuse, though not necessarily by defendant.

Under these facts, we conclude that the interlocking factors of the victim's history combined with the physical findings constituted a sufficient basis for the expert opinion that sexual abuse had occurred. *Cf. State v. Stancil*, 355 N.C. 266 *passim*, 559 S.E.2d 788 *passim* (2002) (per curiam) (finding an inadequate foundation for expert opinion that sexual assault occurred when opinion based only upon an interview with complaining witness unsupported by any physical evidence of abuse despite two physical examinations and a

series of tests on the alleged victim). In light of Dr. Conroy's specialized knowledge in pediatrics and child physical and sexual abuse, her opinion testimony assisted the jury in understanding the evidence presented. N.C.G.S. § 8C-1, Rule 702(a) (2005) ("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 . . . may testify thereto in the form of an opinion."). For the same reason, Dr. Conroy's similar opinion on the second day of trial that C.H.'s symptoms were consistent with sexual abuse was properly admitted. *See Stancil*, 355 N.C. at 266-67, 559 S.E.2d at 789.

[2] The more difficult issue before us is whether the trial court committed error in admitting Dr. Conroy's subsequent expert testimony that, based on C.H.'s statements, she would conclude that C.H. had been abused even in the absence of physical symptoms and, if so, whether the error was plain error. Defendant argues the statement reveals that Dr. Conroy reached her opinion because she believed C.H.'s statements and therefore, her testimony was a "direct comment on [C.H.'s] veracity." The State responds that Dr. Conroy's comment was a hypothetical scenario inapplicable to this case.

"In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." *Stancil*, 355 N.C. at 266-67, 559 S.E.2d at 789. *See also State v. Grover*, 142 N.C. App. 411, 417-19, 543 S.E.2d 179, 182-84 (holding the experts' opinion testimony lacked a proper foundation when there was no physical evidence of sexual abuse and the experts admitted that their conclusions were based solely on the children's statements that they had been abused), *aff'd per curiam*, 354 N.C. 354, 553 S.E.2d 679 (2001). Accordingly, Dr. Conroy improperly vouched for C.H.'s credibility when she added to her previous admissible testimony the remark that she would reach the same conclusion based on C.H.'s history alone and that the physical evidence was not a necessary basis for her conclusions. Admission of this part of Dr. Conroy's testimony was error.

We next consider whether admission of this evidence constituted plain error. Defendant raised only a general objection to the recalling of Dr. Conroy on the second day of trial. Defendant did not object specifically to Dr. Conroy's testimony regarding C.H.'s credibility, nor did defendant later move to strike this testimony. *See* N.C.G.S.

§ 8C-1, Rule 103(a)(1) (2005) (stating that when asserting error regarding a ruling admitting evidence, "[n]o particular form is required in order to preserve the right to assert the alleged error upon appeal if the motion or objection *clearly presented the alleged error* to the trial court" (emphasis added)); N.C. R. App. P. 10(b) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, *stating the specific grounds* for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion." (emphasis added)). Accordingly, defendant's general objection was insufficient to preserve this issue for appellate review.

When such an issue is not preserved in a criminal case, we apply plain error review. *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (citations omitted). We find plain error "only in exceptional cases where, 'after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done." ' Thus, the appellate court must study the whole record to determine if the error had such an impact on the guilt determination, therefore constituting plain error." *State v. Davis*, 349 N.C. 1, 29, 506 S.E.2d 455, 470 (1998) (citations omitted), *cert. denied*, 526 U.S. 1161, 144 L. Ed. 2d 219 (1999). Accordingly, we must determine whether the jury would probably have reached a different verdict if this testimony had not been admitted. *See State v. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987) (explaining that "plain error" is error "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached"), *cert. denied*, 485 U.S. 1036, 99 L. Ed. 2d 912 (1988).

Defendant contends that the State's case was not overwhelming and was "totally dependent" on the relative believability of C.H. and defendant. Therefore, defendant argues, Dr. Conroy's impermissible vouching for C.H.'s credibility was a fundamental flaw in the proceedings comparable to other cases in which the Court of Appeals has ordered a new trial under plain error review. However, in all but one of the cases cited by defendant in support of this argument, admission of the expert's testimony was held to be plain error because the opinion that sexual abuse occurred was formed in the absence of any physical findings and the expert relied exclusively

upon the victim's credibility. *See State v. Delsanto*, 172 N.C. App. 42, 46-49, 615 S.E.2d 870, 873-75 (2005); *State v. Ewell*, 168 N.C. App. 98, 105-06, 606 S.E.2d 914, 919-20, *disc. rev. denied*, 359 N.C. 412, 612 S.E.2d 326 (2005); *State v. Bush*, 164 N.C. App. 254, 259-60, 595 S.E.2d 715, 718-19 (2004); *State v. O'Connor*, 150 N.C. App. 710, 712, 564 S.E.2d 296, 297 (2002). In the single remaining case cited by defendant, the only physical evidence was abrasions on the victim's introitus that were not diagnostic of or specific to sexual abuse. *State v. Couser*, 163 N.C. App. 727, 729-32, 594 S.E.2d 420, 422-24 (2004).

In contrast, the case at bar did not rest solely on the victim's credibility. Dr. Conroy appropriately testified that she could tell "from [C.H.'s] physical findings . . . that [C.H.] has been penetrated and . . . it has happened more than once." As the Court of Appeals majority correctly noted, "That C.H. was likely 'repeatedly sexually abused' by someone was not seriously challenged at trial." *Hammett*, 175 N.C. App. at ——, 625 S.E.2d at 173. In addition, while defendant denied abusing C.H., he corroborated her testimony that he had taken showers with her and admitted washing her "private areas" on two occasions. Defendant's stated reason for entering naked into the shower with his thirteen-year-old daughter was that "[s]he had bad personal hygiene." When defendant denied instructing C.H. to wash him in the shower, he was impeached with a prior statement in which he admitted to having C.H. "wash [his] arms and legs." Defendant then acknowledged instructing C.H. to wash "the upper part of my chest." When asked to explain to the jury how having C.H. wash him would help her personal hygiene, defendant conceded, "I have no explanation of that."

Therefore, in addition to C.H.'s consistent statements and testimony that defendant had abused her sexually, the jury was able to consider properly admitted evidence that C.H. exhibited physical signs of repeated sexual abuse, defendant's admissions of bizarre bathing habits with C.H., and defendant's thoroughly impeached denials that his showers with C.H. had any sexual aspect. Thus, while Dr. Conroy's statements vouching for C.H. were improper, we believe the jury would not have acquitted defendant if the challenged statements had been excluded.

We reverse the decision of the Court of Appeals and vacate its order for a new trial. We remand this case to the Court of Appeals for consideration of the remaining issues raised by defendant.

VACATED; REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. ANDREA ANTIONETTE BRYANT

No. 117A06

(Filed 15 December 2006)

Probation and Parole— revocation of probation—expired probationary period—reasonable efforts for earlier hearing—required finding

The trial court lacked subject matter jurisdiction to revoke defendant's probation and activate her suspended sentence more than two months after her probationary period had expired due to the court's failure to make a finding of fact that the State had exerted reasonable efforts to conduct a revocation hearing before expiration of the probationary period and its inability to make such a finding because there was no evidence in the record to support it. N.C.G.S. § 15A-1344(f). The case will not be remanded for the trial court to make the necessary finding when the record lacks sufficient evidence to support the finding.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, 176 N.C. App. ——, 625 S.E.2d 916 (2006), affirming in part, remanding in part, and vacating in part judgments revoking probation entered 24 September 2004 by Judge Kenneth C. Titus in Superior Court, Durham County. Heard in the Supreme Court 11 September 2006.

Roy Cooper, *Attorney General*, *by Ann Stone*, *Assistant Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by Matthew D. Wunsche and Daniel R. Pollitt*, *Assistant Appellate Defenders*, *for defendant-appellee.*

BRADY, Justice.

On 24 September 2004, seventy days after the expiration of defendant's probationary period, which was imposed as a result of her felony conviction for obtaining property by false pretenses, the trial court revoked defendant's probation and activated her suspended sentence. Defendant appealed to the North Carolina Court of Appeals which, in a divided, unpublished opinion, vacated the activation of defendant's sentence in that the trial court lacked subject mat-

ter jurisdiction.[1] The State appealed as of right based upon the dissent. The dissenting judge would have remanded the case to the trial court for further findings of fact on whether the State made reasonable efforts to hold a probation revocation hearing before defendant's probation expired. Therefore, the question presented for review is whether sufficient evidence exists in the record to support a finding of fact that the State made reasonable efforts to conduct a hearing before defendant's probationary period expired, thereby giving the trial court the necessary jurisdiction to revoke probation. Because there is insufficient evidence in the record to support such a finding, we hold the trial court lacked subject matter jurisdiction to activate defendant's sentence for obtaining property by false pretenses, and we therefore affirm the decision of the Court of Appeals.

FACTUAL BACKGROUND

On 15 April 2002, the Durham County Grand Jury returned a true bill of indictment charging defendant Andrea A. Bryant with obtaining property by false pretenses. Consistent with a negotiated disposition, defendant pleaded guilty as charged on 16 January 2003. The trial court sentenced defendant to a prison term of eight to ten months, but suspended the active sentence and imposed an eighteen month period of supervised probation. Further, as special conditions of her probation, defendant was ordered, *inter alia*, to serve one day in jail and to pay restitution and court costs.

On 11 May 2004, defendant's probation officer filed a violation report with the Durham County Clerk of Court alleging defendant failed to be at her residence for curfew checks on sixteen separate specified occasions, failed to pay court costs, and failed to pay restitution. The report also gave notice of a hearing set for 7 June 2004 to review defendant's probation status; however, no hearing was held on that date and the record fails to disclose any specific reason for this failure.

Defendant appeared before the trial court for a probation revocation hearing on 24 September 2004—*seventy days* after the expiration of her probationary period. At the hearing, defendant's attorney made the following remarks to the trial court:

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1. The trial court also activated defendant's sentence for an 8 October 2002 embezzlement conviction. The Court of Appeals affirmed in part and remanded the activation of this sentence. As the dissent concurred with this result, the activation of this sentence is not an issue before this Court and will not be discussed. See N.C. R. App. P. 14(b)(1).

> Your Honor, just to tell you a little about Ms. Bryant. Ms. Bryant is the young lady who had been sick for a while with the shingles and was unable to come to court. She is better now. She is the mother of four children. She's currently enrolled at North Carolina State University. She's studying to be an EMS. She has class Monday, Wednesday, and Friday; she should graduate in December.

After considering remarks from counsel and defendant, as well as the court's file, which included the original judgment and probation revocation petition, the trial court activated defendant's sentence, stating: "Defendant admits willful violation of the terms of her probationary judgment. Frankly, the number of violations are too much for me to say its [sic] just financial and set it aside."

ANALYSIS

The determination of this case depends on the statutory necessity of a finding of fact by the trial court on the issue of whether the State made reasonable efforts to conduct defendant's probation revocation hearing at an earlier time, and the sufficiency of evidence in the record. Initially, we address the State's argument that no finding was required to be made by the trial court in this case.

The General Assembly, in enacting the controlling statute, N.C.G.S. § 15A-1344(f), provided:

> The court may revoke probation after the expiration of the period of probation if: (1) Before the expiration of the period of probation the State has filed a written motion with the clerk indicating its intent to conduct a revocation hearing; and (2) *The court finds that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier.*

N.C.G.S. § 15A-1344(f) (2005) (emphasis added). In analyzing this statute, we use accepted principles of statutory construction by applying the plain and definite meaning of the words therein, as the language of the statute is clear and unambiguous. *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) (citing *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)); *see also Southerland v. B.V. Hedrick Gravel & Sand Co.*, 345 N.C. 739, 742-43, 483 S.E.2d 150, 151-52 (1997) (citing *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974)). The statute unambiguously requires the trial court to make a judicial finding that the State has made a reasonable effort to conduct the probation revoca-

tion hearing during the period of probation set out in the judgment and commitment.

The plain language of this statute leaves no room for judicial construction. In the absence of statutorily mandated factual findings, the trial court's jurisdiction to revoke probation after expiration of the probationary period is not preserved. The State's argument asks us to substitute the unsworn remarks of defendant's counsel for a judicial finding of fact. This we will not do, as the statute requires the *trial court* to make findings of fact. Even in light of the somewhat informal setting of a probation revocation hearing, to accept defense counsel's remarks as a finding of fact violates the plain and definite meaning of the statute.[2]

The State argues that the unsworn remarks of defendant's counsel, along with the scheduled hearing date noticed on defendant's probation violation report, satisfy the statutory requirement. In doing so, the State contends the parenthetical statement made by the Court of Appeals in *State v. Hall* only requires evidence in the record, not an actual finding of fact. 160 N.C. App. 593, 593-94, 586 S.E.2d 561, 561 (2003) (parenthetically stating "nor is there evidence in the record to support such findings"). Although this argument is creative, it is contrary to the explicit statutory requirement that "the court find . . . the State has made reasonable effort to notify the probationer and to conduct the hearing earlier." N.C.G.S. § 15A-1344(f). The statute makes no exception to this finding of fact requirement based upon the strength of the evidence in the record.

In *State v. Camp*, this Court considered similar issues and applied N.C.G.S. § 15A-1344(f) to the facts of that case. 299 N.C. 524, 263 S.E.2d 592 (1980). After noting the defendant appeared before the superior court approximately twenty-three times for a revocation hearing, although the hearing was always continued and a revocation hearing was never conducted, *id.* at 527, 263 S.E.2d at 594, our Court held, *inter alia*: "Moreover, [the trial court] did not find, as indeed [it] could not, that the State had 'made reasonable effort . . . to conduct the hearing earlier,' " *id.* at 528, 263 S.E.2d at 595. Because the probationary period had expired and there was no requisite finding of fact by the trial court, "jurisdiction was lost by the lapse of time and the court had no power to enter a revocation judgment." *Id.* Like

2. *Black's Law Dictionary* defines a finding of fact as "a determination by a judge, jury, or administrative agency of a fact supported by the evidence in the record, [usually] presented at the trial or hearing." *Black's Law Dictionary* 664 (8th ed. 2004).

Camp, the trial court in the instant case was without jurisdiction to revoke defendant's probation and to activate defendant's sentence because it failed to make findings sufficient to satisfy the requirements of the statute.

Additionally the State argues that if such a finding were required, this case should be remanded for the trial court to make the necessary finding. "Ordinarily when [there is a failure] to make a material finding of fact . . . , the case must be remanded . . . for a proper finding . . . . In the instant case, however, further proceedings are neither necessary nor advisable." *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 674-75, 599 S.E.2d 888, 904 (2004) (internal citation omitted). Moreover, when the record lacks sufficient evidence to support such a finding, the case should not be remanded in order to conserve judicial resources.

The State argues that the record contains two grounds that would support the trial court in making the necessary finding on remand. First is the State's attempt to set a hearing date of 7 June 2004 referenced in the probation violation report, before expiration of the probationary period. This failed scheduling effort alone is insufficient to support a finding of reasonable efforts. Second is defense counsel's remarks regarding defendant's medical condition. Similarly, these remarks alone are insufficient to support a finding of reasonable efforts. Even when viewing these two grounds together in the light most favorable to the State, they would not support the statutorily mandated finding on remand. The record is devoid of any persuasive evidence as to why there was more than a two-month delay in conducting defendant's probation revocation hearing. Additionally, it is the State's burden to have made reasonable efforts to conduct the hearing at an earlier time, and therefore, defense counsel's remarks did not assist the State in meeting its burden. Defense counsel's remarks cannot be interpreted as an explanation of efforts by the State to conduct the hearing within the probationary period. As such, although ordinarily this case would be remanded for a proper finding, remand is not a proper remedy *sub judice* because the record lacks sufficient evidence to support such a finding.

After considering the statute discussed above and relevant case law, we conclude that no ambiguity should remain regarding this issue. In the case at bar, the trial court revoked defendant's probation on 24 September 2004—more than two months after her probationary term had expired on 16 July 2004—without making a finding that the State had exerted reasonable efforts to conduct a hearing before

expiration of the probationary period. Based on the clear and unambiguous statutory language and relevant case law, we can reach no conclusion other than that the trial court lacked subject matter jurisdiction to revoke defendant's probation due to its failure and inability to make the statutorily mandated finding of fact. Accordingly, we affirm the decision of the Court of Appeals which vacated the activation of defendant's sentence for her conviction of obtaining property by false pretenses.

AFFIRMED.

STATE OF NORTH CAROLINA v. WILLIAM THOMAS BAUBERGER

No. 172A06

(Filed 15 December 2006)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 176 N.C. App. ——, 626 S.E.2d 700 (2006), finding no error in judgments entered on 15 August 2003 and an order denying defendant's Motion for Appropriate Relief entered on 4 February 2004, all entered by Judge John O. Craig, III, in Superior Court, Forsyth County, following jury verdicts finding defendant guilty of second-degree murder and assault with a deadly weapon inflicting serious injury. Heard in the Supreme Court 22 November 2006.

Roy Cooper, Attorney General, by Isaac T. Avery, III, Special Counsel, for the State.

Kathryn L. VandenBerg for defendant-appellant.

PER CURIAM.

Justice WAINWRIGHT took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See State v. Harrison*, 360 N.C. 394, 627 S.E.2d 461 (2006); *Crawford v. Commercial Union Midwest Ins. Co.*,

356 N.C. 609, 572 S.E.2d 781 (2002); *Robinson v. Byrd*, 356 N.C. 608, 572 S.E.2d 781 (2002).

AFFIRMED.

STATE OF NORTH CAROLINA v. TIMMY WAYNE SPEIGHT

No. 491PA04-2

(Filed 15 December 2006)

On order of the United States Supreme Court entered 30 June 2006 granting the State's petition for writ of certiorari to review our decision reported in 359 N.C. 602, 614 S.E.2d 262 (2005), vacating said judgment and remanding the case to this Court for further consideration in light of *Washington v. Recuenco*, 548 U.S. ——, 126 S. Ct. 2546 (2006). Heard on remand in the Supreme Court 17 October 2006.

Roy Cooper, Attorney General, by Robert C. Montgomery, Special Deputy Attorney General, for the State-appellant.

Staples S. Hughes, Appellate Defender, by Barbara S. Blackman, Assistant Appellate Defender, for defendant-appellee.

PER CURIAM.

Upon reconsideration of this case in light of *Washington v. Recuenco*, 548 U.S. ——, 126 S. Ct. 2546 (2006), we reverse the judgment of the Court of Appeals insofar as it held defendant's sentence was imposed in violation of the Sixth Amendment to the United States Constitution, 166 N.C. App. 106, 177-78, 602 S.E.2d 4, 12 (2004), and remand to that court for further proceedings not inconsistent with this Court's decision in *State v. Timothy Earl Blackwell*, 361 N.C. 41, —— S.E.2d —— (2006) (No. 490PA04-2). However, the portion of the Court of Appeals opinion finding no prejudicial error in defendant's convictions as specified in that opinion remains undisturbed.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

VAN REYPEN ASSOCIATES, INC. D/B/A THE GIN MILL v. GERALD EUGENE TEETER, AND GORDEN LEWIS D/B/A GORDEN'S EXCAVATING SERVICE

No. 84PA06

(Filed 15 December 2006)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 175 N.C. App. 535, 624 S.E.2d 401 (2006), affirming an order entered 29 April 2004 by Judge David S. Cayer and an order entered 4 August 2004 by Judge Robert C. Ervin, both in Superior Court, Mecklenburg County. Heard in the Supreme Court 20 November 2006.

James, McElroy & Diehl, P.A., by Charles M. Viser, Preston O. Odom, III, and Fred P. Parker, IV, for plaintiff-appellant.

Stiles Byrum & Horne, L.L.P., by Lane Matthews, for defendant-appellees.

The Avery, P.C., by Isaac T. Avery, III, for North Carolina Association of Police Attorneys, and Kimberly N. Overton for North Carolina Conference of District Attorneys, amici curiae.

Christopher G. Browning, Jr., Solicitor General; John F. Maddrey, Assistant Solicitor General; and Robert C. Montgomery and Hal F. Askins, Special Deputy Attorneys General, for Roy Cooper, Attorney General, amicus curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA v. MONTREZ DEMARIO CARTER

No. 290A06

(Filed 15 December 2006)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 177 N.C. App. 539, 629 S.E.2d 332 (2006), reversing defendant's conviction which resulted in a judgment entered 25 August 2004 by Judge Kenneth C. Titus in Superior Court, Durham County, and ordering a new trial. Heard in the Supreme Court 21 November 2006.

Roy Cooper, Attorney General, by Robert C. Montgomery, Special Deputy Attorney General, and Derrick C. Mertz, Assistant Attorney General, for the State-appellant.

George E. Kelly, III, for defendant-appellee.

PER CURIAM.

AFFIRMED.

TERESA SMITH GILREATH v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES

No. 310A06

(Filed 15 December 2006)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 177 N.C. App. 499, 629 S.E.2d 293 (2006), reversing an order entered on 3 June 2005 by Judge W. Russell Duke, Jr. in Superior Court, Granville County. Heard in the Supreme Court 22 November 2006.

Schiller & Schiller, PLLC, by David G. Schiller, for plaintiff-appellee.

Roy Cooper, Attorney General, by Angel E. Gray, Assistant Attorney General, for defendant-appellant.

PER CURIAM.

AFFIRMED.

IN RE J.H.

[361 N.C. 110 (2006)]

IN THE MATTER OF J.H.

No. 372A06

(Filed 15 December 2006)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 177 N.C. App. 776, 630 S.E.2d 457 (2006), reversing in part and remanding a juvenile disposition and commitment order entered 22 February 2005 by Judge Charles W. Wilkinson, Jr. in District Court, Granville County. Heard in the Supreme Court 20 November 2006.

Roy Cooper, Attorney General, by Donna D. Smith, Assistant Attorney General, for the State.

Kevin P. Bradley for juvenile-appellant.

PER CURIAM.

AFFIRMED.

DUKE ENERGY CORPORATION, A NORTH CAROLINA CORPORATION, TAX IDENTIFICATION NO. 56-0205520 v. WENDELL COREY MALCOLM AND CALLABRIDGE/GRANITE, LLC

No. 379A06

(Filed 15 December 2006)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 178 N.C. App. 62, 630 S.E.2d 693 (2006), affirming in part and reversing in part a judgment entered 14 December 2004 by Judge James E. Lanning in Superior Court, Mecklenburg County. Heard in the Supreme Court 22 November 2006.

Parker Poe Adams & Bernstein LLP, by Irvin W. Hankins III and John W. Francisco, for plaintiff-appellee.

Ferguson, Scarbrough & Hayes, P.A., by James E. Scarbrough, for defendant-appellant Malcolm.

Kilpatrick Stockton LLP, by James H. Kelly, Jr. and Noelle E. Wooten, for defendant-appellant Callabridge/Granite, LLC.

PER CURIAM.

AFFIRMED.

ENRIQUE BADILLO v. ALPHONZA J. CUNNINGHAM, CHRISTIE CUNNINGHAM, AND FRANK OTIS BURROUGHS, JR.

No. 359A06

(Filed 15 December 2006)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 177 N.C. App. 732, 629 S.E.2d 909 (2006), affirming an order entered 27 June 2005 by Judge W. Douglas Albright in Superior Court, Rockingham County. Heard in the Supreme Court 21 November 2006.

Wilson & Coffey, LLP, by G. Gray Wilson and Stuart H. Russell, for plaintiff-appellant.

Teague, Rotenstreich & Stanaland, LLP, by Paul A. Daniels, for unnamed defendant-appellee Nationwide Mutual Insurance Company.

PER CURIAM.

AFFIRMED.

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

MARSHA A. EARLY, PETITIONER v. COUNTY OF DURHAM DEPARTMENT OF SOCIAL SERVICES, RESPONDENT

No. 524PA05

(Filed 15 December 2006)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 172 N.C. App. 344, 616 S.E.2d 553 (2005), affirming an order entered 11 July 2003 by Judge Evelyn Werth Hill in Superior Court, Wake County. Heard in the Supreme Court 20 November 2006.

Patrice Walker for petitioner-appellee.

S.C. Kitchen, County Attorney, by Lowell L. Siler, Deputy County Attorney, for respondent-appellant.

James B. Blackburn, III, General Counsel, for North Carolina Association of County Commissioners, amicus curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

GARRY LEE SKINNER, AND WIFE, JUDY COOPER SKINNER, INDIVIDUALLY AND ON BEHALF OF OTHER SIMILARLY SITUATED INDIVIDUALS v. PREFERRED CREDIT, A/K/A PREFERRED CREDIT CORPORATION, A/K/A PREFERRED MORTGAGE COMPANY, a/k/a T.A.R. PREFERRED MORTGAGE CORPORATION; US BANK N.A.; US BANK NA, ND; IMPERIAL CREDIT INDUSTRIES, INC.; ICIFC SECURED ASSETS CORPORATION 1997-1; MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 1997-1; ICIFC SECURED ASSETS CORPORATION MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 1997-2; ICIFC SECURED ASSETS CORPORATION MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 1997-3; EMPIRE FUNDING HOME LOAN OWNER TRUST 1998-1; CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORPORATION; CS FIRST BOSTON MORTGAGE SECURITIES CORPORATION PREFERRED MORTGAGE ASSET-BACKED CERTIFICATES, SERIES 1996-2; CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORPORATION PREFERRED CREDIT ASSET-BACKED CERTIFICATES, SERIES 1997-1; BANKERS TRUST COMPANY; GMAC-RESIDENTIAL FUNDING CORPORATION; LIFE BANK; LIFE FINANCIAL HOME LOAN OWNER TRUST 1997-3; UNITED MORTGAGE C.B., LLC; BANC ONE FINANCIAL SERVICES; IMH ASSETS CORP. COLLATERALIZED ASSET-BACKED BONDS SERIES 1999-1; AND WILMINGTON TRUST COMPANY

No. 525A05

(Filed 20 December 2006)

1. Jurisdiction— personal—out-of-state mortgage trust—insufficient activity in North Carolina

Personal jurisdiction was not invoked under N.C.G.S. § 1-75.4(1) (activity within North Carolina) against a New York trust which holds mortgage loans. This trust (the 1991-1 Trust) was created after the origination of the loan, only about 3% of its loans relate to North Carolina indebtedness, and the loan payments are received by a separate servicer, not the Trust.

2. Jurisdiction— personal—out-of-state mortgage trust—things of value shipped from North Carolina

Transactions related to a mortgage loan in North Carolina which was later sold to a New York trust did not fall within N.C.G.S. § 1-75.4(5) (jurisdiction over things of value shipped from North Carolina) where the loan origination occurred before creation of the trust and the only things of value shipped from the state are the loan payments. All aspects of payment are handled by a separate servicer. There is no direct contact between plaintiffs and the trust.

3. Jurisdiction— personal—out-of-state mortgage trust—insufficient minimum contacts

A New York trust which held a loan secured by a deed of trust on North Carolina property had tenuous connections to North Carolina through N.C.G.S. § 1-75.4(6) (personal jurisdiction over claims arising from property within North Carolina) where the trust did not participate in the transaction giving rise to the deed of trust and did not directly collect payments from North Carolina residents. Even assuming that the long-arm statute authorizes jurisdiction, there are insufficient minimum contacts for exercise of that jurisdiction to satisfy due process. Plaintiffs argue for specific jurisdiction only, but the trust did not exist at the time the loan was created, was created as a passive repository for many loans, with only 3% having ties to North Carolina, the trust was created outside North Carolina, its day to day operations are in New York, the interest held by the trust is simply a beneficial interest that does not involve holding title to the property, and the loan payments are not received directly by the trust, but by a separate servicer. The trust serves as a depository for income derived, in part, from North Carolina loans. Plaintiffs' allegations stem from the execution of the original loan, not from the manner in which the servicer collects or allocates payments.

Justice TIMMONS-GOODSON dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 172 N.C. App. 407, 616 S.E.2d 676 (2005), affirming an order allowing defendants' motions to dismiss entered on 9 June 2004 by Judge Henry W. Hight, Jr. in Superior Court, Durham County. On 1 December 2005, the Supreme Court allowed plaintiffs' petition for writ of certiorari to review additional issues. Heard in the Supreme Court 16 March 2006.

Shipman & Wright, LLP, by Gary K. Shipman and William G. Wright, for plaintiff-appellants.

Womble Carlyle Sandridge & Rice, PLLC, by Hada V. Haulsee and Bradley R. Johnson, for defendant-appellees Preferred Credit Trust 1997-1 and Deutsche Bank Trust Company Americas.

Christopher G. Browning, Jr., Solicitor General, and Gary R. Govert, Special Deputy Attorney General, for Attorney General Roy Cooper, amicus curiae.

Center for Responsible Lending, by Seth P. Rosebrock, for Center for Responsible Lending, North Carolina Justice Center, Legal Services of Southern Piedmont, Inc., Pisgah Legal Services, Legal Aid Society of Northwest North Carolina, and Financial Protection Law Center, amici curiae.

Paul H. Stock, Counsel for North Carolina Bankers Association, amicus curiae.

NEWBY, Justice.

The issues on appeal are: (1) whether the trial court may exercise personal jurisdiction over a nonresident trust which holds notes secured by deeds of trust on North Carolina real property; and (2) when the statutes of limitations begin to run for an action alleging a usurious loan origination fee and a violation of the Unfair and Deceptive Trade Practices Act ("UDTPA"). Based on the specific facts of this loan agreement and the relationship of the parties, we hold that there is no personal jurisdiction over the trust and accordingly, affirm the Court of Appeals. Because we resolve this case on the basis of personal jurisdiction, we do not reach the statute of limitations issues.

I. BACKGROUND

Plaintiffs obtained a mortgage loan in the principal amount of $45,000.00 from defendant Preferred Credit Corporation ("Preferred Credit") on 22 January 1997. This loan was secured by a second deed of trust on plaintiffs' residence, under which First Carolina Bank was the trustee. The interest rate on the loan was 14.75% with a disclosed annual percentage rate of 16.902%, at a term of 180 months. The fees and costs charged to plaintiffs at closing were in the amount of $5,225.70, which included a $3,600.00 origination fee.

After closing, on 1 March 1997, Preferred Credit as seller entered into a Pooling and Servicing Agreement ("PSA") with Credit Suisse First Boston Mortgage Securities Corporation ("Credit Suisse") as depositor, Advanta Mortgage Corporation USA ("Advanta") as servicer, and Bankers Trust Company n/k/a Deutsche Bank Trust Company Americas ("DB Trust Co.") as trustee. Under this PSA, the Credit Suisse First Boston Mortgage Securities Corporation Preferred Credit Asset-Backed Certificates, Series 1997-1 ("1997-1 Trust") was formed.

Under a related but separate Sale and Purchase Agreement ("SPA"), Credit Suisse purchased mortgage loans from Preferred Credit. Credit Suisse then assigned all rights under the SPA to the 1997-1 Trust, thereby transferring certain mortgage loans with borrowers in North Carolina and thirty-seven other states. North Carolina notes composed approximately 3% in number and value of the 3,537 loans held by the 1997-1 Trust.

The PSA appointed DB Trust Co. as trustee of the 1997-1 Trust (which is different from the trustee under plaintiffs' deed of trust, First Carolina Bank). David Co, vice president of DB Trust Co., averred that the purpose of the 1997-1 Trust (through its trustee DB Trust Co.) is "to hold mortgage loans . . . , receive income from the mortgage loans . . ., distribute payments received from the Servicer . . . , and issue certificates under the terms of the [PSA]." The 1997-1 Trust was formed and is administered under the laws of the State of New York. The 1997-1 Trust has no office other than the corporate offices of its trustee in California and New York; it has no employees; no employees or agents of the trust have traveled to North Carolina on its behalf; the trust does not "own, possess, lease, or use real estate" in North Carolina; it does not "engage in or transact any business"; it does not make contracts nor has it "contracted to supply any service or thing to anyone"; it has neither solicited nor entered into mortgage loan agreements in North Carolina; and it has not "directly collected payments, fees or commissions" from any borrowers associated with these loans.

Pursuant to the PSA forming the 1997-1 Trust, Advanta was named servicer of the mortgage loans eventually deposited with the 1997-1 Trust. Subsequently, Advanta transferred its servicing rights and responsibilities to Chase Manhattan Mortgage Corporation ("Chase"). By the terms of the PSA, the 1997-1 Trust's trustee is not authorized to directly collect payments on loans or enforce rights under the terms of the mortgage agreements; rather, the servicer Chase is authorized to "do any and all things in connection with . . . servicing and administration [of the loans] which the Servicer may deem necessary or desirable." In the event of default, the servicer Chase is authorized to "take such action as it shall deem to be in the best interest of the Certificateholders and the Certificate Insurer." Chase is empowered to determine "in its discretion," whether to foreclose upon a defaulted loan or to allow its assumption by another borrower. The PSA further provides that "[i]f reasonably required by the Servicer, the Trustee [DB Trust Co.] shall execute any powers of

attorney furnished to the Trustee by the Servicer and other documents necessary or appropriate to enable the Servicer to carry out its . . . duties."

Chase services the 1997-1 Trust's mortgage loans from its office in California. This includes submitting statements to the borrowers and receiving payments therefrom in its California office. After collecting payments in California, Chase deducts its servicing fee and then remits the balance collected on the loans held by the 1997-1 Trust to trustee DB Trust Co. in New York.

Plaintiffs filed the present action[1] alleging defendant Preferred Credit, the loan originator, charged excessive loan origination fees and usurious interest rates and violated the UDTPA. Multiple defendants were named in the complaint, but through the course of litigation and appeals, various defendants were dismissed. Preferred Credit was never served and has not made any appearance in this case. Chase, the loan servicer, is not a party to this action. The remaining defendants relevant to this appeal are the 1997-1 Trust and its trustee DB Trust Co.

The trial court dismissed plaintiffs' complaint against the 1997-1 Trust under Rules 12(b)(2) and 12(b)(6) of the North Carolina Rules of Civil Procedure. It also allowed DB Trust Co.'s motion to dismiss under Rules 12(b)(1) and 12(b)(6). The Court of Appeals, in a divided opinion, affirmed the trial court's dismissal of plaintiffs' claims against defendants on two alternative bases: (1) lack of personal jurisdiction; and (2) expiration of the applicable statutes of limitations. *Skinner v. Preferred Credit*, 172 N.C. App. 407, 616 S.E.2d 676 (2005). The dissenting opinion at the Court of Appeals only discussed the personal jurisdiction issue, *id.* at 415-27, 616 S.E.2d at 681-88 (Bryant, J., dissenting), and plaintiffs appealed as of right on that issue. Subsequently, we allowed plaintiffs' petition for writ of certiorari to review the statute of limitations issues. 360 N.C. 177, 626 S.E.2d 650 (2005).

II. PERSONAL JURISDICTION

As a preliminary matter, we note that plaintiffs do not allege or argue that personal jurisdiction over the 1997-1 Trust could be based on contacts that trustee DB Trust Co. might have with North Carolina. Moreover, there is no evidence in the record regarding any

1. Plaintiffs filed this suit as a class action, but the record contains no indication that the trial court certified the class.

contacts DB Trust Co. has with North Carolina. Thus, analysis in this case will focus only on the 1997-1 Trust.

The question presented is whether North Carolina courts can exercise personal jurisdiction over the 1997-1 Trust. To determine whether a nonresident defendant is subject to personal jurisdiction in North Carolina, our Court employs a two-step analysis. First, jurisdiction over the action must be authorized by N.C.G.S. § 1-75.4, our state's long-arm statute. *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 675, 231 S.E.2d 629, 630 (1977). Second, if the long-arm statute permits consideration of the action, exercise of jurisdiction must not violate the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. *Id.*

A. Long-Arm Statute

Plaintiffs argue that three subsections of the long-arm statute grant jurisdiction over this action: N.C.G.S. § 1-75.4(1)(d), (5)(d), and (6)(b). None of these provisions authorizes the exercise of our jurisdiction.

1. Substantial Activity

[1] N.C.G.S. § 1-75.4(1) applies to defendants with a "Local Presence or Status" and grants personal jurisdiction "[i]n any action . . . in which a claim is asserted against a party who . . . [i]s engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise." N.C.G.S. § 1-75.4(1)(d) (2005). This Court has stated that the enactment of N.C.G.S. § 1-75.4(1)(d) was "intended to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process." *Dillon*, 291 N.C. at 676, 231 S.E.2d at 630 (citing 1 McIntosh, *North Carolina Practice & Procedure* § 937.5 (Supp. 1970)).

However, by its plain language the statute requires some sort of "activity" to be conducted by the defendant within this state. Here, the 1997-1 Trust was created after the origination of plaintiffs' loan as a mechanism for holding notes, receiving income, and issuing related certificates. Only 114 (approximately 3%) of the 3,537 loans deposited at the inception of the 1997-1 Trust related to North Carolina indebtedness. These activities occurred outside of North Carolina, in California and New York. The only local activities that link the plaintiffs to the 1997-1 Trust are: (1) the loan itself, an activity completed by Preferred Credit before the creation of 1997-1 Trust; and (2) loan payments made by the plaintiffs, activities conducted by

a separate servicer, not by the 1997-1 Trust. Thus, even under N.C.G.S. § 1-75.4(1)(d)'s very broad terms, the facts of this case fail to invoke jurisdiction.

2. Things of Value

[2] N.C.G.S. § 1-75.4(5) addresses actions relating to "Local Services, Goods or Contracts" and authorizes jurisdiction over "any action which . . . [r]elates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction." N.C.G.S. § 1-75.4(5)(d) (2005). Essentially, this section of the long-arm statute reaches defendants who engage in commercial transactions with residents of this state. *See Johnston Cty. v. R.N. Rouse & Co., Inc.*, 331 N.C. 88, 95, 414 S.E.2d 30, 35 (1992) (describing N.C.G.S. § 1-75.4(5) as "authoriz[ing] the courts of North Carolina to exercise jurisdiction over a nonresident contracting within the state or contracting to perform services within the state").

In this case, the main transaction at issue, the origination of the mortgage loan, was conducted by Preferred Credit before the creation of the 1997-1 Trust. The only things "shipped from this State" are the loan payments, but the servicer Chase handles all aspects of these transactions. As noted previously, Chase does not act "at the order or direction" of the 1997-1 Trust but rather, is authorized to make its own decisions about how best to administer the loans it services, including discretion as to how to handle a default. There is no direct contact between plaintiffs and the 1997-1 Trust. Although this statutory grant of jurisdiction is far-reaching, the transactions in this case do not fall within its grasp.

3. Tangible Property

[3] N.C.G.S. § 1-75.4(6) concerns actions related to "Local Property" and permits our courts to hear cases which arise out of "[a] claim to recover for any benefit derived by the defendant through the use, ownership, control or possession by the defendant of tangible property situated within this State either at the time of the first use, ownership, control or possession or at the time the action is commenced." N.C.G.S. § 1-75.4(6)(b) (2005). Plaintiffs' mortgage was in the form of a deed of trust. A deed of trust is a three-party arrangement in which the borrower conveys legal title to real property to a third party trustee to hold for the benefit of the lender until repayment of the loan. *See* 1 James A. Webster, Jr., *Webster's Real Estate*

Law in North Carolina § 13-1, at 538 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 5th ed. 1999). This three-party arrangement differs from a two-party mortgage in which the conveyance is directly to the lender; here, the conveyance is to a trustee for the lender's benefit. *See id.* § 13-3, at 540-41. When the loan is repaid, the trustee cancels the deed of trust, restoring legal title to the borrower, who at all times retains equitable title in the property. *See id.* § 13-1, at 538.

In this case, as a result of the execution of a deed of trust for a second mortgage loan, equitable title in the property remained with plaintiffs; legal title was conveyed to nonparty trustee First Carolina Bank; and beneficial interest was ultimately held by the 1997-1 Trust. The beneficial interest held by the 1997-1 Trust does not constitute "use, ownership, control or possession" of the property.

This Court has not specifically addressed the application of N.C.G.S. § 1-75.4(6)(b) to a case such as this. However, our Court of Appeals has considered a factually similar case and concluded that our courts lacked personal jurisdiction. In *Whitener v. Whitener*, 56 N.C. App. 599, 289 S.E.2d 887, *disc. rev. denied*, 306 N.C. 393, 294 S.E.2d 221 (1982), the plaintiff, a North Carolina resident, brought an action seeking an accounting of payments received by his ex-wife on a purchase money note. *Id.* at 599, 294 S.E.2d at 888. The plaintiff argued that personal jurisdiction existed under N.C.G.S. § 1-75.4(6)(b), contending that the defendant derived benefit through her ownership of real estate in North Carolina. *Id.* at 601, 294 S.E.2d at 889. The plaintiff and the defendant sold the North Carolina property in question more than fifteen years before the action was filed and, as part of the sale, took a purchase money note secured by a deed of trust. *Id.* at 599, 294 S.E.2d at 888. At the time of the sale and thereafter, the defendant was domiciled in Florida where she received payments on the note sent from North Carolina. *Id.* On these facts, our Court of Appeals concluded that there was no personal jurisdiction. 56 N.C. App. at 602, 294 S.E.2d at 890.

Whitener is persuasive because it involved a deed of trust arrangement analogous to the one in this case with two important distinctions. In the instant case, the nonresident holding the beneficial interest under the deed of trust, the 1997-1 Trust, does not directly collect payments from North Carolina residents as the defendant in *Whitener* did. Further, the 1997-1 Trust did not participate in the transaction giving rise to the deed of trust as the *Whitener* defendant did by participating in the sale of her land. Thus,

the 1997-1 Trust's connections to North Carolina are even more tenuous than those of the defendant in *Whitener*.

As the Court of Appeals acknowledged in *Whitener*, exercising personal jurisdiction over a party who holds the beneficial interest in a deed of trust secured by North Carolina real property but has no other connections to this state would arguably violate due process requirements of the Fourteenth Amendment to the U.S. Constitution. *Id.* at 601-03, 294 S.E.2d at 889-90. Hence, the analysis under this provision of our long-arm statute blends to some extent with the next step in the personal jurisdiction inquiry: whether 1997-1 Trust has sufficient minimum contacts with North Carolina to comport with due process requirements.

B. Due Process Analysis

Even assuming *arguendo* that North Carolina's long-arm statute authorizes jurisdiction over the 1997-1 Trust, exercise of that jurisdiction would violate due process requirements. To satisfy the due process prong of the personal jurisdiction analysis, there must be sufficient "minimum contacts" between the nonresident defendant and our state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95, 102 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 343, 85 L. Ed. 278, 283 (1940)). This Court has stated:

> The concept of "minimum contacts" furthers two goals. First, it safeguards the defendant from being required to defend an action in a distant or inconvenient forum. Second, it prevents a state from escaping the restraints imposed upon it by its status as a coequal sovereign in a federal system.

Miller v. Kite, 313 N.C. 474, 477, 329 S.E.2d 663, 665 (1985) (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)).

There are two types of personal jurisdiction. General jurisdiction exists when the defendant's contacts with the state are not related to the cause of action but the defendant's activities in the forum are sufficiently "continuous and systematic." *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16, 104 S. Ct. 1868, 1872-73, 80 L. Ed. 2d 404, 410-13 (1984). Specific jurisdiction exists when the cause of action arises from or is related to defendant's contacts with the forum. *See id.* at 414 n.8, 104 S. Ct. at 1872 n.8,

80 L. Ed. 2d at 411 n.8. Plaintiffs only argue that specific jurisdiction exists. This Court has noted that, for the purposes of asserting specific jurisdiction, "[o]ur focus should . . . be upon the relationship among the defendant, this State, and the cause of action." *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 366, 348 S.E.2d 782, 786 (1986). We have also observed:

> Application of the "minimum contacts" rule "will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

Chadbourn, Inc. v. Katz, 285 N.C. 700, 705, 208 S.E.2d 676, 679 (1974) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240, 2 L. Ed. 2d 1283, 1298 (1958)).

In this case, plaintiffs argue personal jurisdiction over the 1997-1 Trust exists on three bases: (1) Preferred Credit's origination of plaintiffs' loan in North Carolina; (2) deeds of trust on North Carolina property; and (3) loan payments sent from North Carolina. We address each of these "contacts" in turn.

First, the 1997-1 Trust did not exist at the time the loan in question was created. The loan originator, Preferred Credit, was the entity that solicited plaintiffs' business and executed the loan. This loan was sold to Credit Suisse who then assigned the loan to the 1997-1 Trust. Thus, the 1997-1 Trust is at least two steps removed from the North Carolina origins of this loan. Further, the 1997-1 Trust as an entity was not an active participant in either the loan execution or subsequent assignment. It was created as a passive depository for 3,537 loans, only 3% of which have ties to North Carolina. Moreover, its creation occurred outside of this state. Its day-to-day operations, which consist of its accounts and the office of its trustee DB Trust Co., are in New York.

Second, plaintiffs argue that by virtue of being assigned loans secured by deeds of trust on North Carolina property, the 1997-1 Trust has a significant enough contact with North Carolina to support jurisdiction. The interest held by the 1997-1 Trust is simply a beneficial interest in North Carolina property. It does not hold title to any North Carolina property; legal title is held by a trustee (for plaintiffs' deed of trust, First Carolina Bank), which has no relationship to the

1997-1 Trust apart from the deed of trust. Thus, the nature of this particular contact with North Carolina is insufficient to support jurisdiction, even as arguably the only "direct" contact the 1997-1 Trust has with North Carolina.

Third, the loan payments in question are not received directly by the 1997-1 Trust, but instead by a separate servicer, Chase. In essence, the 1997-1 Trust serves as the depository for income derived, in part, from North Carolina loans. More importantly, plaintiffs did not make Chase a party to this action. Plaintiffs' allegations stem from the execution of the original loan, not the manner in which Chase is collecting or allocating payments.

Our cases analyzing minimum contacts rarely have dealt with so "passive" a defendant. However, we have acknowledged that passivity can result in a lack of jurisdiction even when there is a very direct, intentional contact. In *United Buying Group, Inc. v. Coleman*, 296 N.C. 510, 251 S.E.2d 610 (1979) we found that a defendant who signed a conditional promissory note, which was the subject of the action, to a North Carolina company, but had no other contacts with the state, had insufficient contacts to support personal jurisdiction. *Id.* at 518, 251 S.E.2d at 616. Although the defendant could have anticipated being sued in North Carolina, this Court concluded the fact that the defendant's only contact was signing a note to guarantee a debt owed to a North Carolina company, which "his brother . . . happened to be doing business with," was inadequate to exercise personal jurisdiction over him. *Id.* at 571, S.E.2d at 615. Thus, even though the defendant signed a note that created a relationship with North Carolina residents, we could not automatically exercise personal jurisdiction. Here, the 1997-1 Trust is more passive an "actor" than the defendant in *United Buying Group*. The trust exists as an entity created for the purpose of being assigned income from mortgage notes, some of which happen to be secured by North Carolina property.

Additionally, we note that other jurisdictions have considered similar facts and concluded that there was no personal jurisdiction over the defendants. In fact, one such case involved the same defendant as the present action. The United States District Court for the Western District of Tennessee held that Tennessee lacked personal jurisdiction over the 1997-1 Trust. *See Frazier v. Preferred Credit*, No. 01-2714 GB, 2002 WL 31039856, at *10 (W.D. Tenn. July 31, 2002) (unpublished) (referring to the 1997-1 Trust as part of the collective "First Boston Trusts"). In conducting its due process analysis, the court noted the plaintiffs failed to point to any evidence in the record

regarding the 1997-1 Trust's contacts with Tennessee and resolved the jurisdiction question over the 1997-1 Trust in that manner. *Id.* at *7. However, the court did analyze the facts of similar trusts, noting the plaintiffs alleged the following contacts supported personal jurisdiction over those defendants: "defendants' purchase of at least seventy-four second mortgage loans secured by property held by Tennessee residents; defendants' receipt of income from these mortgages; and defendants' holding of notes secured by mortgages from Tennessee residents secured by real property located within the state." *Id.* at *6 (citations omitted). Concluding it lacked jurisdiction over the defendants, the court in *Frazier* cited facts essentially indistinguishable from the instant case, including that "an independent servicer has exclusive power to perform all acts in connection with administering the loans, including collecting payments and enforcing performance of or seeking remedies with respect to the loans." *Id.* The United States District Court for the Western District of Tennessee has reached the same result in other cases. *See Williams v. Firstplus Home Loan Owner Trust*, 310 F. Supp. 2d 981 (W.D. Tenn. 2004); *Mull v. Alliance Mortgage Banking Corp.*, 219 F. Supp. 2d 895 (W.D. Tenn. 2002); *Street v. PSB Lending Corp.*, No. 01-2751 GV, 2002 WL 1797773 (W.D. Tenn. July 31, 2002) (unpublished); *Berry v. GMAC-Residential Funding Corp.*, No. 01-2713 GB, 2002 WL 1797779 (W.D. Tenn. July 31, 2002) (unpublished).

Similarly, the United States District Court for the District of Kansas held it did not have personal jurisdiction over nonresident assignees in an action brought by consumers claiming that second mortgages violated provisions of the Kansas Uniform Consumer Credit Code. *See Pilcher v. Direct Equity Lending*, 189 F. Supp. 2d 1198 (D. Kan. 2002) (mem.). Another federal district court reached the same conclusion under relevant Michigan statutes. *Mazur v. Empire Funding Home Loan Owner Trust 1997-3*, No. 03-CV-74103-DT (E.D. Mich. Jan. 9, 2004) (unpublished).

Other jurisdictions have indicated a reluctance to exercise personal jurisdiction over nonresident trusts based on actions by the loan originator. *Barry v. Mortgage Servicing Acquisition Corp.*, 909 F. Supp. 2d 65, 74 (D.R.I. 1995) ("Here, there is no evidence to suggest that [the defendant trust] had anything to do with the origination of this loan. Thus, [the originating mortgagee's] origination of the loan in Rhode Island is irrelevant to [the defendant trust's] contacts with the state."); *see also Rogers v. 5-Star Mgmt., Inc.*, 946 F. Supp. 907, 912 (D.N.M. 1996) (mem.) (" '[T]he unilateral activity of parties other than

the non-resident defendant cannot satisfy the requirement of the defendant's contact with the forum state.' " (quoting *Barry*, 909 F. Supp. at 74)). While these cases from other jurisdictions are certainly not controlling on this Court, they persuasively support our conclusion on the personal jurisdiction issue.

Two federal courts have found personal jurisdiction in cases with seemingly similar facts, but these cases are distinguishable. In *Easter v. American West Financial*, 381 F.3d 948 (9th Cir. 2004), the United States Court of Appeals for the Ninth Circuit found it had, under Washington state law, personal jurisdiction over trusts similar to the 1997-1 Trust. *Id.* at 960-61. As is true for the 1997-1 Trust, the trusts in *Easter* were the beneficiaries of deeds of trust for real property located in the forum state, and the trusts ultimately received money from forum state residents. *Id.* at 961. However, in *Easter*, the borrowers' actions arose "out of the Trust Defendants' contacts with the forum because the suit [was] for recovery of the allegedly excessive *interest payments* Borrowers made on their notes." *Id.* (emphasis added). There is an important distinction between an allegation of a usurious interest rate which is collected over the life of the loan and that of illegal origination fees which are charged at closing. In *Easter*, the borrowers' actions arose out of interest payments that were paid while the defendant trusts were beneficial owners of the deeds of trust. The defendant trusts received payments that included usurious interest. In this case, the plaintiffs' cause of action arose out of allegedly usurious fees paid at closing, before the 1997-1 Trust was created. As such, the rationale of the Tennessee, Kansas, and Michigan cases is more applicable.

Likewise, *Johnson v. Long Beach Mortgage Loan Trust*, 451 F. Supp. 2d 16 (D.D.C. 2006) (mem.), a District of Columbia federal district court case relying on *Easter* to find personal jurisdiction over a nonresident trust, is distinguishable. *Johnson* concerned a dispute over the validity of the security interest created by a mortgage, not whether origination fees paid at closing were usurious. *Id.* at 33 (distinguishing *Pilcher*, discussed above, by noting that because the essence of the plaintiffs' case was illegally charged interest and fees, "[t]he cause of action in *Pilcher* might therefore not be said to arise out of or relate to the trusts' interests in Kansas real property").

On the facts in this case, the 1997-1 Trust lacks sufficient minimum contacts to meet the due process requirements for personal jurisdiction. In terms of fairness, it is important to note that the

1997-1 Trust can be sued elsewhere. The 1997-1 Trust admits in its brief that personal jurisdiction exists in New York, where it maintains its office and accounts. We also acknowledge our state's public interest in enforcing its consumer protection laws, but this Court has observed, in a case involving the important interest of enforcing child support obligations, that "[a]bsent the constitutionally required minimum contacts, . . . this interest will not suffice to make North Carolina a proper forum in which to require the defendant to defend the action." *Miller*, 313 N.C. at 480, 329 S.E.2d at 667 (citing *Kulko v. Super. Ct. of Cal.*, 436 U.S. 84, 100-01, 98 S. Ct. 1690, 1701, 56 L. Ed. 2d 132, 146-47 (1978)).

III. CONCLUSION

We hold that North Carolina courts lack personal jurisdiction over a nonresident trust that has no connections to this state other than holding mortgage loans secured by deeds of trust on North Carolina property. Because we decide this case based on personal jurisdiction, it is unnecessary to address when the statutes of limitations for plaintiffs' claims began to run. Accordingly, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice TIMMONS-GOODSON dissenting.

As the majority notes, this case presents an issue of first impression. Regrettably, the Court's decision today aids in the exploitation of our state's most vulnerable citizens. By placing the out-of-state assignee trusts beyond the reach of our long-arm statute, the majority's decision effectively undermines the right of unwitting victims of predatory lending practices in the second mortgage industry to sue the holders of their second mortgage loans in courts in this state. Citizens of North Carolina who enter into mortgage contracts in North Carolina that are secured by real property located in North Carolina have a right to seek the protections of North Carolina law concerning the mortgage contracts *in the courts of North Carolina*.

For the reasons stated below, I respectfully dissent from the majority's decision. I would hold that courts of this state have personal jurisdiction over defendant, an out-of-state assignee holding second mortgages secured by North Carolina property.

I. BACKGROUND

On 22 January 1997, the Skinners closed on their second mortgage loan with Preferred Credit Corporation. The loan was secured by a deed of trust on plaintiffs' residence. The deed of trust provides: "The state and local laws applicable to this Deed of Trust shall be the laws of the jurisdiction in which the Property is located."

Preferred Credit Corporation sold thousands of second mortgage loans to Credit Suisse First Boston Mortgage Securities Corp. (First Boston) with the plan to create a trust in which to deposit the loans. Pursuant to a pooling and servicing agreement (PSA) between Preferred Credit Corporation, First Boston, and others, 114 loans executed in North Carolina with an aggregate value of over $4 million were deposited into a trust, Preferred Credit Asset-Backed Certificates, Series 1997-1 (defendant or Trust). The aggregate unpaid principal balance of all loans collected in the trust fund was almost $131 million.

Under the PSA, First Boston assigned all of its rights and remedies against Preferred Credit Corporation to the Trust. The Trust holds mortgage notes, receives income from the mortgage loans, distributes payments received from the servicer to holders of certificates representing ownership interests in the Trust, and issues certificates under the terms of the PSA.

The loans collected in the Trust fund were used to back securities (in the form of "certificates") sold to individuals and entities who wished to invest in the loan pool. The prospectus provided to investors in the Trust states:

> Applicable state laws generally regulate interest rates and other charges and require certain disclosures. In addition, other state laws, public policy and general principles of equity relating to the protection of consumers . . . may apply to the origination, servicing and collection of the Mortgage Loans. . . . [V]iolations of these laws, policies and principles may limit the ability of the Servicer to collect all or part of the principal of or interest on the Mortgage Loans, may entitle the borrower to a refund of amounts previously paid and, in addition, could subject the owner of the Mortgage Loan to damages and administrative enforcement.

Bankers Trust Company, n/k/a Deutsche Bank Trust Company Americas, was named and appointed trustee of the Trust pursuant to the PSA. The trustee has physical custody of the second mortgage

notes or deeds of trusts and is located in California. The trustee administers the Trust for the benefit of certificate holders.

Advanta Mortgage Corp. USA (Advanta) was the original servicer under the PSA. Advanta subsequently transferred its servicing rights and responsibilities to Chase Manhattan Mortgage Corporation (servicer). The servicer sends statements to mortgagors from its offices in California and receives payments on the loans at its offices in California. The servicer remits the payments, minus a servicing fee, to the trustee of the Trust.

The PSA and powers of attorney executed by the trustee of the trust authorize the servicer to foreclose on the property securing the mortgage loans in the event of a default. Despite defendant's ability to avail itself of the benefits of North Carolina law in the event of a default by a debtor, the majority's decision insulates defendant from its potential liability in this state.

II. PERSONAL JURISDICTION

In order to resolve the jurisdictional issue, the Court must determine: (1) whether the statutes of North Carolina permit courts of this state to entertain this action against defendant; and (2) whether the exercise of personal jurisdiction by courts in this state violates due process. *Dillon v. Numismatic Funding Corp.*, 291 N.C. 674, 675, 231 S.E.2d 629, 630 (1977).

At least two sections of N.C.G.S. § 1-75.4 permit the exercise of personal jurisdiction in the instant case. N.C.G.S. § 1-75.4, frequently referred to as North Carolina's long arm statute, is to be liberally construed to permit courts of this state to exercise in personam jurisdiction over nonresident defendants to the full extent permitted by the Due Process Clause of the United States Constitution. *See, e.g.*, *Dillon*, 291 N.C. at 676, 231 S.E.2d at 630 ("By the enactment of [N.C.G.S.] § 1-75.4(1)(d), it is apparent that the General Assembly intended to make available to the North Carolina courts the full jurisdictional powers permissible under federal due process.").

N.C.G.S. § 1-75.4(1)(d) provides one basis for the exercise of in personam jurisdiction in the instant case. Pursuant to section 1-75.4(1)(d), a court of this state that has jurisdiction over the subject matter of an action may assert personal jurisdiction over a nonresident defendant that "[i]s engaged in substantial activity within this state, whether such activity is wholly interstate, intrastate, or otherwise." N.C.G.S. § 1-75.4(1)(d).

This Court last addressed whether a defendant was engaged in substantial activity in this state pursuant to N.C.G.S. § 1-75.4(1)(d) in *Dillon*, 291 N.C. 674, 231 S.E.2d 629. In that case, the defendant, with its principal place of business in New York, actively and regularly solicited orders for its coins from residents of this state during a twenty-one month period. *Id.* at 679, 231 S.E.2d at 632. The defendant made several mass mailings to North Carolinians and sold coins with a total value of over $50,000 to 27 different residents in one hundred forty-two separate transactions. *Id.*

In the instant case, defendant is the beneficiary of 114 deeds of trust, and payment on the loan notes owned by defendant is secured by North Carolina realty. The real property involved has an aggregate value of over $4 million. Certainly, if the defendant in *Dillon* engaged in substantial activity in North Carolina when the transactions in that case involved the sale of coins, there is substantial activity in the instant case in which the transactions involve real property located in North Carolina.

The majority goes to great lengths to highlight that the North Carolina loans held by defendant comprise only 3% of all loans held by defendant. Respectfully, this fact is of little import in assessing personal jurisdiction. I have found no North Carolina case that grants special consideration to the percentage of a non-resident corporation's total business in the forum state in assessing the issue of personal jurisdiction. Courts in other jurisdictions have considered "whether percentages of a non-resident corporation's total business in a forum state should be given special consideration" in determining the issue of personal jurisdiction. *Lakin v. Prudential Sec., Inc.*, 348 F.3d 704, 708 (8th Cir. 2003). In *Lakin*, the court concluded the "relevant inquiry is not whether the percentage of a company's contacts is substantial for that company; rather, our inquiry focuses on whether the company's contacts are substantial for the *forum*." *Id.* at 709. The court concluded it had general personal jurisdiction over defendant Prudential Securities even though the home-equity loans and lines of credit in Missouri, the forum state, constituted only one percent of the defendant's total loan portfolio. *Id.* at 708, 714.

The Court of Appeals for the Third Circuit also considered the relevance of the percentage of a non-resident corporation's total business in a forum state to the issue of personal jurisdiction in *Provident National Bank v. California Federal Savings & Loan Association*, 819 F.2d 434 (3d Cir. 1987). In *Provident*, the Pennsylvania-based plaintiff sued the defendant, a federally-chartered bank with head-

quarters in California, in Pennsylvania. *Id.* at 435-6. The defendant had no Pennsylvania office, employees, agents, mailing address, or telephone number. *Id.* at 436. The defendant had not applied to do business in Pennsylvania, did no advertising in Pennsylvania and paid no taxes in Pennsylvania. *Id.* The defendant had about $10 million in outstanding loans with Pennsylvania residents but the loans amounted to only .083% of defendant's total loan portfolio of $12 billion. *Id.* The court concluded, "the size of the percentage of [defendant's] total business represented by its Pennsylvania contacts is generally irrelevant." 819 at 438.

In the instant case, the mortgage contracts held by defendant bind over 100 North Carolina families to tender in excess of $4 million in payments to the Trust. I submit that this is substantial activity for North Carolina. Not only are defendant's contacts with North Carolina substantial, they are continuous. The mortgages "are not single point-of-sale transactions. Rather the terms of these loans are typically measured in months and years—creating continuous long-term contacts with" the forum state. *Lakin*, 348 F.3d at 708.

The majority also notes that the Trust was created after plaintiffs executed their loan. The assignment, however, does not wipe away jurisdiction. As assignee, defendant stands in the place of its assignor. *See Rose v. Vulcan Materials Co.*, 282 N.C. 643, 664, 194 S.E.2d 521, 535 (1973); *Auto Fin. Co. of N.C. v. Wash Simmons & Weeks Motors, Inc.*, 247 N.C. 724, 728, 102 S.E.2d 119, 122 (1958) ("[T]he rule is that a note tainted with usury retains the taint in the hands of a subsequent holder." (Citations omitted)); *Turner v. Beggarly*, 33 N.C. 241, 243, 11 Ired. 331, 333-34 (1850); *Smith v. Brittain*, 38 N.C. 272, 279, 3 Ired. Eq. 347, 354 (1844). Defendant assumed all of the rights, benefits, obligations, and liabilities of the assignor when it accepted assignment of the mortgage loans.

The majority also emphasizes that defendant's trustee's day-to-day operations are in New York and that defendant has no offices or employees in North Carolina. As recognized by the United States Supreme Court in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), such circumstances are not dispositive of the personal jurisdiction question. In that case, the Court found that personal jurisdiction was appropriate even though "[a]ppellant ha[d] no office in Washington and ma[de] no contracts either for sale or purchase of merchandise there. It maintain[ed] no stock of merchandise in that state and ma[de] there no deliveries of goods in

intrastate commerce." *Id.* at 313. The Court held that International Shoe Co. was subject to personal jurisdiction in the State of Washington. *Id.* at 320.

N.C.G.S. § 1-75.4(6)(b) also provides a basis for the exercise of personal jurisdiction over defendant in the instant case. The statute asserts that courts of this state having subject matter jurisdiction may exercise personal jurisdiction "[i]n any action which arises out of . . . [a] claim to recover for any benefit derived by the defendant through the use, ownership, control or possession by the defendant of tangible property situated within this State either at the time of the first use, ownership, control or possession or at the time the action is commenced." N.C.G.S. § 1-75.4(6)(b).

Defendant controls an interest in real property located in this state because defendant holds a note secured by a deed of trust of North Carolina realty. Under the deed of trust, legal title to the property is being held by a trustee for defendant's benefit until the indebtedness is extinguished. *See* James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 13-1, at 538 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 5th ed. 1999). Defendant receives monthly payments on the mortgage loan and may enforce repayment of the loan using the laws of this state. This cause of action concerns the amount of the origination fees charged in connection with the loan.

The majority considers *Whitener v. Whitener*, 56 N.C. App. 599, 289 S.E.2d 887, *disc. rev. denied*, 306 N.C. 393, 294 S.E.2d 221 (1982), as analogous to the instant case; however, *Whitener* is distinguishable. Before their divorce, the parties in *Whitener* sold a parcel of real estate located in North Carolina and took a purchase money note secured by a deed of trust for it. 56 N.C. App. at 599, 289 S.E.2d at 888. The defendant had been domiciled in Florida since the property in North Carolina was sold. The plaintiff, domiciled in North Carolina, brought an action to enforce an accounting by the defendant of monies she received in Florida as payments on the purchase money note. *Id.* The court in *Whitener* held that the exercise of personal jurisdiction over defendant by courts of this state did not comport with due process because there was no relationship between the property in North Carolina and the controversy between the parties. 56 N.C. App. at 602, 289 S.E.2d at 889-90. A fundamental distinction between *Whitener* and the instant case is that the cause of action in *Whitener* was for an *accounting of monies payable* and did not con-

cern the property in North Carolina. In the instant case, the controversy directly relates to the property in North Carolina because it concerns the charge for origination fees for a loan secured by the property. I would hold that both N.C.G.S. §§ 1-75.4 (1)(d) and (6)(b) allow courts of this state to assert *in personam* jurisdiction over defendant.

The second inquiry in the jurisdictional analysis is whether the exercise of in personam jurisdiction over defendant by courts of this state would violate due process of law under the United States Constitution. As the majority notes, plaintiffs argue that North Carolina has specific jurisdiction over defendant (or, that defendant's contacts with North Carolina serve as the basis for plaintiffs' cause of action). *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984). The United States Supreme Court articulated the standard for determining whether the exercise of personal jurisdiction over a nonresident defendant comports with due process in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). "[D]ue process requires only that in order to subject a [nonresident] defendant to a judgment *in personam*, . . . he have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940), *superseded by statute*, Fed. R. Civ. P. 60(b) (amended 1946)). "[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). A crucial factor is whether the defendant had reason to expect that he might be subjected to litigation in the forum state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

Defendant has purposefully availed itself of the privileges of conducting business with North Carolina residents, thus invoking the benefits and protections of North Carolina law. Defendant holds at least 114 loan notes executed in North Carolina and secured by deeds of trust that provide on their face that North Carolina law applies. By accepting assignment of the loans secured by North Carolina realty, defendant had every reason to expect that it might be subjected to litigation in North Carolina. The transaction by which defendant became holder of plaintiffs' mortgage note clearly anticipates that defendant would be subject to personal jurisdiction in this state. The prospectus provided to investors in the Trust clearly states:

> Applicable state laws generally regulate interest rates and other charges and require certain disclosures. In addition, other state laws, public policy and general principles of equity relating to the protection of consumers . . . may apply to the origination, servicing and collection of the Mortgage Loans. . . . [V]iolations of these laws, policies and principles may limit the ability of the Servicer to collect all or part of the principal of or interest on the Mortgage Loans, may entitle the borrower to a refund of amounts previously paid and, in addition, could subject the owner of the Mortgage Loan to damages and administrative enforcement.

Defendant's actions constitute a purposeful invocation of the benefits and protection of North Carolina's laws. By purchasing loan notes secured by property situated in North Carolina, defendant agreed to the application of North Carolina law in the enforcement of the provisions of the loan agreements. As the U.S. Supreme Court said in *Burger King Corp. v. Rudzewicz*, "the Due Process Clause may not readily be wielded as a territorial shield to avoid interstate obligations that have been voluntarily assumed." 471 U.S. 462, 474 (1985). Defendant should not be insulated from the assertion of in personam jurisdiction. "So long as a commercial actor's efforts are 'purposefully directed' toward residents of another State, [this Court should] . . . reject[] the notion that an absence of physical contacts can defeat personal jurisdiction [here]." *Id.* at 476 (citations omitted).

"Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' " *Burger King*, 471 U.S. at 476 (quoting *Int'l Shoe*, 326 U.S. at 320). In *World-Wide Volkswagen*, the Supreme Court listed the following factors as relevant considerations: (1) "the forum State's interest in adjudicating the dispute"; (2) "the plaintiff's interest in obtaining convenient and effective relief"; (3) "the interstate judicial system's interest in obtaining the most efficient resolution of controversies"; and (4) "the shared interest of the several States in furthering fundamental substantive social policies." 444 U.S. at 292 (citations omitted). The Supreme Court has recognized that:

> These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. On the other hand, where a defendant who purposefully has directed his activities at forum

> residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable.

Burger King, 471 U.S. at 477 (citations omitted).

North Carolina has a strong interest in adjudicating this dispute. As noted above, defendant is the mortgagee of at least 114 loans to North Carolina residents with an aggregate value of over $4 million. The loan agreements were initiated in North Carolina, and the deeds of trust explicitly state North Carolina law governs the mortgage. The property encumbering the loans is situated in this state. North Carolina has a " 'manifest interest' " in enforcing the laws of the state and protecting its residents in making contracts with others who enter the state for that purpose. *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 367, 348 S.E.2d 782, 787 (1986) (citing *Burger King*, 471 U.S. at 473).

The majority cites *Frazier v. Preferred Credit*, 2002 WL 31039856 (W.D. Tenn. July 31, 2002) No. 01-2714 GB (unpublished) as persuasive on the issue of personal jurisdiction. *Frazier* is one of several opinions of the United States District Court for the Western District of Tennessee rendered on the same day concerning whether courts in Tennessee could exercise personal jurisdiction over several trust defendants. The other opinions include *Brooks v. Terra Funding, Inc.*, 2002 WL 1797785 (W.D. Tenn. July 31, 2002) No. 01-2946 GV (unpublished); *Berry v. GMAC-Residential Funding Corp.*, 2002 WL 1797779 (W.D. Tenn. July 31, 2002) No. 01-2713 GB (unpublished); and *Street v. PBS Lending Corp.*, No. 01-2751 GV, 2002 WL 1797773 (W.D. Tenn. July 31, 2002) (unpublished). In *Frazier*, *Brooks*, *Berry*, and *Street*, the plaintiffs filed suit on behalf of themselves and other persons similarly situated against the holders or assignees of second mortgage notes. Plaintiffs alleged the mortgage notes violated Tennessee's laws concerning interest rates, loan origination fees, loan brokerage commissions, and other loan charges. In each of the four cases, the court determined that it lacked specific personal jurisdiction over the defendants because plaintiffs did not allege "which, if any, defendants actually h[e]ld their second mortgage loans. They merely assert[ed] '[u]pon information and belief, [that defendants were] currently a holder of certain of the second mortgage loan notes made to class members.' " *Frazier*, 2002 WL 31039856, at *7; *Brooks*, 2002 WL 1797785 at *9; *Berry*, 2002 WL 1797779 at *8; *Street*, 2002 WL 1797773 at 12.

Under nearly identical circumstances as those in the instant case, the Ninth Circuit Court of Appeals in *Easter v. American West Financial*, 381 F.3d 948, 961 (9th Cir. 2004), concluded the courts of Washington could exercise personal jurisdiction over several trusts holding second mortgage notes secured by Washington realty. In *Easter*, the court stated:

> Here, the Trust Defendants have availed themselves of the protections of Washington law because they are beneficiaries of deeds of trust[] which hypothecate Washington realty to secure payments on notes owned by the Trust Defendants. The deeds of trust convey a property interest in Washington realty, which interest the Trust Defendants expect Washington law to protect. . . . [H]olding a deed of trust 'represents a significant contact with [the forum].' The Trust Defendants also receive money from Washington residents, albeit routed through the loan servicing companies who actually bill the payors. The Trust Defendants' income stream is derived from loans negotiated and executed in Washington and made to Washington residents.

Id. (footnote call number omitted) (quoting *Sher v. Johnson*, 911 F.2d 1357, 1363 (9th Cir. 1990).

Likewise, in the instant case, defendant has availed itself of the protections of North Carolina law because it is the beneficiary of deeds of trust which hypothecate North Carolina realty to secure payments on notes owned by defendant. The deeds of trust convey a property interest in North Carolina realty, which interest defendant expects North Carolina law to protect. Defendant also receives money from North Carolina residents, albeit routed through the loan servicing company that bills the payors. Defendant's income stream is derived from loans negotiated and executed in North Carolina and made to North Carolina residents. Defendant has purposefully availed itself of the privilege of doing business in North Carolina and should be subject to personal jurisdiction in North Carolina. To hold otherwise unnecessarily cedes our responsibility to protect the citizens of North Carolina.

Justices MARTIN and EDMUNDS join in this dissent.

WAYNE SHEPARD AND ROSEMARY SANDERS SHEPARD v. OCWEN FEDERAL BANK, FSB, AND WELLS FARGO BANK MINNESOTA, AND DONALD T. RITTER, IN HIS CAPACITY AS TRUSTEE

No. 476A05

(Filed 20 December 2006)

Usury; Unfair Trade Practices— second mortgage—usurious origination fee—expiration of statute of limitations

The trial court did not err by granting defendants' motions to dismiss based on expiration of the applicable statutes of limitations for plaintiffs' causes of action nearly five years after closing on a second mortgage loan asserting usury law violations under Chapter 24 of the North Carolina General Statutes and unfair and deceptive trade practices under N.C.G.S. § 75-1.1, because: (1) the statutes of limitations began to run on these claims at the closing of the loan when the fee in dispute was paid; (2) although plaintiffs did pay a usurious origination fee in excess of two percent of the loan's value in violation of N.C.G.S. § 24-14(f), the statute of limitations necessitated that plaintiffs file their claim within two years of paying the fee at closing; (3) the manner in which the origination fee was or could have been paid at closing almost five years before plaintiffs filed their complaint is irrelevant and cannot support extension of the statute of limitations on plaintiffs' claims for usurious origination fees; (4) the entirety of the origination fee was paid at closing, and not piecemeal as part of the loan payments; (5) no usurious fees have been charged or paid since closing on 25 July 1997, and thus, the statute of limitations on plaintiffs' usury claim expired nearly three years before plaintiffs' complaint was filed on 3 May 2002; and (6) the expiration of the applicable four-year statute of limitations under N.C.G.S. § 75-16.2 bars plaintiffs' unfair and deceptive trade practices claim when plaintiffs have conceded that their unfair and deceptive trade practices claim is derived from their usury claim.

Justice TIMMONS-GOODSON dissenting.

Justices MARTIN and EDMUNDS joining in the dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 172 N.C. App. 475, 617 S.E.2d 61 (2005), affirming an order granting defendants' motions to dis-

miss entered on 8 July 2004 by Judge Charles H. Henry in Superior Court, New Hanover County. Heard in the Supreme Court 16 March 2006.

Hartzell & Whiteman, LLP, by J. Jerome Hartzell, for plaintiff-appellants.

Kellam & Pettit, P.A., by William Walt Pettit, and Kilpatrick Stockton LLP, by Adam H. Charnes, for defendant-appellees.

North Carolina Justice Center, by Carlene McNulty, for North Carolina Justice Center, Legal Aid of North Carolina, Inc., Legal Services of Southern Piedmont, Inc., Pisgah Legal Services, Legal Aid Society of Northwest North Carolina, North Carolina Academy of Trial Lawyers, and Center for Responsible Lending, amici curiae.

BRADY, Justice.

The issue presented is whether the applicable statutes of limitations bar plaintiffs' causes of action asserting (1) usury law violations under Chapter 24 of the North Carolina General Statutes and (2) unfair and deceptive trade practices, derived from the usury claims, under section 75-1.1. We hold that the statutes of limitations began to run on these claims at the closing of the loan when the fee in dispute was paid, and therefore plaintiff's claims are barred.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Wayne Shepard and Rosemary Sanders Shepard obtained a second mortgage loan, with a closing date of 25 July 1997, from Chase Mortgage Brokers, Inc. (Chase) in the amount of $16,500.00 and executed a deed of trust on their residential real property to secure the loan. Chase charged plaintiffs a loan origination fee of $1,485.00, which amounts to nine percent of the loan. This origination fee was deducted from the loan proceeds ultimately disbursed to plaintiffs. Chase later assigned the loan to defendant Ocwen Federal Bank, FSB (Ocwen) and Ocwen then assigned the loan to Wells Fargo Bank Minnesota, N.A. (Wells Fargo).

On 3 May 2002, nearly five years after closing, plaintiffs initiated litigation against defendants, alleging in their complaint that the origination fee was impermissible under North Carolina law. Plaintiffs' complaint asserted that the origination fee violated Chapter 24 of the North Carolina General Statutes and N.C.G.S. § 75-1.1, that the loan

should be reformed, and requested treble damages and counsel fees. Defendant Donald T. Ritter, the trustee of the original deed of trust, was joined for purposes of the reformation claim.[1]

Ocwen and Wells Fargo made motions to dismiss plaintiffs' complaint for failure to state a claim, asserting the actions were time barred by the applicable statutes of limitations. On 25 June 2004 the trial court granted both motions to dismiss because "the applicable statute of limitation on both claims for relief had expired prior to the institution of this action." Plaintiffs appealed the granting of the motions to the Court of Appeals, which, in a divided opinion, affirmed the trial court's order. Plaintiffs appealed as of right to this Court.

ANALYSIS

On review of a motion to dismiss, we determine

> whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. In ruling upon such a motion, the complaint is to be liberally construed, and the trial court should not dismiss the complaint unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief.

Meyer v. Walls, 347 N.C. 97, 111-12, 489 S.E.2d 880, 888 (1997) (brackets in original) (citations and internal quotation marks omitted).

"A statute of limitations defense may properly be asserted in a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the claim." *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996). "Once a defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period [rests] on the plaintiff. A plaintiff sustains this burden by showing that the relevant statute of limitations has not expired." *Id.* (citations omitted).

Chapter 24 of the General Statutes governs lending transactions by setting maximum rates for interest and other fees and charges. Plaintiffs assert Chase charged a usurious origination fee in violation of N.C.G.S. § 24-14(f), which limits fees for certain secondary real

1. Donald T. Ritter failed to answer plaintiffs' complaint and default judgment was entered against him on 9 September 2002.

property loans to a maximum of two percent of the loan amount. N.C.G.S. § 24-14(f) (2005). The statute of limitations for a claim under the usury statutes is two years. *Id.* § 1-53(2), (3) (2005). Thus, plaintiffs are required to show that within two years of filing their complaint defendant charged or plaintiffs paid a usurious fee. Plaintiffs cannot do so, and as a result the statute of limitations bars plaintiffs' claims.

It appears plaintiffs did pay a usurious origination fee in excess of two percent of the loan's value. However, the statute of limitations necessitated that plaintiffs file their claim within two years of paying the fee at closing. Attempting to circumvent the statute of limitations, plaintiffs argue that by paying the fee charged at closing out of loan proceeds they essentially rolled the fee into the loan and are paying part of the usurious fee each time they make a loan payment. Therefore, plaintiffs assert they are entitled to recover for any partial payments of the usurious fee they made within two years of filing their complaint plus all partial payments of the usurious fee made since the filing of the complaint.

Plaintiffs' argument is not sound. The origination fee was not added to the loan amount, but was deducted from the proceeds that plaintiffs received after they obtained their loan. All the fees in question were "fully earned" when the loan was made, N.C.G.S. § 24-14(f), and were charged, paid, and received at closing as a prerequisite for obtaining the loan. Although plaintiffs could have paid the origination fee by cash, check, or credit card, they opted to have the full amount of the fee subtracted from the proceeds they received at closing. Regardless of the manner in which the origination fee was or could have been paid, plaintiffs' monthly payments were and are calculated solely based on the principal and interest on a $16,500.00 loan for a fifteen year term. The manner in which the origination fee was or could have been paid at closing almost five years before plaintiffs filed their complaint is irrelevant and cannot support extension of the statute of limitations on plaintiffs' claims for usurious origination fees.

Although not controlling upon this Court, federal case law interpreting North Carolina's usury statutes reaches the same conclusion. *See Faircloth v. Nat'l Home Loan Corp.*, 313 F. Supp. 2d 544, 553 (M.D.N.C. 2003) (mem.), *aff'd per curiam*, 87 F. App'x 314 (4th Cir. 2004) (unpublished). In a case with facts similar to the case *sub judice*, the court in *Faircloth* held that the statute of limitations

began to run at closing because "all the 'actions' Plaintiff attributes to [defendants] are but one action which occurred at the closing of Plaintiff's loan rather than a series of wrongs perpetrated continually." *Id.*

The cases on which plaintiffs rely do not overcome the fatal flaw in their argument. The loans in *Henderson v. Security Mortgage & Finance Co.* and *Hollowell v. Southern Building & Loan Ass'n* were subject to statutory limitations on interest rates, not origination fees. *Henderson*, 273 N.C. 253, 263, 160 S.E.2d 39, 46-7 (1968); *Hollowell*, 120 N.C. 196, 197-98, 120 N.C. 286, 287, 26 S.E. 781, 781 (1897). In these two cases, this Court made clear that lenders cannot subvert statutory limits on interest by requiring "dues" or "commissions" to be paid as part of the loan payments. *Henderson*, 273 N.C. at 263, 160 S.E.2d at 47; *Hollowell*, 120 N.C. at 197, 120 N.C. at 287, 26 S.E. at 781. In the case *sub judice*, the entirety of the origination fee was paid at closing, not piecemeal as part of the loan payments.

Swindell v. Federal National Mortgage Ass'n is equally inapplicable. 330 N.C. 153, 409 S.E.2d 892 (1991). In *Swindell*, this Court concluded that a usurious late payment fee constituted interest charged on the separate loan transaction of forbearance in collecting a payment due. *Id.* at 158, 409 S.E.2d at 895. Because the usurious late payment fee represented interest on a second loan, the lenders forfeited their right to the late payment fee, but did not forfeit their right to interest charged on the original loan. *Id.* at 160, 409 S.E.2d at 896. Significantly, in *Swindell*, the plaintiffs filed their complaint for declaratory judgment within two years of the late fee assessment, and a statute of limitations defense was not raised by the defendants. *Id.* at 155-56, 409 S.E.2d at 893-94.

Because no usurious fees have been charged or paid since closing on 25 July 1997, the statute of limitations on plaintiffs' usury claim expired nearly three years before plaintiffs' complaint was filed on 3 May 2002. The trial court properly granted Ocwen's and Wells Fargo's motions to dismiss for failure to state a claim upon which relief could be granted.

Likewise, the expiration of the applicable four-year statute of limitations bars plaintiffs' unfair and deceptive trade practices claim. *See* N.C.G.S. § 75-16.2 (2005). Plaintiffs have conceded that their unfair and deceptive trade practices claim is derived from their usury claim. Therefore, because we hold that this claim accrued at closing, the trial court properly dismissed plaintiffs' complaint on this issue.

Accordingly, we conclude the trial court correctly granted Ocwen's and Wells Fargo's motions to dismiss because plaintiffs' claims were barred by the applicable statutes of limitations. We therefore affirm the judgment of the Court of Appeals.

AFFIRMED.

Justice TIMMONS-GOODSON dissenting.

Plaintiffs have demonstrated, and the majority agrees, that the loan origination fee plaintiffs were charged is indeed usurious under North Carolina law. Plaintiffs' loan was for $16,500, to be repaid over 180 months. Plaintiffs were charged a loan origination fee of $1485, which amounts to nine percent of the loan. This fee was financed as part of the mortgage loan. N.C.G.S. § 24-14(f) provides, in pertinent part:

> [T]he lender may include in the principal balance fees or discounts not exceeding two percent (2%) of the principal amount of the loan less the amount of any existing loan by that lender to be refinanced, modified or extended.

N.C.G.S. § 24-14(f) (2005). This section applies to loans which meet the following criteria:

(1) Secured in whole or in part by a security instrument on real property, other than a first security instrument on real property; and

(2) The principal amount of the loan does not exceed twenty-five thousand dollars ($25,000); [and]

(3) The loan is repayable in no less than six nor more than 181 successive monthly payments, which payments shall be substantially equal in amount.

Id. § 12-12 (2005). Plaintiffs' loan clearly meets these requirements. Therefore, the loan origination fee charged in conjunction with plaintiffs' loan is usurious under N.C.G.S. § 24-14(f). Moreover, for loans of less than $300,000, including plaintiffs' loan, any fee or interest imposed by a lender that is not affirmatively permitted by Chapter 24 or Chapter 53 of the General Statutes is prohibited by N.C.G.S. § 24-8(a).

The majority holds that the statute of limitations for claims of usury violations under the facts in the instant case accrued on the

closing date of the loan. In reaching that conclusion, the majority adopts the reasoning in *Faircloth v. National Home Loan Corp.*, 313 F. Supp. 2d 544 (M.D.N.C. 2003), *aff'd per curiam*, 87 Fed. App'x 314 (4th Cir. 2004) (unpublished), a federal case in which the plaintiff argued the identical theory that plaintiffs present in the instant case. Federal decisions, with the exception of the United States Supreme Court, are not binding upon this Court. *See State v. McDowell*, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984) (State courts should treat "decisions of the United States Supreme Court as binding and accord[] to decisions of lower federal courts such persuasiveness as these decisions might reasonably command."). I disagree with the rationale in *Faircloth*, and therefore with the majority, for the reasons which follow.

"It is the paramount public policy of North Carolina to protect North Carolina resident borrowers through the application of North Carolina interest laws." N.C.G.S. § 24-2.1 (2005). "Our courts do not hesitate to look beneath the forms of the transactions alleged to be usurious in order to determine whether or not such transactions are in truth and reality usurious." *Kessing v. Nat'l Mortgage Corp.*, 278 N.C. 523, 531, 180 S.E.2d 823, 828 (1971) (citations omitted). As this Court stated in *Henderson v. Security Mortgage and Finance Co.*, " 'A profit,' greater than the lawful rate of interest; intentionally exacted as a bonus for the loan of money, . . . is a violation of the usury laws, it matters not what form or disguise it may assume.' " 273 N.C. 253, 263, 160 S.E.2d 39, 46 (1968) (quoting *Doster v. English*, 152 N.C. 325, 237, 152 N.C. 339, 341, 67 S.E. 754, 755 (1910)).

I would hold that plaintiffs' usury claim is not time-barred. Because plaintiffs' usurious loan origination fee was financed and added to their mortgage loan, plaintiffs have paid usurious interest with each monthly mortgage payment. This conclusion comports with our view in *Henderson v. Security Mortgage & Finance Co.*, 273 N.C. 253, 160 S.E.2d 39 (1968), which holds that "[t]he right of action to recover the penalty for usury paid accrues upon each payment of usurious interest when that payment is made." *Id.* at 264, 160 S.E.2d at 47. In the instant case, plaintiffs' monthly payment is $219.63. This payment amount includes the usurious nine percent origination fee. If plaintiffs had been charged a non-usurious origination fee of two percent, their monthly payment would have been $203.86. Accordingly, plaintiffs are paying usurious interest every month. Therefore, following *Henderson*, plaintiffs' claim is not barred.

Further support can be found for my position in the Internal Revenue Service's treatment of financed fees. As a matter of economic reality, the Internal Revenue Service recognizes that fees that are financed are not paid at closing. Specifically, the United States Tax Court has determined that financed fees cannot be deducted as part of the interest on a home mortgage in the year the loan is made. *See, e.g.*, *Schubel v. Comm'r*, 77 T.C. 701, 704-07 (1981). Instead, such fees must be deducted over the life of the loan. *Id.* This treatment reflects the reality of the present plaintiffs' situation. Plaintiffs have made and continue to make payments that include interest for the alleged usurious loan origination fee.

For the foregoing reasons, I would hold that plaintiffs' claim for twice the amount of interest paid within two years of the filing of the complaint is not barred by the statute of limitations. Accordingly, I respectfully dissent.

Justices MARTIN and EDMUNDS join in this dissenting opinion.

LINDA JONES v. THE CITY OF DURHAM AND JOSEPH M. KELLY, IN HIS OFFICIAL CAPACITY AS A POLICE OFFICER FOR THE CITY OF DURHAM

No. 137A05

(Filed 20 December 2006)

Police Officers— gross negligence—speeding on city street—responding to another officer's call—genuine issue of material fact

Plaintiff's evidence presented a genuine issue of material fact as to whether a police officer was grossly negligent in the operation of his vehicle when he struck a pedestrian while responding at a high rate of speed on a city street to another officer's call for assistance. The prior decision in this case reported at 360 N.C. 81, 622 S.E.2d 596 (2005) is withdrawn.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 168 N.C. App. 433, 608 S.E.2d 387 (2005), affirming in part and reversing in part an order and judgment entered on 6 January 2004 by Judge A. Leon Stanback, Jr. in Superior Court, Durham County. Heard in the Supreme Court 14 September 2005

and opinion filed 16 December 2005, 360 N.C. 81, 622 S.E.2d 596. Upon the allowance of plaintiff's petition for rehearing pursuant to Rule 31(a) of the North Carolina Rules of Appellate Procedure, heard in the Supreme Court 13 September 2006.

Glenn, Mills & Fisher, P.A., by William S. Mills, Stewart W. Fisher, and Carlos E. Mahoney, for plaintiff-appellant.

Faison & Gillespie, by O. William Faison and Reginald B. Gillespie, Jr., for defendant-appellees.

T. Marie Mobley and Bradley N. Schulz for the North Carolina Academy of Trial Lawyers, amicus curiae.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Mark A. Davis; North Carolina Association of County Commissioners, by James B. Blackburn; and North Carolina League of Municipalities, by Andrew L. Romanet, Jr., for the North Carolina Association of County Commissioners and the North Carolina League of Municipalities, amici curiae.

Mitchell Brewer Richardson PLLC, by Ronnie M. Mitchell, and North Carolina Sheriffs' Association, Inc., by Edmond W. Caldwell, Jr., for the North Carolina Sheriffs' Association, Inc., amicus curiae.

Debra Bechtel, Mark H. Newbold, Arnetta Herring, and William Little for the North Carolina Association of Police Attorneys, amicus curiae.

PER CURIAM.

On 16 December 2005, this Court issued an opinion in this case, concluding "the Court of Appeals correctly held that plaintiff failed to demonstrate the existence of a genuine issue of material fact as to gross negligence and that defendants were entitled to summary judgment as a matter of law." *Jones v. City of Durham*, 360 N.C. 81, 90, 622 S.E.2d 596, 603 (2005). Subsequently, on 15 February 2006, this Court allowed plaintiff's petition to rehear. *Jones v. City of Durham*, 360 N.C. 367, 629 S.E.2d 611 (2006). This matter initially came to this Court based on a dissenting opinion in the Court of Appeals. *Jones v. City of Durham*, 168 N.C. App. 433, 608 S.E.2d 387 (2005). In her notice of appeal based on the dissent, plaintiff raised two issues: (1) whether summary judgment was properly granted for defendants as to plaintiff's claim for gross negligence; and (2) whether summary judgment was properly

granted for defendants as to plaintiff's claim for obstruction of justice. *Jones*, 360 N.C. at 84, 622 S.E.2d at 599. However, in her brief originally submitted to this Court, plaintiff addressed only whether summary judgment was properly granted as to her gross negligence allegation, thereby abandoning her appeal of right as to the obstruction of justice issue. *Id.* (citing N.C. R. App. P. 28(b)(6)). Further, the Court of Appeals was unanimous in its decision to apply the standard of gross negligence rather than simple negligence to the facts of this case. *Jones*, 168 N.C. App. at 443, 608 S.E.2d at 394. The correctness of gross negligence as the applicable legal standard was not before this Court in our first hearing of this case, and we decline to address it now.

Turning to the matter on rehearing, the only issue before this Court is whether the facts of this case warranted summary judgment for defendants as to plaintiff's claim for gross negligence. We have carefully considered the briefs submitted by the parties and amici curiae, the cases cited therein, and the parties' arguments before this Court. For the reasons stated in the dissenting opinion as to the gross negligence claim, *id.* at 443-45, 608 S.E.2d at 394-95 (Levinson, J., dissenting in part and concurring in part), we conclude there exists a genuine issue of material fact as to plaintiff's gross negligence claim.

In view of the foregoing, we withdraw our decision reported at 360 N.C. 81, 622 S.E.2d 596 (2005).

Accordingly, as to the appealable issue of right, whether there exists a genuine issue of material fact regarding plaintiff's gross negligence claim, we reverse the decision of the Court of Appeals and remand to that court for consideration of the remaining assignments of error presented by the parties on appeal.

REVERSED IN PART AND REMANDED.

CHERNEY v. N.C. ZOOLOGICAL PARK

[361 N.C. 147 (2006)]

TINYA CHERNEY	)	
	)	
v.	)	ORDER
	)	
N.C. ZOOLOGICAL PARK and N.C. INDUSTRIAL COMMISSION	)	

No. 606A04-2

AMENDED ORDER

Defendant's motion pursuant to Rule 2 of the Rules of Appellate Procedure is dismissed. The Court, having considered all materials before it, concludes that the mandate of this Court's 5 May 2005 *per curiam* opinion was satisfied by the North Carolina Industrial Commission's issuance of its new Decision and Order on 28 April 2006. Accordingly, the 29 June 2006 order allowing plaintiff's petition for writ of mandamus is rescinded, and plaintiff's petition for writ of mandamus is denied.

By order of the Court in Conference this 14th day of December, 2006.

Associate Justices Newby and Timmons-Goodson are recused.

s/Parker, C.J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
LAVORIS MONTEIZ BATTLE	)	

No. 422P05

The Attorney General's petition for discretionary review is allowed, pursuant to our general supervisory authority under Article IV, Section 12 of the Constitution of North Carolina, for the limited purpose of (1) vacating that portion of the Court of Appeals opinion ordering remand to the trial court for resentencing and (2) remanding to the Court of Appeals for reconsideration in light of *State v. Timothy Earl Blackwell*, 361 N.C. 41, ––– S.E.2d ––– (2006). The Court of Appeals opinion remains undisturbed in all other respects.

By Order of the Court in Conference, this 19th day of December, 2006.

s/Timmons-Goodson, J.
For the Court

STATE v. BROWN

[361 N.C. 149 (2006)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
KENNETH BROWN, JR.	)	

No. 413P05

The Attorney General's Petition for Discretionary Review is allowed for the limited purpose of (1) vacating that portion of the Court of Appeals opinion ordering remand to the trial court for resentencing and (2) remanding to the Court of Appeals for reconsideration in light of *State v. Timothy Earl Blackwell*, 361 N.C. 41, —— S.E.2d —— (2006). The Court of Appeals opinion remains undisturbed in all other respects.

By Order of the Court in Conference, this 19th day of December, 2006.

s/Timmons-Goodson, J.
For the Court

STATE v. BULLOCK

[361 N.C.150 (2006)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
VERNELLE LAFARRIS BULLOCK, SR.	)	

No. 445P02-3

The Attorney General's Petition for Discretionary Review is allowed for the limited purpose of (1) vacating that portion of the Court of Appeals opinion ordering remand to the trial court for resentencing and (2) remanding to the Court of Appeals for reconsideration in light of *State v. Timothy Earl Blackwell*, 361 N.C. 41, —— S.E.2d —— (2006). The Court of Appeals opinion remains undisturbed in all other respects.

By Order of the Court in Conference, this 19th day of December, 2006.

s/Timmons-Goodson, J.
For the Court

STATE v. CAUDLE

[361 N.C. 151 (2006)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
TONY CAUDLE	)	

No. 433P05

The Attorney General's Petition for Discretionary Review is allowed for the limited purpose of (1) vacating that portion of the Court of Appeals opinion ordering remand to the trial court for resentencing and (2) remanding to the Court of Appeals for reconsideration in light of *State v. Timothy Earl Blackwell*, 361 N.C. 41, —— S.E.2d —— (2006). The Court of Appeals opinion remains undisturbed in all other respects. Justice Timmons-Goodson recused.

By Order of the Court in Conference, this 19th day of December, 2006.

s/Newsby, J.
For the Court

STATE v. COFFIN

[361 N.C. 152 (2006)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
RODNEY EARL COFFIN	)	

No. 405P05

The Attorney General's petition for discretionary review is allowed, pursuant to our general supervisory authority under Article IV, Section 12 of the Constitution of North Carolina, for the limited purpose of (1) vacating that portion of the Court of Appeals opinion ordering remand to the trial court for resentencing and (2) remanding to the Court of Appeals for reconsideration in light of *State v. Timothy Earl Blackwell*, 361 N.C. 41, ––– S.E.2d ––– (2006). The Court of Appeals opinion remains undisturbed in all other respects.

By Order of the Court in Conference, this 19th day of December, 2006.

s/Timmons-Goodson, J.
For the Court

STATE v. DUARTE

[361 N.C. 153 (2006)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
LORENZO DUARTE	)	

No. 653P05

The Attorney General's Petition for Discretionary Review is allowed for the limited purpose of (1) vacating that portion of the Court of Appeals opinion ordering remand to the trial court for resentencing and (2) remanding to the Court of Appeals for reconsideration in light of *State v. Timothy Earl Blackwell*, 361 N.C. 41, —— S.E.2d —— (2006). The Court of Appeals opinion remains undisturbed in all other respects.

By Order of the Court in Conference, this 19th day of December, 2006.

s/Timmons-Goodson, J.
For the Court

STATE v. HARRIS

[361 N.C. 154 (2006)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
SONYA CASE HARRIS	)	

No. 25P06

The Attorney General's Petition for Discretionary Review is allowed for the limited purpose of (1) vacating that portion of the Court of Appeals opinion ordering remand to the trial court for resentencing and (2) remanding to the Court of Appeals for reconsideration in light of *State v. Timothy Earl Blackwell*, 361 N.C. 41, —— S.E.2d —— (2006). The Court of Appeals opinion remains undisturbed in all other respects.

By Order of the Court in Conference, this 19th day of December, 2006.

s/Timmons-Goodson, J.
For the Court

STATE v. LONG

[361 N.C. 155 (2006)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
ROBERT CHRISTOPHER LONG	)	

No. 610P05

The Attorney General's petition for discretionary review is allowed, pursuant to our general supervisory authority under Article IV, Section 12 of the Constitution of North Carolina, for the limited purpose of (1) vacating that portion of the Court of Appeals opinion ordering remand to the trial court for resentencing and (2) remanding to the Court of Appeals for reconsideration in light of *State v. Timothy Earl Blackwell*, 361 N.C. 41, ––– S.E.2d ––– (2006). The Court of Appeals opinion remains undisturbed in all other respects. Justice Timmons-Goodson recused.

By Order of the Court in Conference, this 19th day of December, 2006.

s/Newby, J.
For the Court

STATE v. PITTMAN

[361 N.C. 156 (2006)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
THEODORE PITTMAN, JR.	)	

No. 694P05

The Attorney General's petition for discretionary review is allowed, pursuant to our general supervisory authority under Article IV, Section 12 of the Constitution of North Carolina, for the limited purpose of (1) vacating that portion of the Court of Appeals opinion ordering remand to the trial court for resentencing and (2) remanding to the Court of Appeals for reconsideration in light of *State v. Timothy Earl Blackwell*, 361 N.C. 41, ––– S.E.2d ––– (2006). The Court of Appeals opinion remains undisturbed in all other respects.

By Order of the Court in Conference, this 19th day of December, 2006.

s/Timmons-Goodson, J.
For the Court

STATE v. ROBERSON

[361 N.C. 157 (2006)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
KENNETH WILLIAM ROBERSON	)	

No. 707P05

The Attorney General's Petition for Discretionary Review is allowed for the limited purpose of (1) vacating that portion of the Court of Appeals opinion ordering remand to the trial court for resentencing and (2) remanding to the Court of Appeals for reconsideration in light of *State v. Timothy Earl Blackwell*, 361 N.C. 41, —— S.E.2d —— (2006). The Court of Appeals opinion remains undisturbed in all other respects.

By Order of the Court in Conference, this 19th day of December, 2006.

s/Timmons-Goodson, J.
For the Court

STATE v. SELLARS

[361 N.C. 158 (2006)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
RANDY LEE SELLARS	)	

No. 547P05

The Attorney General's petition for discretionary review is allowed, pursuant to our general supervisory authority under Article IV, Section 12 of the Constitution of North Carolina, for the limited purpose of (1) vacating that portion of the Court of Appeals opinion ordering remand to the trial court for resentencing and (2) remanding to the Court of Appeals for reconsideration in light of *State v. Timothy Earl Blackwell*, 361 N.C. 41, ––– S.E.2d ––– (2006). The Court of Appeals opinion remains undisturbed in all other respects.

By Order of the Court in Conference, this 19th day of December, 2006.

s/Timmons-Goodson, J.
For the Court

STATE v. SPRINKLE

[361 N.C. 159 (2006)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
DEWEY GRACEON SPRINKLE	)	

No. 570P05

The Attorney General's Petition for Discretionary Review is allowed for the limited purpose of (1) vacating that portion of the Court of Appeals opinion ordering remand to the trial court for resentencing and (2) remanding to the Court of Appeals for reconsideration in light of *State v. Timothy Earl Blackwell*, 361 N.C. 41, —— S.E.2d —— (2006). The Court of Appeals opinion remains undisturbed in all other respects. Justice Timmons-Goodson recused.

By Order of the Court in Conference, this 19th day of December, 2006.

s/Newby, J.
For the Court

STATE v. WALKER

[361 N.C. 160 (2006)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
JASON CHRISTOPHER WALKER	)	
AND	)	
EMIL E. BROWNING	)	
AND	)	
JAVIER A. HERNANDEZ, JR.	)	

No. 16P05-2

The Attorney General's Petition for Discretionary Review is allowed, pursuant to our general supervisory authority under Article IV, Section 12 of the Constitution of North Carolina, for the limited purpose of (1) vacating that portion of the Court of Appeals opinion ordering remand to the trial court for resentencing and (2) remanding to the Court of Appeals for reconsideration in light of *State v. Timothy Earl Blackwell*, 361 N.C. 41, ––– S.E.2d ––– (2006). The Court of Appeals opinion remains undisturbed in all other respects.

By Order of the Court in Conference, this 19th day of December, 2006.

s/Timmon-Goodson, J.
For the Court

STATE v. WATTS

[361 N.C. 161 (2006)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
CHARLES EUGENE WATTS	)	

No. 449P05

The Attorney General's petition for discretionary review is allowed, pursuant to our general supervisory authority under Article IV, Section 12 of the Constitution of North Carolina, for the limited purpose of (1) vacating that portion of the Court of Appeals opinion ordering remand to the trial court for resentencing and (2) remanding to the Court of Appeals for reconsideration in light of *State v. Timothy Earl Blackwell*, 361 N.C. 41, ––– S.E.2d ––– (2006). The Court of Appeals opinion remains undisturbed in all other respects.

By Order of the Court in Conference, this 19th day of December, 2006.

s/Timmons-Goodson, J.
For the Court

STATE v. WEBB

[361 N.C. 162 (2006)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
CHAUMON MARTE WEBB	)	

No. 450P05

The Attorney General's Petition for Discretionary Review is allowed, pursuant to our general supervisory authority under Article IV, Section 12 of the Constitution of North Carolina, for the limited purpose of (1) vacating that portion of the Court of Appeals opinion ordering remand to the trial court for resentencing and (2) remanding to the Court of Appeals for reconsideration in light of *State v. Timothy Earl Blackwell*, 361 N.C. 41, ––– S.E.2d ––– (2006). The Court of Appeals opinion remains undisturbed in all other respects.

By Order of the Court in Conference, this 19th day of December, 2006.

s/Timmons-Goodson, J.
For the Court

STATE v. CAPLE

[361 N.C. 163 (2006)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
EDDIE CAPLE	)	

No. 437P05

The Attorney General's Petition for Discretionary Review is allowed for the limited purpose of (1) vacating that portion of the Court of Appeals opinion ordering remand to the trial court for resentencing and (2) remanding to the Court of Appeals for reconsideration in light of *State v. Timothy Earl Blackwell*, 361 N.C. 41, —— S.E.2d —— (2006). The Court of Appeals opinion remains undisturbed in all other respects. Justice Brady recused.

By Order of the Court in Conference, this 20th day of December, 2006.

s/Edmunds, J.
For the Court

STATE v. MURPHY

[361 N.C. 164 (2006)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
BRIAN KEITH MURPHY	)	

No. 485P05

The Attorney General's petition for discretionary review is allowed, pursuant to our general supervisory authority under Article IV, Section 12 of the Constitution of North Carolina, for the limited purpose of (1) vacating that portion of the Court of Appeals opinion ordering remand to the trial court for resentencing and (2) remanding to the Court of Appeals for reconsideration in light of *State v. Timothy Earl Blackwell*, 361 N.C. 41, ––– S.E.2d ––– (2006). The Court of Appeals opinion remains undisturbed in all other respects. Justice Timmons-Goodson recused.

By Order of the Court in Conference, this 20th day of December, 2006.

s/Edmunds, J.
For the Court

STATE v. CAPLES

[361 N.C. 165 (2006)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	
	)	
BRANDON M. CAPLES	)	
	)	ORDER
STATE OF NORTH CAROLINA	)	
	)	
v.	)	
	)	
CHRISTOPHER G. MITCHELL	)	

No. 512P05

The Attorney General's Petition for Discretionary Review for defendant Caples is allowed, pursuant to our general supervisory authority under Article IV, Section 12 of the Constitution of North Carolina, for the limited purpose of (1) vacating that portion of the Court of Appeals opinion ordering remand to the trial court for resentencing and (2) remanding to the Court of Appeals for reconsideration in light of *State v. Timothy Earl Blackwell*, 361 N.C. 41, —— S.E.2d —— (2006). The Court of Appeals opinion remains undisturbed in all other respects.

The Attorney General's Petition for Discretionary Review for defendant Mitchell is allowed for the limited purpose of (1) vacating that portion of the Court of Appeals opinion ordering remand to the trial court for resentencing and (2) remanding to the Court of Appeals for reconsideration in light of *State v. Timothy Earl Blackwell*, 361 N.C. 41, —— S.E.2d —— (2006). The Court of Appeals opinion remains undisturbed in all other respects.

By Order of the Court in Conference, this 21st day of December, 2006.

s/Timmons-Goodson, J.
For the Court

Becker v. N.C. Dep't of Motor Vehicles Case below: 177 N.C. App. 436	No. 295P06	Plts' PDR Under N.C.G.S. § 7A-31 (COA05-669)	Denied 12/14/06
Calabria v. N.C. State Bd. of Elections	No. 625P06	1. Plt's Motion to Bypass the Court of Appeals (COAP06-995) 2. Plt's PWC 3. Plt's Motion for Temporary Stay 4. Plt's Motion to Expedite Consideration of Writ 5. Plt's Alternative Motion to Suspend the Rules	1. Denied 12/19/06 2. Dismissed as Moot 12/19/06 3. Dismissed as Moot 12/19/06 4. Dismissed as Moot 12/19/06 5. Dismissed as Moot 12/19/06 **Parker, C.J., Martin, J., and Timmons-Goodson, J., Recused**
Diggs v. Novant Health, Inc. Case below: 177 N.C. App. 290	No. 299P06	Def's (Forsyth Memorial Hosp.) Motion for Temporary Stay (COA04-1415)	Allowed 10/30/06
East Mkt. St. Square, Inc. v. Tycorp Pizza IV, Inc. Case below: 175 N.C. App. 628	No. 123P06	Defendant's (Gilbert T. Bland) PDR Under N.C.G.S. § 7A-31 (COA05-212)	Denied 12/14/06
Harrison v. City of Sanford Case below: 177 N.C. App. 116	No. 251P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1001)	Denied 12/14/06
Houston v. Town of Chapel Hill Case below: 177 N.C. App. 739	No. 354P06	Petitioner's (Houston) PDR Under N.C.G.S. § 7A-31 (COA05-1461)	Denied 12/14/06

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

In re A.P. Case below: 179 N.C. App. 425	No. 534A06	1. Petitioner's (Forsyth DSS) Notice of Appeal (Dissent) (COA05-1105) 2. Petitioners' (Forsyth DSS) Petition for Writ of Supersedeas 3. Petitioner's (Forsyth DSS) PDR as to Additional Issues 4. Petitioner's (Forsyth DSS) Motion for Temporary Stay 5. Respondent's (Hylton) Motion to Join in Appeal with Forsyth County DSS	1. —- 2. Allowed 11/22/06 3. Denied 11/22/06 4. Allowed 10/11/06 5. Allowed 11/22/06
In re W.R. Case below: 179 N.C. App. 642	No. 560P06	AG's Motion for Temporary Stay (COA05-1602)	Allowed 10/26/06
In Will of Yelverton Case below: 178 N.C. App. 267	No. 376P06-2	Motion by Caveator, Mansel Yelverton, for Temporary Stay (COA05-771 & 772)	Denied 09/12/06
James River Equip., Inc. v. Tharp's Excavating, Inc. Case below: 179 N.C. App. 336	No. 541P06	1. Def's (Mecklenburg Utilities) PDR Under N.C.G.S. § 7A-31 (COA05-79) 2. Plt's NOA Based Upon a Constitutional Question 3. Plt's PDR Under N.C.G.S. § 7A-31 4. Def's (Orange Co. Board of Education) Motion to Dismiss Appeal 5. Def's (Orange Co. Board of Education) Conditional PDR	1. Denied 12/14/06 2. —- 3. Denied 12/14/06 4. Allowed 12/14/06 5. Dismissed as Moot 12/14/06
Nationwide Mut. Ins. Co. v. Gaskill Case below: 176 N.C. App. 408	No. 268P06	Def's (Lester R. Mitchum) PDR Under N.C.G.S. § 7A-31 (COA05-538)	Denied 12/14/06
Patel v. Stanley Works Customer Support Case below: 178 N.C. App. 562	No. 445P06	Defs' Motion for Temporary Stay (COA05-462)	Allowed 08/23/06

Ramsey v. Southern Indus. Constr'rs, Inc. Case below: 178 N.C. App. 25	No. 485P06	Defs' PDR Under N.C.G.S. § 7A-31 (COA04-1639)	Denied 12/14/06
Sea Ranch Owners Ass'n v. Sea Ranch, II, Inc. Case below: 180 N.C. App. 226	No. 338P06	1. Plt's Motion for Temporary Stay (COA05-1528, 1559, 1593) 2. Def's Motion to Dissolve Stay and Renewal of Motion to Deny Petition for Writ of Supersedeas	1. Allowed 06/26/06 2. Denied 12/01/06 **Martin, J., Recused**
State v. Banner Case below: 178 N.C. App. 562	No. 442P06	1. Def's (Cauthen) PDR Under G.S. 7A-31 (COA05-190) 2. Def's (Banner) PDR or, Alternatively, PWC	1. Denied 12/14/06 2. Denied 12/14/06
State v. Battle Case below: 172 N.C. App. 335	No. 422P05	1. AG's Motion for Temporary Stay (COA03-484) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed **359 N.C. 853** Stay dissolved 12/19/06 2. Denied 12/19/06 3. See Special Order Page 148
State v. Blackwell Case below: 361 N.C. 41	No. 490PA04-2	Def's Third Motion for Appropriate Relief (COA03-793)	Denied 12/14/06
State v. Bradley Case below: 179 N.C. App. 551	No. 559P06	Def's PDR Under G.S. 7A-31 (COA05-1440)	Denied 12/14/06

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

State v. Brown Case below: 172 N.C. App. 171	No. 413P05	1. AG's Motion for Temporary Stay (COA04-737)	1. Allowed Pending Determination of the State's PDR **359 N.C. 854** Stay dissolved 12/19/06
		2. AG's Petition for Writ of Supersedeas	2. Denied 12/19/06
		3. AG's PDR Under N.C.G.S. § 7A-31	3. See Special Order Page 149
		4. Def's Motion to Dissolve Stay	4. Dismissed as Moot 12/19/06
State v. Bullock Case below: 171 N.C. App. 763	No. 445P02-3	1. AG's Motion for Temporary Stay (COA04-665)	1. Allowed **359 N.C. 854** Stay dissolved 12/19/06
		2. AG's Petition for Writ of Supersedeas	2. Denied 12/19/06
		3. AG's PDR Under N.C.G.S. § 7A-31	3. See Special Order Page 150
		4. Def's NOA Based Upon a Constitutional Question	4. —-
		5. AG's Motion to Dismiss Appeal	5. Allowed 12/19/06
		6. Def's PDR Under N.C.G.S. § 7A-31	6. Denied 12/19/06
State v. Bullock Case below: 178 N.C. App. 234	No. 020P06-3	Def's PDR Under N.C.G.S. § 7A-31 (COA05-743)	Denied 12/14/06

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

State v. Caple Case below: 172 N.C. App. 172	No. 437P05	1. AG's Motion for Temporary Stay (COA04-860) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Dissolve Stay	1. Allowed **359 N.C. 854** Stay dissolved 12/19/06 2. Denied 12/19/06 3. See Special Order Page 163 4. Dismissed as Moot 12/19/06 **Brady, J., Recused**
State v. Caples Case below: 173 N.C. App. 233	No. 512P05	1. AG's Motion for Temporary Stay (COA04-887) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 4. AG's Motion to Defer Ruling 5. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **360 N.C. 68** Stay dissolved 12/19/06 2. Denied 12/19/06 3. See Special Order Page 165 4. Denied 12/19/06 5. Denied 12/19/06

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

State v. Caudle Case below: 172 N.C. App. 261	No. 433P05	1. AG's Motion for Temporary Stay (COA03-1576) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 4. Def's PDR Under N.C.G.S. § 7A-31 5. Def's Motion to Vacate Temporary Stay	1. Allowed **359 N.C. 854** Stay dissolved 12/19/06 2. Denied 12/19/06 3. See Special Order Page 151 4. Denied 10/06/05 5. Dismissed as Moot 12/19/06 **Timmons-Goodson, J., Recused**
State v. Cobb Case below: 172 N.C. App. 172	No. 447P05	1. AG's Motion for Temporary Stay (COA04-508) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Bypass COA 5. Def's PWC to Review Order of Guilford County Superior Court 6. AG's Motion to Deem Response Timely Filed	1. Allowed **359 N.C. 854** 2. Allowed 12/19/06 3. Allowed 12/19/06 4. Allowed 12/19/06 5. Allowed 12/19/06 6. Allowed 12/19/06 **Timmons-Goodson, J., Recused**

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

State v. Coffin Case below: 171 N.C. App. 515	No. 405P05	1. AG's Motion for Temporary Stay (COA04-425) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed **359 N.C. 854** Stay dissolved 12/19/06 2. Denied 12/19/06 3. See Special Order Page 152
State v. Conner Case below: Gates County Superior Court	No. 219A91-5	AG's Motion to Vacate Stay of Execution (Gates County Superior Court)	Allowed 12/14/06
State v. Corey Case below: 173 N.C. App. 444	No. 539P05	1. AG's Motion for Temporary Stay (COA04-736) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Dissolve Stay	1. Allowed **360 N.C. 68** 2. Allowed 12/19/06 3. Allowed 12/19/06 4. Dismissed as Moot 12/19/06
State v. Cornett Case below: 177 N.C. App. 452	No. 304P06	1. Def's NOA Based Upon A Constitutional Question (COA05-722) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —- 2. Allowed 12/14/06 3. Denied
State v. Cummings Case below: 174 N.C. App. 772	No. 014P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-188)	Denied 12/19/06
State v. Cupid Case below: 173 N.C. App. 448	No. 560P05	1. AG's Motion for Temporary Stay (COA04-137) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR	1. Allowed **360 N.C. 69** 2. Allowed 12/19/06 3. Allowed 12/19/06 4. Denied 12/19/06

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

State v. Denny Case below: 179 N.C. App. 822	No. 572P06	1. AG's Motion for Temporary Stay (COA05-1419) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed 11/06/06 2. Allowed 12/14/06 3. Allowed 12/14/06
State v. Downs Case below: 179 N.C. App. 860	No. 600P06	1. Def's PDR Under N.C.G.S. § 7A-31 (COA06-28) 2. AG's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 12/14/06 2. Dismissed as Moot 12/14/06
State v. Duarte Case below: 174 N.C. App. 626	No. 653P05	1. AG's Motion for Temporary Stay (COA04-1455) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 4. Def's Motion for Appeal	1. Allowed **360 N.C. 178** Stay dissolved 12/19/06 2. Denied 12/19/06 3. See Special Order Page 153 4. Dismissed Ex Mero Motu 01/26/06
State v. Everette Case below: 172 N.C. App. 237	No. 452A05	1. AG's Motion for Temporary Stay (COA03-858) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 4. Def's NOA (Dissent) 5. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **360 N.C. 69** 2. Allowed 12/19/06 3. Allowed 12/19/06 4. — 5. Allowed 12/19/06 **Timmons-Goodson, J., Recused**
State v. Farrar Case below: 179 N.C. App. 561	No. 527P06	AG's Motion for Temporary Stay (COA05-1319)	Allowed 10/05/06

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

State v. Graham Case below: 178 N.C. App. 392	No. 408P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1223)	Denied 12/14/06
State v. Harris Case below: 175 N.C. App. 360	No. 025P06	1. AG's Motion for Temporary Stay (COA05-111) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 4. Def's PDR Under N.C.G.S. § 7A-31 (COA05-111) 5. Def's Cross-Petition for Discretionary Review Under N.C.G.S. § 7A-31	1. Allowed **360 N.C. 292** Stay dissolved 12/19/06 2. Denied 12/19/06 3. See Special Order Page 154 4. Denied 12/19/06 5. Denied
State v. Hernandez-Madrid Case below: 173 N.C. App. 234	No. 534P05	1. AG's Motion for Temporary Stay (COA04-294) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed Pending Determination of State's PDR **360 N.C. 71** 2. Allowed 12/19/06 3. Allowed 12/19/06
State v. Hocutt Case below: 177 N.C. App. 341	No. 297A06	1. Def's NOA Based Upon A Constitutional Question (COA05-473) 2. AG's Motion to Dismiss Appeal	1. —- 2. Allowed 12/14/06
State v. Holmes Case below: 177 N.C. App. 565	No. 283P06	1. AG's Motion for Temporary Stay (COA05-986) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed **360 N.C. 540** 2. Allowed 12/19/06 3. Allowed 12/19/06

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

State v. Jacobs Case below: 174 N.C. App. 1	No. 617A05	1. AG's Motion for Temporary Stay (COA04-541) 2. AG's Petition for Writ of Supersedeas 3. AG's NOA (Dissent) 4. AG's PDR Under N.C.G.S. § 7A-31 5. Def's (Bruce L. McMillian) PDR Under N.C.G.S. § 7A-31 (COA04-541)	1. Allowed Pending determination of the State's PDR **360 N.C. 178** 2. Allowed 12/19/06 3. —- 4. Allowed 12/19/06 5. Denied 12/19/06 **Timmons-Goodson, J., Recused**
State v. Jones Case below: 174 N.C. App. 367	No. 439P06	Def's Motion for "Notice of Appeal Under G.S. 7A-30(1) and Petition for Discretionary Review Under G.S. 7A-31" (COA05-154)	Denied 12/14/06
State v. Lawrence Case below: 179 N.C. App. 654	No. 293P05-2	Def's PDR Under N.C.G.S. § 7A-31 (COA03-1038-2)	Denied 12/14/06
State v. Long Case below: 173 N.C. App. 758	No. 610P05	1. AG's Motion for Temporary Stay (COA03-1712) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed **360 N.C. 73** Stay dissolved 12/19/06 2. Denied 12/19/06 3. See Special Order Page 155 **Timmons-Goodson, J., Recused**
State v. Massey Case below: 174 N.C. App. 216	No. 637A05	1. AG's NOA (Dissent) (COA04-1443) 2. AG's Motion for Temporary Stay 3. AG's Petition for Writ of Supersedeas 4. AG's PDR Under N.C.G.S. § 7A-31	1. —- 2. Allowed **360 N.C. 179** 3. Allowed 12/19/06 4. Allowed 12/19/06

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

State v. McMahan Case below: 174 N.C. App. 586	No. 657P05	1. AG's Motion for Temporary Stay (COA05-211) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed 360 N.C. 79 2. Allowed 12/19/06 3. Allowed 12/19/06
State v. McPhaul Case below: 177 N.C. App. 287	No. 275P06	1. Def's (McPhaul) NOA Based Upon a Constitutional Question (COA05-1053) 2. AG's Motion to Dismiss Appeal 3. Def's (McPhaul) PDR Under N.C.G.S. § 7A-31 4. Def's (McMillian) PDR Under N.C.G.S. § 7A-31 5. AG's Motion to Deny Def's (McMillian) PDR	1. —- 2. Allowed 12/14/06 3. Denied 12/14/06 4. Denied 12/14/06 5. Dismissed as Moot 12/14/06
State v. Meynardie Case below: 172 N.C. App. 127	No. 446P05	1. AG's Motion for Temporary Stay (COA04-547) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed **360 N.C. 74** 2. Allowed 12/19/06 3. Allowed 12/19/06
State v. Murphy Case below: 172 N.C. App. 734	No. 485P05	1. AG's Motion for Temporary Stay (COA04-344) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed **360 N.C. 74** Stay dissolved 12/19/06 2. Denied 12/19/06 3. See Special Order Page 164 **Timmons-Goodson, J., Recused**

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

State v. Oglesby Case below: 174 N.C. App. 658	No. 683P05	1. AG's Motion for Temporary Stay (COA04-1534) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 4. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **360 N.C. 294** 2. Allowed 12/19/06 3. Allowed 12/19/06 4. Allowed 12/19/06
State v. Pickard Case below: 178 N.C. App. 330	No. 395P06	1. Def's NOA Based Upon a Constitutional Question (COA05-1414) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. — 2. Allowed 12/14/06 3. Denied 12/14/06
State v. Pittman Case below: 174 N.C. App. 745	No. 694P05	1. AG's Motion for Temporary Stay (COA04-417) 2. AG's Petition for Writ of Supersedeas 3. G's PDR Under N.C.G.S. § 7A-31 (COA04-417) 4. Motion to Dissolve Temporary Stay and Set Date Certain for Def's Response 5. AG's Motion to Deem Response Timely Filed	1. Allowed Pending determination of the State's PDR **360 N.C. 294** Stay dissolved 12/19/06 2. Denied 12/19/06 3. See Special Order Page 156 4. Dismissed as Moot 12/19/06 5. Allowed 12/19/06
State v. Risher Case below: 179 N.C. App. 865	No. 595P06	Def's Motion to Stay Mandate Pending PDR (COA05-1249)	Denied 11/22/06

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

State v. Roberson Case below: 174 N.C. App. 840	No. 707P05	1. AG's Motion for Temporary Stay (COA04-1645) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 4. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **360 N.C. 294** Stay dissolved 12/19/06 2. Denied 12/19/06 3. See Special Order Page 157 4. Denied 12/19/06
State v. Sellars Case below: 173 N.C. App. 235	No. 547P05	1. AG's Motion for Temporary Stay (COA04-289) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Dismiss with Prejudice Pursuant to N.C.G.S. § 15A-1443(a)(b)(c) and N.C.G.S. § 15A-954(a)(I)(4)(7) 5. Def's Motion to Dissolve Stay	1. Allowed **360 N.C. 75** Stay dissolved 12/19/06 2. Denied 12/19/06 3. See Special Order Page 158 4. Dismissed 12/19/06 5. Dismissed as Moot 12/19/06
State v. Sprinkle Case below: 173 N.C. App. 449	No. 570P05	1. AG's Motion for Temporary Stay (COA04-1291) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed **360 N.C. 76** Stay dissolved 12/19/06 2. Denied 12/19/06 3. See Special Order Page 159 **Timmons-Goodson, J., Recused**

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

State v. Thai Case below: 175 N.C. App. 249	No. 007P06	1. AG's Motion for Temporary Stay (COA05-347) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed **360 N.C. 295** 2. Allowed 12/19/06 3. Allowed 12/19/06
State v. Walker Case below: 167 N.C. App. 110	No. 016P05-2	1. AG's Motion for Temporary Stay (COA03-1426) 2. AG's Petition for Writ of Supersedeas 3. AG's PWC to Review Order of COA	1. Allowed **360 N.C. 76** Stay dissolved 12/19/06 2. Denied 12/19/06 3. See Special Order Page 160
State v. Watts Case below: 172 N.C. App. 58	No. 449P05	1. AG's Motion for Temporary Stay (COA04-874) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 4. Def's Cross Petition for Discretionary Review Under N.C.G.S. § 7A-31	1. Allowed Pending Determination of the State's PDR **360 N.C. 77** Stay dissolved 12/19/06 2. Denied 12/19/06 3. See Special Order Page 161 4. Denied 12/19/06
State v. Webb Case below: 172 N.C. App. 594	No. 450P05	1. AG's Motion for Temporary Stay (COA04-103) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed **360 N.C. 77** Stay dissolved 12/19/06 2. Denied 12/19/06 3. See Special Order Page 162

State v. Wissink Case below: 172 N.C. App. 829	No. 484P05	1. AG's Motion for Temporary Stay (COA04-1081) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed Pending Determination of PDR **360 N.C. 77** 2. Allowed 12/19/06 3. Allowed 12/19/06
State v. Witherspoon Case below: 178 N.C. App. 394	No. 418P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1467)	Denied 12/14/06
State ex rel. Utils. Comm'n v. Wardlaw Case below: 179 N.C. App. 582	No. 573P06	Appellants' (Wardlaw) PDR Under G.S. 7A-31 (COA05-1481)	Denied 12/14/06
Thompson v. Lee Cty. Case below: 179 N.C. App. 656	No. 577P06	Plaintiffs' PDR Under G.S. 7A-31 (COA05-1578)	Denied 12/14/06

PETITION TO REHEAR

Ezell v. Grace Hosp. Case below: 360 N.C. 529	No. 044A06	1. Plt's (Ezell) Petition to Rehear 2. Plt's (Ezell) Motion to Amend Mandate	1. Denied 12/14/06 2. Denied 12/14/06

TAMMY P. FROST, EMPLOYEE v. SALTER PATH FIRE & RESCUE, EMPLOYER, VOLUNTEER SAFETY WORKERS' COMPENSATION FUND, CARRIER

No. 181A06

(Filed 26 January 2007)

Workers' Compensation— injury not arising from employment—Fun Day go-cart accident

Injury in a go-cart accident is not inherent in being an EMT, and the findings of the Industrial Commission do not support the conclusion that a workers' compensation plaintiff suffered an injury by accident arising from her employment as an EMT when she was injured in a go-cart accident at a Fun Day in a recreational park. Plaintiff's operation of the go-cart was invited, but not required, as a matter of good will.

Justice TIMMONS-GOODSON dissenting.

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

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 176 N.C. App. 482, 628 S.E.2d 22 (2006), affirming an opinion and award filed on 8 February 2005 by the North Carolina Industrial Commission. On 29 June 2006, the Supreme Court allowed defendants' petition for discretionary review of additional issues. Heard in the Supreme Court 22 November 2006.

Ward and Smith, P.A., by S. McKinley Gray, III and William A. Oden, III, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Jonathan C. Anders and Meredith L. Taylor, for defendant-appellants.

BRADY, Justice.

On 30 September 2001, plaintiff Tammy P. Frost, a volunteer emergency medical technician (EMT) with defendant Salter Path Fire & Rescue, was injured while operating a go-cart, an off road recreational vehicle, at a private amusement park during a "Fun Day" event for Salter Path Fire & Rescue volunteers.[1] The question

1. Although plaintiff was a volunteer EMT, both parties have stipulated that the parties are subject to and bound by the Workers' Compensation Act and that, for purposes of the Act, an employer-employee relationship existed between plaintiff and defendant on the date of the injury.

presented is whether plaintiff's injury arose out of her employment. We hold that it did not. Because the Commission's findings of fact do not support its conclusions of law, we reverse and remand the decision of the Court of Appeals.

FACTUAL BACKGROUND

Plaintiff Tammy P. Frost was injured operating a go-cart at a private amusement park on 30 September 2001 at the second annual "Fun Day" arranged by defendant Salter Path Fire & Rescue. After operating the go-cart for approximately one hour, plaintiff was injured when she rounded a corner on the track and collided with another go-cart. She was transported to the hospital emergency department for evaluation, where she was diagnosed with a cervical strain and released the same day. Plaintiff asserts that as a result of the go-cart accident, she now suffers from unresolved neck and back pain that prevents her from working altogether.

Plaintiff served as the volunteer emergency medical services (EMS) captain for Salter Path Fire & Rescue.[2] Her position as captain involved making sure the ambulances were stocked, cleaned, and ready for use, as well as ensuring that calls to the department were handled properly. Plaintiff testified during the hearing before the North Carolina Industrial Commission (Commission) that she had volunteered as an EMT for the Salter Path Fire & Rescue Department on and off for approximately twenty years.

The concept of a "Fun Day" as a way for the community to show appreciation for Department volunteers and their families was first discussed at a meeting of Department members in 2000. The costs of the event were not paid out of the Department's operating budget, but were funded entirely by community donations and paid out of a special account. Attendees did sign a roster upon arrival; however, testimony demonstrated one purpose of the roster was to determine the number of participants in order to calculate payment to the amusement park.

The Commission made a finding of fact that participation in "Fun Day" was voluntary, although volunteers were encouraged to attend if possible. Many of the EMT volunteers did not attend the event in 2001. Plaintiff testified that her role at "Fun Day" was merely partici-

2. Plaintiff was also employed as a waitress at a seasonal restaurant. However, the issues on appeal solely relate to plaintiff's benefits from her service with defendant.

patory, although she did plan to personally thank the volunteers. The testimony further shows that no awards or recognitions were given at the event, nor were there any organized discussions concerning work or the Department.

PROCEDURAL HISTORY

Defendant's insurance carrier denied plaintiff's claim for compensation based on her injury in a filing with the Commission on 3 October 2001. The stated reason for the denial was that the injury was "not by accident within the course and scope of" plaintiff's employment. Plaintiff requested that the claim be assigned for hearing on 4 June 2002. A deputy commissioner denied plaintiff's claim for compensation on 29 April 2004, from which plaintiff appealed to the Full Commission. The Full Commission reviewed plaintiff's claim and, on 8 February 2005, filed its opinion and award reversing the decision of the deputy commissioner and awarding plaintiff benefits for temporary total disability. Defendants filed a notice of appeal from the decision of the Full Commission to the North Carolina Court of Appeals.

On 7 March 2006, a divided panel of the North Carolina Court of Appeals issued its opinion holding that the evidence in the record did support the findings of fact, which in turn supported the conclusions of law, and that the Full Commission properly determined that plaintiff suffered a compensable injury resulting in temporary total disability. The dissent disagreed, stating that some of the Full Commission's findings of fact were not supported by competent evidence in the record, and therefore the findings did not in turn support the conclusions of law reached by the Commission. Defendants filed a notice of appeal as of right based on the dissent.

This Court allowed defendants' petition for discretionary review as to additional issues to consider whether the Commission erred in finding and concluding that plaintiff met her burden to show the existence and extent of her alleged disability from the date of her injury until April 2003. Due to our holding on the arising-out-of-employment issue, we need not address the issue presented in defendants' petition for discretionary review.

STANDARD OF REVIEW

"[W]hen 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.' " *McRae v. Toastmaster*,

Inc., 358 N.C. 488, 496, 597 S.E.2d 695, 700 (2004) (citation omitted). "Whether an accident arose out of the employment is a mixed question of law and fact." *Sandy v. Stackhouse, Inc.*, 258 N.C. 194, 197, 128 S.E.2d 218, 221 (1962) (citations omitted).

ANALYSIS

The workers' compensation system is a creature of statute enacted by the General Assembly and is codified in Chapter 97 of the North Carolina General Statutes.

> The social policy behind the Workers' Compensation Act is twofold. First, the Act provides employees swift and certain compensation for the loss of earning capacity from accident or occupational disease arising in the course of employment. Second, the Act insures limited liability for employers. Although the Act should be liberally construed to effectuate its intent, the courts cannot judicially expand the employer's liability beyond the statutory parameters.

Hendrix v. Linn-Corriher Corp., 317 N.C. 179, 190, 345 S.E.2d 374, 381 (1986) (citations omitted). "The purpose of the [Workers' Compensation] Act . . . is not only to provide a swift and certain remedy to an injured work[er], but also to insure a limited and determinate liability for employers." *Barnhardt v. Yellow Cab Co.*, 266 N.C. 419, 427, 146 S.E.2d 479, 484 (1966) (citation omitted).

Section 97-2(6) of the North Carolina General Statutes states the definition of injury under the Workers' Compensation Act (Act) and articulates the controlling rule in the case *sub judice*: " 'Injury and personal injury' shall mean only injury by accident arising out of and in the course of the employment . . . ." N.C.G.S. § 97-2(6) (2005). " 'Arising out of employment' refers to the manner in which the injury occurred, or the origin or cause of the accident." Leonard T. Jernigan, Jr., *North Carolina Workers' Compensation: Law and Practice* § 5-3, at 38 (2d ed. 1995) [hereinafter Jernigan, *Workers' Compensation*] (citing *Taylor v. Twin City Club*, 260 N.C. 435, 132 S.E.2d 865 (1963)). The limiting language of the definition, requiring the injury arise out of and in the course of employment, "[keeps] the Act within the limits of its intended scope,—that of providing compensation benefits for industrial injuries, rather than branching out into the field of general health insurance benefits." *Duncan v. City of Charlotte*, 234 N.C. 86, 91, 66 S.E.2d 22, 25 (1951) (citations omitted). "Thus the injury must spring from the employment in order to be

compensable under the Act. This requirement is often called the rule of causal relation." Jernigan, *Workers' Compensation* § 5-3, at 38 (citation omitted); *see also Duncan*, 234 N.C. at 91, 66 S.E.2d at 25 (stating that "[the] rule of causal relation is the very sheet anchor of the Workmen's Compensation Act") Therefore, our analysis rests on the statutory language "arising out of and in the course of the employment." *See* N.C.G.S. § 97-2(6).

"An injury is said to arise out of the employment when it . . . is a natural and probable consequence or incident of" the employment and "a natural result of one of [its] risks," so that "there is some causal relation between the accident and the performance of some service of the employment." *Taylor*, 260 N.C. at 438, 132 S.E.2d at 868 (citations omitted). Risk of injury from a go-cart accident is not something a reasonable person would contemplate upon entering service as a volunteer EMT, as it is not a risk one would associate with the anticipated risks inherent in the job. *See Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 404, 233 S.E.2d 529, 532-33 (1977) (stating that if it can be shown that the risk was incidental to employment, so that a reasonable person familiar with the whole situation would have contemplated the risk when he entered the employment, then the injury will have arisen out of the employment). The type of injury sustained by plaintiff in the instant case could more aptly be characterized as a hazard which is equally common to the general public outside of employment as an EMT. *Roberts v. Burlington Indus., Inc.*, 321 N.C. 350, 358, 364 S.E.2d 417, 422-23 (1988); *Cole v. Guilford Cty.*, 259 N.C. 724, 727, 131 S.E.2d 308, 311 (1963); *Bryan v. T.A. Loving Co. & Assocs.*, 222 N.C. 724, 728, 24 S.E.2d 751, 754 (1943) (noting that when an injury "comes from a hazard to which the [worker] would have been equally exposed apart from the employment or from a hazard common to others, it does not arise out of the employment" and that "[t]he causative danger must be peculiar to the work and not common to the neighborhood"; that is, "[i]t must be incidental to the character of the business and not independent of the relation of" employer and employee).

The Act's application to injuries occurring during recreational and social activities related to employment is well established in the jurisprudence of North Carolina. In 1964 this Court issued its opinion in *Perry v. American Bakeries Co.*, 262 N.C. 272, 136 S.E.2d 643 (1964). *Perry* involved an employee injured while diving into a swimming pool at the hotel where the employee was attending a sales meeting. In *Perry*, the plaintiff was directed by his supervisor to

attend the sales meeting. *Id.* at 273, 136 S.E.2d at 644. The plaintiff was told to arrive at the provided accommodations and location for the sales meeting by 4:30 p.m. the day before the meeting began. *Id.* The employer held a social hour for the attending employees at 5:30 p.m. that day, which the plaintiff attended before going to dinner with a coworker. 262 N.C. at 273, 136 S.E.2d at 644-45. Upon returning to the provided accommodations after dinner, the plaintiff, along with other employees, swam in the pool maintained by the hotel for use of its guests. *Id.* at 273, 136 S.E.2d at 645. The plaintiff sustained a fractured cervical vertebra while diving. *Id.*

This Court in *Perry* stated:

> Where, as a matter of good will, an employer at his own expense provides an occasion for recreation or an outing for his employees and invites them to participate, but does not require them to do so, and an employee is injured while engaged in the activities incident thereto, such injury does *not* arise out of the employment.

262 N.C. at 275, 136 S.E.2d at 646 (emphasis added) (citing *Lewis v. W.B. Lea Tobacco Co.*, 260 N.C. 410, 132 S.E.2d 877 (1963); *Berry v. Colonial Furn. Co.*, 232 N.C. 303, 306-07, 60 S.E.2d 97, 100 (1950); *Hildebrand v. McDowell Furn. Co.*, 212 N.C. 100, 112-13, 193 S.E. 294, 303 (1937)). This Court further stated: "Plaintiff's activity in swimming was not a function or duty of his employment, was not calculated to further directly or indirectly his employer's business to an appreciable degree, and was authorized only for the optional pleasure and recreation of plaintiff while off duty during his stay at the Inn." *Perry*, 262 N.C. at 275, 136 S.E.2d at 646. *Perry* is on point with our decision today as plaintiff was invited, but not required, to operate a go-cart in conjunction with a purely voluntary "Fun Day" arranged as a matter of good will by defendant. *Id.* Plaintiff was injured "while engaged in the activities incident thereto," and as illustrated by *Perry*, "such injury does not arise out of the employment." *Id.* Further, plaintiff's operation of the go-cart was not a function of her duties or responsibilities to Salter Path Fire & Rescue. Plaintiff's activities were authorized merely for her optional pleasure and recreation while she was off duty.

Consistent with this Court's holding in *Perry*, the North Carolina Court of Appeals articulated a six question analysis from Larson's treatise to aid in determination of whether an injury arose out of employment:

(1) Did the employer in fact sponsor the event?

(2) To what extent was attendance really voluntary?

(3) Was there some degree of encouragement to attend evidenced by such factors as:

a. taking a record of attendance;

b. paying for the time spent;

c. requiring the employee to work if he did not attend; or

d. maintaining a known custom of attending?

(4) Did the employer finance the occasion to a substantial extent?

(5) Did the employees regard it as an employment benefit to which they were entitled as of right?

(6) Did the employer benefit from the event, not merely in a vague way through better morale and good will, but through such tangible advantages as having an opportunity to make speeches and awards?

Chilton v. Bowman Gray Sch. of Med., 45 N.C. App. 13, 15, 262 S.E.2d 347, 348 (1980) (citing 1A Larson, Workmen's Compensation Law § 22.23, p. 5-85, currently 2 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law* § 22.04[3], at 22-23 (2006)). We are not unmindful that *Chilton* has provided a helpful mode of analysis for the Court of Appeals, the Industrial Commission, and the practitioner for the last twenty-seven years. However, while the *Chilton* factors may serve as helpful guideposts in this inquiry, this Court has never recognized these factors as controlling and we decline to do so here, as a review of this Court's precedent in *Perry* makes the disposition of this case clear.

Rice v. Uwharrie Council Boy Scouts of America is distinguishable from the case *sub judice*. 263 N.C. 204, 139 S.E.2d 223 (1964). The plaintiff in *Rice* was employed by the defendant as a District Scout Executive and was one of four executives of the Uwharrie Council directed to attend a Scouting Executive Conference as a training course for professional scouting. *Id.* at 205, 207, 139 S.E.2d at 224-25, 226. In that case, the evidence and findings of the Industrial Commission "permitted the inference [that] the employer impliedly required participation in" the injurious activity, namely a fishing trip, not merely to amuse and entertain the employee, but to aid his

advancement and make him better qualified to carry on his work in scouting. *Id.* at 208, 139 S.E.2d at 227. This Court noted that "under such circumstances injuries suffered by employees in recreational activities are compensable." *Id.* (citation omitted). Unlike *Rice*, plaintiff's participation was not required in the case *sub judice*. Plaintiff was invited to attend the event, but in no way was she required to do so. *Rice* is further distinguishable, as the plaintiff in that case was engaged in activities of the sort one would normally expect of the youth program, Boys Scouts of America, which emphasizes outdoor activities. Defendant Salter Path Fire & Rescue is not a social organization, and one would not normally associate involvement in amusement park type recreational activities with the duties and functions inherent in the work required of an EMT. Plaintiff attended the "Fun Day" of her own will and for her own personal benefit and pleasure. Therefore, we hold that an employee who, on a purely voluntary basis, attends a "Fun Day" and is injured while participating therein, cannot be said to have suffered a compensable injury which arises out of and in the course of the employment. Thus defendant is not responsible under the Act for the non-compensable injuries plaintiff suffered during her participation.

For the reasons discussed above, the Industrial Commission's findings of fact do not support its conclusion of law that plaintiff suffered an injury by accident arising out of her employment. Based on the clear language of the Workers' Compensation Act and this Court's prior decisions, we hold plaintiff's injury was not compensable as it did not arise out of her employment. We therefore reverse the decision of the Court of Appeals and remand this case to that court for further remand to the Industrial Commission for proceedings not inconsistent with this opinion. As to the issue presented in defendants' petition for discretionary review, we conclude that discretionary review was improvidently allowed.

REVERSED AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

Justice TIMMONS-GOODSON dissenting.

Because I believe the record sustains the findings of fact made by the Industrial Commission, and because I believe those findings

of fact support the Commission's conclusions of law, I respectfully dissent.

Appellate courts' review of a decision by the Industrial Commission is limited to examining "whether any competent evidence supports the Commission's findings of fact and whether the findings of fact 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). This Court's duty " 'goes no further than to determine whether the record contains any evidence tending to support the [Industrial Commission's] finding.' " *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). Further, "[t]he evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Id.* In other words, evidence that might lead another finder of fact to make a different decision is irrelevant unless the Commission's findings are absolutely unsupported by any evidence in the record.

While the majority articulates the appropriate standard of review, it fails to follow it. Not only does the majority fail to give deference to the findings of fact as instructed by this Court's precedent, the majority makes little mention of the Commission's findings of fact.

The issue before us is whether the Commission's findings of fact are supported by any competent evidence in the record and whether those findings support the Commission's conclusions of law. The Industrial Commission concluded that plaintiff's injury arose out of and in the course of her employment with Salter Path Fire & Rescue ("Salter Path") and was therefore compensable. In my opinion, there was sufficient evidence in the record to support the findings of fact and to sustain the Commission's conclusions of law.

The Industrial Commission entered the following findings of fact pertinent to our inquiry:

> 2. Plaintiff was injured at the Salter Path Fire and Rescue Fun Day on September 30, 2001. Fun Day was essentially an appreciation day, in which the community thanked volunteer firemen and rescue workers for their contribution and work in the community. The purpose for Fun Day was to boost the morale and goodwill of Salter Path volunteers, show appreciation for the

unpaid volunteers of Salter Path, and to help develop camaraderie among the volunteers. Fun Day was initiated in 2000.

3. The Fun Day event was put on by Salter Path Fire and Rescue Corporation and was paid for out of a Special Donations Fund, rather than out of the Department's operating budget. Salter Path Fire and Rescue Corporation paid for the admission of the volunteers and their families to Lost Treasures Golf and Raceway ("Lost Treasures"), the private amusement park where Fun Day was held, and provided lunch to the participants while at Fun Day.

4. Fun Day was a voluntary event, but Salter Path volunteers and their families were urged to attend if possible. Many volunteers did not attend. Those in attendance signed in at the Treasure Island main window and were given passes for free rides and a free lunch. One purpose of this sign-in sheet was to allow Treasure Island to compute the total cost, according to the discount ticket rates provided. Another possible purpose was to give management of the fire and rescue unit an attendance log. Notwithstanding that attendance was voluntary, Salter Path did keep attendance for the event. The employer received a tangible benefit from this event in that it helped to improve morale of volunteers and it provided an opportunity for leaders of the fire and rescue unit to encourage volunteers to continue their participation as volunteers. The volunteers viewed Fun Day as a benefit of their voluntary employment. The Chief of Salter Path, Ritchie Frost, told plaintiff that he wanted her to attend Fun Day.

5. On the morning of September 30, 2001, plaintiff called Carteret County Communications ("Communications") to tell the dispatcher to set the tones for noon for all of the volunteers' beepers to remind them of Fun Day. Plaintiff and her husband then took the Salter Path Fire & Rescue ambulance to Treasure Island and proceeded inside to ride the go-carts. Plaintiff had signed in as "on duty" prior to her injury and had intended to give a pep speech thanking the EMS volunteers and encouraging their continued participation with Salter Path just as she had done at the previous Fun Day.

The majority contends that no competent evidence supports the Commission's findings of fact. As the Court of Appeals noted with regard to finding 3, however, "three witnesses testified without objection that Salter Path did sponsor the event and defendants do not

dispute that the volunteers' admission to the event was paid for by Salter Path's special contribution fund." —— N.C. App. ——, ——, 628 S.E.2d 22, 25 (2006). Competent evidence also supports finding 4. Specifically, volunteers who attended Fun Day signed in at the entrance to Lost Treasures. Further, it is undisputed that the Chief of Salter Path told plaintiff he wanted her to attend the event. Testimony also indicated that Salter Path benefitted from the event because the event encouraged volunteers' continued participation. Thus, the Commission appropriately found that improving morale in a volunteer organization amounts to a tangible benefit. With regard to finding 5, plaintiff testified that she signed in as "on duty" the morning of Fun Day when she picked up the ambulance to drive it to Lost Treasures. In addition, she testified that she planned to give a pep talk to the volunteers at Fun Day. In light of the record, I would hold that the Commission's findings are supported by competent evidence.

The next step of our inquiry is whether the Commission's findings of fact support its conclusions of law. The Commission based its conclusions of law on the test set out in *Chilton v. Bowman Gray School of Medicine*, 45 N.C. App. 13, 15, 262 S.E.2d 347, 348 (1980), for whether an injury sustained at an employer-sponsored recreational event or social activity arose out of and in the course of employment. The majority declines to adopt *Chilton*, but does recognize that it is consistent with this Court's holding in *Perry v. American Bakeries Co.*, 262 N.C. 272, 275, 136 S.E.2d 643, 646 (1964). I agree. In the instant case, the Commission concluded that "the evidence in the instant cause establishes affirmative answers to at least four of the six *Chilton* questions, and, arguably, all six." Therefore, the Commission concluded that "[p]laintiff suffered an injury by accident on September 30, 2001, arising out of . . . employment with the defendant-employer." I agree that the *Chilton* factors support plaintiff's position.

The majority bases its analysis on *Perry v. American Bakeries Co.*, 262 N.C. 272, 275, 136 S.E.2d 643, 646 (1964), in which this Court held that an employee's injury that occurred while swimming during free time at an employer-sponsored sales meeting did not arise out of his employment. The plaintiff in *Perry* was a route salesman supervisor for American Bakeries in Raleigh. *Id.* at 272, 136 S.E.2d at 644. At the time of the accident, he was attending a sales meeting in Greensboro. *Id.* at 273, 136 S.E.2d at 644-45. The plaintiff stayed overnight at an inn, and his lodging was paid for by his employer. *Id.*

at 273, 136 S.E.2d at 644. He arrived in Greensboro the day before the meeting began and attended a social hour hosted by his employer. *Id.* After the social hour ended, the plaintiff went to dinner with a coworker, then returned to his hotel and decided to swim in the hotel pool. *Id.* at 273, 136 S.E.2d at 645. At that time, the plaintiff sustained a diving injury. *Id.* As a result of his injury, he remained in the hospital for sixty-five days and was out of work for five months. *Id.* His employer paid the plaintiff's salary during those five months. *Id.*

The majority distinguishes *Rice v. Uwharrie Council Boy Scouts of America*, 263 N.C. 204, 207-08, 139 S.E.2d 223, 226-27 (1964), in which this Court affirmed the Industrial Commission's finding that an injury sustained by an employee while deep-sea fishing at an employer-sponsored conference arose out of his employment. The plaintiff in *Rice* was a District Scout Executive from Lexington, North Carolina. *Id.* at 205, 139 S.E.2d at 224. At the time of his injury, he was attending a five-day Scouting Executive Conference at Jekyll Island, Georgia, at his employer's expense. *Id.* at 205, 139 S.E.2d at 225. The plaintiff fractured his leg during a deep-sea fishing outing, and the evidence before the Commission indicated that such recreational activities were " 'a planned part of the program.' " *Id.* at 207, 139 S.E.2d at 226. The plaintiff was out of work for more than five months and was paid his regular salary during that time. *Id.* at 205, 139 S.E.2d at 224.

Based on the Commission's findings of fact, I find the instant case to be more comparable to *Rice* than to *Perry*. In *Rice*, this Court found that "[t]he evidence and findings permit the inference the employer impliedly required participation in the scheduled activities, . . . not merely for the purpose of furnishing amusement and entertainment for the employee." *Id.* at 208, 139 S.E.2d at 227. Similarly, here, the Commission's findings permit the inference that the event was not wholly voluntary and that the event benefitted Salter Path in a tangible way. I refer specifically to the Commission's findings that plaintiff was told by the Chief of Salter Path that he wanted her to attend Fun Day and that the event benefitted Salter Path in terms of volunteer retention. Moreover, *Perry* can be distinguished from the instant case in the same way this Court in *Rice* distinguished it. In *Rice*, the Court recited the facts of *Perry* as follows: "Mr. Perry entered the swimming pool *entirely on his own after the social hour provided by his employer was over*." *Id.* (emphasis added). Here, however, plaintiff was injured while engaging in activities at the very event her employer asked her to attend.

Because the Commission's findings of fact are supported by some credible evidence in the record and because those findings support the Commission's conclusions of law, I would affirm the Court of Appeals. Therefore, I respectfully dissent.

DOUGLAS M. ROBINS v. TOWN OF HILLSBOROUGH

No. 154A06

(Filed 26 January 2007)

1. Zoning— site specific development plan—applicable ordinance

Plaintiff had a right to have defendant town's board of adjustment consider and render a decision on his application for approval of a site specific development plan for an asphalt plant under the zoning ordinance in effect at the time the application was made where, after the board of adjustment had held hearings on plaintiff's application, the town's board of commissioners adopted a moratorium on consideration of applications for the construction of manufacturing and processing facilities involving petroleum products, including asphalt plants, and the board of commissioners thereafter amended the zoning ordinance to prohibit manufacturing and processing facilities involving the use of petroleum products within the town's zoning jurisdiction.

2. Zoning— amended ordinance—constitutionality

The portion of the Court of Appeals' opinion concerning the constitutionality of the amended zoning ordinance is vacated because the Court of Appeals unnecessarily addressed the issue.

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

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 176 N.C. App. 1, 625 S.E.2d 813 (2006), reversing and remanding an order granting summary judgment entered 29 October 2004 by Judge James C. Spencer, Jr. in Superior Court, Orange County. Heard in the Supreme Court 16 October 2006.

Smith, James, Rowlett & Cohen, LLP, by Seth R. Cohen, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by Susan K. Burkhart, for defendant-appellant.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Craig D. Justus, and Richard A. Zechini, Counsel for North Carolina Association of Realtors, for the North Carolina Home Builders Association, North Carolina Association of Realtors, and North Carolina Outdoor Advertising Association, amici curiae.

BRADY, Justice.

In this case we determine whether plaintiff, who applied to defendant for approval of his site specific development plan, has a right to have his application reviewed under the zoning ordinance in effect at that time. We conclude that he does and therefore modify and affirm in part, and vacate in part, the opinion of the Court of Appeals. We also remand this case for entry of judgment in plaintiff's favor.

FACTUAL BACKGROUND

Prior to 21 January 2003, plaintiff Douglas M. Robins contracted to purchase a parcel of land zoned general industrial and containing approximately 4.96 acres within defendant Town of Hillsborough's extraterritorial zoning jurisdiction.[1] On 21 January 2003, plaintiff submitted an application to defendant seeking approval of his site specific development plan, in which he proposed to construct a bituminous concrete (asphalt) plant on this property, which was situated directly across from an existing cement plant. Plaintiff also submitted an erosion control plan to the Orange County Soil and Erosion Control Officer on 11 March 2003 and received approval of his erosion control plan on 14 April 2003.[2] Plaintiff spent approximately $100,000 in pursuit of this project in addition to the expenditure of time required to prepare his application and attend the various public hearings on his proposal.

Defendant's Board of Adjustment held three separate hearings to consider plaintiff's development plan on 12 February 2003, 12 March

1. Plaintiff closed on this property in December 2003.

2. There is a dispute as to whether this and other state and local permit applications were necessary steps for plaintiff's application to be complete. However, these facts ultimately are not determinative of our analysis of the critical issue in this case.

2003, and finally on 9 April 2003. At the third hearing, the Board of Adjustment once again continued proceedings until 30 April 2003. Earlier that same day, however, defendant had published, in a newspaper of record, notice of a hearing to be held on 22 April 2003 to consider a moratorium on the construction of processing and manufacturing facilities involving petroleum products, including asphalt plants, within its zoning jurisdiction. Nothing in the record indicates plaintiff was aware of the pending moratorium hearing at the time he acquiesced to the 9 April 2003 continuance of his hearing before the Board of Adjustment.

At the moratorium hearing, defendant's Board of Commissioners (Town Board) adopted "An Ordinance Amending the Town of Hillsborough Zoning Ordinance to Temporarily Suspend the Review, Consideration and Issuance of Permits and Applications for Manufacturing and Processing Operations Involving Petroleum Products" (the moratorium), which reads:

> Notwithstanding any provision in this Zoning Ordinance to the contrary, no manufacturing and processing facility involving petroleum products as one of the materials being manufactured and/or processed (including, but not limited to, refineries for gasoline and other fuels, liquefied gas refineries, asphalt plants, finished petroleum products plants, plants which manufacture asphalt paving mixtures and blocks, asphalt shingles and/or coating materials, and plants manufacturing or processing petroleum lubricating oils and greases) shall be permitted, and no application for any permit or approval to operate such a facility shall be accepted, processed, reviewed or considered by the Town. *This section shall apply to all applications for a permit or approval, including any application which is pending as of the effective date hereof.*

(Emphasis added.) This moratorium was to begin immediately and remain in effect until 31 December 2003, unless terminated earlier or extended by the Town Board for a period of up to six months. At the time the moratorium took effect, plaintiff's asphalt plant was the *only* development plan under consideration by the Board of Adjustment that was affected.

Defendant issued a notice that the hearing scheduled for 30 April 2003 was cancelled as a result of the moratorium, causing an indefinite delay in plaintiff's development plan. Then, on 24 November 2003, the Town Board adopted an amendment to Section 3.3 of its

zoning ordinance (the amendment) which states: "[M]anufacturing and processing facilities involving the use of petroleum products, such as . . . asphalt plants . . . are expressly prohibited in the Town of Hillsborough and it[s] extraterritorial zoning jurisdiction." The amendment was to take effect 1 March 2004. On 1 December 2003, the Town Board extended the moratorium to coincide with the effective date of the amendment. This action effectively terminated the development plan of plaintiff, who then initiated litigation.

PROCEDURAL BACKGROUND

On 22 January 2004, plaintiff filed a complaint and petition for judicial review and writ of certiorari in Orange County Superior Court concerning his application. In September 2004 defendant filed a motion for summary judgment. After hearing defendant's motion, the trial court allowed summary judgment for defendant on 29 October 2004. The trial court's order determined, as a matter of law, that plaintiff is not entitled to a review of his application under the pre-moratorium and pre-amendment ordinance; that defendant complied with all due process and statutory requirements in adopting the moratorium, the moratorium extension, and the amendment; that plaintiff's challenge to the extension of the moratorium was mooted by enactment of the amendment; that plaintiff is not entitled to any further review or decision concerning his application; and that plaintiff is not entitled to any damages.

Plaintiff appealed the trial court's order to the Court of Appeals, which, in a divided decision, found that "plaintiff was entitled to rely upon the language of, and have his application considered under, the zoning ordinance in effect at the time he applied for his permit." *Robins v. Town of Hillsborough*, 176 N.C. App. 1, 7, 625 S.E.2d 813, 817 (2006). The majority also held that the trial court erred in granting summary judgment to defendant on plaintiff's constitutional claims because there was a genuine issue of material fact. *Id.* at 10, 625 S.E.2d at 819. Defendant appeals on the basis of a dissent in the Court of Appeals.

STANDARD OF REVIEW

We review a trial court's order for summary judgment de novo to determine whether there is a "genuine issue of material fact" and whether either party is "entitled to judgment as a matter of law." *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003) (citing N.C.G.S. § 1A-1, Rule 56(c)).

ANALYSIS

[1] The issue before us is whether plaintiff has a right to have defendant consider and render a decision on his application under the ordinance in effect at the time the application was made. Although the parties have presented arguments as to whether plaintiff may assert a vested right, either by operation of statute or common law principles, these arguments are inapposite because our vested rights decisions have considered whether a plaintiff has a right to complete his project despite changes in the applicable zoning ordinances, *see, e.g.*, *Finch v. City of Durham*, 325 N.C. 352, 373, 384 S.E.2d 8, 20 (1989), an issue distinct from the one before us today. However, we determine, consistent with prior decisions of this Court, that plaintiff was entitled to have defendant render a decision on his application, complete with competent findings of fact which support such decision. Additionally, defendant's application merits review under the zoning ordinance as it existed before the moratorium and the amendment were passed.

Under Section 21.3.2 of the Town of Hillsborough Zoning Ordinance, the Board of Adjustment's "powers" "shall" include the authority to "[p]ass upon, decide, or determine such other matters as may be required by this Ordinance." Hillsborough, N.C., Zoning Ordinance § 21.3.2 (2003) [hereinafter Zoning Ordinance]. Similarly, the Rules of Procedure of the Board of Adjustment state that the Board "shall . . . hear and *decide* all matters . . . upon which it is required [to] pass by the Zoning Ordinance of Hillsborough." Hillsborough, N.C., Bd. of Adjust. R.P. VI(A) [hereinafter Adjust. R.P.] (emphasis added). Section 5.27 of the Zoning Ordinance lists the land uses for which site plan approval by the Board of Adjustment is "require[d]." Zoning Ordinance § 5.27.2 (2003). These uses include "[a]ll projects involving the construction of new buildings . . . on lots within" various districts including the "GI" district, in which plaintiff's proposed project is located. *Id.* § 5.27.2(b).

Under the Board of Adjustment's Rules of Procedure, board decisions "shall be supported by competent, material, and substantial evidence in the whole record." Adjust. R.P. VI(D)(1). Appeals from Board of Adjustment decisions are to the Superior Court. Zoning Ordinance § 21.3.10. The Board's procedural rules state that "a hearing" shall be held before a decision is rendered. Adjust. R.P. VI(C). Although nothing in the rules allows or prohibits a series of hearings or an indefinite suspension of consideration of an application, the rules require the Board's decision to be rendered in a timely fashion,

that is, "not more than thirty (30) days from the date of the last hearing of the matter under consideration." *Id.* VI(D)(2).

This Court has stated that the task of a court reviewing a town board's decision when the town board has acted as a quasi-judicial body includes:

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

Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs., 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980). Because town boards "are generally composed of laymen who do not always have the benefit of legal advice, they cannot reasonably be held to the standards required of judicial bodies." *Humble Oil & Ref. Co. v. Bd. of Aldermen*, 284 N.C. 458, 470, 202 S.E.2d 129, 137 (1974). However, such a body conducting a quasi-judicial hearing "can dispense with no essential element of a fair trial." *Id.* One of those essential elements is that "[a]ny *decision* of the town board has to be based on competent, material, and substantial evidence that is introduced at a public hearing." *Coastal Ready-Mix Concrete Co.*, 299 N.C. at 626, 265 S.E.2d at 383 (emphasis added). Accordingly, it is impossible for a court reviewing a town board's *decision* to do so unless the town board *actually renders* that decision.

Previously, this Court has bound town boards to their own rules of procedure. In *Humble Oil*, this Court noted that "[t]he procedural rules of an administrative agency 'are binding upon the agency which enacts them as well as upon the public. . . . To be valid the action of the agency must conform to its rules which are in effect at the time the action is taken. . . .' " 284 N.C. at 467, 202 S.E.2d at 135 (citations omitted). Consistent with this Court's duty to ensure "that decisions are not arbitrary and capricious," *Coastal Ready-Mix Concrete Co.*, 299 N.C. at 626, 265 S.E.2d at 383, we must determine whether

defendant followed its own procedures. "In no other way can an applicant be accorded due process and equal protection, or the [board] refute a charge that [its actions] constituted an arbitrary and unwarranted discrimination against a property owner." *Humble Oil*, 284 N.C. at 468, 202 S.E.2d at 135 (citing *Keiger v. Winston-Salem Bd. of Adjust.*, 281 N.C. 715, 720, 190 S.E.2d 175, 179 (1972)).

In many ways this case is analogous to *Humble Oil*. In *Humble Oil*, this Court required a Board of Aldermen to consider an applicant's application de novo because the procedural rules of the ordinance had not been followed. 284 N.C. at 467, 471, 202 S.E.2d at 135, 138. Specifically, the applicable ordinance required the Board of Aldermen, before a decision on an application was made, to receive a recommendation from the Planning Board after the Planning Board conducted an investigation into the subject matter of the application. *Id.* at 467, 202 S.E.2d at 135. In *Humble Oil*, the Board of Aldermen failed to follow this rule by denying the application before referring it to the Planning Board. *Id.* at 468, 202 S.E.2d at 135-36. In the case *sub judice*, the applicable ordinance provides that the Board of Adjustment "shall [p]ass upon, decide, or determine such . . . matters as may be required by this Ordinance," including site plans. Zoning Ordinance § 21.3.2(d). The Zoning Ordinance specifies the grounds upon which a site plan may be approved or denied. *Id.* § 5.27. Instead of following the proper procedures by which the Board of Adjustment would have rendered an up or down decision on plaintiff's application, defendant, acting through its Board of Commissioners, passed the moratorium and eventually amended the ordinance, effectively usurping the Board of Adjustment's responsibility in the matter. In essentially dictating by legislative fiat the outcome of a matter which should be resolved through quasi-judicial proceedings, defendant did not follow its own ordinance pertaining to the disposition of site specific development plans, thus leaving the Town Board no defense to the charge that its actions were arbitrary and capricious. *See Humble Oil*, 284 N.C. at 468, 202 S.E.2d at 135 (citing *Keiger*, 281 N.C. at 720, 190 S.E.2d at 179 (1972)).

We hold that when the applicable rules and ordinances are not followed by a town board, the applicant is entitled to have his application reviewed under the ordinances and procedural rules in effect as of the time he filed his application. Accordingly, plaintiff was entitled to receive a final determination from defendant regarding his application and to have it assessed under the ordinance in effect when the application was filed. We express no opinion as to whether

the application should be approved or denied on the merits, but merely that plaintiff is entitled to a decision by defendant pursuant to the ordinance as it existed before passage of the moratorium and the amendment.

[2] Because of our holding, we need not address the portion of the Court of Appeals opinion concerning the constitutionality of the amended zoning ordinance except to note that the Court of Appeals unnecessarily addressed the issue. Because plaintiff is entitled to have his application decided under the ordinance in effect at the time he filed his application, the amended ordinance does not apply to his proposed activity. Accordingly, we vacate that portion of the Court of Appeals opinion.

Thus, we modify and affirm the portion of the Court of Appeals opinion concerning plaintiff's right to have his application reviewed and a decision made under the zoning ordinance in effect on 21 January 2003. We remand to that court for further remand to the trial court with instructions to enter judgment for plaintiff declaring his right to have his application reviewed in accordance with this opinion. We also vacate the portion of the opinion of the Court of Appeals concerning the constitutionality of the amended zoning ordinance.

MODIFIED AND AFFIRMED IN PART; VACATED IN PART; REMANDED.

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

STATE OF NORTH CAROLINA v. ERNEST ELLIS

No. 638PA04

(Filed 26 January 2007)

1. Appeal and Error— Supreme Court jurisdiction—review of Court of Appeals MAR decision

The Supreme Court had jurisdiction to review the decision of the Court of Appeals regarding defendant's motion for appropriate relief (MAR), because: (1) while N.C.G.S. §§ 7A-28(a) and 7A-31 ordinarily preclude the Supreme Court's review of Court of

Appeals decisions on MARs in noncapital cases, a statute cannot restrict the Supreme Court's constitutional authority under Article IV, Section 12, Clause 1 of the North Carolina Constitution to exercise jurisdiction to review upon appeal any decision of the courts below; (2) the Supreme Court will not hesitate to exercise its rarely used general supervisory authority when necessary to promote the expeditious administration of justice, and may do so to consider questions which are not properly presented according to its rule; and (3) the exercise of its supervisory authority is particularly appropriate when, as here, prompt and definitive resolution of an issue is necessary to ensure the uniform administration of North Carolina's criminal statutes.

2. Sentencing— concurrent versus consecutive—erroneous plea agreement—attempted armed robbery—armed robbery

The Court of Appeals erred by failing to vacate the superior court's 10 July 2003 order allowing defendant's eighteen-year sentence for attempted robbery with a dangerous weapon and fourteen-year sentence for robbery with a dangerous weapon to run concurrently, and by failing to remand the case for the proceedings described in *State v. Wall*, 348 N.C. 671 (1998), because: (1) at the time defendant entered his guilty plea on the charge of armed robbery, N.C.G.S. § 14-87(d) required that a term of imprisonment for armed robbery run consecutively with and commence at the expiration of any other sentence being served by the offender; (2) the imposition of a concurrent sentence for this offense was contrary to law since it provided for specific performance of the illegal 1992 plea arrangement; (3) ever since defendant's initial filing of his pro se MAR, he has continuously admitted that the superior court order imposing such a sentence was contrary to the governing statute; (4) the Court of Appeals explicitly recognized that the superior court erred by imposing a concurrent sentence, but neglected to proceed with the necessary step of vacating the erroneous order; and (5) the State's promise cannot be kept, and thus according to *Wall*, defendant can either withdraw his guilty plea and proceed to trial on the criminal charges, or he may also withdraw his plea and attempt to negotiate another plea agreement that does not violate former N.C.G.S. § 14-87(d).

Justices TIMMONS-GOODSON and HUDSON 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, 167 N.C. App. 276, 605 S.E.2d 168 (2004), affirming an order entered on 10 July 2003 by Judge William C. Gore in Superior Court, Bladen County. Heard in the Supreme Court 19 October 2005.

Roy Cooper, Attorney General, by Elizabeth F. Parsons, Assistant Attorney General, for petitioner-appellant North Carolina Department of Correction.

Carolina Legal Assistance, by Susan H. Pollitt; and Winifred H. Dillon for respondent-appellee.

MARTIN, Justice.

The questions raised by the instant case were resolved by this Court in *State v. Wall*, 348 N.C. 671, 502 S.E.2d 585 (1998). We therefore apply *Wall* and reverse the Court of Appeals.

On 21 May 1991, defendant Ernest Ellis pled guilty in Wilson County Superior Court to one count of attempted robbery with a dangerous weapon (attempted armed robbery) and received an active sentence of eighteen years. At the time of the offense, defendant was on probation for two counts of breaking, entering and larceny, offenses he committed on 25 July 1988. Defendant's probation was revoked as a result of the attempted armed robbery, and a ten-year prison sentence for his 1988 offenses was activated. The Wilson County judgment revoking defendant's probation specified that the ten-year activated sentence was to run concurrently with the eighteen-year sentence for attempted armed robbery.

Soon after defendant began serving these sentences, he was charged with one count of robbery with a dangerous weapon (armed robbery) in Bladen County. Defendant pled guilty to the armed robbery on 13 January 1992, and the Bladen County Superior Court sentenced him to an active sentence of fourteen years. In exchange for defendant's guilty plea, the state agreed to dismiss all other pending charges and recommend that defendant's fourteen-year sentence run concurrently with the eighteen-year sentence he was already serving.

The Bladen County Superior Court sentenced defendant, but neither the court's pronouncement of judgment at the plea hearing nor the judgment and commitment entered 15 January 1992 specified whether the fourteen-year sentence was to run concurrently or consecutively. At the time defendant entered his plea, the General

Statutes required that any term of imprisonment for armed robbery "run consecutively with and . . . commence at the expiration of" any other sentence being served by the offender. N.C.G.S. § 14-87(d) (1993) (repealed effective 1 January 1995). Consequently, the North Carolina Department of Correction (DOC) received the Bladen County judgment and commitment and recorded the sentence pursuant to statute as consecutive to the eighteen-year active term defendant was currently serving for attempted armed robbery.

At some point defendant discovered that the consecutive sentence required by statute was not the agreed-upon sentence for which he had exchanged a guilty plea, and he filed a *pro se* motion for appropriate relief (MAR) on 13 March 1997. Defendant contended that regardless of N.C.G.S. § 14-87(d), his sentences should run concurrently because that was his understanding when he pled guilty to armed robbery in Bladen County. The Bladen County Superior Court accepted defendant's argument and concluded in an order entered on 15 April 1997 that defendant's sentences should run concurrently.

The following year in *State v. Wall*, this Court considered the precise issue raised in defendant's MAR and confronted by the Bladen County Superior Court. *See Wall*, 348 N.C. 671, 502 S.E.2d 585. Wall had pled guilty to two counts of felonious larceny and one count each of second-degree burglary and felonious breaking or entering, in exchange for an agreement that the twenty-five-year consolidated sentence imposed for these crimes would run concurrently with a ten-year sentence he was already serving. *Id.* at 673-74, 502 S.E.2d at 586-87. The Superior Court did not specify whether the twenty-five-year sentence was to run concurrently or consecutively. *Id.* at 673, 502 S.E.2d at 587.

At the time, however, the General Statutes required sentences imposed for burglary to "run consecutively with and . . . commence at the expiration of any sentence being served." N.C.G.S. § 14-52 (1993) (repealed effective 1 January 1995). Thus, DOC recorded Wall's sentence as consecutive in accordance with N.C.G.S. § 14-52. *Wall*, 348 N.C. at 673, 502 S.E.2d at 587. When Wall discovered that his DOC record did not reflect the concurrent sentence for which he had exchanged a guilty plea, he filed a MAR in Superior Court. *Id.* at 674, 502 S.E.2d at 587. The Superior Court allowed Wall's motion and ordered that his sentence be served concurrently, despite the clear statutory mandate otherwise. *Id.* This Court allowed DOC's petition for writ of certiorari to review the MAR order.

Writing for the Court, then Associate Justice Henry Frye explained that the "order directing that defendant's sentences be served concurrently rather than consecutively was in violation of N.C.G.S. § 14-52 and must, therefore, be vacated." *Id.* at 676, 502 S.E.2d at 588. As for Wall's reliance on the guilty plea agreement, he was "not entitled to specific performance [of the plea agreement] . . . because such action would violate the laws of this state." *Id.* Rather, Wall was entitled to "withdraw his guilty plea and proceed to trial on the criminal charges . . . [or] attempt to negotiate another plea agreement that does not violate [the applicable sentencing statute]." *Id.* Accordingly, the Court vacated the Superior Court's order and remanded for further proceedings to afford Wall the opportunity to withdraw his guilty plea. *Id.*

Several years after this Court decided *Wall*, the present defendant filed a motion in Bladen County Superior Court requesting that he be allowed to withdraw his guilty plea. Citing *Wall*, defendant argued that he was entitled to this remedy because the sentence for which he had exchanged his guilty plea was illegal under former N.C.G.S. § 14-87(d). The Superior Court held an evidentiary hearing on defendant's motion as required by N.C.G.S. § 15A-1420(c) and made findings of fact and conclusions of law which were reduced to writing in an order signed on 15 May 2003 and entered on 10 July 2003. This order provided, in pertinent part:

> 3. From the record, the motion, and affidavits submitted by the defendant, which are uncontested by the . . . District Attorney . . . , the Court finds that it was the intent of all the parties that the judgment and sentence imposed [for armed robbery in Bladen County] should run concurrently with the sentence previously imposed and which the defendant was then serving.

Instead of simply allowing for the remedy described in *Wall*, however, the Superior Court granted defendant greater relief than he requested. The Superior Court concluded that "[defendant] is entitled to the benefit of his plea arrangement" and ordered that defendant's sentence for armed robbery in Bladen County "run concurrently with the judgment imposed . . . in Wilson County . . . ."

From this order, DOC filed a petition for writ of certiorari in the Court of Appeals on 21 May 2003. The Court of Appeals ordered full briefing and argument and, on 7 December 2004, affirmed the Superior Court's order. *State v. Ellis*, 167 N.C. App. 276, 605 S.E.2d 168 (2004). We allowed DOC's petition for discretionary review.

[1] Before considering the merits of the instant case, we first address defendant's contention that this Court lacks jurisdiction to review the decision of the Court of Appeals. Defendant cites two statutory provisions indicating that "[d]ecisions of the Court of Appeals upon review of motions for appropriate relief . . . are final and not subject to further review in the Supreme Court by appeal, motion, certification, writ, or otherwise." N.C.G.S. § 7A-28(a) (2005); *see also id.* § 15A-1422(f) (2005) ("Decisions of the Court of Appeals on motions for appropriate relief . . . are final and not subject to further review by appeal, certification, writ, motion, or otherwise."). Defendant also argues that N.C.G.S. § 7A-31 specifically exempts rulings on MARs such as the one in the instant case from discretionary review. *Id.* § 7A-31(a) (2005) ("In any cause in which appeal is taken to the Court of Appeals, except . . . a motion for appropriate relief [in a noncapital case] . . . , the Supreme Court may, in its discretion, . . . certify the cause for review by the Supreme Court, either before or after it has been determined by the Court of Appeals.").

We recognize that the cited statutory provisions ordinarily preclude our review of Court of Appeals decisions on MARs in noncapital cases. Nevertheless, it is beyond question that a statute cannot restrict this Court's constitutional authority under Article IV, Section 12, Clause 1 of the Constitution of North Carolina to exercise "jurisdiction to review upon appeal any decision of the courts below." N.C. Const. art. IV, § 12; *see, e.g.*, *James v. Bartlett*, 359 N.C. 260, 264-65, 607 S.E.2d 638, 641 (2005); *In re Brownlee*, 301 N.C. 532, 548, 272 S.E.2d 861, 870 (1981). As such, "[t]his Court will not hesitate to exercise its rarely used general supervisory authority when necessary to promote the expeditious administration of justice," and may do so to "consider questions which are not properly presented according to [its] rules." *State v. Stanley*, 288 N.C. 19, 26, 215 S.E.2d 589, 594 (1975). This exercise of our supervisory authority is particularly appropriate when, as here, prompt and definitive resolution of an issue is necessary to ensure the uniform administration of North Carolina's criminal statutes.

[2] Having determined that jurisdiction exists in this Court, we now turn to the merits of the instant appeal. DOC argues that the Court of Appeals erred by failing to vacate the Bladen County Superior Court's 10 July 2003 order allowing defendant's sentences to run concurrently, and by failing to remand the case for the proceedings described in *State v. Wall*. We agree.

Wall controls the disposition of the instant case. At the time defendant entered his guilty plea on the charge of armed robbery, N.C.G.S. § 14-87(d) required that a term of imprisonment for armed robbery "run consecutively with and . . . commence at the expiration of" any other sentence being served by the offender. Therefore, as in *Wall*, the imposition of a concurrent sentence for this offense was contrary to law because it provided for specific performance of the illegal 1992 plea arrangement. Indeed, ever since he initially filed his *pro se* MAR, defendant has continuously admitted that the Superior Court order imposing such a sentence was contrary to the governing statute.

The Court of Appeals also explicitly recognized that the Bladen County Superior Court erred in imposing a concurrent sentence. *Ellis*, 167 N.C. App. at 281, 605 S.E.2d at 172 ("[B]ecause defendant was statutorily required to serve a consecutive sentence for armed robbery, the trial court's order directing that [defendant] serve a concurrent sentence on the Bladen County judgment was erroneous."). The Court of Appeals neglected, however, to proceed with the necessary step of vacating the erroneous order entered on 10 July 2003 by the Bladen County Superior Court. *Wall*, 348 N.C. at 676, 502 S.E.2d at 588 ("The court's order directing that defendant's sentences be served concurrently rather than consecutively was in violation of [statute] *and must, therefore, be vacated.*" (emphasis added)).

Similarly, the Court of Appeals erred in failing to remand defendant's case to Superior Court for the proceedings described in *State v. Wall*. Here, as in *Wall*, defendant and the district attorney executed a plea agreement with the expectation and understanding that defendant's sentence for armed robbery would run concurrently with the active sentence he was already serving. Since the state's promise cannot be kept, however, *Wall* ensures that defendant is entitled to his choice of two remedies: (1) "[h]e may withdraw his guilty plea and proceed to trial on the criminal charges"; or (2) "[h]e may also withdraw his plea and attempt to negotiate another plea agreement that does not violate" former N.C.G.S. § 14-87(d). *Wall*, 348 N.C. at 676, 502 S.E.2d at 588. The Court of Appeals should have remanded defendant's case to Superior Court where he could withdraw his guilty plea and avail himself of the remedies described in *Wall*.

Accordingly, we reverse the decision of the Court of Appeals. We remand this case to the Court of Appeals for remand to the Superior Court with instructions to vacate the 10 July 2003 order of

the Bladen County Superior Court and for further proceedings consistent with this opinion.

REVERSED and REMANDED.

Justices TIMMONS-GOODSON and HUDSON did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. ARRIS JAMES HINTON

No. 113PA06

(Filed 26 January 2007)

Robbery— armed—hands not a dangerous weapon

A defendant's hands cannot be dangerous weapons for purposes of robbery with a dangerous weapon under N.C.G.S. § 14-87. Although robbery with a dangerous weapon includes the lesser included offense of assault with a deadly weapon, the doctrine of lesser included offenses moves downstream, not up, and does not require that all deadly weapons for assault be dangerous weapons for robbery. Moreover, the text of N.C.G.S. § 14-87(a) is not sufficient to allow a jury to find robbery with the use of hands or feet to be robbery with a dangerous weapon; the General Assembly intended to require the State to prove that a defendant used an external dangerous weapon.

Justices TIMMONS-GOODSON and HUDSON 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, unpublished decision of the Court of Appeals, 176 N.C. App. 191, 625 S.E.2d 918 (2006), affirming in part, reversing in part, and vacating and remanding in part judgments entered 6 August 2004 by Judge Orlando F. Hudson in Superior Court, Wake County. Heard in the Supreme Court 20 November 2006.

Roy Cooper, Attorney General, by Robert C. Montgomery, Special Deputy Attorney General, for the State-appellant.

Kathryn L. VandenBerg for defendant-appellee.

BRADY, Justice.

Following indictment and a trial by jury, Arris James Hinton (defendant) was convicted of robbery with a dangerous weapon, assault inflicting serious injury, and assault with a deadly weapon inflicting serious injury stemming from his beating of Raleigh Police Officer Kenneth Newton. The trial court arrested judgment on the assault inflicting serious injury conviction and sentenced defendant to consecutive active terms of imprisonment of 77 to 102 months for the robbery with a dangerous weapon conviction and 29 to 44 months for the assault with a deadly weapon inflicting serious injury conviction. Defendant appealed to the Court of Appeals, which in a unanimous opinion, affirmed defendant's conviction for assault with a deadly weapon inflicting serious injury, but vacated defendant's conviction for robbery with a dangerous weapon and remanded to the trial court for entry of judgment on the crime of common law robbery. We allowed the State's petition for discretionary review in order to determine whether a defendant's hands can be considered dangerous weapons under the robbery with a dangerous weapon statute, N.C.G.S. § 14-87. Because we hold that a defendant's hands are not dangerous weapons pursuant to the statute, we affirm the decision of the Court of Appeals.

FACTUAL BACKGROUND

Defendant and Pam McCullers had been residing together in Raleigh until 16 May 2003, when defendant decided to move to Florida to reside with another female acquaintance. Upon arriving at the Raleigh Greyhound bus station by taxi, defendant purchased a ticket to Orlando, Florida, on a bus scheduled to depart at 5:00 or 5:30 p.m. After acquiring the ticket, defendant and an acquaintance walked to a store and purchased beer and wine. Upon defendant's return to the bus station, he discovered to his surprise that McCullers was present. McCullers appeared angry at defendant, and they argued loudly for about five to ten minutes before Raleigh City Police Officer Kenneth Newton arrived.

Officer Newton initially decided to separate defendant and McCullers, as he believed they were engaged in a domestic dispute over a television. After defendant exited the bus station, McCullers alleged that defendant did not live with her and that he had broken into her house and stolen her television. Officer Newton went outside to question defendant. Officer Newton was rendered unconscious by the ensuing altercation and, due to memory loss, he could

not comprehensively testify to the events that occurred when he confronted defendant.

Although there was conflicting testimony concerning the events that followed, it is undisputed that defendant and Officer Newton had a physical altercation which ended with Officer Newton unconscious and defendant taking Officer Newton's handgun from its holster. An eyewitness saw Officer Newton questioning defendant approximately ten to fifteen feet from the bus station wall. Officer Newton grabbed defendant's wrists, after which defendant pushed Officer Newton and the eyewitness lost sight of the altercation. After the eyewitness repositioned himself, he observed defendant strike a supine Officer Newton with his fists four times. Defendant testified at trial that Officer Newton grabbed him by the bicep, placed a hand on his throat, pinned him against the wall, began to choke him, rammed his head against the wall, and ripped his shirt, and that he saw Officer Newton reaching for his handgun. Defendant also testified he feared Officer Newton would shoot him unless he took the handgun from Officer Newton's possession.

After taking the handgun, defendant held it up in the air and began to move to the front of the building. At that time other police officers arrived. Defendant placed the gun on the ground, got on his knees, and put his hands on his head. After his arrest, defendant inquired about the health of Officer Newton and told the officers that Officer Newton "disrespected me, he put his hands on me, and I had to do what I had to do." Defendant's assault resulted in substantial injuries to Officer Newton, including a concussion, a torn right iris which has resulted in permanent damage, a fractured right eye socket, a shattered nose, and the loss of his senses of taste and smell.

ANALYSIS

Robbery with a dangerous weapon is a statutory offense codified in N.C.G.S. § 14-87, and, therefore, the determination of whether a defendant's hands can be considered dangerous weapons is a matter of statutory construction. The relevant statute provides:

> Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of busi-

> ness, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

N.C.G.S. § 14-87(a) (2005). The issue is whether hands are included in the language "any firearms or other dangerous weapon, implement or means." *Id.* The State advances two arguments, both of which are unpersuasive. First, the State argues that because assault with a deadly weapon is a lesser included offense of robbery with a dangerous weapon, the "deadly weapon" and "dangerous weapon" elements must be identical. Additionally, the State argues the text of N.C.G.S. § 14-87(a) is sufficient to allow a jury to find a robbery committed by the use of hands to be a robbery with a dangerous weapon.

It is true assault with a deadly weapon is a lesser included offense of robbery with a dangerous weapon. *See State v. Richardson*, 279 N.C. 621, 628, 185 S.E.2d 102, 107 (1971) ("The crime of armed robbery defined in G.S. 14-87 includes an assault on the person with a deadly weapon."). As a lesser included offense, "all of the essential elements of the lesser crime must also be essential elements included in the greater crime." *State v. Weaver*, 306 N.C. 629, 635, 295 S.E.2d 375, 379 (1982), *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993); *see also Black's Law Dictionary* 1111 (8th ed. 2004) (defining a lesser included offense as "[a] crime that is composed of some, but not all, of the elements of a more serious crime and that is necessarily committed in carrying out the greater crime"). However, the fact that assault with a deadly weapon is a lesser included offense of robbery with a dangerous weapon does not mean that the *scope* of the weapon elements must be identical for each offense. The fact that every dangerous weapon under N.C.G.S. § 14-87 would also be a deadly weapon for purposes of assault with a deadly weapon does not necessitate that all deadly weapons for purposes of assault with a deadly weapon are dangerous weapons under N.C.G.S. § 14-87. The doctrine of lesser included offenses moves downstream, not upstream as the State contends.

We also disagree with the State's contention that the language of the statute provides for a conviction based upon the use of hands as deadly weapons in the commission of a robbery. The State encourages us to construe the robbery with a dangerous weapon statute *in pari materia* with N.C.G.S. § 14-33(c)(1), an assault with a deadly

weapon statute. The basis for the State's argument is that "[t]he statutes criminalizing robbery with a dangerous weapon and assault with a deadly weapon are *in pari materia* insofar as they both include a dangerous or deadly weapon element." The State's argument, if adopted, could result in absurd results if applied to other statutes in which the words "deadly" or "dangerous weapon" are used. *See*, *e.g.*, N.C.G.S. § 7B-2510(a)(10) (2005) (allowing as a special condition of probation for a juvenile that the juvenile not "possess [a] . . . deadly weapon"); *id.* § 14-288.7(a) (prohibiting the transport of dangerous weapons in times of riot or declared states of emergency).

Instead, upon construing the language of N.C.G.S. § 14-87(a), we hold that a defendant's hands and feet may not be considered dangerous weapons. The statute prohibits "the use or threatened use of any firearms or other dangerous weapon, implement or means." In construing statutes, we first determine whether the statute is clear and unambiguous, and if so, we apply the words in their plain and definite meaning. *See Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) (citing *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)). "However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment." *Id.* (citing *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) ("The best indicia of [legislative] intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish." (citations omitted)).

We find the use of the word "means," which the State asserts allows the jury to determine whether hands and feet were used as deadly weapons, to be ambiguous. In construing ambiguous criminal statutes, we apply the rule of lenity, which requires us to strictly construe the statute. *See State v. Ross*, 272 N.C. 67, 69, 157 S.E.2d 712, 713 (1967) ("Statutes creating criminal offenses must be strictly construed."); *see also Bell v. United States*, 349 U.S. 81, 83 (1955) ("When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity."). Considering the purpose of N.C.G.S. § 14-87 is to provide for more severe punishment when the robbery is committed with the "use or threatened use of firearms or other dangerous weapons," *State v. Jones*, 227 N.C. 402, 405, 42 S.E.2d 465, 467 (1947), we conclude the General Assembly intended to require the State to prove that a

defendant used an external dangerous weapon before conviction under the statute is proper. To hold otherwise would remove the critical distinction between common law robbery and N.C.G.S. § 14-87 and require us to resolve an ambiguous criminal statute by making a liberal reading in favor of the State.

Additionally, "when particular and specific words or acts, the subject of a statute, are followed by general words, the latter must as a rule be confined to acts and things of the same kind." *State v. Craig*, 176 N.C. 740, 744, 97 S.E. 400, 401 (1918) (citing, *inter alia*, *State v. Goodrich*, 84 Wis. 359, 54 N.W. 577 (1893)). We find the words "firearm," "dangerous weapon," and "implement" to be specific words insofar as they list types of weapons that suffice under the statute to increase a defendant's sentence and further find that this list indicates a defendant must use an external weapon to be convicted under N.C.G.S. § 14-87. Accordingly, as "means" is more general in nature than "firearm," "dangerous weapon," and "implement," and could conceivably include non-external weapons such as hands, fists, or feet, we will construe the word "means" to be confined to the use of external weapons not otherwise considered firearms, dangerous weapons, or implements.

CONCLUSION

We hold that a defendant's hands, in and of themselves, cannot be dangerous weapons for purposes of robbery with a dangerous weapon under N.C.G.S. § 14-87. Accordingly, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justices TIMMONS-GOODSON and HUDSON did not participate in the consideration or decision of this case.

MAGNOLIA MANUFACTURING OF NORTH CAROLINA, INC. v. ERIE INSURANCE EXCHANGE, ERIE INSURANCE PROPERTY AND CASUALTY COMPANY, AND ERIE INSURANCE GROUP

No. 525A06

(Filed 26 January 2007)

Insurance— business policy—loss from roof collapse—exclusion from coverage

The Court of Appeals' decision that summary judgment was improperly entered in favor of defendant insurer in plaintiff's action to recover under a business insurance policy for loss of business income as a result of a roof collapse during replacement was reversed for the reasons stated in the dissenting opinion that the undisputed evidence showed that plaintiff's losses were caused by a poorly maintained roof and during work to repair or replace it, and that losses from collapse caused by faulty or inadequate maintenance or during construction were expressly excluded from coverage under the policy.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 179 N.C. App. 267, 633 S.E.2d 841 (2006), affirming in part and reversing in part an order granting summary judgment for defendants and denying summary judgment for plaintiff entered on 20 April 2005 by Judge Michael R. Morgan in Superior Court, Orange County, and remanding for further proceedings. Heard in the Supreme Court 10 January 2007.

The Brough Law Firm, *by Robert E. Hornik, Jr.*, *for plaintiff-appellee.*

Bailey & Dixon, L.L.P., *by David S. Coats*, *for defendant-appellants.*

PER CURIAM.

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

REVERSED.

Chief Justice PARKER and Justice HUDSON did not participate in the consideration or decision of this case.

MICHAEL G. RIPELLINO, LOUISE A. RIPELLINO, AND NICOLE RIPELLINO v. THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; NORTH CAROLINA SCHOOL BOARDS TRUST, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1982 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED TRUST FUND, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1986 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED ERRORS AND OMISSIONS/GENERAL LIABILITY TRUST FUND, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; 1997 NORTH CAROLINA SCHOOL BOARDS ASSOCIATION SELF-FUNDED AUTO/INLAND MARINE TRUST FUND, A DIVISION AND/OR DEPARTMENT OF, CREATED AND ADMINISTERED BY, THE NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, INCORPORATED; AND THE JOHNSTON COUNTY BOARD OF EDUCATION

No. 180A06

(Filed 26 January 2007)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 176 N.C. App. 443, 627 S.E.2d 225 (2006), reversing and remanding orders entered 3 September 2004 and 9 September 2004 by Judge Knox V. Jenkins, Jr. in Superior Court, Johnston County, granting summary judgment and judgment on the pleadings in favor of all defendants. On 29 June 2006, the Supreme Court allowed defendants' petitions for discretionary review of additional issues. Heard in the Supreme Court 8 January 2007.

Mast, Schulz, Mast, Mills, Johnson & Wells, P.A., by Bradley N. Schulz, for plaintiff-appellees.

Yates, McLamb & Weyher, L.L.P., by Barbara B. Weyher, for defendant-appellants North Carolina School Boards Association, Inc., North Carolina School Boards Trust, 1982 North Carolina School Boards Association Self-Funded Trust Fund, 1986 North Carolina School Boards Association Self-Funded Errors and Omissions/General Liability Trust Fund, and 1997 North Carolina School Boards Association Self-Funded Auto/Inland Marine Trust Fund.

Cranfill, Sumner & Hartzog, L.L.P., by Rachel B. Esposito and Meredith T. Black, for defendant-appellant Johnston County Board of Education.

Roberts & Stevens, P.A., by Christopher Z. Campbell and K. Dean Shatley, II, for North Carolina Council of School Attorneys, amicus curiae.

PER CURIAM.

As to the appeal of right based on the dissenting opinion, the members of the Court are equally divided. Therefore, those portions of the Court of Appeals opinion are affirmed without precedential value. *See, e.g., Barham v. Hawk*, 360 N.C. 358, 625 S.E.2d 778 (2006). The Court, however, unanimously concludes that the Court of Appeals erred in remanding the case to the trial court for entry of summary judgment in favor of plaintiffs on their non-constitutional claims. Accordingly, we reverse the Court of Appeals and remand to that Court for remand to the trial court for further proceedings on plaintiffs' non-constitutional claims. As to additional issues, discretionary review was improvidently allowed.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

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

MARIE T. FORMYDUVAL, AS ADMINISTRATRIX OF THE ESTATE OF HARTWELL B. FORMYDUVAL, AND JOEY FORMYDUVAL v. WILLIAM S. BRITT, INDIVIDUALLY AND D/B/A BRITT & BRITT; AND BRITT & BRITT, PLLC

No. 357A06

(Filed 26 January 2007)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 177 N.C. App. 654, 630 S.E.2d 192 (2006), reversing an order of dismissal entered 3 November 2003 by Judge B. Craig Ellis in Superior Court, Columbus County, and remanding for further proceedings. Heard in the Supreme Court 9 January 2007.

The Odom Firm, PLLC, by Thomas L. Odom, Jr. and T. LaFontine Odom, Sr., and Williamson & Walton, LLP, by Benton H. Walton, III, for plaintiff-appellees.

Mitchell Brewer Richardson, by Ronnie M. Mitchell and Coy E. Brewer, Jr., for defendant-appellants.

PER CURIAM.

Justice TIMMONS-GOODSON took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See State v. Harrison*, 360 N.C. 394, 627 S.E.2d 461 (2006); *Crawford v. Commercial Union Midwest Ins. Co.*, 356 N.C. 609, 572 S.E.2d 781 (2002); *Robinson v. Byrd*, 356 N.C. 608, 572 S.E.2d 781 (2002).

AFFIRMED.

STATE OF NORTH CAROLINA v. KASEY LEE NIPPER

No. 346PA06

(Filed 26 January 2007)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 177 N.C. App. 794, 629 S.E.2d 883 (2006), finding no error in a judgment entered on 2 December 2004 by Judge Beverly T. Beal in Superior Court, Catawba County, following defendant's conviction for first-degree arson. Heard in the Supreme Court 10 January 2007.

Roy Cooper, Attorney General, by Sandra Wallace-Smith, Assistant Attorney General, for the State.

David Childers for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA v. KAREN ELAINE EVERETT

No. 350A06

(Filed 26 January 2007)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 178 N.C. App. 44, 630 S.E.2d 703 (2006), reversing and remanding a judgment entered 12 August 2004 by Judge Leon Stanback in Superior Court, Wake County, and ordering a new trial. Heard in the Supreme Court 8 January 2007.

Roy Cooper, Attorney General, by Thomas G. Meacham, Jr., Assistant Attorney General, and Robert C. Montgomery, Special Deputy Attorney General, for the State-appellant.

Amos Granger Tyndall for defendant-appellee.

PER CURIAM.

Justice HUDSON took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See State v. Harrison*, 360 N.C. 394, 627 S.E.2d 461 (2006); *Crawford v. Commercial Union Midwest Ins. Co.*, 356 N.C. 609, 572 S.E.2d 781 (2002); *Robinson v. Byrd*, 356 N.C. 608, 572 S.E.2d 781 (2002).

AFFIRMED.

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

Adams v. Pulliam Case below: 177 N.C. App. 286	No. 651P06 1.	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1311) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 01/25/07 2. Dismissed as Moot 1/25/07
Alston v. Britthaven, Inc. Case below: 177 N.C. App. 330	No. 302P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-385)	Denied 01/25/07
Baldwin v. Century Care Ctr., Inc. Case below: 180 N.C. App. 475	No. 626P06	Plt's Motion for Temporary Stay (COA06-380)	Denied 01/09/07
Burnette v. City of Goldsboro Case below: 178 N.C. App. 741	No. 471P06	Petitioners' PDR Under N.C.G.S. § 7A-31 (COA05-1277)	Denied 01/25/07
Carillon Assisted Living, LLC v. N.C. Dep't of Health & Human Servs. Case below: 175 N.C. App. 265	No. 054A06	Joint Motion to Dismiss Appeal Based Upon Settlement By The Parties (COA05-135)	Allowed 01/04/07
Carolina Bldg. Servs. Windows & Doors, Inc. v. Boardwalk, LLC Case below: 178 N.C. App. 561	No. 444PA06	Plt's PDR Under N.C.G.S. § 7A-31 (COA05-1030)	Allowed as to "Second Issue" only 01/25/07
Carroll v. Ferro Case below: 179 N.C. App. 402	No. 535P06	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA05-1420) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 01/25/07 2. Dismissed as Moot 01/25/07
Carter-Hubbard Publ'g Co. v. WRMC Hosp. Operating Corp. Case below: 179 N.C. App. 621	No. 411A06	1. Def's Petition for Writ of Supersedeas 2. Def's NOA (Dissent)	1. Allowed 01/25/07 2. —— **Hudson, J., Recused**

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

Connor v. Harless Case below: 176 N.C. App. 402	No. 162P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA05-355)	Denied 01/25/07 **Hudson, J., Recused**
Ellis v. International Harvester Co. Case below: 179 N.C. App. 741	No. 580P04-2	1. Plt's NOA Based Upon a Constitutional Question (COA04-1114) 2. Plt's PDR Under N.C.G.S. § 7A-31	1.Dismissed *Ex Mero Motu* 01/25/07 2. Denied 01/25/07
Franklin v. Wiggins Case below: 179 N.C. App. 434	No. 496P06	Plt's Motion for "NOA" (COA05-1205)	Dismissed *Ex Mero Motu* 01/25/07
Hall v. Toreros, II, Inc. Case below: 176 N.C. App. 309	No. 187P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA05-199)	Allowed 01/25/07
Hy-Tech Constr., Inc. v. Wake Cty. Bd. of Educ. Case below: 178 N.C. App. 389	No. 419P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA05-884)	Denied 01/25/07 **Hudson, J., Recused**
In re A.W.M. Case below: 176 N.C. App. 766	No. 231P06	Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA05-886)	Denied 01/25/07
In re M.C., R.C. Case below: 179 N.C. App. 653	No. 557P06	Respondent's (Ray C.) PDR Under N.C.G.S. § 7A-31 (COA06-158)	Denied 01/25/07
In re R.D.R. Case below: 175 N.C. App. 397	No. 061P06	Appellant's PDR Under N.C.G.S. § 7A-31 (COA05-651)	Denied 01/25/07
In re Will of Yelverton Case below: 178 N.C. App. 267	No. 376P06-2	1. Caveator's (Mansel Yelverton) Petition for Writ of Supersedeas (COA05-771 & 772) 2. Caveator's (Mansel Yelverton) PWC to Review Order of Wayne County Superior Court	1. Denied 01/25/07 2. Denied 01/25/07 **Hudson, J., Recused**

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

Knight v. Abbott Labs. Case below: 177 N.C. App. 287	No. 399P01-2	Plt's PDR Under N.C.G.S. § 7A-31 (COA05-1061)	Denied 01/25/07 **Timmons-Goodson, J., Recused**
MAPCO, Inc. v. N.C. Dep't of Transp. Case below: 175 N.C. App. 570	No. 085P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA05-266)	Denied 01/25/07
Martin v. Martin (Now Davidson) Case below: 180 N.C. App. 237	No. 634P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA05-1662)	Denied 01/25/07
McClennahan v. N.C. School of the Arts Case below: 177 N.C. App. 806	No. 339P06	1. Defendant-Appellants' Motion for Temporary Stay (COA05-790) 2. Defendant-Appellant's Petition for Writ of Supersedeas Under Rule 23 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **360 N.C. 535** Stay Dissolved 01/25/07 2. Denied 01/25/07 3. Denied 01/25/07
Minowicz v. Stephens Case below: 180 N.C. App. 473	No. 616P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1686)	Denied 01/25/07
N.C. State Bar v. Leonard Case below: 178 N.C. App. 432	No. 449P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1411)	Denied 01/25/07
Overcash v. N.C. Dep't of Env't & Natural Res. Case below: 179 N.C. App. 697	No. 591P06	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA05-1342)	Denied 01/25/07 **Edmunds, J., Recused**
Poindexter, Inc. v. Boardwalk, LLC Case below: 178 N.C. App. 562	No. 443P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA05-1029)	Allowed as to "Second Issue" only 01/25/07

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

Pennsylvania Nat'l Mut. Ins. Co. v. Strickland Case below: 178 N.C. App. 547	No. 454P06	Defs' (Strickland, et al.) PDR Under N.C.G.S. § 7A-31 (COA05-1134)	Denied 01/25/07
Presbyterian Hosp. v. N.C. Dep't of Health & Human Servs. Case below: 177 N.C. App. 780	No. 366P06	1. Petitioner's NOA Based Upon a Constitutional Question (COA05-905) 2. Petitioner's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 01/25/07 2. Denied 01/25/07 **Hudson, J., Recused**
Ramirez v. Golden Corral Case below: 176 N.C. App. 190	No. 112P06	Defs' PDR Under N.C.G.S. 7A-31 (COA05-587)	Denied 01/25/07
Robbins v. Ingham Case below: 179 N.C. App. 764	No. 603P06	1. Plt's NOA Based Upon a Constitutional Question (COA05-1567) 2. Def's (Gamble) Motion to Dismiss Appeal 3. Plts' PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 01/25/07 3. Denied 01/25/07
Rodgers v. Ingham Case below: 179 N.C. App. 864	No. 602P06	1. Plt's NOA Based Upon a Constitutional Question (COA05-1568) 2. Def's (Gamble) Motion to Dismiss Appeal 3. Plt's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 01/25/07 3. Denied 01/25/07
Sea Ranch Owners Ass'n v. Sea Ranch II, Inc. Case below: 180 N.C. App. 226	No. 338P06	Def's Motion to Dissolve Stay and Renewal of Motion to Deny Petition for Writ of Supersedeas (COA05-1528, COA05-1559 and COA05-1593)	Denied 12/01/06 **Martin, J., and Hudson, J., Recused**
Sellers v. Ochs Case below: 180 N.C. App. 332	No. 630P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-235)	Denied 01/25/07
6214 S. Blvd., LLC v. City of Charlotte Case below: 178 N.C. App. 562	No. 450P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA05-1477)	Denied 01/25/07

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

Spruce Pine Indus. Park, Inc. v. Explosives Supply Co. Case below: 179 N.C. App. 505	No. 550P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA05-701)	Denied 01/25/07
State v. Alegria-Sanchez Case below: 165 N.C. App. 544	No. 637P06	Def's PWC to Review the Decision of the COA (COA03-1545)	Denied 01/25/07 **Hudson, J., Recused**
State v. Blackwell Case below: 361 N.C. 41	No. 490PA04-2	Def's Motion to Stay Issuance of Mandate and to Withdraw the Court's Slip Opinion (COA03-793)	Denied 01/03/07
State v. Brooks Case below: 178 N.C. App. 211	No. 381P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-935)	Denied 01/25/07
State v. Bullock Case below: 178 N.C. App. 460	No. 448P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-43)	Denied 01/25/07
State v. Cansler Case below: 180 N.C. App. 692	No. 013P07	1. Def's NOA Based Upon a Constitutional Question (COA06-614) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 01/25/07 2. Denied 01/25/07
State v. Castrejon Case below: 179 N.C. App. 685	No. 607P06	1. Def's (Gonzalez) NOA Based Upon a Constitutional Question (COA06-4) (PWC-D) 2. AG's Motion to Dismiss Appeal 3. Def's (Gonzalez) PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 01/25/07 3. Denied 01/25/07
State v. Chivers Case below: 180 N.C. App. 275	No. 649P06	Def's PDR Under N.C.G.S. § 7A-31 (COA06-134)	Denied 01/25/07

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

State v. Desperados, Inc. Case below: 180 N.C. App. 378	No. 629A06	AG's Motion for Temporary Stay (COA05-1397)	Allowed 12/22/06 **Hudson, J., Recused**
State v. Diaz Case below: 180 N.C. App. 238	No. 620P06	Def-Appellant's PDR Under N.C.G.S. § 7A-31 (COA05-1557)	Denied 01/25/07 **Hudson, J., Recused**
State v. Dockery Case below: 179 N.C. App. 652	No. 561P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1471)	Denied 01/25/07
State v. Farrar Case below: 177 N.C. App. 565	No. 320P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1081)	Denied 01/25/07
State v. Fisher Case below: 171 N.C. App. 201	No. 518P06	Def's PWC to Review Decision of COA (COA04-1155)	Denied 01/25/07 **Timmons-Goodson, J., Recused**
State v. Franklin Case below: 179 N.C. App. 435	No. 538P06	Def's Motion for Request for Discretionary Review (COA05-1538)	Denied 01/25/07
State v. Gillespie Case below: 180 N.C. App. 514	No. 002P07	AG's Motion for Temporary Stay (COA05-1182)	Allowed 01/08/07
State v. Grant Case below: 178 N.C. App. 565	No. 481P06	1. Def-Appellant's NOA (Constitutional Question) (COA05-1295) 2. AG's Motion to Dismiss Appeal 3. Def-Appellant's PDR	1. —— 2. Allowed 01/25/07 3. Denied 01/25/07
State v. Hatchett Case below: 177 N.C. App. 812	No. 356P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-680)	Denied 01/25/07

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

State v. Hoover Case below: 174 N.C. App. 596	No. 370P04-4	Def's Motion for "Petition for a Writ on Newly Discovery Exculpatory Evidence for Appropriate Relief and Subpoena" (COA05-64)	Dismissed 01/25/07 **Hudson, J., Recused**
State v. Hoover Case below: 174 N.C. App. 596	No. 370P04-5	Def-Appellant's MAR (COA05-64)	Dismissed 01/25/07 **Hudson, J., Recused**
State v. Huffman Case below: 177 N.C. App. 565	No. 328P06	1. Def's NOA Based Upon a Constitutional Question (COA05-1297) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 01/25/07 3. Denied 01/25/07
State v. Jones Case below: 179 N.C. App. 864	No. 594P06	1. Def's NOA Based Upon a Constitutional Question (COA05-1409) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 01/25/07 3. Denied 01/25/07
State v. Lane Case below: Wayne County Superior Court	No. 606A05	Def's Motion to Drop Appeal (Wayne County)	Dismissed 01/25/07
State v. Lattimore Case below: 180 N.C. App. 474	No. 638P06	1. Def-Appellant's PDR (COA05-1509) 2. Def-Appellant's Alternative PWC	1. Denied 01/25/07 2. Denied 01/25/07
State v. Massey Case below: 179 N.C. App. 803	No. 592P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1636)	Denied 01/25/07
State v. McAdams Case below: 178 N.C. App. 393	No. 416P06	1. Def's NOA Based Upon a Constitutional Question (COA05-992) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 01/25/07 3. Denied 01/25/07 **Hudson, J. Recused**

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

State v. Peak Case below: 180 N.C. App. 693	No. 011P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-360)	Denied 01/25/07
State v. Pearson Case below: 178 N.C. App. 563	No. 426P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1306)	Denied 01/25/07
State v. Peterson Case below: 179 N.C. App. 437	No. 547A06	1. Def's NOA (Dissent) (COA05-973) 2. Def's PDR as to Additional Issues	1. —— 2. Denied 01/25/07
State v. Purcell Case below: 178 N.C. App. 235	383P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1351)	Denied 01/25/07
State v. Ragland Case below: 177 N.C. App. 150	No. 246P06	1. Def's NOA Based Upon a Constitutional Question (COA05-121) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 01/25/07 2. Denied 01/25/07
State v. Reynolds Case below: 160 N.C. App. 579	No. 588P03-2	Def's Motion for "Petition for Discretionary Review" (PWC-0) (COA02-1510)	Dismissed 01/25/07 **Timmons-Goodson, J., and Hudson, J., Recused**
State v. Riddick Case below: 177 N.C. App. 288	No. 284P06	1. Def's NOA Based Upon a Constitutional Question (COA05-652) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *Ex Mero Motu* 01/25/07 2. Denied 01/25/07
State v. Robinson Case below: Cumberland County Superior Court	No. 411A94-4	1. Def-Appellant's Motion for Expedited Hearing (Cumberland County) 2. Def-Appellant's PWC	1. Allowed 01/23/07 2. Denied 01/23/07 **Brady, J., and Timmons-Goodson, J., Recused**

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

State v. Rose Case below: 177 N.C. App. 463	No. 300P06	1. Def's NOA Based Upon a Constitutional Question (COA05-994) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 01/25/07 3. Denied 01/25/07
State v. Scott Case below: 178 N.C. App. 393	No. 410P06	1. Def's NOA Based Upon a Constitutional Question (COA05-1485) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 01/25/07 3. Denied 01/25/07
State v. Speight Case below: 361 N.C. 106	No. 491PA04-2	Def's Motion to Stay Issuance of Mandate and to Withdraw the Court's Slip Opinion (COA03-776)	Denied 01/03/07
State v. Spencer Case below: 177 N.C. App. 813	No. 364P06	Def's Motion for Dismissal (COA05-623)	Denied 01/25/07
State v. Sturdivant Case below: 178 N.C. App. 394	No. 391P06	1. Def's PDR Under N.C.G.S. § 7A-31 (COA05-1194) 2. Def's Motion for "Petition for Plain Error Review Pursuant to N.C.G.S. § 7A-28(B)(1)(2)(3)(4)"	1. Denied 01/25/07 2. Dismissed 01/25/07 **Hudson, J., Recused**
State v. Turner Case below: 177 N.C. App. 423	No. 298P06	1. Def's PDR Under N.C.G.S. § 7A-31 (COA05-1046) 2. Def's Alternative PWC To Review Decision of COA	1. Denied 01/25/07 2. Denied 01/25/07
State v. Verrett Case below: 173 N.C. App. 643	No. 633P05-2	Def-Appellant's PWC (COA04-1713)	Dismissed 01/25/07
State v. Windless Case below: 177 N.C. App. 814	No. 361P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1225)	Denied 01/25/07 **Hudson, J., Recused**
State v. Winston Case below: 180 N.C. App. 238	No. 624P06	Def's Motion for PDR Under N.C.G.S. § 7A-31 (COA06-129)	Denied 01/25/07

Stonecreek Sewer Ass'n v. Gary D. Morgan Developer, Inc. Case below: 179 N.C. App. 721	No. 589P06	Defs' (Moore) PDR Under N.C.G.S. § 7A-31 (COA06-311)	Denied 01/25/07
Teague v. N.C. Dep't of Transp. Case below: 177 N.C. App. 215	No. 281P06-2	1. Plt's MAR (COA05-522) 2. Plt's Motion for Writ of Mandamus 3. Plt's Motion for Writ of Supersedeas 4. Plt's Motion for Writ of Mandamus	1. Dismissed 01/25/07 2. Denied 01/25/07 3. Denied 01/25/07 4. Denied 01/25/07
Wachovia Bank v. Clean River Corp. Case below: 178 N.C. App. 528	441P06	Defs/Third-Party Plts' (Assurance Co. of America, et al.) PDR Under N.C.G.S. § 7A-31 (COA05-1364)	Denied 01/25/07 **Edmunds, J., Recused**
Walden v. Morgan Case below: 179 N.C. App. –– (17 October 2006)	No. 596P06	Plts' Consent Motion to Withdraw NOA and Alternative PDR (COA05-1560)	Allowed 01/25/07 **Hudson, J., Recused**

PETITIONS TO REHEAR

Chambers v. Transit Mgmt. Case below: 360 N.C. 609	No. 527A05	Plt's Petition for Rehearing (COA04-677)	Denied 01/03/07 **Martin, J., Recused**
Duke Energy Corp. v. Malcom Case below: 361 N.C. 111	No. 379A06-2	Def's Petition for Rehearing	Denied 01/22/07
Patronelli v. Patronelli Case below: 360 N.C. 628	No. 055A06-2	Def-Appellant's Petition for Rehearing	Denied 01/25/07
State v. Bauberger Case below: 361 N.C. 105	No. 172A06	Def's Motion to Stay Issuance of Mandate and Request For Re-Argument Before a Full Court (COA04-1368)	Denied 12/29/06

OCEAN HILL JOINT VENTURE; OCEAN HILL PROPERTIES, INC.; THE VILLAGES AT OCEAN HILL COMMUNITY ASSOCIATION, INC.; ERNEST WOOD AND WIFE, JANE WOOD; RICHARD GONZALEZ AND WIFE, DEBRA GONZALEZ; ROSALEE CHIARA; ROBERT RAMIREZ AND WIFE, JANICE SERINO; GARY ROBINSON AND WIFE, SUSAN ROBINSON; DANIEL HUNT AND WIFE, CATHY HUNT; BARRY HEYMAN AND WIFE, ELLEN HEYMAN; STEPHEN DAIMLER AND WIFE, CAROL DAIMLER; DAVID BOVA AND WIFE, CARRIE BOVA, PETITIONERS v. THE CURRITUCK COUNTY BOARD OF COMMISSIONERS AND OCEAN HILL I PROPERTY OWNERS ASSOCIATION, INC., RESPONDENTS

No. 382PA06

(Filed 9 March 2007)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 178 N.C. App. 182, 630 S.E.2d 714 (2006), finding no error in a judgment entered on 10 March 2005 and an order dated 1 April 2005, both entered by Judge J. Richard Parker in Superior Court, Currituck County. Heard in the Supreme Court 13 February 2007.

C. Everett Thompson, II, for petitioner-appellees.

Katherine F. McKenzie for respondent-appellant Currituck County Board of Commissioners; and Robinson, Bradshaw & Hinson, P.A., by John R. Wester and Jonathan C. Krisko, and Trimpi & Nash, LLP, by Thomas P. Nash, IV, for respondent-appellant Ocean Hill I Property Owners Association, Inc.

Andrew L. Romanet, Jr., General Counsel, and Gregory F. Schwitzgebel, III, Senior Assistant General Counsel, North Carolina League of Municipalities, amicus curiae.

Robert E. Hagemann, Senior Assistant City Attorney, and Ashley R. Heaton, Assistant City Attorney, City of Charlotte, amicus curiae.

Ellis & Winters LLP, by Matthew W. Sawchak and Julia F. Youngman, for North Carolina Association of County Commissioners, amicus curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

BIO-MEDICAL APPLICATIONS OF NORTH CAROLINA, INC., PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, AND NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, MEDICAL FACILITIES PLANNING SECTION, DEFENDANTS AND TOTAL RENAL CARE OF NORTH CAROLINA, LLC AND HEALTH SYSTEMS MANAGEMENT, INC., DEFENDANT-INTERVENORS

No. 549A06

(Filed 9 March 2007)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 179 N.C. App. 483, 634 S.E.2d 572 (2006), affirming an order entered 16 November 2004 by Judge Henry W. Hight, Jr. in Superior Court, Wake County, dismissing plaintiff's complaint and granting summary judgment for defendants and defendant-intervenors. Heard in the Supreme Court 13 February 2007.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene, for plaintiff-appellant.

Roy Cooper, Attorney General, by Amy Y. Bason, Assistant Attorney General, for defendant-appellees.

Poyner & Spruill LLP, by Thomas R. West, Pamela A. Scott, and Chad W. Essick, for Total Renal Care of North Carolina, LLC; and Bode, Call & Stroupe, LLP, by S. Todd Hemphill and Diana E. Ricketts, for Health Systems Management, Inc., defendant-intervenor-appellees.

PER CURIAM.

The North Carolina Department of Health and Human Services (DHHS) issued a semi-annual dialysis report indicating a need for additional dialysis service stations in Wake County. Bio-Medical Applications of North Carolina, Inc. (Bio-Medical) brought an action in Wake County Superior Court challenging the data on which the semi-annual report was based and requesting a declaratory judgment, as well as preliminary and permanent injunctions and a writ of mandamus. DHHS and defendant-intervenors moved for dismissal, and a Superior Court judge dismissed the action and granted summary judgment in their favor.

Bio-Medical appealed to the North Carolina Court of Appeals. While the appeal was pending, DHHS issued a Certificate of Need to

defendant-intervenor Total Renal Care of North Carolina, LLC (Total Renal Care) to construct ten new dialysis service centers in Wake County. Bio-Medical contested the Certificate of Need issuance in an administrative hearing, but the final agency decision upheld the issuance. Bio-Medical did not appeal the agency decision. Thereafter, a divided panel of the Court of Appeals affirmed the trial court's ruling.

Bio-Medical filed an appeal with this Court based on the Court of Appeals' dissent, as well as a petition for a writ of supersedeas. DHHS and Total Renal Care filed separate motions to dismiss Bio-Medical's appeal based on mootness.

After hearing oral arguments and carefully reviewing the record, the parties' briefs, and all other documents submitted, the Court concludes that Bio-Medical's claim is moot. Accordingly, Bio-Medical's appeal is dismissed.

APPEAL DISMISSED AS MOOT.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

DONNA WORNSTAFF v. DON RAY WORNSTAFF

No. 558A06

(Filed 9 March 2007)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 179 N.C. App. 516, 634 S.E.2d 567 (2006), affirming an order entered on 11 August 2005 by Judge Amber Davis in District Court, Dare County. Heard in the Supreme Court 14 February 2007.

Irvine Law Firm, PC, by Stephanie B. Irvine, for plaintiff-appellee.

James R. Wills, III for defendant-appellant.

PER CURIAM.

Justice HUDSON took no part in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See State v. Harrison*, 360 N.C. 394, 627 S.E.2d 461 (2006); *Crawford v. Commercial Union Midwest Ins. Co.*, 356 N.C. 609, 572 S.E.2d 781 (2002).

AFFIRMED.

IN THE MATTER OF T.S., III AND S.M.

No. 384A06

(Filed 9 March 2007)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 178 N.C. App. 110, 631 S.E.2d 19 (2006), affirming an order entered 15 October 2004 by Judge G. Galen Braddy in District Court, Pitt County. Heard in the Supreme Court 13 February 2007.

Anthony H. Morris for petitioner-appellee Pitt County Department of Social Services.

Richard E. Jester for respondent-appellant mother.

PER CURIAM.

AFFIRMED.

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

IN RE C.D.A.W.

[361 N.C. 232 (2007)]

IN THE MATTER OF C.D.A.W., A MINOR CHILD

No. 110A06

(Filed 9 March 2007)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 175 N.C. App. 680, 625 S.E.2d 139 (2006), affirming an order entered 20 July 2004 by Judge Susan E. Bray in District Court, Guilford County. Heard in the Supreme Court 13 February 2007.

Guilford County Attorney's Office, by James A. Dickens, Deputy County Attorney, for petitioner-appellee Guilford County Department of Social Services.

Joyce L. Terres for appellee Guardian ad Litem.

Carlton, Rhodes, & Carlton, by Gary C. Rhodes, for respondent-appellant mother.

PER CURIAM.

AFFIRMED.

CARTER-HUBBARD PUBLISHING COMPANY, INC. v. WRMC HOSPITAL OPERATING CORPORATION

No. 411A06

(Filed 9 March 2007)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 175 N.C. App. 680, 633 S.E.2d 682 (2006), affirming an order entered on 24 January 2005 by Judge James M. Webb in Superior Court, Wilkes County. Heard in the Supreme Court 14 February 2007.

Willardson, Lipscomb & Miller, LLP, by John S. Willardson, for plaintiff-appellee.

McElwee Firm, PLLC, by John M. Logsdon, for defendant-appellant.

Robinson, Bradshaw & Hinson, P.A., by Mark W. Merritt and Blake W. Thomas, for The Charlotte-Mecklenburg Hospital Authority, amicus curiae.

The Bussian Law Firm, PLLC, by John A. Bussian, for the North Carolina Press Association, amicus curiae.

PER CURIAM.

AFFIRMED.

Chief Justice PARKER and Justice HUDSON did not participate in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. JOHN SCOTT BADGETT

No. 522A04

(Filed 4 May 2007)

1. Evidence— prior crimes or bad acts—killing of another victim—similarity—remoteness in time

The trial court did not err in a capital first-degree murder case by denying defendant's motion in limine under N.C.G.S. § 8C-1, Rule 404(b) to exclude evidence related to defendant's 1992 killing of another victim, because: (1) with respect to the similarity requirement, the murder in the instant case and the 1992 killing exhibited remarkable parallels when both crimes involved a fatal stab wound to an unarmed victim's neck with a folding pocketknife which occurred during an argument with the victim in the victim's home; (2) as to the temporal proximity requirement, the trial court may properly exclude prison time resulting from the previous conviction in its determination of whether that conviction is too remote in time to the present crime, and defendant was in prison for five of the ten years between the 1992 killing and the 2002 murder in the present case, leaving only five years between the two crimes; and (3) the trial court did not abuse its discretion under N.C.G.S. § 8C-1, Rule 403 by admitting the 1992 killing when the trial court guarded against the possibility of unfair prejudice by instructing the jury to consider such evidence for the limited purposes allowed by Rule 404(b), and these limiting instructions also specifically admonished the jury not to consider the challenged evidence on the issue of defendant's character.

2. Evidence— prior crimes or bad acts—prior conviction for voluntary manslaughter—harmless error

The trial court committed harmless error in a capital first-degree murder case by admitting evidence that defendant had previously been convicted of voluntary manslaughter, because: (1) contrary to the State's contention, waiver did not occur when the testimony admitted was the same testimony to which defendant had raised the objection overruled by the trial court, and was not later testimony accepted without objection; (2) defendant's reference to his prior conviction in closing argument did not result in waiver when the trial court had admitted evidence of defendant's previous conviction, and defendant was entitled to make a reasonable and bona fide effort to explain and minimize

the impact of this evidence in closing argument without risking waiver; and (3) although it was error to admit evidence from a detective that defendant had been previously convicted of manslaughter when defendant did not testify during the guilt-innocence phase of this case, defendant failed to demonstrate any reasonable possibility that the jury would have reached a different result had the evidence been excluded.

3. Constitutional Law— right to presence—drawing random names from pool of prospective jurors

Defendant's right to presence was not violated in a capital first-degree murder trial when the clerk allegedly drew random names from the pool of prospective jurors outside of defendant's presence, because: (1) nothing in the record suggests that the clerk failed to draw prospective jurors at random, in open court, and in defendant's presence; (2) defendant's theory that the clerk could have failed to properly carry out a routine task rests on pure speculation; and (3) even assuming that the clerk's random draw was not performed in defendant's presence, this fact does not necessarily entitle defendant to a new trial when even though the instant record does not indicate that the clerk formally spoke the names of prospective jurors on the record, the clerk nevertheless drew names of prospective jurors at random, in open court, and in defendant's presence.

4. Constitutional Law— right to presence—bailiff's reminders to prospective jurors to refrain from discussing case or reading media accounts

The bailiff's reminders to prospective jurors in a capital first-degree murder case to refrain from discussing the case or reading media accounts of the case violated defendant's right to presence but were harmless beyond a reasonable doubt because: (1) the record reflects the specific instructions the trial judge sought to have administered to the jury because the trial judge explicitly told the bailiff the substance of the instructions and asked him to pass them along to the jury, and nothing in the record suggests that the bailiff failed to instruct the jury as the trial judge requested; and (2) a reminder by the bailiff to prospective jurors and the jury itself to abide by the court's admonitions should not be considered an instruction as to the law, since communications such as these do not relate to defendant's guilt or innocence.

5. Constitutional Law— right to presence—trial judge met with jury to thank them for service before discharging them

Defendant's right to presence was not violated in a capital first-degree murder case when the trial judge met with the jurors to thank them for their service before discharging them, because: (1) the jury's service was complete at the time the trial judge thanked and discharged the jury outside of defendant's presence since the meeting occurred after the jury had delivered its unanimous verdict and been polled at defendant's request, and after the trial court recorded the verdict; (2) even if defendant were entitled to a re-polling of the jury under these circumstances, he never asked the trial court to do so; and (3) as a practical matter, our Supreme Court failed to see what a second polling of the jury under these circumstances would have accomplished, as the only plausible explanation for why the jury marked "no" on the verdict form as to each mitigating circumstance at issue is that the jury simply did not find the existence of those mitigating circumstances. N.C. Const. art. I, § 23.

6. Sentencing— mitigating circumstances—mental or emotional disturbance

The trial court did not err in a capital first-degree murder case by failing to submit the N.C.G.S. § 15A-2000(f)(2) mitigating circumstance that the murder was committed while defendant was under the influence of mental or emotional disturbance, because: (1) two of defendant's experts made no mention of intermittent explosive disorder or any other disorder that would require the submission of the (f)(2) mitigator; (2) the lone expert who diagnosed defendant with intermittent explosive disorder did so as a preliminary diagnosis offering no evidence or testimony to explain the specific symptoms of this disorder or how such symptoms would have affected defendant at the time of the crime, she reached her preliminary diagnosis without following the recommended practice of first ruling out all other disorders associated with aggressive impulses and without ruling out potential malingering, and she also admitted that she eventually retreated from her initial preliminary diagnosis after learning about defendant's calculated attack on another inmate while in prison which she believed was inconsistent with intermittent explosive disorder; (3) the testimony supporting defendant's claim that he suffered from intermittent explosive disorder was inadequate and highly controverted at best; (4) the trial court's

refusal to admit the (f)(2) mitigating circumstance is appropriate when the events before, during, and after the killing suggest deliberation, and not the frenzied behavior of an emotionally disturbed person; (5) nothing tantamount to substantial evidence of brain damage was introduced into evidence at defendant's trial, and to the contrary, the evidence introduced revealed the plain inability of defendant to control his temper when the mentally disabled victim pointed at defendant and yelled; and (6) an inability to control one's temper is neither mental nor emotional disturbance as contemplated by the (f)(2) mitigator.

7. Sentencing— mitigating circumstances—impaired capacity

The trial court did not err in a capital first-degree murder case by failing to submit the N.C.G.S. § 15A-2000(f)(6) mitigating circumstance that the murder was committed while the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, because: (1) for the same reasons that defendant's argument as to the (f)(2) mitigator failed, defendant's argument here fails as well when there is insufficient evidence in the record that defendant suffered from intermittent explosive disorder; and (2) the same evidence of deliberation which makes submission of the (f)(2) mitigator improper also makes submission of the (f)(6) mitigator improper when defendant's initial lies to police about his involvement in the murder and his washing and disposal of the murder weapon tended to show that defendant fully appreciated the criminality of his conduct.

8. Constitutional Law— competency to stand trial—failure to order competency hearing

The trial court did not err in a first-degree murder case by failing to order a competency hearing sua sponte in the presence of an allegedly bona fide doubt as to defendant's competency to stand trial, because: (1) the statutory right to a competency hearing is waived by the failure to assert that right at trial, and nothing in the instant record indicates that the prosecutors, defense counsel, defendant, or the court raised the question of defendant's capacity to proceed at any point during the proceedings, nor was there any motion made detailing the specific conduct supporting such an allegation; (2) the evidence referenced by defendant did not constitute substantial evidence requiring the trial court to institute a competency hearing, and there was evidence indicating that defendant was competent to stand trial, including

that defendant was able to interact appropriately with his attorneys during the trial, he conferred with them on issues of law applicable to his case, he followed their advice by declining to testify during the guilt-innocence phase, he responded directly and appropriately to questioning during the capital sentencing proceeding as well as to the trial court's inquiries throughout the trial, he demonstrated a strong understanding of the proceedings against him, and he consistently addressed the trial court with appropriate deference and intelligent responses; (3) although the record confirms that defendant was treated for anger management and depression prior to trial, this evidence was insufficient to establish a lack of competency; and (4) our Supreme Court was unable to conclude that defendant's desire for a speedy trial resulting in a death sentence indicates a lack of competence to stand trial. N.C.G.S. § 15A-1001(a).

9. Sentencing— death penalty—proportionality

The trial court did not err in a first-degree murder case by sentencing defendant to the death penalty, because: (1) defendant was found guilty of first-degree murder on the basis of malice, premeditation and deliberation, and under the felony murder rule; (2) there was substantial evidence of premeditation and deliberation including that defendant stabbed the victim, then physically restrained him from using his telephone to call for help before watching him bleed to death, at some point in the struggle defendant also used the pocketknife to slash the victim's right arm leaving a significant wound, and the folding pocketknife used to murder the victim had to be pulled open before it could be used; (3) the jury found the existence of the (e)(3) aggravating circumstance based upon the defendant's prior killing, and the jury's finding of the prior conviction of a violent felony aggravating circumstance is significant in finding a death sentence proportionate; (4) defendant murdered the victim in the victim's home; and (5) the victim had shown defendant compassion by allowing him to stay overnight as a guest in the victim's home on an occasion weeks prior to the murder, as well as on the night of the murder, and in exchange for the victim's kind willingness to provide defendant with shelter from the cold November temperatures, defendant repaid the victim's compassion by taking his life.

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

Appeal of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge John O. Craig, III, on 6 May 2004 in Superior Court, Randolph County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 11 September 2006.

Roy Cooper, Attorney General, by John H. Watters, Special Deputy Attorney General, and Rudy Renfer, Assistant Attorney General, for the state.

James R. Glover for defendant-appellant.

MARTIN, Justice.

On 3 March 2003, John Scott Badgett (defendant) was indicted for the armed robbery and first-degree murder of Grover Arthur Kizer (victim). Defendant was tried capitally at the 19 April 2004 criminal session of Randolph County Superior Court. Defendant's conviction for first-degree murder was based on a theory of malice, premeditation, and deliberation, and the felony murder rule. Following a capital sentencing proceeding, the jury recommended a sentence of death. The trial court entered judgment accordingly and arrested judgment on the robbery conviction. Defendant gave notice of appeal pursuant to N.C.G.S. § 7A-27(a).

The evidence admitted during the guilt-innocence phase of defendant's trial tended to show the following: On or about 20 November 2002, defendant went to the victim's house looking for a place to spend the night. The victim had allowed defendant and another friend to stay the night at his home a few weeks earlier. On this occasion, the victim again offered defendant shelter.

At some point in the evening the victim, who suffered from a mental disability, began complaining to defendant about his next-door neighbors. He explained to defendant his belief that the police had failed to respond adequately to complaints he had made against the neighbors. At some point, the victim began yelling about "workers of iniquity" and pointing his finger at defendant.

Defendant argued briefly with the victim, then opened a folding pocketknife and stabbed him in the neck. The stabbing severed the victim's right carotid artery and damaged his trachea, Adam's apple, and windpipe. As blood squirted from his neck, the victim ran to a telephone in his kitchen. Defendant followed the victim into the kitchen and slashed the victim's right arm with the pocketknife, leav-

ing a deep wound. The victim picked up the telephone to call for help, but defendant pushed him away from the phone, knocking him to the floor. The victim fell prostrate, dying within a few minutes.

Once the victim was dead, defendant stole the victim's wallet containing his driver's license and five dollars in cash. Defendant then ransacked the victim's house, stealing a substantial amount of cash from a set of envelopes in the victim's bedroom, as well as a flashlight. Defendant then returned to his residence, where he hid evidence of the murder. Defendant later traded the murder weapon for five dollars worth of crack cocaine.

A few days later, defendant returned to the victim's house and entered by using the stolen flashlight to break a glass door at the rear of the house. Defendant stole numerous collectable coins of value, some of which he later exchanged for drugs. Defendant also stole clothing, a butcher knife, a cigarette lighter bearing an inscription of the victim's name, a number of coins in saving containers, wrist watches, and a pocket watch. Finally, he stole keys to the victim's house and vehicles. Defendant then left in the victim's truck, leaving the house in disarray with coins strewn across the floor.

Defendant became a suspect when the stolen truck linked him to the murder. Police had recovered the stolen truck, which contained numerous collectable coins belonging to the victim. When police apprehended defendant, he was in possession of one of the victim's coins. Police brought defendant to the Asheboro Police Department for questioning. Defendant initially lied about the murder, but admitted to staying at the victim's home approximately two weeks earlier and riding in the victim's truck. Defendant eventually gave police a signed confession, which described the details of the murder.

Defendant's description of the murder matched the evidence police later recovered from defendant's residence. This evidence consisted of most of the items defendant stole from the victim, as well as defendant's blood-stained shoes from the night of the murder. Additionally, police later recovered the murder weapon and traced it to defendant.

The details of defendant's confession also matched the story defendant told James Parker and Randy Marks, two individuals with whom defendant was incarcerated at different times following his arrest. According to Parker, defendant admitted that he had stabbed the victim because the victim was "running his mouth."

The state also introduced evidence that defendant had killed another individual, J.C. Chriscoe, in October 1992. On that occasion, defendant had attempted to obtain marijuana from Chriscoe's roommate, who sold him tobacco instead. When defendant went to confront Chriscoe's roommate, Chriscoe answered the door and quickly became angry with defendant. The two exchanged blows, and defendant ran up a flight of stairs to the second floor of the house. Chriscoe, who was unarmed, followed defendant into a bedroom. The fight ended when defendant stabbed Chriscoe in the neck with a folding pocketknife. Defendant confessed the details of this killing to police and provided them with a statement. Police were able to recover the pocketknife used to kill Chriscoe in the neighborhood in which defendant lived at the time. Defendant was convicted of voluntary manslaughter for killing Chriscoe.

Defendant offered no evidence in the guilt-innocence phase. Additional evidence admitted during the capital sentencing proceeding tended to show the following:

After defendant pled guilty to voluntary manslaughter in 1993 for killing Chriscoe, defendant received counseling while incarcerated to address anger management issues. At trial, defendant described the counseling program as "kind of silly," and admitted that he eventually decided not to complete it.

After serving his sentence for manslaughter, defendant took up residence in Randolph County. Within six months, he resumed his use of alcohol and cocaine. Defendant sought and obtained treatment for substance abuse and received anger management counseling. After completing the treatment program, defendant stayed at a halfway house and later a boarding house. He was asked to leave that location, however, and afterwards had no place to live. After a brief stay with an acquaintance, defendant began sleeping in a storage room next to a grocery store. On one occasion, however, the victim allowed defendant to sleep in his house along with Tim Morris, a friend of defendant's from prison who knew the victim. On the night defendant killed the victim, defendant had come to the victim's house seeking shelter from the cold November temperatures outside.

After being charged with murder in the instant case, defendant once again sought counseling. Defendant met with a psychologist, Dr. Thomas Ansbro, and two psychiatrists, Dr. Thomas Gresalfi and Dr. Elizabeth Pekarek. All three mental health care providers concluded that defendant suffered from irritability, anger management prob-

lems, and depression. Additionally, Dr. Pekarek tentatively diagnosed defendant with Tourette's Disorder, intermittent explosive disorder, and prominent antisocial traits. During one of his follow-up visits, however, defendant informed Dr. Pekarek that he had stabbed another inmate after waiting for hours for an ideal opportunity to commit the assault. Acknowledging that such planned, deliberate attacks were inconsistent with intermittent explosive disorder, Dr. Pekarek retreated from her initial diagnosis of intermittent explosive disorder. Neither Dr. Ansbro nor Dr. Gresalfi diagnosed defendant with intermittent explosive disorder.

Defendant admitted in open court that he killed the victim and recounted the details of the murder, which matched his previous confession to police. In addition, defendant admitted that he: (1) watched the victim die after pushing him to the floor; (2) cleaned the victim's blood off the murder weapon in the victim's sink; and (3) asked his cellmate's mother to retrieve the victim's wallet after he was arrested for the murder.

Defendant admitted to the following violent acts over the previous seventeen years: (1) assaulting a coworker with a barstool in 1987; (2) assaulting a houseguest with a barstool in 1991; (3) assaulting an individual at a party in 1992; (4) fatally stabbing Chriscoe in 1992; (4) stabbing another inmate while in prison in 1994; (5) assaulting another inmate in the head in 1997; (6) assaulting another individual in 2000; (7) murdering the victim in 2002; and (8) stabbing another inmate while in jail awaiting trial in the instant case.

Defendant concluded his direct testimony in the penalty phase with the following statement: "I just would like this to stop somewhere. You have the power to stop the seventeen-year-span of violence that I've left behind. I'm just tired of causing everyone pain." This implicit request for the death penalty was consistent with defendant's earlier behavior. Prior to trial, defendant wrote numerous letters to the trial court and the Randolph County District Attorney expressing his desire for a speedy trial resulting in a death sentence.

Additional facts and descriptions of events at trial, as necessary to an understanding of defendant's arguments, are set forth below.

GUILT-INNOCENCE PHASE

[1] Defendant first contends the trial court erred by denying his motion *in limine* to exclude evidence related to defendant's 1992 killing of J.C. Chriscoe under N.C. R. Evid. 404(b). After thoroughly

comparing the facts of the 1992 killing with those of the instant case, the trial court found that "there are sufficient similarities to allow the evidence to come in under [Rule 404(b)] and that it would be probative for the jury to hear [evidence of the 1992 killing] in order to prove intent or preparation or plan, motive, perhaps even absence of mistake." On appeal, defendant does not assign error or otherwise argue to this Court that it was error to admit this evidence as proof of intent, preparation, plan, motive, or absence of mistake. Rather, defendant argues only that the prior killing of J.C. Chriscoe was too dissimilar and remote in time to be admitted under Rule 404(b), and that any probative value was substantially outweighed by unfair prejudice to defendant. Defendant's argument is without merit.

N.C. R. Evid. 404(b) provides:

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

This Court has recognized that "Rule 404(b) is a 'rule of inclusion of relevant evidence of other crimes, wrongs, or acts by a defendant, subject to but one exception requiring its exclusion if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.' " *State v. Hyatt*, 355 N.C. 642, 661, 566 S.E.2d 61, 74 (2002) (quoting *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis omitted in original)), *cert. denied*, 537 U.S. 1133 (2003). The Rule, however, is "constrained by the requirements of similarity and temporal proximity." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 123 (2002) (citations omitted). "When the features of the earlier act are dissimilar from those of the offense with which the defendant is currently charged, such evidence lacks probative value." *State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989), *vacated and remanded on other grounds*, 494 U.S. 1023 (1990). Similarly, "[w]hen otherwise similar offenses are distanced by significant stretches of time, commonalities become less striking, and the probative value of the analogy attaches less to the acts than to the character of the actor." *Id.*

In the instant case, the admission of evidence of the 1992 killing of Chriscoe satisfied both the similarity and temporal requirements of

Rule 404(b). With respect to the similarity requirement, the murder in the instant case and the 1992 killing exhibited remarkable parallels. Both crimes involved a fatal stab wound to an unarmed victim's neck with a folding pocketknife, which occurred during an argument with the victim in the victim's home. We conclude that these crimes are sufficiently similar for purposes of Rule 404(b). *See State v. Carter*, 338 N.C. 569, 588-89, 451 S.E.2d 157, 167-68 (1994) (holding that evidence of a previous assault committed by the defendant satisfied the similarity requirement of Rule 404(b) when both the previous offense and that for which the defendant was tried involved a blow above the right eye with a brick-like object), *cert. denied*, 515 U.S. 1107 (1995); *see also State v. Hipps*, 348 N.C. 377, 404-05, 501 S.E.2d 625, 641-42 (1998) (holding that evidence of a previous murder committed by the defendant satisfied the similarity requirement of Rule 404(b) when both the previous offense and that for which defendant was tried involved similar knife wounds and head trauma to the victim), *cert. denied*, 525 U.S. 1180 (1999).

As to the temporal proximity requirement, the trial court may properly exclude prison time resulting from the previous conviction in its determination of whether that conviction is too remote in time to the present crime. *State v. Lloyd*, 354 N.C. 76, 91, 552 S.E.2d 596, 610 (2001) ("It is proper to exclude time defendant spent in prison when determining whether prior acts are too remote." (citations and internal quotation marks omitted)); *see also*, *e.g.*, *State v. Riddick*, 316 N.C. 127, 134, 340 S.E.2d 422, 427 (1986) (noting that "incarceration effectively explain[ed] the remoteness in time"). Here, defendant was in prison for five of the ten years between the 1992 killing and the 2002 murder in the present case, leaving only five years between the two crimes for purposes of the temporal requirement. As a result, the introduction of the challenged evidence satisfied the temporal requirement of Rule 404(b). *Cf. Hipps*, 348 N.C. at 405, 501 S.E.2d at 642 (holding that introducing evidence of crime committed seventeen years earlier did not violate temporal proximity requirement); *State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991) (holding that introducing evidence of act committed ten years earlier did not violate temporal proximity requirement).

Defendant further argues, however, that even if evidence of the 1992 killing is admissible under Rule 404(b), the trial court should have excluded it under N.C. R. Evid. 403. Under Rule 403, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." The exclusion of evidence under Rule

403 is a matter generally left to the sound discretion of the trial court, *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986), which is left undisturbed unless the trial court's ruling "is manifestly unsupported by reason or is so arbitrary it could not have been the result of a reasoned decision." *State v. Syriani*, 333 N.C. 350, 379, 428 S.E.2d 118, 133, *cert. denied*, 510 U.S. 948 (1993).

Here, the trial court did not abuse its discretion under Rule 403 by admitting evidence of the 1992 killing of Chriscoe. Rather, on each occasion in which evidence of Chriscoe's killing was offered, the trial court guarded against the possibility of unfair prejudice by instructing the jury to consider such evidence for the limited purposes allowed by Rule 404(b). These limiting instructions also specifically admonished the jury not to consider the challenged evidence on the issue of defendant's character. *See, e.g.*, *Hyatt*, 355 N.C. at 662, 566 S.E.2d at 74-75 (holding admission of prior bad acts not unfairly prejudicial under Rule 403 when trial court gave extensive limiting instruction regarding permissible uses of 404(b) evidence); *State v. Lemons*, 348 N.C. 335, 353, 501 S.E.2d 309, 320 (1998) (same), *vacated and remanded on other grounds*, 527 U.S. 1018 (1999). Therefore, the trial court did not abuse its discretion by allowing the admission of this evidence.

[2] Defendant next argues that the trial court erred in admitting evidence that defendant had been convicted of manslaughter for killing Chriscoe. At trial, the state was permitted to introduce testimony from Detective Jim Briles indicating that defendant had previously been "convicted" of voluntary manslaughter. Defendant argues that such evidence is not admissible under Rule 404(b), and that North Carolina Rule of Evidence 609 only allows certain evidence related to a prior conviction for the limited purpose of impeaching a witness. Thus, defendant contends, under *State v. Wilkerson*, 356 N.C. 418, 571 S.E.2d 583, *rev'g per curiam*, 148 N.C. App. 310, 559 S.E.2d 5 (2002) (for reasons stated in dissenting opinion, 148 N.C. App. at 318-29, 559 S.E.2d at 10-17 (Wynn, J., dissenting)), evidence of his prior conviction for manslaughter was inadmissible since he did not testify at trial.

As a preliminary matter, we pause to consider the state's contention that defendant waived this argument. The state first argues the waiver rule applies to the introduction of evidence of defendant's conviction because the same evidence was later admitted without objection. Though " '[i]t is well established that the admission of evidence without objection waives prior or subsequent objection to the

admission of evidence of a similar character,' " *State v. Augustine*, 359 N.C. 709, 720, 616 S.E.2d 515, 525 (2005) (quoting *State v. Nobles*, 350 N.C. 483, 501, 515 S.E.2d 885, 896 (1999) (alteration in original) (citations and internal quotation marks omitted)), *cert. denied*, —— U.S. ——, 126 S. Ct. 2980 (2006), this rule is inapplicable here.

In the instant case, Detective Briles testified to defendant's prior conviction for killing Chriscoe, at which time defendant promptly interrupted this testimony by objecting. The trial court overruled defendant's objection and allowed Detective Briles to finish his sentence uninterrupted. Detective Briles then informed the jury that defendant had been convicted of manslaughter. Thus, the testimony admitted was the same testimony to which defendant had raised the objection overruled by the trial court, and not "later testimony . . . accepted *without objection*" as the state contends. As such, waiver did not occur.

The state also contends that defendant's reference to his prior conviction in closing argument amounts to waiver of his earlier objection to Detective Briles' testimony concerning defendant's conviction. This Court has previously held, however, that "[a]n objecting party does not waive its objection to evidence the party contends is inadmissible when that party seeks to explain, impeach, or destroy its value." *State v. Anthony*, 354 N.C. 372, 408, 555 S.E.2d 557, 582 (2001), *cert. denied*, 536 U.S. 930 (2002); *see also State v. Godwin*, 224 N.C. 846, 847-48, 32 S.E.2d 609, 610 (1945) (holding that an "adverse party may . . . explain the evidence, or destroy its probative value, or even contradict it with other evidence," without risking waiver (quoting *Shelton v. S. Ry. Co.*, 193 N.C. 670, 675, 139 S.E. 232, 235 (1927))). This corollary to the waiver rule "represents a commendable effort to rescue objecting counsel from the dilemma . . . of leaving the objectionable evidence unexplained and unrebutted or losing the benefit of an objection by pursuing the matter further on cross-examination or by other evidence." 1 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 22, at 94 (6th ed. 2004) [hereinafter Broun]. To that end, this Court has looked to whether "counsel was making a reasonable and bona fide effort at explanation or denial, or was simply producing additional evidence of the facts that had already been testified to over an objection." *Id.*; *see also State v. Aldridge*, 254 N.C. 297, 300, 118 S.E.2d 766, 768 (1961) (explaining that whether waiver occurs "depend[s] largely upon the nature of the evidence and the circumstances of the particular case").

On these facts, defendant's reference to his prior conviction in closing argument did not result in waiver. As the trial court had admitted evidence of defendant's previous conviction, defendant was entitled to make a reasonable and bona fide effort to explain and minimize the impact of this evidence in closing argument without risking waiver. We therefore conclude that counsel's reference to defendant's manslaughter conviction in closing argument did not waive defendant's earlier objection to the admission of the same evidence. *See Anthony*, 354 N.C. at 408, 555 S.E.2d at 582 (holding that defendant's attempt on cross-examination to explain evidence given by a witness for the state did not result in waiver).

Turning to defendant's argument, we observe that the introduction of evidence that defendant had previously been convicted of manslaughter was error in light of *Wilkerson*, 356 N.C. 418, 571 S.E.2d 583, *rev'g per curiam*, 148 N.C. App. 310, 559 S.E.2d 5 (2002) (for reasons stated in dissenting opinion, 148 N.C. App. at 318-29, 559 S.E.2d at 10-17 (Wynn, J., dissenting)). In *Wilkerson*, we adopted the dissenting opinion of the Court of Appeals, which concluded that evidence of the defendant's prior convictions was inadmissible where the state had also introduced evidence of the underlying facts and circumstances of the convictions. 148 N.C. App. at 318-29, 559 S.E.2d at 10-17 (Wynn, J., dissenting). Thus, although Rule 609 may permit certain evidence of a defendant's prior conviction to be admitted if the defendant testifies, *see, e.g.*, *State v. Lynch*, 334 N.C. 402, 408-09, 432 S.E.2d 349, 352 (1993), it is error to admit evidence of the defendant's prior conviction when the defendant does not testify, *see Wilkerson*, 148 N.C. App. at 327-29, 559 S.E.2d at 16-17 (Wynn, J., dissenting). *See generally* Broun § 94, at 272 n.164 (noting that *Wilkerson* "seems to remove any doubt with regard to this issue"). Here, because defendant did not testify during the guilt-innocence phase, it was error to admit evidence from Detective Briles that defendant had been "convicted" of manslaughter for the 1992 killing of Chriscoe.

The improper admission of a defendant's prior conviction is not, however, reversible per se. *See State v. Ross*, 329 N.C. 108, 121, 405 S.E.2d 158, 165-66 (1991) (concluding the admission of evidence that the defendant had previously been convicted of a crime in violation of Rule 609 is reviewable for harmless error); *State v. McKoy*, 317 N.C. 519, 529, 347 S.E.2d 374, 380 (1986) (holding that admission of evidence in violation of Rule 404(b) was harmless error). Rather, "[d]efendant has the burden under N.C.G.S. § 15A-1443[a] of demonstrating that but for the erroneous admission of this evidence [in vio-

lation of Rule 404(b)], there is a reasonable possibility that the jury would have reached a verdict of not guilty." *State v. Burr*, 341 N.C. 263, 291, 461 S.E.2d 602, 617 (1995) (internal quotation marks omitted), *cert. denied*, 517 U.S. 1123 (1996).

There was no dispute at trial that defendant killed the victim by stabbing him in the neck. Defendant authorized his trial attorneys to admit that fact during the opening statements of counsel. Indeed, defendant's only defense during the guilt-innocence phase was that he lacked the requisite intent for first-degree murder. Defendant asserts that the evidence of his prior conviction "helped convince the jury that the homicide was first-degree murder and not a lesser crime." We disagree.

The jury heard myriad evidence that defendant killed Chriscoe in 1992, including that defendant confessed the crime to police. In light of this overwhelming and uncontroverted evidence, defendant's argument that the trial court's admission of the bare fact of his previous manslaughter conviction materially impacted the jury's decision must necessarily fail. Because defendant has failed to demonstrate any reasonable possibility that the jury would have reached a different result had the evidence been excluded, *see* N.C.G.S. § 15A-1443(a) (2005), the trial court's admission of defendant's 1993 manslaughter conviction was harmless.

[3] Defendant next argues that the trial court deprived him of his right to presence under the Confrontation Clause of the Constitution of North Carolina, which provides in pertinent part: "In all criminal prosecutions, every person charged with crime has the right . . . to confront the accusers and witnesses with other testimony . . . ." N.C. Const. art. I, § 23. "Although the United States Supreme Court has stated that the confrontation clause of the federal constitution guarantees each criminal defendant the fundamental right to personal presence at *all critical stages* of the trial, our state constitutional right of confrontation has been interpreted as being broader in scope, guaranteeing the right of every accused to be present at *every stage* of his trial." *State v. Huff*, 325 N.C. 1, 29, 381 S.E.2d 635, 650-51 (1989) (citations omitted), *vacated and remanded on other grounds*, 497 U.S. 1021 (1990). Moreover, "[w]e have interpreted the state constitutional protection afforded the capital defendant as being even broader, guaranteeing the accused not only the right to be present at each and every stage of trial, but also providing that defendant's right to be present cannot be waived, and imposing on the trial court the duty to insure defendant's presence at trial." *Id.* at 29, 381 S.E.2d at

651; *State v. Moore*, 275 N.C. 198, 208, 166 S.E.2d 652, 659 (1969) ("[I]t is well established in this State that an accused cannot waive his right to be present at every stage of his trial upon an indictment charging him with a capital felony." (citations omitted)).

Defendant argues that his right to presence was violated when the clerk allegedly drew random names from the pool of prospective jurors outside of defendant's presence. The first instance occurred on 21 April 2004, when defendant was present in the courtroom. The following colloquy took place:

THE COURT: Okay. We have all the jurors here. Now how do you—Counsel, how do you wish to draw the next twelve names? Do you want her to do that in here and then we can just have the clerk go to the jury pool room and call those twelve names out and then we move them to this other room, or do you want to bring them—Any preference?

MR. BELL [DEFENSE COUNSEL]: No preference, [y]our Honor.

THE COURT: All right then, Ms. Eubanks, when you get finished you can just go to the jury room and call out the names of the next twelve, and then Mr. Hill can take them to the jury room over here.

The second instance occurred on 23 April 2004, with defendant again present in the courtroom:

THE COURT: . . . We've selected eight jurors so far. My initial thought is to call out twelve more names, which would give us eighteen for today, and then send everybody else home till Monday morning. Do you think that will be sufficient?

MR. ROOSE [DEFENSE COUNSEL]: Yes, sir. I was looking at my—I kind of invented this little log that I really enjoy. We talked to fourteen on Wednesday, which is when we went all day. Yesterday was slower with the orientation and everything. So I'd say eighteen, I don't think we're going to run out if we have eighteen here.

THE COURT: Okay. Then Mr.—If you'll get Mr. Hill twelve new names out of the ones that are in the jury assembly room, and then we'll call those names and have them stay. Well, let's see. We probably won't get through six—Do you think we'd get through six by lunch time?

THE CLERK: No. Sorry.

. . .

THE COURT: Okay. Here's what we'll do then. Pick out, call out twelve names, tell them to be back after lunch, say around 1:30, 1:45, something like that. Then the remainder that have not been called out will not have to come back until Monday morning at 9:30.

The third instance occurred on 26 April 2004, and again, defendant was present in the courtroom. The trial judge asked the clerk to draw seven more names of prospective jurors:

THE CLERK: We've got Number Eleven.

THE COURT: Oh, we do. Okay. I'm sorry.

THE CLERK: Yeah, we have Number Eleven.

THE COURT: Okay. I'm sorry. My fault. So we only have one more.

THE CLERK: And then ever how many alternates you're going to have.

THE COURT: Okay. Any suggestions from counsel?

MR. BELL [DEFENSE COUNSEL]: I think twelve would be a gracious plenty for the morning, [y]our Honor, please.

THE COURT: Okay. All right. Let's do that then.

THE CLERK: You want me to pull seven more?

THE COURT: Pull seven more, send everybody else home until 2:00. Tell them to report back at 2:00.

Nothing in the record suggests that the clerk failed to draw prospective jurors at random, in open court, and in defendant's presence. In essence, defendant's theory that the clerk could have

failed to properly carry out this routine task "rests on pure speculation." *State v. Daughtry*, 340 N.C. 488, 508, 459 S.E.2d 747, 756 (1995) (concluding that the defendant failed to establish that any error occurred when portion of selection process for prospective jurors for defendant's capital trial took place outside his presence), *cert. denied*, 516 U.S. 1079 (1996). Accordingly, as in prior cases involving a capital defendant's unwaivable right to presence, "[w]e will not assume error 'when none appears on the record.' " *Id.* at 517, 459 S.E.2d at 762 (quoting *State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968)); *see also State v. Thompson*, 359 N.C. 77, 114, 604 S.E.2d 850, 876 (2004) (refusing to recognize violation of right to presence "unless and until defendant demonstrates constitutional error on the record"), *cert. denied*, 546 U.S. 830 (2005); *State v. Adams*, 335 N.C. 401, 410, 439 S.E.2d 760, 764 (1994) ("[W]hatever incompleteness may exist in the record precludes defendant from showing that error occurred . . . ."), *cert. denied*, 522 U.S. 1096 (1998).

Even assuming that the clerk's random draw was not performed in defendant's presence, however, this fact does not necessarily entitle defendant to a new trial. Although a capital defendant's state constitutional right to presence is unwaivable, these errors are subject to harmless error review. *State v. Bonnett*, 348 N.C. 417, 431, 502 S.E.2d 563, 573 (1998), *cert. denied*, 525 U.S. 1124 (1999); *State v. Buckner*, 342 N.C. 198, 227-28, 464 S.E.2d 414, 430-31 (1995), *cert. denied*, 519 U.S. 828 (1996). N.C.G.S. § 15A-1214(a) governs the clerk's selection of potential jurors, and simply requires the clerk to "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." While the instant record does not indicate that the clerk formally spoke the names of prospective jurors on the record, the clerk nevertheless drew names of prospective jurors at random, in open court, and in defendant's presence. *See State v. Tirado*, 358 N.C. 551, 571, 599 S.E.2d 515, 530 (2004) ("[N.C.G.S. § 15A-1214(a)] neither prescribes nor proscribes any particular method of achieving random selection." (citation omitted)), *cert. denied*, 544 U.S. 909 (2005); *State v. Smith*, 352 N.C. 531, 548-49, 532 S.E.2d 773, 785 (2000) (concluding that trial court did not err despite using outdated system of calling jurors because the "random-selection requirement" of N.C.G.S. § 15A-1214(a) was satisfied), *cert. denied*, 532 U.S. 949 (2001). Accordingly, the trial court did not err by permitting the clerk to use this method to draw names of prospective jurors from the jury panel.

[4] Defendant also argues that the bailiff's reminders to prospective jurors to refrain from discussing the case or reading media accounts of the case violated defendant's right to presence. The first instance occurred 20 April 2004:

THE COURT: Okay. Wait. Let's go ahead and let everybody go to lunch.

BAILIFF HILL: Okay, [y]our Honor.

THE COURT: I don't think we need—We're probably at a good standing point. You may tell the jurors that are in—back here that they may go to lunch but to be back and ready to go a little bit before 2:00. And make sure they don't discuss the case or talk with anyone about it. And the same with those that are in the jury pool.

BAILIFF HILL: Yes, sir, [y]our Honor.

THE COURT: Thank you very much.

BAILIFF HILL: Yes, sir, [y]our Honor.

The next instance occurred at the end of the proceedings on 22 April 2004:

THE COURT: Okay. Mr. Hill, if you will tell the other jurors to be back here and ready to go at 9:15 or so tomorrow. Remind them not to read any newspaper accounts and not to talk about the case.

BAILIFF HILL: Yes, sir, [y]our Honor.

THE COURT: Okay. And we will—Ms. Cook, we'll be in recess until 9:30 tomorrow morning.

When court resumed the next morning, the following exchange took place:

THE COURT: Okay. Here's what we'll do then. Pick out, call out twelve names, tell them to be back after lunch, say around 1:30, 1:45, something like that. Then the re-

mainder that have not been called out will not have to come back until Monday morning at 9:30.

BAILIFF HILL: Yes, sir, [y]our Honor.

THE COURT: Mr. Hill, please remind them that they're not to talk about the case with anyone and they're not to read any newspaper accounts or any media reports.

Although we reiterate our warning that "shorthand procedures" such as these "may run the risk of violating [a] defendant's right to be present," *State v. Gay*, 334 N.C. 467, 482-83, 434 S.E.2d 840, 848 (1993), the challenged jury management procedures do not constitute reversible error on these facts. In *State v. Gay*, this Court considered two challenges based on a capital defendant's right to presence which bear on the instant case. First, we held that the trial judge's admonitions to prospective jurors outside of defendant's presence did not result in prejudicial error because the record "affirmatively reveal[ed] exactly what the trial court intended to say to the prospective jurors," and there was "no indication that anything to the contrary occurred." *Id.* at 482, 434 S.E.2d at 848. Thus, despite the trial court's error in addressing the prospective jurors outside of the presence of the defendant, the state met its burden of proving that the error was harmless beyond a reasonable doubt. *Id.*

Second, we held that a reminder by the bailiff to prospective jurors and the jury itself to abide by the court's admonitions should not be considered an instruction as to the law, since "[c]ommunications such as these do not relate to defendant's guilt or innocence." *Id.* We further explained that "[t]he subject matter of these communications in no way implicates defendant's confrontation rights, nor would defendant's presence have been useful to his defense . . . . [as] demonstrated by the fact that defendant's attorney had no objection to the shorthand procedure." *Id.* (citation and internal quotation marks omitted).

The present facts are a combination of those involved in the two right-to-presence issues considered in *Gay*. First, as in *Gay*, the record here reflects the specific instructions the trial judge sought to have administered to the jury because the trial judge explicitly told the bailiff the substance of the instructions and asked him to pass them along to the jury. Likewise, there is nothing in the instant record

to suggest that the bailiff did not follow these instructions as ordered. *See State v. May*, 334 N.C. 609, 615, 434 S.E.2d 180, 183 (1993) ("Without anything in the record to show something else happened, we will assume the bailiff followed the court's instructions."), *cert. denied*, 510 U.S. 1198 (1994). Stated succinctly, the record "affirmatively reveals exactly what the trial court intended to say to the prospective jurors" and there was "no indication that anything to the contrary occurred." *Gay*, 334 N.C. at 482, 434 S.E.2d at 848.

Second, as in *Gay*, it was the bailiff who delivered instructions from the trial court to the jury on several occasions, with no objection from defendant to the trial court's shorthand procedures. Here also, the communications "[did] not relate to defendant's guilt or innocence[,] . . . nor would defendant's presence have been useful to his defense." *Id.* (citation and internal quotation marks omitted). Thus, the instructions conveyed by the bailiff "should not be considered an instruction as to the law" outside the presence of a capital defendant. *Id.* Accordingly, although the trial court's shorthand procedure was error, the state has met its burden of proving that the violation of defendant's right to presence was harmless beyond a reasonable doubt. *Id.*; *see also Huff*, 325 N.C. at 27-36, 381 S.E.2d at 649-55 (analyzing various violations of the defendant's right to presence and concluding all were harmless beyond a reasonable doubt).

[5] Next, defendant argues that his right to presence was violated when the trial judge met with the jury to thank them for their service before discharging them. In response to the state's contention that the jury's service was complete at the time of the meeting, defendant notes that the jury marked "NO" on the verdict form next to each mitigating circumstance it found not to exist instead of leaving these spaces blank. For this reason, defendant argues, the jury's role in defendant's trial was not yet complete, because it could still have been polled a second time before it was discharged as to its reasons for making these markings on the verdict form.

We conclude that the trial court did not err in thanking the members of the jury for their service, as the jury's service was complete at the time the trial judge thanked and discharged the jury outside of defendant's presence. This meeting occurred after the jury had delivered its unanimous verdict and been polled at defendant's request, and after the trial court recorded the verdict. It follows then that this meeting occurred after the jury had completed its service. *See Davis v. State*, 273 N.C. 533, 538, 160 S.E.2d 697, 702 (1968) (explaining that

a jury's verdict is "complete" when it is "accepted by the court for its records"). Even if defendant were entitled to a "re-polling" of the jury under these circumstances, he never asked the trial court to do so. Thus, the jury's role in defendant's trial was complete at the time the trial judge met with the jury because defendant waived any purported right to "re-poll" the jury. *See State v. Black*, 328 N.C. 191, 198, 400 S.E.2d 398, 403 (1991) (holding that the right to poll the jury is subject to waiver). Finally, as a practical matter, we fail to see what a second polling of the jury under these circumstances would have accomplished, as the only plausible explanation for why the jury marked "NO" on the verdict form as to each mitigating circumstance at issue is that the jury simply did not find the existence of those mitigating circumstances. *See id.* ("The purpose of polling the jury is to ensure that the jurors unanimously agree with and consent to the verdict at the time it is rendered."). Consequently, defendant's argument is without merit.

CAPITAL SENTENCING PROCEEDING

Defendant argues that he is entitled to a new capital sentencing proceeding because the trial court erred by denying his request to submit certain mitigating circumstances to the jury. N.C.G.S. § 15A-2000(b) provides, in pertinent part:

> In all cases in which the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any aggravating circumstance or circumstances or mitigating circumstance or circumstances from the lists provided in subsections (e) and (f) which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such aggravating or mitigating circumstance or circumstances.

Under N.C.G.S. § 15A-2000(b), the trial court is required to include in the written verdict form all statutory mitigating circumstances supported by "substantial evidence." *State v. Zuniga*, 348 N.C. 214, 217, 498 S.E.2d 611, 613 (1998); *State v. Greene*, 329 N.C. 771, 775-77, 408 S.E.2d 185, 186-87 (1991). "The test for determining if the evidence is 'substantial evidence' is 'whether a juror could reasonably find that the circumstance exists based on the evidence.' " *State v. Watts*, 357 N.C. 366, 377, 584 S.E.2d 740, 748 (2003) (citations and internal quotation marks omitted), *cert. denied*, 541 U.S. 944 (2004). We have further explained that "substantial evidence" is " 'more than a scintilla of evidence,' " and that the evidence must be "existing and real, not just seeming or imaginary." *State v. Hill*, 347 N.C. 275, 301, 493 S.E.2d 264,

279 (1997) (quoting *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982) (citation omitted)), *cert. denied*, 523 U.S. 1142 (1998). Defendant bears "the burden of producing 'substantial evidence' tending to show the existence of a mitigating circumstance before that circumstance will be submitted to the jury." *State v. Holmes*, 355 N.C. 719, 736, 565 S.E.2d 154, 166-67 (citations and internal quotation marks omitted), *cert. denied*, 537 U.S. 1010 (2002).

[6] Defendant argues that the trial court erred by failing to submit the mitigating circumstance described in N.C.G.S. § 15A-2000(f)(2) because substantial evidence existed that the murder was committed while defendant was "under the influence of mental or emotional disturbance." Defendant contends that under *State v. Greene*, 329 N.C. 771, 408 S.E.2d 185, the trial court was required to submit the (f)(2) mitigator to the jury because there was substantial evidence that defendant suffered from intermittent explosive disorder. Defendant claims this mental illness caused his inability to control his violent actions.

Two of defendant's experts, Dr. Thomas Ansbro and Dr. Thomas Gresalfi, made no mention of intermittent explosive disorder, or any other disorder that would require the submission of the (f)(2) mitigator. Dr. Elizabeth Pekarek, the lone expert who diagnosed defendant with intermittent explosive disorder, did so as a preliminary diagnosis, offering no evidence or testimony to explain the specific symptoms of this disorder or how such symptoms would have affected defendant at the time of the crime. Dr. Pekarek admitted that she was not surprised to learn that a leading diagnostic guidebook for mental health professionals referred to intermittent explosive disorder as a "rare" condition, and that she reached her preliminary diagnosis without following the recommended practice of first ruling out all other disorders associated with aggressive impulses and without ruling out potential malingering. Dr. Pekarek also admitted that she eventually retreated from her initial preliminary diagnosis after learning about defendant's calculated attack on another inmate while in prison, which she believed was inconsistent with intermittent explosive disorder. Notably, on the basis of this evidence, the jury unanimously rejected the following nonstatutory mitigating circumstance submitted on defendant's behalf: "During his detention at the Randolph County [j]ail in 2003, the defendant was diagnosed with Intermittent Explosive Disorder." In sum, the testimony supporting defendant's claim that he suffered from intermittent explosive disorder was inadequate and highly controverted at best. Accordingly, the trial court

did not err by refusing to submit the (f)(2) mitigator. *See, e.g.*, *State v. Gainey*, 355 N.C. 73, 103, 558 S.E.2d 463, 482-83 (holding that submission of (f)(2) mitigator was not required when defendant's expert "had reservations" about defendant's diagnosis), *cert. denied*, 537 U.S. 896 (2002); *State v. Hedgepeth*, 350 N.C. 776, 787-88, 517 S.E.2d 605, 612-13 (1999) (concluding that controverted and conflicting evidence did not entitle defendant to submission of the (f)(2) mitigating circumstance), *cert. denied*, 529 U.S. 1006 (2000).

Moreover, the trial court's refusal to admit the (f)(2) mitigating circumstance is appropriate when " '[t]he events before, during, and after the killing suggest[ ] deliberation, not the frenzied behavior of an emotionally disturbed person.' " *State v. Hill*, 347 N.C. 275, 302, 493 S.E.2d 264, 279 (1997) (quoting *State v. Noland*, 312 N.C. 1, 23, 320 S.E.2d 642, 656 (1984), *cert. denied*, 469 U.S. 1230 (1985)), *cert. denied*, 523 U.S. 1142 (1998). Here, defendant stabbed the victim in the neck with a pocketknife requiring both hands to open, then chased the victim into the kitchen, where defendant slashed his arm and pushed him to the ground to prevent him from using the telephone to call for help. Defendant then washed the victim's blood off the murder weapon in the victim's kitchen sink. Next, defendant stole the victim's money and possessions and later returned to the crime scene to steal more items from the victim, including his truck. Defendant also attempted to hide his guilt by disposing of the murder weapon and lying to police. These actions signal deliberation, not the influence of an emotional or mental disturbance at the time of the crime.

Defendant's reliance on *State v. Greene* is also misplaced. In *Greene*, this Court found evidence sufficient to submit the (f)(2) mitigator when there was evidence that defendant "suffered from organic brain damage which resulted in his having poor judgment and a lack of impulse control." 329 N.C. at 775, 408 S.E.2d at 186-87. The facts of the instant case are fully distinguishable from *Greene*, as nothing tantamount to substantial evidence of brain damage was introduced into evidence at defendant's trial. To the contrary, the evidence introduced here revealed the plain inability of defendant to control his temper when the mentally disabled victim pointed at defendant and yelled about "workers of iniquity." To be sure, "[w]e have previously stated that an inability to control one's temper is neither mental nor emotional disturbance as contemplated by [the (f)(2)] mitigator." *State v. Strickland*, 346 N.C. 443, 464, 488 S.E.2d 194, 206 (1997) (citation omitted), *cert. denied*, 522 U.S. 1078 (1998).

Accordingly, the trial court did not err by refusing to submit this mitigating factor to the jury.

[7] Defendant also argues that the trial court erred by failing to submit the mitigating circumstance described in N.C.G.S. § 15A-2000(f)(6) because substantial evidence existed that the murder was committed while "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of [the] law was impaired." Defendant argues that his intermittent explosive disorder led to impulsive and aggressive outbursts in response to minor provocations, and that this evidence is sufficient to require submission of the (f)(6) mitigator to the jury.

For the same reasons that defendant's argument as to the (f)(2) mitigator fails, defendant's argument here fails as well, because there is insufficient evidence in the record that defendant suffered from intermittent explosive disorder. In addition, the same evidence of deliberation which makes submission of the (f)(2) mitigator improper also makes submission of the (f)(6) mitigator improper. In particular, defendant's initial lies to police about his involvement in the murder and his washing and disposal of the murder weapon are especially relevant on the (f)(6) mitigator, because they tend to show that defendant fully appreciated the criminality of his conduct. *See State v. Golphin*, 352 N.C. 364, 476, 533 S.E.2d 168, 240 (2000) (holding trial court properly refused to submit (f)(6) mitigator when there was evidence that defendant initially denied his role in shooting two police officers), *cert. denied*, 532 U.S. 931 (2001). Accordingly, defendant's argument that the trial court erred in refusing to submit the (f)(6) mitigator is without merit.

[8] Defendant next argues that the trial court erred by failing to order a competency hearing *sua sponte* in the presence of an allegedly bona fide doubt as to defendant's competency to stand trial. N.C.G.S. § 15A-1001(a) governs the determination of a defendant's capacity to proceed and provides in pertinent part:

> No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

Under N.C.G.S. § 15A-1002(a), "[t]he question of the capacity of the defendant to proceed may be raised at any time on motion by the

prosecutor, the defendant, the defense counsel, or the court[,]" provided that the motion "detail[s] the specific conduct that leads the moving party to question the defendant's capacity to proceed." N.C.G.S. § 15A-1002(b) further provides that "[w]hen the capacity of the defendant to proceed is questioned [pursuant to N.C.G.S. § 15A-1001(a)], the court shall hold a hearing to determine the defendant's capacity to proceed."

In applying these statutory provisions, this Court has recognized that the trial court is only required to "hold a hearing to determine the defendant's capacity to proceed *if* the question is raised." *State v. King*, 353 N.C. 457, 466, 546 S.E.2d 575, 584 (2001) (internal quotation marks omitted), *cert. denied*, 534 U.S. 1147 (2002). Therefore, the statutory right to a competency hearing is waived by the failure to assert that right at trial. *Id.* at 466, 546 S.E.2d at 584-85; *State v. Young*, 291 N.C. 562, 567, 231 S.E.2d 577, 580-81 (1977). Nothing in the instant record indicates that the prosecutors, defense counsel, defendant, or the court raised the question of defendant's capacity to proceed at any point during the proceedings, nor was there any motion made detailing the specific conduct supporting such an allegation. Defendant's statutory right to a competency hearing was therefore waived by the failure to assert that right at trial.

Nevertheless, under the Due Process Clause of the United States Constitution, "[a] criminal defendant may not be tried unless he is competent." *Godinez v. Moran*, 509 U.S. 389, 396 (1993) (citing *Pate v. Robinson*, 383 U.S. 375, 378 (1996)). As a result, " '[a] trial court has a constitutional duty to institute, *sua sponte*, a competency hearing *if there is substantial evidence before the court* indicating that the accused may be mentally incompetent.' " *King*, 353 N.C. at 467, 546 S.E.2d at 585 (alteration in original) (quoting *Young*, 291 N.C. at 568, 231 S.E.2d at 581 (citation and internal quotation marks omitted)). In enforcing this constitutional right, "the standard for competence to stand trial is whether the defendant has 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding' and has 'a rational as well as factual understanding of the proceedings against him.' " *Godinez*, 509 U.S. at 396 (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam) (internal quotation marks omitted)). Defendant points to evidence in the record indicating that he: (1) wrote numerous letters to the trial court and the district attorney expressing his desire for a speedy trial resulting in a death sentence; (2) read a statement to the jury during the penalty phase in which he impliedly asked for a death sentence; and

(3) had an emotional outburst coupled with verbal attacks on the assistant district attorney who delivered the state's closing argument during the sentencing proceeding.

We conclude that the evidence referenced by defendant did not constitute "substantial evidence" requiring the trial court to institute a competency hearing, and that this evidence was outweighed by substantial evidence indicating that defendant was competent to stand trial. The record shows that defendant was able to interact appropriately with his attorneys during the trial. He conferred with them on issues of law applicable to his case. He followed their advice by declining to testify during the guilt-innocence phase. Defendant also responded directly and appropriately to questioning during the capital sentencing proceeding as well as to the trial court's inquiries throughout the trial.

Defendant also demonstrated a strong understanding of the proceedings against him, and consistently addressed the trial court with appropriate deference and intelligent responses. For instance, defendant had the following exchange with the trial judge:

[DEFENDANT]: Your Honor?

THE COURT: Yes, sir.

[DEFENDANT]: May I address the Court?

THE COURT: Yes, sir, you may.

[DEFENDANT]: In that criminal law book it says, I don't know the General Statute, but it says the defendant or defendant's counsel may have the right to the last argument. I was advised by [defense counsel] that I could not address the jury at that time, that I would have to go through [defense counsel]. Is that correct?

. . .

[DEFENDANT]: Your Honor, may I be allowed to at least say something to the jury before they deliberate on the conviction phase?

Indeed, even after his outburst during the state's closing arguments, defendant calmly and rationally explained that he was upset because he felt the state's closing argument portrayed him as avoiding respon-

sibility for his actions. Defendant then apologized to the trial court for interrupting the proceedings.

We observe that defendant called three experts to testify about his psychological history, yet none of them suggested that he suffered from a condition that would render him incompetent to stand trial. Though the record confirms that defendant was treated for anger management and depression prior to trial, this is insufficient to establish a lack of competency. *See King*, 353 N.C. at 467, 546 S.E.2d at 585 (holding that evidence of treatment for depression and suicidal tendencies several months before trial did not constitute "substantial evidence" requiring the trial court to hold competency hearing).

Finally, we are unable to conclude that defendant's desire for a speedy trial resulting in a death sentence indicates a lack of competence to stand trial. As then-Associate Justice Rehnquist commented in *Lenhard v. Wolff*, 443 U.S. 1306, 1312-13 (1979):

> The idea that the deliberate decision of one under sentence of death to abandon possible additional legal avenues of attack on that sentence cannot be a rational decision, regardless of its motive, suggests that the preservation of one's own life at whatever cost is the *summum bonum*, a proposition with respect to which the greatest philosophers and theologians have not agreed and with respect to which the United States Constitution by its terms does not speak.

Accordingly, we hold that the evidence before the trial court did not constitute "substantial evidence" requiring it to institute a competency hearing *sua sponte*.

PRESERVATION ISSUES

Defendant raises additional issues that have previously been decided by this Court contrary to his position: (1) whether the short-form murder indictment used to charge defendant is unconstitutional; (2) whether the trial court erred by instructing the jury that it "had to unanimously fail to find the aggravating circumstances sufficiently substantial" before it could recommend a sentence of life imprisonment without parole; (3) whether the trial court erred by instructing the jury that it had a "duty" to recommend that defendant be sentenced to death if it "found that the mitigating circumstances were insufficient to outweigh the aggravating circumstances and that the aggravating circumstances, when considered with the mitigating

circumstances, were sufficiently substantial to call for the death penalty"; (4) whether the trial court erred by "defin[ing] mitigating circumstances in its charge to the jury as a fact or group of facts which may be considered as 'extenuating or reducing the moral culpability of the killing or making it less deserving of extreme punishment than other first-degree murders' "; and (5) whether the standards utilized by this Court under N.C.G.S. § 15A-2000(d)(2) to review the proportionality of a jury's determination of death as the appropriate punishment are unconstitutional. We have considered defendant's contentions on these issues and find no compelling reason to depart from our prior holdings. Therefore, we reject defendant's arguments.

PROPORTIONALITY REVIEW

[9] Finally, pursuant to our statutory duty under N.C.G.S. § 15A-2000(d)(2), we must determine: (1) whether the record supports the aggravating circumstances found by the jury; (2) whether the death sentence was imposed "under the influence of passion, prejudice, or any other arbitrary factor"; and (3) whether the death penalty is "excessive or disproportionate to the penalty imposed in similar cases," considering both the crime and the defendant.

Defendant was convicted of first-degree murder on the basis of malice, premeditation, and deliberation, and under the felony murder rule. The jury found two aggravating circumstances to exist: (1) that "defendant had been previously convicted of a felony involving the use . . . of violence to the person," N.C.G.S. § 15A-2000(e)(3); and (2) that the murder was committed for "pecuniary gain," N.C.G.S. § 15A-2000(e)(6). The trial court submitted the statutory catchall mitigating circumstance on defendant's behalf, N.C.G.S. § 15A-2000(f)(9), but the jury did not find this mitigating circumstance to exist and have mitigating value. The trial court also submitted fourteen additional nonstatutory mitigating circumstances on defendant's behalf, eight of which the jury found to exist and have mitigating value.

Having thoroughly reviewed the record, transcripts, and briefs in the present case, we conclude that the record fully supports the aggravating circumstances found by the jury. We find no evidence that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary consideration. Thus, we now address our final statutory duty of proportionality review.

"The purpose of proportionality review is to eliminate the possibility that a person will be sentenced to die by the action of an aberrant jury." *Hyatt*, 355 N.C. at 670, 566 S.E.2d 61 at 79 (citations and internal quotation marks omitted). " 'In our proportionality review, we must compare the present case with other cases in which this Court has ruled upon the proportionality issue.' " *Id.* (quoting *State v. McCollum*, 334 N.C. 208, 240, 433 S.E.2d 144, 162 (1993), *cert. denied*, 512 U.S. 1254 (1994)). We have found the death sentence disproportionate in eight cases. *See 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, 522 (1988); *State v. Stokes*, 319 N.C. 1, 27, 352 S.E.2d 653, 668 (1987); *State v. Rogers*, 316 N.C. 203, 237, 341 S.E.2d 713, 733 (1986), *overruled in part on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988), *and by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900 (1997); *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, 694, 309 S.E.2d 170, 183 (1983); *State v. Jackson*, 309 N.C. 26, 46, 305 S.E.2d 703, 717 (1983).

We conclude that this case is not substantially similar to any case in which this Court has found the death penalty disproportionate. First, defendant was found guilty of first-degree murder on the basis of malice, premeditation and deliberation, and under the felony murder rule. "We have held that a finding of premeditation and deliberation indicates 'a more calculated and cold-blooded crime.' " *Hyatt*, 355 N.C. at 670, 566 S.E.2d at 79 (quoting *State v. Lee*, 335 N.C. 244, 297, 439 S.E.2d 547, 575, *cert. denied*, 513 U.S. 891 (1994)). Defendant stabbed the victim, then physically restrained him from using his telephone to call for help before watching him bleed to death. At some point in the struggle, defendant also used the pocketknife to slash the victim's right arm, leaving a significant wound. We further observe that the folding pocketknife used to murder the victim had to be pulled open before it could be used, a process that lasted a moment and required the use of both of defendant's hands. *See State v. Forrest*, 321 N.C. 186, 196, 362 S.E.2d 252, 258 (1987) (concluding that sufficient evidence of premeditation existed when the revolver defendant used in the murder "had to be cocked each time before it could be fired"). This evidence of premeditation and deliberation supports the proportionality of the death penalty in the instant case.

Second, the jury found the existence of the (e)(3) aggravating circumstance based upon the defendant's killing of Chriscoe in 1992. We have previously stated that "[t]he jury's finding of the prior conviction of a violent felony aggravating circumstance is significant in finding a death sentence proportionate." *State v. Lyons*, 343 N.C. 1, 27, 468 S.E.2d 204, 217 (citing *State v. Harris*, 338 N.C. 129, 449 S.E.2d, 371 (1994), *cert. denied*, 514 U.S. 1100), *cert. denied*, 519 U.S. 894 (1996). "In none of the cases in which the death penalty was found to be disproportionate has the jury found the (e)(3) aggravating circumstance." *State v. Peterson*, 350 N.C. 518, 538, 516 S.E.2d 131, 143 (1999) (citing *Lyons*, 343 N.C. at 27-28, 468 S.E.2d at 217), *cert. denied*, 528 U.S. 1164 (2000).

It is also relevant that defendant murdered the victim in the victim's home, "an especially private place, one in which a person has a right to feel secure." *State v. Brown*, 320 N.C. 179, 231, 358 S.E.2d 1, 34 (relying on fact that victim was murdered while inside his home in finding death sentence not disproportionate), *cert. denied*, 484 U.S. 970 (1987). In addition, the victim had shown defendant compassion by allowing him to stay overnight as a guest in the victim's home on an occasion weeks prior to the murder, as well as on the night of the murder. In exchange for the victim's kind willingness to provide defendant with shelter from the cold November temperatures, defendant repaid the victim's compassion by senselessly taking his life. *See State v. Carter*, 342 N.C. 312, 329, 464 S.E.2d 272, 283 (1995) (holding death penalty not disproportionate when defendant chose to kill a person "who had treated him with kindness and compassion"), *cert. denied*, 517 U.S. 1225 (1996). This evidence further supports the proportionality of the death penalty in the instant case.

" 'We also compare this case with the cases in which we have found the death penalty to be proportionate.' " *Hyatt*, 355 N.C. at 671, 566 S.E.2d at 80 (quoting *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164). "Although this Court reviews all of the cases in that pool when engaging in its duty of proportionality review, we have repeatedly stated that 'we will not undertake to discuss or cite all of those cases each time we carry out that duty.' " *Id.* (quoting *McCollum*, 334 N.C. at 244, 433 S.E.2d at 164). "Whether a sentence of death is disproportionate in a particular case ultimately rest[s] upon the experienced judgments of the members of this Court." *Id.* (citations and internal quotation marks omitted) (alteration in original). We conclude that this case is more similar to cases in which we have found the death penalty proportionate than to those in which we have found it dis-

proportionate. Therefore, based on the foregoing and the entire record in this case, we cannot conclude as a matter of law that the sentence of death was excessive or disproportionate.

In sum, we hold that defendant received a fair trial and capital sentencing proceeding free from prejudicial error. Accordingly, the judgment of the trial court sentencing defendant to death must be left undisturbed.

NO PREJUDICIAL ERROR.

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

GARY HARRIS, JOSEPH B. KINARD, JOHN S. EAGLE, WAYMON TATE, JR., RAYFORD JONES, JOHN L. McGRIFF, AND LESLEY G. BELLINGER, THE PLAINTIFFS SUING ON BEHALF OF SAINT LUKE MISSIONARY BAPTIST CHURCH, INC. v. CLIFFORD J. MATTHEWS, JR., SHARLA BYRD, AND AARON MOORE

No. 479PA05-2

(Filed 4 May 2007)

1. Appeal and Error— appealability—church finances—First Amendment rights

First Amendment rights are substantial and are implicated when a party asserts that a civil court action cannot proceed without impermissibly entangling the court in ecclesiastical matters. The defendant here had an immediate right of appeal from the denial of his motion to dismiss claims involving the conversion of church funds and the breach of fiduciary duty by a pastor, church secretary, and the chairman of the church's Board of Trustees.

2. Churches and Religion— internal property dispute—judicial action on neutral principles of law only

When a congregational church's internal property dispute cannot be resolved using neutral principles of law, the courts must intrude no further and must instead defer to the decisions by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government. Civil court intervention into church property disputes is

proper only when relationships involving church property have been structured so that the civil courts are not required to resolve ecclesiastical questions.

3. Churches and Religion— conversion of funds—understanding of roles within church—doctrine and practice rather than neutral legal principles

Issues in a church dispute involving claims of conversion or breach of fiduciary duty could not be addressed using neutral principles of law because a church's religious doctrine and practice affect its understanding of church management and the role and authority of the pastor, staff, and church leaders.

4. Churches and Religion— nonprofit corporation—First Amendment rights not forfeited

A church that incorporates under the North Carolina Nonprofit Corporation Act does not forfeit its fundamental First Amendment rights. Regardless of a church's corporate structure, the Constitution requires courts to defer to the church's internal governing body with regard to ecclesiastical decisions concerning church management and use of funds.

5. Churches and Religion— conversion of funds—neutral principles of law not available—further discovery not needed

Additional discovery was not necessary in an action involving church funds, and a motion to dismiss was properly allowed. Once it became clear that no neutral principles of law existed to resolve plaintiffs lawsuit, continued involvement by the trial court became unnecessary and unconstitutional; additional discovery would only further entangle the trial court in ecclesiastical matters.

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

Justice BRADY concurring.

Justice HUDSON dissenting.

Justice TIMMONS-GOODSON joins this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of an unpublished decision of the Court of Appeals, 176 N.C. App. 189, 625 S.E.2d 917 (2006) (per curiam), dismissing an appeal by defend-

ant Clifford J. Matthews, Jr. from an order denying his motion to dismiss entered 6 October 2004 by Judge Marcus L. Johnson in Superior Court, Mecklenburg County. Heard in the Supreme Court 8 January 2007.

Knox, Brotherton, Knox & Godfrey, by H. Edward Knox and Lisa G. Godfrey, and John J. Korzen for plaintiff-appellees.

Poyner & Spruill LLP, by Steven A. Rowe and Joshua B. Durham, for defendant-appellant Clifford J. Matthews, Jr.

NEWBY, Justice.

This case, involving an internal church governance dispute, presents two issues. First, we must decide whether defendant has the right to immediately appeal the trial court's interlocutory order denying his motion to dismiss for lack of subject matter jurisdiction. Because we hold defendant can appeal the interlocutory order, we also address whether the restraints of the First Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment, preclude judicial intervention in this internal church controversy.

I. BACKGROUND

Saint Luke Missionary Baptist Church ("Saint Luke"), an unaffiliated congregational church, was formed in 1950 as an unincorporated association. Like most congregational churches, Saint Luke's governing authority resides in a majority of the membership. Reverend L.D. Parker served as Saint Luke's pastor from the church's formation until his death in 1998. Defendant Clifford J. Matthews, Jr. ("Matthews") became Saint Luke's interim pastor in October 1999 and, following a congregational vote, was installed as pastor in May 2000.

After defendant Matthews' installation, Saint Luke underwent several changes to its organizational structure. At a congregational meeting on 9 December 2001, Saint Luke's members approved a new set of bylaws for the church. The bylaws created an internal governing body, the "Council for Ministry," with broad authority to manage the "business and affairs" of the church. On 13 March 2002, Saint Luke transferred its assets to Saint Luke Missionary Baptist Church, Inc., a North Carolina nonprofit corporation.

Some members of Saint Luke, including the named plaintiffs, expressed concern over the changes. On multiple occasions, they requested access to the church's financial records, but were denied. On 3 July 2002, plaintiffs Joseph B. Kinard and John S. Eagle filed suit pursuant to N.C.G.S. § 55A-16-4 for production of Saint Luke's legal and financial records. On 23 July 2002, the trial court entered an order requiring Saint Luke to produce the documents. After reviewing the documents, plaintiffs believed that church funds had been misappropriated by Saint Luke's pastor (defendant Matthews), secretary (defendant Sharla Byrd), and chairman of the Board of Trustees (defendant Aaron Moore).

On 16 July 2003, pursuant to N.C.G.S. § 55A-7-40, plaintiffs filed suit, as members, on behalf of Saint Luke, alleging conversion of funds, breach of fiduciary duty, and civil conspiracy by defendants. The plaintiffs sought return of the disputed funds and punitive damages on behalf of Saint Luke. A somewhat lengthy procedural process ensued. Defendants moved to dismiss the complaint pursuant to N.C.G.S. § 55A-7-40(b), alleging that plaintiffs failed to demand an investigation by the church's governing body before filing suit, but the trial court denied the motions on 5 November 2003. Defendant Matthews, through new counsel, moved on 1 September 2004 to dismiss the complaint for lack of subject matter jurisdiction. The trial court denied this motion on 6 October 2004. Defendant Matthews appealed, and plaintiffs filed a motion to dismiss the appeal, alleging in part that the appeal was interlocutory. On 18 August 2005, the Court of Appeals allowed plaintiffs' motion to dismiss defendant's appeal. On 1 December 2005, we dismissed defendant's notice of appeal and denied his petition for discretionary review, but allowed his petition for writ of certiorari "for the limited purpose of remanding this case to the Court of Appeals for more thorough consideration in light of *Tubiolo v. Abundant Life Church, Inc.*, 167 N.C. App. 324, 605 S.E.2d 161 (2004), *disc. rev. denied*, 359 N.C. 326, 611 S.E.2d 853, *cert. denied*, [546] U.S. [819], 126 S. Ct. 350, 163 L. Ed. 2d 59 (2005)." *Harris v. Matthews*, 360 N.C. 175, 626 S.E.2d 297 (2005). The Court of Appeals again dismissed defendant's appeal on 21 February 2006, holding that defendant had not obtained Rule 54(b) certification from the trial court and that defendant did not possess a substantial right that would be irreparably damaged if his interlocutory appeal was delayed. Defendant again sought review by this Court, which allowed his petition for discretionary review on 17 August 2006.

II. INTERLOCUTORY APPEAL

[1] Defendant's appeal from the trial court's denial of his motion to dismiss for lack of subject matter jurisdiction is interlocutory. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy."). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). This general prohibition against immediate appeal exists because "[t]here is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders." *Veazey*, 231 N.C. at 363, 57 S.E.2d at 382. However, interlocutory orders are immediately appealable if they: "(1) affect a substantial right and (2) [will] work injury if not corrected before final judgment." *Goldston*, 326 N.C. at 728, 392 S.E.2d at 737.[1]

Defendant asserts that the trial court's order affects substantial First Amendment rights. We agree. The First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. Likewise, the "comparable provision" in the North Carolina Constitution declares that "[a]ll persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience." N.C. Const. art. I, § 13 ("Religious liberty"); *see Atkins v. Walker*, 284 N.C. 306, 318, 200 S.E.2d 641, 649 (1973).

The United States Supreme Court has found First Amendment rights to be substantial, *Frisby v. Schultz*, 487 U.S. 474, 479, 108 S. Ct. 2495, 2499, 101 L. Ed. 2d 420, 428 (1988) (noting that First Amendment right to picket is substantial), and has held the First Amendment prevents courts from becoming entangled in internal church governance concerning ecclesiastical matters, *Presby-*

1. An interlocutory order is also immediately appealable if the trial court certifies that: (1) the order represents a final judgment as to one or more claims in a multi-claim lawsuit or one or more parties in a multi-party lawsuit, and (2) there is no just reason to delay the appeal. N.C.G.S. § 1A-1, Rule 54(b) (2005). Rule 54(b) is not applicable to this case because the trial court's denial of defendant's motion to dismiss was not a final judgment as to any party or claim.

terian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 451-52, 89 S. Ct. 601, 607, 21 L. Ed. 2d 658, 666-67 (1969). When First Amendment rights are asserted, this Court has allowed appeals from interlocutory orders. *Priest v. Sobeck*, 153 N.C. App. 662, 571 S.E.2d 75 (2002), *rev'd per curiam*, 357 N.C. 159, 579 S.E.2d 250 (2003) (for reasons stated in the dissenting opinion, thus finding in a defamation action that a trial court order concerning actual malice affected a substantial First Amendment right and was therefore immediately appealable). Accordingly, we reaffirm our stance that First Amendment rights are substantial and hold that First Amendment rights are implicated when a party asserts that a civil court action cannot proceed without impermissibly entangling the court in ecclesiastical matters.

Further, we are unpersuaded by plaintiffs' suggestion that defendant cannot raise entanglement concerns. The constitutional prohibition against court entanglement in ecclesiastical matters is necessary to protect First Amendment rights identified by the "Establishment Clause" and the "Free Exercise Clause." *See* Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1218 n.129 (2d ed. 2002) ("Analytically, it does not seem to matter whether this [court involvement in internal church disputes] issue is characterized as a free exercise clause issue or one involving the establishment clause."). These rights are not held by church bodies alone. They have been consistently asserted by individuals to challenge administrative, legislative, and judicial actions. *See*, *e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 124 S. Ct. 2301, 159 L. Ed. 2d 98 (2004); *Wallace v. Jaffree*, 472 U.S. 38, 105 S. Ct. 2479, 86 L. Ed. 2d 29 (1985); *Jones v. Wolf*, 443 U.S. 595, 99 S. Ct. 3020, 61 L. Ed. 2d 775 (1979); *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971); *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 20 L. Ed. 666 (1871).

It is not determinative that the trial court's order affects a substantial right. The order must also work injury if not corrected before final judgment. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690, 49 L. Ed. 2d 547, 565 (1976) (plurality). In *Elrod*, the United States Supreme Court held injunctive relief appropriate in situations in which "First Amendment interests were either threatened or in fact being impaired at the time relief was sought." *Id.* Likewise, when First Amendment rights are threatened or impaired by an interlocutory order, immediate appeal is appropriate.

In short, we find defendant's substantial First Amendment rights are affected by the trial court's order denying his motion to dismiss. Further, these rights will be impaired or lost and defendant will be irreparably injured if the trial court becomes entangled in ecclesiastical matters from which it should have abstained. Therefore, defendant has the right to immediately appeal the trial court order denying his motion to dismiss for lack of subject matter jurisdiction on impermissible entanglement grounds.

III. IMPERMISSIBLE ENTANGLEMENT

[2] Having determined that defendant has a right to immediately appeal, we now address the merits of defendant's impermissible entanglement argument. We review Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction de novo and may consider matters outside the pleadings. 2 James Wm. Moore et al., *Moore's Federal Practice* §§ 12.30[3], .30[5] (3d ed. 2006); *see also Tubiolo v. Abundant Life Church, Inc.*, 167 N.C. App. at 327, 605 S.E.2d at 163.

"[T]he First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes." *Presbyterian*, 393 U.S. at 449, 89 S. Ct. at 606, 21 L. Ed. 2d at 665. In *Presbyterian*, two local Presbyterian churches withdrew from a hierarchical general church organization, and a dispute arose over who owned the local churches' properties. *Id.* at 441-43, 89 S. Ct. at 602-03, 21 L. Ed. 2d at 661-62. Under Georgia law, resolution of the property ownership turned on a jury's decision as to whether the general church's actions which caused the local church withdrawals, " 'amount[ed] to a fundamental or substantial abandonment of the original tenets and doctrines of the [general church].' " *Id.* at 443-44, 89 S. Ct. at 603, 21 L. Ed. 2d at 662 (second alteration in original). The United States Supreme Court held this to be an improper inquiry for a court.

Although "[c]ivil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property[,] . . . First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice." *Id.* at 449, 89 S. Ct. at 606, 21 L. Ed. 2d at 665. Civil court intervention into church property disputes is proper only when "relationships involving church property [have been structured] so as not to require the civil courts to resolve ecclesiastical questions." *Id.* When a congrega-

tional church's internal property dispute cannot be resolved using neutral principles of law, the courts must intrude no further and must instead defer to the decisions "by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government." *Watson*, 80 U.S. (13 Wall.) at 724, 20 L. Ed. at 675.

This Court applied *Presbyterian* to a church property dispute in *Atkins v. Walker*, 284 N.C. 306, 200 S.E.2d 641 (1973). A minority of the members of a Missionary Baptist Church congregation argued they were entitled to possession of church property as a result of several improper actions taken by the church and its leaders. We recognized the constitutional boundaries set by *Presbyterian*, concluding that court review should be limited to questions that can be "resolved on the basis of [neutral] principles of law" such as "(1) [w]ho constitutes the governing body of this particular [church], and (2) who has that governing body determined to be entitled to use the properties." *Id.* at 319, 200 S.E.2d at 650.

In *Atkins*, the plaintiffs could have challenged the validity of church action "by showing that such action was not taken in a meeting duly called and conducted according to the procedures of the church." *Id.* at 320, 200 S.E.2d at 651. However, because nothing in the record suggested that any actions of which the plaintiffs complained were not properly taken at a meeting of the church's governing body (the congregation), we concluded the trial court's decision could only have been based on factors that it was constitutionally prohibited from considering. *Id.* at 321, 200 S.E.2d at 651.

As in *Atkins*, we again must decide whether certain claims brought by a minority faction of a congregational church fall under the severely circumscribed role of the courts or whether the allegations must be addressed by the church itself through its own internal governing body. And, as in *Atkins*, we conclude that the civil courts are constitutionally prohibited from addressing plaintiffs' claims.

[3] Plaintiffs first allege that defendant Matthews has usurped the governmental authority of the church's internal governing body. The remainder of plaintiffs' causes of action seek damages for the church as a proximate result of defendants' breach of fiduciary duty and conversion of church funds, stemming from defendants' civil conspiracy to convert funds. Based on these claims, plaintiffs also seek punitive damages on behalf of the church.

Plaintiffs do not ask the court to determine who constitutes the governing body of Saint Luke or whom that body has authorized to expend church resources. Rather, plaintiffs argue Saint Luke is entitled to recover damages from defendants because they breached their fiduciary duties by improperly using church funds, which constitutes conversion. Determining whether actions, including expenditures, by a church's pastor, secretary, and chairman of the Board of Trustees were proper requires an examination of the church's view of the role of the pastor, staff, and church leaders, their authority and compensation, and church management. Because a church's religious doctrine and practice affect its understanding of each of these concepts, seeking a court's review of the matters presented here is no different than asking a court to determine whether a particular church's grounds for membership are spiritually or doctrinally correct or whether a church's charitable pursuits accord with the congregation's beliefs. None of these issues can be addressed using neutral principles of law.

Here, for example, in order to address plaintiffs' claims, the trial court would be required to interpose its judgment as to both the proper role of these church officials and whether each expenditure was proper in light of Saint Luke's religious doctrine and practice, to the exclusion of the judgment of the church's duly constituted leadership. This is precisely the type of ecclesiastical inquiry courts are forbidden to make. *See Jones v. Wolf*, 443 U.S. at 602, 99 S. Ct. at 3025, 61 L. Ed. 2d at 784 ("Most importantly, the First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice." (citing *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710, 96 S. Ct. 2372, 2381, 49 L. Ed. 2d 151, 163 (1976); *Md. & Va. Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368, 90 S. Ct. 499, 500, 24 L. Ed. 2d 582, 583 (1970) (per curiam); *Presbyterian*, 393 U.S. at 449, 89 S. Ct. at 606, 21 L. Ed. 2d at 665)).

Because no neutral principles of law exist to resolve plaintiffs' claims, the courts must defer to the church's internal governing body, the Council for Ministry, thereby avoiding becoming impermissibly entangled in the dispute.[2] *See Watson*, 80 U.S. (13 Wall.) at 724, 20

2. Concluding that the trial court's adjudication of plaintiffs' conversion claim would constitute impermissible entanglement, necessarily precludes adjudication of plaintiffs' civil conspiracy claim since civil conspiracy is premised on the underlying act. *See Muse v. Morrison*, 234 N.C. 195, 198, 66 S.E.2d 783, 785 (1951). Similarly, once plaintiffs' other claims are dismissed, their punitive damages claim fails.

L. Ed. at 675. Having been delegated broad oversight authority by the congregation, the Council for Ministry has already considered some of expenditures challenged by plaintiffs, taken action, and declared the matter closed. Plaintiffs' complaint does not challenge the authority of the Council for Ministry or argue that the Council did not follow its own internal governance procedures.[3] Plaintiffs simply object to the Council's determination that the expenditures were proper. Although it has not specifically considered every issue raised by plaintiffs, as Saint Luke's internal governing body, the Council for Ministry is the only authority constitutionally permitted to decide matters that cannot be resolved using neutral principles of law. Unless Saint Luke, through its congregation and following proper internal procedures, revokes the Council for Ministry's authority to resolve church disputes, plaintiffs must raise their concerns with the Council for Ministry and accept the resolutions reached by that governing body.

[4] Plaintiffs make the broad assertion that, because Saint Luke is a nonprofit corporation, the North Carolina Nonprofit Corporation Act can be used to resolve the dispute. N.C.G.S. §§ 55A-1-01 to -17-05. (2005). However, a church that incorporates under the North Carolina Nonprofit Corporation Act does not forfeit its fundamental First Amendment rights. Regardless of a church's corporate structure, the Constitution requires courts to defer to the church's internal governing body with regard to ecclesiastical decisions concerning church management and use of funds.

[5] Finally, we are unpersuaded by plaintiffs' argument that defendants' motion to dismiss should not be allowed because discovery is incomplete. The trial court properly opened its door to this church property dispute. However, once it became clear that no neutral principles of law existed to resolve plaintiffs' lawsuit, continued involvement by the trial court became unnecessary and unconstitutional. Additional discovery will only further entangle the trial court in ecclesiastical matters, notwithstanding that there is no issue it can constitutionally decide.

When a party brings a proper complaint, " '[w]here civil, contract[,] or property rights are involved, the courts will inquire as to

3. Although plaintiffs, in their appellate briefs and through affidavits, have challenged the authority of the Council for Ministry and suggested that the Council for Ministry did not follow its internal governance procedures, plaintiffs have not attempted to amend or supplement their complaint to include these allegations, and as such the allegations are not properly before this Court or the trial court. N.C.G.S. § 1A-1, Rules 8(a), 15 (2005).

whether the church tribunal acted within the scope of its authority and observed its own organic forms and rules.' " *Atkins*, 284 N.C. at 320, 200 S.E.2d at 650 (quoting *W. Conference of Original Free Will Baptists v. Creech*, 256 N.C. 128, 140-41, 123 S.E.2d 619, 627 (1962)). But when a party challenges church actions involving religious doctrine and practice, court intervention is constitutionally forbidden.

IV. DISPOSITION

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.

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

Justice BRADY concurring.

I concur fully in the reasoning and result of the majority opinion and join that opinion in its entirety. However, as Joshua and the tribes of Israel were compelled to march around the walls of Jericho as the priests blew the horns, I am compelled to write separately to provide a word of caution: While the metaphor of a "wall of separation between church and state" may fit nicely in a case such as the one *sub judice*, it is generally a misplaced metaphor that should not occupy such a lofty position in religious freedom jurisprudence. Even a brief review of the exchange between Thomas Jefferson and the Danbury Association of Baptists demonstrates that the metaphor "separation of church and state"[4] has been wrenched torturously out of context in many circumstances to require "neutrality on the part of

4. This metaphor, however, does not have its origins in Jefferson's letter. Roger Williams, a prominent 17th Century religious figure, wrote that the Old Testament "Church of the Jews" and the New Testament Church

> were both separate from the world; and that when they have opened a gap in the hedge or wall of Separation between the Garden of the Church and the Wildernes of the world, God hath ever broke down the wall it selfe, removed the Candlestick, *&c.* and made his Garden a Wildernesse, as at this day.

Roger Williams, *Mr. Cotton's Letter Lately Printed Examined and Answered* 108 (London 1644), *reprinted in* 1 *The Complete Writings of Roger Williams* (1963). "Although Williams['s] principal concern in the separation of church and state was to preserve the church from worldly contamination, he also believed that government suffered when diverted from its proper functions by the church." Edmund S. Morgan, *Roger Williams:* The Church and the State, 118 (1967).

government between religion and irreligion." *See Wallace v. Jaffree*, 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting).

Although it is not necessary to extensively discuss this topic, just a brief consideration displays the truth of the statement written by Benjamin Cardozo while sitting on the New York Court of Appeals before his appointment to our nation's highest court: "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." *Berkey v. Third Ave. Ry. Co.*, 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926). This enslaving of Establishment Clause jurisprudence by a mistaken metaphor ignores the historical fact that "[o]ur Founding Fathers never intended that we utilize the Establishment Clause of the United States Constitution or any other laws to sterilize our public forums by removing all references to our religious beliefs." *State v. Haselden*, 357 N.C. 1, 32, 577 S.E.2d 594, 613 (2003) (Brady, J., concurring) (citations omitted).

HISTORICAL BACKGROUND

The phrase "separation between church and state" appears nowhere in the text of the Constitution or its amendments. However, courts have used it as a basis for a policy of rigid separation, "[n]otwithstanding the absence of a historical basis for this theory." *Wallace*, 472 U.S. at 106 (Rehnquist, J., dissenting). The phrase was first injected into religion clause jurisprudence by the Supreme Court of the United States in *Reynolds v. United States*, 98 U.S. 145, 164 (1878), a case dealing with a Mormon's free exercise challenge to a polygamy law. The concept was further elaborated upon in *Everson v. Board of Education*, 330 U.S. 1, 16 (1947), which concerned public funding of transportation for parochial students. The phrase has since become an integral part of judicial analysis under the religion clauses. However, a review of the history surrounding the phrase "wall of separation between church and state" demonstrates that it should be either discarded or its use restricted to cases such as the one *sub judice*.

Justice Rehnquist solidly and succinctly set out the historical background of the Establishment Clause in his dissent in *Wallace v. Jaffree*, and I would not undertake to restate that history here. However, I note, as I have expressed before, that the first Congress authorized the appointment of compensated congressional chaplains only days before approving the final draft of the Bill of Rights. *See Haselden*, 357 N.C. at 32, 577 S.E.2d at 613-14 (Brady, J., concurring) (citing *Marsh v. Chambers*, 463 U.S. 783, 788 (1983)). I have previ-

ously noted this nation's history of opening congressional sessions with prayer, providing for chaplains in each branch of our armed forces, and using invocations and benedictions at both state and federal ceremonial installations and inaugurations. *Id.* at 32, 577 S.E.2d at 614 (Brady, J., concurring) (citations omitted). Additionally, "[t]he United States Congress has provided for the national motto reflecting our religious heritage, 'In God we trust,' 36 U.S.C.A. § 302 (West 2001), and has mandated that it 'shall' be inscribed onto our currency, 31 U.S.C.A. § 5112(d)(1) (West 2003)." *Id.* at 32-33, 577 S.E.2d at 614 (Brady, J., concurring). Moreover, this Court and countless other tribunals around the country "open their sessions asking God to save their honorable courts." *Id.* at 33, 577 S.E.2d at 614 (Brady, J., concurring). Even before the founding of this nation, the Mayflower Compact demonstrated our early emigrants' recognition of God's sovereignty, stating that one purpose of their to-be-formed colony was "Advancement of the Christian Faith." *See* Mayflower Compact (1620). Prior to the enactment of the Fourteenth Amendment, many states in the early history of our country had an organized, state-sponsored religion. *See Wallace*, 472 U.S. at 99, n.4 (Rehnquist, J., dissenting). In fact, North Carolina disestablished the Church of England in its first constitution, displaying its power to establish or disestablish a State church during that period. *See* John V. Orth, *The North Carolina State Constitution with History and Commentary* 49 (Univ. of N.C. Press 1995) (1993).

This is certainly not to endorse the establishment of a State church in North Carolina, or any other State for that matter. When the State sets up an official religion and excludes all others from lawful worship, the results are disastrous. *See* Robert G. Torbet, *A History of the Baptists* 242-43 (3d ed. 2000) (discussing the "Battle of Alamance," which occurred in 1771 and the religious oppression of Baptists under Governor Tryon). When courts become involved in ecclesiastical matters, the result is the same as a state established religion—the losing party must submit to the decision of the court under penalty of law without regard to his own personal rights of conscience. To reflect that concern, the North Carolina Constitution provides: "All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience." N.C. Const. art. I, § 13. That states were free to establish and disestablish religion during the early periods of our country clearly demonstrates that a strict "neutrality on the part of government between religion and irreligion" was never

intended by our Founding Fathers. *Wallace*, 472 U.S. at 98 (Rehnquist, J., dissenting).

Many of our Presidents, such as George Washington and Abraham Lincoln, have chosen to include scriptural readings in their inaugural speeches. *See* Richard Land, *The Divided States of America?* 84-87 (2007) (collecting quotes of scripture from presidential inaugurations). President Washington recognized the need for religion and morality in the young country. In his "farewell address" to the nation, he eloquently stated:

> Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. Let it simply be asked, Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in courts of justice? And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.
>
> It is substantially true that virtue or morality is a necessary spring of popular government. The rule, indeed, extends with more or less force to every species of free government. Who that is a sincere friend to it can look with indifference upon attempts to shake the foundation of the fabric?

George Washington, Farewell Address (Sept. 19, 1796).

ANALYZING THE TEXT OF THE LETTER

Viewing the correspondence of the exchange between the Danbury Association of Baptists and Thomas Jefferson by focusing on the context surrounding the "wall of separation" metaphor sheds extensive light on its meaning. The Association feared that its members would suffer because of their minority beliefs. Moreover, the members of the Association were concerned that those "who seek after *power & gain* under the pretence of *government & Religion*

should reproach their fellow men" and would also "reproach" President Jefferson "because he will not, dares not assume the prerogative of Jehovah and make Laws to govern the Kingdom of Christ." Letter from the Danbury Baptist Association to Thomas Jefferson (Oct. 7, 1801), *in* Daniel L. Dreisbach, *Thomas Jefferson and the Wall of Separation between Church and State* 31 (2002) [hereinafter Dreisbach, *Wall of Separation*]. Thus, the Association was concerned about governmental regulation in the sphere of religion. In a thoughtfully considered and eloquently penned response, Jefferson wrote to the Association:

> Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church & State . . . .

Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802), *in* Dreisbach, *Wall of Separation* 48. Thus, in response to the Association's fears of persecution and government intermeddling with the affairs of the Church, Jefferson merely assured them that his position was that the First Amendment would not allow Congress to do so.

The "wall of separation" metaphor should only be used, if at all, in cases such as the one *sub judice*. In other words, the gate to the "wall of separation" only swings one way, locking the government out of ecclesiastical matters. Because no religious right is more precious than the right to form one's own religious opinions without interference from the civil government, I concur fully in the Court's opinion.

Justice HUDSON dissenting.

Because I believe that the Court of Appeals correctly dismissed this case as interlocutory, I respectfully dissent.

Defendant does not dispute that there was no final judgment in this case and that his appeal is thus interlocutory. However, "N.C.G.S. § 1-277 and N.C.G.S. § 7A-27(d) allow an appeal to be taken from an interlocutory order which affects a substantial right although the appeal may be interlocutory." *DKH Corp. v. Rankin-Patterson Oil*

Co., 348 N.C. 583, 585, 500 S.E.2d 666, 668 (1998). Defendant contends, and the majority agrees, that adjudication of this matter would require a court to impermissibly delve into and entangle itself in ecclesiastical matters in violation of the First Amendment. While I agree that such entanglement would affect a substantial right under the First Amendment, I do not agree that at this stage of this lawsuit, any such entanglement appears, or that a substantial right of defendant's would be threatened or impaired, if this case proceeds.

Although the First Amendment prohibits courts from becoming entangled in ecclesiastical matters, "[i]t nevertheless remains the duty of civil courts to determine controversies concerning property rights over which such courts have jurisdiction and which are properly brought before them, notwithstanding the fact that the property is church property." *Atkins v. Walker*, 284 N.C. 306, 318, 200 S.E.2d 641, 649 (1973). "Neither the First Amendment to the Constitution of the United States nor the comparable provision in Article I, Section 13, of the Constitution of North Carolina deprives those entitled to the use and control of church property of protections afforded by government to all property owners alike . . . [including] access to the courts for the determination of contract and property rights." *Id.* (citing *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 89 S. Ct. 601, 21 L. Ed. 2d 658 (1969)). The pleadings and attached affidavits here indicate that the disputed issues in this case involve whether defendant used church property without proper authority. There is no reference in any of the pleadings or other supporting documents to any doctrinal issue. Rather, the issues as developed thus far involve, purely and simply, property matters.

I cannot agree with the majority's contention that "First Amendment rights are implicated when a party *asserts* that a civil court action cannot proceed without impermissibly entangling the court in ecclesiastical matters," even though the pleadings reflect otherwise. (Emphasis added.) First, the cases the majority relies on do not support such a broad holding. Further, I fear that this approach could have the unintended consequence of allowing, or even inviting, misbehavior by church officials who could then avoid court review by baldly *asserting* that further review would result in impermissible entanglement in ecclesiastical matters.

The majority cites *Priest v. Sobeck* in support of its argument that when First Amendment rights are asserted, this Court has allowed appeals from interlocutory orders. 357 N.C. 159, 579 S.E.2d 250

(2003), *rev'g per curiam for the reasons stated in the dissenting opinion*, *Priest v. Sobeck*, 153 N.C. App. 662, 571 S.E.2d 75 (2002). However, *Priest* is distinguishable. In *Priest*, union members sued a union representative alleging that she defamed them in a union newsletter by falsely and maliciously blaming them for the hiring of non-union members. 153 N.C. App. at 664-65, 571 S.E.2d at 77. The Court of Appeals concluded that regardless of the trial court's certification of the matter for interlocutory review, the partial grant of summary judgment neither constituted a final judgment nor affected defendants' substantial right to free speech. *Id.* at 667-69, 571 S.E.2d at 78-80. The dissent disagreed, concluding that the judgment was final as to one or more of plaintiff's claims and furthermore, that denial of defendants' summary judgment motion based on the trial court's misapplication of the "actual malice" standard would have a chilling effect on their First Amendment rights of free speech. *Id.* at 670-71, 571 S.E.2d at 80-81 (Greene, J., dissenting). This Court, per curiam, reversed the Court of Appeals "[f]or the reasons stated in the dissenting opinion." 357 N.C. at 159, 579 S.E.2d at 250.

Here, I see no such chilling effect and in fact, no infringement on a First Amendment right. Should it appear at a later stage in the lawsuit that matters of church doctrine seem to be at issue, any party or the court on its own motion may raise the issue of subject matter jurisdiction. At this point, though, it is difficult to see how we or the trial court would venture into ecclesiastical waters in order to decide whether defendant's expenses for clothing, airfare, or hotel rooms were authorized by the church. Defendant has not shown how these issues bear on his freedom to exercise his religion. Instead, these matters appear to bear entirely on defendant's exercise of personal and fiscal responsibility toward the very secular assets of the church. Thus, I conclude that this appeal does not threaten or impair a substantial right, and I would dismiss it as interlocutory.

Turning to the merits, defendant here appeals from the denial of his Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. Both *Presbyterian Church* and *Atkins* involved cases which went to the jury, and in both cases, the Courts made clear that "[c]ivil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property." *Presbyterian Church*, 393 U.S. at 449, 89 S. Ct. at 606, 21 L. Ed. 2d at 665. In *Atkins*, this Court emphasized that it is "the duty of civil courts to determine controversies concerning property rights . . . notwithstanding the fact that the property is church property." 284 N.C. at 318, 200 S.E.2d at

649. In *Presbyterian*, two local churches withdrew from the general church over serious doctrinal differences and then sought to enjoin the general church from trespassing on disputed church property. 393 U.S. at 442-43, 89 S. Ct. at 602-03, 21 L. Ed. 2d at 661-62. The Georgia Supreme Court affirmed "a civil court jury decision as to whether the general church abandoned or departed from the tenets of faith and practice it held at the time the local churches affiliated with it." *Id.* at 441, 89 S. Ct. at 602, 21 L. Ed. 2d at 661. The United States Supreme Court concluded that the Georgia courts violated the First Amendment because the "church property litigation [wa]s made to turn on the resolution by civil courts of controversies over *religious doctrine and practice*." *Id.* at 449, 89 S. Ct. at 606, 21 L. Ed. 2d at 665 (emphasis added). Similarly, in *Atkins*, this Court held that the First Amendment forbids a court decision about church property which depends on "a judicial determination that one group of claimants has adhered faithfully to the fundamental faiths, doctrines and practices of the church . . . while the other group of claimants has departed substantially therefrom." 284 N.C. at 318, 200 S.E.2d at 649. There, the issues submitted to the jury were:

> 1. Did the Plaintiffs remain faithful to the doctrines and practices of the Little Mountain Baptist Church recognized and accepted by the Plaintiffs and Defendants prior to the division?
>
> 2. Have the Defendants departed radically and fundamentally from the characteristic usages, customs, doctrines and practices of the Little Mountain Baptist Church accepted by all members prior to the division as alleged in the complaint?

Id. at 308, 200 S.E.2d at 643. Clearly, the court and jury were delving into matters of doctrine and belief.

Here, by contrast, no party alleged such doctrinal or ecclesiastical issues in the pleadings or affidavits. While there could conceivably be some impermissible infringement into doctrinal issues at some later point in this case, such possible future infringement is merely speculative. The record as developed thus far indicates no such infringement if this case were allowed to proceed beyond the Rule 12(b)(1) motion to dismiss.

This Court has held that church property disputes must be decided "pursuant to 'neutral principles of law.' " *Atkins*, *id.* at 319, 200 S.E.2d at 650 (quoting *Presbyterian*, 393 U.S. at 449, 89 S. Ct. at 606, 221 L. Ed. 2d at 665). The majority contends that "[b]ecause a

church's religious doctrine and practice affect its understanding" of the "concepts" of "the role of the pastor, staff, and church leaders, their authority and compensation, and church management," none of the issues here can be addressed using neutral principles of law. The majority then asserts that because no neutral principles of law exist, we must defer to the church's internal governing body, the Council for Ministry. However, it appears to me that the courts could easily apply neutral principles of law in this case to determine whether the Council for Ministry acted within the scope of its authority, which is an appropriate area of action for courts. Indeed, this Court, in *Atkins*, held that "[w]here civil, contract or property rights are involved, the courts will inquire as to whether the church tribunal acted within the scope of its authority and observed its own organic forms and rules." *Id.* at 320, 200 S.E.2d at 651 (citations and internal quotation marks omitted).

Here, plaintiffs, as members of a non-profit corporation church, brought suit in a derivative capacity pursuant to N.C.G.S. § 55A-7-40(a), alleging the following causes of action: that defendant converted church funds, breached a fiduciary duty owed to the church and its members, and engaged in a civil conspiracy to convert money and assets of the church. The majority argues that "in order to address plaintiffs' claims, the trial court would be required to interpose its judgment as to both the proper role of these church officials and whether each expenditure was proper in light of Saint Luke's religious doctrine and practice, to the exclusion of the church's duly constituted leadership." To the contrary, I conclude that each of plaintiff's claims could be resolved through the application of neutral principles of law.

Conversion is "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *In re Legg*, 325 N.C. 658, 669, 386 S.E.2d 174, 180 (1989), *cert. denied*, 496 U.S. 906, 110 S. Ct. 2589, 110 L. Ed. 2d 270 (1990) (citation and internal quotation marks omitted). Here, the law of conversion can be neutrally applied to this case to inquire whether defendant exercised a right of ownership over funds belonging to the church without authorization. The church's bylaws explicitly address expenditures, and a court can review whether or not the bylaws were followed, and thus whether the expenditures were authorized, without delving into the church's "religious doctrine and practice."

Next, this Court has described the necessary elements for a claim of breach of fiduciary duty as follows:

> For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties. Such a relationship has been broadly defined by this Court as one in which "there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence . . . ,[and] 'it extends to any possible case in which a fiduciary relationship exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other.' "

Dalton v. Camp, 353 N.C. 647, 651, 548 S.E.2d 704, 707-08 (2001) (ellipses and brackets in original) (citations omitted) (emphasis added). I believe that a court could apply neutral principles defining fiduciary duty as the Court did in *Dalton* to consider whether defendant acted in good faith by looking at whether he followed the church's bylaws regarding spending and authorization for spending, and that such inquiry would not delve into ecclesiastical matters.

Finally, this Court has defined civil conspiracy as follows:

> A conspiracy has been defined as "an agreement between two or more individuals to do an unlawful act or to do a lawful act in an unlawful way." The common law action for civil conspiracy is for damages caused by acts committed pursuant to a conspiracy rather than for the conspiracy, *i.e.*, the agreement, itself. Thus to create civil liability for conspiracy there must have been an overt act committed by one or more of the conspirators pursuant to a common agreement and in furtherance of a common objective.

Dickens v. Puryear, 302 N.C. 437, 456, 276 S.E.2d 325, 337 (1981) (citations omitted). Plaintiffs assert that the object of the civil conspiracy here was to convert church money and assets. I agree with the majority that this claim is premised on the conversion claim; thus, as discussed above regarding the conversion claim, I believe this claim could also be decided without implicating the First Amendment.

In similar types of claims, courts in other jurisdictions have concluded that judicial consideration of whether a church followed its own internal procedures or governing documents does not violate the First Amendment. *Murphy v. Green*, 794 So. 2d 325, 330 (Ala. 2000) (holding that trial court properly concluded that defendants improp-

erly converted church funds in violation of church's "purpose" clause); *Abyssinia Missionary Baptist Church v. Nixon*, 340 So. 2d 746, 748 (Ala. 1976) (trial court erred in not allowing plaintiffs to present evidence as to "the proper established procedures of the Baptist Church on the issue of the validity of expulsion from membership"); *Ervin v. Lilydale Progressive Missionary Baptist Church*, 351 Ill.App.3d 41, 46, 813 N.E.2d 1073, 1078 (2004) ("The court can decide the issue by applying neutral legal principles to interpret the church's bylaws, handbook and covenant"); *Libhart v. Copeland*, 949 S.W.2d 783, 793 (Tex. App. 1997) (" '[T]he proceedings of the association are subject to judicial review where there is fraud, oppression, or bad faith, or property or civil rights are invaded, or the proceedings in question are violative of the laws of the [association], or the law of the land, or are illegal.' " (brackets in original) (citations omitted))

The majority concludes that plaintiffs have not adequately preserved any challenge to the authority of the church's Council for Ministry, or advanced any argument that the Council did not follow its own internal governance procedures, because plaintiffs did not make such allegations in their complaint. However, in his first motion to dismiss, under Rule 12(b)(6), defendant asserted that the bylaws of the church provide that "the business and affairs for the corporation shall be managed by its Council on [sic] Ministry . . . [and that] [t]he Council on [sic] Ministry, has, in fact, performed that responsibility." Furthermore, plaintiffs submitted affidavits from numerous members asserting that since defendant became pastor, there have been no congregational elections of the Council for Ministry, and that "[t]he individuals who serve as members of the Council of [sic] Ministry and other official positions of the church are appointed by Reverend Clifford Matthews, Jr. and serve at his pleasure." These affidavits also state that there has not been proper notice for church meetings, that no budget has been presented, and that votes are not being counted and minutes not being kept or published. The 4 November 2003 order of the trial court indicates that it considered the affidavits filed by plaintiffs in denying defendants' 12(b)(6) motions. Thus, although the complaint itself did not specifically allege that the church's internal governance body was not properly elected and was not following the bylaws, defendant himself raised these issues in his motion to dismiss, and plaintiffs submitted affidavits regarding these issues. *See Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 165 (1970) ("Under the 'notice theory of pleading' a statement of claim is adequate if it gives sufficient notice of the claim asserted 'to enable the adverse

party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata*, and to show the type of case brought' " (citation omitted)); *Taylor v. Gillespie*, 66 N.C. App. 302, 305, 311 S.E.2d 362, 364, *disc. rev. denied*, 310 N.C. 748, 315 S.E.2d 710 (1984) ("A formal amendment to the pleadings 'is needed only when evidence is objected to at trial as not within the scope of the pleadings.' . . . Because no objection was made to the introduction of the evidence, the pleadings were amended by implication." (citations omitted)) Moreover, as plaintiffs allege in their complaint that defendant misappropriated funds and acted without proper authorization in spending church funds, whether or not the internal governance of the church was followed is an essential issue in determining whether or not the use of the funds was "authorized." These matters are clearly before the Court.

As I believe the courts can resolve plaintiffs' claims by applying neutral principles of law and without impermissibly entangling themselves in ecclesiastical issues in violation of the First Amendment, I conclude that the Court of Appeals correctly dismissed the appeal as interlocutory. In so concluding, I also note that this Court has previously twice dismissed defendant's notice of appeal to this Court on the basis that this appeal lacks a substantial constitutional question. 360 N.C. 576, 635 S.E.2d 599 (2006); 360 N.C. 175, 626 S.E.2d 297 (2005). Furthermore, I reiterate that defendant seeks to have this case dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction. The majority argues that if this case is allowed to proceed, defendant's First Amendment rights will be irreparably injured because the court would become entangled in ecclesiastical matters from which it should have abstained. The majority cites no law and gives no concrete explanation for the proposition that allowing this case to proceed beyond a Rule 12 motion affects a substantial right which will be irreparably lost if the case proceeds. The majority asserts that the trial court "properly opened its door to this church property dispute," and that "once it became clear that no neutral principles of law existed to resolve plaintiffs' lawsuit, continued involvement by the trial court became unnecessary and unconstitutional." As discussed above, I do not believe that this case, as pleaded, involves any ecclesiastical or doctrinal disputes and, to the contrary, it appears that the property dispute at issue can be resolved using neutral principles of law. I believe, as did the Supreme Court of Alabama in *Abyssinia*, that "[p]laintiffs are entitled to present evidence as to the proper established procedures of the [church]." 340 So.2d at 748.

For the reasons discussed above, I respectfully dissent and would affirm the Court of Appeals.

Justice TIMMONS-GOODSON joins this dissenting opinion.

IN THE MATTER OF R.L.C.

No. 531A06

(Filed 4 May 2007)

1. Appeal and Error— appeal from Court of Appeals to Supreme Court—dissent—issues properly before the Court

In determining the issues properly before the Supreme Court in an appeal based upon a dissent, the Supreme Court considers whether the issue was raised at trial and in the Court of Appeals, whether the error was properly assigned in the record on appeal, and whether the issue was a point of dispute set out in the dissenting opinion of the Court of Appeals. Moreover, the issue must be stated in the notice of appeal and properly argued and presented in the appellant's new brief. The Supreme Court here declined to address arguments concerning equal protection or the facial validity of the North Carolina crime against nature statute.

2. Appeal and Error— appeal from Court of Appeals to Supreme Court—dissent—commingled issues

Arguments concerning statutory construction and the constitutionality of applying the crime against nature statute to the juveniles without an age requirement were so intertwined by the defendant and the Court of Appeals' dissent that both were heard, even though it was not clear that the constitutionality argument was a basis for the dissent. There is no prejudice to the State, which argued the issue below and addressed it in the alternative in its brief.

3. Juveniles; Sexual Offenses— delinquency—crime against nature—no age differential

A juvenile's actions violated the crime against nature statute, N.C.G.S. § 14-177, even though the two juveniles were only about two years apart in age. The crime against nature statute does not

contain an age differential and it is clear that the plain language of the statute encompasses this activity. Although other statutes dealing with sexual activity by minors have an age differential, an age requirement will not be judicially imposed on N.C.G.S. § 14-177. The other statutes prohibit similar acts, but do not apply, due to the lesser age difference in this case.

4. Juveniles; Sexual Offenses— crime against nature statute—not unconstitutional as applied to juveniles

Application of the crime against nature statute to a juvenile was not unconstitutional in this case. *Lawrence v. Texas*, 539 U.S. 558, noted that it did not involve minors, and found that a sodomy statute furthered no legitimate state interest which could justify its intrusion into personal life. Preventing sexual conduct between minors furthers a legitimate government interest and application of the crime against nature statute is a reasonable means of promoting that interest.

Justice MARTIN concurring in the result.

Justice EDMUNDS joins in this concurring opinion.

Justice TIMMONS-GOODSON dissenting.

Justice HUDSON joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 179 N.C. App. 311, 635 S.E.2d 1 (2006), finding no error in juvenile adjudication and disposition orders entered 15 February 2005 by Judge G. Wayne Abernathy in District Court, Alamance County. Heard in the Supreme Court 15 February 2007.

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

Staples S. Hughes, Appellate Defender, and Constance E. Widenhouse, Assistant Appellate Defender, for respondent-appellant.

Michael Kent Curtis, Shannon Gilreath, and Robert N. Hunter, Jr. for the North Carolina Academy of Trial Lawyers and American Civil Liberties Union of North Carolina, amici curiae.

Theresa A. Newman for Erwin Chemerinsky, amicus curiae.

BRADY, Justice.

In this case we determine whether a juvenile may be adjudicated delinquent based upon his violation of the crime against nature statute. We hold that he may and accordingly affirm the decision of the Court of Appeals.

FACTUAL BACKGROUND

The evidence presented at the juvenile trial tended to show that defendant R.L.C. and O.P.M were dating in the spring and summer of 2003. At the time the two were dating, R.L.C. was fourteen years old and O.P.M. was twelve years old. During this relationship, the two juveniles had sexual intercourse and engaged in two separate incidents of fellatio in or around July and August of 2003 in the back seat of O.P.M.'s mother's sport utility vehicle, which was parked in a bowling alley parking lot. O.P.M.'s parents were inside bowling at the time of the sexual activity.

Over a year after the juveniles' relationship ended, Alamance County Sheriff's Deputy Bobby Baldwin investigated a fight between O.P.M. and another student at her school. During this investigation, O.P.M. informed him of her sexual conduct with R.L.C. Deputy Baldwin questioned R.L.C., who admitted O.P.M. had performed fellatio on him "two [or] three times."

PROCEDURAL BACKGROUND

On 9 November 2004, three separate juvenile petitions were filed alleging that R.L.C. was delinquent for committing a "crime against nature with [O.P.M]" in violation of N.C.G.S. § 14-177. The case was heard at the 20 December 2004 and 6 January 2005 juvenile sessions of Alamance County District Court. After hearing evidence and arguments of counsel, the trial court dismissed one of the juvenile petitions due to insufficient evidence and entered a Juvenile Adjudication Order finding R.L.C. delinquent. The trial court entered a Disposition Order imposing a sentence of six months of unsupervised probation and also ordered that R.L.C. not have any contact with O.P.M. R.L.C. appealed both orders to the Court of Appeals which, in a divided opinion, found no error in the trial court's actions. Based upon the existence of a dissent in the Court of Appeals, R.L.C. appealed as of right to this Court.

THE RECORD ON APPEAL AND TRANSCRIPT

We note at the outset that R.L.C.'s full name appears in the record in at least three places, despite the requirements of Rule of Appellate Procedure 3. Additionally, it appears that the transcript was not submitted to the Court in a signed, sealed envelope as required by Rule of Appellate Procedure 9(c). Accordingly, we have issued an order *ex mero motu* sealing the transcript in accordance with Rule 9 and amending the record on appeal to complete the redaction of the information that identifies the juveniles.

ISSUES PRESENTED

[1] Broadly speaking, the issue before us is whether R.L.C. may be adjudicated delinquent based upon his violation of the crime against nature statute. In determining which specific issues are properly before the Court in an appeal based upon a dissent, we must consider whether the issue was raised at the trial court and the Court of Appeals, whether the error was properly assigned in the record on appeal, and whether the issue was a point of dispute set out in the dissenting opinion of the Court of Appeals. *See* N.C. R. App. P. 10(a) (stating that "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this [rule]"); N.C. R. App. P. 16(b) ("Where the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those questions which are [] specifically set out in the dissenting opinion as the basis for that dissent . . . ."); *State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 518-19 (1988) (stating that constitutional issues raised for the first time on appeal should not be reviewed on the merits). Moreover, to be properly presented, the issue must be stated in the notice of appeal and properly argued and presented in the appellant's new brief. *See* N.C. R. App. P. 16(b). Otherwise, unless an alternative form of review has been allowed by this Court, such as through a petition for discretionary review or a petition for writ of certiorari, only those issues presented in accordance with the rules referenced above are properly before the Court.

Turning now to the specific issues presented in this case, amici encourage us to invalidate R.L.C.'s adjudication based upon either equal protection concerns or because the North Carolina crime against nature statute is facially invalid after the decision in

Lawrence v. Texas, 539 U.S. 558 (2003). However, these issues were not argued at trial, argued at the Court of Appeals, specifically set out in the dissenting opinion in the Court of Appeals, presented in the notice of appeal, contained in the assignments of error, or argued in R.L.C.'s new brief before this Court. Accordingly, we decline to address these issues or express any opinion on their merits.

[2] The juvenile R.L.C. has interwoven his argument that normal rules of statutory construction would require us to vacate his adjudication with his argument that if those rules are not followed, the crime against nature statute is unconstitutional as applied. These arguments have been commingled to the point that they cannot easily be separated. The same could be said for the dissenting opinion in the Court of Appeals. The dissent's conclusion asserts: "In sum, I would hold that the General Assembly did not intend that the conduct of respondent and O.P.M. be subject to criminal regulation." *In re R.L.C.*, —— N.C. App. ——, ——, 635 S.E.2d 1, 8 (Elmore, J., dissenting). From that statement we would be inclined to rule only upon matters of statutory construction. However, in the preceding paragraph the dissent states: "[W]e disagree with the State that all conduct between minors may be regulated by the crime against nature statute, without regard to the circumstances. . . . [O]ur General Assembly has dictated that there is no legitimate state interest in the regulation of minors less than three years apart in age, absent the use of force." *Id.* at ——, 635 S.E.2d at 8 (Elmore, J., dissenting). This language, while speaking of legislative intent, is also fraught with substantive due process connotations such as "legitimate state interest."

Whether it would be unconstitutional to apply the crime against nature statute to R.L.C. without first imposing some sort of age separation requirement was raised at the trial level, was properly assigned as error, was argued before the Court of Appeals, and has been presented in new briefs before this Court. However, it is unclear from reading the dissenting opinion in the Court of Appeals that the issue is a "basis for that dissent." N.C. R. App. P. 16(b). Because the issue of statutory construction has been intertwined with the argument that a contrary reading of the statute as applied to R.L.C. violates due process, we will address both of these issues separately. We note that addressing the as-applied constitutional issue would not prejudice the State, as the State argued this issue in the lower tribunals and has addressed it on the merits in the State's New Brief as an alternative to its assertion that the issue is procedurally barred.

Accordingly, we determine that the issues properly before the Court are: (1) whether principles of statutory construction prohibit adjudicating R.L.C. as delinquent; and (2) whether failing to follow the dissent's statutory construction renders the crime against nature statute unconstitutional as applied to R.L.C.

ANALYSIS

I. STATUTORY CONSTRUCTION

[3] R.L.C. contends that this Court should reverse the Court of Appeals because "[c]ontrolling principles of statutory construction" require a reviewing court to analyze the crime against nature statute *in pari materia* with other statutes that criminalize similar activity such as the statutory rape, statutory sex offense, and indecent liberties between minors statutes. The crux of R.L.C.'s argument is because these statutes include some measure of age differential between the actors involved among their elements, the General Assembly must not have intended any minor be convicted of any consensual sexual crime unless some minimum age differential exists. Therefore, R.L.C.'s position is he may not be adjudicated delinquent based upon his violation of the crime against nature statute because he is not more than three years older than O.P.M.

This Court determines matters of statutory construction as follows:

> When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. *See Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment. *See Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs of Town of Nags Head*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) ("The best indicia of that intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish.").

Diaz v. Div. of Soc. Servs., 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006). Moreover, when confronted with a clear and unambiguous statute, courts "are without power to interpolate, or superimpose, provisions and limitations not contained therein." *In re Banks*, 295 N.C. 236, 239, 244 S.E.2d 386, 388-89 (1978).

The law from which North Carolina's crime against nature statute is derived is older than our nation, tracing its roots back to the reign of King Henry VIII in 1533. 1 *Laws of the State of North Carolina* 90 (Raleigh, Henry Potter 1821). The currently codified statute states: "If any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon." N.C.G.S. § 14-177 (2005). This Court has held that the crime against nature includes fellatio. *See State v. Harward*, 264 N.C. 746, 746, 142 S.E.2d 691, 692 (1965). The question we must now answer is whether acts of consensual fellatio between R.L.C. and O.P.M. fall within the activity proscribed by the statute. The statute itself contains no age element. Instead the statute's coverage is broad, namely "any person." It is clear that the plain language of the statute encapsulates the activity of R.L.C. and O.P.M. and makes such action criminal.

Nonetheless, R.L.C. argues that this Court must harmonize the crime against nature statute with other statutes that criminalize certain sexual conduct among minors such as N.C.G.S. §§ 14-27.2(a)(1), 14-27.4(a)(1), 14-27.7A, and 14-202.2. In pertinent part, section 14-27.2 provides:

> (a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:
>
> (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim . . . .

N.C.G.S. § 14-27.2 (2005). Section 14-27.4 provides in pertinent part:

> (a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
>
> (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim . . . .

Id. § 14-27.4 (2005). A "sexual act" is defined in part as "cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse." *Id.* § 14-27.1(4) (2005). Additionally, section 14-27.7A prohibits, *inter alia*, "vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is more than four but less than six years older than the person, except when the defendant is lawfully married to the person." N.C.G.S. § 14-27.7A(b) (2005). N.C.G.S. § 14-202.2(a) provides:

(a) A person who is under the age of 16 years is guilty of taking indecent liberties with children if the person either:

(1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex who is at least three years younger than the defendant for the purpose of arousing or gratifying sexual desire; or

(2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex who is at least three years younger than the defendant for the purpose of arousing or gratifying sexual desire.

Id. § 14-202.2(a) (2005). Because these criminal statutes have age differential requirements, R.L.C. argues the General Assembly intended that no sex act between minors less than three years apart in age be criminal.

When determining the meaning of a statute, the purpose of viewing the statute *in pari materia* with other statutes is to harmonize statutes of like subject matter and, if at all possible, give effect to each. *See Rhyne v. K-Mart Corp.*, 358 N.C. 160, 188, 594 S.E.2d 1, 20 (2004); *Lutz v. Gaston Cty. Bd. of Educ.*, 282 N.C. 208, 219, 192 S.E.2d 463, 471 (1972). R.L.C.'s proposed statutory construction would produce the opposite of the goal of *in pari materia* analysis. Rather than giving effect to both the crime against nature statute and the other statutes listed above, R.L.C. would have us give effect to statutes containing age differential requirements while disregarding a statute that does not, in essence rendering the crime against nature statute useless and redundant. *See Town of Pine Knoll Shores v. Evans*, 331 N.C. 361, 336, 416 S.E.2d 4, 7 (1992) (stating that this Court follows "the maxims of statutory construction that words of a statute are not to be deemed useless or redundant"). We will not judicially impose an age differential element into the crime against nature statute. The crime against nature statute prohibits *exactly* the actions committed by R.L.C. The other statutes mentioned prohibit similar acts, but due to the lesser age difference between R.L.C. and O.P.M., they do not apply to any of the acts committed by R.L.C. Therefore, the statutes that contain age differentials did not constrain R.L.C.'s sexual activity in this instance. However, the crime against nature statute did. Accordingly, we hold R.L.C.'s actions vio-

lated the crime against nature statute, which does not contain any age differential element.

II. R.L.C.'S "AS APPLIED" DUE PROCESS CHALLENGE

[4] R.L.C.'s second argument is that if the Court does not adopt his statutory construction of the crime against nature statute, then that statute is unconstitutional as applied to him. R.L.C. does not contend his asserted right is fundamental. Therefore, the question we must answer is whether there exists a legitimate government interest in penalizing the type of conduct involved in this case. *See Washington v. Glucksberg*, 521 U.S. 702, 728 (1997); *Rhyne*, 358 N.C. at 180-81, 594 S.E.2d at 15.

When determining whether a rational basis exists for application of a law, we must determine whether the law in question is rationally related to a legitimate government purpose. *See Glucksberg*, 521 U.S. at 728; *Rhyne*, 358 N.C. at 180-81, 594 S.E.2d at 15. That is, the government's objective must be legitimate, and the means used by the government must be reasonable to serve that legitimate goal. *See Glucksberg*, 521 U.S. at 728 n.21 ("Our inquiry, however, is limited to the question whether the State's prohibition is rationally related to legitimate state interests."). It is not necessary for courts to determine the actual goal or purpose of the government action at issue; instead, any conceivable legitimate purpose is sufficient. *See U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (stating that there is no requirement "that a legislative body articulate its reasons for enacting a statute").

One plausible legitimate purpose for penalizing the activity of R.L.C. and O.P.M. at issue is the government's interest in preventing sexual conduct between minors. R.L.C. argues against a broad application and enforcement of this governmental interest, asserting such actions would be improper under *Lawrence v. Texas*, 539 U.S. 558 (2003). *Lawrence* held unconstitutional a Texas sodomy statute used to convict two adult men engaged in private, consensual homosexual conduct. *Id.* at 578. In doing so, the Supreme Court of the United States found that the statute in question "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Id.* However, *Lawrence* is distinguishable from the instant case by the very language of *Lawrence*. The Court noted in *Lawrence* that "[t]he present case does not involve minors." *Id.* This juvenile case does involve minors.

Besides the goal of promoting proper notions of morality among our State's youth, the government's desire for a healthy young citizenry underscores the legitimacy of the government's interest in prohibiting the commission of crimes against nature by minors. Like vaginal intercourse, non-vaginal sexual activity carries with it the risk of sexually transmitted diseases. *See* Ctrs. for Disease Control & Prevention, *HIV/AIDS Update* (Dec. 2000). ("Numerous studies have demonstrated that oral sex can result in the transmission of HIV and other sexually transmitted diseases (STDs)." (emphasis omitted)). Moreover, many minors, especially those in their most formative years, are unable to make reasoned decisions based upon their limited life experience and education whether to engage in these sexual activities. Not only do these decisions physically affect and potentially endanger the minors, there may be psychological implications as well. We hold that preventing sexual conduct between minors furthers a legitimate government interest and application of the crime against nature law in cases such as the one *sub judice* is a reasonable means of promoting that legitimate interest.

CONCLUSION

Because the actions of R.L.C. fall within the ambit of the conduct prohibited by the crime against nature statute, and because the application of the crime against nature statute to R.L.C. in this case does not run afoul of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice MARTIN concurring in the result.

I concur in the majority's conclusion that the Court of Appeals correctly affirmed the trial court's adjudication of delinquency. I write separately, however, to emphasize that the statutory question, as framed by the majority and dissenting opinions, is resolved by application of the basic principle that we do not apply canons of statutory construction, including the doctrine of *in pari materia*, when the plain meaning of the statute is evident on its face.

It is axiomatic that " '[w]here 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.' " *In re Estate of Lunsford*, 359 N.C. 382, 391-92, 610 S.E.2d 366, 372 (2005)

(alteration in original) (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)); *see also Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006); *James v. Bartlett*, 359 N.C. 260, 267, 607 S.E.2d 638, 642 (2005); *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001); *Spruill v. Lake Phelps Vol. Fire Dep't, Inc.*, 351 N.C. 318, 320, 523 S.E.2d 672, 674 (2000); *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 811, 517 S.E.2d 874, 878 (1999); *State v. Bates*, 348 N.C. 29, 34-35, 497 S.E.2d 276, 279 (1998).

When a statute is plain and unambiguous on its face, the courts "are without power to interpolate, or superimpose, provisions and limitations not contained" in the statute itself. *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974) (internal quotation marks omitted). Moreover, "[i]n such event, it is our duty to apply the statute so as to carry out the intent of the Legislature, irrespective of any opinion we may have as to its wisdom or its injustice" to the parties involved, "unless the statute exceeds the power of the Legislature under the Constitution." *Peele v. Finch*, 284 N.C. 375, 382, 200 S.E.2d 635, 640 (1973). *See also Philip Morris USA, Inc. v. Tolson*, 176 N.C. App. 509, 516, 626 S.E.2d 853, 859 (2006) (holding that "the rules of statutory construction, including the rule of *in pari materia*, do not apply in determining the meaning" of plain and unambiguous provisions), *appeal dismissed and disc. review denied*, —— N.C. ——, —— S.E.2d ——, 2007 N.C. LEXIS 304, 2007 WL 1063313 (Mar. 8, 2007) (No. 191P06); *accord People v. Honig*, 48 Cal. App. 4th 289, 327-28, 55 Cal. Rptr. 2d 555, 576-77 (Ct. App. 1996); *Ind. Alcoholic Beverage Comm'n v. Baker*, 153 Ind. App. 118, 127, 286 N.E.2d 174, 179-80 (Ct. App. 1972); *N. Baton Rouge Publ'g Co. v. Rester*, 218 La. 414, 418, 49 So. 2d 744, 746 (1950); *Lloyd v. Dir. of Revenue*, 851 S.W.2d 519, 521 (Mo. 1993) (en banc); *State v. Krutz*, 28 Ohio St. 3d 36, 37-38, 502 N.E.2d 210, 211 (1986), *cert. denied*, 481 U.S. 1028 (1987); *McFarland Estate*, 377 Pa. 290, 296-97, 105 A.2d 92, 95-96 (1954).

Application of this cardinal principle to N.C.G.S. § 14-177, which unambiguously classifies "any person" who "commit[s] the crime against nature, with mankind or beast" as a Class I felon, requires us to apply the statute as written. As the juvenile himself concedes in his brief before this Court, "[t]he soundness of this public policy is the exclusive province of the General Assembly." Accordingly, I concur in the result of the majority opinion.

Justice EDMUNDS joins in this separate opinion.

Justice TIMMONS-GOODSON dissenting.

Because I believe that the North Carolina General Assembly did not intend that the conduct engaged in by R.L.C. and O.P.M. be subject to criminal prosecution, I respectfully dissent.

The question before this Court is not whether we are offended or concerned by the notion that a twelve-year-old and a fourteen-year-old have engaged in sexual misconduct. Sexual activity by young people with "limited life experience and education" *is* troubling. That observation, however, does not dictate the outcome of this case.

The majority and concurring opinions assert the legal axiom that when a statute's plain meaning is evident on its face no further interpretation is necessary. Just as constant in our law is the axiom that " 'where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.' " *Mazda Motors of Am., Inc. v. Sw. Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979) (quoting *State v. Barksdale*, 181 N.C. 621, 625, 107 S.E. 505, 507 (1921)).

"The object of all interpretation is to determine the intent of the lawmaking body." *State v. Humphries*, 210 N.C. 406, 410, 186 S.E. 473, 476 (1936). There is often a thin line between interpreting the laws as intended by the legislature and "legislating from the bench." Even this Court's relatively close physical proximity to the legislative halls does not make this role any easier. That said, North Carolina courts have developed rules of construction to serve as guideposts for statutory interpretation. One such "settled rule of construction . . . requires that all statutes relating to the same subject matter shall be construed *in pari materia* and harmonized if this end can be attained by any fair and reasonable interpretation." *Faulkner v. New Bern-Craven Cty. Bd. of Educ.*, 311 N.C. 42, 58, 316 S.E.2d 281, 291 (1984) (citations omitted).

I agree with the majority that a literal interpretation of the crime against nature statute requires that R.L.C.'s delinquency adjudication be affirmed. My disagreement with the majority stems from an understanding that rules of statutory construction articulated by this Court demand a different result. In the instant case, I believe that affirming R.L.C.'s delinquency adjudication results in a contravention of the General Assembly's intent.

The North Carolina General Assembly has made explicit its intent regarding the criminalization of consensual sexual conduct between minors in several statutes, each of which includes an age difference of at least three years. *See* N.C.G.S. §§ 14-27.2(a)(1); -27.4(a)(1); -27.7A; -202.2 (2005). More specifically, the legislature has decided that it is not a crime for minors less than three years apart in age to engage in consensual sexual intercourse, indecent liberties, or lewd or lascivious acts. Because R.L.C. and O.P.M. are two years and ten months apart in age, their conduct was not criminal pursuant to any of these statutes.

The application of the crime against nature statute to the conduct of R.L.C. and O.P.M. clearly conflicts with the intent underlying the more specific statutes governing consensual sexual conduct between minors. Construing the statutes *in pari materia* so that the age differences established in the statutes governing consensual sexual conduct between minors also apply to the crime against nature statute results in a fair and reasonable outcome that is in line with the intent of the North Carolina General Assembly.

Because I believe that the North Carolina General Assembly did not intend to criminalize the conduct engaged in by R.L.C. and O.P.M., I would reverse the Court of Appeals opinion. Therefore, I respectfully dissent.

Justice HUDSON joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. DEVIN M. LASITER

No. 222PA06

(Filed 4 May 2007)

1. Jury— denial of motion to remove juror for cause— personal and social ties to law enforcement officers and courthouse personnel

The trial court did not abuse its discretion in a first-degree murder and attempted robbery with a dangerous weapon case by refusing to remove for cause a prospective juror who had several personal and social ties to law enforcement officers and other courthouse personnel, because: (1) while these officers provided

evidence necessary for a complete presentation of the State's case, defendant's culpability was established by civilian witnesses, including a cooperating codefendant who testified on behalf of the State; (2) the credibility of the police officers known to the prospective juror was not at issue and neither received more than a cursory cross-examination by defense counsel; and (3) the prospective juror stated repeatedly that she could be impartial, and the trial judge both witnessed and participated in the voir dire concluding that she could fulfill her duties as a juror.

2. Sentencing— attempted robbery—*Blakely* error

The Supreme Court exercised its discretionary powers under N.C. R. App. P. 2 and determined that the trial court's *Blakely* error of sentencing defendant in the aggravated range for his attempted robbery conviction, based on the trial court's finding of the statutory aggravating factor that defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy, was not harmless beyond a reasonable doubt, because evidence was presented that only one other person joined with defendant in committing the offense. The case is remanded to the Court of Appeals for further remand to the trial court so that defendant may receive a new sentencing hearing for the attempted robbery conviction, with instructions to submit any aggravating factors to a jury.

Justice BRADY concurring.

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

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 176 N.C. App. 768, 627 S.E.2d 352 (2006), finding no error in defendant's convictions for first-degree murder and attempted robbery with a dangerous weapon which resulted in judgments entered 15 July 2004 by Judge W. Russell Duke, Jr. in Superior Court, Onslow County, but remanding for a new sentencing hearing on the attempted robbery charge. Heard in the Supreme Court 21 November 2006.

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

Staples S. Hughes, *Appellate Defender*, *by Charlesena Elliott Walker*, *Assistant Appellate Defender*, *for defendant-appellant.*

EDMUNDS, Justice.

[1] Defendant contends the trial court abused its discretion by refusing to remove for cause a prospective juror who had several personal and social ties to law enforcement officers and other courthouse personnel. Because we hold the trial court did not abuse its discretion, we affirm the Court of Appeals.

Defendant was tried non-capitally for first-degree murder and attempted robbery with a dangerous weapon. Summarily stated, the evidence tended to show that defendant, assisted by codefendant Brandon Maynes, beat the victim to death with a baseball bat. A more detailed recitation of the evidence may be found in the Court of Appeals opinion. *See State v. Lasiter*, 176 N.C. App. 768, 627 S.E.2d 352, 2006 N.C. App. LEXIS 675 (Mar. 21, 2006) (No. COA05-777) (unpublished). During juror *voir dire*, defendant exercised all his peremptory challenges before prospective juror Huffman was called. Therefore, when defendant's challenge of Huffman for cause was denied, she sat as a juror. Defendant was found guilty of both offenses and, because the case was not tried capitally, was sentenced to life imprisonment without parole for the murder conviction. In addition, he was sentenced to a consecutive aggravated term of 80 to 105 months for the attempted robbery conviction. Defendant appealed to the Court of Appeals, assigning as error, *inter alia*, the trial court's denial of his challenge for cause to juror Huffman. The Court of Appeals unanimously held the trial court did not abuse its discretion in denying the challenge for cause. *Lasiter*, 2006 N.C. App. LEXIS 675, at *8-9. However, the court remanded the case for a new sentencing hearing because, in imposing sentence for the conviction of attempted armed robbery, the trial court found an aggravating factor, in violation of *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). *Id.* at *12. We granted defendant's petition for discretionary review to consider whether the trial court abused its discretion in denying defendant's challenge for cause.

A prospective juror may be challenged for cause on a number of grounds, including that "the juror . . . [f]or any other cause is unable to render a fair and impartial verdict." N.C.G.S. § 15A-1212(9) (2005). We review a trial court's ruling on a challenge for cause for abuse of discretion. *State v. Kennedy*, 320 N.C. 20, 28, 357 S.E.2d 359, 364 (1987) (citing *State v. Watson*, 281 N.C. 221, 188 S.E.2d 289, *cert. denied*, 409 U.S. 1043, 34 L. Ed. 2d 493 (1972)). A trial court abuses its discretion if its determination is "manifestly unsupported by reason" and is "so arbitrary that it could not have been the result of a rea-

soned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). In our review, we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record. *See Wainwright v. Witt*, 469 U.S. 412, 434, 83 L. Ed. 2d 841, 858 (1985).

Our review is deferential because "[t]he trial court holds a distinct advantage over appellate courts in determining whether to allow a challenge for cause." *State v. Reed*, 355 N.C. 150, 155, 558 S.E.2d 167, 171 (2002).

> " 'In doubtful cases the exercise of [the trial judge's] power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.' "

Id. (quoting *Wainwright*, 469 U.S. at 434, 83 L. Ed. 2d at 858) (citations omitted).

While responding to the trial court's preliminary questions during *voir dire*, Huffman notified the trial court that she recognized one of the trial prosecutors and the bailiff. Upon further inquiry by the court, she explained that her husband worked as a sergeant at the jail. When the trial court asked if anything about her husband's employment would affect her ability to be fair and impartial, the trial transcript indicates she hesitated before answering, "I don't believe it would." After the trial court responded by pointing out that the question called for a "yes" or "no" answer, she said, "No. No, it wouldn't." The trial court repeated its question, and Huffman again said, "No" and nodded affirmatively when the trial court asked if she was sure.

An assistant district attorney then questioned Huffman, who reaffirmed that, through her husband's work as a bailiff, she knew the other assistant district attorney trying the case. Although her testimony is ambiguous, Huffman reported that she had eaten lunch in the lawyer's lounge with either the assistant district attorney or her husband. She recognized one of the names on the list of potential prosecution witnesses and added that one of the other names "sound[ed] familiar." She stated that the elected sheriff, who was not involved in the trial, was her husband's uncle. When asked by the assistant district attorney if the attendance of any of these people at the trial would impair her ability to be fair and impartial, she said, "No."

Huffman was next questioned by defense counsel, whose questions focused on her relationships with law enforcement personnel.

Q. Do you honestly feel that you can sit there, even knowing the way you smiled at [the assistant district attorney] like you recognize him, you dealt with him for lunch or whatever you guys did, do you really feel with all those things in your background or mind you can be absolutely fair to the defendant in this case?

A. Yes.

Q. Why is that?

A. It's my duty to be fair.

Q. You don't think your relationship with [the assistant district attorney] will maybe come into your head over things your husband have told you—pardon me?

A. I don't have a relationship with him. I just know of him.

. . . .

Q. Of course, I'm not trying to give you a hard time. Would you want you as a juror if you were sitting over here?

A. Probably not.

[DISTRICT ATTORNEY]: Objection.

THE COURT: Sustained.

Q. Probably not?

THE COURT: That's an improper question. I can't allow you to ask that question.

A. I mean, I'll try to be as fair as I could.

Q. And that's all we're talking about. Is your ability to be fair somehow affected?

A. Yes. Oh — by my husband, no, no.

Defendant then unsuccessfully challenged Huffman for cause.

Defendant argues that Huffman's connection to law enforcement is substantially similar to that of the prospective juror in *State v. Lee*, 292 N.C. 617, 234 S.E.2d 574 (1977). In that case, which arose and was tried in the city of Wilson, the trial court denied the defendant's chal-

lenge for cause of a prospective juror who was married to a Wilson police officer, knew most of the officers in the Wilson Police Department, was acquainted with the principal investigating officer, and was a member of the Wilson Police Auxiliary. *Id.* at 619-20, 234 S.E.2d at 576. We determined that the juror was "subject to strong influences which ran counter to defendant's right to a trial by an impartial jury" and held the trial court abused its discretion when it denied the challenge for cause. *Id.* at 625, 234 S.E.2d at 579. However, *Lee* is distinguishable from the instant case.

First, our analysis in that case included consideration of the role played during the investigation and at trial by the officers whom the juror knew. *Id.* In *Lee*, Wilson Police Officer Moore, "with whom the juror was acquainted, was an important State's witness. He was not only the State's chief investigating officer, but it was by his corroborative testimony that the State sought to buttress the credibility of its only eyewitness." *Id.* By contrast, in the case at bar, the police officer Huffman knew testified only that he had discovered the victim's body and secured the scene and then described for the jury the location and condition of the body. The officer whose name sounded familiar to Huffman described at trial how he located the victim's residence. While these officers provided evidence necessary for a complete presentation of the State's case, defendant's culpability was established by civilian witnesses, including a cooperating codefendant who testified on behalf of the State. The credibility of the police officers known to Huffman was not at issue and neither received more than a cursory cross-examination by defense counsel. Thus, unlike *Lee*, in which the credibility of the testifying officer was critical, the police testimony here was a formality. "Ordinarily, if the testimony of the witness [with whom the prospective juror has a relationship] will be directed to proof of some formal matter or to some minor facet of the case, there would be no substantial basis for challenge for cause." *State v. Allred*, 275 N.C. 554, 562, 169 S.E.2d 833, 837 (1969).

Second, when questioned, the juror in *Lee* advised defense counsel that she was not sure she could give the same weight to the testimony of a stranger as she would to the testimony of Wilson police witnesses and that she would have a tendency to believe the officers. *Lee*, 292 N.C. at 621, 625, 234 S.E.2d at 576-77, 579. She never forthrightly assured defense counsel that she could be impartial. *Id.* In contrast, Huffman stated repeatedly that she could be impartial.

We acknowledge that Huffman's *voir dire* responses were not entirely consistent and that, depending on the form of the question, some of her answers were not absolute. However, a transcript is an imperfect tool for conceptualizing the events of a trial. We give deference to a trial court's exercise of discretion in allowing or denying challenges for cause because "[t]he trial judge is in a better position to weigh the significance of the pertinent factors than is an appellate tribunal. He has the advantage of seeing and hearing the witnesses, so that he cannot only evaluate their credibility but also can gain a 'feel' of the case which a cold record denies to a reviewing court." *State v. Little*, 270 N.C. 234, 240, 154 S.E.2d 61, 66 (1967); *see State v. Rogers*, 355 N.C. 420, 430, 562 S.E.2d 859, 867 (2002) ("A judge who observes the prospective juror's demeanor as he or she responds to questions and efforts at rehabilitation is best able to determine whether the juror should be excused for cause."); *State v. Jaynes*, 353 N.C. 534, 546, 549 S.E.2d 179, 190 (2001) (" 'The trial court has the opportunity to see and hear a juror and has the discretion, based on its observations and sound judgment[,] to determine whether a juror can be fair and impartial.' " (quoting *State v. Dickens*, 346 N.C. 26, 42, 484 S.E.2d 553, 561 (1997))), *cert. denied*, 535 U.S. 934, 152 L. Ed. 2d 220 (2002).

A trial judge has the difficult but vital responsibility of discerning which prospective jurors can be impartial among a venire that may include some who are eager to elude jury service and others who hope to be selected so as to impose their will upon their peers. The court's navigation between Scylla and Charybdis requires the informed exercise of judicial discretion. Here, whether questioned by the court or by counsel, Huffman always returned to the position that she could be fair. The trial judge both witnessed and participated in the *voir dire* and concluded that Huffman could fulfill her duties as a juror. Nothing in the transcript indicates this decision was arbitrary or capricious. Accordingly, the trial court did not abuse its discretion in ruling that Huffman's familiarity with and connections to police officers and attorneys were not a basis to support defendant's challenge for cause.

[2] The Court of Appeals remanded this case for resentencing on the attempted robbery conviction based on the trial court's *Blakely* error in "making a finding in aggravation that had not been stipulated to by defendant or found beyond a reasonable doubt by the jury." *Lasiter*, 2006 N.C. App. LEXIS 675, at *12. The court did so in reliance on our precedent in *State v. Allen*, in which we held that *Blakely* error is structural error requiring a new trial. *Id.* (citing

State v. Allen, 359 N.C. 425, 615 S.E.2d 256 (2005), *withdrawn*, 360 N.C. 569, 635 S.E.2d 899 (2006)). However, we have since reconsidered our *Allen* holding in light of the United States Supreme Court's decision in *Washington v. Recuenco*, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), which states that *Blakely* error is subject to federal harmless error analysis. *See State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 75 U.S.L.W. 3609 (2007).

Accordingly, in the interests of judicial economy, while this case is before us we exercise our authority under Rule 2 of the North Carolina Rules of Appellate Procedure to consider whether the trial court's *Blakely* error was harmless beyond a reasonable doubt. N.C. R. App. P. 2; *see*, *e.g.*, *Wall v. Stout*, 310 N.C. 184, 202-03, 311 S.E.2d 571, 582 (1984). "In conducting harmless error review, we must determine from the record whether the evidence against the defendant was so 'overwhelming' and 'uncontroverted' that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt." *Blackwell*, 361 N.C. at 49, 638 S.E.2d at 458 (citations omitted).

Defendant received an aggravated sentence for his attempted robbery conviction based on the trial court's finding of the statutory aggravating factor that defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy, pursuant to N.C.G.S. § 15A-1340.16(d)(2), and that this aggravator outweighed any mitigators. Our review of the record and transcripts reveals that at trial, evidence was presented that only one other person joined with defendant in committing the offense. Codefendant Maynes testified that he was present when defendant murdered the victim, and he pleaded guilty to aiding and abetting defendant by covering up the robbery and murder. Although Maynes and defendant afterward told a friend that they had killed someone, the friend did not participate in the planning, execution, or concealment of the crime and was not charged with any related offense. In addition, there was no testimony at trial that the friend was told about the robbery, the offense to which the aggravator in question relates. We find neither "overwhelming" nor "uncontroverted" evidence that would lead a reasonable jury to conclude defendant joined with more than one other person in committing the robbery. *See State v. Hurt*, 359 N.C. 840, 842, 616 S.E.2d 910, 911 (2005) (explaining that joining with *more than* one other person to commit an offense without being charged with conspiracy is a significantly different aggra-

vating factor than joining with only one other person), *vacated in part on other grounds*, 361 N.C. 325, 643 S.E.2d 915 (2007). Accordingly, the *Blakely* error in this case was not harmless beyond a reasonable doubt. We remand this case to the Court of Appeals for further remand to the trial court so that defendant may receive a new sentencing hearing for the attempted robbery conviction, with instructions to submit any aggravating factors to a jury.

AFFIRMED AND REMANDED.

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

Justice BRADY concurring.

While I concur in the Court's opinion, I write separately to emphasize how important it is for our trial courts to exercise the greatest of care in protecting a defendant's fundamental right to be tried by an impartial jury. Within the outer limits of a trial court's discretion there are prudential lines which serve as cautionary barriers to alert a trial court of a potential abuse of discretion. These lines were not heeded by the trial court in this case.

So fundamental to the jurisprudence of the Anglosphere is the right to a trial by jury that it is set forth in the Magna Carta, the Declaration of Independence, Article III of the United States Constitution, the Sixth Amendment to the United States Constitution, and in the Constitution of North Carolina. *See*, *e.g.*, U.S. Const. amend. VI ("In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."). Undoubtedly, trial courts represent the first line in the defense of this right in our adversarial system and are therefore granted broad discretion in ruling upon a juror's ability to remain fair and impartial to both the State and defendant. *See State v. Lee*, 292 N.C. 617, 621, 234 S.E.2d 574, 577 (1977) ("Unquestionably the trial judge is vested with broad discretionary powers in determining the competency of jurors and that discretion will not ordinarily be disturbed on appeal." (citations omitted)); *State v. Watson*, 281 N.C. 221, 227, 188 S.E.2d 289, 293 (1972) ("The question of the competency of jurors is a matter within the trial judge's discretion, and his rulings thereon are not subject to review on appeal unless accompanied by some imputed error of law." (citations omitted)), *cert. denied*, 409 U.S. 1043 (1972).

It is troubling, however, that the trial court in this case traveled perilously close to the outer limits of its discretion when prudence would have suggested a more conservative course of action. My review of the record indicates that the challenged juror had been married for twenty years to a sergeant with the Onslow County Sheriff's Office, was the elected sheriff's niece by marriage, was well acquainted with one of the assistant district attorneys prosecuting the case because she would have lunch in the lawyer's lounge with her husband and him, personally knew the bailiff and one of the law enforcement officers testifying for the State, and likely knew other witnesses for the State and numerous other members of the Onslow County Sheriff's Office. Additionally, the prospective juror would generally allow her husband to talk about his work at home in order "to release pressure on him." Moreover, as the Court's opinion acknowledges, the juror's responses during *voir dire* appear from the record to have been less than steadfast, such as when she stated "I'll try to be as fair as I could."

The record also reflects that the trial court stated no express reason to deny defendant's motion to dismiss the juror for cause, nor did the trial court state any reason for denying defendant's motion seeking an additional peremptory challenge. While the trial court's failure to articulate its analysis, in itself, does not reflect an abuse of discretion, such a statement would have provided added assurance that these rulings rested upon the thoughtful consideration of the trial court and were not made hastily and without reason.

Of course, prudence would have dictated that the trial court allow defendant's motion to strike the juror for cause, since a failure to do so has needlessly placed the jury verdict in dispute on appeal. From our understanding about basic human nature ever since the fall of mankind in *Genesis* 3, we know that an individual who more closely identifies with one side of a case will likely have difficulty rendering a fair and impartial verdict. Our trial courts should not pit an individual against fallen human nature, even when the individual is committed to the duty of impartiality.

Thus, though it did not go so far as to abuse its discretion, the trial court unnecessarily caused this issue to come before the Court on appeal by failing to follow the dictates of prudence. Accordingly, while I concur fully in the result of the majority opinion, I would urge trial courts in the future to act out of an abundance of caution to protect a right so critical to our system of justice. The people should

expect nothing less from the courts of this state than the vigilant defense of an accused's right to be tried by an impartial jury.

STATE OF NORTH CAROLINA v. ELGIN ORLANDAS HART

No. 446A06

(Filed 4 May 2007)

1. Appeal and Error— appellate rules violation—dismissal not required

Any interpretation of prior cases to require dismissal in every case in which there is a violation of the Appellate Rules is disavowed. Language that an appeal is "subject to" dismissal for rules violations means that dismissal is a possible sanction, not that an appeal shall be dismissed for any violation.

2. Appeal and Error— assignment of error—different legal basis in argument—overbroad language

An assignment of error that a police officer's testimony constituted an opinion on an ultimate issue did not provide a basis for a different argument, that the testimony violated Rule 701 (personal knowledge of the witness). The remainder of the assignment of error (that the testimony otherwise violated the Rules of Evidence and denied defendant a fair trial) was too broad and thus ineffectual.

3. Appeal and Error— Rule 2—may be applied by Court of Appeals—caution required

Viar v. N.C. Dep't of Transp., 359 N.C. 400, does not mean that the Court of Appeals cannot apply Appellate Rule 2 to suspend or vary the requirements or provisions of the rules to prevent manifest injustice or to expedite a decision. However, Rule 2 must be applied cautiously; fundamental fairness and the predictable operation of the courts for which the Rules of Appellate Procedure were designed depend upon the consistent exercise of that authority.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 179 N.C. App. ——, 633 S.E.2d 102 (2006), finding no error in a judgment entered on 13 May 2005 by

Judge D. Jack Hooks, Jr. in Superior Court, Lenoir County. Heard in the Supreme Court 14 February 2007.

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

Staples S. Hughes, Appellate Defender, by Barbara S. Blackman, Assistant Appellate Defender, for defendant-appellant.

HUDSON, Justice.

In September 2003 defendant was indicted in Lenoir County for possession with intent to sell and deliver cocaine, keeping and maintaining a dwelling for the use of cocaine, and possession of marijuana, and for having attained habitual felon status. On 13 May 2005, a jury convicted defendant of the three drug offenses, after which defendant pleaded guilty to being an habitual felon. The trial court sentenced defendant to an active term within the presumptive range. Defendant appealed to the Court of Appeals. In a divided opinion issued on 1 August 2006, *State v. Hart*, 179 N.C. App. 30, 633 S.E.2d 102 (2006), the Court of Appeals found no error at trial. Defendant filed his appeal of right based on the dissenting opinion. We affirm in part, reverse in part, and remand to the Court of Appeals.

On appeal, defendant made fourteen assignments of error, five of which he argued in his brief to the Court of Appeals. The dissenting opinion only addressed the majority's decision to dismiss one of defendant's arguments for violations of the Rules of Appellate Procedure. The dissent presents the only issue before this Court.

At trial, a police officer testified over defense counsel's objection that a razor blade taped to cardboard and seized near defendant was a "crack pipe." Although defendant assigned error to this testimony, the majority opinion concluded that the pertinent assignment of error violated Rule 10(c)(1) of the North Carolina Rules of Appellate Procedure and thus was "beyond the scope of appellate review"; as a result, the court did not address the merits of this argument. The dissent maintained that the assignment of error at issue, although perhaps "technically deficient," essentially complied with Rule 10(c)(1) and that even if the assignment were technically deficient, the court was not required to dismiss it, but could exercise its discretion under Rule 2 to review the assignment on the merits.

[1] Although we will address the Court of Appeals' Rule 10(c)(1) analysis below, we must first address whether the Court of Appeals

may review an appeal if there are any violations of the Rules of Appellate Procedure. We note at the outset that the State did not mention any appellate rules violation in the Court of Appeals, but that the court raised that issue on its own, which it was not required to do.

It is well settled that the Rules of Appellate Procedure "are mandatory and not directory." *Reep v. Beck*, 360 N.C. 34, 38, 619 S.E.2d 497, 500 (2005) (quoting *State v. Fennell*, 307 N.C. 258, 263, 297 S.E.2d 393, 396 (1982) (citation and internal quotation marks omitted)); *Pruitt v. Wood*, 199 N.C. 788, 789, 156 S.E. 126, 127 (1930) (citing *Calvert v. Carstarphen*, 133 N.C. 59, 60, 133 N.C. 25, 27, 45 S.E. 353, 354 (1903)). Thus, compliance with the Rules is required. *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 401, 610 S.E.2d 360, 360 (2005) (per curiam); *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999). However, every violation of the rules does not require dismissal of the appeal or the issue, although some other sanction may be appropriate, pursuant to Rule 25(b) or Rule 34 of the Rules of Appellate Procedure.

In order to correct the misapplication of our *Viar* decision, a review of the pertinent opinions is essential. In *Steingress*, this Court stated that violation of the mandatory rules "will subject an appeal to dismissal." 350 N.C. at 65, 511 S.E.2d at 299. Thereafter, in *Viar*, we held that the Court of Appeals acted improperly when it reviewed issues not raised or argued by the appellant. 359 N.C. at 402, 610 S.E.2d at 361. Deciding the case on the basis of issues appellant did not present, the Court of Appeals majority in *Viar* reversed the decision of the Industrial Commission denying a tort claim, holding that certain findings and conclusions were not supported by the evidence. 162 N.C. App. 362, 590 S.E.2d 909 (2004). The majority justified its action by saying that "[the Court of Appeals] may suspend or vary the requirements of the rules to 'prevent manifest injustice,' N.C. R. App. P. 2, or 'as a matter of appellate grace.' *Enterprises, Inc. v. Equipment Co.*, 300 N.C. 286, 288, 266 S.E.2d 812, 814 (1980)." *Id.* at 375, 590 S.E.2d at 919. The dissent argued that the court should have dismissed the appeal because the appellant's arguments bore no relationship to its assignments of error. *Id.* at 378-79, 590 S.E.2d at 921-22 (Tyson, J., dissenting).

This Court reversed per curiam, explaining as follows:

> The majority opinion in the Court of Appeals, recognizing the flawed content of plaintiff's appeal, applied Rule 2 of the Rules of Appellate Procedure to suspend the Rules. The majority opinion

> then addressed the issue, not raised or argued by plaintiff, which was the basis of the Industrial Commission's decision, namely, the reasonableness of defendant's decision to delay installation of the median barriers. The Court of Appeals majority asserted that plaintiff's Rules violations did not impede comprehension of the issues on appeal or frustrate the appellate process. It is not the role of the appellate courts, however, to create an appeal for an appellant.

359 N.C. at 402, 610 S.E.2d at 361 (citation omitted). This Court then dismissed the appeal for the reasons stated in its per curiam opinion, as well as for the reasons stated in the Court of Appeals dissent which addressed the Rules violations. *Id.*

Subsequently, in *State v. Buchanan*, 170 N.C. App. 692, 613 S.E.2d 356 (2005), the Court of Appeals misinterpreted and improperly extended *Viar* when it opened with the following:

> Recently, in *Viar v. N.C. Dep't of Transp.*, our Supreme Court admonished this Court to avoid applying Rule 2 of the Rules of Appellate Procedure even in instances where a party's "Rules violations did not impede comprehension of the issues on appeal or frustrate the appellate process." . . . Because we are constrained to follow the dictates of *Viar*, we must hold that Defendant's failure to comply with Rule 10(b) by failing to renew his Motion to Dismiss at the close of all evidence mandates a dismissal of this appeal.

170 N.C. App. at 693, 613 S.E.2d at 356 (citation omitted). Later in the opinion, the court said:

> In *Viar*, our Supreme Court stated that this Court may not review an appeal that violates the Rules of Appellate Procedure even though such violations neither impede our comprehension of the issues nor frustrate the appellate process.

Id. at 695, 613 S.E.2d at 357 (citation omitted). These excerpts reveal that the Court of Appeals in *Buchanan* misapplied the holding of this Court's *Viar* decision. In *Viar*, we neither admonished the Court of Appeals to avoid applying Rule 2, nor did we state that the court may not review an appeal that violates the Rules, even when rules violations "d[o] not impede comprehension of the issues on appeal or frustrate the appellate process." 359 N.C. at 402, 610 S.E.2d at 361. We simply noted that the Court of Appeals majority had justified its application of Rule 2 in *Viar* by using that phrase. Rather

than approving this justification for applying Rule 2 to that scenario, we rejected it and dismissed the *Viar* appeal. In so doing, we held that the Court of Appeals improperly applied Rule 2 when it created an appeal for the appellant and addressed issues not raised or argued.

We also addressed appellate rules violations in *Munn v. N.C. State Univ.*, 360 N.C. 353, 626 S.E.2d 270 (2006) (per curiam), *rev'g* 173 N.C. App. 144, 617 S.E.2d 335 (2005). In *Munn*, the plaintiff raised two assignments of error. One, not pertinent here, related to the award of damages. The other stated: "Denial of Plaintiff's Motion for Judgment Notwithstanding the Verdict on the ground that the jury disregarded the Court's instructions on contract damages." 173 N.C. App. at at 151, 617 S.E.2d at 339 (Jackson, J., dissenting). Because the assignments of error failed to refer to the record or transcript and because the plaintiff did not object to the jury charge or assign it as error, we adopted the dissent's position that the majority improperly considered the merits of the issue on appeal. 360 N.C. at 354, 626 S.E.2d at 271. Although the dissent in *Munn* correctly analyzed the plaintiff's failures to comply with Rule 10, by adopting that dissent we did not intend to adopt the *Buchanan* analysis cited therein.

To clarify, when this Court said an appeal is "subject to" dismissal for rules violations, it did not mean that an appeal *shall be* dismissed for any violation. *See Black's Law Dictionary* 1466 (8th ed. 2004) (defining "subject to liability" as "susceptible to a lawsuit"). Rather, "subject to" means that dismissal is one possible sanction. By quoting this language from *Steingress* in *Viar*, we did not intend thereby to imply that all rules violations mandate automatic dismissal. To the extent that the Court of Appeals has interpreted *Steingress*, *Viar*, and *Munn* to require dismissal in every case in which there is a violation of the Rules of Appellate Procedure, we expressly disavow this interpretation.

[2] Here, after conducting what it believed to be a mandatory review of defendant's compliance with the appellate rules, the Court of Appeals majority found a violation of Rule 10(c)(1). Because the dissenting opinion and defendant's brief contend that defendant did not violate Rule 10(c)(1), the issue of whether the majority correctly concluded that defendant violated Rule 10(c)(1) is squarely before this Court.

Rule 10(c)(1) of the Rules of Appellate Procedure, entitled "Assignments of Error. Form; Record References," states in part:

> A listing of the assignments of error upon which an appeal is predicated shall be stated at the conclusion of the record on appeal, in short form without argument, and shall be separately numbered. Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned. An assignment of error is sufficient if it directs the attention of the appellate court to the particular error about which the question is made, with clear and specific record or transcript references.

N.C. R. App. P. 10(c)(1). Defendant's assignment of error number four reads:

> 4. The trial court erred in overruling defendant's objection as to the officer's testimony that certain evidence constituted a "crack pipe", as such testimony constituted an opinion as to an ultimate issue for the jury and a legal conclusion, otherwise violated the N.C. Rules of Evidence, and denied defendant due process, a fair trial and his legal and constitutional rights.

In defendant's brief to the Court of Appeals, the argument heading related to this assignment of error reads: "The trial court erred in overruling defendant's objection as to the officer's testimony that certain evidence constituted a 'crack pipe', as such testimony violated the N.C. Rules of Evidence, and denied defendant due process and a fair trial." Defendant then argued in his brief that the officer's lay testimony that an object was a "crack pipe" violated Rule 701 of the North Carolina Rules of Evidence. Defendant maintained that the State did not show that the officer had personal knowledge for his testimony or that his opinion was "rationally based on the perception of the witness." N.C.G.S. § 8C-1, Rule 701 (2005). However, when addressing this argument, the majority opinion concluded: "Nowhere in defendant's assignment of error does he assign error on this specific basis; rather, he states generally that the challenged testimony 'otherwise violated the N.C. Rules of Evidence.' " The majority opinion further concluded that "this assignment of error is broad, vague, and unspecific," "fails to identify the issues on appeal," and "would allow defense counsel to argue on appeal any and every violation of the North Carolina Rules of Evidence." *Hart*, —— N.C. App. at ——, 633 S.E.2d at 107. We agree that defendant's fourth assignment of error fails to satisfy the requirements of Rule 10(c)(1).

Although on its face the assignment of error states a "particular" alleged error (that the "trial court erred in overruling defendant's objection as to the officer's testimony that certain evidence constituted a 'crack pipe' ") and states a "legal basis upon which [the] error [was] assigned" (that "such testimony constituted an opinion as to an ultimate issue for the jury and a legal conclusion"), defendant presented a different legal argument before the Court of Appeals, namely that the lay opinion testimony regarding the alleged "crack pipe" should not have been admitted because the testimony violated Rule 701. Thus, defendant's fourth assignment of error does not provide "the legal basis" for an argument that the testimony at issue violated Rule 701. Moreover, the Court of Appeals majority opinion correctly concluded that the remainder of this assignment of error, that the testimony "otherwise violated the N.C. Rules of Evidence, and denied defendant due process, a fair trial and his legal and constitutional rights," is too broad and thus ineffectual. *E.g.*, *Hines v. Frink*, 257 N.C. 723, 729, 127 S.E.2d 509, 514 (1962). Thus, we affirm the majority opinion's conclusion that assignment of error number four failed to comply with North Carolina Rule of Appellate Procedure 10(c)(1).

[3] Appellate Rule 2 specifically gives "either court of the appellate division" the discretion to "suspend or vary the requirements or provisions of any of [the] rules" in order "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest." N.C. R. App. P. 2. Although this Court concluded in *Viar* that the Court of Appeals improperly applied Rule 2 under those particular circumstances, 359 N.C. at 402, 610 S.E.2d at 361, the *Viar* holding does not mean that the Court of Appeals can no longer apply Rule 2 at all. Here, in response to the dissent's suggestion that the Court of Appeals exercise discretion under Rule 2, the majority opinion held it could not apply Rule 2. *Hart*, —— N.C. App. at ——, 633 S.E.2d at 107.

Because we disavow this interpretation, which led the majority below to conclude incorrectly that the Court of Appeals had no authority to apply Rule 2, we reverse this portion of the majority opinion. In so doing, we note that Rule 2 must be applied cautiously. The text of Rule 2 provides two instances in which an appellate court may waive compliance with the appellate rules: (1) "[t]o prevent manifest injustice to a party"; and (2) "to expedite decision in the public interest." N.C. R. App. P. 2. "While it is certainly true that Rule 2 has been and may be so applied in the discretion of the Court, we reaffirm that Rule 2 relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of im-

portance in the public interest or to prevent injustice which appears manifest to the Court and only in such instances." *Steingress*, 350 N.C. at 66, 511 S.E.2d at 299-300 (citing *Blumenthal v. Lynch*, 315 N.C. 571, 578, 340 S.E.2d 358, 362 (1986)).

When the North Carolina Rules of Appellate Procedure were adopted by this Court, the rules drafting committee saw fit to note that Rule 2 "expresses an obvious residual power possessed by any authoritative rule-making body to suspend or vary operation of its published rules in specific cases *where this is necessary to accomplish a fundamental purpose of the rules*." N.C. R. App. P. 2 drafting comm. comment., *reprinted in* 287 N.C. 680 (1975) (emphasis added). Thus, the exercise of Rule 2 was intended to be limited to occasions in which a "fundamental purpose" of the appellate rules is at stake, which will necessarily be " 'rare occasions.' " *See Reep v. Beck*, 360 N.C. at 38, 619 S.E.2d at 500 (citing and quoting *Blumenthal*, 315 N.C. at 578, 340 S.E.2d at 362; *see also Steingress*, 350 N.C. at 66, 511 S.E.2d at 299-300 (noting that Rule 2 should only be used in "exceptional circumstances").

While an appellate court has the discretion to alter or suspend its rules, exercise of this discretion should only be undertaken with a view toward the greater object of the rules. This Court has tended to invoke Rule 2 for the prevention of "manifest injustice" in circumstances in which substantial rights of an appellant are affected. *See State v. Sanders*, 312 N.C. 318, 320, 321 S.E.2d 836, 837 (1984) (per curiam) ("In view of the gravity of the offenses for which defendant was tried and the penalty of death which was imposed, we choose to exercise our supervisory powers under Rule 2 of the Rules of Appellate Procedure and, in the interest of justice, vacate the judgments entered and order a new trial."); *see also* Alan D. Woodlief, Jr., *Shuford North Carolina Civil Practice and Procedure* § 88:10 (6th ed. 2003).

Although this Court has exercised Rule 2 in civil cases, *see, e.g.*, *Potter v. Homestead Pres. Ass'n*, 330 N.C. 569, 576, 412 S.E.2d 1, 5 (1992) (exercising Rule 2 in an action for breach of contract and quantum meruit involving application of the statute of frauds to a partnership's ownership of real property), and *Whitley's Elec. Serv., Inc. v. Sherrod*, 293 N.C. 498, 500, 238 S.E.2d 607, 609 (1977) (exercising Rule 2 in a collections action involving application of the statute of limitations to an accounting for money claimed to be due for services rendered), the Court has done so more frequently in the criminal context when severe punishments were imposed. *See, e.g.*,

State v. Moore, 335 N.C. 567, 612, 440 S.E.2d 797, 823, *cert. denied*, 513 U.S. 898, 115 S. Ct. 253, 130 L. Ed. 2d 174 (1994); *State v. Booher*, 305 N.C. 554, 564, 290 S.E.2d 561, 566 (1982); *State v. Poplin*, 304 N.C. 185, 186-87, 282 S.E.2d 420, 421 (1981); *State v. Adams*, 298 N.C. 802, 804, 260 S.E.2d 431, 432 (1979).

Before exercising Rule 2 to prevent a manifest injustice, both this Court and the Court of Appeals must be cognizant of the appropriate circumstances in which the extraordinary step of suspending the operation of the appellate rules is a viable option. Fundamental fairness and the predictable operation of the courts for which our Rules of Appellate Procedure were designed depend upon the consistent exercise of this authority. Furthermore, inconsistent application of the Rules may detract from the deference which federal habeas courts will accord to their application. Although a petitioner's failure to observe a state procedural rule may constitute an "adequate and independent state ground[]" barring federal habeas review, *Wainwright v. Sykes*, 433 U.S. 72, 81, 97 S. Ct. 2497, 2503, 53 L. Ed. 2d 594, 604 (1977), a state procedural bar is not "adequate" unless it has been "consistently or regularly applied." *Johnson v. Mississippi*, 486 U.S. 578, 589, 108 S. Ct. 1981, 1988, 100 L. Ed. 2d 575, 586 (1988). Thus, if the Rules are not applied consistently and uniformly, federal habeas tribunals could potentially conclude that the Rules are not an adequate and independent state ground barring review. Therefore, it follows that our appellate courts must enforce the Rules of Appellate Procedure uniformly.

We remand this case to the Court of Appeals for consideration of whether to exercise such discretion and whether other sanctions should be imposed pursuant to appellate Rule 25(b) or Rule 34.[1]

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

1. We note that current appellate counsel did not represent defendant in the Court of Appeals or at trial.

JERRY A. WIGGS v. EDGECOMBE COUNTY AND EDGECOMBE COUNTY BOARD OF COMMISSIONERS, IN THEIR OFFICIAL CAPACITY

No. 466A06

(Filed 4 May 2007)

Pensions and Retirement— special separation allowance— local law enforcement officer

The Court of Appeals did not err by concluding that a local law enforcement officer who entered into retirement and received a special separation allowance pursuant to N.C.G.S. § 143-166.42 is entitled to continued receipt of that allowance regardless of a subsequent ordinance passed by the local governing authority purporting to retroactively amend the terms and conditions of the allowance, because: (1) the General Assembly authorized defendant county to enter into a contract with plaintiff under which he would continue collecting a special separation allowance upon reemployment with another member of the Local Government Retirement System, and plaintiff was entitled to payment according to the law at the time his rights vested; (2) prohibiting double-dipping or allowing an employee to draw benefits while being compensated by another member of the System is not a sufficient public purpose to justify impairment of the contract; and (3) no important public purpose justifies the impairment of plaintiff's contract with defendants, and thus, the Contract Clause of the United States Constitution, contained in Article I, Section 10, prevents defendants from retroactively changing the terms and conditions of the benefits afforded plaintiff.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 179 N.C. App. 47, 632 S.E.2d 249 (2006), affirming an order granting summary judgment for plaintiff entered on 7 September 2005 by Judge Quentin T. Sumner in Superior Court, Edgecombe County. Heard in the Supreme Court 9 January 2007.

Shanahan Law Group, by Kieran J. Shanahan and Steven K. McCallister, for plaintiff-appellee.

Womble Carlyle Sandridge & Rice, PLLC, by Alison R. Bost, for defendant-appellants.

BRADY, Justice.

In this case we determine whether a local law enforcement officer who, after three decades of public service, enters into retirement and receives a special separation allowance pursuant to N.C.G.S. § 143-166.42 is entitled to continued receipt of that allowance regardless of a subsequent ordinance passed by the local governing authority purporting to retroactively amend the terms and conditions of the allowance. We conclude that plaintiff is entitled to continued receipt of the special separation allowance, and we therefore affirm the decision of the Court of Appeals.

FACTUAL BACKGROUND

Jerry A. Wiggs (plaintiff) was employed as a Deputy Sheriff by Edgecombe County from 1976 until 2004. On 1 March 2004, plaintiff informed the North Carolina Local Government Employees' Retirement System (Local Retirement System) that he planned to retire as of 1 April 2004. The Local Retirement System certified that plaintiff had thirty years of creditable service in the retirement plan effective 31 March 2004 due to his service with Edgecombe County's Office of the Sheriff and prior law enforcement employment. Additionally, on 1 March 2004 plaintiff notified the Edgecombe County Administrative Office of his intended retirement, and on 15 March 2004, that office notified plaintiff of the calculated amount of his special separation allowance. Plaintiff retired and began receiving payments on 1 April 2004.

In late May of 2004, plaintiff applied for a part-time position as a police officer with the Raleigh-Durham Airport Authority (Airport Authority), which is also a member of the Local Retirement System. On 3 June 2004, at the behest of the Airport Authority, plaintiff contacted the Edgecombe County Manager to inquire whether his special separation allowance payments would continue upon employment with the Airport Authority. On 12 July 2004 the Edgecombe County Commissioners adopted a resolution which provided that "[t]he separation allowance will terminate under the following conditions: . . . 3. Upon retiree's re-employment in any capacity (fulltime, part time, temporary, permanent, contractual, etc.) by any local government participating in the NC Local Government Employees['] Retirement System." As a result, plaintiff did not seek further employment with the Airport Authority or any other member of the Local Retirement System.

PROCEDURAL HISTORY

On 4 October 2004, plaintiff initiated litigation against Edgecombe County and the Edgecombe County Board of Commissioners (defendants) alleging breach of contract, breach of fiduciary duty, and violations of the federal and state constitutions, and asserting that the resolution amounted to a bill of attainder. Additionally, plaintiff sought declaratory relief and a preliminary injunction. Both parties filed motions for summary judgment. The trial court granted plaintiff's motion for summary judgment as to his claims for declaratory and injunctive relief, denied defendants' motion, and enjoined defendants from applying or enforcing the resolution with respect to plaintiff. The trial court certified the order pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, and defendants appealed to the Court of Appeals.

In a divided decision, the Court of Appeals affirmed the trial court's order, holding that the resolution violated the Contract Clause found in Article I, Section 10 of the United States Constitution and the Law of the Land Clause in Article I, Section 19 of the North Carolina Constitution. The dissent would have reversed, holding that the resolution was superfluous and immaterial and that the applicable statutes require that plaintiff's benefits cease upon reemployment with another employer in the Local Retirement System. Defendants appeal on the basis of the dissent.

ANALYSIS

Courage, a sense of duty, and a willingness to make personal sacrifice are among the many personal characteristics required of members of our domestic security forces, the "Thin Blue Line" upon which our public safety depends. In recognition of the sacrifices made by these individuals, the 1984 General Assembly created a special separation allowance to supplement the income of certain officers who retire from State law enforcement and meet specific criteria. N.C.G.S. § 143-166.41 (2005). Recognizing the similar sacrifices made by local law enforcement officers, the General Assembly later extended a special separation allowance to eligible local law enforcement officers. N.C.G.S. § 143-166.42 (2005).

I. STATUTORY CONSTRUCTION

The first question presented is whether the General Assembly authorized defendant to enter into a contract with plaintiff which would require continued payment of the special separation allowance

after reemployment with another participant in the Local Government Retirement System. Counties, like municipalities, are creatures of the State and "can exercise only that power which the legislature has conferred upon them." *Bowers v. City of High Point*, 339 N.C. 413, 417, 451 S.E.2d 284, 287 (1994); *see Moody v. Transylvania Cty.*, 271 N.C. 384, 386, 156 S.E.2d 716, 717 (1967) (stating that the same rules apply to counties and municipalities). To determine whether the General Assembly authorized defendants to enter into the contract with plaintiff, we must consider as a matter of statutory law whether a local law enforcement officer receiving a special separation allowance is no longer entitled to receive that allowance upon reemployment with another member of the Local Retirement System in the absence of any local government resolution to the contrary. The applicable statute provides:

> On and after January 1, 1987, the provisions of G.S. 143-166.41 shall apply to all eligible law-enforcement officers as defined by G.S. 128-21(11b) or G.S. 143-166.50(a)(3) who are employed by local government employers, except as may be provided by this section. As to the applicability of the provisions of G.S. 143-166.41 to locally employed officers, the governing body for each unit of local government shall be responsible for making determinations of eligibility for their local officers retired under the provisions of G.S. 128-27(a) and for making payments to their eligible officers under the same terms and conditions, other than the source of payment, as apply to each State department, agency, or institution in payments to State officers according to the provisions of G.S. 143-166.41.

N.C.G.S. § 143-166.42. Subsection 143-166.41(a) presents the initial eligibility requirements for receiving the special separation allowance and the amount of the allowance due to each recipient. This subsection requires the officer "shall" have either "completed 30 or more years of creditable service or" to have completed "five or more years of creditable service" if the officer is over age 55. *Id.* § 143-166.41(a). Additionally, the officer "shall" not have "attained 62 years of age" and must "[h]ave completed at least five years of continuous service as a law enforcement officer" as provided by the statute. *Id.* Subsection (c) provides the circumstances under which payments cease, including, *inter alia*, the officer's death or attainment of 62 years of age. *See* N.C.G.S. § 143-166.41(c). None of these circumstances include reemployment with another participator in the Local Retirement System. *Id.*

Defendants contend that section 143-166.42 provides that a recipient of a special separation allowance who is later reemployed by another participant in the Local Retirement System is no longer entitled to the special separation allowance. Under the guise of statutory construction, defendants seek to have this Court engraft into subsection 143-166.41(c) a requirement that payment of the special separation allowance would cease if plaintiff is reemployed with another employer participating in the Local Retirement System.

When construing statutes, this Court first determines whether the statutory language is clear and unambiguous. *See Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) (citing *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)). If the statute is clear and unambiguous, we will apply the plain meaning of the words, with no need to resort to judicial construction. *Id.* "However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment." *Id.* (citing *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) ("The best indicia of [legislative] intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish." (citations omitted)).

We determine that the language of section 143-166.42 is clear and unambiguous on its face. The statute mandates that payments are to be made "under the same terms and conditions, other than the source of payment, as apply to each State department, agency, or institution" under section 143-166.41. N.C.G.S. § 143-166.42. There is nothing apparent from that language that brings into question the plain meaning of the words used therein. Those "same terms and conditions" are plainly set out in section 143-166.41. This "Court has no power to amend an Act of the General Assembly." *State v. Davis*, 267 N.C. 126, 128, 147 S.E.2d 570, 572 (1966) (per curiam). Moreover, " '[w]hen the language of a statute is clear and unambiguous, it must be given effect and its clear meaning may not be evaded by an administrative body or a court under the guise of construction.' " *Thigpen v. Ngo*, 355 N.C. 198, 202, 558 S.E.2d 162, 165 (2002) (quoting *State ex rel. Utils. Comm'n v. Edmisten*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977)). We will not engage in judicial construction merely to assume a legislative role and rectify what defendants argue is an absurd result.

Nothing in the language of sections 143-166.41 or 143-166.42 indicate in any way that payments to an officer receiving the special sep-

aration allowance should cease upon reemployment with another Local Retirement System participant. Not only has the General Assembly authorized defendant to enter into such a contract, the General Assembly has mandated that a special separation allowance be paid by local governing authorities to qualified officers. *See* N.C.G.S. § 143-166.42 (stating that "G.S. 143-166.41 shall apply to all eligible law-enforcement officers . . . who are employed by local government" and "the governing body for each unit of local government shall be responsible for . . . making payments to their eligible officers"). Accordingly, defendants' actions in entering into such a contractual relationship with plaintiff were not *ultra vires*.

II. CONTRACT CLAUSE

Having determined that the applicable statutes would not bar plaintiff's continued receipt of the allowance and that defendants' entering into the special separation allowance agreement was not *ultra vires*, we turn to defendants' resolution to determine whether it would properly require the cessation of payments upon plaintiff's reemployment with the Airport Authority. Plaintiff asserts that the resolution passed by defendants violates, *inter alia*, the Contract Clause of the United States Constitution. We agree. The Contract Clause provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. Const. art. I, § 10. In determining whether a Contract Clause violation has occurred, this Court first determines whether a contractual obligation exists. *See Faulkenbury v. Teachers' & State Employees' Ret. Sys.*, 345 N.C. 683, 690, 483 S.E.2d 422, 427 (1997). If a contractual obligation does exist, the next step "requires a determination that the [government action] has the effect of impairing a contractual obligation." *U.S. Tr. Co. v. New Jersey*, 431 U.S. 1, 17 (1977); *see also Faulkenbury*, 345 N.C. at 690, 483 S.E.2d at 427. "Finally, we must determine whether the impairment was reasonable and necessary to serve an important public purpose." *Faulkenbury*, 345 N.C. at 690, 483 S.E.2d at 427 (citing *U.S. Tr. Co.*). When analyzing the purported "important public purpose" in cases in which the government itself is a party to the contract, we note that "complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *U.S. Tr. Co.*, 431 U.S. at 26.

This Court has previously determined that payments under the Teachers' and State Employees' Retirement Plan are part of a contractual relationship between the System and the payee. *See*

Faulkenbury, 345 N.C. at 690, 483 S.E.2d at 427. We can find no discernable difference between the Teachers' and State Employees' Retirement Plan and the Local Government Employees' Retirement Plan that would lead us to a different result. Accordingly, we hold that a contractual relationship exists between defendants and plaintiff. Moreover, at the time plaintiff's rights under this agreement vested, there was no restriction in place that would have prevented his reemployment with another member of the Local Retirement System. He was entitled to payment according to the law at the time his rights vested, and these rights "may not be taken from [him] by legislative action." *Id.* Defendants were obligated to make payments to plaintiff in the form of a special separation allowance pursuant to section 143-166.42, and the resolution seeking to relieve defendants of that duty impaired that contractual obligation. This is not to say defendants were unable, consistent with their incidental powers to implement the mandate of section 144-166.42, to pass a resolution which would apply prospectively to those whose rights to the special separation allowance had not yet vested. *See*, *e.g.*, *Campbell v. City of Laurinburg*, 168 N.C. App. 566, 608 S.E.2d 98 (2005). However, the issue in this case is whether defendant's resolution can be retroactively applied to plaintiff's vested contractual right to receipt of the special separation allowance payments.

Finally, we must determine whether this "impairment was reasonable and necessary to serve an important public purpose." *Id.* (citing *U.S. Tr. Co.*). Prohibiting "double-dipping," or allowing an employee to draw benefits while being compensated by another member of the System, is not a sufficient public purpose to justify this impairment of the contract. *See Faulkenbury*, 345 N.C. at 694, 483 S.E.2d at 429 (rejecting the argument that "the correct operation of the plan is an important public purpose"). Moreover, we will not "engage in a utilitarian comparison of public benefit and private loss." *U.S. Tr. Co.*, 431 U.S. at 29. Merely because the governmental actor believes the money can be better spent or should now be conserved does not provide a sufficient interest to impair the obligation of contract. "If a State could reduce its financial obligations whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all." *Id.* at 26. Accordingly, because no important public purpose justifies the impairment of plaintiff's contract with defendants, we hold that the Contract Clause of the United States Constitution, contained in Article I, Section 10, prevents defendants from retroactively changing the terms and conditions of the benefits afforded plaintiff. *See*

Faulkenbury, 345 N.C. at 690-94, 483 S.E.2d at 427-29 (holding that the Contract Clause prevents a change in the calculation of the plaintiffs' disability retirement benefits by legislative action).

Because the Contract Clause prohibits defendants from retroactively changing the terms and conditions of plaintiff's special separation allowance, the resolution adopted by defendants does not apply to plaintiff. Accordingly, we need not address plaintiff's other assertions which rely on other rights contained in the federal and state constitutions. *See id.*, 345 N.C. at 694, 483 S.E.2d at 429 (finding it unnecessary to address additional state and federal constitutional issues because of the Court's resolution of the Contract Clause claim).

CONCLUSION

In sum, we hold that the General Assembly authorized defendant to enter into a contract with plaintiff under which he would continue collecting a special separation allowance upon reemployment with another member of the Local Retirement System, and that the Contract Clause forbids retroactively modifying the terms and conditions of the special separation allowance agreement. Accordingly, we affirm the opinion of the Court of Appeals.

AFFIRMED.

STATE OF NORTH CAROLINA v. DAVID FRANKLIN HURT

No. 192A04-2

(Filed 4 May 2007)

1. Sentencing— aggravating factors—heinous, atrocious, or cruel murder—failure to submit to jury—counsel's argument not admission—*Blakely* error

The trial court erred under *Blakely v. Washington*, 542 U.S. 296, when it found the especially heinous, atrocious, or cruel aggravating factor without submitting it to the jury in a second-degree murder sentencing hearing where defendant admitted to the underlying facts supporting the second-degree murder charge but did not admit that those facts supported the existence of such aggravating factor as to him. A judge may not find an aggravating

factor on the basis of a defendant's admission unless that defendant personally or through counsel admits the necessary facts or admits that the aggravating factor is applicable, and defense counsel's argument opposing imposition of the aggravating factor could not be construed as an admission that the aggravating factor did apply to defendant.

2. Sentencing— aggravating factors—*Blakely* error—not structural

The North Carolina Supreme Court relied on *State v. Blackwell*, 361 N.C. 41, in rejecting arguments that *Blakely* error was structural and violated Article I, § 24 of the North Carolina Constitution.

3. Sentencing— aggravating factors—*Blakely* error—not harmless

The trial court's *Blakely* error in finding the especially heinous, atrocious, or cruel aggravating factor without submitting it to the jury in a second-degree murder sentencing hearing was not harmless beyond a reasonable doubt in light of the conflicting evidence as to defendant's role in the offense.

Upon reconsideration of this Court's opinion in *State v. Hurt*, 359 N.C. 840, 616 S.E.2d 910 (2005), pursuant to the order of the United States Supreme Court entered 30 June 2006 vacating the judgment of this Court in *North Carolina v. Speight*, 126 S. Ct. 2977, 165 L. Ed. 2d 983 (2006) and remanding that case to this Court for further consideration in light of *Washington v. Recuenco*, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). Heard in the Supreme Court 17 October 2006.

Roy Cooper, *Attorney General*, *by Robert C. Montgomery*, *Special Deputy Attorney General*, *for the State-appellant.*

Staples S. Hughes, *Appellate Defender*, *by Barbara S. Blackman*, *Assistant Appellate Defender*, *for defendant-appellee.*

EDMUNDS, Justice.

In our reconsideration of this matter, we limit our review to the sentencing procedure followed by the trial court. When defendant entered a plea of guilty to second-degree murder, his attorney argued that the court should find certain mitigating factors and reject aggravating factors proposed by the State. The trial court imposed an aggravated sentence without submitting the aggravating factors to the

jury. Because we hold that the arguments of defendant's counsel in mitigation did not constitute an admission that the offense was especially heinous, atrocious, or cruel, the trial court's sentencing procedure was erroneous under *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004). The United States Supreme Court has held that *Blakely* error is subject to harmless error analysis. *Washington v. Recuenco*, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). Conflicting evidence as to defendant's role in the offense precludes a finding that the trial court's error was harmless beyond a reasonable doubt. Accordingly, we remand this case for a new sentencing hearing.

On 26 February 1999, police officers found Howard Cook, the victim in this case, dead in his home. He had suffered both blunt force injuries and multiple stab wounds. Shortly after discovering the victim's body, officers questioned his nephew, William Parlier, whom they found intoxicated and lying in a ditch. The jailer observed blood on Parlier and on money taken from him. After he sobered up, Parlier gave several statements implicating defendant as the murderer. Police next questioned defendant, who denied being at the victim's home or participating in the murder. When the police later arrested defendant, he stated, "[Parlier] was the one with blood all over him, and he had the money. What does that tell you?", then invoked his right to counsel.

Defendant was indicted for first-degree murder, first-degree burglary, and common law robbery. Parlier pleaded guilty to first-degree murder and was sentenced to life imprisonment in exchange for a promise to testify against defendant. However, a few days before trial, Parlier reneged on his agreement and refused to testify. Because the State's case against defendant hinged on Parlier's testimony, the State agreed to accept defendant's plea of guilty to second-degree murder in exchange for dismissal of the remaining charges. A more complete recitation of the facts in this case is set out in *State v. Hurt*, 163 N.C. App. 429, 594 S.E.2d 51 (2004), *rev'd*, 359 N.C. 840, 616 S.E.2d 910 (2005).

The trial court found two statutory aggravating factors: that the offense was especially heinous, atrocious, or cruel (HAC), pursuant to N.C.G.S. § 15A-1340.16(d)(7); and that "defendant joined with his co-defendant, William Wayne Parlier, in committing an offense of robbery from the person of the victim, Mr. Cook, and was not charged with committing conspiracy," pursuant to N.C.G.S. § 15A-1340.16(d)(2). In addition, the trial court found as a non-

statutory aggravating factor that "defendant acting in concert with his co-defendant, William Wayne Parlier, took and carried away from the person of Howard Nelson Cook property, to wit, $4 in U.S. currency, by force and placing the victim in fear of bodily harm or threats of bodily harm." The court also found several mitigating factors, determined that the aggravating factors outweighed the mitigating factors, and sentenced defendant to a minimum of 276 months and a maximum of 341 months incarceration.

Defendant appealed to the Court of Appeals, which, in a divided opinion, vacated the sentence and remanded for resentencing on grounds that the trial court erred in treating as a statutory aggravating factor its finding that defendant "joined with *one* other person, Parlier, in committing the offense of robbery and was not charged with conspiracy." *Hurt*, 163 N.C. App. at 435, 594 S.E.2d at 56. After the State filed its appeal of right to this Court, defendant filed a motion for appropriate relief (MAR), alleging that the trial court committed *Blakely* error when it failed "to empanel a jury to consider potential aggravating factors or secure a stipulation from [defendant] as to factors supporting aggravated range sentencing."

Upon consideration of defendant's appeal and his MAR, we reversed the Court of Appeals holding as to the aggravating factor at issue, finding that the facts cited by the trial court constituted a nonstatutory aggravator. *State v. Hurt*, 359 N.C. at 842, 616 S.E.2d at 912. However, we remanded for resentencing consistent with *Blakely* and this Court's opinion in *State v. Allen*, which held that a trial court committed structural error when it imposed an aggravated sentence based upon findings of fact made by a judge. *Hurt*, 359 N.C. at 845-46, 616 S.E.2d at 913-14 (citing *Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), *withdrawn*, 360 N.C. 569, 635 S.E.2d 899 (2006)). Thereafter, we allowed the State's motion to stay issuance of the mandate. *Hurt*, 359 N.C. 846, 620 S.E.2d 528 (2005).

On 26 June 2006, the United States Supreme Court issued its decision in *Recuenco*, holding that "[f]ailure to submit a sentencing factor to the jury . . . is not structural error." 126 S. Ct. at 2553, 165 L. Ed. 2d at 477. On 21 August 2006, we ordered the State "to file and serve a supplemental brief with this Court, limited to the questions of whether there was error in this case pursuant to *Washington v. Recuenco* and, if so, whether any error can be found to be harmless beyond a reasonable doubt." *Hurt*, 360 N.C. 572, 572, 636 S.E.2d 188, 189 (2006).

The United States Supreme Court has held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455 (2000). The Supreme Court later refined this holding by clarifying that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely*, 542 U.S. at 303, 159 L. Ed. 2d at 413. Thus, while a trial court may impose an aggravated sentence on the basis of admissions made by a defendant, error occurs when a judge aggravates a criminal sentence on the basis of findings made by the judge that are in addition to or in lieu of findings made by a jury.

[1] The State first contends that no *Blakely* error occurred and harmless error analysis is not necessary because, according to the State, defendant admitted to the facts supporting all three of the aggravating factors found. The State asserts the admissions occurred when defendant failed to challenge the facts presented by the prosecutor during the sentencing hearing and when defendant's counsel argued that the aggravating factors should not apply to defendant. Specifically, as to the nonstatutory aggravating factor that defendant and Parlier took four dollars from the victim by force, the State argues that defendant's counsel did not dispute facts found by the trial court supporting this factor. The State similarly contends that, by arguing that defendant's role was minimal, defendant's counsel admitted to facts supporting the aggravating factor that defendant joined with another to commit the offense but was not charged with conspiracy. Finally, the State notes that when it urged the trial court to find the HAC aggravating factor, defendant's counsel again responded by arguing that defendant's role in the offense was minor because he only aided and abetted the principal perpetrator. The State asks us to interpret the arguments of defendant's counsel as tacit admissions of facts supporting the aggravating factors found by the trial court. Defendant responds that he did not personally admit to any aggravating factor in the case, and that defense counsel's arguments opposing a finding of the aggravating factors were neither admissions nor stipulations.

A stipulation must be "definite and certain in order to afford a basis for judicial decision." *State v. Powell*, 254 N.C. 231, 234-35, 118 S.E.2d 617, 619-20 (1961) (explaining the trial court erred "by not insisting upon a full, complete, definite and solemn admission and

stipulation") (citation omitted), *superseded on other grounds by statute*, Safe Roads Act, N.C.G.S. § 20-138.1 and -179 (1989), *as recognized in State v. Denning*, 316 N.C. 523, 342 S.E.2d 855 (1986). While we have recognized that stipulations and admissions may take a variety of forms and may be found by implication, *see*, *e.g.*, *State v. Mullican*, 329 N.C. 683, 686, 406 S.E.2d 854, 855 (1991) (holding that when the prosecutor said he summarized the State's evidence "with the permission of the defendant," the defendant's failure to object was a factor supporting the finding of a stipulation), after reviewing the arguments made at sentencing, we are satisfied that, at most, defendant's attorney was acknowledging that the aggravating factors might apply as he asked the trial court not to accept the State's argument. We do not believe defense counsel's argument opposing imposition of an aggravating factor can be construed as an admission that the very same aggravating factor did apply to defendant. To the contrary, we hold that a judge may not find an aggravating factor on the basis of a defendant's admission unless that defendant personally or through counsel admits the necessary facts or admits that the aggravating factor is applicable.[1] *See Blakely*, 542 U.S. at 303, 159 L. Ed. 2d at 413.

Here, our review of the record reveals that while defendant admitted to the underlying facts supporting the second-degree murder charge, nowhere did he admit that those facts supported the existence of the HAC aggravator as to him. Consequently, the trial court committed *Blakely* error when it found this aggravating factor without submitting it to the jury.

[2] Next, defendant contends the *Blakely* error in this case was structural error because North Carolina allegedly lacked a procedural mechanism by which judges could submit aggravating factors to the jury, and because *Blakely* error allegedly violates Article I, Section 24 of the North Carolina Constitution. For the reasons set out in *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 75 U.S.L.W. 3609 (2007), we hold these arguments to be without merit.

[3] Finally, the State argues that, in light of the overwhelming evidence against defendant, any *Blakely* error in this case was harmless beyond a reasonable doubt. Defendant responds that, because

1. The General Assembly has codified the procedure to be used when a defendant admits the existence of an aggravating factor at sentencing for all offenses committed after 30 June 2005. N.C.G.S. § 15A-1022.1 (2005). Because the offense here occurred in 1999, this statute does not apply to the case at bar.

there is no credible evidence that he, rather than Parlier, killed the victim, a jury could have declined to apply any aggravating factor to him.

We begin by considering the HAC aggravator, which applies only if "the facts of the case disclose *excessive* brutality, or physical pain, psychological suffering, or dehumanizing aspects *not normally present in [the] offense*." *State v. Blackwelder*, 309 N.C. 410, 414, 306 S.E.2d 783, 786 (1983). The State has the burden of proving that the judge's finding of the HAC aggravating factor was harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b) (2005) ("A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless."). If this Court concludes that the HAC aggravating factor was "so 'overwhelming' and 'uncontroverted' that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt," then the *Blakely* error in finding this aggravating factor would be harmless beyond a reasonable doubt. *Blackwell*, 361 N.C. at 49, 638 S.E.2d at 458 (citing N.C.G.S. § 15A-1443(b); *Neder v. United States*, 527 U.S. 1, 9, 144 L. Ed. 2d 35, 47 (1999); *State v. Heard*, 285 N.C. 167, 172, 203 S.E.2d 826, 829 (1974)).

The State's evidence that the victim asked to be allowed to say a prayer before he was killed; that he begged for his life and tried to run away; that he was stabbed twelve times; that he suffered blunt force trauma to his head, neck, chest, abdomen, and extremities; and that he "probably suffered quite severely while the wounds were being inflicted," could have led the jury to find that the offense itself was especially heinous, atrocious, or cruel. However, the fact that the jury *could have* found the HAC aggravator does not mean that the jury necessarily *would have* found it beyond a reasonable doubt. "It is . . . proper at sentencing to consider the defendant's actual role in the offense as opposed to his legal liability for the acts of others." *State v. Benbow*, 309 N.C. 538, 546, 308 S.E.2d 647, 652 (1983). The State conceded that its case was stronger against Parlier than against defendant. The DNA evidence did no more than place defendant at the front door of the victim's house, while much of the remaining evidence against defendant established only that he helped dispose of evidence after the murder. Parlier's statements implicating defendant, though damning, were also self-serving and, had Parlier testified at trial, would have been subject to impeachment through cross-

examination. In addition, evidence presented by defendant's niece corroborated defendant's claim that Parlier had motive to kill the victim. She testified that the victim had given loans to Parlier, who wanted even more money. She added that a couple of weeks before the murder, the victim told her Parlier was threatening him and if anything ever happened to him, Parlier would be the one who did it.

Under these circumstances, the evidence supporting the HAC aggravator was neither overwhelming nor uncontradicted. Accordingly, we hold that the evidence was insufficient to establish that the trial court's *Blakely* error in finding the HAC aggravating factor was harmless beyond a reasonable doubt. We note, however, that our review of the evidence for the purpose of harmless error review and our subsequent holding that the judge's decision to apply the aggravating factor was error does not preclude the State from submitting evidence of the factor to a jury on resentencing.

Having concluded that the trial court's finding of the HAC aggravating factor was not harmless error, we need not consider the other two aggravating factors. If the State seeks an aggravated sentence upon remand, the trial court can consider the evidence then presented to determine which aggravating factors may be submitted to the jury.

In light of *Recuenco*, we vacate the portion of our previous opinion in this case, reported at 359 N.C. 840, 616 S.E.2d 910, that remands this case due to structural error and instead remand to the Court of Appeals because the trial court's *Blakely* error was not harmless beyond a reasonable doubt. We leave undisturbed our analysis of the aggravating factor at issue in that opinion, which reversed the decision of the Court of Appeals, reported at 163 N.C. App. 429, 594 S.E.2d 51. *See Hurt*, 359 N.C. 840, 843-45, 616 S.E.2d 910, 912-13. The stay entered in this case by this Court on 2 September 2005 is dissolved. We remand to the Court of Appeals with instructions to remand to the trial court for a new sentencing hearing.

The decision of the Court of Appeals, reported at 163 N.C. App. 429, 594 S.E.2d 51, is

REVERSED IN PART AND AFFIRMED IN PART AS MODIFIED.

The decision of this Court, reported at 359 N.C. 840, 616 S.E.2d 910, is

VACATED IN PART AND AFFIRMED IN PART.

Justices TIMMONS-GOODSON and HUDSON did not participate in the consideration or decision in this case.

STATE OF NORTH CAROLINA v. WADDY NATHAN AGNEW

No. 388PA06

(Filed 4 May 2007)

Criminal Law— guilty plea—independent judicial determination—information before the court not sufficient

The trial court erred by accepting a guilty plea where there was nothing in the record to support an independent judicial determination of a factual basis for the plea. The transcript of plea was inadequate standing alone because the requirement of a factual basis would then be meaningless. Defense counsel's stipulation of a factual basis was insufficient because it gave the court no additional substantive evidence, the indictment simply stated the charge and did not provide any further factual description, and a summary of facts provided by the prosecution to a subsequent judge at defendant's sentencing hearing occurred months later rather than when the plea was accepted. N.C.G.S. § 15A-1022(c).

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 178 N.C. App. 234, 630 S.E.2d 743 (2006), affirming a judgment dated 9 March 2005 entered by Judge Clifton W. Everett, Jr. in Superior Court, Pitt County, following denial of defendant's motion to withdraw his plea of guilty. Heard in the Supreme Court 15 February 2007.

Roy Cooper, Attorney General, by Dahr Joseph Tanoury, Assistant Attorney General, for the State.

Kevin P. Bradley for defendant-appellant.

NEWBY, Justice.

This case presents the issue of whether N.C.G.S. § 15A-1022(c) requires an independent judicial determination that a sufficient fac-

tual basis exists before a trial court accepts a guilty plea. We find it does and reverse the Court of Appeals.

I. BACKGROUND

On 8 March 2004, a grand jury indicted defendant for violating N.C.G.S. § 90-95. The indictment stated in pertinent part:

> [O]n or about [23 April 2003] and in [Pitt County] the defendant named above unlawfully, willfully and feloniously did traffick cocaine by possession of in excess of 200 grams but less than 400 grams of a mixture containing cocaine, a controlled substance, included in Schedule II of the North Carolina Controlled Substance [sic] Act.

Defendant pled guilty on 9 June 2004 in Pitt County Superior Court. The trial court asked defendant questions listed on the Transcript of Plea (Form AOC-CR-300, rev. 2/2000), which defendant had completed and signed. In response, defendant affirmed that, *inter alia*, he understood the charges against him and "that there [were] mandatory sentences and fines"; he understood that he was giving up his right to a trial by jury; and he was "in fact guilty." After addressing defendant, the trial court had the following exchange with defense counsel:

> THE COURT: Do you stipulate that there is a factual basis to support this plea and waive a formal presentation of the evidence?
>
> [DEFENSE COUNSEL]: Yes, sir.
>
> THE COURT: Based upon that stipulation, the Court finds that there is a factual basis for the entry of the plea, that the defendant is satisfied with [h]is lawyer, that the defendant is competent to stand trial, that the plea is the informed choice of the defendant, and that the plea is made freely, voluntarily, and understandingly.

Pursuant to defendant's plea arrangement, the trial court ordered that sentencing be continued until scheduled by the State.

On 10 March 2005, a different superior court judge, the Honorable Clifton W. Everett, Jr., held the sentencing hearing. Before sentencing, defendant addressed the court and said he "would like to explain [his] case." Defendant proceeded to tell the trial court that he had never seen any evidence in his case; he had never possessed the drugs in question; he did not understand how he could be charged

with trafficking by possession; he had been under the influence of marijuana when he pled guilty in June 2004; and he had been under the impression that he would receive probation for his cooperation with the prosecutor. Defendant further stated he wanted "to make a motion as far as [his] plea to see if [he could] have a fair trial."

Treating defendant's request as a motion to withdraw his guilty plea, the trial court denied this motion and said to the prosecutor: "Tell me something about the case so I can sentence him." The prosecutor described how law enforcement had contact with a confidential informant who assisted them in setting up an undercover drug sale in which defendant gave the undercover officer $5,750 for 347.5 grams of cocaine. The prosecution also stated that at the time of arrest, "defendant was actually caught with his right hand inside one of the bags of cocaine." After this summary by the State and further colloquy between the trial court and defendant in which defendant continued to assert that he never possessed the drugs, the trial court entered a sentence of 70 to 84 months and imposed a $100,000 fine.

Defendant appealed to the Court of Appeals, which unanimously affirmed the trial court. The Court of Appeals held the trial court complied with the N.C.G.S. § 15A-1022(c) factual basis requirement when accepting defendant's plea and the trial court did not err in denying defendant's motion to withdraw his guilty plea on grounds that fair and just reasons did not exist to support withdrawal. We allowed defendant's petition for discretionary review.

II. ANALYSIS

The question presented is whether the trial court complied with N.C.G.S. § 15A-1022(c) in determining there was a factual basis for defendant's guilty plea. Because a guilty plea waives certain fundamental constitutional rights such as the right to a trial by jury, our legislature has enacted laws to ensure guilty pleas are informed and voluntary. *See State v. Sinclair*, 301 N.C. 193, 197, 270 S.E.2d 418, 421 (1980) (citing N.C.G.S. § 15A-1022(a)-(b)). Additionally, guilty pleas must be substantiated in fact as prescribed by the statute at issue in this case:

> The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:
>
> (1) A statement of the facts by the prosecutor.

(2) A written statement of the defendant.

(3) An examination of the presentence report.

(4) Sworn testimony, which may include reliable hearsay.

(5) A statement of facts by the defense counsel.

N.C.G.S. § 15A-1022(c) (2005).

The five sources listed in the statute are not exclusive, and therefore "[t]he trial judge may consider any information properly brought to his attention." *State v. Dickens*, 299 N.C. 76, 79, 261 S.E.2d 183, 185-86 (1980). Nonetheless, such information "must appear in the record, so that an appellate court can determine whether the plea has been properly accepted." *Sinclair*, 301 N.C. at 198, 270 S.E.2d at 421. Further, in enumerating these five sources, the statute "contemplate[s] that some substantive material independent of the plea itself appear of record which tends to show that defendant is, in fact, guilty." *Id.* at 199, 270 S.E.2d at 421-22.

In the case *sub judice*, prior to accepting defendant's plea, the trial court had before it the indictment, defendant's Transcript of Plea, and defense counsel's oral stipulation that a factual basis existed. Defendant argues the trial court had no actual description of the conduct giving rise to the charge before accepting defendant's guilty plea and thus could not properly determine there was a factual basis under N.C.G.S. § 15A-1022(c). The State, relying on our decision in *Dickens*, argues the Transcript of Plea taken together with the indictment and defense counsel's stipulation provided adequate information for the trial court to determine that there was a factual basis.

In *Dickens*, the defendant sought a trial de novo in superior court after being convicted in district court of eight charges of issuing worthless checks. 299 N.C. at 82, 261 S.E.2d at 187. Before the superior court, the defendant entered pleas of not guilty and then subsequently changed his pleas to guilty. *Id.* at 76, 261 S.E.2d at 184. Almost immediately after judgment was entered on the guilty pleas, the defendant returned to the superior court and moved to withdraw his pleas. *Id.* at 77, 261 S.E.2d at 184. The superior court denied the motion to withdraw. *Id.* at 77, 261 S.E.2d at 185. On appeal before this Court, we concluded the superior court had sufficient information to determine there was a factual basis for the pleas because the record revealed that a district court judge found the defendant guilty after

considering evidence and the defendant had admitted actual guilt on his Transcript of Plea. *Id.* at 82, 261 S.E.2d at 187.

Nine months later in *Sinclair*, this Court addressed whether the Transcript of Plea itself provided sufficient information for the trial court to determine the existence of a factual basis. We concluded the transcript was insufficient, reasoning that "[i]f the plea itself constituted its own factual basis, the statute requiring a factual basis to support the plea would be meaningless." *Sinclair*, 301 N.C. at 199, 270 S.E.2d at 421. Further, this Court clarified our holding in *Dickens* by noting:

> In *State v. Dickens*, we relied on the fact, appearing of record, that defendant had been duly convicted in the district court on the very charges to which he entered pleas of guilty in superior court *in addition to* his statement in his transcript that he was 'in fact' guilty to support our conclusion that a factual basis for the plea existed in the record.

Id. at 199, 270 S.E.2d at 422 (emphasis added) (citation omitted).

In this case, there was scant factual information before the trial court when defendant's guilty plea was accepted. As noted in *Sinclair*, the Transcript of Plea standing alone was inadequate. Similarly, defense counsel's stipulation to the existence of a factual basis was insufficient because the stipulation gave the trial court no additional substantive information about the case as required by statute. Likewise, the indictment simply stated the charge and did not provide any further factual description of defendant's particular alleged conduct. In sum, the transcript, defense counsel's stipulation, and the indictment taken together did not contain enough information for an independent judicial determination of defendant's actual guilt in the instant case.

Finally, we note the summary of facts provided by the prosecution at defendant's sentencing hearing could not serve as the factual basis in this case because that summary occurred months after the plea had been accepted. N.C.G.S. § 15A-1022(c) requires that the trial court make the determination of a factual basis when accepting the plea.

III. CONCLUSION

We conclude the trial court erred in accepting defendant's guilty plea because there was nothing in the record to support an indepen-

dent judicial determination of a factual basis for the plea. Because we find the trial court erred in accepting defendant's guilty plea, we do not reach the issue of whether fair and just reasons exist for defendant to withdraw his plea. The Court of Appeals is reversed, and this case is remanded to that court for remand to the trial court for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

IN RE: INQUIRY CONCERNING A JUDGE, NO. 04-038, GAREY M. BALLANCE, RESPONDENT

No. 117A07

(Filed 4 May 2007)

Judges— removal from office—guilty plea to crime

A district court judge who pled guilty to one count of failure to file a federal income tax return was removed from office for conduct in violation of Canons I, 2A and 2B of the North Carolina Code of Judicial Conduct, conviction of a crime involving moral turpitude, and conduct prejudicial to the administration of justice that brings the judicial office into disrepute.

This matter is before the Court pursuant to N.C.G.S. § 7A-376 upon a recommendation by the Judicial Standards Commission entered 29 November 2006 that respondent Garey M. Ballance, a Judge of the General Court of Justice, District Court Division, Judicial District Nine B of the State of North Carolina, be removed for conduct in violation of Canons 1, 2A, and 2B of the North Carolina Code of Judicial Conduct, conviction of a crime involving moral turpitude, and conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376. Calendered for argument in the Supreme Court 12 April 2007; determined on the record without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure and Rule 2(c) of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission.

No counsel for Judicial Standards Commission or respondent.

PER CURIAM.

As a result of the recommendation of the North Carolina Judicial Standards Commission ("Commission"), the issue before this Court is whether respondent Garey M. Ballance should be removed from office for conduct in violation of Canons 1, 2A, and 2B of the North Carolina Code of Judicial Conduct, conviction of a crime involving moral turpitude, and conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376.

The facts which led to the Commission's recommendation that respondent be removed from office are not in dispute. Likewise, respondent does not dispute the Commission's recommendation that he be removed from judicial office. Respondent waived formal hearing before the Commission, and Special Counsel for the Commission and counsel for respondent stipulated to the following:

> 1. The North Carolina Judicial Standards Commission is a body duly organized under the laws of North Carolina and is authorized to recommend to the Supreme Court of North Carolina[] the censure and removal of Judges and Justices of the General Court of Justice pursuant to the Constitution of North Carolina, Article 4, Section 17, and the procedures prescribed by the North Carolina General Assembly in [N.C.]G.S. § 17A, Article 30.
>
> 2. At all times referred to for purposes of this matter, the Respondent was a Judge of the General Court of Justice, District Court Division, Judicial District 9B, and as such is subject to the Canons of [the] North Carolina Code of Judicial Conduct, the laws of the State of North Carolina, the laws of the United States of America, and the provisions of the oath of office for District Court Judge as set forth in the North Carolina General Statutes, Chapter 11. The Respondent tendered his resignation from his judicial office to the Governor of North Carolina on October 14, 2005.
>
> 3. The Commission had reason to file formal proceedings upon information concerning the conduct of the Respondent in which it alleged:
>
> a. The Respondent pled guilty to one count of failure to file federal income tax returns, a violation of 26 U.S.C. § 7203, on March 29, 2005, as shown by the "Memorandum of Plea

Agreement" attached [to the stipulation]. As a result of the plea agreement, the Respondent was sentenced to a nine month term of imprisonment, a $5,000.00 fine, and supervised release for a term of one year from Respondent's release from imprisonment. The complete terms of the Respondent's sentence are shown by the "Judgement [sic] In a Criminal Case" attached [to the stipulation].

4. The Respondent acknowledges that the conduct admitted in this Stipulation are [sic] in violation of Canon's [sic] 1, 2A and 2B of the North Carolina Code of Judicial Conduct, and under the terms of the Stipulation constitutes the conviction of a crime involving moral turpitude and conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of N.C.G.S. § 7A-376.

5. The Respondent agrees to enter this Stipulation to bring closure to this matter because of his concern for protecting the integrity of the court system.

6. The Respondent hereby waives formal hearing of these matters and agrees to accept a Recommendation of removal from the Commission because his conduct amounted to the conviction of a crime involving moral turpitude and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. The Respondent further agrees and represents to the Commission that he will not seek judicial office nor accept any appointment as an emergency judge or special judge, nor serve in any position which would require him to perform in any judicial capacity, in North Carolina in the future.

Following a hearing on 3 November 2006, the Commission made findings of fact reciting the procedural history of the matter and incorporating, as additional findings of fact, the stipulation agreed to by counsel for respondent and the Commission. Based on the stipulated and other documentary evidence, which the Commission determined to be clear and convincing, the Commission concluded as a matter of law that respondent's conduct constitutes: (1) "Conduct in violation of Canons 1, 2A and 2B of the North Carolina Code of Judicial Conduct," and (2) "Conviction of a crime involving moral turpitude, and conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376." On 29 November 2006, the Commission recommended that "the Supreme Court remove the respondent from his judicial office."

This Court concludes that the Commission's findings of fact are supported by the findings of fact stipulated to by respondent and the other evidence in the record before us. Moreover, we conclude that the Commission's findings of fact support its conclusions of law. Therefore, we accept the Commission's findings and adopt them as our own. Based upon those findings and conclusions and the recommendation of the Commission, we conclude and adjudge that respondent should be removed from his judicial office.

Now, therefore, it is ordered by the Supreme Court of North Carolina in conference that respondent Garey M. Ballance be, and he is hereby, officially removed from office as a judge of the General Court of Justice, District Court Division, Judicial District 9B, for conduct in violation of Canons 1, 2A, and 2B of the North Carolina Code of Judicial Conduct, conviction of a crime involving moral turpitude, and conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376. As a consequence of his removal from office, respondent Garey M. Ballance is disqualified by statute from holding further judicial office and is ineligible for retirement benefits. N.C.G.S. § 7A-376(b) (Supp. 2006).

IN THE MATTER OF J.T.W., A MINOR CHILD

No. 477A06

(Filed 4 May 2007)

Termination of Parental Rights— neglect—probability of repetition

A divided panel of the Court of Appeals erred by reversing the trial court's termination of respondent mother's parental rights based on its erroneous determination that none of the court's findings indicate that neglect is likely to reoccur if respondent mother regains custody.

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

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 178 N.C. App. 678, 632 S.E.2d

237 (2006), reversing an order terminating parental rights entered 17 May 2004 by Judge L. Dale Graham in District Court, Iredell County. Heard in the Supreme Court 14 February 2007.

Holly M. Groce for appellant Guardian ad Litem.

Katharine Chester and Richard E. Jester for respondent-appellee mother.

PER CURIAM.

In its order terminating respondent mother's parental rights, entered 17 May 2004, the trial court found that "[t]he minor child . . . was adjudicated neglected on 11/1/01" and that the motion for termination of parental rights of respondent mother was filed on 30 May 2003. The trial court also found the following facts:

> 9. . . . Until recently, the mother had a different employer every couple of months, a pattern which continued for years and which continues through the time of this hearing.
>
> . . . .
>
> 13. The Respondent Mother's transportation problems have repeatedly led to the mother losing her employment and has [sic] contributed to difficulties with the mother visiting her children. The mother's voluntary departure from Statesville to Gastonia in 2003 has created further difficulties for the mother in visiting her children since she has no transportation which would allow her to visit them.
>
> . . . .
>
> 15. The Respondent Mother has had no visits with any of her children who were placed in custody since December 2002. As a result, these children have no observable bond with the mother. The mother is virtually unknown to [J.T.W.] in as much as [sic] he has been in care since he was an infant.
>
> . . . .
>
> 22. All three children taken into the custody of the Iredell County DSS have exhibited or are exhibiting special needs.

Based on these findings of fact, the trial court concluded:

> 2. Clear, Cogent and Convincing evidence exists to find that the minor child has been neglected within the definition of N.C.G.S.

[§] 7B-101 and that such neglect would continue for the foreseeable future if the child were placed in the care and custody of either parent, and that the parents, for a period of twelve months next proceeding [sic] the filing of the TPR motion in this case, have failed to show to the satisfaction of the court that reasonable progress has been made to correct the conditions which led to the removal of the minor child.

3. The best interest of the minor child would be served by terminating the parental rights of both Respondent Parents.

A divided panel of the Court of Appeals reversed the trial court's termination of respondent mother's parental rights because "[n]one of the court's findings indicate that neglect is likely to reoccur if respondent mother regains custody." *In re J.T.W.*, 178 N.C. App. 678, 686, 632 S.E.2d 237, 241-42 (2006). The dissent, voting to affirm the trial court's order, stated, " '[E]vidence of changed conditions in light of the history of neglect by the parent, and the probability of a repetition of neglect' are also factors that must be considered, and 'visitation by the parent is a relevant factor in [neglect] cases.' " *Id.* at 688, 632 S.E.2d at 243 (Martin, C.J., dissenting) (quoting *In re Pierce*, 146 N.C. App. 641, 651, 554 S.E.2d 25, 31 (2001), *aff'd*, 356 N.C. 68, 565 S.E.2d 81 (2002)). The dissent further noted, " 'The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*.' " *Id.* at 688, 632 S.E.2d at 243 (quoting *In re Brim*, 139 N.C. App. 733, 742, 535 S.E.2d 367, 372 (2000)).

Having carefully considered the opinion of the Court of Appeals, the record, briefs, and oral arguments, we conclude the trial court's findings were sufficient to support its conclusions of law, and we reverse the decision of the Court of Appeals.

REVERSED.

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

IN RE A.P.

[361 N.C. 344 (2007)]

IN THE MATTER OF A.P., A MINOR CHILD

No. 534A06

(Filed 4 May 2007)

Child Abuse and Neglect— neglected child—custody—closing of case—termination of district court's jurisdiction

The decision of the Court of Appeals remanding this case for an evidentiary hearing determining who is best suited to care for a dependent child who had been placed in the custody of the DSS and placed by DSS with her natural father is reversed for the reasons stated in the dissenting opinion that the district court's closing of the case terminated its jurisdiction and returned the child's parents to their pre-petition legal status. The parents now have the option to pursue a custody determination in a Chapter 50 proceeding.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 179 N.C. App. 425, 634 S.E.2d 561 (2006), reversing an order entered 18 October 2004 by Judge Denise S. Hartsfield in District Court, Forsyth County, and remanding the case for an evidentiary hearing. Heard in the Supreme Court 10 April 2007.

Theresa A. Boucher, Assistant County Attorney, for petitioner-appellant Forsyth County Department of Social Services.

Katharine Chester and Richard E. Jester for respondent-appellee mother.

Robert T. Newman, Sr. for respondent-appellee Roy P.

Gary C. Rhodes for respondent-appellant William David H.

PER CURIAM.

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

IN RE C.B., J.B., TH.B., & TI.B.

[361 N.C. 345 (2007)]

IN THE MATTER OF C.B., J.B., Th.B., AND Ti.B., MINOR CHILDREN

No. 586A06

(Filed 4 May 2007)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 180 N.C. App. 221, 636 S.E.2d 336 (2006), reversing and remanding an adjudication order entered 17 May 2005 by Judge Phyllis Gorham in District Court, Pender County. Heard in the Supreme Court 11 April 2007.

No brief for petitioner.

Deana K. Fleming, Associate Counsel for North Carolina Guardian ad Litem Program, and R. Kent Harrell, GAL Attorney Advocate, for appellant Guardian ad Litem.

Sofie W. Hosford for respondent-appellee father.

PER CURIAM.

Affirmed.

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

ESTATE OF MELVIN NELSON, DECEDENT, BY AND THROUGH HIS CO-EXECUTORS JANICE BREWER AND LIBBY NELSON v. CARRIE LEE NELSON

No. 508A06

(Filed 4 May 2007)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 179 N.C. App. 166, 633 S.E.2d 124 (2006), reversing and remanding a judgment entered 18 February 2005 by Judge Jacquelyn L. Lee in District Court, Lee County. Heard in the Supreme Court 12 April 2007.

Staton, Doster, Post & Silverman, by Jonathan Silverman, for plaintiff-appellee.

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene, for defendant-appellant.

PER CURIAM.

AFFIRMED.

PRINTING SERVICES OF GREENSBORO, INC. v. AMERICAN CAPITAL GROUP, INC.

No. 599A06

(Filed 4 May 2007)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 180 N.C. App. 70, 637 S.E.2d 230 (2006), affirming in part and reversing in part and remanding a judgment entered 8 November 2005 by Judge Catherine C. Eagles in Superior Court, Guilford County. Heard in the Supreme Court 11 April 2007.

Robertson, Medlin & Blocker, PLLC, by Stephen E. Robertson, for plaintiff-appellee.

The Wescott Law Firm P.C., by Lynanne B. Wescott, for defendant-appellant.

Christopher G. Browning, Jr., Solicitor General; Gary R. Govert, Special Deputy Attorney General; and M. Lynne Weaver and Philip A. Lehman, Assistant Attorneys General, for Attorney General Roy Cooper, amicus curiae.

PER CURIAM.

AFFIRMED.

WALSH v. TOWN OF WRIGHTSVILLE BEACH BD. OF ALDERMAN

[361 N.C. 348 (2007)]

JOSEPH T. WALSH, PETITIONER v. TOWN OF WRIGHTSVILLE BEACH BOARD OF ALDERMAN ACTING AS A BOARD OF ADJUSTMENT; CHARLES W. SMITH, III AND WIFE, CONSTANCE C. SMITH, RESPONDENTS

No. 467A06

(Filed 4 May 2007)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 179 N.C. App. 97, 632 S.E.2d 271 (2006), dismissing petitioner's appeal from an order entered on 29 August 2005 by Judge Benjamin G. Alford in Superior Court, New Hanover County. Heard in the Supreme Court 9 January 2007.

Carolina Legal Counsel, by J. Wesley Casteen, for petitioner-appellant.

Wessell & Rainey, by John C. Wessell, III, for respondent-appellee Town of Wrightsville Beach Board of Aldermen; and Murchison, Taylor & Gibson, PLLC, by Michael Murchison, for respondent-appellees Charles W. and Constance C. Smith.

PER CURIAM.

The decision of the Court of Appeals is reversed and remanded to that court for reconsideration in light of our decision in *State v. Hart*, 361 N.C. 309, —— S.E.2d —— (2007).

REVERSED AND REMANDED.

IN RE R.L.C.

[361 N.C. 349 (2007)]

IN RE R.L.C.	)	ORDER

No. 531A06

The counsel for R.L.C., Staples S. Hughes, Appellate Defender, and Constance Widenhouse, Assistant Appellate Defender, are directed to amend the record in the above captioned case by redacting, in accordance with Rule 3 (b) of the Rules of Appellate Procedure, any and all information identifying R.L.C. and O.P.M. except by their initials, within 30 days from the entry of this Order. Additionally, the Clerk of the Supreme Court is ordered to seal the transcript in this matter in the manner described in Rule 9(c) of the Rules of Appellate Procedure.

By Order of the Court in Conference, this 3rd day of May, 2007.

Hudson, J.
For the Court

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

FILED 8 MARCH AND 3 MAY 2007

Binney v. Banner Therapy Products, Inc. Case below: 178 N.C. App. 417	No. 431A06	1. Respondent's (ESC) NOA Based Upon a Dissent (COA05-916) 2. Respondent's (ESC) PDR as to Additional Issues	1. — 2. Allowed 03/08/07
Bio-Medical Applications of N.C., Inc. v. N.C. Dep't of Health & Human Servs. Case below: 179 N.C. App. 483	No. 549A06	1. Def-Appellee's Motion to Dismiss Appeal (COA05-294) 2. Def-Intervenor-Appellee's Motion to Dismiss Appeal	1. See opinion **361 N.C. 229** 2. See opinion page 228
Bobbitt v. N.C. State Univ. Case below: 179 N.C. App. 743	No. 601P06	Def-Appellant's PDR Under N.C.G.S. § 7A-31 (COA05-1548)	Denied 05/03/07 **Hudson, J., Recused**
Bradley v. Mission St. Joseph's Health Sys. Case below: 180 N.C. App. 592	No. 025P07	Def's (Health System's) PDR Under N.C.G.S. § 7A-31 (COA06-100)	Allowed 05/03/07
Broadbent v. Allison Case below: 176 N.C. App. 359	No. 184P06	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA05-194) 2. Plts' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 03/08/07 2. Dismissed as Moot 03/08/07
Brown v. Ginn Case below: 181 N.C. App. 563	No. 107P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-511)	Denied 05/03/07
Calhoun v. WHA Med. Clinic, PLLC Case below: 178 N.C. App. 585	No. 479P06	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA05-1345) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 03/08/07 2. Dismissed as Moot 03/08/07

Campbell v. Ingram Case below: 180 N.C. App. 239	No. 636A06	1. Def's (McLaurin) Motion to Withdraw Appeal (COA05-1516) 2. Def's (Ingram) Motion to Withdraw Appeal	1. Allowed 04/10/07 2. Allowed 04/10/07 **Hudson, J., Recused**
Dillahunt v. Clark Case below: 178 N.C. App. 561	No. 447P06	Plts' PDR Under N.C.G.S. § 7A-31 (COA05-1494)	Denied 05/03/07
Don Setliff & Assocs., Inc. v. Subway Real Estate Corp. Case below: 178 N.C. App. 385	No. 413P06	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA05-1423) 2. Plt's Motion to Supplement and Amend the PDR	1. Allowed 03/08/07 2. Allowed 03/08/07
Dunn v. Canoy Case below: 180 N.C. App. 30	No. 633P06	1. Max D. Ballinger's NOA Based Upon a Constitutional Question (COA05-794) 2. Max D. Ballinger's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 05/03/07 2. Denied **Edmunds, J., Recused**
Dunn v. State Case below: 179 N.C. App. 753	No. 605PA06	Defs' PDR Under N.C.G.S. § 7A-31 (COA05-1178)	Allowed 05/03/07

Estate of Redden v. Redden Case below: 179 N.C. App. 113	No. 554PA06	Defs' PDR Under N.C.G.S. § 7A-31 (COA05-1202)	Allowed for limited purpose of remanding to Court of Appeals for consideration of whether plaintiff's admission of defendant's deposition and failure to object to incompetent portions of said deposition evidence, during the partial summary judgment hearing, constituted a waiver of the protections of N.C.R.E. Rule 601(c), the North Carolina Dead Man's Statute 05/03/2007
Foster v. Crandell Case below: 181 N.C. App. ——	No. 073P07	Defs' Motion for Temporary Stay (COA05-1140)	Allowed 02/09/07
Gore v. Myrtle/Mueller Case below: 178 N.C. App. 561	No. 396P06	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA05-988) 2. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 03/08/07 2. Allowed 03/08/07

Harrell v. Bowen Case below: 179 N.C. App. 857	No. 587P06	Plt's PDR Under N.C.G.S. 7A-31 (COA06-256)	Allowed 05/03/07
Hayes v. Macias Case below: 180 N.C. App. 475	No. 632A06	Plt's NOA Based Upon a Constitutional Question (COA06-131)	Dismissed *Ex Mero Motu* 03/08/07 **Hudson, J., Recused**
Hollin v. Johnston Cty. Council On Aging Case below: 181 N.C. App. 77	No. 079P07	Defs' Motion for Temporary Stay (COA06-310)	Allowed 02/08/07 **Hudson, J., Recused**
In re A.A.W. Case below: 180 N.C. App. 690	No. 029P07	Respondent's (Mother) PDR Under N.C.G.S. 7A-31 (COA06-550)	Denied 05/03/07
Baldwin v. Wilkie Case below: 179 N.C. App. 567	No. 562P06	Def's (Jason Wilkie) PDR Under N.C.G.S. 7A-31 (COA05-1503)	Denied 05/03/07 **Hudson, J., Recused**
In re C.S. & C.A.S. Case below: 177 N.C. App. 810	367P06	Respondent's (Stanley S.) PDR Under N.C.G.S. § 7A-31 (COA05-1362)	Denied 03/08/07
In re J.J., T-a.J., T-e.J. Case below: 180 N.C. App. 606	No. 015A07	1. Respondent's (Mother) PWC to Review Decision of COA (COA05-1510) 2. Respondent's (Mother) second PWC to Review Decision of COA	1. Allowed 05/03/07 2. Allowed 05/03/07 **Hudson, J., Recused**

In re Key Case below: 182 N.C. App. —— (17 April 2007)	No. 208P07	Respondent's (Mark Key) Motion for Temporary Stay (COA06-498)	Allowed 04/30/07
In re Key Case below: 182 N.C. App. —— (17 April 2007)	No. 209P07	Respondent's (Mark Key) Motion for Temporary Stay (COA06-499)	Allowed 04/30/07
In re L.C., I.C., L.C. Case below: 181 N.C. App. 278	No. 039P07	Respondent's (Father) PDR Under N.C.G.S. 7A-31 (COA06-575)	Denied 05/03/07 **Hudson, J., Recused**
In re M.D.D. Case below: 181 N.C. App. 148	No. 056P07	1. Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA06-657) 2. Guardian Ad Litem's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 03/08/07 2. Dismissed as Moot 03/08/07
In re M.E. Case below: 181 N.C. App. 322	No. 068P07	Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA06-787)	Denied 05/03/07
In re S.M., C.E., E.E. Case below: 181 N.C. App. 149	No. 065P07	Respondent's (Mother) Motion to Withdraw PDR/Writ of Certiorari (COA06-842)	Allowed 05/03/07
In re W.R. Case below: 179 N.C. App. 642	No. 560P06	AG's Motion for Temporary Stay (COA05-1602)	Allowed 10/26/06
In re: Z.P.S. & A.M.S. Case below: 180 N.C. App. 691	No. 032P07	Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA06-563)	Denied 03/08/07

James River Equip., Inc. v. Mecklenburg Utils., Inc. Case below: 179 N.C. App. 414	No. 540P06	1. Def's (Mecklenburg Utilities) PDR Under N.C.G.S. § 7A-31 (COA05-622) 2. Plt's NOA Based Upon a Constitutional Question 3. Def's (Orange County BOE) Motion to Dismiss Appeal 4. Plt's PDR Under N.C.G.S. § 7A-31 5. Def's (Orange County BOE) Conditional PDR	1. Denied 03/08/07 2. —— 3. Allowed 03/08/07 4. Denied 03/08/07 5. Dismissed as Moot 03/08/07 **Hudson, J., Recused**
Jenkins v. Jones Onslow EMC Case below: 181 N.C. App. 436	No. 100P07	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-23)	Denied 03/08/07
Jernigan v. Herring Case below: 179 N.C. App. 390	No. 536P06	Plts' PDR Under N.C.G.S. § 7A-31 (COA05-1233)	Denied 05/03/07
Jones v. Town of Angier Case below: 181 N.C. App. 121	No. 080P07	1. Def's (Town of Angier) PDR Under N.C.G.S. § 7A-31 (COA06-391) 2. Plt's (David Jones) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 03/08/07 2. Dismissed as Moot 03/08/07
Level 3 Communications, LLC v. Couch Case below: 178 N.C. App. 390	No. 412P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA05-1505)	Allowed 05/03/07 **Hudson, J., Recused**

Lucas v. LL Bldg. Prods. Case below: 178 N.C. App. 562	No. 459P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1431)	Denied 03/08/07 **Hudson, J., Recused**
McKyer v. McKyer Case below: 179 N.C. App. 132	No. 514P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA05-810)	Denied 05/03/07 **Hudson, J., Recused**
Patel v. Stanley Works Customer Support Case below: 178 N.C. App. 562	No. 445PA06	1. Defs' Motion for Temporary Stay (COA05-462) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed 08/23/06 2. Allowed 05/03/07 3. Allowed 05/03/07
Perkins v. U.S. Airways Case below: 177 N.C. App. 205	No. 276P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA05-392)	Denied 03/08/07
Philip Morris USA, Inc. v. Tolson Case below: 176 N.C. App. 509	No. 191P06	1. Plt's NOA Based Upon a Constitutional Question (COA05-340) 2. AG's Motion to Dismiss Appeal 3. Plt's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 03/08/07 3. Denied 03/08/07
Rainey v. N.C. Dep't of Pub. Instruction Case below: 181 N.C. App. 666	No. 143PA07	Respondent's PDR Under N.C.G.S. § 7A-31 (COA05-1609)	Allowed 05/03/07
Rose v. City of Rocky Mount Case below: 180 N.C. App. 392	No. 017P07	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1645)	Denied 03/08/07

Sable v. Sable (now Knight) Case below: 177 N.C. App. 811 (6 June 2006)	No. 351P06	1. Plt's Petition for Writ of Supersedeas (COA05-664) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Plt's Motion for Leave to Partially Withdraw PDR 4. Plt's Motion for Limited Remand	1. Denied 03/08/07 2. Denied 03/08/07 3. Dismissed as Moot 03/08/07 4. Dismissed as Moot 03/08/07
Sea Ranch Owners Ass'n v. Sea Ranch, II, Inc. Case below: 180 N.C. App. 226	No. 338P06	1. Plt's Motion for Temporary Stay (COA05-1528 & 1559) 2. Plt's Petition for Writ of Supersedeas 3. Plt's PDR Under N.C.G.S. § 7A-31 4. Plt's Motion for Leave to File a Rule 60(a) Motion in Superior Court	1. Allowed 06/26/06 **360 N.C. 649** Stay Dissolved 03/08/07 2. Denied 03/08/07 3. Denied 03/08/07 4. Dismissed as Moot 03/08/07 **Martin, J., and Hudson, J., Recused**
Shelton v. Duke Univ. Health Sys., Inc. Case below: 179 N.C. App. 120	No. 470P06	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA05-1113) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 03/08/07 2. Dismissed as Moot 03/08/07
State v. Aikin Case below: 180 N.C. App. 691	No. 027P07	1. Def's NOA Based Upon a Constitutional Question (COA06-8) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 03/08/07 3. Denied 03/08/07

State v. Alexander Case below: 177 N.C. App. 281	No. 278P06	1. Def's NOA Based Upon a Constitutional Question (COA05-971) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 03/08/07 3. Denied 03/08/07 **Hudson, J., Recused**
State v. Apple Case below: 182 N.C. App. —— (3 April 2007)	No. 195P07	Def's Motion for Temporary Stay (COA06-652)	Denied 04/26/07
State v. Ballard Case below: 180 N.C. App. 637	No. 001P07	1. AG's Motion for Temporary Stay (COA05-1398) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 01/03/07 Stay Dissolved 05/03/07 2. Dismissed as Moot 05/03/07 3. Denied 05/03/07 4. Dismissed as Moot 05/03/07 **Hudson, J., Recused**
State v. Bethea Case below: 176 N.C. App. 767	No. 362P06	Def's PWC to Review Decision of COA (COA05-866)	Denied 03/08/07
State v. Boyce Case below: 175 N.C. App. 663	No. 129A06	1. Def's NOA (Dissent) (COA05-279) 2. Def's PDR as to Additional Issues	1. —— 2. Allowed 03/08/07
State v. Brown Case below: Wayne County Superior Court	No. 145A02-2	Def's Petition for Certiorari to Review Order of the Wayne County Superior Court	Denied 05/03/07

State v. Chaplin Case below: 180 N.C. App. 692	No. 030P07	Def's PDR Under N.C.G.S. 7A-31 (COA06-96)	Denied 05/03/07
State v. Chapman Case below: 176 N.C. App. 767	No. 179PA06	1. AG's Motion for Temporary Stay (COA05-254)	1. Allowed 04/07/06 **360 N.C. 485** Stay Dissolved 03/08/07
		2. AG's Petition for Writ of Supersedeas	2. Denied 03/08/07
		3. AG's PDR Under N.C.G.S. § 7A-31	3. Allowed for the limited purpose of (1) vacating that portion of the Court of Appeals opinion ordering remand to the trial court for resentencing and (2) remanding to the Court of Appeals for reconsideration in light of *State v. Blackwell*, **361 N.C. 41.** 03/08/07
		4. Def's NOA Based Upon a Constitutional Question	4. ——
		5. AG's Motion to Dismiss Appeal	5. Allowed 03/08/07

State v. Chevalier Case below: 181 N.C. App. 150	No. 046P07	1. Def's Motion for Relief (COA06-552) 2. Def's Motion for Appointment of Counsel 3. Def's Motion for Relief	1. Dismissed (05/03/07) 2. Denied (05/03/07) 3. Dismissed without prejudice to file a motion for appropriate relief in the trial court with respect to defendant's ineffective assistance of trial and appellate counsel claims (05/03/07)
State v. Christian Case below: 178 N.C. App. 562	No. 428P06	1. Def's NOA Based Upon a Constitutional Question (COA05-958) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 03/08/07 3. Denied 03/08/07
State v. Cragher Case below: 180 N.C. App. 474	No. 650P06	1. Def's NOA Based Upon a Constitutional Question (COA05-1590) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 03/08/07 3. Denied 03/08/07
State v. Crawford Case below: 179 N.C. App. 613	No. 574P06	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1086)	Denied 03/08/07

State v. Desperados, Inc. Case below: 180 N.C. App. 378	No. 629A06	AG's Petition for Writ of Supersedeas	Allowed 03/08/07 **Hudson, J. Recused**
State v. Edwards Case below: 181 N.C. App. 150	No. 076P07	1. Def's NOA Based Upon a Constitutional Question (COA06-12) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 03/08/07 3. Denied 03/08/07
State v. Erickson Case below: 181 N.C. App. 479	No. 95PA07	Defs' PDR Under N.C.G.S. § 7A-31 (COA06-173)	Allowed for the limited purpose to review Issue No. 1 (that it was plain error for the court not to instruct the jury on second-degree murder). As to all other issues, discretionary review is denied. 05/03/07
State v. Farrar Case below: 179 N.C. App. 561	No. 527P06	1. AG's Petition for Writ of Supersedeas 2. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed 03/08/07 2. Allowed 03/08/07

State v. Finney Case below: 175 N.C. App. 795	No. 093PA06	1. AG's Motion for Temporary Stay (COA05-850) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed 02/23/06 Stay Dissolved 05/03/07 2. Denied 05/03/07 3. Allowed for the limited purpose of remanding this case to the Court of Appeals for consideration in light of the deceisions of this Court in *State v. Blackwell*, 361 N.C. 41, and *State v. Hurt*, 361 N.C. 325, —— S.E.2d ——, (2007)
State v. Garibay Case below: 177 N.C. App. 463	No. 301P06	1. Def's NOA Based Upon a Constitutional Question (COA05-444) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. 7A-31	1. —— 2. Allowed 05/03/07 3. Denied 05/03/07
State v. Gillespie Case below: 180 N.C. App. 514	No. 002P07	1. AG's Motion for Temporary Stay (COA05-1182) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed 01/08/07 Stay Dissolved **361 N.C. 223** 2. Allowed 05/03/07 3. Allowed 05/03/07

State v. Glascoe Case below: 177 N.C. App. 565	No. 332P06	1. Def's NOA Based Upon a Constitutional Question (COA05-1145) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 03/08/07 3. Denied 03/08/07
State v. Gwynn Case below: 182 N.C. App. —— (20 March 2007)	No. 158P07	AG's Motion for Temporary Stay (COA06-403)	1. Allowed 04/04/07
State v. Hall Case below: 177 N.C. App. 463	No. 245A06	1. Def's NOA Based Upon A Constitutional Question (COA05-654) 2. AG's Motion to Dismiss Appeal	1. —— 2. Allowed 03/08/07 **Hudson, J., Recused**
State v. Harrison Case below: 179 N.C. App. 654	No. 578P06	Def's PDR Under N.C.G.S. 7A-31 (COA05-897)	Denied 05/03/07
State v. Hendricks Case below: 181 N.C. App. 150	No. 087P07	1. Def's NOA Based Upon a Constitutional Question (COA05-1465) 2. AG's Motion to Dismiss Purported Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 03/08/07 3. Denied 03/08/07
State v. Hodges Case below: 180 N.C. App. 692	No. 035P07	Def's PDR Under N.C.G.S. 7A-31 (COA06-30)	Denied 05/03/07
State v. Holmes Case below: 180 N.C. App. 474	No. 641P06	1. Def-Appellant's PDR (COA06-51) 2. Def's Motion to Strike State's Response	1. Denied 03/08/07 2. Dismissed as Moot

State v. Hoover Case below: 174 N.C. App. 596	No. 370P04-6	1. Def's Motion for "Petition for a Writ of Newly Discovered Evidence for Appropriate Relief and Subpoena and Defendant for Appropriate Relief" (COA05-64) 2. Def's Petition for a Writ of Mandamus for Motion for Appropriate Relief and Notice of Appeal 3. Def's Motion for "Petition for Motion Writ Production of Documentary of State Procedure"	1. Dismissed 05/03/07 2. Dismissed 05/03/07 3. Dismissed 05/03/07 **Hudson, J., Recused**
State v. Hoover Case below: 179 N.C. App. 226	No. 512P06	Def's PDR Under N.C.G.S. 7A-31 (COA05-1670)	Denied 05/03/07
State v. Hopper Case below: 181 N.C. App. —— (20 February 2007)	No. 157P07	Def's Motion for PDR Under N.C.G.S. § 7A-31 (06-313)	Denied 05/03/07
State v. Johnson Case below: 181 N.C. App. 287	No. 072P07	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1403)	Denied 03/08/07 **Hudson, J., Recused**
State v. Johnson Case below: 181 N.C. App. 287	No. 072P07-2	Def's Motion for "Notice of Appeal" (COA05-1403)	Dismissed *ex mero motu* 05/03/07 **Hudson, J., Recused**
State v. Johnson Case below: 180 N.C. App. 476	No. 004P07	Def's PDR Under N.C.G.S. 7A-31 (COA05-1606)	Denied 05/03/07
State v. Joyner Case below: 178 N.C. App. 742	No. 468P06	Def's PDR Under 7A-31 (COA05-1124)	Denied 05/03/07

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

State v. Lakey Case below: 181 N.C. App. 608	No. 130P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-602)	Denied 05/03/07
State v. Lockhart Case below: 181 N.C. App. 316	No. 033P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-174)	Denied 03/08/07
State v. McCollum Case below: 177 N.C. App. 681 (6 June 2006)	No. 355P06	Def-Appellant's PDR (COA05-845)	Denied 05/03/07
State v. McIver Case below: 178 N.C. App. 235	No. 377P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1283)	Denied 05/03/07
State v. McMillan Case below: 180 N.C. App. 474	No. 133P07	Def's PWC to Review Decision of COA (COA06-201)	Denied 05/03/07
State v. McQueen Case below: 181 N.C. App. 417	No. 101P07	1. Def's NOA Based Upon a Constitutional Question (COA06-203) 2. AG's Motion to Dismiss Appeal 3. Def's Motion for Temporary Stay 4. Def's Petition for Writ of Supersedeas 5. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 05/03/07 3. Allowed 04/05/07 Stay Dissolved 05/03/07 4. Denied 05/03/07 5. Denied 05/03/07
State v. Mims Case below: 180 N.C. App. 403	No. 005P07	1. Def's NOA Based Upon a Constitutional Question (COA06-10) 2. Def's Motion to Withdraw NOA and PDR	1. —— 2. Allowed 05/03/07

State v. Parmaei Case below: 180 N.C. App. 179	No. 618P06	Def's PDR Under N.C.G.S. § 7A-31 (COA06-120)	Denied 05/03/07
State v. Partridge Case below: 179 N.C. App. 227	No. 570P06	Def's PWC to Review Decision of COA (COA05-1482)	Denied 05/03/07
State v. Phelps Case below: 166 N.C. App. 518	No. 566P06	Def's PWC (COA04-298)	Dismissed 05/03/07
State v. Poke Case below: 178 N.C. App. 742	No. 434P06	1. Def's NOA Based Upon a Constitutional Question (COA05-1003) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. 7A-31	1. —— 2. Allowed 05/03/07 3. Denied 05/03/07
State v. Rashidi Case below: 172 N.C. App. 628	No. 510A05-2	Def-Appellant's Motion to Relieve Def from the Court's Adverse Judgment (COA04-311)	Dismissed 05/03/07
State v. Reed Case below: 182 N.C. App. —— (6 March 2007)	No. 141P07	AG's Motion for Temporary Stay (COA06-400)	Allowed 03/23/07
State v. Ridley Case below: 177 N.C. App. 463	No. 272P06	AG's Motion for Temporary Stay (COA03-1543)	Allowed 05/18/06 **Hudson, J., Recused**
State v. Risher Case below: 179 N.C. App. 865	No. 595P06	1. Def's PDR Under N.C.G.S. § 7A-31 (COA05-1249) 2. Def's Motion to Stay Mandate Pending PDR 3. Def's Petition for Writ of Supersedeas	1. Denied 05/03/07 2. Denied 11/22/06 3. Denied 05/03/07

State v. Rivers Case below: 179 N.C. App. 656	No. 569P06	Def's PDR Under N.C.G.S. § 7A-31 (COA06-90)	Denied 03/08/07
State v. Roberson Case below: 182 N.C. App. 133	No. 707P05-2	Def's PDR Under N.C.G.S. § 7A-31 (COA04-1645-2)	Denied 05/03/07
State v. Rogers Case below: 180 N.C. App. 474	No. 028P07	1. Def's NOA Based Upon a Constitutional Question (COA06-99) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 03/08/07 2. Denied 03/08/07
State v. Scott Case below: 180 N.C. App. 462	No. 016P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-300)	Denied 03/08/07
State v. Shannon Case below: 182 N.C. App. 350	No. 177A07	AG's Motion for Temporary Stay (COA06-418)	Allowed 04/17/07
State v. Shelly Case below: 181 N.C. App. 196	No. 066P07	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1395)	Denied 05/03/07
State v. Sloan Case below: 180 N.C. App. 527	No. 024A07	1. Def's (Sloan) NOA Based Upon a Constitutional Question (COA05-1513) 2. Def's (Sloan) PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 03/08/07 2. Denied 03/08/07
State v. Stitt Case below: 181 N.C. App. 150	No. 075P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-238)	Denied 03/08/07 **Hudson, J., Recused**

State v. Stoneman Case below: 181 N.C. App. 150	No. 059P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-74)	Denied 03/08/07
State v. Sutton Case below: 180 N.C. App. 693	No. 022P07	1. Def's NOA Based Upon a Constitutional Question (COA06-337) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. 7A-31	1. —— 2. Allowed 05/03/07 3. Denied 05/03/07
State v. Trujillo Case below: 181 N.C. App. 609	No. 125P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-2)	Denied 05/03/07
State v. Watts Case below: 180 N.C. App. 474	No. 639P06	Def-Appellant's PDR Under N.C.G.S. § 7A-31 (COA06-480)	Denied 03/08/07
State v. West Case below: 180 N.C. App. 664	No. 031P07	1. Def's NOA Based Upon a Constitutional Question (COA06-205) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 03/08/07 3. Denied 03/08/07

State v. Whaley Case below: 178 N.C. App. 563	No. 440PA06	1. Def's NOA Based Upon a Constitutional Question (COA05-948) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 05/03/07 3. Allowed on the issue whether the Court of Appeals erred in affirming the decision of the trial court to exclude the testimony and evidence offered at defendant's trial regarding the victim's credibility and mental state. 05/03/07
State v. Woodard Case below: 177 N.C. App. 150	No. 239P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-597)	Denied 03/08/07
State v. Young Case below: 178 N.C. App. 394	No. 417P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1265)	Denied 03/08/07 **Hudson, J., Recused**
Taylor v. N.C. Farm Bureau Mut. Ins. Co. Case below: 181 N.C. App. 343	No. 083P07	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-321)	Denied 05/03/07 **Hudson, J., Recused**
Teague v. N.C. Dep't of Transp. Case below: 177 N.C. App. 215	No. 281P06-3	Plt's Motion for Declaratory Judgment on Five Separate and Distinct Alternative NC Statutes All Referenced to the Subject Case (COA05-522)	Dismissed

Turner v. Ellis Case below: 179 N.C. App. 357	No. 537P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1527)	Denied 03/08/07 **Hudson, J., Recused**
Wendt v. Thomas Case below: 174 N.C. App. 368	No. 486A06	Plt-Appellant's NOA (Constitutional Question) (COA04-1651)	Dismissed *ex mero motu* 03/08/07
Wendt v. Thomas Case below: 174 N.C. App. 368	No. 486P06-2	Plt's PWC to Review the Decision of the COA (COA04-1651)	Denied 05/03/07
Whitaker v. Whitaker Case below: 181 N.C. App. 609	No. 120P07	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-465)	Denied 05/03/07
Womack Newspapers, Inc. v. Town of Kitty Hawk Case below: 181 N.C. App. 1	No. 082P07	1. Defs' (Harris, et al.) PDR Under N.C.G.S. § 7A-31 (COA05-1650) 2. Defs' (Harris, et al.) Motion to Withdraw Petition	1. —— 2. Allowed 03/08/07

PETITIONS TO REHEAR

Bio-Medical Applications of N.C., Inc. v. N.C. Dep't of Health & Human Servs. Case below: 361 N.C. 229	No. 549A06-2	Plt's Petition for Rehearing (COA05-294)	Denied 05/02/07

Magnolia Mfg. of N.C., Inc. v. Erie Ins. Exch. Case below: 361 N.C. 213	No. 525A06-2	Plt/Appellee/Petitioner's Petition for Rehearing	Denied 03/08/07 **Parker, C.J., Timmons-Goodson, J., and Hudson, J., Recused**
Shepard v. Ocwen Federal Bank, FSB Case below: 361 N.C. 137	No. 476A05-2	Plt's Petition for Rehearing	Denied 02/01/07
Skinner v. Preferred Credit Case below: 361 N.C. 114	No. 525A05-2	Plt's Petition for Rehearing	Denied 2/15/07

MULTIPLE CLAIMANTS v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, DIVISION OF FACILITY SERVICES, JAILS AND DETENTION SERVICES

No. 183A06

(Filed 28 June 2007)

Tort Claims Act— jail fire—negligence action—public duty doctrine—special relationship exception—inmates

The special relationship exception to the public duty doctrine allowed a negligence action to proceed against the State where the plaintiffs are an inmate injured in a jail fire and the estates of others who died in the fire. A special relationship exists because DHHS has a statutory duty to inspect jails to ensure compliance with minimum fire safety standards, a duty which arises from concern for the health and safety of particular individuals (the inmates). The special relationship also applied because of the inmates' inability to care for themselves. Although the county has the primary responsibility for the health and safety of the inmates, the General Assembly has determined that the State must play a role in establishing and enforcing minimum standards to ensure the safety of all inmates.

Chief Justice PARKER dissenting.

Justice BRADY joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 176 N.C. App. 278, 626 S.E.2d 666 (2006), affirming an order entered by the North Carolina Industrial Commission on 19 March 2004. Heard in the Supreme Court 21 November 2006.

Beasley, Allen, Crow, Methvin, Portis & Miles, P.C., by Benjamin E. Baker, Jr., for plaintiff-appellees.

Roy Cooper, Attorney General, by Amar Majmundar, Special Deputy Attorney General, for defendant-appellant.

TIMMONS-GOODSON, Justice.

At the heart of this case is a fire at the Mitchell County jail that resulted in injury and loss of life. The question before us concerns the application of the public duty doctrine to the statutorily-imposed

duty of the Department of Health and Human Services ("DHHS" or "defendant") to inspect local confinement facilities. Because we conclude that the special relationship exception to the public duty doctrine applies, we hold that plaintiffs may pursue their negligence claims against DHHS.

A fire at the Mitchell County jail on 3 May 2002 claimed the lives of Jason Jack Boston, Mark Halen Thomas, Jesse Allen Davis, and Danny Mark Johnson and seriously injured O.M. Ledford, Jr. Plaintiffs in the instant case are Mr. Ledford and the administrators of the decedents' estates.

Plaintiffs filed individual claims under the Tort Claims Act, Article 31 of N.C.G.S. Chapter 143, and on 27 August 2003, the Industrial Commission ("the Commission") consolidated the claims with the agreement of all parties. On 21 July 2003, before all claims were consolidated, Deputy Commissioner Edward Garner, Jr. denied defendant's Rule 12(b)(6) motion to dismiss for failure to state a claim, finding that the public duty doctrine did not apply.[1] On appeal, the Commission affirmed the decision of the Deputy Commissioner. The Court of Appeals heard the interlocutory appeal after deciding a substantial right was involved and held, in a divided opinion, that the Commission properly denied defendant's motion to dismiss because the public duty doctrine did not apply and, alternatively, the special relationship exception to the doctrine applied.

Because we are reviewing the Commission's denial of defendant's motion to dismiss for failure to state a claim, we must treat the factual allegations in plaintiffs' affidavits of claim as true. *Hunt v. N.C. Dep't of Labor*, 348 N.C. 192, 194, 499 S.E.2d 747, 748 (1998) (citing *Cage v. Colonial Bldg. Co. of Raleigh*, 337 N.C. 682, 683, 448 S.E.2d 115, 116 (1994)). Plaintiffs allege that DHHS and Ernest Dixon, a DHHS employee, were responsible for inspecting the Mitchell County jail facility "to ensure compliance with certain regulations and to ensure that all fire safety devices and procedures were in good working order." Plaintiffs allege that defendant and Dixon "were negligent and/or wanton in their duties" and that Mr. Ledford's injuries and the deaths of decedents were "a direct proximate result of said conduct." Further, plaintiffs allege that "[t]he State also failed to properly train [Dixon] to perform the special duties of inspecting county jails."

1. In the same motion, defendant also sought to dismiss plaintiffs' claims "on the basis of the sovereign immunity enjoyed by the defendant pursuant to N.C. R. Civ. P. 12(b)(1) and 12(b)(2)." Defendant's claim of sovereign immunity rests on the applicability of the public duty doctrine to the instant case.

At about the same time that defendant filed a motion to dismiss based on the public duty doctrine, plaintiffs amended their affidavits of claim to also allege that a special relationship existed between defendant and the injured and deceased inmates and that defendant had a special duty to them. Specifically, plaintiffs allege that because the injured and deceased inmates were confined and unable to protect themselves, "a special relationship arose between the aforementioned department and individual to fulfill the duties imposed under the law to ensure that the decedent, as a confined individual, would be protected in the event of a fire." Plaintiffs also allege that "the State promised it would inspect county jails to ensure the protection of inmates in the event of fires." Finally, plaintiffs contend that "[t]he duties described hereinabove were not for the benefit of the public at large, but for the benefit of the specific individuals confined in the subject jail."

The issue before us is whether the public duty doctrine bars plaintiffs' negligence claims against DHHS. Because plaintiffs allege facts sufficient to support the determination that a special relationship exists between the inmates and DHHS, we hold that the special relationship exception applies, and plaintiffs' claims are not barred by the public duty doctrine.

The public duty doctrine, which this Court first adopted in *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991), provides that "a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals." *Id.* at 370, 410 S.E.2d at 901. There are two exceptions to the doctrine: "(1) where there is a special relationship between the injured party and the police," and "(2) 'when a municipality, through its police officers, creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered.' " *Id.* at 371, 410 S.E.2d at 902 (quoting *Coleman v. Cooper*, 89 N.C. App. 188, 194, 366 S.E.2d 2, 6, *disc. rev. denied*, 322 N.C. 834, 371 S.E.2d 275 (1988), *overruled in part on other grounds by Meyer v. Walls*, 347 N.C. 97, 489 S.E.2d 880 (1997)). The purpose of the doctrine, as noted in *Braswell*, is to respect the limited resources of law enforcement agencies by relieving them of liability for failure to prevent every criminal act. *Id.* at 370-71, 410 S.E.2d at 901.

In *Stone v. North Carolina Department of Labor*, this Court expanded the application of the public duty doctrine to a state agency

conducting a governmental function other than law enforcement. 347 N.C. 473, 480-81, 495 S.E.2d 711, 715-16, *cert. denied*, 525 U.S. 1016 (1998). There, the Court noted, "Just as we recognized the limited resources of law enforcement in *Braswell*, we recognize the limited resources of [the state agency] here." *Id.* at 481, 495 S.E.2d at 716.

The claims in *Stone* arose out of a deadly fire at the Imperial Foods Products chicken plant in Hamlet, North Carolina. 347 N.C. at 477, 495 S.E.2d at 713. After the fire, it was determined that conditions in the plant violated numerous provisions of the Occupational Safety and Health Act of North Carolina. *Id.* For example, building exits were blocked and the fire suppression system was inadequate. *Id.* Injured employees and the personal representatives of deceased employees filed suit against the North Carolina Department of Labor for failure to inspect the plant. *Id.* The Court concluded that the legislature's establishment of the Occupational Safety and Health Division of the Department of Labor did not impose "a duty upon this agency to each *individual* worker in North Carolina," but rather imposed a duty to protect the safety of the general public. 347 N.C. at 482-83, 495 S.E.2d at 716-17. The Court noted that Chapter 95 of the North Carolina General Statutes does not "authorize a private, individual right of action against the State. . . . Rather, the most the legislature intended was that the Division prescribe safety standards and secure some reasonable compliance through spot-check inspections made 'as often as practicable.' " *Id.* at 482, 495 S.E.2d at 716 (quoting N.C.G.S. § 95-4(5) (1996)). Because the plaintiffs did not allege facts establishing the existence of a special relationship or a special duty, those claims failed. *Id.* at 483, 495 S.E.2d at 717. The holding in *Stone* was confined to "this limited new context, not heretofore confronted by this Court." *Id.*

In *Hunt*, this Court relied on *Stone* to hold that the public duty doctrine barred claims based on the Department of Labor's negligent inspection of go-karts. 348 N.C. at 199, 499 S.E.2d at 751. The plaintiff in *Hunt* was operating a go-kart "when the brakes failed, causing [him] to hit a pole." *Id.* at 194, 499 S.E.2d at 748. The plaintiff suffered severe injuries to his abdominal area from the tightening of his lap belt. *Id.* at 194-95, 499 S.E.2d at 748. According to a rule promulgated by the Department of Labor, go-kart seat belts must include shoulder straps. 13 NCAC 15 .0429(a)(3)(B) (June 2006). The plaintiff alleged that "an elevator and amusement ride inspector for defendant North Carolina Department of Labor[] had previously inspected and passed the go-karts [in question] when the seat belts were not in compliance

with the . . . Administrative Code." 348 N.C. at 195, 499 S.E.2d at 748. Plaintiff, by and through his guardian ad litem, contended that the Department's negligent inspection caused the plaintiff's injury. *Id.* at 195, 499 S.E.2d at 748-49. The Court concluded that the Amusement Device Safety Act, N.C.G.S. §§ 95-111.1 to -111.18, did not "impose a duty upon defendant to each go-kart customer." *Id.* at 197, 499 S.E.2d at 750.

The Court also considered whether the special relationship exception to the public duty doctrine applied to the facts of *Hunt*. While the Court in *Hunt* ultimately concluded that the special relationship exception did not apply, its analysis of the exception is instructive:

> To determine whether the "special relationship" exception applies, we compare the regulatory language at issue in this case with the language at issue in *Stone*. In *Stone* we held that the applicable statute [requiring the Department of Labor to inspect factories] "imposes a duty upon defendants, [but] that duty is for the benefit of the public". . . . We conclude that the language of the Administrative Code at issue in this case is analogous to that in *Stone*.

Id. at 198, 499 S.E.2d at 750 (citations omitted) (quoting *Stone*, 347 N.C. at 483, 495 S.E.2d at 717 (alternation in original)). After reviewing both the rules governing the inspection of go-karts and the rules setting standards for go-kart design and safety features, the Court noted that the rules did not "explicitly prescribe a standard of conduct for this defendant as to individual go-kart customers." *Id.* at 198, 499 S.E.2d at 750-51. Thus, *Hunt* instructs us to assess whether the language of the relevant statutes and regulations clearly mandates a standard of conduct owed by an agency to the complainant.

This Court has not previously decided a case in which the special relationship exception to the doctrine applies. As an initial matter, we note that N.C.G.S. § 153A-216 describes, in part, the relevant legislative policy: "Local confinement facilities should provide secure custody of persons confined therein in order to protect the community and should be operated so as to protect the health and welfare of prisoners and to provide for their humane treatment." N.C.G.S. § 153A-216(1) (2005). Because the operation of safe jails benefits the general public, the public duty doctrine would generally preclude claims asserted by persons in custody absent an exception. Here, plaintiffs argue the special relationship exception applies. As noted

above, the exception exists "where there is a special relationship between the injured party and the governmental entity." *Id.* at 197, 499 S.E.2d at 750. While this Court has cited the special relationship created in the context of "a state's witness or informant who has aided law enforcement officers" as an example of when the exception might apply, *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902, the Court has also recognized that the exception may apply in the context of a duty established by statute for the benefit of particular individuals. *See Myers v. McGrady*, 360 N.C. 460, 469, 628 S.E.2d 761, 767 (2006); *Hunt*, 348 N.C. at 197-99, 499 S.E.2d at 750-51; *see also* 57 Am. Jur. 2d *Municipal, County, School, and State Tort Liability* § 85, at 116-17 (2001) (noting that the special relationship exception applies in cases "concerning a violation of a duty commanded by a statute enacted for the special benefit of particular individuals"). Specifically, this Court recognized in *Myers* that "statutes which create a special duty or specific obligation to a particular class of individuals" might merit different treatment than statutes that protect the general public. 360 N.C. at 469, 628 S.E.2d at 767.

The regulatory language at issue in the instant case is distinguishable from that at issue in *Hunt* and *Stone*. Here, the relevant statutes and regulations establish that defendant's duty to inspect is to a particular class of individuals. The General Assembly has mandated that the Department of Health and Human Services:

> Visit and inspect local confinement facilities; advise the sheriff, jailer, governing board, and other appropriate officials as to deficiencies and recommend improvements; and submit written reports on the inspections to appropriate local officials.

N.C.G.S. § 153A-220(3) (2005). The specific inspections required by statute are as follows:

> Department personnel shall visit and inspect each local confinement facility at least semiannually. The purpose of the inspections is to investigate *the conditions of confinement*, *the treatment of prisoners*, the maintenance of entry level employment standards for jailers and supervisory and administrative personnel of local confinement facilities as provided for in G.S. 153A-216(4), and *to determine whether the facilities meet the minimum standards published pursuant to G.S. 153A-221*. The inspector shall make a written report of each inspection and submit it within 30 days after the day the inspection is completed to the governing body and other local officials responsible for the

> facility. The report shall specify each way in which the facility does not meet the minimum standards.

Id. § 153A-222 (2005) (emphasis added).

Importantly, the minimum standards that are the subject of the mandated inspections "shall be developed with a view to providing secure custody of prisoners and *to protecting their health and welfare and providing for their humane treatment*." *Id.* § 153A-221(a) (2005) (emphasis added). The regulations detailing the minimum standards for local confinement facilities also focus on the safety, health, and welfare of inmates held in local confinement facilities. If an inspection reveals noncompliance with the standards, the inspector "shall submit to the Secretary [of DHHS] a written description of the conditions that caused noncompliance and a preliminary determination of whether those conditions jeopardize the safe custody, safety, health or welfare of the inmates confined in the jail." 10A NCAC 14J .1302(c) (June 2006). Within thirty days after receiving the report, the Secretary "shall determine whether conditions in the jail jeopardize the safe custody, safety, health or welfare of its inmates." *Id.* at .1303(a) (June 2006). If the confinement facility is not in compliance with standards regarding the "fire plan" and "fire equipment," among other things, the Secretary's determination is *not discretionary*. *Id.* at .1303(c)(2), (3) (June 2006). Specifically, "the Secretary shall determine that [such] noncompliance . . . jeopardizes the safe custody, safety, health or welfare of inmates confined in the jail." *Id.* Upon making such a determination, the Secretary "shall notify the local officials responsible for the jail" and "shall order corrective action, order the jail closed, or enter into an agreement of correction with local officials." *Id.* at .1303(d) (June 2006). It is well established that "the word 'shall' is generally imperative or mandatory." *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979); *accord State Farm Mut. Auto. Ins. Co. v. Fortin*, 350 N.C. 264, 269, 513 S.E.2d 782, 784-85 (1999); *Pearson v. Nationwide Mut. Ins. Co.*, 325 N.C. 246, 255, 382 S.E.2d 745, 749 (1989). Thus, a special relationship exists between DHHS and the inmates because DHHS has a statutory duty to inspect jails to ensure their compliance with minimum standards for fire safety. The duty arises out of concern for the health and welfare of particular individuals—here, the inmates.[2]

2. We are not alone in holding that the special relationship exception to the public duty doctrine may apply in cases involving statutorily-imposed duties that benefit a particular class of individuals. *See, e.g.*, *Wilson v. Nepstad*, 282 N.W.2d 664, 667 (Iowa 1979) ("Duty can be created by statute if the legislature purposed or intended to protect a class of persons to which the victim belongs against a particular harm which the

The special relationship exception also applies to the facts of the instant case because of the relationship between the State and inmates by reason of the inmates' inability to care for themselves. This special relationship has been recognized by both this Court and the United States Supreme Court. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (" '[I]t is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.' " (quoting *Spicer v. Williamson*, 191 N.C. 487, 490, 132 S.E. 291, 293 (1926))); *Medley v. N.C. Dep't of Corr.*, 330 N.C. 837, 842, 412 S.E.2d 654, 657-58 (1992) (same). Inmates in custody necessarily have limited freedom to provide for themselves or to protect themselves from external dangers such as fire. They cannot ensure that the facility in which they are confined contains functional safety devices and procedures to deal with an emergency. Defendant argues that these cases are inapposite because in each of them, the inmates were in the custody of the State rather than the county. While defendant is perhaps correct that Mitchell County was primarily responsible for the health and safety of the inmates, the General Assembly has determined that the State must also play a role in establishing and enforcing statewide minimum standards to ensure the safety of all inmates.

Because plaintiffs have properly alleged facts that establish the existence of a special relationship between DHHS and the inmates, we hold that the special relationship exception to the public duty doctrine applies in the instant case. Therefore, plaintiffs are not barred from bringing their negligence claims against DHHS. For the foregoing reasons, the Court of Appeals decision affirming the Industrial Commission's order denying defendant's motion to dismiss is modified and affirmed.

MODIFIED AND AFFIRMED.

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victim has suffered." (citations omitted)); *Cracraft v. City of St. Louis Park*, 279 N.W.2d 80, 806 (Minn. 1979) ("A duty of care arises only when there are additional indicia that the municipality has undertaken the responsibility of not only protecting itself, but also undertaken the responsibility of protecting a particular class of persons from the risks associated with fire code violations."); *McCorkell v. City of Northfield*, 266 Minn. 267, 270-71, 123 N.W.2d 367, 370-71 (1963) (finding that statutes requiring that certain activities be undertaken for the protection of inmates' health and safety established a duty sufficient to support plaintiff's cause of action against the city for negligence after the prisoner died from asphyxiation caused by a smoldering fire in an unattended jail); *Halvorson v. Dahl*, 89 Wash. 2d 673, 676, 574 P.2d 1190, 1192 (1978) ("Liability can be founded upon a municipal code if that code by its terms evidences a clear intent to identify and protect a particular and circumscribed class of persons." (citations omitted)).

Chief Justice PARKER dissenting.

In my view, based on *Stone v. North Carolina Department of Labor*, 347 N.C. 473, 495 S.E.2d 711, *cert. denied*, 525 U.S. 1016, 142 L. Ed. 2d 449 (1998), and *Hunt v. North Carolina Department of Labor*, 348 N.C. 192, 499 S.E.2d 747 (1998), plaintiffs' action is barred by the public duty doctrine.

In *Stone*, this Court noted that under the Tort Claims Act, "the State is liable *only* under circumstances in which a private person would be." 347 N.C. at 478, 495 S.E.2d at 714 (citing N.C.G.S. § 143-291). The Court then stated:

> Private persons do not possess public duties. Only governmental entities possess authority to enact and enforce laws for the protection of the public. If the State were held liable for performing or failing to perform an obligation to the public at large, the State would have liability when a private person could *not*. The public duty doctrine, by barring negligence actions against a governmental entity absent a "special relationship" or a "special duty" to a particular individual, serves the legislature's express intention to permit liability against the State only when a private person could be liable.

Id. at 478-79, 495 S.E.2d at 714 (citations omitted). The operation of a local confinement center is a public duty undertaken by government. *See* N.C.G.S. §§ 153A-216, -218 (2005).

Moreover, this action is not within the purview of either of the two exceptions to the public duty doctrine recognized by this Court in *Braswell v. Braswell* in that neither a "special relationship" nor a "special duty" exists between the governmental entity and the injured party. 330 N.C. 363, 371, 410 S.E.2d 897, 902 (1991).

Chapter 153A of the General Statutes, entitled "Counties," sets forth a county's functions and duties. The primary responsibility for local confinement centers rests with the county. N.C.G.S. § 153A-218. Section 153A-218 provides that the county may "establish, acquire, erect, repair, maintain, and operate local confinement facilities." *Id.* While the General Assembly contemplated a special relationship between Mitchell County and its own inmates, no language in Chapter 153A suggests that the State had a special relationship with Mitchell County's inmates.

As noted by the majority, the legislative policy described in section 153A-216(1) provides that local confinement facilities should be

operated to protect the community as well as the health and welfare of prisoners. N.C.G.S. § 153A-216(1). However, an analysis of the plain language of other subsections of section 153A-216 reveals that the General Assembly intended that the State should provide minimum statewide standards "to guide and assist local governments" in establishing confinement facilities and in developing programs for humane treatment of prisoners and their rehabilitation, *id.* § 153A-216(2), and "should provide" limited services to local officials for the maintenance and operation of the county's confinement facilities through "inspection, consultation, technical assistance, and other appropriate services," *id.* § 153A-216(3).

The majority relies on three other statutes in Chapter 153A to hold that the special relationship exception applies in this case. Specifically, the majority focuses on sections 153A-220, 153A-221, and 153A-222. Section 153A-220 not only fails to identify inmates as a special class of individuals but makes no reference to inmates whatsoever. The language of N.C.G.S. § 153A-220, namely, to "[c]onsult with," "provide technical assistance," "[v]isit and inspect," "advise," "recommend," and "[r]eview," manifests the General Assembly's intent that the State merely advise and assist a county in the county's duty to ensure the security of the confinement center and the safe custody and care of its inmates. *Id.* § 153A-220 (2005).

Similarly, N.C.G.S. § 153A-221 only requires the State to "develop and publish minimum standards for the operation of local confinement facilities." *Id.* § 153A-221 (2005). These standards adopted pursuant to section 153A-221 direct the county's responsibility with regard to the facility and inmates in its custody. Under N.C.G.S. § 153A-222, the State inspector is to report to local officials who are responsible for ensuring that the local confinement facility is in conformity with the standards established pursuant to section 153A-221. Section 153A-222 also references N.C.G.S. § 153A-216(4), which does not address inmate safety but deals with employment standards and qualifications for personnel at local confinement facilities.

Alleging that a governmental entity has merely undertaken to perform its duties to enforce a statute " 'is not sufficient, by itself, to show the creation of a special relationship with particular individual citizens.' " *Hunt*, 348 N.C. at 199, 499 S.E.2d at 751 (quoting *Sinning v. Clark*, 119 N.C. App. 515, 519, 459 S.E.2d 71, 74, *disc. rev. denied*, 342 N.C. 194, 463 S.E.2d 242 (1995)). Such an exception is to be "narrowly construed and applied." *Stone*, 347 N.C. at 482-83, 495 S.E.2d at 717 (citing *Braswell*, 330 N.C. at 372, 410 S.E.2d at 902, and *Sinning*,

119 N.C. App. at 519, 459 S.E.2d at 74). The statutes under Chapter 153A pertaining to confinement centers prescribe the State's limited advisory and educational role in assisting a local government in its maintenance and operation of a secure and safe public jail. None of the statutes can reasonably be construed to establish a "special relationship," giving rise to an individual right to recovery, between the State and Mitchell County's inmates. By enacting these statutes utilizing the resources of state government to assist local governments in this manner, the legislature did not intend to make the State "a virtual guarantor" of the safety of every confinement facility subject to its inspection, thereby, " 'exposing it to an overwhelming burden of liability' " for the alleged failure to prevent the county's alleged negligence in the care, custody and maintenance of its confinement facility. *Hunt*, 348 N.C. at 199, 499 S.E.2d at 751 (quoting *Sinning*, 119 N.C. App. at 519-20, 459 S.E.2d at 74).

While statutory language is a useful guide to determine the existence of a "special relationship," the "special duty" exception exists only when the claimant shows that an actual promise was made by a State agent. *Braswell*, 330 N.C. at 371, 410 S.E.2d at 902. Plaintiffs have not alleged such a special duty.

For the foregoing reasons, I respectfully dissent.

Justice BRADY joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. DONNIE SCOTT CARPENTER

No. 422A06

(Filed 28 June 2007)

Evidence— prior crimes or bad acts—sale of cocaine—prejudicial error

The trial court erred in a possession with intent to sell or deliver cocaine case by admitting under N.C.G.S. § 8C-1, Rule 404(b) evidence of defendant's prior sale of cocaine in 1996 and resulting felony conviction, and defendant's conviction is vacated and remanded for a new trial, because: (1) the two offenses in the case at bar are separated by eight years, and evidence related to defendant's 1996 sale of cocaine lacked sufficient similarity with

his 2004 alleged crime of possession with intent to sell or deliver cocaine; (2) at most, the trial court found that both cases involved multiple dosages of crack cocaine but made no findings as to the significance of these quantities, and there were more differences than similarities when both the quantity and weight of the contraband in the two cases differ by almost precisely 100 percent; (3) although in both instances the crack cocaine rocks were not individually wrapped, an officer testified that rocks of crack cocaine are not normally individually packaged; and (4) the inference afforded by the amount of drugs in defendant's possession does not outweigh the prejudice caused by the erroneous admission of his prior conviction.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 179 N.C. App. 79, 632 S.E.2d 538 (2006), finding no error in defendant's trial which resulted in a judgment entered 21 April 2005 by Judge Timothy S. Kincaid in Superior Court, Lincoln County. Heard in the Supreme Court 9 January 2007.

Roy Cooper, Attorney General, by Douglas A. Johnston, Special Deputy Attorney General, for the State.

M. Victoria Jayne for defendant-appellant.

EDMUNDS, Justice.

On 21 April 2005, a jury convicted defendant Donnie Carpenter of one count of possession with intent to sell or deliver cocaine. During the trial, the State introduced evidence pursuant to North Carolina Rule of Evidence 404(b) of defendant's prior sale of cocaine and resulting felony conviction. Defendant contends this evidence was improperly admitted because his previous sale of cocaine, which occurred eight years before, lacked sufficient similarity with the crime for which he was being tried. Because we agree that the trial court's findings failed to establish sufficient similarity and that introduction of this past sale served only to show defendant's propensity to commit a similar crime, we reverse the Court of Appeals.

At trial, the State presented evidence that on the night of 11 March 2004, Lincolnton Police Officer Dennis Harris parked in a vacant lot across from the Gaston College campus. At approximately 10:00 p.m., he watched as a car backed out of a residential driveway and proceeded down the middle of the street. After following for

about one block, Officer Harris conducted a routine traffic stop for being left of the center line. The car held four people, including defendant, who was sitting in the back seat. When Officer Harris approached the vehicle, he smelled marijuana and saw a bit of smoke inside, and accordingly conducted a search for drugs.

After first searching the driver, Officer Harris removed defendant from the vehicle and conducted a pat-down. In the pocket of defendant's sweatshirt, Officer Harris found a small red tube containing twelve unpackaged rocks of crack cocaine, each within average dosage range and weighing a total of 1.6 grams. He also found two bags of marijuana in defendant's right sock.

Officer Harris secured the drugs for evidence and handcuffed defendant. He then searched the interior of the car and the two female passengers who had been in the vehicle. After finding no additional contraband, he released the driver and female passengers and took defendant into custody.

The State indicted defendant for one felony count of possession with intent to sell and deliver cocaine, pursuant to N.C.G.S. § 90-95(a). Although he was also indicted for one felony count of possession with intent to sell and deliver marijuana, the State later reduced the marijuana charge to misdemeanor possession, and defendant's conviction on that charge is not before us on this appeal.

To establish defendant's intent to sell or deliver cocaine, the State introduced the testimony of Lincolnton Police Chief Dean Abernathy, who had been a narcotics officer in 1996 when he conducted an undercover drug operation leading to defendant's conviction for the sale and delivery of cocaine. At the start of Chief Abernathy's testimony, defendant objected, contending this and other evidence from the 1996 offense was inadmissible under North Carolina Rule of Evidence 404(b), N.C.G.S. § 8C-1, Rule 404(b) (2005), and that the prejudicial effect of the evidence would substantially outweigh its probative value. The State responded that defendant's prior offense of selling cocaine was admissible under Rule 404(b) to show defendant's intent to sell cocaine in 2004.

The trial court conducted a voir dire examination of Chief Abernathy. He testified that he was a lieutenant in charge of narcotics investigations in 1996. On the afternoon of 12 September 1996, Chief Abernathy gave a paid police informant a $100 bill and a body wire. The informant then drove to a high crime area in Lincolnton, with the

police following at a discreet distance, listening to and recording the informant's conversations via the body wire. At approximately 3:13 p.m., the informant stopped his car and spoke to defendant, who was standing in a yard adjacent to the street. The informant paid defendant $80.00 for six rocks of crack cocaine, which weighed a total of .82 grams. Chief Abernathy had provided the informant a "BC Powder" plastic package to hold the cocaine rocks, and the informant returned that container with the crack cocaine to Chief Abernathy following the purchase. Defendant was later arrested in March 1997 and pleaded guilty to the sale and delivery of crack cocaine.

At the completion of the voir dire examination, and after considering arguments of counsel, the trial court made findings of fact as to the circumstances of and quantity of drugs involved in each offense. The trial court observed that the average dosage unit of a rock of crack cocaine is between .05 and .12 grams. In neither instance was the cocaine possessed by defendant individually packaged. The court further found that defendant's 1997 plea of guilty to the sale or delivery of .82 grams of crack cocaine supported an inference that his 2004 possession of the larger quantity of 1.6 grams of crack cocaine was with intent to sell. Based on these findings, the trial court held that evidence of defendant's 1997 conviction was admissible under Rule 404(b) to show defendant's intent. However, the trial court denied admission of defendant's 1997 indictment on the grounds that its prejudicial nature outweighed its probative value.

When the jury returned, the State called Chief Abernathy as a witness to describe the 1996 drug sale, played the audiotape recording of the drug sale, and introduced the defendant's transcript of plea and judgment. Defendant continually renewed his objections to the introduction of this evidence. The trial court admitted the evidence, then instructed the jury that the evidence could be considered only for the purpose of considering whether

> defendant had the intent which is a necessary element of the crime that is charged in this case. If you believe this evidence you may consider it but only for the limited purpose of showing intent. You may not consider this evidence to prove the character of the defendant or that he acted in conformity therewith on the date of this offense.

The court repeated the essence of this instruction in the final charge to the jury before it began deliberations.

The jury convicted defendant of possession with intent to sell or deliver cocaine, and defendant appealed, assigning error to the admission of evidence of the 1996 crime. In a divided opinion, the Court of Appeals affirmed the trial court's decision to admit evidence of the 1996 crime under Rule 404(b), determining that the trial court reasonably concluded the 1996 and 2004 crimes were sufficiently similar and that the 1996 crime was relevant to show defendant's intent to sell or deliver cocaine in 2004. *State v. Carpenter*, —— N.C. App. ——, ——, 632 S.E.2d 538, 541-42 (2006). The dissenting judge, however, argued that the only similarity between the two offenses was that "defendant previously sold cocaine and is now charged with selling cocaine." *Id.* at ——, 632 S.E.2d at 543 (Elmore, J., concurring in part and dissenting in part). Thus, we must consider whether defendant's 1996 possession and sale of .82 grams of crack cocaine makes it more probable that he intended to sell 1.6 grams of the same drug in 2004.

North Carolina Rule of Evidence 404(b) provides:

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

N.C.G.S. § 8C-1, Rule 404(b). We have characterized Rule 404(b) as a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990). However, we have also observed that Rule 404(b) is "consistent with North Carolina practice prior to [the Rule's] enactment." *State v. DeLeonardo*, 315 N.C. 762, 770, 340 S.E.2d 350, 356 (1986); *accord State v. McKoy*, 317 N.C. 519, 525, 347 S.E.2d 374, 378 (1986). Before the enactment of Rule 404(b), North Carolina courts followed "[t]he general rule . . . that in a prosecution for a particular crime, the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense. This is true even though the other offense is of the same nature as the crime charged." *State v. McClain*, 240 N.C. 171, 173, 81 S.E.2d 364, 365 (1954) (citations omitted); *see also*

DeLeonardo, 315 N.C. at 769, 340 S.E.2d at 355 ("Since *State v. McClain* . . . it has been accepted as an established principle in North Carolina that 'the State may not offer proof of another crime independent of and distinct from the crime for which defendant is being prosecuted even though the separate offense is of the same nature as the charged crime.' ") (quoting *State v. Williams*, 303 N.C. 507, 513, 279 S.E.2d 592, 596 (1981)). As we explained in *McClain*, the general rule "rests on these cogent reasons":

> (1) Logically, the commission of an independent offense is not proof in itself of the commission of another crime.
>
> (2) Evidence of the commission by the accused of crimes unconnected with that for which he is being tried, when offered by the State in chief, violates the rule which forbids the State initially to attack the character of the accused, and also the rule that bad character may not be proved by particular acts, and is, therefore, inadmissible for that purpose.
>
> (3) Proof that a defendant has been guilty of another crime equally heinous prompts to a ready acceptance of and belief in the prosecution's theory that he is guilty of the crime charged. Its effect is to predispose the mind of the juror to believe the prisoner guilty, and thus effectually to strip him of the presumption of innocence.
>
> (4) Furthermore, it is clear that evidence of other crimes compels the defendant to meet charges of which the indictment gives him no information, confuses him in his defense, raises a variety of issues, and thus diverts the attention of the jury from the charge immediately before it. The rule may be said to be an application of the principle that the evidence must be confined to the point in issue in the case on trial.

240 N.C. at 173-74, 81 S.E.2d at 365-66 (citations and quotation marks omitted); *see also McKoy*, 317 N.C. at 526, 347 S.E.2d at 378. Thus, while we have interpreted Rule 404(b) broadly, we have also long acknowledged that evidence of prior convictions must be carefully evaluated by the trial court.

Accordingly, we have observed that evidence admitted under Rule 404(b) "should be carefully scrutinized in order to adequately safeguard against the improper introduction of character evidence against the accused." *State v. Al-Bayyinah*, 356 N.C. 150, 154, 567 S.E.2d 120, 122 (2002). When evidence of a prior crime is introduced,

the " 'natural and inevitable tendency' " for a judge or jury " 'is to give excessive weight to the vicious record of crime thus exhibited and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused's guilt of the present charge.' " *Id.* at 154, 567 S.E.2d at 122-23 (quoting IA John Henry Wigmore, *Evidence* § 58.2, at 1212 (Peter Tillers ed., 1983)). Indeed, "[t]he dangerous tendency of [Rule 404(b)] evidence to mislead and raise a legally spurious presumption of guilt requires that its admissibility should be subjected to strict scrutiny by the courts." *State v. Johnson*, 317 N.C. 417, 430, 347 S.E.2d 7, 15 (1986).

In light of the perils inherent in introducing prior crimes under Rule 404(b), several constraints have been placed on the admission of such evidence. Our Rules of Evidence require that in order for the prior crime to be admissible, it must be relevant to the currently alleged crime. N.C.G.S. § 8C-1, Rule 401 (2005) (" '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."); *id.*, Rule 402 (2005) ("Evidence which is not relevant is not admissible."). In addition, "the rule of inclusion described in *Coffey* is constrained by the requirements of similarity and temporal proximity." *Al-Bayyinah*, 356 N.C. at 154, 567 S.E.2d at 123; *see also State v. Lynch*, 334 N.C. 402, 412, 432 S.E.2d 349, 354 (1993) ("The admissibility of evidence under [Rule 404(b)] is guided by two further constraints—similarity and temporal proximity."). This Court has stated that "remoteness in time is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident; remoteness in time generally affects only the weight to be given such evidence, not its admissibility." *State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991). Nevertheless, we note that the two offenses in the case at bar are separated by eight years. Moreover, as to the "similarity" component, evidence of a prior bad act must constitute " 'substantial evidence tending to support a reasonable finding by the jury that the defendant committed [a] *similar* act.' " *Al-Bayyinah*, 356 N.C. at 155, 567 S.E.2d at 123 (quoting *Stager*, 329 N.C. at 303, 406 S.E.2d at 890 (alteration in original)). "Under Rule 404(b) a prior act or crime is 'similar' if there are 'some unusual facts present in both crimes . . . .' " *Stager*, 329 N.C. at 304, 406 S.E.2d at 890 (citations omitted). Finally, if the propounder of the evidence is able to establish that a prior bad act is both relevant and meets the requirements

of Rule 404(b), the trial court must balance the danger of undue prejudice against the probative value of the evidence, pursuant to Rule 403. N.C.G.S. § 8C-1, Rule 403 (2005).

Defendant's prior drug conviction could be relevant to the instant offense under Rule 401. However, if the only relevancy is to show defendant's character " 'or his disposition to commit an offense of the nature of the one charged,' " it is inadmissible under Rule 404(b). *State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989) (quoting *State v. Young*, 317 N.C. 396, 412, 346 S.E.2d 626, 635 (1986)), *judgment vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990). Accordingly, we next consider whether evidence of the prior offense is permitted by Rule 404(b). Defendant contends evidence related to his 1996 sale of cocaine lacked sufficient similarity with his 2004 alleged crime of possession with intent to sell or deliver cocaine. The State responds that the trial court's conclusions of law were supported by its findings of fact. We begin with the State's contentions.

The State argues that defendant possessed significantly large quantities of cocaine in each case and that in each case the individual rocks were of a similar dosage size. However, these purported similarities do not stand up to scrutiny. In defendant's 1996 sale, six rocks were involved, while defendant possessed twelve rocks in the case at bar. The total weight of cocaine in the instant case, 1.6 grams, is almost twice the .82 grams of cocaine that defendant sold in 1996. At most, the trial court found that both cases involved multiple dosages of crack cocaine but made no findings as to the significance of these quantities. Thus, the findings do not establish whether these amounts are pertinent to defendant's alleged intent to sell and distribute. Moreover, we see more differences than similarities when both the quantity and weight of the contraband in the two cases differ by almost precisely 100 percent.

The State also claims the trial court correctly identified a similarity between the 1996 sale of cocaine and the 2004 alleged crime because, in both instances, the crack cocaine rocks were not individually wrapped. This finding is accurate. However, as Chief Abernathy later explained in his testimony before the jury, rocks of crack cocaine are not normally individually packaged:

> Q. Now, based on your training and experience what is the way in which crack cocaine is sold?
>
> A. By a dosage unit.

Q. And what is a dosage unit?

A. A rock, one rock.

Q. And are these rocks usually packaged in some kind of paper or plastic?

A. Not normally. Sometimes you did get them packaged, but not normally, no.

. . . .

Q. Now, you testified that based on your experience crack is not generally packaged in a package by the person who is selling it?

A. Under these circumstances, no, not normally. During drive-up buys and whatever, no, it's usually loose.

We acknowledge that this testimony was given at trial, after the trial court made its ruling on the admissibility of the evidence. Nevertheless, this testimony establishes that the supposed similarity between 1996 and 2004 describes only generic behavior. When the State's efforts to show similarities between crimes establish no more than "characteristics inherent to most" crimes of that type, the State has "failed to show . . . that sufficient similarities existed" for the purposes of Rule 404(b). *Al-Bayyinah*, 356 N.C. at 155, 567 S.E.2d at 123. In *Al-Bayyinah*, we deemed the "use of a weapon, a demand for money, [and] immediate flight" to be generic because those characteristics were "inherent to most armed robberies" and thus inadmissible under Rule 404(b). *Id.* For the same reasons, the lack of individual packaging of these cocaine rocks is neither an "unusual fact" nor a "particularly similar act" common to defendant's 1996 crime and his 2004 alleged offense. *Stager*, 329 N.C. at 304, 406 S.E.2d at 890-91; *State v. Green*, 321 N.C. 594, 603, 365 S.E.2d 587, 593, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988); *State v. Riddick*, 316 N.C. 127, 133, 340 S.E.2d 422, 426 (1986).

In response, defendant argues that the offenses were not similar. In 1996, the crime took place in the afternoon in a high crime area when defendant sold six rocks of crack cocaine to a police informant who approached him to make a purchase. The informant placed these rocks in a "BC Powder" plastic package provided by the police. In 2004, defendant was a passenger in a car stopped at night for a routine traffic offense across from a community college. The police officer searched defendant and found twelve rocks of crack cocaine in

defendant's small cylindrical tube, but did not discover normal indices of drug selling, such as scales, a pager, or cash.

In *Al-Bayyinah*, we found two robberies to be dissimilar from each other when the facts and circumstances differed:

> In the first Splitt robbery, the robber rushed into the store and immediately demanded money, while in the second, the robber pretended to be a legitimate customer before demanding money. In the first robbery, the man used a gun; in the second, gasoline and a lighter. The first robbery took place in the early morning, and the second occurred at night. The first robber was masked, while the second was not.

356 N.C. at 155, 567 S.E.2d at 123. Those two robberies were themselves deemed dissimilar from a third robbery, in which the robber surprised the victim from behind, hit him on the back of the head, and stabbed him. *Id.* We concluded that "substantial evidence of similarity among the prior bad acts and the crimes charged is . . . lacking." *Id.* By way of contrast, we found numerous significant similarities between two shootings in *Stager*, when:

> (1) each of the defendant's husbands had died as a result of a single gunshot wound, (2) the weapon in each case was a .25 caliber semi-automatic handgun, (3) both weapons were purchased for the defendant's protection, (4) both men were shot in the early morning hours, (5) the defendant discovered both victims after their respective shootings, (6) the defendant was the last person in the immediate company of both victims, (7) both victims died in the bed that they shared with the defendant, and (8) the defendant benefitted from life insurance proceeds resulting from both deaths.

329 N.C. at 305-06, 406 S.E.2d at 892.

While some of the disparities between defendant's 1996 offense and the case at bar might be peripheral standing alone, we consider them in their totality. The 1996 sale and the alleged 2004 possession with intent to sell differed in numerous material aspects. Neither the collective weight of the crack cocaine nor the unpackaged state of the rocks, whether considered as separate factors or together, makes the past crime and the instant offense "similar" as we have interpreted that term in this context. Accordingly, defendant's 1996 sale of cocaine, as a prior bad act, did not constitute "substantial evidence tending to support a reasonable finding by the jury that the defendant

committed [a] *similar* act," and hence was inadmissible under Rule 404(b). *Al-Bayyinah*, 356 N.C. at 155, 567 S.E.2d at 123 (citations and quotation marks omitted).

We next consider whether the trial court's error in admitting this evidence was prejudicial. "A defendant is prejudiced by errors . . . 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) (2005); *see also Al-Bayyinah*, 356 N.C. at 157, 567 S.E.2d at 124. The only other evidence of defendant's intent to sell or deliver that we perceive in the record is the quantity of drugs. While this Court recognizes that "[t]he mere quantity of the controlled substance alone may suffice to support the inference of an intent to transfer, sell or deliver," *State v. Morgan*, 329 N.C. 654, 659, 660, 406 S.E.2d 833, 835, 836 (1991) (holding that 28.3 grams of cocaine was a substantial amount sufficient to support the inference that defendant intended to sell the drugs), the quantity here was not great. The inference afforded by the amount of drugs in defendant's possession does not outweigh the prejudice caused by the erroneous admission of his prior conviction. Accordingly, we deem the error prejudicial. N.C.G.S. § 15A-1443(a). We reverse the Court of Appeals and remand this case to that court with instructions to vacate defendant's conviction for possession of cocaine with the intent to sell or deliver and to further remand this case to the trial court for a new trial.

REVERSED AND REMANDED; NEW TRIAL.

IN THE MATTER OF A.R.G.

No. 378A06

(Filed 28 June 2007)

1. Appeal and Error— appealability—child neglect order—termination of parental rights to be pursued—never completed—no modification of father's nonexisting custody

The Court of Appeals correctly held that an appeal from an order that DSS pursue termination of respondent-father's parental rights was interlocutory and subject to dismissal. The father contended that the court modified his custodial rights,

which would have provided a right of appeal under the version of N.C.G.S. § 7B-1001 then in effect; however, there was no modification because respondent did not have custody at any time during the case. Moreover, DSS never filed a termination petition and the court never entered an order terminating respondent's parental rights.

2. Child Abuse and Neglect— petition—clerical information not included—not an impediment to subject matter jurisdiction

The absence of certain information (such as the child's current and past addresses) on a petition alleging that the child was neglected and dependent as required by N.C.G.S. § 7B-402 and N.C.G.S. § 50A-209 did not prevent the court from exercising subject matter jurisdiction. The trial court could easily determine whether it had subject matter jurisdiction from the facts in the petition; holding otherwise would elevate form over substance and impose jurisdictional limitations which the General Assembly never intended.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 178 N.C. App. 205, 631 S.E.2d 146 (2006), dismissing as interlocutory respondent-father's appeal from an order entered 25 May 2005 by Judge David A. Leech in District Court, Pitt County. Heard in the Supreme Court 10 April 2007.

Anthony Hal Morris and Janis E. Gallagher for petitioner-appellee Pitt County Department of Social Services.

Annick Lenoir-Peek for respondent-appellant father.

BRADY, Justice.

Respondent-father appeals from a decision of the Court of Appeals dismissing his appeal as interlocutory and not based upon a "final order" in a juvenile action. Because we hold that respondent-father's appeal is not properly before this Court, we affirm the decision of the Court of Appeals. We also exercise our constitutional supervisory powers to determine whether the trial court has subject matter jurisdiction over this action even though the Pitt County Department of Social Services failed to provide certain information about the minor child when it filed the initial petition. We hold that it does.

BACKGROUND

A.R.G., a minor, was born in April 1998. The Pitt County Department of Social Services (DSS) first became involved with A.R.G. after receiving an allegation on 21 May 1998 that respondent-father Bruce G. and A.R.G.'s mother Brandy B. were engaged in a domestic violence incident while one of them was holding the child. From 21 May 1998 until 5 February 2003, DSS received six allegations concerning the mother's care of A.R.G., which included claims of domestic violence, improper care and inadequate supervision of the child, and substance abuse in the residence where the child was residing. Only one of these six allegations was unsubstantiated.

In April 2003, DSS filed a petition in Pitt County District Court alleging that A.R.G. was a neglected and dependent juvenile as defined by N.C.G.S. § 7B-101. However, DSS failed to provide the juvenile's address in its initial petition in compliance with N.C.G.S. § 7B-402, and also failed to submit an affidavit complying with N.C.G.S. § 50A-209. The trial court conducted an adjudication hearing on 31 July 2003 and on 10 September 2003 entered an order finding that A.R.G. was a neglected and dependent juvenile and awarding legal custody of the child to DSS, thereby giving DSS full responsibility for A.R.G.'s placement and care. Subsequently, the trial court entered review orders on 26 November 2003, on or about 26 January 2004, and on 28 June 2004, under which legal custody and placement authority over A.R.G. remained with DSS. On 14 September 2004, the trial court once more entered a review order under which legal custody and placement authority over A.R.G. remained with DSS. However, under this order DSS was no longer required to seek A.R.G.'s reunification with his mother but was permitted instead to pursue A.R.G.'s permanent placement with another family. On 2 November 2004, A.R.G.'s mother died in a single-vehicle accident.

Although represented by counsel at previous hearings, respondent-father did not make his first personal appearance in the matter until after the death of A.R.G.'s mother. On 25 May 2005, the trial court entered its most recent review order, under which it concluded that DSS should pursue termination of respondent-father's parental rights and adoption of A.R.G. by his foster parents. The trial court's order was based upon its finding of fact that placement with respondent-father "is unlikely" and that "it is in the best interests of" the child for DSS to pursue termination of respondent-father's parental rights. On 6 June 2005, respondent-father gave notice of appeal to the Court of Appeals from the 25 May 2005 order.

A divided panel of the Court of Appeals dismissed respondent-father's appeal on 20 June 2006. The Court of Appeals majority held that the matter was not appealable since the 25 May 2005 order of the trial court did not constitute a "final order" under N.C.G.S. § 7B-1001 and was therefore interlocutory. The dissent set forth two reasons why dismissal of the appeal was improper and a decision should have been rendered on the merits: First, a determination was necessary as to whether the trial court lacked subject matter jurisdiction over this case, due to DSS's failures to provide A.R.G.'s address in the initial petition or to submit the required section 50A-209 affidavit until after the matter was no longer under the district court's jurisdiction; and, second, the 25 May 2005 order of the trial court did constitute a "final order" under N.C.G.S. § 7B-1001(4) (2003) and was thus appealable.

On 24 July 2006, respondent-father gave notice of appeal to this Court based on the dissent at the Court of Appeals.

ANALYSIS

[1] We first address respondent-father's argument that the 25 May 2005 order of the trial court is not interlocutory because it constitutes a "final order" consistent with former N.C.G.S. § 7B-1001(4), and is therefore properly before this Court on appeal. The version of N.C.G.S. § 7B-1001 in effect when the initial petition was filed provided a right of appeal of a juvenile matter to the Court of Appeals from any "final order" of a trial court and enumerated four types of orders which constituted a "final order." *See* N.C.G.S. § 7B-1001 (2003).[1] Among these was "[a]ny order modifying custodial rights." *Id.* § 7B-1001(4).

Respondent-father argues that the 25 May 2005 order of the trial court modifies his custodial rights over A.R.G. because the trial court, in an order entered on 14 September 2004, previously found that it was *not* in the best interests of A.R.G. for DSS to pursue termination of parental rights at that time. Moreover, respondent-father states that there were never any orders entered before 25 May 2005 which affected his parental rights in any way, even as DSS sought reunification of A.R.G. with his mother for several months. Thus, respondent-father asserts that on 25 May 2005 the trial court effectively "changed the permanent plan from not addressing" his parental rights to "cutting him and his family off as a possibility for placement."

1. Section 7B-1001 was subsequently amended in 2005. *See* Act of Aug. 23, 2005, ch. 398, sec. 10, 2005 N.C. Sess. Laws 1455, 1459-60.

This Court has consistently stated that when a statute is clear and unambiguous, we will give effect to its plain meaning and will not entertain a contextual determination of legislative intent. *See State v. Bryant*, 361 N.C. 100, 102, 637 S.E.2d 532, 534 (2006) (citing, *inter alia*, *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006)). As the applicable statute stated, appeal could have been taken from "[a]ny order modifying custodial rights." N.C.G.S. § 7B-1001(4). The meaning of "custodial" in this statute is clear and unambiguous, as is the meaning of "modifying." Black's Law Dictionary, for instance, defines both "custody" and "legal custody" as "[t]he care, control, and maintenance of a child awarded by a court to a responsible adult" or awarded "to the state for placing the child in foster care if no responsible relative or family friend is willing and able to care for the child." *Black's Law Dictionary* 412 (8th ed. 2004). It further defines "modification" as "[a] change to something; an alteration." *Id.* at 1025.

Taken together, then, an order "modifying custodial rights" plainly and unambiguously means an order which effects a change in the responsibility for the care, control, and maintenance of a child by virtue of lawful process. However, in the 10 September 2003 order of adjudication and in every review order since then, the trial court has ordered that the "legal custody" of A.R.G. should remain with DSS, and that DSS was responsible for his placement and care. Moreover, throughout the history of this case, respondent-father has never been awarded any right to legal or physical custody of A.R.G. and thus there has been no "modification" of respondent-father's rights in regard to A.R.G.

Additionally, it is instructive that DSS was merely ordered to *pursue* termination of respondent-father's parental rights in regard to A.R.G., but the record does not reflect that DSS has filed a petition to *terminate* those rights. Nor has the trial court entered an order terminating respondent-father's parental rights in regard to A.R.G. pursuant to Article 11 of the Juvenile Code. *See* N.C.G.S. §§ 7B-1100 to -1112 (2005). Clearly then, respondent-father's appeal is interlocutory, since the 25 May 2005 order does not constitute a "final order" which "modif[ies] custodial rights" within the plain meaning of N.C.G.S. § 7B-1001(4).

An interlocutory appeal may be taken when a judicial order "affects a substantial right claimed in any action or proceeding."

N.C.G.S. § 1-277(a) (2005).[2] This Court has stated that the substantial right test is rooted in the particular facts of a case and the procedural context in which the trial court's order was made. *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978). Respondent-father offers no argument that the 25 May 2005 order has affected a substantial right, and we decline to construct one for him. *See Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (per curiam). Thus, the Court of Appeals did not err in holding that the instant appeal is subject to dismissal.

[2] Respondent-father contends that the trial court lacked subject matter jurisdiction in that the petition filed by DSS in April 2003 was not in compliance with N.C.G.S. §§ 7B-402 and 50A-209. Ordinarily, dismissal of an appeal would preclude any further consideration of a trial court's decision. *See*, *e.g.*, *Waters*, 294 N.C. at 209-10, 240 S.E.2d at 344. However, we are cognizant that a court which lacks subject matter jurisdiction over a dispute is absolutely without power to render a decision upon it, and that there may be questions in the district courts and in our intermediate appellate court as to which provisions of Article 4 of the Juvenile Code are jurisdictional in nature. *See In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) ("Subject matter jurisdiction is the indispensable foundation upon which valid judicial decisions rest, and in its absence a court has no power to act." (citing *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956)). Thus, under the specific facts of this case, we find it necessary to exercise the Court's constitutional supervisory power to address respondent-father's challenge to the trial court's subject matter jurisdiction. *See* N.C. Const. art. IV, § 12, cl. 1; *see also Waters*, 294 N.C. at 209, 240 S.E.2d at 344 (citing *N.C. Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 206 S.E.2d 178 (1974)).

A juvenile abuse, neglect, or dependency action is a creature of statute and "is commenced by the filing of a petition," which constitutes the initial pleading in such actions. *See* N.C.G.S. §§ 7B-401, -405 (2005). The version of N.C.G.S. § 7B-402 in effect when the initial petition was filed provided: "The petition shall contain the name, date of birth, address of the juvenile, the name and last known address of the juvenile's parent, guardian, or custodian and shall allege the facts which invoke jurisdiction over the juvenile." *Id.* § 7B-402

2. An interlocutory appeal may also be taken pursuant to N.C.G.S. § 1A-1, Rule 54(b) when multiple claims for relief or multiple parties are involved. Rule 54(b) is not applicable in this case, as the trial court has not entered a final judgment as to respondent-father or certified that there is no just reason to delay an appeal from the order in question.

(2003).[3] Respondent-father's contention is that since DSS failed to include the juvenile's address when it filed the initial petition, the trial court never acquired subject matter jurisdiction over the action.

This Court recently addressed a related issue in *In re T.R.P.*, when the question presented was whether DSS's failure to verify a petition upon filing it with the clerk of superior court, as required by N.C.G.S. § 7B-403(a), prevented the trial court from acquiring subject matter jurisdiction over the juvenile action. 360 N.C. at 588, 636 S.E.2d at 789. The Court answered in the affirmative, stating that verification "is a vital link in the chain of proceedings carefully designed to protect children at risk on one hand while avoiding undue interference with family rights on the other." *Id.* at 591, 636 S.E.2d at 791. Importantly, however, the Court contrasted the verification requirement with the "routine clerical information that must be included in a petition pursuant to N.C.G.S. § 7B-402." *Id.* at 591, 636 S.E.2d at 790-91.

As we are presented in this case with the failure of DSS to include "routine clerical information," we hold that the absence of the juvenile's address on the petition did not prevent the trial court from exercising subject matter jurisdiction over this juvenile action.

The following facts are evident from a reading of the petition: A.R.G. was residing with his mother in Greenville, North Carolina; he had resided in North Carolina throughout his life, except for a short period of time he spent in Myrtle Beach, South Carolina, before 9 December 1999; and, Pitt County DSS maintained an ongoing involvement in the matter from 21 May 1998, the date DSS first received a substantiated allegation regarding the mother's care of A.R.G., until April 2003, when DSS filed the petition with the trial court. Moreover, the petition reflected significant neglect of the child while he was in the custody of his mother. From this information, the trial court could easily determine whether it had subject matter jurisdiction over the juvenile action.

Finally, respondent-father argues that the failure of DSS to supply "information as required by [N.C.G.S.] § 50A-209," either within the petition or attached to the petition, also prevented the trial court from exercising subject matter jurisdiction over the action. Specifically, respondent-father points to the information listed in N.C.G.S. § 50A-209(a): "[T]he child's present address or whereabouts,

3. Section 402 was subsequently amended in 2005. *See* Act of Aug. 16, 2005, ch. 320, sec. 3, 2005 N.C. Sess. Laws 1151, 1152-53.

the places where the child has lived during the last five years, and the names and present addresses of the persons with whom the child has lived during that period."[4] Again, we disagree. Nothing in the statute suggests that the information required is jurisdictional. To the contrary, much of the language therein leads to the opposite conclusion. First, this information is required only "if reasonably ascertainable." *See* N.C.G.S. § 50A-209(a) (2005). Second, if this information is not furnished at the outset, "the court . . . may stay the proceeding until the information is furnished." *See id.* § 50A-209(b). Finally, the pertinent statute requires *both* parties to submit the information. *See id.* § 50A-209(a). It would defy reason to suggest that a parent could defeat the jurisdiction of a trial court by his or her own noncompliance with the statute.

To hold that either of the deficiencies in the petition filed by DSS could have prevented the trial court from acquiring subject matter jurisdiction over the juvenile action would be to elevate form over substance. Such a holding would additionally impose jurisdictional limitations which the General Assembly clearly never intended when it sought to balance the interests of children with the rights of parents in juvenile actions. *See id.* § 7B-100(3) (2005) (stating a policy to "respect both the right to family autonomy and the juveniles' needs for safety, continuity, and permanence").

Accordingly, we modify and affirm the opinion of the Court of Appeals, which dismissed respondent-father's appeal.

MODIFIED AND AFFIRMED.

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4. The current provision of N.C.G.S. § 7B-402(b), which references N.C.G.S. § 50A-209, was absent from the version of N.C.G.S. § 7B-402 which governs the instant case. Nevertheless, N.C.G.S. § 50A-209 on its face applies to DSS's petition since "a child-custody proceeding" was and is defined to include a juvenile abuse, neglect, or dependency action. *See* N.C.G.S. § 50A-102(4) (2003); N.C.G.S. § 50A-102(4) (2005).

STATE OF NORTH CAROLINA v. DARIAN JAQUAN HARRIS

No. 472PA06

(Filed 28 June 2007)

Drugs— positive marijuana metabolite test—evidence of presence in system—not evidence of power and intent to control use—insufficient evidence of possession

A positive urinalysis for marijuana matabolites is not alone sufficient to prove that defendant knowingly and intentionally possessed marijuana, and the trial court here erred by denying defendant's motion to dismiss a charge of possessing marijuana. Such a test, standing alone, indicates only the presence of metabolites, but leaves the jury to speculate on how the substance entered defendant's system. It does not speak to the requirement that defendant have the power and intent to control the use or disposition of the substance.

Justice HUDSON 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, 178 N.C. App. 723, 632 S.E.2d 534 (2006), affirming in part and reversing in part judgments entered on 21 April 2005 by Judge Kenneth F. Crow in Superior Court, Craven County, and remanding for entry of judgment dismissing defendant's conviction for possession of marijuana. Heard in the Supreme Court 15 February 2007.

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

Thomas R. Sallenger for defendant-appellee.

BRADY, Justice.

In this case we determine an issue of first impression: Whether a positive urinalysis for marijuana metabolites alone is substantial evidence sufficient to prove that a defendant knowingly and intentionally possessed marijuana. We hold that this evidence alone is not sufficient, and therefore affirm the decision of the Court of Appeals.

FACTUAL BACKGROUND

In the early morning hours of 21 August 2004, Renetta Bryant arrived at a friend's residence and observed defendant sitting in a chair in the front room snorting cocaine. Bryant testified that she bought a rock of crack cocaine from defendant and, after smoking it, fell asleep. Bryant further testified that after awakening she returned to the front room where defendant was still located, and that defendant, for no apparent reason, doused her in rubbing alcohol and then used his cigarette lighter to set her ablaze. Bryant was transported by emergency medical services to the local hospital, where she was treated for second and third degree burns.

Three days after the alleged incident, defendant's probation officer, who was supervising defendant's probation for an unrelated incident, obtained a urine sample to determine whether defendant had used controlled substances in violation of his probation. The urine sample was analyzed twice by personnel in the North Carolina Department of Correction Substance Abuse and Intervention Program, and both analyses of the sample confirmed the presence of marijuana and cocaine metabolites in defendant's urine.[1] At trial, Dr. Robert McClelland, who was tendered without objection as an expert in general pharmacology, testified that cocaine is detectable in the body for approximately 24 to 96 hours after ingestion or use, while marijuana remains detectable for a longer period of approximately 40 to 45 days.

PROCEDURAL BACKGROUND

On 18 April 2005, the Craven County Grand Jury returned true bills of indictment charging defendant with assault with a deadly weapon with intent to kill inflicting serious injury, assault inflicting serious bodily injury, sale and delivery of cocaine, possession of cocaine, possession of marijuana, and of having attained habitual felon status. The indictments specified 21 August 2004 as the offense date. Defendant was arraigned, tendered a plea of not guilty, and was subsequently tried before a jury in Craven County Superior Court at the 19 April 2005 Criminal Session. At the close of the State's evidence and again at the close of all evidence, defendant moved to dismiss the charges as set forth in the indictment due to insufficiency of

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1. Metabolites are defined as a "product of metabolism." *See* Medline-Plus: Medical Dictionary (service of the U.S. National Library of Medicine and the National Institutes of Health), http://www2.merriam-webster.com/cgi-bin/mwmednlm?book=Medical&va=metabolite (last visited Apr. 11, 2007).

the evidence. The trial court denied these motions. After deliberation, the jury returned guilty verdicts for possession of cocaine and possession of marijuana. As to the remaining charges, the jury returned verdicts of not guilty. Defendant then pleaded guilty to having attained habitual felon status. After finding defendant had a prior record level of V, the trial court sentenced defendant to a term of active imprisonment of 132 to 168 months for felony possession of cocaine as an habitual felon and to a 20 day concurrent term for misdemeanor possession of marijuana.

Defendant appealed to the Court of Appeals, which concluded in a unanimous opinion that there was no error as to the possession of cocaine conviction but that the possession of marijuana conviction must be reversed and remanded. *State v. Harris*, 178 N.C. App. 723, 632 S.E.2d 534 (2006). The Court of Appeals held that "a positive urine test, without more, does not satisfy the intent or the knowledge requirement inherent in our statutory definition of possession." *Id.* at 726-27, 632 S.E.2d at 537-38. On 5 October 2006, this Court allowed the State's petition for discretionary review of the Court of Appeals decision.

ANALYSIS

In ruling on a motion to dismiss, the trial court must determine whether there is substantial evidence of each essential element of the crime and whether the defendant is the perpetrator of that crime. *State v. McNeil*, 359 N.C. 800, 803, 617 S.E.2d 271, 273 (2005) (citing, *inter alia*, *State v. Garcia*, 358 N.C. 382, 412, 597 S.E.2d 724, 746 (2004), *cert. denied*, 543 U.S. 1156 (2005)). As to whether substantial evidence exists, the question for the trial court is not one of weight, but of the sufficiency of the evidence. *Id.* at 804, 617 S.E.2d at 274 (citing *Garcia*, 358 N.C. at 412-13, 597 S.E.2d at 746). Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion. *Id.* When reviewing claims of sufficiency of the evidence, an appellate court must determine whether any evidence exists which tends to prove all material elements of the offense or reasonably leads to the conclusion of guilt as a fairly logical and legitimate deduction, viewing all the evidence in the light most favorable to the State and resolving all contradictions and discrepancies in the State's favor. *State v. Jones*, 303 N.C. 500, 504-05, 279 S.E.2d 835, 838 (1981).

A case should be submitted to a jury if there is any evidence tending to prove the fact in issue or reasonably leading to the jury's con-

clusion " 'as a fairly logical and legitimate deduction.' " *Id.* at 504, 279 S.E.2d at 838 (quoting *State v. Johnson*, 199 N.C. 429, 431, 154 S.E. 730, 731 (1930)). This evidence must be more than that which merely " 'raises a suspicion or conjecture.' " *Id.* (quoting *State v. Johnson*, 199 N.C. at 431, 154 S.E. at 731); *see also State v. Simmons*, 240 N.C. 780, 785, 83 S.E.2d 904, 908 (1954). To obtain a conviction for possession of a controlled substance, the State bears the burden of proving two elements beyond a reasonable doubt: (1) defendant possessed the substance; and (2) the substance was a controlled substance. *See* N.C.G.S. § 90-95(a) (2005); *State v. Elliott*, 360 N.C. 400, 412, 628 S.E.2d 735, 743-44, *cert. denied*, —— U.S. ——, 27 S. Ct. 505, 166 L. Ed. 2d 378 (2006); *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972).

As there is no question that marijuana is classified as a Schedule VI controlled substance, we turn to the first element of the offense, which is possession. *See* N.C.G.S. § 90-94 (2005). In order to "possess" a controlled substance, a defendant must have the "power and intent to control" the "disposition or use" of the substance. *Harvey*, 281 N.C. at 12, 187 S.E.2d at 714. Here, testimony and evidence presented at trial merely tended to show that Bryant observed defendant snorting cocaine. Bryant offered no testimony indicating that she ever observed defendant in possession of marijuana or that she ever saw marijuana at the residence. The *only* evidence presented at trial pertaining to marijuana was the presence of marijuana metabolites in the urine sample obtained from defendant on 24 August 2004. Standing alone, this evidence does not speak to the aspect of the possession element requiring defendant to have the "power and intent to control [the] disposition or use" of the substance. *Id.* at 12, 187 S.E.2d at 714.

Without more, the presence of marijuana metabolites found in defendant's urine sample only raises a suspicion or conjecture that defendant had the power and intent to control the substance's disposition. From this test result, the jury can know that the metabolites were present, but is left to speculate as to how the substance resulting in those metabolites entered defendant's system. Accordingly, this evidence does not rise to the level of "tending to prove the fact in issue" or "reasonably conduc[ing] to [that] conclusion as a fairly logical and legitimate deduction." *Johnson*, 199 N.C. at 431, 154 S.E. at 731.

The State asserted both in its brief and at oral argument that a positive drug test gives rise to an inference that defendant knowingly

possessed marijuana. However, the only reasonable inference that may be drawn from these test results is that marijuana was somehow introduced into defendant's system. This inference, in itself, is insufficient to permit a jury to find that defendant had the power and intent to control the substance. The State's attempted analogy to constructive possession cases is inapposite because sufficient evidence of constructive possession would still require more than a suspicion or conjecture as raised by the evidence in the case *sub judice*. Additionally, the State attempts to draw an analogy between this case and the use of drug test results in probation revocation hearings. This argument is unpersuasive due to the significant differences between the proof required in a probation revocation hearing and the proof required in an initial criminal trial. Evidence is only sufficient in the context of a criminal trial if, taken in the light most favorable to the State, it "permits a rational jury to find the existence of each element of the charged crime beyond a reasonable doubt." *State v. Warren*, 348 N.C. 80, 102, 499 S.E.2d 431, 443, *cert. denied*, 525 U.S. 915 (1998). However, in a probation revocation, the standard is "that the evidence be such as to reasonably satisfy the [trial court] in the exercise of [its] sound discretion that the defendant has willfully violated a valid condition of probation." *State v. Hewett*, 270 N.C. 348, 353, 154 S.E.2d 476, 480 (1967). Thus, what might be sufficient evidence to *reasonably satisfy* a judge is not necessarily sufficient evidence to allow a rational jury to find defendant committed a crime *beyond a reasonable doubt*.

The State also asserts that the Court of Appeals incorrectly stated the "majority rule" as to whether a positive drug test is sufficient evidence of knowing possession of a controlled substance. The military cases cited by the State in support of this argument are inapposite as they relate only to prosecutions for drug *use*, not drug possession. *See*, *e.g.*, *United States v. Green*, 55 M.J. 76, 81 (C.A.A.F.) (discussing inferences of *knowing use* of illegal drugs and stating that "[a] urinalysis . . . provides a legally sufficient basis upon which to draw the permissive inference of knowing, wrongful use"), *cert. denied*, 534 U.S. 998 (2001). The Uniform Code of Military Justice treats as separate offenses both wrongful use and wrongful possession of drugs in order to protect the critical mission of the organization and the sensitive nature of the duties for which it is responsible. 10 U.S.C. § 912a (2000); *see United States v. Reichenbach*, 29 M.J. 128, 136-37 (C.M.A. 1989). By contrast, the General Statutes of North Carolina, as well as the United States Code, only provide for the offense of wrongful possession and do not criminalize wrongful use. *See generally* North

Carolina Controlled Substances Act, N.C.G.S. §§ 90-86 to -113.8 (2005); Drug Abuse Prevention and Control, 21 U.S.C. §§ 801-971 (2000). In addition, the United States Court of Appeals cases cited by the State relate to post release supervision, not initial determinations of guilt or innocence. *See, e.g.*, *United States v. Wirth*, 250 F.3d 165, 169-70 (2d Cir. 2001) (per curiam) (post release supervision case). Whatever the "majority rule" on this issue, and however it is calculated, our holding is unaffected.

The State further argues that the Court of Appeals erred in holding that an inference of knowledge and intent from a positive drug test "shifts the burden of proof" to a defendant. We have already determined that the State did not meet its burden of showing the elements necessary for possession, thereby failing to provide sufficient evidence to overcome a motion to dismiss. Accordingly, it is not necessary for us to address this argument.

Finally, it is important to note that an accused cannot be prosecuted for a criminal offense in North Carolina unless the situs of the crime was within the territorial jurisdiction of the State.[2] *See State v. Tickle*, 238 N.C. 206, 208-09, 77 S.E.2d 632, 634 (1953) ("An act to be punishable as a crime in this State must be an act committed here and against this sovereignty."), *cert. denied*, 346 U.S. 938 (1954). As indicated by expert testimony at trial, marijuana can be present in an individual's system for up to 45 days, yet no evidence was presented which established defendant's whereabouts during the 45 days before the urinalysis. Thus, it would be pure speculation to assume that defendant knowingly consumed the marijuana at issue while he was in North Carolina. Moreover, it would be difficult, if not impossible, for defendant to present credible evidence in his defense as to his alleged lack of knowledge of such possession due to the elusiveness of the alleged offense and the time periods involved. Additionally, the duration marijuana metabolites can be present in one's system renders it nearly impossible to pinpoint an offense date with positive urinalysis evidence alone.

Therefore, we conclude that a positive urinalysis indicating the presence of marijuana metabolites alone is not substantial evidence sufficient to prove that defendant knowingly and intentionally possessed marijuana. The trial court erred in denying defend-

2. When jurisdiction in a criminal prosecution is challenged, the State is required to prove beyond a reasonable doubt that the crime with which defendant is charged occurred in North Carolina. *State v. Rick*, 342 N.C. 91, 100-01, 463 S.E.2d 182, 187 (1995).

ant's motion to dismiss. Accordingly, we affirm the decision of the Court of Appeals.

AFFIRMED.

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

STATE OF NORTH CAROLINA v. MARLON RIO MASSEY

No. 637A05

(Filed 28 June 2007)

1. Constitutional Law— right to unanimous jury—evidence showed greater number of incidents committed than number of offenses charged

The Court of Appeals erred by reversing eight of defendant's convictions of felonious sexual act with a minor and four indecent liberties convictions based on the fact that it could not determine whether the jury unanimously convicted defendant for specific incidents, and those charges are reinstated. Although the evidence showed a greater number of incidents committed by defendant than the number of offenses with which he was charged and convicted, no jury unanimity problem existed regarding the convictions since while one juror might have found some incidents of misconduct and another juror might have found different incidents of misconduct, the jury as a whole found that improper sexual conduct occurred.

2. Sentencing— aggravating factors—*Blakely* error—took advantage of position of trust or confidence—harmless error beyond a reasonable doubt

The Court of Appeals erred by determining that defendant was entitled to a new sentencing hearing on his five first-degree sexual offense convictions even though a jury did not find the imposed aggravating factor that defendant took advantage of a position of trust or confidence to commit the offense beyond a reasonable doubt, because assuming arguendo *Blakely* error in the present case, any error was harmless beyond a reasonable doubt when: (1) the minor victim's biological parents agreed that

defendant was to be treated as a stepfather and adult parental figure, and our Supreme Court has held that a parental role is sufficient to support the aggravating factor of abusing a position of trust; (2) defendant cared for the minor victim and her half-siblings on a regular basis while her mother worked, and the jury convicted defendant of ten counts of felonious sexual act with a minor over whom he had assumed the position of a parent residing in the home; and (3) the evidence against defendant in each instance is so overwhelming and uncontroverted that any rational factfinder would have found the aggravating factor beyond a reasonable doubt.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 174 N.C. App. 216, 621 S.E.2d 633 (2005), reversing in part and finding no error in part in judgments entered by Judge William Z. Wood, Jr. on 22 April 2004 in Superior Court, Forsyth County, and remanding for resentencing and a new trial. On 19 December 2006, the Supreme Court allowed the State's petition for discretionary review as to an additional issue. Heard in the Supreme Court 9 May 2007.

Roy Cooper, Attorney General, by Anne M. Middleton, Assistant Attorney General, for the State-appellant.

C. Scott Holmes for defendant-appellee.

NEWBY, Justice.

In this case we first decide whether certain of defendant's convictions were obtained in violation of the unanimous verdict requirement of the North Carolina Constitution. Second, we address whether the Court of Appeals properly remanded this case for resentencing because defendant was sentenced in the aggravated range without a jury determination concerning the aggravating factor.

[1] At trial the State presented evidence showing defendant's sexual abuse of H.J., the daughter of a girlfriend in whose home defendant was living at the time. Defendant was convicted of five counts of first-degree sexual offense with a child under thirteen, ten counts of felonious sexual act with a minor over whom he had assumed the position of a parent residing in the home, and four counts of indecent liberties. These verdicts were consolidated for sentencing, and defendant received five consecutive sentences of a minimum of 275 months to a maximum of 339 months. For each sentence, the trial

court found as an aggravating factor that "defendant took advantage of a position of trust or confidence to commit the offense."

Defendant appealed his convictions and sentences. A divided panel of the Court of Appeals reversed eight of defendant's convictions of felonious sexual act with a minor and the four indecent liberties convictions because it could not determine whether the jury unanimously convicted defendant based on specific incidents and remanded those charges for a new trial. *State v. Massey*, 174 N.C. App. 216, 621 S.E.2d 633 (2005). The Court of Appeals also unanimously granted defendant a new sentencing hearing on the remaining convictions because a jury did not find beyond a reasonable doubt the aggravating factor used to enhance defendant's sentence. *Id.* The State appealed the unanimity issue as of right and sought discretionary review of the sentencing issue, which this Court allowed. *State v. Massey*, 361 N.C. 175, 640 S.E.2d 390 (2006).

The North Carolina Constitution provides: "No person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. art. I, § 24. Following its own case law, the Court of Appeals held it was impossible to know whether the jury had unanimously determined that defendant committed the same specific act to support each conviction because the evidence showed more acts of sexual misconduct than the number of charges against defendant and the verdicts were identical on each charge, *State v. Markeith Lawrence*, 170 N.C. App. 200, 612 S.E.2d 678 (2005); *State v. Gary Lawrence*, 165 N.C. App. 548, 599 S.E.2d 87 (2004), and that " 'there is no apparent statutory or common law authority that would permit the return of more than one indictment based on the same generic testimony,' " *Massey*, 174 N.C. App. at 227, 621 S.E.2d at 640 (quoting *Gary Lawrence*, 165 N.C. App. at 557, 599 S.E.2d at 94).

This Court subsequently reversed the decision of the Court of Appeals in both *Lawrence* cases as to the jury unanimity issue. *State v. Markeith Lawrence*, 360 N.C. 368, 627 S.E.2d 609 (2006); *State v. Gary Lawrence*, 360 N.C. 393, 627 S.E.2d 615 (2006). We concluded that, although the evidence showed a greater number of incidents committed by the defendant than the number of offenses with which he was charged and convicted, no jury unanimity problem existed regarding the convictions because, "while one juror might have found some incidents of misconduct and another juror might have found different incidents of misconduct, the jury as a whole found that improper sexual conduct occurred." *Markeith Lawrence*, 360 N.C. at 374, 627 S.E.2d at 613-14 (citation omitted). In the case *sub judice*,

our *Lawrence* decisions control and require reinstatement of the eight felonious sexual act with a minor and four indecent liberties convictions reversed by the Court of Appeals.

[2] The Court of Appeals also determined defendant was entitled to a new sentencing hearing on his five first-degree sexual offense convictions because a jury did not find the imposed aggravating factor beyond a reasonable doubt.[1] *See Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). After the Court of Appeals issued its decision, the United States Supreme Court concluded that *Blakely* error was subject to federal harmless error analysis. *Washington v. Recuenco*, —— U.S. ——, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). Shortly thereafter, in *State v. Blackwell*, this Court held a *Blakely* error harmless because a review of the record showed "the evidence against the defendant was so overwhelming and uncontroverted that any rational fact-finder would have found the disputed aggravating factor beyond a reasonable doubt." 361 N.C. 41, 49, 638 S.E.2d 452, 458 (2006) (citations and internal quotation marks omitted), *cert. denied*, —— U.S. ——, —— S. Ct. ——, —— L. Ed. 2d ——, 75 U.S.L.W. 3609 (2007).

Assuming, without deciding, *Blakely* error in the present case, we find such error to be harmless beyond a reasonable doubt. The evidence in the record established that H.J. was six years old when defendant moved in with her mother and that they lived in the same house for more than two years before the sexual abuse began. H.J.'s biological parents agreed that defendant was to be treated as a stepfather and adult parental figure. This Court has held that a parental role is sufficient to support the aggravating factor of abusing a position of trust. *State v. Tucker*, 357 N.C. 633, 634, 639-40, 588 S.E.2d 853, 854, 857 (2003) (holding that the aggravating factor of abusing a position of trust was properly applied when the only evidence to support the aggravator was the stepfather-stepdaughter relationship between the defendant and the victim). Additionally, here, defendant cared for H.J. and her half-siblings on a regular basis while her mother worked, and the jury convicted defendant of ten counts of felonious sexual act with a minor over whom he had assumed the position of a parent residing in the home. Taken together, the evidence against defendant

1. Defendant also received a new sentencing hearing on the two convictions of felonious sexual act with a minor, which were not reversed by the Court of Appeals, solely because those two convictions were consolidated for judgment with the first-degree sex offense convictions. Therefore, defendant is only entitled to a new sentencing hearing on the felonious sexual act convictions if he properly received a new sentencing hearing on the first-degree sex offense convictions.

in each instance is so overwhelming and uncontroverted that any rational fact-finder would have found beyond a reasonable doubt the aggravating factor that defendant took advantage of a position of trust or confidence to commit the offense.

In sum, as to the appealable issue of right, whether defendant's right to a unanimous jury verdict was violated when defendant was convicted of eight counts of felonious sexual act with a minor while acting in a parental role and four counts of taking indecent liberties, we reverse the decision of the Court of Appeals finding error and granting defendant a new trial. As to the issue before this Court on discretionary review, whether defendant's constitutional rights were violated when a jury did not find beyond a reasonable doubt the aggravating factor that defendant violated a position of trust, we reverse the decision of the Court of Appeals which ordered a new sentencing hearing. The other issues addressed by the Court of Appeals are not before this Court, and that court's decision as to those issues remains undisturbed.

REVERSED IN PART.

STATE OF NORTH CAROLINA v. NICHOLAS HOLMES

No. 283PA06

(Filed 28 June 2007)

Appeal and Error; Sentencing— appeal of probation revocation—challenge to aggravated sentences—improper collateral attack

Defendant could not attack the aggravated sentences imposed and suspended in 11 March 2004 trial court judgments based on *Blakely v. Washington*, 542 U.S. 296 (2004), when appealing from the 9 March 2005 trial court order revoking his probation and activating his sentences, because: (1) defendant cannot question his original sentences when appealing his 2005 probation revocation since such a challenge is an impermissible collateral attack on the sentences imposed pursuant to his 2004 guilty plea; (2) a direct appeal from the original judgment lies only when the sentence is originally entered, and defendant could

have appealed his 2004 judgments as a matter of right by giving notice of appeal within the time limit mandated by our appellate rules but failed to do so; and (3) *Blakely* is inapplicable to this case when the United States Supreme Court decided *Blakely* on 24 June 2004, and defendant's aggravated sentences entered on 11 March 2004 were not under direct appeal at the time of *Blakely* nor are they now under direct review.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 177 N.C. App. 565, 629 S.E.2d 620 (2006), affirming in part and vacating and remanding in part probation revocation judgments entered 9 March 2005 by Judge Jack A. Thompson in Superior Court, Cumberland County, which activated sentences imposed in judgments entered 11 March 2004 by Judge E. Lynn Johnson in Superior Court, Cumberland County following defendant's plea of guilty. Heard in the Supreme Court 9 May 2007.

Roy Cooper, Attorney General, by Amy C. Kunstling, Assistant Attorney General, and Robert C. Montgomery, Special Deputy Attorney General, for the State-appellant.

Jeffrey Evan Noecker for defendant-appellee.

NEWBY, Justice.

This case presents the issue of whether a suspended sentence can be challenged when appealing the trial court's order revoking probation and activating the sentence. We hold that a direct appeal from the original judgment lies only when the sentence is originally entered. Accordingly, we reverse the Court of Appeals as to that issue.

Defendant pled guilty on 11 March 2004 to second-degree kidnapping, assault inflicting serious bodily injury, and accessory after the fact to second-degree rape. The trial court determined defendant had a prior record level of I and found two aggravating factors as to the kidnapping and assault charges: (1) that defendant joined with more than one other person in committing the offense and was not charged with committing conspiracy; and (2) that the victim has great mental suffering. The trial court sentenced defendant in the aggravated range for the kidnapping and assault charges and in the presumptive range for the accessory after the fact to rape charge. The court ordered all sentences to run consecutively, but suspended the

sentences and placed defendant on sixty months probation. Defendant did not appeal his sentences.

On 15 February 2005, defendant's probation officer filed violation reports. After a hearing, the trial court entered an order on 9 March 2005 revoking defendant's probation and activating his three consecutive sentences. Defendant appealed the probation revocation to the Court of Appeals, where he argued: (1) the trial court abused its discretion by revoking his probation; and (2) his sentences for kidnapping and assault were unconstitutionally aggravated in violation of the United State Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), because the aggravating factors were found by a judge and not submitted to a jury. The Court of Appeals affirmed in part, finding that the trial court did not abuse its discretion by revoking defendant's probation and upholding the activation of defendant's presumptive range sentence for the accessory after the fact to rape conviction. *State v. Holmes*, 177 N.C. App. 565, 629 S.E.2d 620, 2006 WL 1319836, at *2-3 (May 16, 2006) (No. COA05-986) (unpublished). However, the court determined that the aggravated sentences should be vacated and remanded to the trial court for resentencing in light of *Blakely*. *Id.* at *3. On 19 December 2006, we allowed the State's petition for discretionary review of that issue. *State v. Holmes*, 361 N.C. 174, 641 S.E.2d 308 (2006).

The sole question before us is whether defendant can attack the aggravated sentences imposed and suspended in the 11 March 2004 trial court judgments based on *Blakely* by appealing from the 9 March 2005 trial court order revoking his probation and activating his sentences. Relying on two Court of Appeals decisions, the State contends that defendant cannot question his original sentences when appealing his 2005 probation revocation, because such a challenge is an impermissible collateral attack on the sentences imposed pursuant to his 2004 guilty plea. We agree.

Although this Court has not addressed this specific issue, the Court of Appeals has done so on at least two occasions. Over thirty-five years ago, in *State v. Noles*, 12 N.C. App. 676, 184 S.E.2d 409 (1971), the defendant, while appealing the revocation of his probation, challenged aspects of his original conviction. The Court of Appeals held: "Questioning the validity of the original judgment where sentence was suspended on appeal from an order activating the sentence is, we believe, an impermissible collateral attack." *Id.* at

678, 184 S.E.2d at 410. More recently, in *State v. Rush*, 158 N.C. App. 738, 582 S.E.2d 37 (2003), the Court of Appeals found that by failing to appeal from the original judgment suspending her sentences, the defendant waived any challenge to that judgment and thus could not attack it in the appeal of a subsequent order activating her sentence. *Id.* at 741, 582 S.E.2d at 39.

We find the reasoning of the Court of Appeals in *Noles* and *Rush* persuasive. In the case *sub judice*, defendant could have appealed his 2004 judgments as a matter of right by giving notice of appeal within the time limit mandated by our appellate rules. *See* N.C.G.S. §§ 15A-1342(f), -1444 (2005); N.C. R. App. P. 4(a). Defendant did not appeal the 2004 judgments, and consequently they became final. Defendant now attempts to attack the sentences imposed and suspended in 2004 in his appeal from the 2005 judgments revoking his probation and activating his sentences. We conclude, consistent with three decades of Court of Appeals precedent, that this challenge is an impermissible collateral attack on the original judgments.

Finally, we note that the United States Supreme Court decided *Blakely* on 24 June 2004. Defendant's aggravated sentences entered on 9 March 2004 were not under direct appeal at the time of *Blakely*—nor are they now under direct review. Consequently, we find that *Blakely* is inapplicable to this case. *See State v. Hinnant*, 351 N.C. 277, 287, 523 S.E.2d 663, 669 (2000) (applying a constitutional ruling "only to trials commencing on or after the certification date of this opinion or to cases on direct appeal"); *see also Griffith v. Kentucky*, 479 U.S. 314, 322-23, 107 S. Ct. 708, 713, 93 L. Ed. 2d 649, 658-59 (1987) (discussing the rationale for applying newly declared constitutional rules to criminal cases pending on direct review).

For the reasons stated, we reverse the decision of the Court of Appeals as to the *Blakely* issue before this Court on discretionary review. The other issues addressed by the Court of Appeals are not before this Court, and that court's decision as to those issues remains undisturbed.

REVERSED IN PART.

STATE OF NORTH CAROLINA v. JAMES JORDAN COBB, III

No. 447PA05

(Filed 28 June 2007)

Constitutional Law; Sentencing— *Blakely* error—harmlessness

Assuming that the trial court committed *Blakely* error in finding an aggravating factor and sentencing defendant in the aggravated range, any such error was harmless beyond a reasonable doubt.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 172 N.C. App. 172, 616 S.E.2d 29 (2005), finding no error in part in judgments entered 27 and 28 August 2003 by Judge Melzer A. Morgan, Jr. in Superior Court, Guilford County, but remanding the case for resentencing. On 19 December 2006, the Supreme Court allowed defendant's motion to bypass the Court of Appeals and conditional petition for writ of certiorari to review an additional issue. Heard in the Supreme Court 7 May 2007.

Roy Cooper, Attorney General, by Robert C. Montgomery, Special Deputy Attorney General, for the State-appellant/appellee.

Adams & Osteen, by William L. Osteen, Jr., for defendant-appellee/appellant.

PER CURIAM.

On 25 August 2003, defendant James Jordan Cobb, III pleaded guilty to five counts of embezzlement in violation of N.C.G.S. § 14-90 and one count of malfeasance by a corporate officer in violation of N.C.G.S. § 14-254. These charges arose from defendant's diversion of over $1,100,000 into an unauthorized bank account and embezzlement of over $800,000 from his former employers Southland Pine Needles, LLC and/or Southern Importers, Inc. during a four and one-half year period. Pursuant to the plea agreement, the trial court consolidated the embezzlement convictions into a single judgment of embezzlement of over $100,000, a Class C felony. The trial court then found as an aggravating factor that the embezzlement offenses involved the actual taking of property of great monetary value. De-

fendant was sentenced in the aggravated range to an active term of imprisonment of 92 to 120 months for the embezzlement convictions and in the presumptive range to an active term of imprisonment of 6 to 8 months for the corporate malfeasance conviction. The trial court then suspended the sentence for the corporate malfeasance conviction and ordered 60 months of supervised probation to begin at the expiration of defendant's incarceration for the embezzlement convictions. Defendant appealed to the Court of Appeals, which remanded for resentencing, holding that the trial court committed *Blakely* error by finding an aggravating factor and sentencing defendant in the aggravated range and that such error was structural.

We assume without deciding that the trial court committed *Blakely* error in finding an aggravating factor and sentencing defendant in the aggravated range. *See Blakely v. Washington*, 542 U.S. 296 (2004). However, after a thorough review of the record, we hold that any such error was harmless beyond a reasonable doubt and therefore reverse the decision of the Court of Appeals. *See Washington v. Recuenco*, —— U.S. ——, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), *cert. denied*, —— U.S. ——, —— S. Ct. ——, —— L. Ed. 2d ——, 75 U.S.L.W. 3609 (2007). We also remand the case to the Court of Appeals to make determinations on defendant's assignments of error not originally addressed by that court. Additionally, we conclude that defendant's petition for writ of certiorari was improvidently allowed. The remaining issues addressed by the Court of Appeals are not before this Court and the Court of Appeals' decision as to these issues remains undisturbed.

REVERSED IN PART AND REMANDED; WRIT OF CERTIORARI IMPROVIDENTLY ALLOWED.

Justices TIMMONS-GOODSON and HUDSON took no part in the consideration or decision of this case.

STATE OF NORTH CAROLINA v. JAMES MEYNARDIE

No. 446PA05

(Filed 28 June 2007)

Sentencing— aggravating factors—position of trust or confidence—insufficient evidence—remand for resentencing

A first-degree sexual offense case involving the daughter of defendant's former girlfriend is remanded for resentencing where the trial court sentenced defendant in the aggravated range based upon a finding that defendant took advantage of a position of trust or confidence but the record includes no description of the relationship among defendant, the victim, and the victim's mother, and it is unclear what position of trust or confidence may have existed.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 172 N.C. App. 127, 616 S.E.2d 21 (2005), affirming a judgment entered 20 May 2002 by Judge William C. Griffin, Jr. in Superior Court, Beaufort County, but remanding the case for resentencing after granting defendant's Motion for Appropriate Relief. Heard in the Supreme Court 7 May 2007.

Roy Cooper, *Attorney General*, *by Robert C. Montgomery*, *Special Deputy Attorney General*, *for the State-appellant.*

Daniel F. Read for defendant-appellee.

PER CURIAM.

Defendant entered *Alford* pleas to one charge of first-degree sexual offense and two charges of indecent liberties with a minor. The trial court consolidated all three charges into one judgment and sentenced based upon the most serious charge, the first-degree sexual offense. This offense involved B.H., the daughter of defendant's former girlfriend. The trial court sentenced defendant in the aggravated range, finding defendant took advantage of a position of trust or confidence to commit the offense. Because the record fails to include any description of the relationship existing among defendant, B.H., and B.H.'s mother at the time of the offense, it is unclear what position of trust or confidence may have existed. The matter is remanded to the Court of Appeals for further remand to the trial court for resentencing, where evidence of the existence of this and other factors in

aggravation may be presented to the jury and factors in mitigation may be considered by the court.

AFFIRMED AND REMANDED.

STATE OF NORTH CAROLINA v. KENNETH JOEL CUPID

No. 560PA05

(Filed 28 June 2007)

Constitutional Law; Sentencing— right to jury trial—aggravating factor found by court—admission by defendant

Defendant's Sixth Amendment right to a jury trial was not violated because his probationary status, which was used to increase his sentences, was found by the trial court instead of by the jury where defendant voluntarily declared in open court during his presentencing statement that he "was on . . . probabtion" at the time of the offenses since this statement constituted an admission of the necessary facts relied on by the trial court to increase defendant's sentences.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 173 N.C. App. 448, 618 S.E.2d 874 (2005), finding no reversible error in a trial which resulted in judgments entered 20 August 2003 by Judge Ronald E. Spivey in Superior Court, Guilford County, but remanding the case for resentencing after allowing in part defendant's Motion for Appropriate Relief. Heard in the Supreme Court 8 May 2007.

Roy Cooper, Attorney General, by Michael D. Youth, Assistant Attorney General, for the State-appellant.

M. Alexander Charns for defendant-appellee.

PER CURIAM.

After a jury trial, defendant was found guilty of robbery with a dangerous weapon, possession of a firearm by a felon, and felony fleeing to elude arrest with a motor vehicle. The trial court assigned defendant eight prior record points for previous convictions and one point because the offenses were committed "(a) while on . . . proba-

tion, parole, or post-release supervision." The one additional point increased defendant's prior record level from III to IV, and defendant was sentenced accordingly. During defendant's sentencing hearing, he stated to the trial court that he "was on . . . probation" at the time of the offenses.

Defendant argues that his Sixth Amendment right to a trial by jury was violated because his probationary status, which was used to increase his sentence, was improperly found by the trial court instead of a jury. *See Blakely v. Washington*, 542 U.S. 296 (2004). This Court held in *State v. Hurt*, 361 N.C. 325, 330, 643 S.E.2d 915, 918 (2007), however, that a trial court's aggravation of a defendant's sentence on the basis of an admission does not violate the Sixth Amendment if "that defendant personally or through counsel admits the necessary facts."

Here, defendant voluntarily declared, in open court during his N.C.G.S. § 15A-1334(b) presentencing statement, that he "was on . . . probation" at the time of the offenses. This constitutes an admission of the necessary facts relied on by the trial court to increase defendant's sentence. Therefore, we hold that defendant's Sixth Amendment right to a trial by a jury was not violated.

For the foregoing reasons, the portion of the Court of Appeals opinion allowing defendant's Motion for Appropriate Relief in part and remanding for resentencing is reversed. However, the portions of the Court of Appeals opinion denying the Motion for Appropriate Relief in part and finding no prejudicial error in defendant's convictions as specified in that opinion remain undisturbed.

AFFIRMED IN PART; REVERSED IN PART.

STATE OF NORTH CAROLINA v. CRAIG CLIFFORD WISSINK

No. 484PA05

(Filed 29 June 2007)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 172 N.C. App. 829, 617 S.E.2d 319 (2005), finding no error in part in judgments entered 1 April 2004 by Judge Knox V. Jenkins in Superior Court, Cumberland County, but remanding for resentencing on defendant's conviction for

discharging a firearm into occupied property. Heard in the Supreme Court 7 May 2007.

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

M. Alexander Charns for defendant-appellee.

PER CURIAM.

Although the Court of Appeals addressed several issues in its opinion, we allowed review solely for consideration of whether the trial court's finding of defendant's probationary status constituted error under *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004), and whether defendant had knowingly and voluntarily stipulated to his probationary status. The decision of the Court of Appeals to remand for resentencing is reversed, and we remand this case to that court for reconsideration of these two issues in light of our decisions in *State v. Hurt*, 361 N.C. 325, 330, 643 S.E.2d 915, 918 (2007) (holding "a judge may not find an aggravating factor on the basis of a defendant's admission unless that defendant personally or through counsel admits the necessary facts or admits that the aggravating factor is applicable") and *State v. Blackwell*, 361 N.C. 41, 44, 49-51, 638 S.E.2d 452, 455, 458-59 (2006) (explaining that *Blakely* error is subject to harmless error review), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 75 U.S.L.W. 3609 (2007). The Court of Appeals opinion remains undisturbed in all other respects.

REVERSED IN PART AND REMANDED.

STATE OF NORTH CAROLINA v. ANH VIET THAI

No. 7PA06

(Filed 29 June 2007)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 175 N.C. App. 249, 623 S.E.2d 89 (2005), finding no prejudicial error in defendant's conviction which resulted in a judgment entered 28 May 2004 by Judge James E. Lanning in Superior Court, Mecklenburg County, but remanding for resentencing. Heard in the Supreme Court 9 May 2007.

Roy Cooper, Attorney General, by Q. Shanté Martin, Assistant Attorney General, for the State-appellant.

Isabel Scott Day, Mecklenburg County Public Defender, by Julie Ramseur Lewis, Assistant Public Defender, for defendant-appellee.

PER CURIAM.

To the extent the Court of Appeals ordered remand of defendant's case for resentencing, we reverse and remand to that court for reconsideration in light of *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), *cert. denied*, —— U.S. ——, —— L. Ed. 2d ——, 75 U.S.L.W. 3609 (2007). The Court of Appeals opinion remains undisturbed in all other respects.

REVERSED IN PART AND REMANDED.

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

STATE OF NORTH CAROLINA v. ELIZABETH PAIGE McMAHAN

No. 657PA05

(Filed 29 June 2007)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 174 N.C. App. 586, 621 S.E.2d 319 (2005), vacating probation revocation judgments entered 6 August 2004 by Judge Susan C. Taylor in Superior Court, Cabarrus County, thereby activating sentences imposed in judgments entered 8 August 2003 by Judge Howard R. Greeson, Jr. in Superior Court, Guilford County following defendant's plea of guilty to twenty-eight counts of embezzlement, and remanding for a new sentencing hearing. Heard in the Supreme Court 9 May 2007.

Roy Cooper, Attorney General, by Amy C. Kunstling, Assistant Attorney General, and Robert C. Montgomery, Special Deputy Attorney General, for the State-appellant.

Staples S. Hughes, Appellate Defender, by Matthew D. Wunsche, Assistant Appellate Defender, for defendant-appellee.

PER CURIAM.

For the reasons stated in *State v. Holmes*, 361 N.C. 410, —— S.E.2d —— (2007) (No. 283PA06), the decision of the Court of Appeals is reversed.

REVERSED.

STATE OF NORTH CAROLINA v. ALEJANDRO HERNANDEZ-MADRID

No. 534PA05

(Filed 29 June 2007)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 173 N.C. App. 234, 617 S.E.2d 724 (2005), affirming in part judgments entered 2 July 2003 by Judge W. Osmond Smith in Superior Court, Wake County, but remanding the case for resentencing after granting defendant's Motion for Appropriate Relief. Heard in the Supreme Court 8 May 2007.

Roy Cooper, Attorney General, by Robert C. Montgomery, Special Deputy Attorney General, for the State-appellant.

Irving Joyner for defendant-appellee.

PER CURIAM.

To the extent the Court of Appeals ordered remand of defendant's case for resentencing, we reverse and remand to that court for reconsideration in light of *State v. Hurt*, 361 N.C. 325, 643 S.E.2d 915, (2007), and *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), *cert. denied*, —— U.S. —— , —— L. Ed. 2d ——, 75 U.S.L.W. 3609 (2007). The Court of Appeals opinion remains undisturbed in all other respects.

REVERSED IN PART AND REMANDED.

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

STATE OF NORTH CAROLINA v. DELAUNO MONTREZ COREY

No. 539PA05

(Filed 29 June 2007)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 173 N.C. App. 444, 618 S.E.2d 784 (2005), remanding for resentencing a judgment entered 11 December 2001 by Judge Carl L. Tilghman in Superior Court, Martin County, following defendant's plea of guilty to robbery with a dangerous weapon. Heard in the Supreme Court 8 May 2007.

Roy Cooper, Attorney General, by Robert C. Montgomery, Special Deputy Attorney General, for the State-appellant.

Geoffrey W. Hosford for defendant-appellee.

PER CURIAM.

The decision of the Court of Appeals is reversed and remanded to that court for reconsideration in light of our decisions in *State v. Hurt*, 361 N.C. 325, 643 S.E.2d 915 (2007), and *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), *cert. denied*, —– U.S. —–, —– L. Ed. 2d —–, 75 U.S.L.W. 3609 (2007).

REVERSED AND REMANDED.

IN RE E.F.S., JR.

[361 N.C. 423 (2007)]

IN RE E.F.S., JR.	)	ORDER

No. 285P06

The Attorney General's petition for writ of certiorari is allowed for the limited purpose of vacating the Court of Appeals' order denying the Attorney General's petition for writ of certiorari and remanding to the Court of Appeals for review on the merits in light of this Court's decision in *State v. Green*, 348 N.C. 588, 595, 502 S.E.2d 819, 823 (1998) and the Court of Appeals' decision in *In re Bunn*, 34 N.C. App. 614, 615-16, 239 S.E.2d 483, 484 (1977).

By order of the Court in conference, this the 27th day of June 2007.

Hudson, J.
For the Court

STATE v. RIDLEY

[361 N.C. 424 (2007)]

STATE OF NORTH CAROLINA	)	
v.	)	ORDER
CHRISTOPHER DALE RIDLEY	)	

No. 272PA06

The State's petition for discretionary review filed 18 May 2006 is allowed for the limited purpose of remanding the matter to the North Carolina Court of Appeals for reconsideration in light of *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006) and *State v. Hurt*, 361 N.C. 325, 643 S.E.2d 915 (2007).

By order of the Court in conference this 27th day of June, 2007.

Timmons-Goodson, J.
For the Court

Baker v. Charlotte Motor Speedway, Inc. Case below: 180 N.C. App. 296	No. 642P06	Plt-Appellant's (Walter E. Sudderth) PDR (COA05-1618)	Denied 06/27/07 **Martin, J., Recused**
Baldwin v. Century Care Ctr., Inc. Case below: 180 N.C. App. 475	No. 626P06	1. Plt's Motion for Temporary Stay (COA06-380) 2. Plt's Petition for Writ of Supersedeas 3. Plt's PDR Under N.C.G.S. § 7A-31	1. Denied 01/09/07 2. Denied 06/27/07 3. Denied 06/27/07
Bowling v. Margaret R. Pardee Mem'l Hosp. Case below: 179 N.C. App. 815	No. 588P06	1. Plt's NOA Based Upon a Constitutional Question (COA05-1497) 2. Def's Motion to Dismiss Appeal 3. Plt's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 06/27/07 3. Denied 06/27/07
Bradley v. Mission St. Joseph's Health Sys. Case below: 180 N.C. App. 592	No. 025PA07	Def's (Mission Hospitals, Inc.) Motion to Withdraw PDR (COA06-100)	Allowed 06/27/07
Burgin v. Owen Case below: 181 N.C. App. 511	No. 189P07	1. Plt's NOA (Dissent) (COA06-450) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Dismissed 05/18/07 2. Dismissed 05/18/07
Cabarrus Cty. v. Systel Bus. Equip. Co. Case below: 180 N.C. App. 690	No. 051P07	Def and Third-Party Plt's (Systel) PDR Under N.C.G.S. 7A-31 (COA06-250 & COA06-425)	Denied 06/27/07 **Brady, J., Recused**

Carson v. Grassman Case below: 182 N.C. App. 521	No. 223P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-862)	Denied 06/27/07
Diggs v. Novant Health, Inc. Case below: 177 N.C. App. 290	No. 299P06	1. Def's (Forsyth Memorial Hosp.) Motion for Temporary Stay (COA04-1415) 2. Def's (Forsyth Memorial Hosp.) Petition for Writ of Supersedeas 3. Def's (Forsyth Medical Center) PDR Under N.C.G.S. 7A-31 (COA04-1415)	1. Allowed 10/30/06 Stay Dissolved 06/27/07 2. Denied 06/27/07 3. Denied 06/27/07
Eudy v. Michelin N. Am., Inc. Case below: 182 N.C. App. ––– (17 April 2007)	No. 285P07	1. Def's Motion for Temporary Stay (COA06-902) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed 06/20/07 Stay Dissolved 06/27/07 2. Denied 06/27/07 3. Denied 06/27/07
Foster v. Crandell Case below: 181 N.C. App. 152	No. 073P07	Defs' Motion for Temporary Stay (COA05-1140)	Allowed 02/09/07
Gailey v. Triangle Billiards & Blues Club, Inc. Case below: 179 N.C. App. 848	No. 611P06	1. Def's PDR Under N.C.G.S. 7A-31 (COA06-327) 2. Plt's Motion to Dismiss "Petition for Discretionary Review"	1. Denied 06/27/07 2. Dismissed as Moot 06/27/07
Hailey v. Auto-Owners Ins. Co. Case below: 181 N.C. App. 677	No. 227P07	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA06-187) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 06/27/07 2. Dismissed as Moot 06/27/07

Hill v. Hill Case below: 181 N.C. App. 69	No. 138P06-2	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA06-331) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Notice of Appeal Based Upon a Constitutional Question 4. Plt's Motion for Sanctions and Notice Regarding the Dependency of Federal Bankruptcy Court Proceedings on Ruling in 138P06-2	1. Dismissed *ex mero motu* 06/27/07 2. Denied 06/27/07 3. Dismissed *ex mero motu* 06/27/07 4. Denied 06/27/07 **Martin, J., Recused** **Timmons-Goodson, J., Recused**
Hollin v. Johnston Cty. Council On Aging Case below: 181 N.C. App. 77	No. 079P07	Defs' Motion for Temporary Stay (COA06-310)	Allowed 02/08/07 **Hudson, J., Recused**
Howard v. UNC Chapel Hill Case below: 181 N.C. App. 148	No. 069P07	Def's PDR Under N.C.G.S. 7A-31 (COA06-487)	Denied 06/27/07 **Hudson, J., Recused**
In re A.S. & M.J.W. Case below: 181 N.C. App. 706	No. 140A07	1. Respondent's (Father) NOA Based Upon a Constitutional Question (COA06-1028) 2. Guardian ad Litem's Motion to Dismiss Appeal	1. —— 2. Allowed 06/27/07
In re J.E. & B.E. Case below: 182 N.C. App. —— (17 April 2007)	No. 231A07	1. Respondent's (Mother) NOA (Dissent) (COA06-1553) 2. Respondent's (Mother) PDR as to Additional Issues	1. —— 2. Denied 06/27/07

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

In re J.S.B., D.K.B., D.D.J., Z.A.T.J. Case below: 183 N.C. App. —— (15 May 2007)	No. 269P07	Respondent's (Mother) Motion for Temporary Stay (COA06-1107)	Denied 06/11/07
In re K.S. & J.S. Case below: 181 N.C. App. 606	No. 122P07	Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA06-777)	Denied 06/27/07
In re Key Case below: 182 N.C. App. —— (17 April 2007)	No. 208P07	1. Respondent's Motion for Temporary Stay (COA06-498) 2. Respondent's (Mark Key) Petition for Writ of Supersedeas 3. Respondent's PDR Under N.C.G.S. § 7A-31	1. Allowed 04/30/07 Stay Dissolved 06/27/07 2. Denied 06/27/07 3. Denied 06/27/07
In re M.M., An.E., Ad.E. Case below: 182 N.C. App. 529	No. 203P07	1. Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA06-600) 2. Respondent's (Father) PWC to Review Decision of COA 3. Respondent's (Father) PDR Under N.C.G.S. § 7A-31	1. Denied 06/27/07 2. Denied 06/27/07 3. Denied 06/27/07
In re W.R. Case below: 179 N.C. App. 642	No. 560P06	AG's Motion for Temporary Stay (COA05-1602)	Allowed 10/26/06
In re C.E.M. & Z.C.M. Case below: 181 N.C. App. 148	No. 071P07	1. Respondent's (Mother) PDR Under N.C.G.S. 7A-31 (COA06-514) 2. Petitioner's (Alamance Co. DSS) Motion for Expedited Hearing	1. Denied 06/27/07 2. Dismissed as Moot 06/27/07 **Hudson, J., Recused**

Lee v. Spring Pines Homeowners Ass'n Case below: 182 N.C. App. 529	No. 176P07	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-1018)	Denied 06/27/07
Moore v. Covenant Transp., Inc. Case below: 181 N.C. App. 607	No. 106P07	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-226)	Denied 05/27/07
Morris v. Deerfield Episcopal Ret. Cmty., Inc. Case below: 179 N.C. App. 863	No. 598P06	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA05-1652) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 06/27/07 2. Dismissed as Moot 06/27/07
News and Observer Publ'g Co. v. Easley Case below: 182 N.C. App. 14	No. 142P07	1. Plt's PDR Under N.C.G.S. 7A-31 (COA06-132) 2. Def's Conditional Petition for Discretionary Review Under N.C.G.S. § 7A-31	1. Denied 06/27/07 2. Dismissed as Moot 06/27/07 **Parker, C.J., Recused**
Parada v. Custom Maint., Inc. Case below: 179 N.C. App. 653	No. 612P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-89)	Denied 06/27/07
Perkinson v. Hawley Case below: 179 N.C. App. 225	No. 457P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA05-1685)	Denied 06/27/07

Progress Energy Carolinas, Inc. v. Strickland Case below: 181 N.C. App. 610	No. 118A07	Def's Motion to Withdraw Appeal (COA06-20)	Allowed 06/27/07
Revels v. Miss Am. Org. Case below: 182 N.C. App. 334	No. 189P06-2	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-477)	Denied 06/27/07
Shavitz v. City of High Point Case below: 177 N.C. App. 465	No. 336P06	1. Def's (High Point) NOA Based Upon a Constitutional Question (COA05-571) 2. Def's (Guilford Bd. of Ed.) Motion to Dismiss Appeal 3. Def's (High Point) PDR Under N.C.G.S. 7A-31	1. —— 2. Allowed 06/27/07 3. Denied 06/27/07
State v. Anderson Case below: 181 N.C. App. 655	No. 151P07	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1520)	Denied 06/27/07
State v. Apple Case below: 182 N.C. App. 529	No. 195P07	Def's Motion for Temporary Stay (COA06-652)	Denied 04/26/07
State v. Artis Case below: 181 N.C. App. 601	No. 017P06-2	Def's PDR Under N.C.G.S. 7A-31 (COA06-443)	Denied 06/27/07
State v. Blancher Case below: 170 N.C. App. 171	No. 109P07	Def's Motion for "Petition for Discretionary Review Under N.C.G.S. § 7A-31" (COA04-260)	Dismissed 06/27/07 **Hudson, J., Recused**

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

State v. Bracamontes Case below: 181 N.C. App. 149	No. 047P07	Def's (Cruz) PDR Under N.C.G.S. 7A-31 (COA06-259)	Denied 06/27/07 **Hudson, J., Recused**
State v. Brown Case below: 182 N.C. App. 115	No. 171P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-396)	Denied 06/27/07
State v. Brunson Case below: 180 N.C. App. 188	No. 623A06	1. Def's NOA (Dissent) (COA05-1486) 2. Def's NOA Based Upon a Constitutional Question 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Dismissed *ex mero motu* 06/27/07 3. Denied 06/27/07
State v. Caldwell Case below: 181 N.C. App. 808	No. 121P07	1. Def's NOA Based Upon a Constitutional Question (COA05-1646) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. 7A-31	1. —— 2. Allowed 06/27/07 3. Denied 06/27/07
State v. Conner Case below: Gates County Superior Court	No. 219A91-6	1. Def's PWC to Review the Order of Gates County Superior Court 2. AG's Motion to Dismiss PWC	1. Denied 06/27/07 2. Dismissed as Moot 06/27/07
State v. Crump Case below: 178 N.C. App. 717	No. 474P06	1. Def's NOA Based Upon a Constitutional Question (COA05-902) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 06/27/07 3. Denied 06/27/07

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

State v. Crump Case below: 181 N.C. App. 150	No. 058P07	1. Def's PDR Under N.C.G.S. § 7A-31 (COA06-411) 2. Def's Motion for Affidavit to be Considered with Petition for Discretionary Review	1. Denied 06/27/07 2. Denied 06/27/07
State v. Cuthrell Case below: 175 N.C. App. 593	No. 043P07	Def's PWC to Review Decision of COA (COA05-314)	Denied 06/27/07
State v. Deal Case below: 182 N.C. App. 347	No. 185P07	Def's PDR Under N.C.G.S. 7A-31 (COA06-889)	Denied 06/27/07
State v. Ezzell Case below: 182 N.C. App. 417	No. 217P07	1. Def's NOA Based Upon a Constitutional Question (COA06-624) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 06/27/07 3. Denied 06/27/07
State v. Garcell Case below: Rutherford County Superior Court	No. 465A06	Def's Motion to Toll Time Periods for Perfecting Appeal	Denied 05/25/07
State v. Gary Case below: 180 N.C. App. 692	No. 034A07	1. Def's NOA Based Upon a Constitutional Question (COA06-154) 2. AG's Motion to Dismiss Appeal	1. —— 2. Allowed 06/27/07
State v. Godwyn Case below: 183 N.C. App. —— (1 May 2005)	No. 270P07	Def's PDR Under N.C.G.S. 7A-31 (COA06-670)	Denied 06/27/07
State v. Gwynn Case below: 182 N.C. App. 343	No. 158P07	AG's Motion for Temporary Stay (COA06-403)	Allowed 04/04/07

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

State v. Hill Case below: 182 N.C. App. 348	No. 198P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-753)	Denied 06/27/07
State v. Hurley Case below: 180 N.C. App. 680	No. 038P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-329)	Denied 06/27/07
State v. Johnson Case below: 182 N.C. App. 63	No. 139P07	Def's PDR Under N.C.G.S. 7A-31 (COA06-523)	Denied 06/27/07
State v. Jones Case below: 183 N.C. App. —— (1 May 2007)	No. 265P07	Def's PDR Under N.C.G.S. 7A-31 (COA06-1257)	Denied 06/27/07
State v. Key Case below: 180 N.C. App. 286	No. 643P06	Def-Appellant's PDR (COA06-124)	Denied 06/27/07
State v. Key Case below: 182 N.C. App. —— (17 April 2007)	No. 209P07	1. Defendant's Motion for Temporary Stay (COA06-499) 2. Defendant's (Mark Key) Petition for Writ of Supersedeas 3. Respondent's PDR Under N.C.G.S. § 7A-31	1. Allowed 04/30/07 Stay Dissolved 06/27/07 2. Denied 06/27/07 3. Denied 06/27/07
State v. King Case below: Guilford County Superior Court	No. 204A99-2	Def's PWC to Review Order of Guilford County Superior Court	Denied 06/27/07
State v. Lewis Case below: 176 N.C. App. 191	No. 558PA04	AG's Motion for Temporary Stay (COA03-785-2)	Allowed 03/10/06

State v. Locklear Case below: 178 N.C. App. 732	No. 430P06	AG's Motion for Temporary Stay (COA05-509)	Allowed 08/17/06
State v. McAlwain Case below: 182 N.C. App. 348	No. 193P07	Def's PDR Under N.C.G.S. 7A-31 (COA06-672)	Denied 06/27/07
State v. McGirt Case below: 182 N.C. App. 348	No. 390P06-3	Def's Motion for "Notice of Appeal" (COA06-609)	Dismissed *ex mero motu* 06/27/07
State v. Miller Case below: 183 N.C. App. ––– (1 May 2007)	No. 255A07	Def's NOA Based Upon a Constitutional Question (COA06-727)	Dismissed *ex mero motu* 06/27/07
State v. Montgomery Case below: 183 N.C. App. ––– (1 May 2007)	No. 245P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-956)	Denied 06/27/07
State v. Murphy Case below: 182 N.C. App. 176	No. 149P07	Def's PDR Under N.C.G.S. § 7A-31 (COA04-344-2)	Denied 06/27/07 **Timmons-Goodson, J., Recused**
State v. Nickerson Case below: 173 N.C. App. 642	No. 090P07	Def's PWC to Review the Decision of the COA (COA04-1640)	Dismissed 06/27/07
State v. Ortez Case below: 178 N.C. App. 236	No. 406P06	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA05-711) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. ––– 2. Allowed 06/27/07 3. Denied 06/27/07

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

State v. Pitter Case below: 180 N.C. App. 474	No. 640P06	Def-Appellant's PDR (COA05-1547)	Denied 06/27/07
State v. Reed Case below: 182 N.C. App. 109	No. 141P07	AG's Motion for Temporary Stay (COA06-400)	Allowed 03/23/07
State v. Richardson Case below: Nash County Superior Court	No. 232A95-3	1. Def's Motion to Toll Time for Perfecting Appeal 2. Def's Motion to Reverse Sentence of Death and Convert to Life Sentence 3. Def's Motion to Order a New Mental Retardation Motion Hearing 4. Def's Motion to Remand and to Determine if an Accurate Transcript can be Produced 5. AG's Motion to Deem Response Timely Filed	1. Allowed 06/27/07 2. Denied 06/27/07 3. Denied 06/27/07 4. Denied 06/27/07 5. Denied 06/27/07
State v. Ridley Case below: 177 N.C. App. 463	No. 272P06	1. AG's Motion for Temporary Stay (COA03-1543) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed 05/18/06 Stay Dissolved 06/27/07 2. Denied 06/27/07 3. See Special Order Page 424 **Hudson, J., Recused**
State v. Royster Case below: 182 N.C. App. 176	No. 168P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-473)	Denied 06/27/07

State v. Shannon Case below: 182 N.C. App. 350	No. 177A07	1. AG's Motion for Temporary Stay (COA06-418) 2. AG's Petition for Writ of Supersedeas 3. AG's NOA Based Upon Dissent 4. AG's PDR as to Additional Issues 5. Def's PDR	1. Allowed 04/17/07 2. Allowed 06/27/07 3. —— 4. Allowed 06/27/07 5. Denied 06/27/07
State v. Shue Case below: 175 N.C. App. 796 163 N.C. App. 58	No. 048P07	Def's PWC to review the Decisions of the COA (COA05-244) and (COA03-133)	Denied 06/27/07 **Hudson, J., Recused**
State v. Tarleton Case below: 182 N.C. App. —— (17 April 2007)	No. 212P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-760)	Denied 06/27/07
State v. Wallace Case below: 179 N.C. App. 710	No. 597P06	1. Def's NOA Based Upon a Constitutional Question (COA05-1550) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. 7A-31	1. —— 2. Allowed 06/27/07 3. Denied 06/27/07 **Hudson, J. Recused**
State v. Watkins Case below: 169 N.C. App. 518	No. 119A07	1. Def's NOA Based Upon a Constitutional Question (COA04-295-2) 2. AG's Motion to Dismiss Appeal	1. —— 2. Allowed 06/27/07 **Hudson, J., Recused**

State v. Watson Case below: 179 N.C. App. 228	No. 533P06	Def's PDR Under N.C.G.S. § 7A-31 (COA05-1439)	Denied 06/27/07 **Hudson, J., Recused**
State v. Wilson Case below: 183 N.C. App. ––– (1 May 2007)	No. 257A07	Def's Emergency Motion for Temporary Stay (COA06-509)	Allowed 06/11/07
Swain v. Swain Case below: 179 N.C. App. 795	No. 590P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-95)	Denied 06/27/07
Tubiolo v. Abundant Life Church, Inc. Case below: 180 N.C. App. 238	No. 621P06	Plts' PDR Under N.C.G.S. § 7A-31 (COA06-193)	Denied 06/27/07 **Hudson, J., Recused**
Volger v. Branch Erections Co. Case below: 181 N.C. App. 457	No. 128A07	1. Def's (N.C. Ins. Guaranty Ass'n.) Notice of Appeal (Dissent) (COA06-288) 2. Def's (Branch Erections Co.) Petition for Discretionary Review Under N.C.G.S. 7A-31	1. ––– 2. Allowed 06/27/07

STATE OF NORTH CAROLINA v. PAUL DEWAYNE CUMMINGS

No. 1A05

(Filed 24 August 2007)

1. Jury— capital selection—challenge for cause—police lieutenant

The trial court did not abuse its discretion in a first-degree murder case by denying defendant's challenge for cause of a police lieutenant during the jury selection process, because: (1) the record fairly supported the conclusion that the prospective juror could perform his duties as a juror consistent with the trial court's instructions when considering mitigating evidence; (2) the prospective juror indicated numerous times that he would follow the law as instructed by the trial judge, and it is reasonable to believe that he understood that law including the presumption of innocence; (3) neither the qualifications nor the grounds for challenging a juror for cause lead to a recognition of any type of rule prohibiting members of the law enforcement community from entering the jury pool; and (4) exchanges between defense counsel and the prospective juror about his law enforcement employment and how that might influence his determinations of credibility demonstrate that he would view each witness on the facts of the case and not automatically give the prosecution's law enforcement witnesses more weight.

2. Jury— capital selection—challenge for cause—automatic vote for death penalty

The trial court did not abuse its discretion in a first-degree murder case by denying defendant's challenge for cause of a prospective juror who would allegedly vote automatically for the death penalty in every first-degree murder case, because: (1) after reviewing the totality of the prospective juror's voir dire, it cannot be said that the trial court's decision was manifestly unsupported by reason; and (2) the prospective juror who at first appeared confused and a strong proponent of the death penalty in premeditated murder cases later indicated to counsel that he would follow the law and that he would return a recommendation of life imprisonment without parole if the State failed to meet its burdens of proof and persuasion during the penalty proceeding.

3. Jury— capital selection—voir dire—stake out questions

The trial court did not abuse its discretion in a first-degree murder case by sustaining prosecution objections to alleged stake out questions asked by defense counsel during voir dire including asking prospective jurors what they might view as harm experienced by a child exposed to domestic violence, the effects on children who had been exposed to physical abuse, whether a prospective juror believed her grandson was harmed by fights between his parents, whether a juror believed that a woman who was abused has the ultimate responsibility to protect her children, how a particular family was affected by alcohol abuse, why a juror thought people would abuse hard drugs, and whether, in a prospective juror's personal experience, the effects of drug abuse were negative, because the trial court gave defendant wide latitude to determine whether prospective jurors had been personally involved in any of those situations, but it was within the trial court's authority to limit questioning on these matters and not permit the hypothetical and speculative questions that the trial court could have determined were being used to try defendant's mitigation evidence.

4. Jury— capital selection—voir dire—costs of life imprisonment versus the costs of death sentence

The trial court did not abuse its discretion in a first-degree murder case by prohibiting defense counsel from questioning prospective jurors on whether their decisions would be influenced by their ideas about the costs of life imprisonment versus the costs of a death sentence in light of *State v. Elliott*, 360 N.C. 400 (2006).

5. Sentencing— capital—defendant's argument—denial of exhibit about presumption of life imprisonment

The trial court did not abuse its discretion in a capital sentencing proceeding by refusing to allow defendant to present to the jury during closing argument an exhibit containing the statement that life imprisonment is the presumptive sentence for first-degree murder unless and until the prosecution proves otherwise, because defendant's admission that his assertion that life was the presumptive sentence was nothing more than defense counsel's contention of the law amounted to invited error, and thus, defendant cannot show prejudice even if the trial court's ruling was erroneous.

6. Sentencing— capital—prosecutor's argument—crime committed for money

The trial court did not abuse its discretion in a capital sentencing proceeding by failing to intervene ex mero motu during the prosecution's closing argument when the prosecutor began to discuss how defendant's crime was committed for money, because: (1) it would be proper for the jury, under the facts of this case, to consider defendant's motive for pecuniary gain in the commission of the murder through the N.C.G.S. § 15A-2000(e)(5) robbery with a dangerous weapon aggravating circumstance; and (2) considering the statement in context, the record indicated that the prosecution was alluding to the fact that there were sixteen jurors in the jury box sitting on their wallets right now, and not that the jury should find sixteen pecuniary gain aggravating circumstances.

7. Sentencing— capital—prosecutor's argument—chart—armed robbery as aggravating circumstance

The trial court did not abuse its discretion in a capital sentencing proceeding by overruling defendant's objection when the prosecutor requested to use a chart that stated in part that the armed robbery during the premeditated murder is an aggravating factor and by allowing the prosecution to tell the jury it had already found the N.C.G.S. § 15A-2000(e)(5) aggravating factor, even though defendant did not object to those statements, because: (1) N.C.G.S. § 15A-2000(e)(5) states that the commission of robbery with a dangerous weapon during the commission of first-degree murder is an aggravating circumstance to be considered; and (2) the prosecution relayed to the jury that the State must prove the aggravators beyond a reasonable doubt, and then defense counsel, with defendant's permission, conceded to the jury that the prosecution had, indeed, proved the aggravating circumstances beyond a reasonable doubt.

8. Sentencing— capital—prosecutor's argument—letter shown in photograph

The trial court did not abuse its discretion in a capital sentencing proceeding by failing to intervene ex mero motu in the prosecution's closing argument when the prosecution read a letter from the victim's son that was shown in a crime scene photograph of the victim's living room but the actual letter was not in evidence, because: (1) considering the entirety of the record, the

reading of the letter by the prosecution without defendant's objection was not so grossly improper that it rendered the trial and sentence fundamentally unfair; and (2) the trial court admonished the jurors to rely solely upon their recollection of the evidence in their deliberations and stated that final arguments are not evidence.

9. Sentencing— capital—prosecutor's argument—compassion and mercy not the law

The trial court did not abuse its discretion in a capital sentencing proceeding by failing to intervene ex mero motu when the prosecutor stated that compassion and mercy were not the law, because our Supreme Court has stated that prosecutors may properly argue to the sentencing jury that its decision should be based not on sympathy, mercy, or whether it wants to kill defendant, but instead on the law.

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

The trial court did not commit plain error in a capital sentencing proceeding by instructing the jury pursuant to N.C.G.S. § 15A-2000(f)(1) regarding no significant history of prior criminal activity even though defendant did not request this mitigating circumstance, because: (1) the determination is not based merely on the number of prior criminal activities, but also on the nature and age of the activities; (2) even if defendant does not request the submission of the (f)(1) mitigator or objects to its submission, the trial court must submit the circumstance when it is supported by sufficient evidence; (3) a rational juror could conclude that defendant's underage alcohol and illegal drug use were minor offenses and thus insignificant when considered in light of the total circumstances; and (4) the trial court could have reasonably believed a rational juror would find a prior robbery to be insignificant when the robbery was so close in time to the robbery and murder at issue and was an aberration in an otherwise insignificant criminal background.

11. Evidence— affidavit—past recollection recorded—corroboration

The affidavit of a law student concerning statements made in class by another student, who had worked on defendant's case as a summer intern, that attributed by inference statements about defendant's case by the prosecutor was not admissible as sub-

stantive evidence under N.C.G.S. § 8C-1, Rule 803(5) as past recollection recorded in a hearing on a motion for appropriate relief and was properly admitted only for the purpose of corroboration where there was no showing that the affiant had insufficient recollection to enable him to testify fully and accurately.

12. Evidence— law professor—opinion testimony—personal perception

The trial court did not err in a hearing on a motion for appropriate relief by allowing a law professor to testify that he believed a discussion by a law student, who interned in the prosecutor's office and worked on defendant's case, only showed that he was illustrating a race-neutral policy and was not talking about the actual decision made in defendant's case, because: (1) the professor's testimony satisfied N.C.G.S. § 8C-1, Rule 701 as his opinion on what the law student meant was based on his personal perception of the statements made; (2) the professor's opinion would be helpful in determining whether the decision to prosecute defendant capitally was based upon racial or political consideration, just as defense witnesses' testimony concerning their inferences drawn from the law student's class presentation was helpful in determining that same issue; and (3) no verbatim transcript of the class discussion existed, and thus, the opinion of those present helped the trial court determine whether the statements allegedly attributed to the prosecutor indicated a denial of defendant's constitutional rights.

13. Sentencing— death penalty—proportionality

The trial court did not err in a first-degree murder case by sentencing defendant to the death penalty, because: (1) the trial court found three aggravating circumstances to exist beyond a reasonable doubt including the N.C.G.S. § 15A-2000(e)(3) aggravator that defendant had previously been convicted of a felony involving the threat of violence to a person, the N.C.G.S. § 15A-2000(e)(5) aggravator that the murder was committed while defendant was engaged in the commission of a robbery with a dangerous weapon, and the N.C.G.S. § 15A-2000(e)(9) aggravator that the murder was especially heinous, atrocious, or cruel; (2) defendant was the sole murderer of his neighbor in her home; and (3) defendant did not seek medical attention for his victim whom he stabbed numerous times in the face, but instead left her bleeding to death on the floor of her own home after rendering her helpless while he departed to withdraw money from

her bank account by using her ATM card and the PIN number he had tortured out of her.

14. Appeal and Error— preservation of issues—failure to argue—failure to cite authority

Defendant's remaining assignments of error that he provided no argument or supporting authority for in his brief are deemed abandoned and are therefore dismissed under N.C. R. App. P. 28(b)(6).

Chief Justice PARKER concurring in result only.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered on 8 September 2004 and a judgment denying defendant's motion for appropriate relief dated 27 January 2005, both entered by Judge Jerry Cash Martin in Superior Court, New Hanover County, following a jury verdict finding defendant guilty of first-degree murder. On 13 April 2006, the Supreme Court allowed defendant's motion to bypass the Court of Appeals as to his appeal of an additional judgment. Heard in the Supreme Court 8 January 2007.

Roy Cooper, Attorney General, by Amy C. Kunstling and Daniel P. O'Brien, Assistant Attorneys General, for the State.

Staples S. Hughes, Appellate Defender, by Barbara S. Blackman, Assistant Appellate Defender, for defendant-appellant.

BRADY, Justice.

On 4 October 2002, Paul Dewayne Cummings (defendant) stabbed his neighbor Jane Head (the victim) to death with her paring knife in her own home. Defendant then stole the victim's van and automated teller machine (ATM) card and used the ATM personal identification number (PIN) he had extracted from the victim before her death to withdraw $400 from her bank account. Defendant was convicted of robbery with a dangerous weapon and first-degree murder. The jury returned a binding recommendation of death for the first-degree murder conviction, and the trial court sentenced defendant accordingly. The trial court also sentenced defendant to a term of 117 to 150 months of active imprisonment for the robbery with a dangerous weapon conviction.

FACTUAL AND PROCEDURAL BACKGROUND

Jane Head, a sixty-two-year-old woman, lived alone in a mobile home in Wilmington. Jane Head's first career was as a special education and first-grade teacher. At the time of her murder, she was a nanny and home care provider, serving both children and the elderly. Her residence was in the same mobile home park where defendant and his family resided. Approximately three months before the murder, a break-in occurred at Jane Head's residence in which the intruder stole her television. Mrs. Head told her daughter and investigators that she believed defendant was the perpetrator. Approximately a week before her murder, Mrs. Head telephoned her son's wife around 9:30 or 10:00 p.m. and confided to her in a whispered voice that defendant was banging on her door and that she was afraid.

Defendant disclosed to mental health professionals that on 4 October 2002, the day of the murder, he had been using crack cocaine and drinking beer at a picnic table near the victim's residence. When he saw the victim arrive, he approached her and asked her for a ride to the store in order to purchase more beer. According to defendant's recitation to the mental health professionals, the victim agreed to drive defendant to the store, but stated that she needed to use the restroom before leaving. Defendant then decided to rob her to garner cocaine money. Grabbing a small paring knife from her kitchen, defendant awaited his victim's return from the restroom, after which he stabbed her sixteen times in the face, head, neck, back, shoulder, and chest. While stabbing her, defendant asked the victim "Where is the money?" and when she asked him, "Why are you doing this?" he told her to "Shut up, do you have any money?" Eventually defendant obtained her ATM card, stabbed her a few more times and then demanded her PIN from her. She told him the PIN, which was composed of numbers corresponding to letters that spelled a family member's name. Defendant put the knife down to record the number on a piece of paper. He then stole the victim's van, drove it to a store to purchase cigarettes and beer, and then proceeded to the ATM, where he withdrew $400 from the victim's bank account.

The victim's daughter, Joni Head Carson, and her husband, Bill Carson, arrived at the victim's residence at approximately 4:55 p.m. on the day of the murder. They had previously spoken to the victim by telephone at 4:30 p.m. When the victim's daughter entered the residence, she found her mother lying face down on the guest bedroom

floor, with a large pool of blood around her. Mr. Carson called 911, and the couple attempted to resuscitate the victim to no avail.

Officer Kevin Getman of the Wilmington Police Department responded to the scene of the crime. An emergency medical technician told Officer Getman that a window on the adjoining mobile home appeared to have been broken. Officer Getman then entered the nearby mobile home to determine whether any other victims existed. Upon entry Officer Getman, along with Officer Weeks, discovered blood on the blinds and on clothing bundled up beside the window. The officers then obtained a search warrant for the mobile home, which happened to be defendant's residence. They found a bloody, bent knife matching the description of the victim's missing paring knife on the ground under the open window of defendant's residence. The DNA profile of the blood on the knife, the blood on the blinds, the blood on a shirt found in defendant's mobile home, and blood found in defendant's sink matched that of the victim.

The next night, 5 October 2002, police responded to a report that defendant and his father were fighting at the mobile home park. Defendant was subsequently arrested for the murder of Jane Head. At the time of his arrest, defendant's shorts were stained with blood. The DNA profile of the blood on defendant's shorts matched that of the victim. On 13 January 2003, defendant was indicted by the New Hanover County grand jury for the murder and robbery with a dangerous weapon of Jane Head.

Defendant's evidence at the guilt-innocence proceeding tended to show that his father, Paul Ransom, was a violent man, especially toward defendant and his mother. Mr. Ransom beat defendant and his mother on multiple occasions, prompting significant intervention by the Department of Social Services. Additionally, the evidence tended to show that defendant abused alcohol and illegal drugs. Psychologist James Hilkey testified as an expert in forensic psychology and drug abuse and addiction. It was his opinion that defendant was intoxicated at the time of the murder and was affected by dysthymia and post-traumatic stress disorder. Additionally, Dr. Hilkey testified that defendant met the criteria for borderline personality disorder.

After hearing this evidence and being instructed on the law, the jury deliberated and returned verdicts finding defendant guilty of first-degree murder and robbery with a dangerous weapon. Consistent with the jury's verdict of guilty of first-degree murder, the trial court moved to the sentencing proceeding of defendant's trial.

The State presented evidence at the sentencing proceeding that on 31 August 2002 defendant robbed Eula Dale Cauldwell, a fifty-two-year-old taxi driver, at knife point. The State also presented victim-impact evidence from Mrs. Head's family and friends. Defendant's evidence in mitigation tended to show that defendant was remorseful, had converted to Christianity, was a good elementary school student, that defendant lacked a father figure in his life, that defendant was a productive employee in the detention center's food service area, that defendant had a good, upbeat attitude while detained, and that when he was fourteen or fifteen he received an award from the Woodmen of the World for saving the life of another boy's father. Additionally, defendant presented further evidence of physical abuse, substance abuse, and mental instability.

After being instructed by the trial court on sentencing matters, the jury deliberated and returned a recommendation that defendant be sentenced to death. The jury found as aggravating circumstances that defendant had been previously convicted of a felony involving the threat of violence to the person, that the murder was committed while defendant was engaged in the commission of robbery with a dangerous weapon, and that the murder was especially heinous, atrocious, or cruel. The jury found as statutory mitigating circumstances that the murder was committed while defendant was under the influence of mental or emotional disturbance and that defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired. The jury also found ten other nonstatutory mitigating circumstances to exist. The jury did not find thirty other submitted mitigating circumstances. The trial court sentenced defendant according to the jury's recommendation.

ANALYSIS

I. Jury Selection

A. The Denial of Defendant's Challenge of Lieutenant Goodson

[1] Defendant's first argument is that the trial court erred in denying his challenge for cause of Lieutenant Billy Goodson during the jury selection process. At the time of defendant's trial, Lt. Goodson was the Carolina Beach Chief of Detectives and had investigated numerous homicide cases, including many that were prosecuted capitally. Defendant contends that the trial court's decision to deny his challenge of Lt. Goodson was an abuse of discretion because, in defendant's view, Lt. Goodson could not impartially consider evidence in defense or mitigation, would not afford defendant the presumption of

innocence or a presumption of a life sentence, and was too closely aligned with the prosecutor's office and would therefore accord more weight to police officer testimony. This Court has recently reaffirmed the method for reviewing whether a defendant's challenge for cause of a juror was proper:

> We review a trial court's ruling on a challenge for cause for abuse of discretion. *State v. Kennedy*, 320 N.C. 20, 28, 357 S.E.2d 359, 364 (1987) (citing *State v. Watson*, 281 N.C. 221, 188 S.E.2d 289, *cert. denied*, 409 U.S. 1043 (1972)). A trial court abuses its discretion if its determination is "manifestly unsupported by reason" and is "so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). In our review, we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record. *See Wainwright v. Witt*, 469 U.S. 412, 434 (1985).

State v. Lasiter, 361 N.C. 299, 301-02, 643 S.E.2d 909, 911 (2007) (citations omitted). The question that the trial court must answer in determining whether to excuse a prospective juror for cause is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright*, 469 U.S. at 424 (internal quotation marks omitted).

During *voir dire* by defendant's counsel, Lt. Goodson indicated that it was his personal opinion that "mental illness is a condition that takes out the rationalization that you and I grew up with, from right and wrong. Short of that, there is not a whole lot on that list [of possible mitigating circumstances] that I would consider."[1] Lt. Goodson also stated that "[d]omestic violence, drug use, broken homes. . . . learned violence[:] I don't find those as acceptable mitigating circumstances for someone having committed a homicide." He further stated that he would "have a very limited window in which things that I would consider that would negate the death penalty." When questioned on issues of the burdens of proof and persuasion, Lt. Goodson stated that he equated the presumption of innocence as "being on the fence" and being "even-steven." When asked whether his long law enforcement career would influence his judgment in this case, he indicated that he might be inclined to give more credence to law enforcement testimony although it would depend on each case's circumstances.

1. Unless otherwise indicated by brackets, all transcript quotations are verbatim.

However, personal opinions aside, Lt. Goodson also said "I can follow the law, as I told the State, regardless of having the knowledge of the circumstances that's been [alluded] to by you and [defense co-counsel], I would follow the law down to the line." (Emphasis added.) Additionally, in response to defense counsel's questioning, Lt. Goodson stated, "If the Court instructs me to follow certain guidelines, I will follow them to the end." Regarding the issue of mitigating evidence, Lt. Goodson indicated he would consider all such evidence, stating that "[i]f the Court directed me to consider it, then that's going to happen." Lt. Goodson also indicated that his view of the presumption of innocence gave defendant the "benefit of the doubt." With respect to whether he would give law enforcement testimony more credibility than statements made by defense counsel, he indicated that he might in some cases, but in this case he would not.

Based upon the answers to the questions elicited during *voir dire*, defendant challenged Lt. Goodson for cause, and the trial court denied that challenge. In doing so the trial court stated:

> All right. The Court has had occasion to observe Billy Goodson, juror at Seat 9, for some time. He's been examined by the Court, by counsel for the State and counsel for the Defendant. And there is just no doubt about it, he is a man of strong conviction and he is with [sic] viewed with strong beliefs, including matters in mitigation.
>
> But the Court is, likewise, convinced that he will follow the law. And if his belief or beliefs differ from the law, he will yield and try to obey and follow the law as he is instructed to him [sic] by the Court.
>
> In looking at his face, he's got a face that's been chiseled in stone and I imagine his convictions are just the same way. His convictions are strong. And if he sits there and tells us that he will yield a matter of personal preference or belief and follow the law, I think he will do so. The evidence demonstrates that he is a soldier. He is a patriot, a good man and good juror.
>
> The Court is of the view is [sic] that he should not be excused for cause and the motion to challenge for cause is denied.

Defendant then used a peremptory challenge to excuse Lt. Goodson. Later in the selection process, after defendant had exhausted his peremptory challenges, he renewed his challenge for cause of Lt. Goodson. The trial court considered the motion and stated:

> All right, the Court does . . . revisit the ruling with regard to juror in Seat 9, Billy Goodson. Mr. Goodson is the gentleman identified by the Court as the soldier, patriot, good man, good juror, a man of strong convictions, views with strong beliefs, including the matters in mitigation. The Court concluded he would follow the law even if his beliefs differed. And looking back at his comments, I think any person could pull out any one comment by any one juror to probably support a position either for or against the juror being discharged.
>
> And so the Court, likewise, has had an occasion to review his examination by the Court[,] by Counsel for the State and by Counsel for the Defendant and considered his examination in its totality and I do note that he did indicate that he could follow the law, even though he may disagree with it. He was being asked at that time about self-imposed alcoholism, which again is just one comment by the juror, but the total of his comments and the examination of this Court of his demeanor and his responses and his approach to his view convinces this Court that the ruling should stand. Billy Goodson should not be excused for cause upon the renewed motion. The motion to remove him for cause is denied.

Defendant's argument that the trial court erred because Lt. Goodson would not consider mitigating evidence is without merit. While there is no constitutional requirement of a certain method in which mitigating circumstances are considered by jurors, a juror must be able to consider all relevant mitigating evidence. *Kansas v. Marsh*, —— U.S. ——, 126 S. Ct. 2516, 2523, 165 L. Ed. 2d 429, 440 (2006); *State v. Duke*, 360 N.C. 110, 139-40, 623 S.E.2d 11, 30 (2005), *cert. denied*, —— U.S. ——, 127 S. Ct. 130, 166 L. Ed. 2d 96 (2006). If the record supports the trial court's decision that the juror could follow the law, then the trial court's ruling should be upheld on appeal. *See State v. Morgan*, 359 N.C. 131, 148-50, 604 S.E.2d 886, 897 (2004), *cert. denied*, 546 U.S. 830 (2005). Thus, the question we must consider in determining whether the trial court abused its discretion is whether the record fairly supports the conclusion that Lt. Goodson could perform his duties as a juror consistent with the trial court's instructions when considering mitigating evidence.

The duty of the appellate court is not to micromanage the jury selection process. Indeed, an appellate court should reverse only in the event that the decision of the trial court is so arbitrary that it is

void of reason. *Id.* Many citizens, like Lt. Goodson, have strong feelings about the efficacy of the death penalty and how a capital sentence is determined. However, merely because a prospective juror holds personal views that do not comport completely with the structure set out in N.C.G.S. § 15A-2000 does not disqualify that person from fulfilling his or her civic responsibility to serve on a jury. Moreover, the General Assembly's intent is to maximize the pool of qualified citizens who can serve as jurors. *See* N.C.G.S. § 9-3 (2005). Determinations of whether a juror would follow the law as instructed are best left to the trial judge, who is actually present during *voir dire* and has an opportunity to question the prospective juror. *See Lasiter*, 361 N.C. at 301-02, 643 S.E.2d at 911. "Deference to the trial court is appropriate because it is in a position to assess the demeanor of the venire, and of the individuals who compose it, a factor of critical importance in assessing the attitude and qualifications of potential jurors." *Uttecht v. Brown*, 551 U.S. ——, 127 S. Ct. 2218, 2224, 167 L. Ed. 2d 1014, 1023 (2007) (citations omitted). After reviewing the substantial exchange between the parties, the trial court, and Lt. Goodson, we conclude, as did Justice Webb writing for this Court in *State v. Jackson*, 322 N.C. 251, 257, 368 S.E.2d 838, 841 (1988), *cert. denied*, 490 U.S. 1110 (1989): "We might not have reached the same result as the superior court but giving, as we must, deference to its findings, we hold it was not error" for the trial court to deny defendant's challenges of Lt. Goodson.

We conclude that the record fairly supports the trial court's conclusion that Lt. Goodson would follow the law as instructed. The statements made by Lt. Goodson were in response to incisive questions by both parties seeking to determine whether Lt. Goodson could follow the law. These questions were more specific and targeted than the general fairness and "follow the law" questions which alone are insufficient to make a determination of whether a juror will follow his oath. *See Morgan v. Illinois*, 504 U.S. 719, 734-36 (1992). The record indicates Lt. Goodson made statements which the trial court reasonably credited, such as "I would follow the law down to the line" and "if the Court instructs me to follow certain guidelines, I will follow them to the end." Additionally, this is not a case in which the trial court summarily denied defendant's challenge of a prospective juror; instead, the trial court elaborated upon its reasons for the denial. *See Lasiter*, 361 N.C. at 308, 643 S.E.2d at 914 (Brady, J., concurring) (explaining the helpfulness to a reviewing court of detailed findings by trial courts in rulings concerning jury selection). We cannot say that the trial court's decision to deny defendant's challenge of

Lt. Goodson on the basis of an alleged inability to consider circumstances in mitigation was an abuse of discretion.

Similarly, we cannot say that the trial court abused its discretion in rejecting defendant's argument that Lt. Goodson could not afford defendant the proper presumptions. In *State v. Jones*, this Court found no error in a trial court's denial of the defendant's challenge for cause of a prospective juror who insisted that there must be some evidence against the defendant since he was charged with a crime, stated that many defendants just wasted taxpayer money in proceeding to trial, and added that he believed the defendant should take the stand to defend himself. 342 N.C. 457, 470-75, 466 S.E.2d 696, 702-05, *cert. denied*, 518 U.S. 1010 (1996). However, after making those statements of opinion, the prospective juror indicated to the trial court that he would follow the law. *Id.* at 474, 466 S.E.2d at 704. This Court stated the trial court "could have concluded that [the prospective juror] may not have agreed with the presumption of innocence but would follow the law as given to him by the court. This was all that was required to deny the challenge for cause." *Id.* at 475, 466 S.E.2d at 704-05 (citing *State v. McKinnon*, 328 N.C. 668, 403 S.E.2d 474 (1991)).

Defendant argues this case is similar to *State v. Cunningham*, in which this Court ordered a new trial because a juror who was severely confused on the presumption of innocence was not removed for cause. 333 N.C. 744, 429 S.E.2d 718 (1993). In *Cunningham*, the prospective juror stated that "if [the defendant] doesn't want to prove his innocence, I would have to accept that." *Id.* at 752, 429 S.E.2d at 722. That prospective juror still indicated her confusion over the presumption of innocence after two detailed instructions from the trial court on the subject. *Id.* at 749-51, 429 S.E.2d at 720-21.

This case is more like *Jones* than *Cunningham* in that Lt. Goodson indicated numerous times that he would follow the law as instructed by the trial judge, and it is reasonable to believe that he understood that law. The only confusion in the instant case is from the label Lt. Goodson applied to the presumption of innocence. Lt. Goodson's answers make it clear that he viewed the presumption of innocence to be that until evidence is presented establishing defendant's guilt, defendant is "given the benefit of the doubt" and is presumed "not guilty until proven." Even defense counsel recognized that they were both considering the same presumption—just with a different label—noting that "[i]t may just be a lawyer thing." If the trial court's denial of the challenge for cause in *Jones* was not an

abuse of discretion even though the statements made by that prospective juror were much more provocative than those made by Lt. Goodson, we cannot say the trial court abused its discretion in rejecting defendant's argument that Lt. Goodson could not follow the law on the presumption of innocence.

Defendant's final argument pertaining to Lt. Goodson is that Lt. Goodson, as a member of the law enforcement community, was closely aligned with the prosecutor's office and would give more weight to law enforcement officers' testimony. The qualifications to serve as a juror are contained in North Carolina General Statute section 9-3, and the grounds for challenging a juror for cause are found in section 15A-1212. Neither the qualifications nor the grounds for challenging a juror for cause lead us to recognize any type of prophylactic rule prohibiting members of the law enforcement community from entering the jury pool. *See State v. Lee*, 292 N.C. 617, 234 S.E.2d 574 (1977).

During *voir dire*, Lt. Goodson admitted that he had previously worked with the attorneys now prosecuting the instant case, as would be common in the law enforcement community. This contact mainly consisted of Lt. Goodson seeking legal opinions from the prosecutors as to whether he should pursue criminal charges against certain suspects. Additionally, as would be expected, Lt. Goodson worked with members of the Wilmington Police Department in his capacity with the Carolina Beach Police Department. No one alleged that Lt. Goodson was involved in defendant's case in any way. However, exchanges between defense counsel and Lt. Goodson about his law enforcement employment and how that might influence his determinations of credibility demonstrate that Lt. Goodson would view each witness on the facts of the case and not automatically give the prosecution's law enforcement witnesses more weight:

> MR. PETERS [Defense Counsel]: With the nature of your work and law enforcement over these 29 years have certainly brought you into the court system with some degree of regularity, I take it?
>
> JUROR NO. 9: Yes, sir.
>
> MR. PETER[S]: And the professional interactions have largely been with the prosecutors, at least, certainly by way of time, is that fair to say?
>
> JUROR NO. 9: Yes, sir.

MR. PETERS: That would assist you in developing, working up your investigations?

JUROR NO. 9: Yes, sir.

MR. PETERS: When you come to this courtroom, do you feel more of an allegiance toward or a commonality with the prosecutors than you would defense lawyers in this case?

JUROR NO. 9: I don't believe so, no, sir.

MR. PETERS: But, obviously, the information that you would seek relating to your investigations, you would be relying on these folks and the prosecutor's office?

JUROR NO. 9: That's correct.

MR. PETERS: And that would indicate that you have a great respect for their opinions and their approaches to the work that they do?

JUROR NO. 9: Yes, sir.

MR. PETERS: And when you see them now come into court with a case and prosecution, wouldn't some of your views as your prior relations with those folks, be a factor in just your experiences as a professional?

JUROR NO. 9: I'm sure it would be a factor in that relationship. But I also happen to know defense lawyers that have represented the client that [I] [] have great admiration for. Professionally, I think that they did an outstanding job and [s]o to say I would value anybody, anyone on the law side, their opinion or the other, I can't say that I would. It's a case-by-case basis to me, counselor.

. . . .

MR. PETERS: You're not the first law enforcement officer whose [sic] been called to jury service for this case. And in response to one question an officer had indicated that he felt that he would attach more credibility to a law enforcement officer than to the defense lawyer. That was the comment. I saw you wince.

MR. DAVID [Prosecutor]: Objection to the form of that question.

THE COURT: Court sustained. Counsel, rephrase, then.

MR. PETERS: Would you share that point of view?

JUROR NO. 9: In your case, no, sir. In some cases, it's a possibility of that, yes, sir.

MR. PETERS: Thank you. But you do attach a great deal of credibility to law enforcement officers?

JUROR NO. 9: Yes, sir, I do.

MR. PETERS: That's certainly a part of your work on a day-to-day basis?

JUROR NO. 9: Yes, sir.

MR. PETERS: You trust those that you serve?

JUROR NO. 9: That I serve with, yes, sir.

MR. PETERS: And under anyone and under and over?

JUROR NO. 9: In some cases, yes, sir.

MR. PETERS: Depends on your associations with members of law enforcement?

JUROR NO. 9: Yes, sir.

MR. PETERS: And you feel a closeness to law enforcement officers, don't you?

JUROR NO. 9: Yes, sir.

MR. PETERS: This is something that goes—it really [is] in your bones, isn't it?

JUROR NO. 9: Yes, sir.

MR. PETERS: And you consider yourself a law enforcement officer 24 hours a day, don't you?

JUROR NO. 9: Yes, sir, I do.

MR. PETERS: And oftentimes go about armed.

JUROR NO. 9: Yes, sir, I do.

MR. PETERS: And you're prepared?

JUROR NO. 9: Yes.

MR. PETERS: When you leave you might be armed?

JUROR NO. 9: I will.

MR. PETERS: And if you're listening to the testimony of a law enforcement officer, wouldn't you be inclined to ascribe to that person more credibility than you may someone you don't know at all?

JUROR NO. 9: Not necessarily because I know them. But I would probably attribute it to their experience and expertise of what they're saying because they know what they're looking for and what they're looking at.

MR. PETERS: Well, when we're talking about—looking as if it were a matter of an officer seeing something and then an agreement with a civilian about what was seen or done in a situation like this, because of your background and your years and service to law enforcement, would you want to be more inclined to assign more credibility to the officer over, say, the civilian?

JUROR NO. 9: Yes, sir, because of their training, I would think I would.

MR. PETERS: Their training and your respect for the truthfulness that you feel attaches to those in service to law enforcement?

MR. DAVID: Objection to the form of that question.

THE COURT: Court sustained. Counsel may rephrase.

MR. PETERS: That you feel that those that you serve alongside with are truthful and responsible and credible people, don't you?

JUROR NO. 9: I hope so.

MR. PETERS: As you are?

JUROR NO. 9: I try to be, yes.

MR. PETERS: And you assign that to those in law enforcement, don't you, as a matter of fact, of course?

JUROR NO. 9: Yes, sir.

MR. PETERS: You trust people in law enforcement?

JUROR NO. 9: Yes, sir.

MR. PETERS: You consider them to be part of the same team that you're on and the work that you do, don't you?

JUROR NO. 9: Yes, sir.

MR. PETERS: So in this sense, do you feel, then, that if you're looking at a situation where an officer has testified and there is a multiple number of officers the, State's witnesses 20 or 30 officers testifying in a case, that would mean a lot to you, wouldn't it?

JUROR NO. 9: I would place it in proper respective [sic], counselor, as to what they saw, what they're testifying to. As far as giving them exceptional credibility over anything else, if I think that the facts don't match what they're saying, then I would not. But if it's mirroring up with what they're saying, I would say yes.

MR. PETERS: Well, this may be a different way to roll it around in your mind, but—not talking about necessarily this trial, but just in the general sense, your mind set of a case where a goodly number of officers may be testifying in a case, that is something that would suggest to you a strong case, isn't it?

JUROR NO. 9: Yes, sir.

MR. PETERS: And one officer after another after another—when I was younger, I believe there was [an] Elvis Presley album out, 50 million Elvis fans can't be wrong—you have an attitude that as officer[s] are testifying in a case, that certainly provides greater and greater strength to the State's prosecution?

JUROR NO. 9: To credibility, yes.

. . . .

MR. PETERS: Well, it can be difficult, but, I mean, the testimony of a police officer, would that be seen different from you than that of, say, a psychiatrist. I'm trying to understand your thoughts about psychiatric testimony and what the Court may say about what constitutes an expert.

JUROR NO. 9: I would not take a police officer over a psychiatrist. I would think No. 1, a police officer would not be testifying as to a mental state of a suspect and I would rely on a psychiatrist to provide some basis, mental status, mental condition of that subject at the time. So I don't equate police officers or psychiatrists in the same realm of testimony.

MR. PETERS: Could I ask about Defendants?

JUROR NO. 9: I'm sorry, what would your question be about Defendants?

MR. PETERS: How would you equate them in the realms of either psychiatric testimony or that of the law enforcement officer, in terms of credibility?

MR. DAVID: Well, objection.

THE COURT: Court sustained.

MR. PETERS: Do you feel that you could attach or assign the same degree of credibility to a person who's under an accusation of murder, first-degree murder, as you could a law enforcement officer?

JUROR NO. 9: I would need to qualify an answer to that. I couldn't say yes or no. I would need to elaborate on that if you want me to.

MR. PETERS: Would you do that for me, lieutenant.

JUROR NO. 9: If I had a Defendant that made an explanation in this case, testified as to the circumstances surrounding the incident, that, coupled with the facts, would be able to ascertain whether the Defendant was telling us the truth. And on the other hand, if that Defendant's version of the incident is so far afield that common sense doesn't even attach itself, then I could not give them the same credibility to their testimony that I would a police officer.

MR. PETERS: Do you feel that your experiences, your considerable experiences over the years, would color your ability to hear any defense that may be offered by a person accused in a case like this?

MR. DAVID: Objection. Stake out.

THE COURT: Objection. Overruled. You may answer.

JUROR NO. 9: I don't believe so, no, sir.

This case is indistinguishable from *State v. McKinnon*, 328 N.C. 668, 403 S.E.2d 474 (1991) with regards to Lt. Goodson's answers concerning law enforcement credibility. In that case, the defendant challenged a prospective juror for cause after the potential juror indicated that he would "possibly" give more credence to statements made by a police officer because of the police officer's training. *Id.* at

675-76, 403 S.E.2d at 478-79. This Court noted that the prospective juror "indicated that he would not automatically give enhanced credence to testimony by any particular class of witness. Rather, certain factors in the witness's background, such as training or experience, would affect the credibility of that witness." *Id.* at 676, 403 S.E.2d at 479. In the case *sub judice*, Lt. Goodson indicated that he would be inclined under certain circumstances to give more credence to a law enforcement officer's testimony because of the officer's training when the facts "match up with what they are saying." He never indicated that he would automatically give more weight to any particular testimony, but steadfastly assured the parties and the trial court that he would look at each person's testimony in light of the other evidence in the case. Considering the entirety of the *voir dire* of Lt. Goodson, we cannot say the trial court abused its discretion in denying defendant's challenge for cause based on Lt. Goodson's alleged bias toward the prosecution and law enforcement personnel. Accordingly, these assignments of error are overruled.

B. The Denial of Defendant's Challenge of Mr. Boston

[2] Defendant next contends that the trial court abused its discretion in denying his challenge of prospective juror Boston. Defendant argues that juror Boston would vote automatically for the death penalty in every first-degree murder case, and therefore, the trial court's failure to remove him for cause amounts to a violation of defendant's right to a fair and impartial jury as set out in *Morgan v. Illinois*, 504 U.S. 719 (1992). In recognizing a defendant's right to challenge a prospective juror for cause whenever that juror would "automatically vote for the death penalty in every case," *id.* at 729, the Supreme Court of the United States noted that "[a]ny juror who would impose death regardless of the facts and circumstances of conviction cannot follow the dictates of law." *Id.* at 735. As stated above, when determining whether the trial court erred in its decision to excuse a juror for cause, we give a high degree of deference to the trial court, which is better suited than a reviewing court "to assess the demeanor of the venire, and of the individuals who compose it." *Uttecht*, 551 U.S. at ——, 127 S. Ct. at 2224, 167 L. Ed. 2d at 1023.

During the rather lengthy *voir dire* of Mr. Boston, he indicated that he supported the death penalty, that if "you've taken a life, you don't deserve to live," that he personally would rather die than spend his life in prison, and that life imprisonment was cost-prohibitive compared with a sentence of death. Furthermore, Mr. Boston agreed with defense counsel's characterization of Mr. Boston's answers to

mean that if the murder was premeditated, cold-blooded, deliberate, and willful, the appropriate punishment would be death. When questioned by the prosecution, Mr. Boston indicated that, regardless of his views, he could follow the trial court's instructions on both the guilt-innocence and penalty proceedings and that he would return a sentence recommendation of life without parole if the State failed to meet its burden in the penalty proceeding. After hearing arguments on defendant's challenge of Mr. Boston, the trial court stated:

> The standard is whether a juror's views on capital punishment would prevent or substantially impair the juror in the performance of his duties in accordance with the instructions and the juror's oath, and a juror who is so committed to a view about the death penalty that the juror would not give up that view and follow the law must be excused. If a juror's view is so strong as the Morgan vs. Illinois standard, then the juror must be excused. If a juror indicates that the juror automatically would vote for the death penalty following a conviction for first degree murder, then the trial judge must remove him.
>
> This juror does have a view, it is a strong view, I believe he has indicated and this opinion or belief is one I think the Court does need to evaluate. The Court has had the benefit of viewing the juror in the courtroom, watching him, hearing him, observing him and his responses to difficult questions and the Court does note that prospective juror's biases might not always be provable by unmistakable clarity. Reviewing courts must defer to the trial judge's judgment whether the prospective juror would be able to follow the law impartially. Here is a juror who has stated repeatedly his opinion about it and his opinion is one that if a person has gone out, premeditated, took another person's life, no accident, no excuse, meant to do it and the State shows that beyond a reasonable doubt, then he feels that person should be sentenced to death. But when examined further about it, he does indicate that he still believes he can go through the process, he can keep an open mind, he can consider the aggravating and mitigating circumstances.
>
> He has indicated that he would not prejudge the sentence after the Defendant were convicted of first degree murder. If he were, then he can go through the sentencing process and was asked point-blank if the State fails in its burden in the sentencing proceeding, he indicated he'd return a life without parole. A potential juror who indicates that he believes that a person

should be sentenced to death after a conviction for first degree murder can still serve.

Likewise, a potential juror who says that he or she believes a person should receive life imprisonment without parole after a sentence or a conviction of first degree murder can still serve.

The question is whether that view or that opinion is so strong that it would prevent or substantially impair that juror in carrying out his or her view. In the final analysis of this juror, this juror can do that, he can set that view aside and return life if it's called for by the evidence and return death if it's called for by the evidence.

The Court is of the view his view does not prevent or substantially impair him in carrying out his duty as a juror. The motion to excuse for cause is denied.

After further questioning by both defense counsel and the prosecution, defendant renewed his challenge for cause after Mr. Boston indicated that the appropriate penalty would be death if the State proved an aggravating circumstance beyond a reasonable doubt. In denying the renewed challenge for cause, the trial court stated:

All right, the Court has had ample opportunity to consider this juror and we are dealing with an esoteric, convoluted, confusing area of the law. Jurors are easily confused. This juror, I think, is confused. He indicated when he was examined by Counsel for the Defendant that if we get to the place all of us decide that it is premeditated murder with specific intent, then we're at the punishment level. Then the State proves an aggravating circumstance beyond a reasonable doubt and if fully satisfied and entirely convinced, would you feel that the appropriate punishment would be the death penalty. Answer, yes. The Defendant made a motion renewing the challenge for cause but then followed up by another question in which he was asked if he would be able to set that opinion aside and essentially the juror said he would not set that opinion aside.

Well, the renewed challenge for cause I thought was very appropriate. Here at this late stage, we're getting a juror who still is not quite understanding. In fact, when the State started asking him a question, he previewed his remarks with I didn't understand the question, right. So he didn't. And when he was asked again to go through, to walk through the process, he did indicate finally that there was nothing about his personal beliefs that

> would prevent him being a fair juror and consider the sentencing options. He was asked if there was anything about his beliefs that would prevent or substantially impair him from considering the sentence of life imprisonment without parole or death. He said no. He indicated again that he could keep an open mind and listen to the evidence and could return a sentence of life if the D.A. failed to prove what he is required to prove.
>
> The Court is of the view, again, his view, although a juror that has been confused about it, at this point is not one that has a view that would prevent or substantially impair him from carrying out his duty as a juror in the case.
>
> The renewed motion for challenge for cause is denied.

After a recess, defense counsel requested that the court allow him to ask Mr. Boston one final question. After discussion and argument, the trial court allowed defense counsel to ask Mr. Boston the following question: "Mr. Boston, if a person were to be convicted of cold-blooded, first degree murder, is it your view that you would vote for the death penalty every time?" Mr. Boston answered, "Yes, sir."

Upon receiving this answer, defendant renewed his challenge for cause. The prosecutor then questioned Mr. Boston, and he again indicated that he would follow the law. Defense counsel then asked Mr. Boston: "Just the question I asked was, to be clear, that if a person were to be convicted by you as a juror of first degree, cold-blooded, premeditated murder would you vote for the death penalty then every time?" Mr. Boston responded, "If all the facts are proven to me, yes." Mr. Boston later clarified his view: "I just feel that if every fact can be proven, I believe in the death penalty. If it's not proven, I believe that life without parole." When asked what needed to be proved, Mr. Boston responded:

> If every fact has not been proven, like he talked about, the tight-knit process, the four steps. If he doesn't prove all four steps then it would be life without parole, but if he proves everything without a shadow of a doubt, or however you want to say it, then I will vote basically for death. If the State proves everything, everything, every fact, do you understand what I'm saying?

(Emphasis added.)

After defendant renewed his objection to Mr. Boston's service, the trial court once again denied the challenge. Toward the end of the

jury selection process, but before alternate jurors were to be chosen, defendant once again asked the trial court to reconsider its ruling on this issue. The trial court then ruled:

> The Court reconsiders the matter then, pursuant to 15A-1214(h) and [i] to reconsider the facts and arguments that have been made and additional arguments that have been made to determine whether this juror should have been excused for cause. Kenneth Boston, the juror in Seat 7 was an interesting fellow. He is a butcher. Historically, I think we learned that butchers are supposed to be pro defendant; typically they will not return a verdict of guilty. So starting out with some idea about the gentleman, I was surprised to find that he had some strong opinions, and he did. He believed that the death penalty is a necessary law, and indicated why should we burden ourselves with the expense, why keep financing the burden. And so leading off on that, it certainly gave the Court pause.
>
> . . . Our appellate courts have been particularly excellent in allowing the trial judge the benefit of the doubt about determinations made concerning a juror's service. The cold record, if you read that, of Mr. Boston's examination, I think you can pick out any number of spots in that record where he has said things that would make you think that he did have a view that would prevent or substantially impair him in carrying out his duty as a juror. But in looking at the totality of it, again, here is a gentleman who was challenged for cause and he had ample opportunity to sit then and he was challenged at least twice, possibly three times, and he did, I think, have a lot of confusion about it. He did indicate that he still believed if you went through the process, even though he had the views he told us about, he thought he could keep an open mind, he could still consider aggravating and mitigating circumstances, and indicated he would not prejudge the sentence after the Defendant was convicted of first degree murder, if he were, but he could go through the sentencing process and he indicated that if the District Attorney fails, he would return life without parole.
>
> He did indicate after, I think, he finally understood it, if a person had gone out and premeditated, took another person's life, no accident, no excuse, no self-defense, the State shares every bit of that in sentencing, that asked if would he have felt that then should the sentence be death, he said yes, it would be tough, but

> indicated as well that he could go through the sentencing process and not prejudge, keep an open mind, consider aggravating and mitigating. And in the Court's view he is just the kind of juror we're looking for, someone who can understand this very convoluted, complicated process and who can, even if they come in with a strong feeling about any number of things, can lay that aside, leave it out of the courtroom and determine his verdict based on what we present to him. He has convinced the Court he can do that. This Court has had the advantage over anyone who might read the cold record. I have been able to look him in the face, I've been able to hear him talk, and I've been able to watch him as the lights went off and slowly he came to an awakening of what was desired of him. The juror passes then and passes now and the Court denies the motion to excuse this juror for cause.

The trial court's extensive findings and explanation of its reasoning are helpful in demonstrating that the trial court's decision was not arbitrary or without thought. These lengthy passages indicate that the trial court was attentively listening to the questions and the answers given during *voir dire*. "A trial court abuses its discretion if its determination is 'manifestly unsupported by reason' and is 'so arbitrary that it could not have been the result of a reasoned decision.' " *Lasiter*, 361 N.C. at 301-02, 643 S.E.2d at 911 (quoting *White*, 312 N.C. at 777, 324 S.E.2d at 833). After reviewing the totality of Mr. Boston's *voir dire*, we cannot say that the trial court's decision was "manifestly unsupported by reason."

This case is similar to *State v. Hedgepeth*, 350 N.C. 776, 792-95, 517 S.E.2d 605, 615-16 (1999), *cert. denied*, 529 U.S. 1006 (2000). In *Hedgepeth*, a prospective juror indicated that she preferred death in first-degree murder cases, but upon further questioning, also indicated that she could put aside those opinions and follow the law. *Id.* This Court held that the trial court did not abuse its discretion because of the prospective juror's later answers which indicated she would follow the law. *Id.* at 794-95, 517 S.E.2d at 616. In the instant case, Mr. Boston, who at first appeared confused and a strong proponent of the death penalty in premeditated murder cases, later indicated to counsel that he would follow the law and that he would return a recommendation of life imprisonment without parole if the State failed to meet its burdens of proof and persuasion during the penalty proceeding. Accordingly, we cannot say the trial court abused its discretion in denying defendant's challenge for cause of Mr. Boston. These assignments of error are overruled.

C. The Refusal to Allow Defendant to Ask "Stake Out" Questions on Voir Dire

[3] Defendant argues that the trial court erred in sustaining prosecution objections to certain questions asked by defense counsel during *voir dire*. The prosecution contended that these questions were "stake out" questions meant to determine how a juror would vote in the case and were attempts to lock the jurors into a certain position by asking hypothetical questions that mirrored some of the mitigating evidence defendant intended to present in a possible penalty proceeding. In particular, defendant argues the trial court abused its discretion in not allowing him to question prospective jurors on what they might view as harm experienced by a child exposed to domestic violence, the effects on children who had been exposed to physical abuse, whether a prospective juror believed her grandson was harmed by fights between his parents, whether a juror believed that a woman who was abused has the ultimate responsibility to protect her children, how a particular family was affected by alcohol abuse, why a juror thought people would abuse hard drugs, and whether, in a prospective juror's personal experience, the effects of drug abuse were negative.

Two purposes of *voir dire* are to allow the parties (1) to determine whether there exists a reason to challenge a prospective juror for cause; and (2) to intelligently exercise their limited number of peremptory challenges. *See State v. Syriani*, 333 N.C. 350, 372, 428 S.E.2d 118, 129, *cert. denied*, 510 U.S. 948 (1993). Allowing adequate *voir dire* is essential in guaranteeing a defendant's right to a fair and impartial jury. *See Morgan*, 504 U.S. at 729. However, there are limits on *voir dire* examination. A defendant is not entitled to put on a mini-trial of his evidence during *voir dire* by using hypothetical situations to determine whether a juror would cast a vote for his theory. *See State v. Leroux*, 326 N.C. 368, 384, 390 S.E.2d 314, 325 (stating that "counsel is not permitted to 'fish' for legal conclusions or argue its case during *voir dire*"), *cert. denied*, 498 U.S. 871 (1990). Moreover, "[i]n this jurisdiction counsel's exercise of the right to inquire into the fitness of jurors is subject to the trial judge's close supervision. 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* 410 U.S. 958, *and cert. denied* 410 U.S. 987 (1973).

We cannot say the trial court abused its discretion in sustaining objections to the questions at issue. Defendant planned to present

evidence of physical child abuse, alcohol abuse, and drug abuse. The trial court gave defendant wide latitude to determine whether prospective jurors had been personally involved in any of those situations; however, it was within the trial court's authority to limit questioning on these matters and not permit the hypothetical and speculative questions that the trial court could have determined were being used to try defendant's mitigation evidence during *voir dire*. *See State v. Ball*, 344 N.C. 290, 304, 474 S.E.2d 345, 353 (1996), *cert. denied*, 520 U.S. 1180 (1997); *State v. Jones*, 339 N.C. 114, 136, 451 S.E.2d 826, 836 (1994), *cert. denied*, 515 U.S. 1169 (1995); *State v. Mash*, 328 N.C. 61, 63-64, 399 S.E.2d 307, 309 (1991). Accordingly, this assignment of error is overruled.

D. The Refusal to Allow Defendant's Questions on Incarceration and Death Penalty Costs

[4] Defendant assigns as error the trial court's ruling prohibiting defense counsel from questioning prospective jurors on whether their decisions would be influenced by their ideas about the costs of life imprisonment versus the costs of a death sentence. This Court recently decided this issue in *State v. Elliott*, 360 N.C. 400, 409-10, 628 S.E.2d 735, 742, *cert. denied*, —— U.S. ——, 127 S. Ct. 505, 166 L. Ed. 2d 378 (2006), which held that a trial court did not abuse its discretion in prohibiting the defendant from questioning jurors on their views about death penalty versus life imprisonment costs. *Id.* Defendant respectfully has asked the Court to reconsider this decision. We have considered defendant's arguments *sub judice* and decline to overrule our decision in *Elliott*. We therefore hold that it was within the trial court's discretion, consistent with *Elliott*, to prohibit defendant from seeking the jurors' views on punishment costs. This assignment of error is overruled.

II. Penalty Proceeding

[5] Defendant assigns as error the trial court's refusal to allow him to present to the jury during penalty proceeding closing argument an exhibit containing the statement that life imprisonment is the presumptive sentence for first-degree murder "unless and until the prosecution proves otherwise." We note at the outset that the trial court has broad discretion to control the scope of closing arguments. *See State v. Allen*, 360 N.C. 297, 306, 626 S.E.2d 271, 280, *cert. denied*, —— U.S. ——, 127 S. Ct. 164, 166 L. Ed. 2d 116 (2006). This Court will find error in such instances " 'only upon a showing that [the trial court's] ruling could not have been the result of a reasoned decision.' " *State*

v. Augustine, 359 N.C. 709, 734, 616 S.E.2d 515, 533 (2005) (quoting *State v. Burrus*, 344 N.C. 79, 90, 472 S.E.2d 867, 875 (1996)), *cert. denied*, —— U.S. ——, 126 S. Ct. 2980, 165 L. Ed. 2d 988 (2006). Counsel also enjoys a wide latitude of discretion in closing arguments, although this discretion is not without limits. *See Allen*, 360 N.C. at 306, 626 S.E.2d at 280 (citing *State v. Call*, 349 N.C. 382, 419, 508 S.E.2d 496, 519 (1998)). Nonetheless, proposed statements inviting error do not warrant relief, *see Elliott*, 360 N.C. at 410-11, 628 S.E.2d at 743, and statements which cannot be supported by relevant authority but merely assert the personal opinion of counsel on the law may properly be excluded by the trial court in its discretion. *See State v. Flowers*, 347 N.C. 1, 36-37, 489 S.E.2d 391, 412 (1997) (citing *State v. Johnson*, 298 N.C. 355, 368, 259 S.E.2d 752, 761 (1979)), *cert. denied*, 522 U.S. 1135 (1998).

Here, defense counsel was invited to respond to the State's objection to the use of the word "presumption." In response defense counsel stated: "Nowhere does it say that this is the law, this is just our contention . . . ." Defendant's admission that his assertion that life was the presumptive sentence was nothing more than defense counsel's "contention" of the law amounts to invited error, and, therefore, even if we were to find the trial court's ruling erroneous, defendant cannot show prejudice. *See* N.C.G.S. § 15A-1443(c) (2005) ("A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct."). This assignment of error is overruled.

[6] Defendant next argues that the trial court erred in failing to intervene during the prosecution's penalty proceeding closing argument when the prosecutor began to discuss how defendant's crime was committed "for money." In the context of explaining to the jurors how he believed they should weigh the aggravating factors, the prosecutor stated:

> But sadly we're not done. No, we're not done. He did it for money. That's the very worst kind of crime because everyone is a potential victim who is sitting on his or her wallet right now. So that has to go on the scale. Put this on the scale and multiply it by 16. You've seen it, taking it out of its sheath bent on killing.

Defense counsel did not object to this statement. The trial court had decided to submit the section 15A-2000(e)(5) aggravating circumstance that the murder occurred while defendant was also committing robbery with a dangerous weapon, but not the (e)(6) aggravator

that the murder was committed for pecuniary gain. The trial court was limited to submitting only one of these aggravators by *State v. Quesinberry*, 319 N.C. 228, 238, 354 S.E.2d 446, 452 (1987), *judgment vacated on other grounds*, 494 U.S. 1022 (1990), which held that in cases of premeditated murder in which there was also a robbery with a dangerous weapon with an underlying motive of pecuniary gain, it is only permissible to submit either the (e)(5) or (e)(6) aggravating circumstance, as "one plainly comprises the other."

This Court has stated the standard for examining whether a trial court erred in not intervening *ex mero motu* during a closing argument:

> In a hotly contested trial, such as a capital case, "[t]he scope of jury arguments is left largely to the control and discretion of the trial court, and trial counsel will be granted wide latitude." *State v. Call*, 349 N.C. 382, 419, 508 S.E.2d 496, 519 (1998). Counsel may argue any facts in the record and any reasonable inference that may be drawn from any facts in the record. *See id.* . . . However, we will not find error in a trial court's failure to intervene in closing arguments *ex mero motu* unless the remarks were so grossly improper they rendered the trial and conviction fundamentally unfair. *Id.* at 419-20, 508 S.E.2d at 519.

Allen, 360 N.C. at 306-07, 626 S.E.2d at 280 (brackets in original).

Defendant contends that the trial court's failure to intervene was error because the prosecution's argument amounted to the State asking the jurors to add sixteen pecuniary gain aggravators to their calculations. Defendant argues that this left the impression that the jury could consider defendant's desire for pecuniary gain although a pecuniary gain aggravating circumstance was not submitted. We disagree. It would be proper for the jury, under the facts of this case, to consider defendant's motive for pecuniary gain in the commission of the murder through the N.C.G.S. § 15A-2000(e)(5) robbery with a dangerous weapon aggravating circumstance. After considering the statement in context, the record indicates that the prosecution was alluding to the fact that there were sixteen jurors in the jury box "sitting on [their] wallet[s] right now," not that the jury should find sixteen pecuniary gain aggravating circumstances. Considering the entirety of the statement, we cannot say that it rendered the trial fundamentally unfair. Instead, the statement appears to be a valid argument concerning a topic on which the jurors would soon deliberate: The weight each juror would give to the aggravating circumstances as

compared with the mitigating circumstances. These assignments of error are overruled.

[7] Defendant argues that the trial court abused its discretion in overruling his objection when the prosecutor requested to use a chart that stated in part: "The armed robbery during the premeditated murder is an aggravating factor." Additionally, defendant also argues that the trial court erred in allowing the prosecution to tell the jury it had already found the N.C.G.S. § 15A-2000(e)(5) aggravating factor, even though defendant did not object to those statements. We reject both of defendant's arguments. First, N.C.G.S. § 15A-2000(e)(5) states that the commission of robbery with a dangerous weapon during the commission of first-degree murder is an aggravating circumstance to be considered. Thus, it was not an abuse of discretion for the trial court to allow, for illustrative purposes, a chart that made a correct statement of the law. Moreover, we reject defendant's arguments regarding the statements made by the prosecutor that the jury had already found the aggravating circumstance. The prosecution relayed to the jury that the State must prove the aggravators beyond a reasonable doubt, and then defense counsel, with defendant's permission, conceded to the jury that the prosecution had, indeed, proved the aggravating circumstances beyond a reasonable doubt. We cannot, therefore, say that these statements "were so grossly improper they rendered the trial and conviction fundamentally unfair." *Allen*, 360 N.C. at 306-07, 626 S.E.2d at 280. These assignments of error are overruled.

[8] Defendant next argues the trial court erred in failing to intervene *ex mero motu* in the prosecution's closing argument when the prosecution read a certain letter from the victim's son. The letter was shown in a crime scene photograph of the victim's living room, but the actual letter was not in evidence. Defendant does not argue that the letter would have been inadmissible had it been offered. *See id.* at 310, 626 S.E.2d at 282 (recognizing admissibility of victim-impact evidence). Considering the entirety of the record, the reading of the letter by the prosecution without defendant's objection was not "so grossly improper [it] rendered the trial and [sentence] fundamentally unfair." *Id.* at 306-07, 626 S.E.2d at 280. This is especially true considering the trial court's admonitions to the jurors "to rely solely upon your recollection of the evidence in your deliberations" and that final arguments "are not evidence." This assignment of error is overruled.

[9] Defendant's final closing statement argument is that the trial court erred in failing to intervene *ex mero motu* when the prosecutor

stated: "They want to talk about compassion, mercy. That's not the law. That's not the standard. If it was, you wouldn't forget about the compassion and mercy that he showed for her. No, don't base it on any of that." Defendant states that this "was a patent misstatement of law designed to misdirect the jury from its constitutionally imposed function." Yet, this Court has stated that "prosecutors may properly argue to the sentencing jury that its decision should be based not on sympathy, mercy, or whether it wants to kill the defendant, but on the law." *State v. Frye*, 341 N.C. 470, 506, 461 S.E.2d 664, 683 (1995), *cert. denied*, 517 U.S. 1123 (1996). Considering that the argument was not improper, it did not render the sentencing proceeding fundamentally unfair. This assignment of error is overruled.

[10] Defendant argues that the trial court erred in instructing the jury pursuant to N.C.G.S. § 15A-2000(f)(1) as the evidence was insufficient to support a jury finding that defendant's prior criminal history was insignificant. This error, defendant contends, opened the door for the jury to "view the mitigation submitted with cynicism and skepticism," and to "irrationally fail to find factors uncontrovertedly supported by evidence or conclude that the substantial mitigation found nonetheless fails to outweigh" the proven aggravating circumstances. Defendant did not include the (f)(1) mitigating circumstance in his proposed list of mitigators. However, the trial court said it would include the mitigator, and it set out the instruction it would give to the jury, including language indicating that defendant had not asked for this mitigating circumstance but that the court was required to submit it as a matter of law. The trial court invited defense counsel to speak as to any objection, correction, addition or special requests in regard to the instructions as set out, but defendant had no correction or objection regarding the (f)(1) mitigating circumstance at that time.

In criminal cases, a question which was not preserved by objection noted at trial and which is not deemed preserved by rule of law without any such action may still be the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error. *See* N.C. R. App. P. 10(c)(4). When a defendant does not allege plain error, the question may still be reviewed in the exercise of the Court's discretion. *See* N.C. R. App. P. 2. "[P]lain error analysis applies only to instructions to the jury and evidentiary matters." *State v. Cummings*, 352 N.C. 600, 613, 536 S.E.2d 36, 47 (2000) (quoting *State v. Greene*, 351 N.C. 562, 566, 528 S.E.2d 575, 578, *cert. denied*, 531 U.S. 1041 (2000)), *cert. denied*, 532 U.S. 997 (2001). We have considered submission of

the (f)(1) circumstance to the jury reviewable under a plain error analysis. *See State v. Williams*, 355 N.C. 501, 584, 565 S.E.2d 609, 657 (2002) (citing N.C. R. App. P. 10(c)(4)), *cert. denied*, 537 U.S. 1125 (2003).

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (brackets in original) (internal quotation marks omitted) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982) (second brackets in original) (footnote call numbers omitted), *cert. denied*, 459 U.S. 1018 (1982)). However, before engaging in plain error analysis it is necessary to determine whether the instruction complained of constitutes error. *State v. Torain*, 316 N.C. 111, 116, 340 S.E.2d 465, 468, *cert. denied*, 479 U.S. 836 (1986). The appellate court " 'must be convinced that absent the error the jury probably would have reached a different verdict.' " *Id.* (quoting *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986).

When deciding whether to submit the statutory mitigating (f)(1) circumstance to the jury, the trial court must review the evidence to determine whether substantial evidence exists to support the submission. N.C.G.S. § 15A-2000(b) (2005); *see also State v. Polke*, 361 N.C. 65, 70, 638 S.E.2d 189, 192 (2006) (citing *State v. Daniels*, 337 N.C. 243, 272-73, 446 S.E.2d 298, 316 (1994), *cert. denied*, 513 U.S. 1135 (1995)). The trial court must determine if, based on the evidence, any rational juror might conclude that the defendant had no significant history of prior criminal activity. *State v. Jones*, 339 N.C. 114, 157, 451 S.E.2d 826, 849-50 (1994) (citing *State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988)), *cert. denied*, 515 U.S. 1169 (1995). This determination is not based merely on the number of prior criminal activities but also on the nature and age of the activities. *State v.*

Sexton, 336 N.C. 321, 375, 444 S.E.2d 879, 910 (citing *State v. Artis*, 325 N.C. 278, 314, 384 S.E.2d 470, 490 (1989), *judgment vacated on other grounds*, 494 U.S. 1023 (1999)), *cert. denied*, 513 U.S. 1006 (1994). Even if the defendant does not request the submission of the (f)(1) mitigator or objects to its submission, the trial court must submit the circumstance when it is supported by sufficient evidence. N.C.G.S. § 15A-2000(b); *Polke*, 361 N.C. at 71, 638 S.E.2d at 193 (citing *State v. Lloyd*, 321 N.C. 301, 311-12, 364 S.E.2d 316, 323, *judgment vacated on other grounds*, 488 U.S. 807 (1988)). *See also State v. Watts*, 357 N.C. 366, 377, 584 S.E.2d 740, 748 (2003), *cert. denied*, 541 U.S. 944 (2004).

As defendant did not object to the instruction on the (f)(1) mitigator or argue plain error to this Court, this issue was not properly preserved. However, we will consider the issue as presented to prevent manifest injustice. *See* N.C. R. App. P. 2. Evidence in the case *sub judice* is more than sufficient to support submission of the (f)(1) circumstance. Both the nature and the recency of defendant's prior criminal activities are such that a rational juror could find his history insignificant. A rational juror could conclude that defendant's underage alcohol and illegal drug use were minor offenses and thus insignificant when considered in light of the total circumstances. Likewise, the trial court could have reasonably believed a rational juror would find the robbery of Eula Cauldwell to be insignificant because the robbery was so close in time to the robbery and murder at issue and was an aberration in an otherwise insignificant criminal background. Therefore, as there was sufficient evidence presented upon which a rational juror could reasonably find defendant's prior criminal history to be insignificant, we find there was no error on the part of the trial court that would amount to plain error. This assignment of error is overruled.

III. Motion for Appropriate Relief

On 13 September 2004, less than a week after he was sentenced to death, defendant filed a motion for appropriate relief pursuant to N.C.G.S. § 15A-1413(b) and 1414 seeking to vacate his first-degree murder conviction and death sentence. In the motion, defendant alleged that the prosecution's decision to proceed capitally was influenced by improper considerations of race and political aspirations. The trial court subsequently denied the motion. Defendant does not argue that the trial court's findings of fact in its order denying the motion are unsupported by the record, and upon a review of the record we conclude those findings are supported by competent evi-

dence. Accordingly, the trial court's findings of fact are conclusive on appeal. *See State v. Wiggins*, 334 N.C. 18, 38, 431 S.E.2d 755, 767 (1993).

The trial court found, *inter alia*: After defendant murdered Jane Head on 4 October 2002, the Death Penalty Review Team of the Office of the District Attorney of the Fifth Prosecutorial District considered whether the case against defendant should proceed capitally. The team considering defendant's case was composed of the District Attorney and two Assistant District Attorneys, neither of whom was Ben David. The Death Penalty Review Team considered multiple factors in its decision, but none of those factors included racial or political considerations. After the Review Team decided the case was to be tried capitally, defendant made an offer to plead guilty to first-degree murder in exchange for a sentence of life without parole. The prosecution rejected this offer as it felt it had a strong case against defendant and that the strength of the case was growing daily. On 28 June 2004, District Attorney John Carriker announced his retirement and endorsed then-Assistant District Attorney Ben David for appointment by the Governor to serve as interim District Attorney and to be elected as the next District Attorney. On 19 July 2004, defendant's trial began, with Assistant District Attorney Ben David serving as lead prosecutor. The Governor appointed Assistant District Attorney John Sherrill as interim District Attorney, and Sherrill assumed that position on 2 August 2004. Additionally, on 2 August 2004, Ben David announced his candidacy for District Attorney.

During the summer of 2004, both the Office of the District Attorney and the Office of the Capital Defender were assisted by interns. Jeremy Eicher, a student at Duke University School of Law, and Sarah McCauley, a student at Harvard University School of Law, assisted Ben David in defendant's case. Defendant was sentenced to death on 8 September 2004, and on 9 September 2004, Jeremy Eicher was asked to discuss defendant's case in a Death Penalty Clinic presented by Duke Law School Professor James Coleman and Adjunct Professor Gretchen Engel. Death Penalty Clinic students Stephanie Bradford, Noah Clements, and David Fuhr, along with Adjunct Professor Engel inferred that Eicher was attributing statements to Ben David to the effect that David sought the death penalty against defendant because defendant, although a Lumbee Indian, appeared Caucasian. Therefore, some students surmised, David could seek the death penalty against Curtis Dixon, a black male, who was charged with murdering a white female University of

North Carolina at Wilmington student, and avoid any allegations of racial discrimination. The trial court concluded that the inferences made by these students and Adjunct Professor Engel were incorrect.

Professor James Coleman testified that he construed Eicher's statements as illustrations and hypothetical statements explaining why the prosecution would seek the death penalty for defendant and not as a report of actual statements made by Ben David. Professor Coleman opined that he did not believe any of the students were under the impression that Eicher was saying that Ben David did not accept defendant's plea offer to avoid an allegation of racial discrimination.

Ben David testified that he did not make the statements attributed by inference to him by Bradford, Clements, Fuhr, and Professor Engel. He also testified that defendant's race and the political campaign had no bearing on the decision to proceed capitally against defendant. The trial court found that Eicher did not relate the statements or views of Ben David, that David did not make the statements inferred to him, and that David did not use racial or political considerations in deciding to reject the plea offer. Consistent with these findings of fact, the trial court concluded as a matter of law that defendant's rights under the United States and North Carolina Constitutions were not violated and accordingly denied defendant's motions for appropriate relief and to vacate his conviction and sentence.

[11] Defendant assigns error to the trial court's refusal to admit student David Fuhr's affidavit as substantive evidence and to admit it only for the purpose of corroborating his testimony given at the motion for appropriate relief evidentiary hearing. On 10 September 2004, Fuhr met with defendant's attorney Staples Hughes concerning the discussion that took place the prior day in the Death Penalty Clinic. Hughes memorialized the discussion in the form of an affidavit, and Fuhr made certain corrections to the affidavit. However, Fuhr did not sign the affidavit in September 2004. On 20 January 2005, four days before the motion for appropriate relief evidentiary hearing, Fuhr signed the affidavit. Fuhr testified that he could only relate generally what happened in class on 9 September 2004, but that his memory of the events was clear when he signed the affidavit just four days earlier. Defendant offered the affidavit as substantive evidence under N.C.G.S. § 8C-1, Rule 803(5) as a past recollection recorded. The trial court ruled that an insufficient foundation had been laid for

the affidavit, and Fuhr testified extensively on his recollection of the events at issue:

> I recall that prior to the day of this class session on September 8th, I received, along with other members of the class, an e-mail from Jeremy Eicher, I believe, that had an attachment or an addition describing the outcome of the Cummings case. And Jeremy, I believe, in the e-mail stated that he would be talking in class the next day about that because he had worked on it this summer when he was interning with the prosecution here. In class, and I remember the theme at the time was mitigation. Professor Coleman actually at the beginning of class remembered or recalled or remarked that this hypothetical case that we were dealing with as an example was strikingly similar to the case of Paul Cummings, and we proceeded to talk about this hypothetical mitigation case at the beginning of class.
>
> But towards the latter part of the class, Professor Coleman asked Jeremy to talk about his experience with the Cummings case this summer and Jeremy did so and initially said—he talked about the facts of the case and the details and I believe he remarked that in his mind, there were more atrocious cases, more egregious cases than the Cummings case, that there had been some mitigating evidence. Again, mitigating evidence being the theme of that day in class.
>
> So he discussed the case and then I remember Stephanie Bradford asked a question about the race of the Defendant to which Jeremy said that he was a member of a Native American tribe but he looked white.
>
> The discussion continued. I think then Jeremy talked about this other case that recently had occurred in this area where an African American male had committed a murder of a white college student here in Wilmington and, to the best of my recollection now, he remarked that that case had been more atrocious and egregious than the Cummings case. Then I think again Stephanie asked why did Cummings not do a plea bargain or why did Cummings get the death penalty as well if the other case was more atrocious, and then Jeremy talked about issues of race and politics and campaigning. He attributed some remarks to Mr. David that went along the lines of something like, I can't—for political purposes I can't get or I can't seek the death penalty in

this—I cannot not seek the death penalty in the Cummings case if I seek it in the other case of the black defendant.

That was more or less what I remember from the class. Then the discussion continued. Stephanie and Jeremy had a—not heated, but pretty intense exchange and that was more or less the end of the class.

After this testimony, defense counsel stated: "Your Honor, Mr. Fuhr has now testified and now I'm not seeking it under 803(5), I'm seeking it merely as corroboration of his previous testimony." However, when the trial court admitted the affidavit as corroboration and not as substantive evidence under Rule 803(5), defense counsel took exception to that ruling.

North Carolina Rule of Evidence 803 provides, in pertinent part:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . . .

(5) Recorded Recollection.—A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

N.C.G.S. § 8C-1, Rule 803 (2005). Considering the detail and extensiveness of Fuhr's testimony concerning the incidents that occurred in the Death Penalty Clinic class, defendant failed to show that Fuhr had "insufficient recollection to enable him to testify fully and accurately." That Fuhr testified he had a clear memory of the 9 September 2004 events four days before his 24 January 2005 testimony, but that his recollection was insufficient during his testimony, indicates the trial court did not err in receiving the affidavit solely as corroboration of Fuhr's testimony. Merely because a witness's testimony does not match up exactly word-for-word with a previously recorded recollection does not render the recorded recollection admissible under Rule 803. Accordingly, this assignment of error is overruled.

[12] Defendant additionally assigns as error the trial court's decision to allow Professor James Coleman to testify that he believed Eicher's discussion only showed that David was illustrating a race-neutral policy and was not talking about the actual decision made in defendant's case. The trial court admitted that evidence pursuant to Rule of Evidence 701, which provides:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Id., Rule 701 (2005). The issues during the motion for appropriate relief evidentiary hearing were: (1) what Eicher said to the class; (2) whether David made those statements to Eicher; and (3) whether the decision to prosecute defendant capitally was based upon racial or political considerations. The testimony given by Coleman satisfied Rule 701, as his opinion on what Eicher meant was based on his personal perception of the statements made. Additionally, Coleman's opinion would be helpful in determining whether the decision to prosecute defendant capitally was based upon racial or political considerations—just as defense witnesses' testimony concerning their inferences drawn from Eicher's class presentation was helpful in determining that same issue. Because no verbatim transcript of the class discussion existed, the opinion of those present helped the trial court determine whether the statements allegedly attributed to David indicated a denial of defendant's constitutional rights. Thus, the trial court did not err in admitting the testimony. The assignment of error is overruled.

IV. Preservation Issues

Defendant raises four preservation issues: (1) the "especially heinous, atrocious, or cruel" aggravating circumstance is unconstitutionally vague and overbroad; (2) the trial court lacked jurisdiction to enter a death sentence because the aggravating circumstances were not included in the indictment; (3) the trial court lacked jurisdiction because the short-form murder indictment was insufficient; and (4) defendant's death sentence violates international law. We have considered all of these arguments and decline to overrule our prior precedent. *See Allen*, 360 N.C. at 316-18, 626 S.E.2d at 286-87 (rejecting each of these arguments). These assignments of error are overruled.

V. Proportionality

[13] Having concluded that defendant's trial and capital sentencing proceeding were free from prejudicial error, we must now consider: (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 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 facts of the crime and the defendant. *See* N.C.G.S. § 15A-2000(d)(2) (2005).

The jury found three aggravating circumstances to exist beyond a reasonable doubt: (1) defendant had previously been convicted of a felony involving the threat of violence to a person, *id.* § 15A-2000(e)(3) (2005); (2) the murder was committed while defendant was engaged in the commission of a robbery with a dangerous weapon, *id.* § 15A-2000(e)(5) (2005); and (3) the murder was especially heinous, atrocious, or cruel, *id.* § 15A-2000(e)(9) (2005). The evidence supports these aggravating circumstances. Defendant had previously been convicted of robbery with a dangerous weapon of Eula Cauldwell, evidence of which was sufficient for the jury to find the (e)(3) aggravator. The evidence also tended to show that defendant murdered Jane Head to rob his victim of her ATM card and PIN number, which sufficiently supports the (e)(5) aggravating circumstance. The evidence also supports the aggravating circumstance that the murder was especially heinous, atrocious, or cruel. Defendant murdered Mrs. Head while she was in the supposed safety of her own home, stabbing her numerous times in the face and leaving her bleeding after rendering her helpless to prevent her impending death. This evidence was sufficient for the jury to find the (e)(9) aggravating circumstance.

Nothing in the record indicates that the sentence of death was entered under the influence of passion, prejudice, or any other arbitrary factor. Instead, the record shows that the jury considered and weighed each aggravating and mitigating circumstance and rendered its recommendation based upon the law. Accordingly, we will not disturb the jury's weighing of aggravating and mitigating circumstances.

Finally, we must determine whether defendant's sentence is disproportionate, considering both defendant and his crime. In determining proportionality, we consider "all cases which are roughly similar in facts to the instant case, although we are not constrained to

cite each and every case we have used for comparison." *State v. McNeill*, 360 N.C. 231, 254, 624 S.E.2d 329, 344 (citing *State v. Al-Bayyinah*, 359 N.C. 741, 761, 616 S.E.2d 500, 514 (2005), *cert. denied*, 547 U.S. 1076 (2006)), *cert. denied*, —— U.S. ——, 127 S. Ct. 396, 166 L. Ed. 2d 281 (2006). Likewise, "[a]lthough 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. Garcia*, 358 N.C. 382, 429, 597 S.E.2d 724, 756 (2004) (quoting *State v. McCollum*, 334 N.C. 208, 244, 433 S.E.2d 144, 164 (1993), *cert. denied*, 512 U.S. 1254 (1994)), cert. denied, 543 U.S. 1156 (2005). "[O]nly in the most clear and extraordinary situations may we properly declare a sentence of death which has been recommended by the jury and ordered by the trial court to be disproportionate." *See State v. Chandler*, 342 N.C. 742, 764, 467 S.E.2d 636, 648, *cert. denied*, 519 U.S. 875 (1996). The determination of proportionality of an individual defendant's sentence is ultimately dependent upon the sound judgment and experience of the members of this Court. *See McNeill*, 360 N.C. at 253, 624 S.E.2d at 344 (citing *State v. Garcia*, 358 N.C. at 426, 597 S.E.2d at 754).

This Court has previously determined capital punishment 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 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988); *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); and *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983). The instant case is dissimilar to all of these cases. In only two of these cases did the jury find the murders to be especially heinous, atrocious, or cruel: *Stokes* and *Bondurant*.

In *Stokes*, the defendant was seventeen years old and the only one of four assailants to receive the death penalty. 319 N.C. at 3-4, 21, 352 S.E.2d at 654-55, 664. In *Bondurant*, the defendant showed immediate remorse for his actions and even directed the victim's transport to the hospital, hoping to see the victim live. 309 N.C. at 694, 309 S.E.2d at 182-83. In the instant case, defendant was the sole murderer of his neighbor. Defendant did not seek medical attention for his victim; instead, he left her bleeding to death on the floor of her own

home while he departed to withdraw money from her bank account by using her ATM card and the PIN number he had tortured out of her. Defendant's sentence is not disproportionate, considering defendant and his crime.

CONCLUSION

[14] Defendant has assigned numerous other instances of error, but provided no argument or supporting authority for these assignments in his brief. Those assignments of error are considered abandoned and are therefore dismissed. *See* N.C. R. App. P. 28(b)(6); *State v. McNeill*, 360 N.C. at 241, 624 S.E.2d at 336. We conclude that defendant received a fair trial and sentencing proceeding, and we find no error in his convictions or his sentences. We additionally conclude that defendant's sentence of death is not disproportionate to the crime he committed.

NO ERROR.

Chief Justice PARKER concurring in the result only.

Defendant argues that the trial court erred in failing to exclude for cause prospective juror Billy Goodson, a Lieutenant with the Carolina Beach Police Department, who expressed concern over his own ability to consider evidence in defense or in mitigation, specifically evidence that would support guilt phase defenses of diminished capacity attributable to intoxication and statutory and nonstatutory mitigating circumstances relating to defendant's mental state, intoxication, child abuse, and the effects of domestic violence. For the reasons stated herein, I concur in the result only.

When considering whether a defendant had the right to question jurors whether they would automatically impose a sentence of death upon conviction in a capital trial, the U.S. Supreme Court noted:

> It may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so. A defendant on trial for his life must be permitted on *voir dire* to ascertain whether his prospective jurors function under such misconception. The risk that such jurors may have been empaneled in this case and "infected petitioner's capital sentencing [is] unacceptable in light of the ease with which that risk could have been minimized."

Morgan v. Illinois, 504 U.S. 719, 735-36, 119 L. Ed. 2d 492, 507 (1992) (footnote omitted) (quoting *Turner v. Murray*, 476 U.S. 28, 36, 90 L. Ed. 2d 27, 36 (1986) (plurality) (alteration in original).

During *voir dire* in this case, prospective juror Goodson, a law enforcement officer with experience investigating murder cases, interrupted questioning by the defense to offer an observation that he thought would "shorten this process for you and the Court." He then stated:

> I'm going to have a great propensity to scrutinize the mitigating circumstances that [defense counsel] alluded to yesterday in his voir dire of some of the other counselors [sic]. And based on that, I will have a natural inclination to look at some of those mitigating circumstances in a little more detail than perhaps others may or may not. And I can say that unless I see a mitigating circumstance that is a non self-induced condition, then I'm not inclined to give a lot of weight to it.
>
> Without—there is no other persons here, so I'm going to say it, if it's not a mental condition, that is, it's not self-induced, I hope you know how hard it is to say, if it's not a capital offense punishment. And that's my interpretation of what mitigating means to me as an individual.
>
> . . . .
>
> And I'm saying that it's not an excuse, as some people think. It's an explanation of why things occurred. And because of the nature of the investigations that I have done over the past umpteen years, that an explanation in some cases are a logical mitigating circumstance.
>
> [DEFENSE]: Do you find mental illness to be one?
>
> [JUROR]: I do, yes, sir. I can say in my personal viewpoint that mental illness is a condition that takes out the rationalization that you and I grew up with, from right and wrong. Short of that, there is not a whole lot on that list that I would consider.
>
> . . . .
>
> Short of mental illness, medically defined attributed mental illness, that would rationally justify our actions, I don't personally see any other type of mitigating circumstances that can justify the taking of a life. And, again, as was alluded to in your presenta-

tions yesterday, there may be some other issues that you're going to be broaching that . . . many cause for consideration of mitigation. Having investigated numerous cases of that, and listening to people everyday—

. . . .

Cases where that type of explanation as to why crimes were perpetrated.

[DEFENSE]: Mental illness?

[JUROR]: No.

[DEFENSE]: Another explanation you're not talking about?

[JUROR]: Domestic violence, drug use, broken homes . . . learned violence. I don't find those as acceptable mitigating circumstances for someone having committed a homicide.

[DEFENSE]: All right. Now, that's—I do thank you for telling me that. You prefaced that by saying, I think, that might expedite what we're doing here this morning. That is a view that developed over your years as a law enforcement officer?

[JUROR]: Yes, sir.

[DEFENSE]: And it involved the cases that you worked on and things of that nature?

[JUROR]: Yes, sir.

The prospective juror would later state:

I can follow the law, as I told the State, regardless of having the knowledge of the circumstances that's been [alluded] to by [the defense], I would follow the law down to the line. I can reach a conclusion as to what I think would be the appropriate punishment if, in fact, he was found guilty of it.

But as I pointed out to you earlier, counselor's explanations of as use of justification of why something occurred or didn't occur under mitigating circumstances, I'm going to take a crucial look at. And in my personal viewpoint, has nothing to do with law enforcement, I just think that it's going to be, short of mental illness, some major issues along those lines that I'm not going to put much credence to justifying or rationalizing acts that we take—that we have control over.

[DEFENSE]: Having that view of things, do you feel that that would in any way influence or have an impact on the way you would hear what we'll call the guilt phase?

. . . .

[JUROR]: I would say it will obviously have an [effect]. I will be as objective as I can to listen to the mitigating circumstances surrounding this particular case, but I think I'm going to have a very limited window in which things that I would consider that would negate the death penalty.

[DEFENSE]: Your window is limited to mental illness, isn't it?

[JUROR]: I'm saying that is one example. Yes, I'm sure there is some others out there that perhaps I haven't thought about. However, listening to what's been proffered by the defense, at this point, I'm saying mental defense, mental illness would be something along the lines. It's going to take to satisfy me that first degree—or that the death penalty is not warranted.

[DEFENSE]: In all the time that you sat here and listened to the examination of other jurors, would you say that that—of all the information you've heard is the most significant sticking point as to whether or not you feel you could be a fit juror in this case?

[JUROR]: Absolutely. Up until you brought this subject up yesterday, I was sitting in the middle of the fence, you know, either way I had no preponderance of decision or any opinion one way or the other, would have been a very fair—I think I would have been fair. But I'm just honest with you with regard to what I call explanations of why incidents occur.

[DEFENSE]: These [ ] thoughts didn't develop just over the last day or two. They've been thoughts that have gone through your mind over some time, haven't they?

[JUROR]: I've investigated too many cases for that not to have been an issue in my developments.

[DEFENSE]: And when you say it's an issue, you do in your way of thinking, equate some explanations, as just being, can we use the word cop-out, for criminal acts?

[JUROR]: It's an adequate term, yes, sir.

[DEFENSE]: And is it fair to say you really just don't think very much of that at all positive?

[JUROR]: No, sir. As I said before, we're all responsible for what we do or don't do, getting drunk, drunk driving is not a homicidal explanation of why we go out there and have wrecks and people die or the use of drugs or any of these others that I heard everyday.

[DEFENSE]: And as you've thought about it, you believe that that is an aspect of your value system based on your own personal values, your own professional experiences, that would color your understanding as you hear the evidence in this case?

[JUROR]: It has a potential to do that, yes, sir.

[DEFENSE]: And that gives you concern, too?

[JUROR]: Yes, it does.

[DEFENSE]: A significant concern?

[JUROR]: Now that I've heard the defense's line of approach to this trial, yes, sir.

. . . .

[DEFENSE]: Now, you may receive some legal instructions relating to certain matters pertaining to say whether or not someone had consumed alcoholic beverages and whether or not that would diminish their capacity. You've heard [the prosecutor] talk about felony murder, which you are aware of; armed robbery, which you're aware of; breaking and entering, you are aware of that?

[JUROR]: Yes, sir.

[DEFENSE]: Premeditation, deliberation, you're very familiar with those terms. And [diminished] capacity, that is a defense that could be involved in a case, you've heard of this before?

[JUROR]: Yes, sir.

[DEFENSE]: And when you've talked for the last number of minutes . . . about these matters relating to mitigation, it's things like that that you just kind of come to the end of your road on, isn't that it?

. . . .

That is an intellectual rub for you?

[JUROR]: Yes, sir. I think everybody has their limits of what tolerance for various things. That would be, to me, the end of that, I think.

[DEFENSE]: If the Judge were to say—give you an instruction relating to certain matters that would pertain to things short of your window, and I understand you, your window could be tainted, but the window you indicated of mental illness, if he were to give you instructions relating to something beyond that, do you feel that that is an instruction you would find difficult to follow?

. . . .

[JUROR]: If the Court instructs me to follow certain guidelines, I will follow them to the end.

. . . .

[DEFENSE]: Understanding that you would try, if you took an oath to be a juror in this case, to follow all the instructions the Court gave you. I'll ask you to think, do you believe it would be a difficult one for you to do if it related to something that went beyond the issue of mental illness?

[JUROR]: No, sir. If the Court directed me to consider it, then that's going to happen. To me, I don't find—to me it's black or white. If the Court says that we should consider that and that's within the realm of the thing that I have to do, then I'll do that.

[DEFENSE]: But let me ask you, before you get to the place that the Judge may give you that instruction, you'll be listening to evidence and information and things of that nature. . . .

. . . .

Do you feel it would be—we're not up to the place where the Judge is giving the instructions. That would come at the end of the trial, as you know. But I'm talking about during the course of the trial, as you're hearing information from witnesses and things of that nature, do you think that your point of view would make it more difficult for you to receive that information in a fair-minded way?

[JUROR]: I would say no, it would not impede me receiving it. I'm open to a myriad of explanations with possibilities of things

that evidence, whatever it might have been. I'm not a close-minded individual. But I would say that, obviously, if it wasn't something of a substantial nature, it wouldn't change my philosophy or my attitude.

Later counsel for the defense read the prospective juror the pattern jury instruction concerning the voluntary intoxication defense to first-degree murder:

[DEFENSE]: "You may find there is evidence which tends to show that the Defendant was intoxicated or drugged at the time of the acts alleged in this case. Generally, voluntary intoxication is not a legal excuse for crime. However, if you should find that the Defendant was intoxicated, was ever drugged, you should consider whether this condition affected his ability to formulate the specific intent which is required for a conviction of first-degree murder."

Now, up to that point, are you understanding what the instruction is asking you?

[JUROR]: Yes, sir.

[DEFENSE]: In order for you to find the Defendant guilty of first-degree murder, you must find beyond a reasonable doubt that he killed the deceased with malice and in the execution of an actual specific intent to kill, formed after premeditation and deliberation.

Now, this next line in the instructions goes to the mental state of the Defendant, "If, as a result of intoxication, a drugged condition, the Defendant did not have the specific intent to kill the deceased, formed after premeditation and deliberation, he is not guilty of first-degree murder."

Let me ask: Do you understand what the instruction is saying?

[JUROR]: I understand.

[DEFENSE]: Now, on the basis of your years in investigations and such, is it that issue that gives you some concern, the issue of someone being voluntarily intoxicated or the use of some drug?

[JUROR]: Yes.

[DEFENSE]: And that is a matter that you do not find to be an excuse for a crime?

[JUROR]: No.

[DEFENSE]: And it's not a matter that you find mitigating, is it?

[JUROR]: No, sir.

[DEFENSE]: And you have come to that belief after considerable thought, I would imagine. This is not a matter that's just popped into your mind. This is something that's been a part of your work for some years, hasn't it?

[JUROR]: Yes, sir.

[DEFENSE]: The many offenses that you may have seen [during your law enforcement experience], you've seen actions by people who have been either impaired or drugged, haven't you?

[JUROR]: Yes, sir.

. . . .

[DEFENSE]: And everything about that, you just find to be offensive, don't you? I mean—

[JUROR]: I won't say it's offensive. I just don't believe it is a justification or rationalization or an excuse, whatever label one wants to attach to it.

. . . .

[DEFENSE]: Lieutenant, do you feel that your views relating to self-imposed impairment or intoxication would it make it difficult for you to follow the law with respect to the instruction that's been read?

[JUROR]: I could follow it. Do you mean do I agree with it?

[DEFENSE]: Well, do you feel that your [dis]agreement with it that's carried with you into this courtroom, is one that would make it difficult for you to follow that instruction?

[JUROR]: I can follow the instruction. Like I said, I don't necessarily agree, but I would evaluate and make a decision based on what the Court tells me to do.

[DEFENSE]: There is some reluctance, though, on your part that is born of difficulty.

[JUROR]: Absolutely.

[DEFENSE]: And even though an instruction may be given, it would certainly be a part of your life experience that would be carried into the jury room as well; is that fair to say?

[JUROR]: Yes, sir.

Defendant challenged this prospective juror for cause. The trial court denied defendant's motion, stating:

> The Court has had occasion to observe [the prospective juror] for some time. He's been examined by the Court, by counsel for the State and counsel for the Defendant. And there is just no doubt about it, he is a man of strong conviction and he is with [sic] viewed with strong beliefs, including matters in mitigation.
>
> But the Court is, likewise, convinced that he will follow the law. And if his belief or beliefs differ from the law, he will yield and try to obey and follow the law as he is instructed to him [sic] by the Court.
>
> In looking at his face, he's got a face that's been chiseled in stone and I imagine his convictions are just the same way. His convictions are strong. And if he sits there and tells us that he will yield a matter of personal preference or belief and follow the law, I think he will do so. The evidence demonstrates that he is a soldier. He is a patriot, a good man and good juror.
>
> The Court is of the view[ ] that he should not be excused for cause and motion to challenge for cause is denied.

Defendant excepted to this ruling and then exercised a peremptory challenge as to the prospective juror. Defendant later renewed his challenge for cause as to the prospective juror, which was again denied. In denying the renewed challenge for cause, the trial court stated:

> All right, the Court does, on the motion pursuant to 15(A)-1214(h) and (i), revisit the ruling [denying the challenge for cause of the prospective juror]. [He] is the gentleman identified by the Court as the soldier, patriot, good man, good juror, a man of strong convictions, views with strong beliefs, including the matters in mitigation. The Court concluded he would follow the law even if his beliefs differed. And looking back at his comments, I think any person could pull out any one comment by any

> one juror to probably support a position either for or against the juror being discharged.
>
> And so the Court, likewise, has had an occasion to review his examination by the Court by Counsel for the State and by Counsel for the Defendant and considered his examination in its totality and I do note that he did indicate that he could follow the law, even though he may disagree with it. He was being asked at that time about self-imposed alcoholism, which again is just one comment by the juror, but the total of his comments and the examination of this Court of his demeanor and his responses and his approach to his views convinces this Court that the ruling should stand. [The prospective juror] should not be excused for cause upon the renewed motion. The motion to remove him for cause is denied.

Defendant exhausted his peremptory challenges and asked to exercise an additional peremptory challenge as to an additional juror, who was then empaneled. The requirements of N.C.G.S. §§ 15A-1214(h) and (i) were thus satisfied, thereby preserving any error for review and establishing prejudice to the defendant in the event an abuse of discretion occurred.

This Court has said,

> A juror who reveals that he is unable to accept a particular defense or penalty recognized by law is prejudiced to such an extent that he can no longer be considered competent. One "who is unwilling to accept as a defense, if proved, that which the law recognizes as such" should be removed from the jury when challenged for cause.

State v. Leonard, 296 N.C. 58, 62-63, 248 S.E.2d 853, 855-56 (1978) (citations omitted) (holding that denial of defendant's challenges for cause of three prospective jurors was error when prospective jurors indicated they would not be willing to return a verdict of not guilty by reason of insanity even if satisfied by evidence that the defendant was insane at the time of the crime); *see also State v. Cunningham*, 333 N.C. 744, 754-55, 429 S.E.2d 718, 723 (1993) (holding that denial of defendant's challenge for cause was error when transcript indicated prospective juror either did not understand or was reluctant to follow the principles of presumption of innocence); *State v. Hightower*, 331 N.C. 636, 641, 417 S.E.2d 237, 240 (1992) (holding that

denial of defendant's challenge for cause was error despite prospective juror's assertions that he could follow the law when prospective juror repeatedly stated that the defendant's failure to testify would "stick in the back of my mind").

"[E]xcusal of a prospective juror for cause is not mandatory when he or she is able to disregard any personal convictions, follow the laws of the state as provided by the trial court, and render a fair and impartial verdict based on the evidence." *State v. Morgan*, 359 N.C. 131, 148, 604 S.E.2d 886, 897 (2004) (citations omitted), *cert. denied*, 546 U.S. 830, 163 L. Ed. 2d 79 (2005). Although the challenged juror here asserted that he would be able to follow the law "to the end," "[t]he court is not bound by the answers of the juror on his *voir dire* when they are opposed to and inconsistent with the facts and circumstances disclosed by his examination." *State v. Lee*, 292 N.C. 617, 624-25, 234 S.E.2d 574, 579 (1977) (citations and quotation marks omitted); *see also Cunningham*, 333 N.C. at 754-55, 429 S.E.2d at 723 (finding ambiguity in the context of the entire *voir dire*, despite some responses regarding the presumption of innocence that were appropriate, sufficient to render prospective juror excludable for cause).

From the record of *voir dire* before this Court, I am of the opinion that this particular prospective juror's ability to consider impartially evidence relevant to both guilt phase defenses and various statutory and nonstatutory mitigating circumstances was questionable. I acknowledge that the prospective juror asserted his ability to follow the law and the trial court's instructions, and I am confident that he intended to do so. Nevertheless, in the context of the entire *voir dire*, his expressions of his views regarding "self-imposed" conditions raise serious concerns as to his ability to consider impartially evidence in defense and in mitigation. The prospective juror's statements suggest that he was perhaps the precise juror described in *Morgan v. Illinois*, the one who "by definition . . . cannot perform [his] duties in accordance with the law, [his] protestations to the contrary notwithstanding." 504 U.S. at 735, 119 L. Ed. 2d at 506.

By his comments concerning relevant mitigating evidence, this prospective juror essentially stated that he could not follow the law. In *State v. Jaynes* this Court said:

> If a juror determines that a statutory mitigating circumstance exists, however, the juror must give that circumstance mitigating

> value. The General Assembly has determined as a matter of law that statutory mitigating circumstances have mitigating value. Therefore, jurors must give them some weight in mitigation. Nevertheless, the amount of weight any particular statutory mitigating circumstance is to be given is a decision entirely for the jury.

342 N.C. 249, 285, 464 S.E.2d 448, 470 (1995) (internal citations omitted), *cert. denied*, 518 U.S. 1024, 135 L. E. 2d 1080 (1996).

However, the trial court has broad discretion in overseeing *voir dire*, including whether to grant or deny a challenge for cause. *State v. Abraham*, 338 N.C. 315, 343, 451 S.E.2d 131, 145 (1994); *State v. Quick*, 329 N.C. 1, 17, 405 S.E.2d 179, 189 (1991). The standard of review is whether the trial court abused its discretion and whether this abuse of discretion prejudiced the defendant. *Abraham*, 338 N.C. at 343-44, 451 S.E.2d at 145-46. An abuse of discretion is established upon a showing that the trial court's actions were "manifestly unsupported by reason" and "so arbitrary that [they] could not have been the result of a reasoned decision." *State v. Williams*, 361 N.C. 78, 81, 637 S.E.2d 523, 525 (2006) (alteration in original) (citations and internal quotation marks omitted). *But see Hightower*, 331 N.C. at 641, 417 S.E.2d at 240 (stating that "in a case . . . in which a juror's answers show that he could not follow the law as given . . . by the judge in his instructions to the jury, it is error not to excuse such a juror").

Giving deference to the discretion of the trial judge who observed the prospective juror, heard the prospective juror's voice, and opined at length as to the juror's patriotism, chiseled looks, and firm beliefs, I concur in the result only.

PENDER COUNTY, DWIGHT STRICKLAND, INDIVIDUALLY AND AS A PENDER COUNTY COMMISSIONER, DAVID WILLIAMS, INDIVIDUALLY AND AS A PENDER COUNTY COMMISSIONER, F.D. RIVENBARK, INDIVIDUALLY AND AS A PENDER COUNTY COMMISSIONER, STEPHEN HOLLAND, INDIVIDUALLY AND AS A PENDER COUNTY COMMISSIONER, AND EUGENE MEADOWS, INDIVIDUALLY AND AS A PENDER COUNTY COMMISSIONER v. GARY BARTLETT, AS EXECUTIVE DIRECTOR OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS; LARRY LEAKE, ROBERT CORDLE, GENEVIEVE C. SIMS, LORRAINE G. SHINN, AND CHARLES WINFREE, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE STATE BOARD OF ELECTIONS; JAMES B. BLACK, IN HIS OFFICIAL CAPACITY AS CO-SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; RICHARD T. MORGAN, IN HIS OFFICIAL CAPACITY AS CO-SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; MARC BASNIGHT, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; MICHAEL EASLEY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA; AND ROY COOPER, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA

No. 103A06

(Filed 24 August 2007)

1. Elections— redistricting—appeal from three-judge panel—directly to Supreme Court

An appeal from a summary judgment by a three-judge panel upholding a redistricting across county boundaries was directly to the Supreme Court. Although N.C.G.S. § 120-5 authorizes direct appeals to the Supreme Court from final orders declaring redistricting acts invalid, the General Assembly did not intend to limit appeals to one type of outcome. Any appeal from a three-judge panel dealing with apportionment or redistricting pursuant to N.C.G.S. § 1-267.1 is directly to the Supreme Court.

2. Elections— redistricting—Voting Rights Act—vote dilution—numerical majority as precondition

The current configuration of a North Carolina legislative district was not required by Section 2 of the Voting Rights Act (VRA), which prohibits vote dilution. The conditions in *Thornburg v. Gingles*, 478 U.S. 30, must be satisfied before Section 2 applies; here, only the first condition is at issue (a minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district). This provision refers to the voting age citizens rather than the entire population of the minority group, and a numerical majority is required rather than a smaller number that needs to draw votes from other racial groups to control the outcome of an election. Because the African-American minority group in this district does not constitute a numerical majority of citizens of voting age,

the first *Gingles* precondition is not met and the current configuration of the district is not required by Section 2 of the Voting Rights Act.

3. Elections— redistricting—Whole County Provision—violation

A legislative district which was not subject to the federal Voting Rights Act (VRA) was required to comply with the Whole County Provision (WCP) of the North Carolina Constitution and with *Stephenson v. Bartlett*, 355 N.C. 354, and did not. The county involved, Pender, was divided into two districts, with population from an adjoining county added to both, in anticipation of Voting Rights Act requirements which did not apply. Because Pender lacks sufficient population to meet the requirements for a non-VRA district, population from across a county line must be added, but only to the extent necessary to comply with the one-person, one-vote standard in *Stephenson*. The precise remedy is a legislative responsibility. N.C. Const. art. II, §§ 3(3), 5(3).

4. Elections— redistricting error—remedy stayed for election

The remedy for a redistricting erroneously drawn was stayed until after a pending election.

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

Chief Justice PARKER dissenting.

Justice TIMMONS-GOODSON joins in this dissenting opinion.

Justice TIMMONS-GOODSON dissenting.

Appeal pursuant to N.C.G.S. § 120-2.5 from an order entered 2 December 2005 and a judgment entered 9 January 2006 by a three-judge panel of the Superior Court, Wake County appointed by the Chief Justice under N.C.G.S. § 1-267.1. Heard in the Supreme Court 13 September 2006.

Carl W. Thurman III for plaintiff-appellants Dwight Strickland, David Williams, and Stephen Holland, in their individual capacities.

Roy Cooper, Attorney General, by Tiare B. Smiley and Alexander McC. Peters, Special Deputy Attorneys General, for defendant-appellees.

Center for Civil Rights, University of North Carolina School of Law, by Anita S. Earls, for Cindy Moore, Milford Farrior, and Mary Jordan, amici curiae.

EDMUNDS, Justice.

In this case, we consider whether the current geographic configuration and racial composition of North Carolina House District 18 as established by the North Carolina General Assembly was required by Section 2 of the Voting Rights Act of 1965.[1] We conclude that the Voting Rights Act did not mandate the creation of a Section 2 "crossover" district and that House District 18 violates the Whole County Provision of the Constitution of North Carolina. Accordingly, we reverse the decision of the three-judge panel below.

The General Assembly's redistricting powers are confined and directed in several respects. In the first instance, redistricting "must comport with federal law." *Stephenson v. Bartlett*, 355 N.C. 354, 363, 562 S.E.2d 377, 384 *(Stephenson I)*, *stay denied*, 535 U.S. 1301, 152 L. Ed. 2d 1015 (Rehnquist, Circuit Justice 2002). In addition, the Constitution of North Carolina enumerates several limitations on the General Assembly's redistricting authority. *See* N.C. Const. art. II, §§ 3, 5. Those constitutional limitations are binding upon the General Assembly "except to the extent superseded by federal law." *Stephenson I*, 355 N.C. at 372, 562 S.E.2d at 390. None of the express limitations on redistricting in our State Constitution is facially inconsistent with federal law. *Id.* at 370, 562 S.E.2d at 389.

Two constitutional sections limiting redistricting, collectively known as the "Whole County Provision" (WCP), provide "[n]o county shall be divided in the formation of a senate district," N.C. Const. art. II, § 3(3), and "[n]o county shall be divided in the formation of a representative district," *id.* art. II, § 5(3). Although federal law is supreme, when "the primary purpose of the WCP can be effected to a large degree without conflict with federal law, it should be adhered to by the General Assembly to the maximum extent possible." *Stephenson I*, 355 N.C. at 374, 562 S.E.2d at 391. Moreover, "the WCP cannot be applied in isolation or in a manner that fails to comport with other requirements of the State Constitution." *Id.* at 376, 562 S.E.2d at 392.

1. House District 16 also lies in Pender County and perforce is affected by our holding today. However, we shall follow the lead of the parties and the three-judge panel and focus solely on House District 18.

Based upon data from the 2000 decennial census, an ideal single-member North Carolina House district holds 67,078 citizens. According to that census, Pender County had 41,082 residents, or 61 percent of the population required to support its own House district. That census also indicated that adjoining New Hanover County had 160,307 residents, or 239 percent of the population needed for a single House district. Combining these two counties provided the population for approximately three House districts.

The district in question, House District 18, was drawn after this Court determined that earlier redistricting efforts by the North Carolina General Assembly failed to meet federal and state standards. In *Stephenson I*, we held that the General Assembly's 2001 state House and Senate legislative redistricting plans violated the State Constitution's WCP. 355 N.C. at 375, 562 S.E.2d at 392. Similarly, in *Stephenson II*, this Court held that the General Assembly's proposed 2002 redistricting plans were also constitutionally deficient. *Stephenson v. Bartlett*, 357 N.C. 301, 314, 582 S.E.2d 247, 254 (2003) (*Stephenson II*). In the 2003 House redistricting plan promulgated after the two *Stephenson* opinions, Pender County was divided between two legislative districts, House District 16 and House District 18. Act of Nov. 25, 2003, ch. 434, secs. 1-2, 2003 N.C. Sess. Laws (1st Extra Sess. 2003) 1313, 1313-92. Both districts encompass portions of Pender and New Hanover Counties and thus cross county lines. *Id.*, sec. 1 at 1327-30.

The General Assembly drew House District 18 to meet the requirements of Section 2 of the Voting Rights Act of 1965 (VRA), codified as amended at 42 U.S.C. § 1973 (2003). Section 2 of the VRA, which we discuss in detail below, "generally provides that states or their political subdivisions may not impose any voting qualification or prerequisite that impairs or dilutes, on account of race or color, a citizen's opportunity to participate in the political process and to elect representatives of his or her choice." *Stephenson I*, 355 N.C. at 363, 562 S.E.2d at 385 (citing 42 U.S.C. §§ 1973(a), (b); *Thornburg v. Gingles*, 478 U.S. 30, 43, 92 L. Ed. 2d 25, 42 (1986)). Past election results in North Carolina demonstrate that a legislative voting district with a total African-American population of at least 41.54 percent, or an African-American voting age population of at least 38.37 percent, creates an opportunity to elect African-American candidates. Accordingly, in the 2003 House redistricting plan, the General Assembly fashioned House District 18 with a total African-American population of 42.89 percent, and an African-American voting age pop-

ulation of 39.36 percent. Defendants refer to House District 18 as an "effective black voting district," with a sufficient African-American population to elect representatives of their choice.

On 14 May 2004, plaintiffs brought the instant action. Pender County was a named plaintiff, as were five persons suing both as individuals and in their official capacities as county commissioners of Pender County. Defendants, consisting of the Executive Director and members of the North Carolina Board of Elections, the then co-Speakers of the North Carolina House of Representatives, the President Pro Tempore of the North Carolina Senate, the Attorney General, and the Governor of the State of North Carolina, were all sued in their official capacities. In their complaint, plaintiffs contended that the 2003 House redistricting plan violated the WCP by dividing Pender County into House District 16 and House District 18. Defendants responded that the division of Pender County was required by Section 2 of the VRA, which trumped the State Constitution.

Pursuant to N.C.G.S. § 1-267.1(b), on 24 May 2004 the Chief Justice appointed a three-judge panel to hear this redistricting challenge. Plaintiffs first sought a preliminary injunction to enjoin defendants from proceeding with the 2004 primary and general elections. The panel denied the injunction. On 25 February 2005, the parties filed cross-motions for summary judgment, followed by initial and amended stipulations of fact.

On 2 December 2005, the three-judge panel entered an order allowing partial summary judgment in favor of defendants and denying summary judgment for plaintiffs. In its order, the panel determined that plaintiff Pender County and its commissioners lacked standing to sue in their official capacity, although the commissioner-plaintiffs could proceed in their individual capacities. Plaintiffs do not appeal this determination. Next, the panel examined House District 18 in light of the United States Supreme Court's decision in *Thornburg v. Gingles*, the leading case interpreting Section 2. *Gingles* set out three "necessary preconditions" a plaintiff is required to demonstrate before he or she can establish that a legislative district must be drawn to comply with Section 2 or that an existing district violates Section 2. 478 U.S. at 50, 92 L. Ed. 2d at 46. These preconditions require a plaintiff to show that: (1) a minority population is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority population is "politically cohesive" and thus votes as a bloc; and (3) the majority

population "votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.* at 50-51, 92 L. Ed. 2d at 46-47. By demonstrating these three preconditions, a plaintiff can show that a particular legislative district may "impair minority voters' ability to elect representatives of their choice." *Id.* at 50, 92 L. Ed. 2d at 46.

As the three-judge panel noted, the procedural posture of the case at bar differs from a typical Section 2 case. Here, defendants drew House District 18 as a preemptive measure against the possibility that a lawsuit might be filed challenging the absence of a Section 2 district in southeastern North Carolina. Plaintiffs claim that the current configuration of House District 18 was not required by Section 2 and that the District violates the WCP, thus placing defendants in the unusual position of having to defend a legislative district by proving that a Section 2 violation would have occurred if current House District 18 had not been created. Accordingly, defendants here must bear the burden, normally borne by plaintiffs, of establishing the *Gingles* preconditions. If they succeed, defendants can demonstrate that the drawing of House District 18 was required by Section 2, obviating the need to comply with the WCP.

The three-judge panel held that House District 18 met the first two *Gingles* preconditions but determined that material issues of fact remained as to whether the third precondition had been satisfied. Because the panel did not reach the issue of whether House District 18 met the third precondition, it declined to consider whether the district also met the "totality of circumstances" test prescribed by *Gingles* and Section 2 of the VRA. *Gingles*, 478 U.S. at 43, 92 L. Ed. 2d at 42 (quoting 42 U.S.C. § 1973(b)) (explaining that Section 2 is violated when the "totality of the circumstances" establishes that members of a protected class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice").

Following the order of partial summary judgment, the parties on 9 January 2006 filed another joint stipulation that the Caucasian majority voted sufficiently as a bloc to enable it usually to defeat the African-American minority's preferred candidate. Through this stipulation, plaintiffs conceded House District 18 met the third *Gingles* precondition. However, plaintiffs did not stipulate that House District 18 was required by Section 2 of the VRA.

With the issues of material fact resolved as to the third precondition, the three-judge panel issued its final summary judgment order on 9 January 2006. The panel concluded House District 18 met all three of the *Gingles* threshold preconditions and, based on the totality of circumstances, the creation of House District 18 as a crossover district (i.e., one where the minority group enjoys reliable support from members of the majority who "cross over" racial or ethnic lines to vote with the minority and elect the minority's candidate) was required by Section 2 of the VRA. Accordingly, the panel held that House District 18 could split Pender County and that the district complied, to the maximum extent practicable, with the legal requirements of the WCP, as set out in *Stephenson I*.

[1] Three of the five individual plaintiffs appealed to this Court pursuant to N.C.G.S. § 120-2.5. Although neither party has raised the issue of jurisdiction, we note that this statute authorizes direct appeal to this Court "from any final order or judgment of a court declaring unconstitutional or otherwise invalid in whole or in part and for any reason any act of the General Assembly that apportions or redistricts State legislative or congressional districts." N.C.G.S. § 120-2.5 (2005). While the three-judge panel did not declare the 2003 House redistricting plan unconstitutional or invalid, we do not believe the General Assembly intended to limit appeals of the findings of such a three-judge panel to one type of outcome only. This view is supported by a later part of the same session law that enacted § 120-2.5, which provides that the appeal provision applies to "*any* action of a court *affecting the validity* of an act apportioning or redistricting State legislative or congressional districts." Ch. 434, sec. 16, 2003 N.C. Sess. Laws (1st Extra Sess. 2003) at 1419 (emphasis added). Accordingly, we interpret N.C.G.S. § 120-2.5 to mean that any appeal from a three-judge panel dealing with apportionment or redistricting pursuant to N.C.G.S. § 1-267.1 is direct to this Court. We now consider whether the VRA required that House District 18 be drawn in its current form as a crossover district.

[2] An order allowing summary judgment is reviewed *de novo*. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). Summary judgment is appropriate when "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) (2005). An act of the General Assembly is accorded a "strong presumption of constitutionality" and is "presumed valid *unless it conflicts with the Constitution*." *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (per curiam).

Section 2 of the VRA forbids any "qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color" or membership in a language minority group. 42 U.S.C. § 1973(a) (2003). A denial or abridgement of the right to vote in violation of Section 2 occurs when:

> [B]ased on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Id. § 1973(b) (2003). "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed" by minority voters to elect their preferred representatives. *Gingles*, 478 U.S. at 47, 92 L. Ed. 2d at 44.

Consequently, Section 2 prohibits the dilution, on account of race or color, of a minority citizen's opportunity to participate in the political process and to elect representatives of his or her choice. *Stephenson I*, 355 N.C. at 363, 562 S.E.2d at 385. Although the phrase "vote dilution" does not appear in Section 2, the United States Supreme Court has provided guidance on this issue. Vote dilution of a racial minority group can occur "by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority." *Gingles*, 478 U.S. at 46 n.11, 92 L. Ed. 2d at 44 n.11. "The phrase 'vote dilution,' in the legal sense, simply refers to the impermissible discriminatory effect that a . . . districting plan has when it operates 'to cancel out or minimize the voting strength of racial groups.' " *Id.* at 87, 92 L. Ed. 2d at 70 (O'Connor, J., concurring) (quoting *White v. Regester*, 412 U.S. 755, 765, 37 L. Ed. 2d 314, 324 (1973)); *see also Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 359, 145 L. Ed. 2d 845, 875 (2000) (Souter, J., concurring in part and dis-

senting in part) ("The principal concept of diminished voting strength recognized as actionable under our cases is vote dilution, defined as a regime that denies to minority voters the same opportunity to participate in the political process and to elect representatives of their choice that majority voters enjoy.").

Although courts ultimately apply a totality of the circumstances test to determine whether a practice results in a denial or abridgement of the right to vote, 42 U.S.C. § 1973(b), a plaintiff bringing a claim under Section 2 must first establish the three *Gingles* threshold preconditions. In the case at bar, plaintiffs argue, and defendants do not dispute, that these three preconditions must exist before the General Assembly is required to draw a legislative district pursuant to Section 2. Failure to sustain any one of the *Gingles* preconditions means that the General Assembly is not required to create a legislative district pursuant to Section 2 to ensure that the votes of the minority are not diluted. *See Voinovich v. Quilter*, 507 U.S. 146, 158, 122 L. Ed. 2d 500, 514 (1993).

While *Gingles* construed Section 2 in the context of a lawsuit concerning dilution in a multi-member legislative district, the Supreme Court subsequently applied the *Gingles* preconditions to single-member legislative districts. "[A] claim of vote dilution in a single-member district requires proof meeting the same three threshold conditions for a dilution challenge to a multimember district." *Johnson v. De Grandy*, 512 U.S. 997, 1006, 129 L. Ed. 2d 775, 788 (1994) (citing *Growe v. Emison*, 507 U.S. 25, 40, 122 L. Ed. 2d 388, 403-04 (1993)). Thus, the *Gingles* preconditions must be found before Section 2 requires the General Assembly to create a single-member district on behalf of a minority group. In other words, the existing configuration and makeup of House District 18 was not required by Section 2 unless all three *Gingles* preconditions were established.

Only the first *Gingles* precondition is at issue in this appeal. The narrow question before us is whether this precondition, that a minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district," 478 U.S. at 50, 92 L. Ed. 2d at 46, requires that the minority group constitute a numerical majority of the relevant population, or whether a numerous minority can satisfy the precondition. We must determine whether the United States Supreme Court in *Gingles* meant a quantitative majority of the minority population (i.e., greater than 50 percent), or whether it meant instead a minority group sufficiently

large in population to have significant impact on the election of candidates but not of a size to control the outcome without help from other racial groups. The Supreme Court explicitly left open this question in *Gingles*, 478 U.S. at 46 n.12, 92 L. Ed. 2d at 44 n.12, and has not answered it in several cases since. *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2647-48, 165 L. Ed. 2d 609, 672-73 (2006) (Souter, J., concurring in part and dissenting in part); *De Grandy*, 512 U.S. at 1008-09, 129 L. Ed. 2d at 789-90; *Voinovich*, 507 U.S. at 154, 122 L. Ed. 2d at 511; *Growe*, 507 U.S. at 41 n.5, 122 L. Ed. 2d at 404 n.5.

Before we can answer that question, however, we must determine "which characteristic of minority populations (*e.g.*, age, citizenship) ought to be the touchstone" for the first *Gingles* precondition. *De Grandy*, 512 U.S. at 1008, 129 L. Ed. 2d at 789. We cannot discuss the terms "minority" and "majority" in the context of a redistricting case without knowing what population we are considering. In other words, a "majority" or "minority" of *what*? Are we including the entire population of the minority group in the geographic area or are we limiting consideration to a smaller subset of that minority population? Although the United States Supreme Court has left open this question as well, *id.* at 1008-09, 129 L. Ed. 2d at 789-90, dictum in *Perry* from a unanimous Court indicates a majority should be determined by the number of minority citizens of voting age, not by its total population: "Latinos, to be sure, are a bare majority of the voting-age population in new District 23, but only in a hollow sense, for the parties agree that the relevant numbers must include citizenship. This approach fits the language of § 2 because only eligible voters affect a group's opportunity to elect candidates." *Perry*, 126 S. Ct. at 2616, 165 L. Ed. 2d at 638.

In addition, the plain language of Section 2 indicates citizenship should be taken into account in that the statute prohibits any "qualification or prerequisite to voting . . . which results in a denial or abridgement of the right of any *citizen of the United States* to vote on account of race." 42 U.S.C. § 1973(a) (emphasis added). As *Gingles* explained:

> The reason that a minority group making such a challenge must show, as a threshold matter, that it is sufficiently large and geographically compact to constitute a majority in a single-member district is this: Unless minority voters *possess the potential to elect representatives* in the absence of the challenged structure

> or practice, they cannot claim to have been injured by that structure or practice.

478 U.S. at 50 n.17, 92 L. Ed. 2d at 46 n.17 (emphasis added). *Gingles* "repeatedly makes reference to effective voting majorities, rather than raw population totals, as the touchstone for" determining the first precondition. *Romero v. City of Pomona*, 883 F.2d 1418, 1425 (9th Cir. 1989), *overruled in part on other grounds*, *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358 (9th Cir. 1991). "The *raison d'etre* of [*Gingles*] and of amended § 2 is to facilitate participation by minorities in our political processes, by preventing dilution of their votes. . . . It would be a Pyrrhic victory for a court to create a single-member district in which a minority population dominant in absolute, but not in voting age numbers, continued to be defeated at the polls." *Campos v. City of Houston*, 113 F.3d 544, 548 (5th Cir. 1997) (quotation omitted). Because only voting age citizens of the United States possess the ability to elect candidates, we hold that the "proper statistic" for deciding whether a minority group can meet the first *Gingles* precondition is "voting age population as refined by citizenship." *Negrón v. City of Miami Beach*, 113 F.3d 1563, 1569 (11th Cir. 1997); *see also Barnett v. City of Chicago*, 141 F.3d 699, 704 (7th Cir. 1998) ("We think that citizen voting-age population is the basis for determining equality of voting power that best comports with the policy of [Section 2]."), *cert. denied sub nom. Bialczak v. Barnett*, 524 U.S. 954, 141 L. Ed. 2d 740 (1998).

We now return to the critical question on appeal, whether the "sufficiently large and geographically compact" minority population must constitute a numerical majority of citizens of voting age in order to satisfy the first *Gingles* precondition. As we undertake this analysis, we are mindful of at least four distinct types of legislative districts: (1) "majority-minority" districts, (2) "coalition" districts, (3) "crossover" districts, and (4) "influence" districts. A majority-minority district is one "in which a majority of the population is a member of a specific minority group." *Voinovich*, 507 U.S. at 149, 122 L. Ed. 2d at 508. Majority-minority districts are often called "safe" districts for the minority because the minority group voters can vote as a bloc to elect the candidates of their choice without relying on voters of other races.

By contrast, in the other types of legislative districts, the predominant minority group cannot consistently elect its candidate of choice without the assistance of other racial groups. Absent such

help, even if every eligible member of the minority group voted for a single candidate, that candidate would not be assured of electoral success. Thus, a coalition district is one in which a minority group joins with voters from at least one other minority group to elect a candidate. *De Grandy*, 512 U.S. at 1020, 129 L. Ed. 2d at 796; *see also Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n*, 366 F. Supp. 2d 887, 904 (D. Ariz. 2005) ("A coalition district is one in which two separate minority groups allege that a district could be formed in which they could join forces to elect a representative."). In a crossover district, a minority group has "support from a limited but reliable white crossover vote." *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 376 (S.D.N.Y.) (per curiam), *aff'd mem.*, 543 U.S. 997, 160 L. Ed. 2d 454 (2004). The terms "coalition" district and "crossover" district are sometimes used interchangeably, but we distinguish them here because the former refers to two or more minority groups combining forces to elect a candidate, while the latter refers to a minority group gaining support from voters in the dominant racial majority group. Finally, an influence district is one in which a minority group is merely large enough to influence the election of candidates but too small to determine the outcome. *Georgia v. Ashcroft*, 539 U.S. 461, 470, 156 L. Ed. 2d 428, 445 (2003) (defining an influence district as one in which a minority group "would be able to exert a significant—if not decisive—force in the election process").

Plaintiffs contend that a minority group must constitute a numerical majority of the voting population in the area under consideration before Section 2 of the VRA requires the creation of a legislative district to prevent dilution of the votes of that minority group. They point to the wording of the first *Gingles* precondition, which says a minority group must be "sufficiently large and geographically compact to constitute a *majority* in a single-member district," 478 U.S. at 50, 92 L. Ed. 2d at 46 (emphasis added), and claim this language permits only majority-minority districts to be formed in response to a Section 2 claim. Defendants respond that the language of both *Gingles* and Section 2 allows for other types of legislative districts, such as coalition, crossover, and influence districts. House District 18, which defendants term an "effective minority district," functions as a single-member crossover district in which the total African-American voting age population of 39.36 percent needs to draw votes from a Caucasian majority to elect the candidate of its choice. Defendants contend such a crossover district is permitted by Section 2 and *Gingles*.

Our analysis leads us to the conclusion that plaintiffs' position is both more logical and more readily applicable in practice. As noted above, while *Gingles* addresses multi-member districts, its analysis also applies to single-member districts. *De Grandy*, 512 U.S. at 1006-07, 129 L. Ed. 2d at 788. The first *Gingles* precondition is premised on initial proof that a single-member district could be constructed with a majority of minority voters. *Gingles*, 478 U.S. at 50 n.17, 92 L. Ed. 2d at 46 n.17. *Gingles* further states that the single-member district "is generally the appropriate standard against which to measure minority group potential to elect" candidates in a multi-member district. *Id.* In light of *Gingles*' use of a numerical majority of a minority group's voters to calibrate the minority's ability to elect its candidate in a multi-member district, we see no reason to use a quantity less than a numerical majority as the determinant in a single-member district. *See Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 654 (N.D. Ill. 1991) (three-judge panel) ("The concerns animating the *Gingles* electoral majority precondition for multi-member cases—concerns of proof and relief—reside equally in the single-member context.").

Although the United States Supreme Court has left open this issue, the majority of federal circuit courts confronting the question have concluded that, when a district must be created pursuant to Section 2, it must be a majority-minority district. *See*, *e.g.*, *Hall v. Virginia*, 385 F.3d 421, 423 (4th Cir. 2004) (holding "*Gingles* establishes a numerical majority requirement for all Section 2 claims"), *cert. denied*, 544 U.S. 961, 161 L. Ed. 2d 602 (2005); *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 850 (5th Cir. 1999) (holding "we reject the appellants' contention that a 'majority' may be less than 50% of the citizen voting-age population"), *cert. denied*, 528 U.S. 1114, 145 L. Ed. 2d 811 (2000); *Negrón*, 113 F.3d at 1571 (11th Cir.) (plaintiffs failed to establish first *Gingles* precondition when Hispanics did not "constitute a majority of potential voters")[2]; *Sanchez v. Colorado*, 97 F.3d 1303, 1314 (10th Cir. 1996) (noting that "satisfaction of the first precondition requires plaintiffs show a majority-Hispanic district is feasible"), *cert. denied sub nom.*

2. Despite the holding in *Negrón*, a later Eleventh Circuit case purports in a footnote to "leave open the question of whether a section 2 plaintiff can pursue a 'coalition' or 'crossover' dilution claim." *Dillard v. Baldwin County Comm'rs*, 376 F.3d 1260, 1269 n.7 (11th Cir. 2004). We note without further comment an Eleventh Circuit "absolute rule that a prior decision of the circuit (panel or en banc) [cannot] be overruled by a panel but only by the court sitting en banc." *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc); *accord Va. Props., Inc. v. Home Ins. Co.*, 74 F.3d 1131, 1132 n.2 (11th Cir. 1996) (citing *Bonner* and other authority).

Colorado v. Sanchez, 520 U.S. 1229, 137 L. Ed. 2d 1028 (1997); *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 945 (7th Cir. 1988) (first *Gingles* precondition requires a minority group to have a "voting age majority" of population), *cert. denied*, 490 U.S. 1031, 104 L. Ed. 2d 204 (1989). The issue is unresolved in two circuits. *Metts v. Murphy*, 363 F.3d 8, 11 (1st Cir. 2004) (en banc) (per curiam) (holding "[w]e are thus unwilling *at the complaint stage* to foreclose the possibility that a section 2 claim can ever be made out" with a minority population of 21 percent) (emphasis changed); *Romero*, 883 F.2d at 1424 n.7, 1427 n.15 (9th Cir.) (straddling the fence via two footnotes, first noting that "[w]e are aware of no successful section 2 voting rights claim ever made without a showing that the minority group was capable of a majority vote in a designated single district," but also "express[ing] no opinion as to whether section 2's protections extend to a *coalition* of racial or language minorities"). No circuit has agreed with defendants and affirmatively held that Section 2 can be satisfied by the creation of coalition, crossover, or influence districts.

We find these cases to be sensible and persuasive. When a minority group lacks a numerical majority in a district, "the ability to elect candidates of their own choice was never within the [minority group's] grasp." *Hall*, 385 F.3d at 430. If a minority group lacks the voting population "to independently decide the outcome of an election," it cannot demonstrate that its voting strength has been diluted in violation of Section 2 because it cannot show that any electoral structure or practice has thwarted its ability or potential to elect candidates of its choice. *Id.* at 429. "Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by [a vote-diluting] structure or practice." *Gingles*, 478 U.S. at 50 n.17, 92 L. Ed. 2d at 46 n.17; *see also Hall*, 385 F.3d at 429.

Several federal cases have described this interpretation as imposing a "bright line rule." *See McNeil*, 851 F.2d at 944 (the *Gingles* preconditions can be viewed as a "brightline requirement" that the minority voters make up the majority of the district); *Valdespino*, 168 F.3d at 852 ("[T]his court has interpreted the *Gingles* factors as a bright line test."). This bright line rule, requiring a minority group that otherwise meets the *Gingles* preconditions to constitute a numerical majority of citizens of voting age, can be applied fairly, equally, and consistently throughout the redistricting process. With a straightforward and easily administered standard, Section 2 legislative districts will be more uniform and less susceptible to ephemeral political vot-

ing patterns, transitory population shifts, and questionable predictions of future voting trends. A bright line rule for the first *Gingles* precondition "promotes ease of application without distorting the statute or the intent underlying it." *McNeil*, 851 F.2d at 942.

In addition, a bright line rule provides our General Assembly a safe harbor for the redistricting process. Redistricting should be a legislative responsibility for the General Assembly, not a legal process for the courts. Without a majority requirement, each legislative district is exposed to a potential legal challenge by a numerically modest minority group with claims that its voting power has been diluted and that a district therefore must be configured to give it control over the election of candidates. In such a case, courts would be asked to decide just how small a minority population can be and still claim that Section 2 mandates the drawing of a legislative district to prevent vote dilution. "[A]n unrestricted breach of this precondition 'w[ould] likely open a Pandora's box of marginal Voting Rights Act claims by minority groups of all sizes.' " *Dillard*, 376 F.3d at 1268 (quoting *Hastert*, 777 F. Supp. at 654 (alterations in original)). "The first *Gingles* precondition provides a gate-keeping mechanism by which the courts maintain" ascertainable and objective standards from which to adjudicate Section 2 claims. *Id.* Although we acknowledge that a bright line rule "might conceivably foreclose a meritorious claim," in general it "ensure[s] that violations for which an effective remedy exists will be considered while appropriately closing the courthouse to marginal claims." *McNeil*, 851 F.2d at 943. "In making that trade-off, the *Gingles* majority justifiably sacrificed some claims to protect stronger claims and promote judicial economy." *Id.*

Besides the advantages of a bright line rule requiring a minority group to have a numerical majority of citizens of voting age, we are also advertent to the disadvantages of coalition, crossover, and influence districts. Without a rule requiring a numerical majority of citizens of voting age, "there appears to be no logical or objective measure for establishing a threshold minority group size necessary" for Section 2 legislative districts. *Hastert*, 777 F. Supp. at 654. In addition, courts could be called upon to divine whether coalitions would hold together through biennial and quadrennial election cycles, whether a majority group would continue to cross over through the election cycles, whether one minority group would consistently support another minority group's primary election candidate, what percentage of a minority group would vote with or against that minority, whether the claims of one minority group are superior to those of

another minority group, and so on. We do not believe the political process is enhanced if the power of the courts is consistently invoked to second-guess the General Assembly's redistricting decisions.

We also recognize a specific tension in the *Gingles* preconditions if crossover districts are permitted to satisfy Section 2 requirements. A crossover district is premised upon a minority group gaining support from voters in the typically Caucasian majority to elect the candidate of the minority group's choice. In apparent contradiction, the third *Gingles* precondition requires that the majority population vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51, 92 L. Ed. 2d at 47. Consequently, if the majority group does not vote sufficiently as a bloc, the third *Gingles* prong cannot be met. When a minority group is able to accumulate sufficient crossover Caucasian votes that the minority candidate is successful, however, the *Gingles* premise that the Caucasian majority votes *as a bloc* to defeat the minority group's candidate is undermined. *Metts*, 363 F.3d at 12 (recognizing the "tension" in "any effort to satisfy both the first and third prong of *Gingles*," and observing that "[t]o the extent that African-American voters have to rely on cross-over voting to prove they have the 'ability to elect' a candidate of their choosing, their argument that the majority votes as a bloc against their preferred candidate is undercut"). In short, a high level of crossover voting is inconsistent with the majority bloc voting defined in the third *Gingles* precondition and weakens the possibility of vote dilution. *See id.* at 13-14 (Selya, J., dissenting) (contending that a showing of majority bloc voting is "structurally inconsistent" with a crossover district).

Thus, after taking into account the language of *Gingles*, the weight of persuasive authority from the federal circuits, the importance of imposing a practicable rule, the necessity for judicial economy, the redistricting responsibility of the General Assembly, and the inherent tension lurking in the third *Gingles* prong, we conclude that a bright line rule is appropriate. Accordingly, if a minority group is geographically compact but nevertheless lacks a numerical majority of citizens of voting age, the minority group lacks the power to decide independently the outcome of an election, and its voting power has not been diluted by the lack of a legislative district. In such a case, the first *Gingles* precondition has not been satisfied and the General Assembly is not required to create a Section 2 legislative district.

As presently drawn, House District 18 does not meet this bright line test. The district has a total African-American population of 42.89

percent, and an African-American voting age population of 39.36 percent. Although the record does not reveal the number of voting-age African-Americans who are citizens, that number cannot exceed the total minority voting age population. Because the African-American minority group in House District 18 does not constitute a numerical majority of citizens of voting age, House District 18 does not meet the first *Gingles* precondition and its current configuration is not mandated by Section 2 of the VRA.

[3] As we noted at the beginning of this opinion, the formation of legislative districts must comport with the requirements of our State Constitution, unless federal law supercedes those provisions. Accordingly, because current House District 18 is not required by Section 2, it must comply with the redistricting principles enunciated by this Court in *Stephenson I*. The WCP forbids the division of a county in the formation of a legislative district, N.C. Const. art. II, §§ 3(3), 5(3), except to the extent the WCP conflicts with the VRA and "one-person, one-vote" principles, *Stephenson I*, 355 N.C. at 381, 562 S.E.2d at 396. The importance of counties in the redistricting process was discussed at length in *Stephenson I*, *id.* at 364-68, 562 S.E.2d at 385-88, in which we noted the "long-standing tradition of respecting county lines during the redistricting process in this State," *id.* at 366, 562 S.E.2d at 386. The U.S. Supreme Court acknowledges the importance of " 'traditional districting principles such as maintaining communities of interest and traditional boundaries' " in redistricting. *Abrams v. Johnson*, 521 U.S. 74, 92, 138 L. Ed. 2d 285, 303 (1997) (quoting *Bush v. Vera*, 517 U.S. 952, 977, 135 L. Ed. 2d 248, 269 (1996) (plurality)); *see also Stephenson I*, 355 N.C. at 381, 562 S.E.2d at 396 ("[O]peration of federal law does not preclude states from recognizing traditional political subdivisions when drawing their legislative districts."). Thus, the General Assembly must comply with the WCP to the "maximum extent possible," consistent with federal law. *Stephenson I*, 355 N.C. at 374, 562 S.E.2d at 391.

Stephenson I established nine requirements for a valid redistricting plan, several of which are relevant to House District 18:

> [3.] In counties having a 2000 census population sufficient to support the formation of one non-VRA legislative district . . ., the WCP requires that the physical boundaries of any such non-VRA legislative district not cross or traverse the exterior geographic line of any such county.

> [4.] When two or more non-VRA legislative districts may be created within a single county, . . . single-member non-VRA districts shall be formed within said county. Such non-VRA districts shall be compact and shall not traverse the exterior geographic boundary of any such county.
>
> [5.] In counties having a non-VRA population pool which cannot support at least one legislative district . . . or, alternatively, counties having a non-VRA population pool which, if divided into districts, would not comply with the . . . "one-person, one-vote" standard, the requirements of the WCP are met by combining or grouping the minimum number of whole, contiguous counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard. Within any such contiguous multi-county grouping, compact districts shall be formed, consistent with the at or within plus or minus five percent standard, whose boundary lines do not cross or traverse the "exterior" line of the multi-county grouping; provided, however, that the resulting interior county lines created by any such groupings may be crossed or traversed in the creation of districts within said multi-county grouping but only to the extent necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard.
>
> [6.] The intent underlying the WCP must be enforced to the maximum extent possible; thus, only the smallest number of counties necessary to comply with the at or within plus or minus five percent "one-person, one-vote" standard shall be combined[.]
>
> [7.] . . . [C]ommunities of interest should be considered in the formation of compact and contiguous electoral districts.

Stephenson II, 357 N.C. at 306-07, 582 S.E.2d at 250 (emphasis omitted) (quoting and numbering the *Stephenson I* factors, 355 N.C. at 383-84, 562 S.E.2d at 396-98 (alterations in original)).

The General Assembly created House District 18, the only legislative district specifically at issue in this appeal, with the intention of complying with the requirements of Section 2 and thus with the belief that the district was exempt from the WCP and *Stephenson I* requirements. However, as explained above, the configuration of House District 18 is not required by Section 2, and thus the VRA neither controls the formation of that district nor supercedes our State

Constitution. Consequently, House District 18 must be drawn in accordance with the WCP and the *Stephenson I* requirements.

Pursuant to N.C.G.S. § 120-2.3 (2005), any judicial opinion which declares a redistricting plan "unconstitutional or otherwise invalid, in whole or in part and for any reason" must "identify every defect found by the court, both as to the plan as a whole and as to individual districts." Although the language of § 120-2.3 appears to be directed to trial courts that make findings of fact and conclusions of law, we acknowledge the General Assembly's need to know with specificity how a defective district fails to meet constitutional and statutory standards. Accordingly, we follow the statute's directive.

From the information provided by the parties in the record before us, it appears New Hanover County has a total population large enough to form two or more non-VRA legislative districts that need "not traverse the exterior geographic boundary" of the county, which would satisfy the fourth requirement of *Stephenson I*. *Stephenson I*, 355 N.C. at 383, 562 S.E.2d at 397. Pender County, in contrast, lacks sufficient population to support a non-VRA House district. Therefore, to comply with the fifth *Stephenson I* requirement, a voting district that includes Pender County must add population across a county line, but "only to the extent necessary to comply with the at or within plus or minus five percent 'one-person, one-vote' standard." *Id.* at 384, 562 S.E.2d at 397. In following the sixth *Stephenson I* requirement, the districts within these counties must all comply with the WCP "to the maximum extent possible," and "only the smallest number of counties necessary to comply with the . . . 'one-person, one-vote' standard shall be combined." *Id.*

As a remedy, plaintiffs contend two House districts should be drawn in New Hanover County and one House district should be drawn comprising all of Pender County and a portion of New Hanover County. This Court declines, however, to specify the exact configuration of House District 18 or the configuration of House districts in Pender and New Hanover counties generally. "[R]edistricting is a legislative responsibility, [and] 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." *Stephenson v. Bartlett*, 358 N.C. 219, 230, 595 S.E.2d 112, 119 (2004) (*Stephenson III*). "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." *Id.*

Although we leave to the General Assembly the drawing of either House District 18 or the surrounding districts in Pender, New Hanover, and other counties in the vicinity, we direct that all redistricting plans for the North Carolina House of Representatives and North Carolina Senate comply with the principal holding of this case: in order for a minority group to satisfy the first *Gingles* precondition and be "sufficiently large and geographically compact to constitute a majority in a single-member district," 478 U.S. at 50, 92 L. Ed. 2d at 46, it must constitute a numerical majority of citizens of voting age. Any legislative district designated as a Section 2 district under the current redistricting plans, and any future plans, must either satisfy the numerical majority requirement as defined herein, or be redrawn in compliance with the Whole County Provision of the Constitution of North Carolina and with *Stephenson I* requirements.

Since House District 18 fails to comply with the WCP and *Stephenson I* requirements, it must be redrawn. We leave to the General Assembly the decision whether House District 18 should be redrawn as a non-VRA district, or whether it should be redrawn to meet the numerical majority requirement to satisfy the first *Gingles* precondition.

[4] We are cognizant that the General Assembly will need time to redistrict not only House District 18 but also other legislative districts directly and indirectly affected by this opinion. The North Carolina General Assembly is now in recess and is not scheduled to reconvene until 13 May 2008, after the closing of the period for filing for elective office in 2008. We also realize that candidates have been preparing for the 2008 election in reliance upon the districts as presently drawn. Accordingly, to minimize disruption to the ongoing election cycle, the remedy explained above shall be stayed until after the 2008 election. *See Reynolds v. Sims*, 377 U.S. 533, 585, 12 L. Ed. 2d 506, 551 (1964) ("In awarding or withholding immediate relief [in an apportionment case], a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree."). At the conclusion of the 2008 election, House District 18 and other impacted districts must be redrawn. All redistricting performed thereafter shall comply with this opinion.

REVERSED.

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

Chief Justice PARKER dissenting.

I respectfully dissent. In my view the General Assembly had a sound legal basis for concluding that the configuration of North Carolina House District 18 in the 2003 House Plan was necessary to comply with Section 2 of the Voting Rights Act. Accordingly, for the reasons discussed herein, I would affirm the decision of the three-judge panel upholding the division of Pender County.

Article II, Section 3, Clause 3 and Section 5, Clause 3 of the North Carolina Constitution, collectively referred to as the "Whole County Provisions" (the WCP), provide that "[n]o county shall be divided" in the formation of senate and representative districts. In *Stephenson I* and *Stephenson II*, this Court established legal principles, including application of the Whole County Provisions, under which the legislature's redistricting authority is exercised; however, the Court deferred to the Supremacy Clauses of both the State and Federal Constitutions for purposes of applying the WCP. *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (2002) (*Stephenson I*); *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (2003) (*Stephenson II*). This Court explained the supremacy of federal law as follows:

> We recognize that, like the application or exercise of most constitutional rights, the right of the people of this State to legislative districts which do not divide counties is not absolute. In reality, an inflexible application of the WCP is no longer attainable because of the operation of the provisions of the VRA and the federal "one-person, one-vote" standard, as incorporated within the State Constitution. This does not mean, however, that the WCP is rendered a legal nullity if its beneficial purposes can be preserved consistent with federal law and reconciled with other state constitutional guarantees.

Stephenson I, 355 N.C. at 371, 562 S.E.2d at 389 (internal citations omitted). Throughout its opinion, this Court repeatedly noted that the WCP must yield to provisions of the Voting Rights Act prohibiting the dilution of minority voting strength. "[T]he State retains significant discretion when formulating legislative districts, so long as the

'effect' of districts created pursuant to a 'whole-county' criterion or other constitutional requirement does not dilute minority voting strength in violation of federal law." *Id.* at 370, 562 S.E.2d at 389. "Although no federal law has preempted this Court's authority to interpret the WCP as it applies statewide, we acknowledge that complete compliance with federal law is the first priority before enforcing the WCP." *Id.* at 374 n.4, 562 S.E.2d at 391 n.4.

Finally, this Court established nine criteria to be followed by the General Assembly in drawing legislative districts. The first criterion expressly requires drawing districts that comply with the provisions of the Voting Rights Act:

> [T]o ensure full compliance with federal law, legislative districts required by the VRA shall be formed prior to creation of non-VRA districts. . . . In the formation of VRA districts within the revised redistricting plans on remand, we likewise direct the trial court to ensure that VRA districts are formed consistent with federal law and in a manner having no retrogressive effect upon minority voters. To the maximum extent practicable, such VRA districts shall also comply with the legal requirements of the WCP.

Stephenson II, 357 N.C. at 305, 582 S.E.2d at 250 (alterations in original) (emphasis omitted) (citing *Stephenson I*, 355 N.C. at 383, 562 S.E.2d at 396-97).

Section 2 of the Voting Rights Act forbids any "voting qualification or prerequisite to voting or standard, practice or procedure . . . which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a) (2000). A State is in violation of Section 2

> if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

Id. § 1973(b) (2000).

In construing the totality of circumstances test, the United States Supreme Court in *Gingles* relied upon the Senate Report accompany-

ing the 1982 VRA Amendments, stating, "the Committee determined that the question whether the political processes are 'equally open' depends upon a searching practical evaluation of the past and present reality, and on a functional view of the political process." *Thornburg v. Gingles*, 478 U.S. 30, 45, 92 L. Ed. 2d 25, 43 (1986) (quoting S. Rep. No. 97-417, at 30 (1982) (citations, internal quotation marks, and footnotes omitted)). In providing structure to the totality of circumstances inquiry, the Court in *Gingles* enumerated three threshold factors for establishing vote dilution as follows:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate.

Id. at 50-51, 92 L. Ed. 2d at 46-47 (internal citations and footnote omitted).

With respect to whether a minority group is sufficiently large to "constitute a majority," the Court in *Gingles* disclaimed mechanical application of the first precondition by stating:

> We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to *influence* elections.

Id. at 46 n.12, 92 L. Ed. 2d at 44 n.12. Thus, the Court declined to address whether the first threshold requirement could extend to a group that constitutes a sufficiently large minority to elect the candidate of its choice with the assistance of limited, yet predictable, crossover votes from the white majority.

In her concurring opinion, Justice O'Connor rejected the distinction between a Section 2 claim in which the minority constitutes a numerical majority in a district and a Section 2 claim when the minority group, though not a majority in the proposed district, has the ability to elect its candidate of choice with the assistance of limited crossover support from white voters, stating:

> I note, however, the artificiality of the Court's distinction between claims that a minority group's "ability *to elect* the representatives of [its] choice" has been impaired and claims that "its ability to *influence* elections" has been impaired. *Ante*, at 46-47, n.12. . . . [T]he Court recognizes that when the candidates preferred by a minority group are elected in a multimember district, the minority group has *elected* those candidates, even if white support was indispensable to these victories. On the same reasoning, if a minority group that is not large enough to constitute a voting majority in a single-member district can show that white support would probably be forthcoming in some such district to an extent that would enable the election of the candidates its members prefer, that minority group would appear to have demonstrated that, at least under this measure of its voting strength, it would be able to elect some candidates of its choice.

Id. at 90 n.1, 92 L. Ed. 2d at 72 n.1 (O'Connor, J., Burger, C.J., Powell & Rehnquist, JJ., concurring in the judgment).

In subsequent cases, the United States Supreme Court has not endorsed a bright line requirement that a minority group seeking Section 2 VRA relief constitute a numerical majority. In fact, despite having the opportunity to do so, the Court has repeatedly declined to close the door on the issue. *See Johnson v. De Grandy*, 512 U.S. 997, 1008-09, 129 L. Ed. 2d 775, 789-90 (1994) (in which the Court declined to hold that plaintiffs could not make a VRA claim based on influence districts); *Voinovich v. Quilter*, 507 U.S. 146, 154, 122 L. Ed. 2d 500, 511 (1993) (in which the Court declined to address whether a reapportionment commission's failure to create influence districts resulted in a Section 2 violation); *Growe v. Emison*, 507 U.S. 25, 41 & n.5, 122 L. Ed. 2d 388, 404 & n.5 (1993) (in which the Court declined to decide if plaintiffs could argue influence dilution in addition to vote dilution when the *Gingles* test was not satisfied).

Moreover, the Supreme Court has continued to caution lower courts against applying *Gingles* to impose a rigid numerical majority requirement. In *Voinovich*, the Supreme Court explained that the *Gingles* factors "cannot be applied mechanically and without regard to the nature of the claim." 507 U.S. at 158, 122 L. Ed. 2d at 514. Justice O'Connor noted that the first *Gingles* requirement would have to be "modified or eliminated" when the Court considered cases in which black voters are denied "the possibility of being a sufficiently

large *minority* to elect their candidate of choice with the assistance of cross-over votes from the white majority." *Id.*

Recently, in *League of United Latin American Citizens v. Perry*, —— U.S. ——, 165 L. Ed. 2d 609 (2006), the Supreme Court was confronted with the issue presented in this case. In the plurality opinion of Justice Kennedy, Part IV addressed the first *Gingles* threshold condition by assuming, as the Court had done in the past, that it is possible for a minority group that makes up less than fifty percent of the district's population to state a claim under Section 2. *Id.* at ——, 165 L. Ed. 2d at 647 (plurality). Justice Kennedy concluded that under this assumption, the racial minority "must show they constitute a sufficiently large minority to elect their candidate of choice with the assistance of cross-over votes." *Id.* at ——, 165 L. Ed. 2d at 647 (plurality) (quoting *Voinovich*, 507 U.S. at 158, 122 L. Ed. 2d at 515 (emphasis and internal quotation marks omitted)). Although the Court concluded that no Section 2 violation occurred, the Court did so based on its determination that the evidence did not show that black voters could elect a candidate of their choice, even with crossover voting.

Justice Souter, in a separate opinion joined by Justice Ginsberg, dissented from Part IV, in which the plurality upheld the trial court's ruling that no Section 2 violation of the VRA occurred. *Id.* at ——, 165 L. Ed. 2d at 672 (Souter & Ginsburg, JJ., concurring in Parts II-A, II-D, III, and dissenting from Part IV). Justice Souter concluded that "[a]lthough both the plurality today and our own prior cases have sidestepped the question whether a statutory dilution claim can prevail without the possibility of a district percentage of minority voters above 50%, the day has come to answer it." *Id.* at ——, 165 L. Ed. 2d at 672-73 (Souter and Ginsburg, JJ., dissenting) (internal citations omitted). Justice Souter would have returned the Section 2 VRA claim to the district court for reconsideration "untethered by the 50% barrier." *Id.* at ——, 165 L. Ed. 2d at 677 (Souter & Ginsburg, JJ., dissenting). Justice Stevens, in his dissenting opinion, stated, "I agree with Justice Souter that the '50% rule,' which finds no support in the text, history, or purposes of § 2, is not a proper part of the statutory vote dilution inquiry." *Id.* at —— n.16, 165 L. Ed. 2d at 670 n.16 (Stevens, J., dissenting).

Although the Supreme Court has repeatedly left open the issue, several lower federal courts, as noted by the majority, have ruled that a numerical majority is necessary to establish a Section 2 claim. *See*,

e.g., *Hall v. Virginia*, 385 F.3d 421 (4th Cir. 2004), *cert. denied*, 544 U.S. 961, 161 L. Ed. 2d 602 (2005) *and Rodriguez v. Pataki*, 308 F. Supp. 2d 346 (S.D.N.Y.) (per curiam), *aff'd mem.*, 543 U.S. 997, 160 L. Ed. 2d 454 (2004).

In *Hall*, the plaintiffs contended that a redistricting plan which reduced the black voting age population of a district from 37.8% to 32.3% violated Section 2 of the VRA because, under the newly drawn Fourth Congressional District, blacks were too small in number to form the same winning coalition with crossover white voters that existed before enactment of the plan. By requiring a literal numerical majority, the *Hall* court did not determine whether, prior to the new redistricting plans, blacks in the district had the ability to elect a candidate of choice with the support of limited crossover votes. Stated differently, the court did not determine whether a 37.8% black voting age population constituted a sufficiently large minority presence in the district to allow minority voters the ability to elect their candidate of choice with a small, but predictable, number of crossover votes, and consequently, whether reducing the minority presence in the district to 32.3% would cause blacks to lose the ability to elect a candidate by making successful coalition voting impossible.

In *Rodriguez v. Pataki*, the court opined that "[e]ven if the first *Gingles* factor were applied flexibly to accommodate crossover or 'ability to elect' districts, the plaintiffs would have to prove that their proposed district would provide blacks with the ability to elect candidates of choice." 308 F. Supp. 2d at 403 (citation omitted). Although the *Rodriguez* court stated its preference for a bright-line rule, it denied the plaintiffs' ability to elect claim not because the black population in the district was less than fifty percent, but because the plaintiffs did not present sufficient evidence that blacks would have the ability to elect candidates of their choice. *Id.* at 403.

North Carolina courts are not bound by decisions of the Fourth Circuit or any other lower federal court, but only by a decision of the United States Supreme Court. *See State v. McDowell*, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984), *cert. denied*, 476 U.S. 1164, 90 L. Ed. 2d 732 (1986).

In North Carolina's legislative elections, a clear pattern exists which demonstrates the level of minority presence necessary to give minority voters an opportunity to elect their preferred candidates. Prior voting patterns reveal that house districts in North Carolina having total black population percentages of 41.54% and above and

black voting age population percentages of 38.37% and above provide an effective opportunity to elect black candidates. The record shows that the General Assembly considered the most relevant indicator of black voting strength to be black Democratic voter registration; districts where such registration exceeds fifty percent consistently elect black representatives.

In this case, the minority concentration in House District 18 in the 2003 Plan consisted of a total black population of 42.89%, a black voting age population of 39.36%, and a black Democratic voter registration of 53.72%. In House District 18, election results have already established that minority voters have the potential to elect a representative of choice.[3] The 2004 election results, held under the 2003 plan, demonstrated that District 18 as currently drawn is an effective minority voting district in which the minority voters' preferred candidate was re-elected. Unquestionably, a black candidate can be elected in House District 18, notwithstanding that the number of minority voters in the district is less than fifty percent.

Altering the district to further reduce the minority population would result in dilution of a distinctive minority vote. In *Hall*, the court found that a minority group's voting strength is measured in terms of the group's "ability to elect candidates to public office." 385 F.3d at 427. However, minority voters who do not form a numerical majority in a district but who can elect their candidate of choice with a limited number of crossover votes do, indeed, have the "ability to elect." Taking this predictable measure away from minorities leaves them with "less opportunity than other members of the electorate . . . to elect representatives of their choice." 42 U.S.C. § 1973(b).

The three-judge panel reviewed the existing law and correctly declined to follow a rigid test requiring an absolute numerical majority of minority voters in a single-member district. The panel instead took a functional approach and found that the proper factual inquiry in analyzing a "coalition" or an "ability to elect district" is not whether black voters make up the numerical majority of voters in a single-member district, but whether "the political realities of the district, such as the political affiliation and number of black registered voters

3. District 18 can be described as an "ability to elect" or "crossover" district. An "ability to elect district" is a district where members of the minority group are not a majority of the voting population, but have the ability to elect representatives of their choice with support from a limited, but reliable, white crossover vote. *Rodriguez v. Pataki*, 308 F. Supp. 2d at 376 (citation omitted).

when combined with other relevant factors" operate to allow black voters to elect their candidate of choice. Such an inquiry must focus on the potential of black voters to elect their preferred candidates, not merely on raw numbers alone.

Recent United States Supreme Court opinions suggest that the application of a numerical majority requirement without respect to attendant political circumstances is not the appropriate test of the merits of a Section 2 Voting Rights Act claim. Nowhere in the language of Section 2 is there a requirement that a district must include a population of more than fifty percent of minority voters in order for a petitioner to state a claim for relief under Section 2. Rather, the "totality of circumstances" language mandates a flexible standard based on political realities of the district and supports creation of a district in which the minority group has the ability to elect a representative of choice with crossover support from voters of other racial or ethnic groups.

Under this Court's prior rulings, the General Assembly must meet the requirements of federal law before adhering to the Whole County Provisions in Article II, Section 3, Clause 3 and Section 5, Clause 3 of the North Carolina Constitution. *See Stephenson I*, 355 N.C. at 381-82, 562 S.E.2d at 396-97. In drawing House District 18 in Pender and New Hanover Counties, the General Assembly sought to maintain an effective minority district to comply with Section 2 of the VRA and to comply with the WCP to the maximum extent possible. Following the principles this Court established in the *Stephenson v. Bartlett* cases, the three-judge panel properly concluded that no county, including Pender County, is guaranteed protection from being divided based on the WCP of our State Constitution when the division of counties is necessary to comply with the Voting Rights Act.

House District 18, as presently drawn, contains a black voting age population that is "sufficiently large and geographically compact" to elect its candidate of choice, *Gingles*, 478 U.S. at 50, 92 L. Ed. 2d at 46, and the General Assembly drew House District 18 to comply with the North Carolina Constitution to the maximum extent possible.

For the foregoing reasons, I would vote to affirm the decision of the three-judge panel.

Justice TIMMONS-GOODSON joins in this dissenting opinion.

Justice TIMMONS-GOODSON dissenting.

I join the Chief Justice's dissent. Furthermore, I write separately to express my concern that in overriding our legislature's decisions in order to impose a bright-line rule, the majority has given insufficient deference to the legislature's considered judgment. As the Supreme Court of the United States has stated, "The function of the legislature is primary, its exercises fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety." *Weems v. United States*, 217 U.S. 349, 379, 30 S. Ct. 544, 554, 54 L. Ed. 793, 803 (1910). " '[I]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.' " *Gregg v. Georgia*, 428 U.S. 153, 175-76, 96 S. Ct. 2909, 2926, 49 L. Ed. 2d 859, 876 (1976) (judgment of the court and opinion of Stewart, Powell & Stevens, JJ.) (alteration in original) (quoting *Furman v. Georgia*, 408 U.S. 238, 383, 92 S. Ct. 2726, 2800-01, 33 L. Ed. 2d 346, 432, (1972) (Burger, C. J., Blackmun, Powell & Rehnquist, JJ., dissenting)).

Since the majority's calculus does not appear to appropriately factor in the legislature's role in the districting process, and the deference due it, I respectfully dissent.

LAMARR GARLAND FORBIS, CO-EXECUTOR OF THE ESTATE OF BONNIE S. NEWELL; AND LAMARR GARLAND FORBIS, EXECUTRIX OF THE ESTATE OF AUGUSTA LEE SUSTARE (FORMERLY ATTORNEY-IN-FACT FOR AUGUSTA LEE SUSTARE) v. BEVERLY LEE NEAL

No. 79PA06

(Filed 24 August 2007)

1. Statutes of Limitation and Repose— fraud—attorney-in-fact and executor

The statute of limitations was not a proper basis for summary judgment in an action for fraud by an attorney-in-fact and executor. Ordinarily, a jury must decide when fraud should have been discovered in the exercise of reasonable diligence under the circumstances, but a lack of diligence may be excused when the fraud is allegedly committed by the superior party in a confidential or fiduciary relationship. Here, the forecast of evidence was too inconclusive to resolve the issue as a matter of law.

2. Evidence— Dead Man's Statute—affidavit—summary judgment—court presumed to disregard inadmissible statements

The trial court did not err in a summary judgment proceeding on a complaint alleging fraud by an executor by considering an affidavit which contained statements from the deceased. It is assumed that the trial court properly disregarded any averments which would have violated N.C.G.S. § 8C-1, Rule 601(c) (the Dead Man's Statute) if admitted in a later trial.

3. Fraud— attorney-in-fact and executor—transfer of assets—issue of fact as to intent of deceased

The trial court erred by granting summary judgment for defendant on a claim for fraud where defendant was the attorney-in-fact for his aunt and then her executor, and certain transactions involving a joint account resulted in his acquiring some of her assets. Whether these transactions accorded with his aunt's wishes is a question of fact for a jury.

4. Fraud— attorney-in-fact—transfer of property to new accounts—signature of principal

Summary judgment was correctly granted for defendant on fraud claims arising from the opening of certain accounts for an aunt for whom he served as attorney-in-fact where his aunt signed the signature cards for the accounts. Plaintiffs did not forecast evidence to indicate that defendant forged the signatures or caused them to be forged.

5. Fraud— constructive—attorney-in-fact—property passing outside principal's estate

Summary judgment should not have been granted for defendant on a claim for constructive fraud against defendant for establishing certain accounts for an aunt for whom he served as an attorney-in-fact which resulted in a portion of her property passing to him outside of her will. There was a genuine issue of material fact as to whether defendant's fiduciary relationship with his aunt led to and surrounded the consummation of the transactions.

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

On writ of certiorari, pursuant to N.C.G.S. § 7A-32(b), to review a decision of a divided panel of the Court of Appeals, 175 N.C. App. 455,

624 S.E.2d 387 (2006), affirming an order entered by Judge David S. Cayer on 5 August 2004 in Superior Court, Mecklenburg County. On 6 April 2006, the Supreme Court allowed plaintiffs' petition for discretionary review as to additional issues. Heard in the Supreme Court 20 November 2006.

Eugene C. Hicks, III for plaintiff-appellants.

Baucom, Claytor, Benton, Morgan & Wood, P.A., by James F. Wood, III, for defendant-appellee.

MARTIN, Justice.

This case arises from a dispute over the assets of Bonnie Sustare Newell (Newell) and her sister Augusta Lee Sustare (Sustare). LaMarr Garland Forbis, Newell and Sustare's niece, brought a fraud action on behalf of her aunts' estates against Beverly Lee Neal (defendant), her first cousin and the nephew of Newell and Sustare. The trial court granted summary judgment for defendant, and the Court of Appeals affirmed. We affirm in part, reverse in part, and remand with instructions.

During the 1990s, Newell and Sustare resided in an assisted living facility in Matthews, North Carolina. Sustare had spent her working years as a hair stylist, and Newell had worked at various jobs in insurance and real estate. When they entered the assisted living facility, neither sister had been a member of the workforce for approximately twenty years. Their nephew, defendant, was a licensed real estate broker who held a bachelor's degree from the University of Georgia and a Masters of Business Administration degree from the University of Utah.

On 5 November 1991, both sisters executed powers of attorney designating defendant as their attorney-in-fact. The powers of attorney authorized defendant to act for each sister with respect to real and personal property transactions, banking, taxes, and similar transactions. Neither power of attorney, however, authorized defendant to make gifts of the sisters' assets to himself or anyone else.

In December 1995, Newell and Sustare executed wills, leaving most of their respective estates to each other by means of residuary clauses. Secondary residual provisions, which were designed to activate upon the death of the last surviving sister (as between Newell and Sustare), left any remaining assets to various nephews and nieces, including defendant and Forbis.

On 19 June 1996, Newell personally executed two signature cards with Branch Banking and Trust (BB&T). The first card, which she alone signed, created a payable-on-death account (the POD account) and designated defendant as the beneficiary. The other card, which both Newell and defendant signed, created a joint account with right of survivorship (the ROS account). At the time, BB&T accepted the signature cards as authentic and established the corresponding accounts.

On 26 June 1998, defendant and Newell set up a joint Paine Webber account with right of survivorship. In his capacity as attorney-in-fact, defendant signed the Paine Webber account application on Newell's behalf, listing her as the primary account holder and himself as a joint account holder. The Paine Webber account application does not bear any signature purporting to belong to Newell. Defendant stated during the course of discovery that Newell "opted to create the Paine Webber account because it ha[d] a significantly better rate of return than she could receive at BB&T, there was no penalty for early withdrawal, and it facilitated the incremental sale of her . . . stock, if needed." Over the course of several years, defendant sold tracts of Newell's real property and deposited funds into the Paine Webber account.

Defendant also established a second system of accounts for managing Sustare's assets. Although Sustare's system of accounts was similar to Newell's system, it is undisputed that Sustare signed all the relevant documents.

Newell died on 19 December 1999, just before her ninety-first birthday. Her death certificate listed "Dementia of [the] Alzheimer's type" as an underlying cause of death. Upon Newell's death, defendant received $70,000.00 as the sole beneficiary of the POD account. He also became the sole account holder of the Paine Webber account, which contained stock and other assets valued at $175,204.00, and the ROS account, worth $1,963.73. In total, defendant received $247,167.73 in cash and stock as a result of Newell's death, all of which passed to him outside of her will.

On 14 February 2000, defendant and Forbis qualified as coexecutors of the Newell estate. They filed an inventory of the estate on 8 May 2000. After various personal items, cash, and other specific bequests were distributed in accordance with Newell's will, Sustare received, through the residuary clause, cash in the amount of $5,828.70, a promissory note valued at $165,000.00, and real prop-

erty interests. A final accounting of the Newell estate was filed on 15 February 2001, and the estate was closed.

After her sister's death, Sustare lived alone at the assisted living facility, and her own funds eventually ran short. At that time, Sustare and other family members requested that defendant provide assistance to help ease Sustare's financial difficulties. Defendant refused.

By March 2001, Sustare had cancelled all the accounts she held jointly with defendant or which listed defendant as a beneficiary. By October 2002, she had also revoked the power of attorney that named defendant as her attorney-in-fact and appointed Forbis as her new attorney-in-fact. On 17 December 2002 Forbis reopened Newell's estate, and the Clerk of Superior Court re-issued letters testamentary, reinstating Forbis and defendant as co-executors.

Forbis, on behalf of the Newell estate, and Sustare[1] (collectively, plaintiffs) instituted the present action against defendant on 18 December 2002, alleging fraud and related claims. Following discovery, all parties filed motions for summary judgment. After a hearing, the trial court entered an order granting defendant's motion for summary judgment and denying plaintiffs' motion for summary judgment.

Plaintiffs appealed, and the Court of Appeals affirmed the trial court in a divided opinion. *Forbis v. Neal*, 175 N.C. App. 455, 624 S.E.2d 387 (2006). Judge Steelman wrote separately, agreeing that summary judgment in favor of defendant was appropriate as to the POD and ROS accounts. *Id.* at 459, 624 S.E.2d at 390 (Steelman, J., concurring in part and dissenting in part). He disagreed, however, with the majority's conclusion that defendant was entitled to summary judgment as to the Paine Webber account. *Id.* at 462, 624 S.E.2d at 392 (Steelman, J., concurring in part and dissenting in part).

Plaintiffs filed a notice of appeal in this Court based on the dissenting opinion and a petition for discretionary review of additional issues. The Court treated the notice of appeal, which was untimely, as a petition for writ of certiorari and allowed it. The Court also allowed plaintiffs' petition for discretionary review of additional issues not addressed in the dissenting opinion.

The instant case presents cross-motions for summary judgment. Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with

1. Sustare died while this matter was pending in the Court of Appeals, and Forbis proceeded as Sustare's executor.

the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c). The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact. *Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972). Moreover, "all inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion." *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975) (internal quotation marks omitted). The standard of review for summary judgment is de novo. *Builders Mut. Ins. Co. v. North Main Constr., Ltd.*, 361 N.C. 85, 88, 637 S.E.2d 528, 530 (2006).

[1] At the outset, we address defendant's contention that the statute of limitations bars plaintiffs' action. N.C.G.S. § 1-52(9) provides that actions for "relief on the ground of fraud or mistake" must be brought within three years. N.C.G.S. § 1-52(9) (2005). Defendant contends that the three-year period began to run when the alleged wrong was complete—that is, on the dates the various accounts were opened. In support of his contention, defendant relies on *Davis v. Wrenn*, 121 N.C. App. 156, 158-59, 464 S.E.2d 708, 710-11 (1995), which held that the statutory limitations period begins to run when the fraud occurs, regardless of when the aggrieved party actually becomes aware of the fraudulent conduct. Plaintiffs argue, on the other hand, that the three-year period did not begin to run until Newell's death.

N.C.G.S. § 1-52(9) states unequivocally that, in actions for fraud, "the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." We have previously construed this provision to "set accrual at the time of discovery *regardless* of the length of time between the fraudulent act or mistake and plaintiff's discovery of it." *Feibus & Co. v. Godley Constr. Co.*, 301 N.C. 294, 304, 271 S.E.2d 385, 392 (1980). To the extent Court of Appeals cases such as *Davis* conflict with this Court's decision in *Feibus*, they are overruled.

For purposes of N.C.G.S. § 1-52(9), "discovery" means either actual discovery or when the fraud should have been discovered in the exercise of "reasonable diligence under the circumstances." *Bennett v. Anson Bank & Trust Co.*, 265 N.C. 148, 154, 143 S.E.2d 312, 317 (1965) (emphasis omitted). Ordinarily, a jury must decide when fraud should have been discovered in the exercise of reasonable diligence under the circumstances. This is particularly true when the evidence is inconclusive or conflicting. *Feibus*, 301 N.C. at 304-05,

271 S.E.2d at 392; *Lowery v. Wilson*, 214 N.C. 800, 805-06, 200 S.E. 861, 865 (1939).

When, as here, the fraud is allegedly committed by the superior party to a confidential or fiduciary relationship, the aggrieved party's lack of reasonable diligence may be excused. *See*, *e.g.*, *Bennett*, 265 N.C. at 156, 143 S.E.2d at 318 (involving a defendant who allegedly defrauded the heirs of his business partner who was also his brother); *Vail v. Vail*, 233 N.C. 109, 116-17, 63 S.E.2d 202, 207-08 (1951) (involving a defendant who allegedly defrauded his mother); *Small v. Dorsett*, 223 N.C. 754, 760-62, 28 S.E.2d 514, 517-18 (1944) (involving a banker who allegedly defrauded his customer, a long time friend and widow with no business experience). This principle of leniency does not apply, however, when an event occurs to "excite [the aggrieved party's] suspicion or put her on such inquiry as should have led, in the exercise of due diligence, to a discovery of the fraud." *Vail*, 233 N.C. at 117, 63 S.E.2d at 208.

Here, the statute of limitations began to run when Newell or her estate discovered or should have discovered the alleged fraud. As in *Feibus*, the forecast of evidence in the present case was too inconclusive for the trial court to resolve this issue as a matter of law. The statute of limitations was therefore not a proper basis for summary judgment.

Another procedural argument advanced by defendant to defeat plaintiffs' action arises from provisions of Chapter 28A of the General Statutes pertaining to estate administration. Specifically, defendant alleges that Forbis, on behalf of the Newell estate, is unable to assert a fraud claim against defendant without his consent. Forbis remains capable of maintaining the instant action as the sole executor of the Sustare estate even if the Newell estate were to be eliminated as a party plaintiff. In any event, our disposition of the present appeal sends this case back to the trial court for further proceedings, without prejudice to defendant's right to assert any procedural arguments under Chapter 28A. Accordingly, we decline—as did the Court of Appeals—to address this argument.

[2] We next address plaintiffs' challenge to an affidavit that defendant presented in support of his motion for summary judgment. They contend the trial court erred by considering this affidavit because it describes, among other things, statements made by Newell and Sustare. Such statements, they argue, are barred by N.C. R. Evid. 601(c), the so-called "Dead Man's Statute," which provides that

"[u]pon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event . . . shall not be examined as a witness in his own behalf or interest . . . against the executor, administrator or survivor of a deceased person . . . concerning any oral communication between the witness and the deceased person . . . ." This Court previously described the reasoning behind Rule 601(c) as follows:

> "Death having closed the mouth of one of the parties, (with respect to a personal transaction or communication) it is but meet that the law should not permit the other to speak of those matters which are forbidden by the statute. Men quite often understand and interpret personal transactions and communications differently, at best; and the Legislature, in its wisdom, has declared that an *ex parte* statement of such matters shall not be received in evidence."

In re Will of Lamparter, 348 N.C. 45, 49, 497 S.E.2d 692, 694 (1998) (parentheses added by Court) (quoting *Sherrill v. Wilhelm*, 182 N.C. 673, 675, 110 S.E. 95, 96 (1921)).

In the instant case, plaintiffs' contention that the trial court erred by allegedly considering the challenged affidavit is without merit. North Carolina Rule of Civil Procedure 56(e) provides that, at summary judgment, affidavits "shall set forth such facts as would be admissible in evidence." N.C. R. Civ. P. 56(e). To the extent the challenged affidavit contains averments which would violate Rule 601(c) if admitted as evidence at a later trial, we assume the trial court properly disregarded them.

We now turn to plaintiffs' substantive claims. Although the original complaint alleged various causes of action including fraud, undue influence, and breach of fiduciary duty, plaintiffs did not brief the undue influence and breach of fiduciary duty claims before this Court and thereby abandoned them. *See* N.C. R. App. P. 28(b)(6) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned."). Accordingly, our analysis narrows to whether summary judgment was proper on plaintiffs' fraud claims.

[3] Fraud may be actual or constructive. *Watts v. Cumberland County Hosp. Sys., Inc.*, 317 N.C. 110, 115, 343 S.E.2d 879, 883 (1986). While actual fraud "has no all-embracing definition," the following essential elements of actual fraud are well established: "(1) False rep-

resentation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974). Additionally, any reliance on the allegedly false representations must be reasonable. *Johnson v. Owens*, 263 N.C. 754, 757, 140 S.E.2d 311, 313 (1965). The reasonableness of a party's reliance is a question for the jury, unless the facts are so clear that they support only one conclusion. *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 225, 513 S.E.2d 320, 327 (1999); *see also Johnson*, 263 N.C. at 758, 140 S.E.2d at 314 (observing that "[j]ust where reliance ceases to be reasonable and becomes such negligence and inattention that it will, as a matter of law, bar recovery for fraud is frequently very difficult to determine.").

As to the Paine Webber account, defendant stated that he and Newell created the account because it had a better rate of return than a regular bank account, it carried no penalties for early withdrawal, and it enabled Newell to liquidate her stock incrementally. Defendant's right of survivorship in Newell's Paine Webber account, however, was not necessary to accomplish these stated goals. Moreover, Newell did not sign the Paine Webber account application, and defendant's power of attorney did not confer upon him the authority to make gifts of Newell's assets, including joint ownership of an account, to himself or anyone else. Despite the limitations on his power of attorney, defendant purported to sign the Paine Webber account application on Newell's behalf giving every appearance that he was carrying out her wishes. He then sold real estate titled exclusively in Newell's name and deposited the proceeds into the Paine Webber account. Through this process, he became joint owner of a significant portion of Newell's assets.

Whether this series of transactions accorded with Newell's wishes is a question of fact which must be decided by a jury. Genuine issues of material fact exist as to whether defendant's signature on the Paine Webber application was a "false representation or concealment of a material fact," *Ragsdale*, 286 N.C. at 138, 209 S.E.2d at 500, namely, the "material fact" that his power of attorney did not actually authorize him to open this joint account with right of survivorship on Newell's behalf. It follows that similar issues exist as to the other elements of actual fraud: Whether defendant's signature was "reasonably calculated to deceive" and "made with intent to deceive"; whether it did "in fact deceive," *id.*; and whether reliance upon it was

reasonable, *Johnson*, 263 N.C. at 757, 140 S.E.2d at 313. Plaintiffs have also forecasted sufficient evidence to survive summary judgment as to damages, since Newell's will reveals that Sustare would have received the contents of the Paine Webber account through the residuary clause in the event that the account had passed as part of the Newell estate. Accordingly, the Court of Appeals erred by affirming the trial court's grant of summary judgment as to the actual fraud claim on the Paine Webber account.

[4] As to the POD and ROS accounts, the trial court properly granted summary judgment in favor of defendant on the actual fraud claim. Unlike the Paine Webber account application, Newell signed the BB&T signature cards for these two accounts. Put simply, plaintiffs did not forecast any evidence to indicate that defendant forged the signatures or caused them to be forged. In the absence of such evidence, there is no false representation or concealment of a material fact to support a claim that defendant engaged in actual fraud in setting up the two accounts. Moreover, without any forecast of an evidentiary link between defendant and the alleged forgeries, plaintiffs have not adequately forecasted evidence of defendant's mental state, such as whether the alleged forgery was reasonably calculated to deceive or made with intent to deceive. For these reasons, no genuine issue of material fact exists on the issue of whether defendant committed actual fraud in setting up the POD and ROS accounts. Accordingly, summary judgment in defendant's favor was proper as to the actual fraud claims in connection with the POD and ROS accounts.

[5] Although summary judgment on the actual fraud claim was appropriate for the POD and ROS accounts and inappropriate for the Paine Webber account, it remains for us to evaluate the propriety of summary judgment on the constructive fraud claim as to all three bank accounts. "A claim of constructive fraud does not require the same rigorous adherence to elements as actual fraud." *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981). Rather, this cause of action "arises where a confidential or fiduciary relationship exists," *Watts*, 317 N.C. at 115, 343 S.E.2d at 884, which has " 'led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.' " *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997) (quoting *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950)). Thus, "[c]onstructive fraud differs from actual fraud in that 'it is based on a confidential relationship

rather than a specific misrepresentation.' " *Id.* (quoting *Terry*, 302 N.C. at 85, 273 S.E.2d at 678-79). Another difference is that intent to deceive is not an element of constructive fraud. *Link v. Link*, 278 N.C. 181, 192, 179 S.E.2d 697, 704 (1971).

When, as here, the superior party obtains a possible benefit through the alleged abuse of the confidential or fiduciary relationship, the aggrieved party is entitled to a presumption that constructive fraud occurred. *Watts*, 317 N.C. at 116, 343 S.E.2d at 884; *McNeill v. McNeill*, 223 N.C. 178, 181, 25 S.E.2d 615, 617 (1943). "This presumption arises 'not so much because [the fiduciary] has committed a fraud, but [because] he may have done so.' " *Watts*, 317 N.C. at 116, 343 S.E.2d at 884 (alterations in original) (quoting *Atkins v. Withers*, 94 N.C. 431, 433, 94 N.C. 581, 590 (1886)). Once the presumption arises, the alleged fiduciary "may rebut the presumption by showing, for example, that the confidence reposed in him was not abused." *Id.* (internal quotation marks omitted); *see also Lee v. Pearce*, 68 N.C. 63, 66, 68 N.C. 76, 81 (1873) (stating that the presumption may "be rebutted by proof that no fraud was committed, and no undue influence or moral duress exerted").

In *Watts v. Cumberland County Hospital System, Inc.*, for example, this Court held that the alleged fiduciaries—in that case the plaintiff's doctors—were able to successfully rebut the plaintiff's presumption of constructive fraud because they proved, and the plaintiff admitted, that she had obtained "numerous second opinions from several other specialists" regarding the matters that were the subject of the allegedly fraudulent transaction. 317 N.C. at 116, 343 S.E.2d at 884.

Here, it is undisputed that defendant and Newell were in a fiduciary relationship created by the power of attorney vested in defendant. Plaintiffs forecasted evidence that all three bank accounts were established at defendant's initiative. They also forecasted evidence that the Newell estate, Sustare, and later the Sustare estate were damaged by the fact that a large portion of Newell's assets passed to defendant outside her will.

In opposition to plaintiffs' forecast of evidence, defendant filed a six-page affidavit in which he claimed that Newell had full knowledge of all his financial activities on her behalf and that she understood defendant would receive the contents of the three accounts upon her death.

This forecasted evidence raised genuine issues of material fact as to whether defendant committed constructive fraud in relation to the three accounts. Unlike in *Watts*, a genuine issue of material fact exists as to whether defendant's fiduciary relationship with Newell "led up to and surrounded the consummation" of the transactions that effectively transferred most of her assets to him. This issue must be decided by a jury.

Because plaintiffs alleged that defendant obtained a benefit as a result of his abuse of the fiduciary relationship, plaintiffs were entitled to the legal presumption described in *Watts*. Unlike the defendant in *Watts*, however, defendant here did not rebut that presumption. *Watts* involved substantially different forecasts of evidence than the instant case. The *Watts* plaintiff alleged she had been defrauded by her doctors as she evaluated treatment options, but admitted herself that she had obtained numerous second opinions before undertaking the course of action from which she alleged the defendants had fraudulently benefitted. *Id.*; *see also* 37 Am. Jur. 2d *Fraud and Deceit* § 472, at 457 (2001) (noting that a plaintiff's procurement of "competent and independent advice" is a "significant factor" in determining whether a defendant has rebutted the presumption). The instant case, by contrast, involves a fiduciary who allegedly divested the beneficiaries of almost all their assets. Nothing in plaintiffs' forecast of evidence indicates the presence of other factors, such as an independent advisor, which might tend to mitigate the impact of the alleged fraud.

After a careful review of the record, we conclude plaintiffs demonstrated that genuine issues of material fact exist as to whether defendant perpetrated a constructive fraud in setting up and maintaining Newell's Paine Webber, ROS, and POD accounts. The Court of Appeals therefore erred in affirming the trial court's grant of summary judgment on these claims.

We conclude summary judgment was properly granted for defendant with respect to actual fraud on the ROS and POD accounts. Defendant was not entitled to summary judgment, however, as to the actual fraud claim on the Paine Webber account. Moreover, summary judgment was improper as to plaintiffs' constructive fraud claims on all three accounts.

We therefore remand to the Court of Appeals for further remand to the trial court with instructions to proceed on the following issues: (1) the claim of actual fraud as to the Paine Webber account, and (2)

the claims of constructive fraud as to the Paine Webber, ROS, and POD accounts.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

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

HOLLY RIDGE ASSOCIATES, LLC, PETITIONER v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES AND ITS DIVISION OF LAND RESOURCES; WILLIAM P. HOLMAN, IN HIS OFFICIAL CAPACITY; AND CHARLES H. GARDNER, IN HIS OFFICIAL CAPACITY, RESPONDENTS, AND NORTH CAROLINA SHELLFISH GROWERS ASSOCIATION AND NORTH CAROLINA COASTAL FEDERATION, INTERVENOR-RESPONDENTS

No. 218A06

(Filed 24 August 2007)

1. Administrative Law— intervention in contested case—civil procedure and administrative procedure

Intervention in a contested case is controlled by interlocking statutes, N.C.G.S. § 1A-1, Rule 24, and N.C.G.S. § 150B-1(e). The Rules of Civil Procedure allow intervention as a full party, while the Administrative Procedure Act allows intervention to the extent deemed appropriate by the administrative law judge. However, the ALJ's discretion in allowing intervention with the full rights of parties is limited to those who meet the conditions set out in Rule 24.

2. Administrative Law— intervention in contested case—administrative rules—scope

An administrative rule must be within the authority delegated by the General Assembly, and the Administrative Code cannot expand the scope of intervention beyond that set out in N.C.G.S. § 150B-23(d).

3. Civil Procedure— intervention by right—direct interest—not sufficient

Intervention under N.C.G.S. § 1A-1, Rule 24(a) requires a direct and immediate interest relating to the property or transaction for intervention by right. The interest claimed by the

Shellfish Growers and Coastal Federation, that ditching and draining on petitioner's property could jeopardize shellfish waters, is a general interest in an underlying issue and not a direct interest in the civil penalty, the issue here.

4. Civil Procedure— permissive intervention—prejudice to opposing party

Permissive intervention should not have been allowed in this case pursuant to N.C.G.S. § 1A-1, Rule 24(b) because of undue prejudice to the petitioner. Intervention late in the process resulted in the expenditure of time and money, affected a parallel federal case, and compelled a late change in trial strategy.

Justices TIMMONS-GOODSON and HUDSON did not participate in the consideration or decision of this case.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 176 N.C. App. 594, 627 S.E.2d 326 (2006), affirming an order entered on 5 September 2003 by Judge Benjamin G. Alford in Superior Court, New Hanover County. Heard in the Supreme Court 10 April 2007.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Alexander Elkan, George W. House, and S. Kyle Woosley, for petitioner-appellant.

Roy Cooper, Attorney General, by John F. Maddrey, Assistant Solicitor General, James C. Gulick, Senior Deputy Attorney General, and Nancy Reed Dunn, Assistant Attorney General, for respondent-appellees.

Southern Environmental Law Center, by Derb S. Carter, Jr. and Chandra T. Taylor, for intervenor-respondent-appellees.

EDMUNDS, Justice.

In this case we consider whether an administrative law judge properly allowed the North Carolina Shellfish Growers Association and the North Carolina Coastal Federation to intervene with full rights as parties in a contested case challenge to the State's imposition of a civil penalty. While the parties characterize this question as a policy issue, it is properly considered as a procedural matter within our statutory framework governing intervention. Because we hold that the intervenors did not meet the requirements of Rule 24 of the

North Carolina Rules of Civil Procedure to participate as parties, we reverse the decision of the Court of Appeals.

Petitioner Holly Ridge Associates, LLC ("Holly Ridge") owns a two-thirds interest in 1,262 acres of land in Onslow County, North Carolina, known as the Morris Landing Tract. The tract drains directly to the Atlantic Intracoastal Waterway and to Cypress Branch, a tributary of Batts Mill Creek. These waters are classified as "SA" waters by the North Carolina Environmental Management Commission, meaning they are used for shellfishing for market purposes. From January through November 1998, Holly Ridge excavated eight miles of ditches on the Morris Landing Tract. After receiving complaints from the North Carolina Division of Water Quality, representatives from the Land Quality Services ("LQS") of the Division of Land Resources ("DLR") of the North Carolina Department of Environment and Natural Resources ("DENR") conducted an inspection and issued a report to DLR listing violations of erosion and sedimentation control requirements.

Although Holy Ridge was sent a copy of the report, it failed to take adequate remedial measures. Subsequently, on 3 March 1999, LQS sent Holly Ridge a Notice of Violations of the Sedimentation Pollution Control Act of 1973, N.C.G.S. —— 113A-50 to -66 ("SPCA"), and Title 15A, Chapter 4 of the North Carolina Administrative Code. Under the version of the SPCA in effect at the time, "[a]ny person who violates any of the provisions of [the SPCA] . . . or who initiates or continues a land-disturbing activity for which an erosion control plan is required except in accordance with the terms, conditions, and provisions of an approved plan, is subject to a civil penalty." N.C.G.S. § 113A-64(a)(1) (1999). DENR "shall determine the amount of the civil penalty and shall notify the person who is assessed the civil penalty of the amount of the penalty and the reason for assessing the penalty." *Id.* § 113A-64(a)(2) (1999). On 9 July 1999, DENR assessed a civil penalty against Holly Ridge in the amount of $32,100.00 for violations of the SPCA.

Holly Ridge then submitted an erosion control permit application to DLR, but the application was disapproved on 13 August 1999. Shortly thereafter, several hurricanes hit the North Carolina coast in the vicinity of Morris Landing. After another inspection of the site on 21 October 1999, LQS on 10 November 1999 sent a Notice of Additional Violations of the SPCA to Holly Ridge. LQS conducted a further inspection on 16 December 1999, and on 5 January 2000, sent

Holly Ridge a Notice of Continuing Violations. On 5 March 2000, DENR assessed a second civil penalty in the amount of $118,000.00 for these violations, and on 3 April 2000, Holly Ridge petitioned the Office of Administrative Hearings ("OAH") for a contested case hearing to challenge this second penalty. *See id.* (stating the assessment notice "shall direct the violator to either pay the assessment or contest the assessment within 30 days by filing a petition for a contested case under Article 3 of Chapter 150B of the General Statutes").

On 31 October 2000, two months after discovery had closed in the contested case, the North Carolina Shellfish Growers Association ("Shellfish Growers") and the North Carolina Coastal Federation ("Coastal Federation") (collectively "intervenors") moved to intervene as parties.[1] That same day these organizations formally notified Holly Ridge that they intended to bring a federal lawsuit under the Clean Water Act against Holly Ridge based upon the same facts and circumstances that gave rise to the contested case. Intervenors asserted that they should be allowed to intervene in the case at bar to protect their interests in the related federal proceeding.[2] After reviewing intervenors' motion, Holly Ridge's objection, several affidavits, and arguments of counsel, the administrative law judge ("ALJ") on 15 November 2000 ordered that Shellfish Growers and Coastal Federation be "allowed to intervene in this contested case with the full rights of parties, pursuant to N.C. Rule of [Civil] Procedure 24(b), 24(a), and 26 NCAC 03.0117." The ALJ reopened discovery and set time limits for written discovery and depositions. After both Holly Ridge and DENR received separate continuances, the contested case was finally heard during late summer and fall of 2001.

On 20 December 2001, the ALJ issued a recommended decision that affirmed assessment of the 5 March 2000 civil penalty but reduced the amount to $104,180.00, and DENR subsequently issued a final agency decision adopting the ALJ's recommendations in full. Holly Ridge sought judicial review in New Hanover County Superior Court. When that court affirmed the final agency decision, Holly Ridge appealed to the Court of Appeals, which, in a divided opinion,

1. Shellfish Growers was founded in 1995 to represent the interests of North Carolinians involved in the shellfish industry, and Coastal Federation was founded in 1982 to promote better stewardship of coastal resources.

2. Shellfish Growers and Coastal Federation have since concluded their federal action. *N.C. Shellfish Growers Ass'n v. Holly Ridge Assocs.*, 278 F. Supp. 2d 654 (E.D.N.C. 2003); Consent Decree entered 19 October 2004.

affirmed the trial court's order. *Holly Ridge Assocs. v. N.C. Dep't of Env't & Natural Res.*, 176 N.C. App. 594, 627 S.E.2d 326 (2006).

Holly Ridge, appealing on the basis of the dissent, argues that private third parties do not have the right or authority to prosecute civil penalties under applicable North Carolina case law or statutes. Intervenors respond that intervention in this contested case was proper, citing N.C.G.S. § 150B-23(d), 26 NCAC 3 .0117, and this Court's prior holding in *State ex rel. Commissioner of Insurance v. North Carolina Rate Bureau*, 300 N.C. 460, 269 S.E.2d 538 (1980) (granting the ALJ discretion without limitation to allow intervention in a contested case).

An appellate court reviewing a superior court order regarding an agency decision " 'examines the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.' " *ACT-UP Triangle v. Comm'n for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (citation omitted). When, as here, "a petitioner contends the [agency's] decision was based on an error of law, de novo review is proper." *Mann Media, Inc. v. Randolph Cty. Planning Bd.*, 356 N.C. 1, 13, 565 S.E.2d 9, 17 (2002) (citations and internal quotation marks omitted).

[1] Intervention in a contested case hearing is controlled by interlocking statutes. "The Rules of Civil Procedure . . . shall apply in contested cases in the Office of Administrative Hearings (OAH) unless another specific statute or rule of the Office of Administrative Hearings provides otherwise." 26 NCAC 3 .0101(a) (June 2006). The North Carolina Rules of Civil Procedure provide two avenues for intervention: intervention as of right pursuant to Rule 24(a) and permissive intervention pursuant to Rule 24(b). N.C.G.S. § 1A-1, Rule 24 (2005) ("Rule 24"). Rule 24 has long been interpreted to mean that a successful intervenor under subsection (a) or (b) enters the case as a party. *See, e.g.*, *Leonard E. Warner, Inc. v. Nissan Motor Corp.*, 66 N.C. App. 73, 78, 311 S.E.2d 1, 4 (1984) (stating that a Rule 24 "intervenor is as much a party to the action as the original parties are and has rights equally as broad").

In addition to the Rules of Civil Procedure, the North Carolina Administrative Procedure Act ("APA") applies to this case. N.C.G.S. § 150B-1(e) (2005) ("The contested case provisions of this Chapter

apply to all agencies and all proceedings not expressly exempted from the Chapter."). Pursuant to section 150B-23(d):

> Any person may petition to become a party [in a contested case] by filing a motion to intervene in the manner provided in G.S. 1A-1, Rule 24. In addition, any person interested in a contested case may intervene and participate in that proceeding to the extent deemed appropriate by the administrative law judge.

Id. § 150B-23(d) (2005). We do not read the second sentence of this APA provision as overriding Rule 24. To the contrary, "statutes *in pari materia* should be construed together and harmonized whenever possible." *State v. Jones*, 359 N.C. 832, 836, 616 S.E.2d 496, 498 (2005) (citing *Williams v. Williams*, 299 N.C. 174, 180-81, 261 S.E.2d 849, 854 (1980)). Accordingly, a person or entity wishing to intervene in a contested case may choose one of two routes, either to intervene as a party or to participate in a lesser role at the discretion of the ALJ. To intervene with the full rights of a party, the applicant must satisfy the requirements of Rule 24. However, an applicant may instead elect to participate to a lesser extent as deemed appropriate by the ALJ, pursuant to N.C.G.S. § 150B-23(d). In this latter instance, the ALJ has broad discretion to allow such participation.

Intervenors contend our holding in *State ex rel. Commissioner of Insurance v. North Carolina Rate Bureau* requires the ALJ be given unlimited discretion in granting intervention. *See* 300 N.C. at 468, 269 S.E.2d at 543. In *Rate Bureau*, we explained that the second sentence of N.C.G.S. § 150B-23(d) provides the ALJ with unlimited discretion, broader than that granted by Rule 24, in allowing an entity to participate " 'to the extent deemed appropriate.' " *Id.* (citation omitted). Thus, an ALJ has the described discretion to allow participation to those who do not or cannot meet the requirements of Rule 24. However, our holding in that case does not mean that an ALJ has that same broad discretion in granting intervention *with full rights as parties*. Pursuant to the first sentence of N.C.G.S. § 150B-23(d), the ALJ's discretion in granting full rights as parties is limited to those intervenors who meet the conditions set out in Rule 24. Otherwise, a party seeking to intervene could avoid satisfying the requirements of Rule 24 and still obtain the full rights of parties under N.C.G.S. § 150B-23(d). We do not believe that the General Assembly intended to allow such an end run.

[2] Although the ALJ's order also cites 26 NCAC 3 .0117, we need not address separately this provision of the North Carolina Administra-

tive Code, which sets out the OAH's procedures and rules for intervention in a contested case. The statutory authority for 26 NCAC 3 .0117 is N.C.G.S. § 150B-23(d). 26 NCAC 3 .0117 (June 2006). Because an administrative rule must be "within the authority delegated to the agency by the General Assembly," N.C.G.S. § 150B-21.9(a)(1), the North Carolina Administrative Code cannot expand the scope of intervention beyond that set out in N.C.G.S. § 150B-23(d).

[3] We begin our analysis of the ALJ's order by considering Rule 24. As a preliminary matter, Rule 24 requires that a motion to intervene be timely. *Id.* § 1A-1, Rule 24. Here, Shellfish Growers and Coastal Federation moved to intervene two months after the close of discovery and one month before the contested case hearing was to begin. The ALJ determined that intervenors' motion, while made "later in the process than would be ideal," was timely. We share the ALJ's disquiet about the tardy filing but acknowledge that, in practice, "[a]s a general rule, motions to intervene made prior to trial are seldom denied." *State Employees' Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 264, 330 S.E.2d 645, 648 (1985).

The ALJ's order stated that intervention was granted both as of right pursuant to Rule 24(a) and by permission pursuant to Rule 24(b). Assuming without deciding that intervention in the same case is permissible under both sections of Rule 24, we examine each section in turn.

An applicant may seek to intervene as a matter of right pursuant to Rule 24(a) either on the basis of (1) a statute which confers an unconditional right to intervene or (2) an interest in the property or transaction which is the subject of the action when such interest was not adequately represented by the existing parties and would be impaired if intervention were not granted. N.C.G.S. § 1A-1, Rule 24(a). Shellfish Growers and Coastal Federation do not allege an unconditional statutory right to intervene in this case, nor do we find one in our statutes. Accordingly, we review the ALJ's grant of intervention under Rule 24(a) as pursuant to Rule 24(a)(2). We have held that:

> The prospective intervenor seeking such intervention as a matter of right under Rule 24(a)(2) must show that (1) it has a direct and immediate interest relating to the property or transaction, (2) denying intervention would result in a practical impairment of the protection of that interest, and (3) there is inadequate representation of that interest by existing parties.

Virmani v. Presbyterian Health Servs. Corp., 350 N.C. 449, 459, 515 S.E.2d 675, 683 (1999) (citations omitted); *see* N.C.G.S. § 1A-1, Rule 24(a)(2). We review de novo the grant of intervention of right under Rule 24(a). *Harvey Fertilizer & Gas Co. v. Pitt Cty.*, 153 N.C. App. 81, 89, 568 S.E.2d 923, 928 (2002).

Intervenors contend they have direct interests in the Morris Landing Tract because the ditching and draining of that property could result in excessive turbidity and sediment being transported to shellfish waters, which would jeopardize those waters and cause them to be closed to the taking of shellfish for human consumption. Intervenors assert they will suffer economic and environmental losses if Holly Ridge is found to be exempt from SPCA erosion control requirements, an issue to be decided during the contested case.

While intervenors' allegations of injury could be an appropriate basis for Shellfish Growers and Coastal Federation to participate in the proceedings as amici curiae to argue the reasons they believe Holly Ridge is not exempt from the SPCA or to file a private claim under the SPCA requesting damages, enforcement of the SPCA, injunctive relief, or some combination of these remedies, *see* N.C.G.S. § 113A-66 (explaining requirements for civil relief under SPCA), the injuries alleged are not the kind of direct interest required for intervention of right here. To satisfy the requirements for intervention as of right, Shellfish Growers and Coastal Federation must have a "direct and immediate interest relating to the property or transaction" that is the subject of the contested case. *See Virmani*, 350 N.C. at 459, 515 S.E.2d at 683. While intervenors have a general interest in an underlying issue of the contested case, whether Holly Ridge is exempt from the SPCA, they do not have a direct interest in the civil penalty imposed by DENR, which is the "property or transaction" at issue here. *See* N.C.G.S. § 113A-64(a)(5) (2005) ("The clear proceeds of civil penalties collected by [DENR] . . . shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2."). Accordingly, the ALJ erred by granting intervention as of right pursuant to Rule 24(a).

[4] The ALJ also allowed permissive intervention pursuant to Rule 24(b). An applicant may be granted permissive intervention when a statute allows such a conditional right or when the applicant's claim or defense has a question of law or fact in common with the main action. *Id.* § 1A-1, Rule 24(b). "[P]ermissive intervention by a private party under Rule 24(b) rests within the sound discretion of the trial

court and will not be disturbed on appeal unless there was an abuse of discretion." *Virmani*, 350 N.C. at 460, 515 S.E.2d at 683 (citations omitted).

"Rule 24(b)(2) expressly requires that in exercising discretion as to whether to allow permissive intervention, 'the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.' " *Id.* (quoting N.C.G.S. § 1A-1, Rule 24(b)). Holly Ridge commenced this contested case to assert that it was entitled to relief from civil penalties imposed by DENR. Consequently, Holly Ridge bore the burden of proving its land-disturbing activities were exempt from the SPCA and that DENR erred in calculating the amount of the penalty assessed. N.C.G.S. § 150B-23(a) (instructing the petitioner in a contested case to state "facts tending to establish" the named agency's error in assessing a civil penalty); *see Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 328, 507 S.E.2d 272, 281 (1998) (placing the burden of proof on the petitioner-employee in a contested case regarding the validity of a "just cause" termination); *Overcash v. N.C. Dep't of Env't & Natural Res.*, —— N.C. App. ——, ——, 635 S.E.2d 442, 444-45 (2006) ("[C]ontrolling case law places the burden of proof on the petitioner in an administrative contested case proceeding to prove that he is entitled to relief from an agency decision . . . ."), *disc. review denied*, 361 N.C. 220, 642 S.E.2d 445 (2007). DENR bore the burden of proving that Holly Ridge violated the SPCA.

In his order allowing Shellfish Growers and Coastal Federation to intervene as parties, the ALJ reopened discovery in the case.[3] Intervenors thereby obtained evidence they could use in their upcoming federal action against Holly Ridge. In addition, by intervening as respondents in this case, intervenors avoided having to shoulder alone the burden of proof they would have had if they had pursued a separate action under the SPCA against Holly Ridge, pursuant to N.C.G.S. § 113A-66. Balanced against these significant benefits to intervenors is the additional burden on Holly Ridge. The time and expense involved in a second, unanticipated round of discovery was prejudicial to Holly Ridge, as was the requirement that Holly Ridge meet its burden of proof against both intervenors and the State agency authorized to impose the civil penalty. In addition, DENR

3. Although the period set for discovery by the original scheduling order had passed, an ALJ has authority to allow discovery up until the first day of the contested case hearing and, if necessary, during the pendency of the hearing. *See* N.C.G.S. § 150B-33(b)(4) (2005); 26 NCAC 3 .0112(e) (June 2006).

received a windfall from Shellfish Growers and Coastal Federation's intervention because it obtained the benefit of additional discovery concerning Holly Ridge without having to provide Holy Ridge with any additional discovery and gained a partner in meeting its burden of proof that Holly Ridge violated the SPCA. Counsel for Holly Ridge stated during oral argument that Holly Ridge was compelled to change its trial strategy late in the process due to the evidence produced through this second round of discovery and intervenors' ability as full parties in the proceeding to cross-examine witnesses separately from DENR. In light of the resulting prejudice to Holly Ridge, we hold that the ALJ abused his discretion in allowing permissive intervention pursuant to Rule 24(b).

Our analysis is consistent with sound policy. To proceed in this contested case hearing as the party aggrieved, Holly Ridge had to allege that DENR had "ordered [Holly Ridge] to pay a . . . civil penalty . . . and that the agency: (1) Exceeded its authority or jurisdiction; (2) Acted erroneously; (3) Failed to use proper procedure; (4) Acted arbitrarily or capriciously; or (5) Failed to act as required by law or rule." N.C.G.S. § 150B-23(a). Because intervenors could not have imposed a civil penalty, they could not have been respondents in the first instance and are not properly participants in the case now as intervenor-respondents.

Our intent is not to change well-established law pertaining to intervention. While the laudable purpose of Rule 24 intervention is generally to promote efficiency and avoid delay and multiplicity of suits, we conclude that under the circumstances presented here, Shellfish Growers and Coastal Federation should not have been permitted to intervene as parties. Our holding does not mean that intervenors, who also brought suit as plaintiffs in federal court, lacked recourse in state court. As noted above, they could have sought to participate as amici curiae in the contested case proceeding. In addition, they could have filed a separate suit as private entities seeking redress under N.C.G.S. § 113A-66, or they could have sought participation pursuant to N.C.G.S. § 150B-23(d). However, under the circumstances presented here, intervenors were not entitled to the status accorded parties in a contested case.

Accordingly, we reverse the Court of Appeals and remand to that court for further remand to New Hanover County Superior Court for additional proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

Justices TIMMONS-GOODSON and HUDSON did not participate in the consideration or decision in this case.

STATE OF NORTH CAROLINA v. ANGELA DEBORAH LEWIS

No. 558PA04-2

(Filed 24 August 2007)

Constitutional Law— right to confrontation—unavailable witness—testimonial statements

A review in light of *Davis v. Washington*, U.S. (2006), revealed that defendant's right to confrontation was violated in an assault with a deadly weapon inflicting serious injury, robbery with a dangerous weapon, and misdemeanor breaking and entering case, and she is entitled to a new trial based on the erroneous admission of testimonial evidence including the unavailable witness victim's statements to an officer in her home and her photo identification of defendant to a detective while at a hospital, because: (1) at the time the victim made her statement to an officer, she faced no immediate threat to her person, the officer was seeking to determine what happened rather than what was happening, the interrogation bore the requisite degree of formality because the officer questioned the victim as part of his investigation and outside defendant's presence, the victim's statement in response to police questioning deliberately recounted how potentially criminal past events began and progressed, and the interrogation occurred some time after the events described were over; (2) the circumstances surrounding the officer's interrogation of the victim objectively indicated that no ongoing emergency existed and that the primary purpose of the interrogation was to establish or prove past events potentially relevant to a later criminal prosecution; (3) although defendant's location was unknown at the time of the interrogation, this fact does not in and of itself create an ongoing emergency; (4) it cannot be said beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained when the victim was the only eyewitness to the crimes; and (5) it cannot be said beyond a reasonable doubt

that the total evidence against defendant was so overwhelming that the error was harmless when the identification of defendant as the perpetrator of the crimes depended almost entirely on the victim's statements and photo identification. The parties are free to develop the issue of forfeiture during defendant's new trial.

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

On order of the United States Supreme Court entered 30 June 2006 granting defendant's petition for writ of certiorari to review our decision reported in 360 N.C. 1, 619 S.E.2d 830 (2005), vacating said judgment and remanding the case to this Court for further consideration in light of *Davis v. Washington*, —— U.S. ——, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Heard on remand in the Supreme Court 17 October 2006.

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

Paul M. Green for defendant-appellant.

NEWBY, Justice.

Having originally decided this case concerning defendant's Confrontation Clause rights through the general approach provided by the United States Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), we now address it under the specific guidance of *Davis v. Washington*, —— U.S. ——, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). We conclude that *Davis* controls and that defendant is entitled to a new trial, thereby modifying and affirming the decision of the Court of Appeals.

I. BACKGROUND

Defendant was indicted for assault with a deadly weapon inflicting serious injury on eighty-year-old Nellie Joyner Carlson ("Carlson"); felony breaking and entering into Carlson's residence at 1312 Glenwood Towers, a public housing development for senior citizens located in Raleigh, North Carolina; and robbery of currency valued at approximately three dollars from Carlson perpetrated through use of a dangerous weapon at the time of the assault. The charges were consolidated for trial on 22 and 27 January 2003. Carlson, the only witness to the crimes, died before defendant's trial, and the State relied in part on the testimony of Officer Narley Cashwell

("Cashwell") and Detective Mark Utley ("Utley") of the Raleigh Police Department regarding statements Carlson made during their investigation of the offenses.

At trial, Officer Cashwell testified that, after receiving a call at 5:43 p.m. on 22 November 2001 concerning a robbery, he went to Carlson's apartment. Upon his arrival, Officer Cashwell observed Carlson "sitting in a chair. . . . kind of hunched over." Before speaking with Carlson, he talked with Ida Griffin ("Griffin") and John Woods, two elderly friends and neighbors of Carlson. Officer Cashwell took a statement from Griffin that after several unsuccessful attempts to reach Carlson by telephone, she went to Carlson's apartment around 5:00 p.m. and found the door ajar, the apartment "tore up," and Carlson sitting in a chair. The exact timing of the incident between Carlson and defendant was not developed at trial, although the State posited it occurred during the afternoon sometime after 12:00 p.m. or 1:00 p.m. Officer Cashwell then spoke with Carlson, whose face and arms were badly bruised and swollen. Carlson complained of pain in her head, but seemed coherent and cognizant of her surroundings. She was able to get out of her chair and move around the room. At some point before taking a statement from Carlson, Officer Cashwell summoned Emergency Medical Services. Officer Cashwell testified, over defendant's objection, that in response to a series of questions he took the following statement from Carlson:

> I was in the hall opening my door. My door was locked. I—I was at the door and she slipped up behind me. She asked me for some money. I said what do I look like, the money tree. She said—she said, you don't like me because I'm black. I told her I don't like whatever color she was. I opened the door and she pushed me inside. She grabbed my hair and pulled my hair. She hit me with her fist. She also hit me with a flashlight, phone and my walking stick. She hit me in the ribs with my walking stick. She took a small brown metal tin that I had some change in. I also had some change on the table that she took. I know her. She comes up here all the time begging for money. She visits a man at the end of the hall. I don't know her name but he might.

Carlson also provided a brief description of her assailant.

Detective Utley testified that he was called to the scene later in the evening and was informed by Officer Cashwell that one of Carlson's neighbors, Burlee Kersey ("Kersey"), might know the name of the assailant. Detective Utley met with Kersey, who gave defend-

ant's name as the person Carlson had described. Detective Utley used defendant's picture and created a six-person photographic lineup that he took to Wake Medical Center, where Carlson was being treated for injuries sustained during the assault. He showed Carlson one photograph at a time and instructed her "the person that assaulted you or robbed you . . . may or may not be in this photographic lineup. This is something you would have to tell me." Detective Utley testified, over defendant's objection, that Carlson selected defendant's photograph and identified defendant as the person who assaulted and robbed her.

On 27 January 2003, the jury found defendant guilty of assault with a deadly weapon inflicting serious injury, robbery with a dangerous weapon, and misdemeanor breaking and entering, which is a lesser included offense of felonious breaking and entering. Defendant was sentenced to consecutive terms of 144 months minimum to 182 months maximum imprisonment for robbery with a dangerous weapon and 48 months minimum to 67 months maximum imprisonment for the remaining offenses. Defendant appealed, and on 19 October 2004 the Court of Appeals reversed defendant's convictions and awarded her a new trial, relying principally on *Crawford*, which was decided on 8 March 2004. The Court of Appeals did not reach defendant's argument that Carlson's statements to police should not have been admitted on hearsay grounds because it concluded the admissions of Carlson's statements violated defendant's rights under the Confrontation Clause. *State v. Lewis*, 166 N.C. App. 596, 600, 603 S.E.2d 559, 561 (2004). This Court allowed the State's petition for discretionary review, reversed the decision of the Court of Appeals, and remanded the case to that court for consideration of defendant's additional assignments of error. We concluded that under *Crawford*, Carlson's statements to Officer Cashwell were nontestimonial and thus their admission did not violate defendant's Confrontation Clause rights and that although Carlson's identification of defendant to Detective Utley was testimonial, its admission was harmless error because other "competent overwhelming evidence of defendant's guilt existed." *State v. Lewis*, 360 N.C. 1, 29, 619 S.E.2d 830, 848 (2005).

Defendant petitioned the United States Supreme Court for writ of certiorari. On 19 June 2006, that Court issued *Davis*, clarifying when statements made to police are testimonial. On 30 June 2006, that Court granted defendant's petition for writ of certiorari to review *Lewis*, vacated the judgment, and remanded the case to this Court for

further consideration in light of *Davis*. *Lewis v. North Carolina*, —— U.S. ——, 126 S. Ct. 2983, 165 L. Ed. 2d 985 (2006).

II. ANALYSIS

The Sixth Amendment to the United States Constitution provides in part that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. At the time of defendant's jury trial, *Ohio v. Roberts* governed Confrontation Clause analysis and allowed an unavailable witness's statement to be admitted against a criminal defendant if the statement bore "adequate 'indicia of reliability.' " 448 U.S. 56, 66, 100 S. Ct. 2531, 2539, 65 L. Ed. 2d 597, 608 (1980). While defendant's direct appeal was pending, the United States Supreme Court determined that *Roberts* provided an incorrect application of the Confrontation Clause. *Crawford*, 541 U.S. at 60, 124 S. Ct. at 1369, 158 L. Ed. 2d at 198. *Crawford* holds the Confrontation Clause forbids "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Id*. at 53-54, 124 S. Ct. at 1365, 158 L. Ed. 2d at 194. The Court declined to endorse a particular definition of testimonial statements because it found the statements at issue in *Crawford* "testimonial under even a narrow standard." *Id*. at 51-52, 68, 124 S. Ct. at 1364, 1374, 158 L. Ed. 2d at 193, 203.

In *Davis*, the Supreme Court consolidated two state cases, *Davis v. Washington* and *Hammon v. Indiana*, which required the Court to further define the testimonial nature of statements made to police officers. The relevant statements in *Davis* were made to a 911 operator by the victim as she was being attacked by her former boyfriend. *Davis*, —— U.S. at ——, 126 S. Ct. at 2270-71, 165 L. Ed. 2d at 234-35. As soon as the victim identified the defendant by name, the defendant ran out the door and left in a car. *Id*. at ——, 126 S. Ct. at 2271, 165 L. Ed. 2d at 234. The operator then asked the victim a series of questions about the defendant and the context of the assault. *Id*. at ——, 126 S. Ct. at 2271, 165 L. Ed. 2d at 234. The victim did not testify, and the trial court, over the defendant's objection, admitted the recording of the 911 call, redacted to remove references to a police visit to the residence two days earlier. *State v. Davis*, 154 Wash. 2d 291, 296 & n.1, 111 P.3d 844, 847 & n.1 (2005) (en banc). The Washington Court of Appeals in affirming defendant's conviction found no error. *State v. Davis*, 116 Wash. App. 81, 96, 64 P.3d 661, 669 (2003). The Supreme Court of Washington affirmed, concluding that the portion of the call

identifying the defendant was nontestimonial and that in light of other untainted evidence, admission of any other portions of the call that may have been testimonial was harmless error. *Davis*, 154 Wash. 2d at 305, 111 P.3d at 851.

In *Hammon*, two police officers arrived at the home of a reported domestic disturbance to find the victim "alone on the front porch, appearing " 'somewhat frightened,' " but she told them ' "nothing was the matter." ' " *Davis*, —— U.S. at ——, 126 S. Ct. at 2272, 165 L. Ed. 2d at 235. After entering the house with permission, the officers found the defendant in the kitchen. *Id.* at ——, 126 S. Ct. at 2272, 165 L. Ed. 2d at 235. One of the officers remained with the defendant, while the other officer questioned the victim, who gave a verbal description of what happened and then completed a form battery affidavit by hand. *Id.* at ——, 126 S. Ct. at 2272, 165 L. Ed. 2d at 235. The victim did not testify, and the trial court, over the defendant's objection, admitted the victim's affidavit and allowed the officer to testify as to what the victim told him. *Id.* at ——, 126 S. Ct. at 2272, 165 L. Ed. 2d at 236. The Indiana Court of Appeals affirmed in relevant part. *Hammon v. State*, 809 N.E.2d 945, 953 (Ind. App. 2004). The Supreme Court of Indiana affirming, concluded that the victim's oral statement was nontestimonial and that admission of the affidavit was harmless error. *Hammon v. State*, 829 N.E.2d 444, 458-59 (Ind. 2005).

In order to resolve the specific situations before it, the United States Supreme Court held:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, —— U.S. at ——, 126 S. Ct. at 2273-74, 165 L. Ed. 2d at 237.

After noting that it was only asked to consider the statements from the 911 call that identified the defendant in *Davis*, the Court concluded that the circumstances in that case objectively indicated the primary purpose of the investigation that elicited the identifying statements was to enable police assistance to meet an ongoing emergency. The Court cited several factors in support of its decision: (1) the victim "was speaking about events as they were actually happen-

ing, rather than describing past events"; (2) the victim was facing an ongoing emergency and her "call was plainly a call for help against bona fide physical threat"; (3) "the elicited statements were necessary to be able to resolve the present emergency"; (4) the interrogation was very informal and the victim's "frantic answers were provided over the phone, in an environment that was not tranquil, or even . . . safe." *Id.* at ——, 126 S. Ct. at 2276-77, 165 L. Ed. 2d at 240 (citations, emphasis, brackets, and internal quotation marks omitted). Further examining the victim's statements, the Court emphasized that "[s]he simply was not acting as a *witness*; she was not *testifying*. What she said was not 'a weaker substitute for live testimony' at trial." *Id.* at ——, 126 S. Ct. at 2277, 165 L. Ed. 2d at 240-41 (citation omitted). Moreover, "[n]o 'witness' goes into court to proclaim an emergency and seek help." *Id.* at ——, 126 S. Ct. at 2277, 165 L. Ed. 2d at 241. The Court was clear to limit its analysis to the early statements made by the victim identifying the defendant and not the later parts of the 911 call, adding in dicta that "[i]t could readily be maintained" the ongoing emergency ended when the defendant left the victim's presence and the victim's subsequent statements to the 911 operator were testimonial. *Id.* at ——, 126 S. Ct. at 2277, 165 L. Ed. 2d at 241.

Turning to *Hammon*, the Court determined that the victim's statements to police were testimonial. Notwithstanding that flames were coming out of the shattered glass door of the home's living room gas heating unit and that the defendant repeatedly tried to intervene in the victim's conversation with the police, the Court determined that "[t]here was no emergency in progress" and that "[i]t is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct." *Id.* at ——, 126 S. Ct. at 2278, 165 L. Ed. 2d at 242. Several factors influenced the Court's decision including: (1) when the police arrived the victim "told them that things were fine"; (2) the victim faced "no immediate threat to her person"; (3) the officer questioning the victim "was not seeking to determine . . . 'what is happening,' but rather 'what happened' "; (4) the interrogation was "formal enough" because it was conducted in a separate room away from the defendant as part of a police officer's investigation; (5) the victim's statement "deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed"; and (6) the interrogation occurred "some time after the events described were over." *Id.* at ——, 126 S. Ct. at 2278, 165 L. Ed. 2d at 242. These characteristics led the Court to conclude the victim's statements were "neither a cry for help

nor the provision of information enabling officers immediately to end a threatening situation," but were instead "an obvious substitute for live testimony, because they [did] precisely *what a witness does* on direct examination; they [were] inherently testimonial." *Id.* at ––, 126 S. Ct. at 2278-79, 165 L. Ed. 2d at 242-43.

Having revisited the case *sub judice* in light of *Davis*, we conclude that the United States Supreme Court's analysis of the circumstances surrounding the victim's statements in *Hammon* controls and that Carlson's statements to Officer Cashwell in her home and her photo identification of defendant to Detective Utley while at the hospital were testimonial. Because it is clear that Carlson's photo identification of defendant was testimonial, *see United States v. Billingslea*, 204 F. Appx. 856, 858 (11th Cir. 2006) (unpublished) (per curiam), our discussion will focus on Carlson's statements to Officer Cashwell.

The circumstances surrounding Carlson's statements to Officer Cashwell bear almost all the characteristics of those circumstances surrounding the victim's statements in *Hammon*. At the time she made her statement to Officer Cashwell: (1) Carlson faced no immediate threat to her person; (2) Officer Cashwell was seeking to determine "what happened" rather than "what is happening"; (3) the interrogation bore the requisite degree of formality because Officer Cashwell questioned Carlson as part of his investigation and outside defendant's presence; (4) Carlson's statement "deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed"; and (5) the interrogation occurred "some time after the events described were over." *See Davis*, –– U.S. at ––, 126 S. Ct. at 2278, 165 L. Ed. 2d at 242.

Conversely, the circumstances surrounding Carlson's statements bear little resemblance to those circumstances the United States Supreme Court found relevant in its analysis of the *Davis* facts. Carlson was not speaking about events as they actually happened. She was not plainly calling for help while encountering a bona fide physical threat or facing an ongoing emergency. Therefore, the statements elicited by Officer Cashwell were not necessary to resolve an emergency. Finally, the environment in which Carlson provided answers to Officer Cashwell's questions was not chaotic or unsafe. *See id.* at ––, 126 S. Ct. at 2276-77, 165 L. Ed. 2d at 240.

The circumstances surrounding Officer Cashwell's interrogation of Carlson objectively indicate that no ongoing emergency existed

and that the primary purpose of the interrogation was to establish or prove past events potentially relevant to a later criminal prosecution. The assault occurred hours before Carlson was discovered, and Carlson's neighbors were with her for a period of time before Officer Cashwell arrived. Although defendant's location was unknown at the time of the interrogation, *Davis* clearly indicates that this fact does not in and of itself create an ongoing emergency. *Id.* at ——, 126 S. Ct. at 2279 n.6, 165 L. Ed. 2d at 243 n.6. Carlson's statements were "neither a cry for help nor the provision of information enabling [Officer Cashwell] immediately to end a threatening situation." *Id.* at ——, 126 S. Ct. at 2279, 165 L. Ed. 2d at 243. Rather, Carlson "deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed." *Id.* at ——, 126 S. Ct. at 2278, 165 L. Ed. 2d at 242. As such, Carlson's statements to Officer Cashwell were testimonial, and admission of those statements at trial violated defendant's right to confrontation because she was not afforded an opportunity to cross-examine Carlson.

"A violation of the defendant's rights under the Constitution of the United States is prejudicial unless . . . it was harmless beyond a reasonable doubt." N.C.G.S. § 15A-1443(b) (2005). Because Carlson was the only eyewitness to the crimes, we cannot say "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705, 710 (1967). Likewise, because the identification of defendant as the perpetrator of the crimes depended almost entirely on Carlson's statements and photo identification, we cannot say beyond a reasonable doubt that the total evidence against defendant was so overwhelming that the error was harmless. *See e.g.*, *State v. Tirado*, 358 N.C. 551, 581, 599 S.E.2d 515, 536 (2004), *cert. denied*, 544 U.S. 909, 125 S. Ct. 1600, 161 L. Ed. 2d 285 (2005).

We briefly address the concept of forfeiture, which, in the context of the Confrontation Clause, means that "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." *Davis*, —— U.S. at ——, 126 S. Ct. at 2280, 165 L. Ed. 2d at 244. We are mindful that *Roberts* governed Confrontation Clause analysis at the time of defendant's original trial and the State had little incentive, if any, to argue forfeiture as "[t]he *Roberts* approach to the Confrontation Clause undoubtedly made recourse to [the forfeiture] doctrine less necessary, because prosecutors could show the 'reliability' of *ex parte* statements more easily than they could show the defendant's procurement of the witness's absence."

Id. at ——, 126 S. Ct. at 2280, 165 L. Ed. 2d at 244. Indeed, forfeiture has not been raised in this case because, at the court's request and in light of the *Roberts* framework, the State stipulated that Carlson's death was not a result of defendant's actions. Both *Crawford* and *Davis* explicitly reaffirmed that defendants can forfeit their Confrontation Clause rights because " 'the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds.' " *Id.* at ——, 126 S. Ct. at 2280, 165 L. Ed. 2d at 244 (citing *Crawford*, 541 U.S. at 62, 124 S. Ct. at 1370, 158 L. Ed. 2d at 199) (alteration in original)). The parties are, of course, free to develop this issue during defendant's new trial.

III. DISPOSITION

For the reasons stated above, the opinion of the Court of Appeals granting defendant a new trial is modified and affirmed.

MODIFIED AND AFFIRMED.

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

STATE OF NORTH CAROLINA v. JAAMALL DENARIS OGLESBY

No. 683PA05

(Filed 24 August 2007)

1. Appeal and Error— preservation of issues—incriminating statement—failure to renew objection at trial—failure to allege plain error—review under Appellate Rule 2

Although defendant failed to preserve the admissibility of his in-custody incriminating statement for review when he failed to renew his objection at trial following the denial of his pretrial motion *in limine* and failed to argue plain error because the amendment to N.C.G.S. § 8C-1, Rule 103(a)(2) is unconstitutional and Rule of Appellate Procedure 10(b)(1) thus applied, the Supreme Court exercised its discretion under Rule of Appellate Procedure 2 to review his contention where the amendment to Rule 103(a)(2) was presumed constitutional at the time of defendant's trial and defendant may have relied to his detriment on that law.

2. Confessions and Incriminating Statements— motion to suppress—juvenile—guardian

The trial court did not err in a first-degree murder, first-degree kidnapping, and attempted robbery with a firearm case by denying defendant juvenile's motion *in limine* to suppress the statement he made to law enforcement officers on 11 September 2002 under N.C.G.S. § 7B-2101 even though the juvenile had requested to telephone his aunt before making the statement, because: (1) defendant's aunt was not a guardian for purposes of the relevant statute, and an interpretation of the term "guardian" to encompass anything other than a relationship established by legal process would unjustifiably expand the plain and unambiguous meaning of the word; (2) from the testimony of defendant's aunt, it is apparent that she never had custody of defendant, that defendant had only stayed with her on occasion but not for any considerable length of time, and that she had never signed any school papers for him; and (3) the only evidence which could possibly support a contrary finding of fact is the aunt's testimony that she was a mother figure to defendant, which did not amount to the legal authority inherent in a guardian or custodial relationship.

3. Sentencing— *Blakely* error—harmless error review

The Court of Appeals' finding of *Blakely* error in aggravated sentences imposed for armed robberies, which it treated as structural error, is vacated and the cases are remanded to the Court of Appeals for harmless error review pursuant to *State v. Blackwell*, 361 N.C. 41 (2006).

Justice TIMMONS-GOODSON dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 174 N.C. App. 658, 622 S.E.2d 152 (2005), finding no error in part in judgments entered 28 May 2004 by Judge Catherine C. Eagles in Superior Court, Forsyth County, but remanding for resentencing on two counts of robbery with a dangerous weapon and to arrest judgment either on defendant's conviction for first-degree kidnapping or his conviction for attempted robbery with a dangerous weapon. Heard in the Supreme Court 7 May 2007.

Roy Cooper, Attorney General, by Jonathan P. Babb, Special Deputy Attorney General, for the State-appellant/appellee.

M. Gordon Widenhouse, Jr. for defendant-appellee/appellant.

BRADY, Justice.

In this case we determine whether an incriminating statement made by a juvenile during a custodial interrogation must be suppressed at trial, pursuant to N.C.G.S. § 7B-2101, when the juvenile had requested to telephone his aunt before making the statement. We hold that the statement need not be suppressed since defendant's aunt was not a "guardian" for purposes of the relevant statute. Accordingly, we affirm the decision of the Court of Appeals in part. We also vacate and remand the decision of the Court of Appeals in part for further proceedings.

BACKGROUND

On 7 July 2003, the Forsyth County Grand Jury returned a true bill of indictment charging defendant with first-degree murder, first-degree kidnapping, and attempted robbery with a firearm in connection with the fatal shooting of Scott Gray Jester during the early morning hours of 10 September 2002. Jester's body had been discovered later the same morning near an exit ramp off Interstate 40 in Winston-Salem after he had sustained three gunshot wounds to the back of the head. On 3 November 2003, the Forsyth County Grand Jury also returned a true bill of indictment charging defendant with two counts of robbery with a dangerous weapon in connection with the robberies of two convenience stores on 7 September 2002 and on 8 September 2002. On 24 May 2004, defendant entered a plea of guilty to the two charges of robbery with a dangerous weapon, but the trial court postponed sentencing on those convictions until after defendant's trial on the three remaining charges.

Also on 24 May 2004, and before defendant's trial, the trial court heard defendant's motion to suppress an incriminating statement he made to law enforcement officers with the Winston-Salem Police Department during a custodial interrogation which had taken place on 11 September 2002, when defendant was sixteen years old. Defendant's contention was that his juvenile rights were violated during the interrogation because the detectives did not cease questioning him when he requested to telephone his aunt and that therefore the statement should be suppressed. At the conclusion of the pretrial

hearing, the trial court made findings of fact that defendant's aunt was not his guardian or custodian under N.C.G.S. § 7B-2101 and that, although defendant requested to telephone his aunt, this "was not a time specific request," nor did defendant say he would not speak with the officers until he was allowed to place the call. Based upon these findings, the trial court concluded that there was no statutory or constitutional violation of defendant's juvenile rights and denied defendant's motion to suppress.

On 28 May 2004, the jury found defendant guilty of first-degree murder under the felony murder rule, first-degree kidnapping, and attempted robbery with a firearm. The trial court entered judgment consistent with the jury's verdict, and defendant was sentenced to life imprisonment without parole for the felony murder conviction and in the presumptive ranges for the first-degree kidnapping and attempted robbery convictions. Also on 28 May 2004, the trial court entered judgment on the two charges of robbery with a dangerous weapon consistent with defendant's plea of guilty. The trial court sentenced defendant in the aggravated range for both convictions, finding the same aggravating factor for both: That defendant joined with more than one other person in the commission of the offense and was not charged with committing a conspiracy.

Defendant appealed to the Court of Appeals, which in a unanimous 6 December 2005 opinion found no error in part and remanded the case in part for resentencing. The State and defendant petitioned this Court for discretionary review of the Court of Appeals decision, and these petitions were subsequently allowed on 19 December 2006. The State has raised one issue before the Court on appeal: Whether the trial court committed reversible *Blakely* error by sentencing defendant in the aggravated range for his two convictions for robbery with a dangerous weapon. Defendant has raised three issues: (1) whether the trial court erred in denying his motion to suppress; (2) whether the trial court erred in ordering that defendant be restrained by leg shackles; and (3) whether defendant's conviction for murder should be vacated because the indictment did not set forth all the elements of first-degree murder.

ANALYSIS

[1] We determine first whether the trial court erred in denying defendant's motion *in limine* to suppress the statement he made to law enforcement officers on 11 September 2002. The State contends that defendant should be barred from raising this issue on appeal

since he did not renew his objection at trial and has not argued, alternatively, that the trial court committed plain error by allowing the statement entered into evidence. *See* N.C. R. App. P. 10(c)(4)*; State v. Golphin*, 352 N.C. 364, 449, 533 S.E.2d 168, 224 (2000), *cert. denied*, 532 U.S. 931 (2001).

As the Court of Appeals indicated, defendant may have relied to his detriment on a 2003 amendment to the North Carolina Rules of Evidence, which provides in pertinent part: "Once the [trial] court makes a definitive ruling on the record admitting or excluding evidence, *either at or before trial*, a party need not renew an objection or offer of proof to preserve a claim of error for appeal." N.C.G.S. § 8C-1, Rule 103(a)(2) (2005) (emphasis added). There is a direct conflict between this evidentiary rule and North Carolina Rule of Appellate Procedure 10(b)(1), which this Court has consistently interpreted to provide that a trial court's evidentiary ruling on a pretrial motion is *not* sufficient to preserve the issue of admissibility for appeal unless a defendant renews the objection during trial. *See State v. Roache*, 358 N.C. 243, 292, 595 S.E.2d 381, 413 (2004); *State v. Grooms*, 353 N.C. 50, 65-66, 540 S.E.2d 713, 723 (2000), *cert. denied*, 534 U.S. 838 (2001); *Golphin*, 352 N.C. at 449, 533 S.E.2d at 224; *State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (per curiam); *State v. Bonnett*, 348 N.C. 417, 437, 502 S.E.2d 563, 576-77 (1998), *cert. denied*, 525 U.S. 1124 (1999). For this reason, our intermediate appellate court has already held that Rule of Evidence 103(a)(2) is unconstitutional to the extent it conflicts with Rule of Appellate Procedure 10(b)(1). *See State v. Tutt*, 171 N.C. App. 518, 524, 615 S.E.2d 688, 692-93 (2005).

The Constitution of North Carolina expressly vests in this Court the "exclusive authority to make rules of procedure and practice for the Appellate Division." N.C. Const. art. IV, § 13, cl. 2. Although Rule 103(a)(2) is contained in the Rules of Evidence, it is manifestly an attempt to govern the procedure and practice of the Appellate Division as it purports to determine which issues are preserved for appellate review. Accordingly, we hold that, to the extent it conflicts with Rule of Appellate Procedure 10(b)(1), Rule of Evidence 103(a)(2) must fail. *See State v. Stocks*, 319 N.C. 437, 439, 355 S.E.2d 492, 493 (1987); *State v. Bennett*, 308 N.C. 530, 535, 302 S.E.2d 786, 790 (1983); *State v. Elam*, 302 N.C. 157, 160, 273 S.E.2d 661, 664 (1981).

As a consequence of the invalidity of Rule 103(a)(2) and the application of Appellate Rule 10(b)(1) to the instant case, defendant

has failed to preserve the admissibility of his incriminating statement for appellate review. Nor has defendant argued that the trial court committed plain error. *See* N.C. R. App. P. 10(c)(4); *Golphin*, 352 N.C. at 449, 533 S.E.2d at 224. Nevertheless, as the Court of Appeals noted, the amendment to Rule 103(a)(2) was presumed constitutional at the time of defendant's trial, which was held before the Court of Appeals decision in *Tutt*. Given the harsh consequences of barring review when a defendant has relied to his detriment on existing law, we exercise this Court's discretion under Appellate Procedure Rule 2 "to prevent manifest injustice" to defendant and to review his contention on the merits. *See* N.C. R. App. P. 2; *see also Stocks*, 319 N.C. at 439, 355 S.E.2d at 493; *Elam*, 302 N.C. at 161, 273 S.E.2d at 664.

[2] An accused juvenile's rights during a custodial interrogation are codified in N.C.G.S. § 7B-2101, which states in part that "[a]ny juvenile in custody must be advised prior to questioning . . . [t]hat the juvenile has a right to have a parent, guardian, or custodian present during questioning." N.C.G.S. § 7B-2101(a)(3) (2005).[1] The statute further provides that "[i]f the juvenile indicates in any manner and at any stage of questioning . . . that the juvenile does not wish to be questioned further, the officer shall cease questioning." *Id.* § 7B-2101(c) (2005). Before allowing evidence to be admitted from a juvenile's custodial interrogation, a trial court is required to "find that the juvenile knowingly, willingly, and understandingly waived the juvenile's rights." *Id.* § 7B-2101(d) (2005). Defendant argues that the interrogation should have ceased when he requested to telephone his aunt, whom he asserts was effectively a "guardian," and that therefore the trial court erred under N.C.G.S. § 7B-2101(d) by denying his motion to suppress the incriminating statement he made shortly after his request was denied by the interrogating officers.

Clearly, defendant was entitled by N.C.G.S. § 7B-2101(a)(3) to have a "parent, guardian, or custodian" present during his interrogation. However, an "aunt" is not an enumerated relation in the statute, and an interpretation of the term "guardian" to encompass anything other than a relationship established by legal process would unjustifiably expand the plain and unambiguous meaning of the word. *See Black's Law Dictionary* 566 (abr. 7th ed. 2000) (defining "guardian"

1. N.C.G.S. § 7B-101 defines "juvenile" to mean "[a] person who has not reached the person's eighteenth birthday and is not married, emancipated, or a member of the armed forces of the United States." As a result, N.C.G.S. § 7B-2101 applies to defendant even though he was tried as an adult, notwithstanding the heading of Chapter 7B, Article 21, which reads: "Law Enforcement Procedures in Delinquency Proceedings." *See State v. Fincher*, 309 N.C. 1, 9-11, 305 S.E.2d 685, 691-92 (1983).

as "[o]ne who has the *legal* authority and duty to care for another's person or property" (emphasis added)). We are bound by well-accepted rules of statutory construction to give effect to this plain and unambiguous meaning and we therefore decline any attempt to ascertain a contrary legislative intent. *See, e.g.*, *In re A.R.G.*, 361 N.C. 392, 396, 646 S.E.2d 349, 351 (2007).

The trial court made a finding of fact that defendant's aunt was not his guardian or custodian. From the testimony of defendant's aunt, it is apparent that she never had custody of defendant, that defendant had only stayed with her on occasion but not for any considerable length of time, and that she had never signed any school papers for him. As the trial court's finding of fact is supported by competent evidence, it cannot be disturbed on appeal. *See State v. Ripley*, 360 N.C. 333, 339, 626 S.E.2d 289, 293 (2006). Moreover, the only evidence which could possibly support a contrary finding of fact is the aunt's testimony that she was "a mother figure" to defendant. However, this does not amount to the *legal* authority inherent in a guardian or custodial relationship. Defendant's aunt was clearly not a statutory person, and defendant therefore had no right to have her present during questioning. Thus, we affirm in part the decision of the Court of Appeals.

[3] However, we vacate the portion of the Court of Appeals decision in which that court found *Blakely* error in defendant's aggravated sentences for robbery with a dangerous weapon, which it treated as structural error, and remand to the Court of Appeals for harmless error review pursuant to *State v. Blackwell*, 361 N.C. 41, 42, 49-51, 638 S.E.2d 452, 453, 458-59 (2006), *cert. denied*, —— U.S. ——, 127 S. Ct. 2281, 167 L. Ed. 2d 1114 (2007). As to the additional issues presented in defendant's petition, we conclude that discretionary review was improvidently allowed.

AFFIRMED IN PART; VACATED AND REMANDED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

Justice TIMMONS-GOODSON dissenting.

Because I believe that the majority erroneously elevates form over substance in casting the dispositive issue in this case as the subsequently determined legal status of the aunt instead of the contemporaneous state of mind of the juvenile and police officers during interrogation, I respectfully dissent.

Our legislature has provided that "[a]ny juvenile in custody must be advised prior to questioning . . . [t]hat the juvenile has a right to have a parent, guardian, or custodian present during questioning[.]" N.C.G.S. § 7B-2101 (2005). Juveniles are awarded special consideration in light of their youth and limited life experiences. *In re Stallings*, 318 N.C. 565, 576, 350 S.E.2d 327, 333 (1986) (Martin, J., dissenting) ("Our criminal justice system recognizes that their immaturity and vulnerability sometimes warrant protections well beyond those afforded adults. It is primarily for that reason that a separate juvenile code with separate juvenile procedures exists.").

This is why our courts have consistently recognized that " '[t]he [S]tate has a *greater* duty to protect the rights of a respondent in a juvenile proceeding than in a criminal prosecution.' " *In re T.E.F.*, 359 N.C. 570, 575, 614 S.E.2d 296, 299 (2005) *(*quoting *State v. Fincher*, 309 N.C. 1, 24, 305 S.E.2d 685, 699 (1983) (Harry Martin, J., concurring) (alterations in original)); *see also In re Meyers*, 25 N.C. App. 555, 558, 214 S.E.2d 268, 270 (1975) (stating that in a juvenile proceeding, unlike an ordinary criminal proceeding, the burden upon the State to see that a juvenile's rights are protected is increased rather than decreased). Though not paramount, age is an important factor in assessing the possible violation of constitutional or statutory rights. *See id.* ("Although a confession is not inadmissible merely because the person making it is a minor, to be admissible it must have been voluntary, and the age of the person confessing is an additional factor to be considered in determining voluntariness."(internal citation omitted)).

"Once a juvenile defendant has requested the presence of a parent, or any one of the parties listed in the statute, defendant may not be interrogated further 'until [counsel, parent, guardian, or custodian] has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.' " *State v. Branham*, 153 N.C. App. 91, 95, 569 S.E.2d 24, 27 (2002) (quoting *Michigan v. Jackson*, 475 U.S. 625, 626, 106 S. Ct. 1404, 1406, 89 L. Ed. 2d 631, 636 (1986) (alterations in original)). In the past, our appellate courts have held that contravention of these juvenile rights is akin to *Miranda* violations. *State v. Smith*, 317 N.C. 100, 106, 343 S.E.2d 518, 521 (1986), *abrogated on other grounds by State v. Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (2001). In *Smith*, we applied the rule requiring all interrogation to cease when an adult defendant requests an attorney to a juvenile who requests an attorney, parent, guardian, or custodian. *Id; see also State v. Hunt*, 64 N.C.

App. 81, 86, 306 S.E.2d 846, 850 (holding that juvenile defendant's *Miranda* rights were violated when the police continued to interrogate him after he requested that his parents be present), *disc. rev. denied*, 309 N.C. 824, 310 S.E.2d 354 (1983). The burden rests on the State to show the juvenile defendant made a knowing and intelligent waiver of such *Miranda* rights. *State v. Miller*, 344 N.C. 658, 666, 477 S.E.2d 915, 920 (1996) (citing *State v. Simpson*, 314 N.C. 359, 367, 334 S.E.2d 53, 59 (1985)).

In evaluating whether such a waiver was knowing and intelligent, we consider the relevant state of mind of reasonable actors during the situation, and not with the benefit of hindsight. *See State v. Davis*, 305 N.C. 400, 410, 290 S.E.2d 574, 580-81 (1982) (describing the test for determining whether someone is in police custody as whether a "reasonable person in the suspect's position would believe that he had been taken into custody or otherwise deprived of his freedom of action was deprived in any significant way" (citing *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980))). Seen in this light, the detectives had no way of knowing the legal status of the juvenile's aunt at the time of the taped confession.

It is telling that even appellate courts have not always construed the statute as narrowly as the majority seems to indicate is required. In a case in which the shoe was on the other foot and the State sought to have an aunt recognized as complying with this statute in an analogous situation, the Court of Appeals held that an aunt constituted a guardian for the purpose of admitting a defendant's confession, even though she did not fall into any of the statute's enumerated categories. *State v. Jones*, 147 N.C. App. 527, 539-40, 556 S.E.2d 644, 652 (2001) (finding aunt was guardian "within the spirit and meaning of the Juvenile Code," even though she did not meet the legal definition set therein or fit into the enumerated categories), *disc. rev. denied and appeal dismissed*, 355 N.C. 351, 562 S.E.2d 427 (2002).

From a policy perspective, we have long held that whether evidence is admitted or excluded under *Miranda* depends on whether exclusion of the evidence would deter improper conduct by law enforcement. *State v. May*, 334 N.C. 609, 613, 434 S.E.2d 180, 182 (1993), *cert. denied*, 510 U.S. 1198, 114 S. Ct. 1310, 127 L. Ed. 2d 661 (1994). The majority's holding effectively discourages police officers from complying with the strictures of the Juvenile Code. Since it is uncontested that (a) the juvenile's confession in this case would be inadmissible if the individual requested had fallen into the requisite

category, and (b) the detectives were not aware of the aunt's precise legal status when they chose to press ahead in their interrogation, policy considerations also favor excluding the taped confession. Therefore, I would hold the confession inadmissible.[2]

A test centering on the circumstances of the aunt *as known to the detectives during the interrogation*, rather than following a subsequent legal determination, fits in better with the structure and stated objectives of the Juvenile Code.[3] Such a test is more aptly geared to our oft-stated maxim that the burden of proof to show that the juvenile made a knowing and intelligent waiver of his rights lies with the State. *Miller*, 344 N.C. at 666, 477 S.E.2d at 920. Taking the majority's reasoning to its logical conclusion, police could decline a defendant's request for counsel and still use his subsequent statements as evidence if the requested attorney turned out to have unrelated professional licensing problems such as a shortfall in CLE credits or delinquency in Bar dues. Such a scenario would be self-evidently problematic. Yet I believe it is analytically indistinguishable from the majority's current holding.

Since I believe the majority erroneously shifts the pivotal test from the contemporaneous knowledge of the police officers to the subsequently ascertained legal status of the aunt, I cannot agree with the majority's reasoning as currently stated, and respectfully dissent.

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2. The majority's holding is likely to have wider repercussions because of the large number of North Carolina minors in nontraditional households. *See* Child Welfare League of Am., *North Carolina's Children in 2007*, available at http://www.cwla.org/advocacy/statefactsheets/2007/northcarolina.pdf (last visited Aug. 20, 2007) (21.7% of the 10,077 children in North Carolina not in parental custody on 30 September 2004 resided with relatives.)

3. The need for special protection is wellfounded since at least two empirical studies show that "the vast majority of juveniles are simply incapable of understanding their *Miranda* rights and the meaning of waiving those rights." Trey Meyer, Comment, *Testing the Validity of Confessions and Waivers of the Self-Incrimination Privilege in the Juvenile Courts*, 47 U. Kan. L. Rev. 1035, 1050-51 (1999).

IN RE ROYSTER

[361 N.C. 560 (2007)]

IN RE: INQUIRY CONCERNING A JUDGE, NO. 05-158
THEODORE S. ROYSTER, JR., RESPONDENT

No. 608A06

(Filed 24 August 2007)

Judges— censure—*ex parte* hearing and order

A district court judge is censured by the Supreme Court for conduct in violation of Canons 1, 2A and 3A(4) of the N.C. Code of Judicial Conduct for participating in an *ex parte* conference with a defendant's attorney and entering an order as a result thereof, without notice to plaintiff and without taking evidence, striking an order entered by another district court judge which had found defendant in contempt for failure to comply with child support orders and had ordered his arrest.

This matter is before the Court pursuant to N.C.G.S. § 7A-376 upon a recommendation by the Judicial Standards Commission entered 2 November 2006 that respondent Theodore S. Royster, Jr., a Judge of the General Court of Justice, District Court Division, Twenty-Second Judicial District of the State of North Carolina, be censured for conduct in violation of Canons 1, 2A, and 3A(4) of the North Carolina Code of Judicial Conduct and for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376. Heard in the Supreme Court 10 April 2007.

Robert C. Montgomery and Amy C. Kunstling, Special Counsels, for the Judicial Standards Commission.

Law Offices of J. Calvin Cunningham, by J. Calvin Cunningham and Nicholas D. Wilson, for respondent.

ORDER OF CENSURE

On 2 November 2006, the Judicial Standards Commission (Commission) recommended that the Supreme Court censure respondent for participating in an *ex parte* conference with a defendant's attorney and entering an order as a result thereof, without notice to the plaintiff and without taking evidence.

On 17 May 2006, the Commission's counsel filed a complaint alleging that respondent "engaged in conduct inappropriate to his judicial office." In particular, it alleged that on 13 July 2005, respond-

ent participated in an *ex parte* conference with an attorney representing a defendant in an action in Iredell County District Court to recover unpaid child support. As a result of this conference, respondent entered an order striking an earlier order which had been entered by a different district court judge and had found defendant in contempt. The complaint to the Commission further alleged that respondent's actions "constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute, in violation of N.C.G.S. § 7A-376, and are in violation of Canons 1, 2A, and 3A(4) of the North Carolina Code of Judicial Conduct." Respondent did not file an answer, but sent a letter to the Commission while the matter was under investigation stating that he believed the trial court has inherent authority to enter *ex parte* orders "to prevent irreparable harm to an individual as well as to prevent a possible violation of an individual's civil rights and liberty."

On 2 November 2006, the Commission filed its recommendation, which included the following findings of fact made at its 6 October 2006 hearing on the complaint:

> 2. Tanya (Moore) Bennett is the plaintiff in an action pending in the District Court Division of the General Court of Justice, Iredell County, entitled *Tanya (Moore) Bennett v. Lester Wayne Moore, II*, 01CVD822, in which Ms. Bennett sought, *inter alia*, child support for the parties' two minor children. Throughout the course of the proceeding, Ms. Bennett has been required to file numerous motions due to Mr. Moore's noncompliance with child support orders. On many of those occasions, she has appeared *pro se*.
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> 3. On or about 20 April 2005, Ms. Bennett filed a Motion to Show Cause alleging Mr. Moore was in arrears more than $29,000.00; an order was issued by the Assistant Clerk of Superior Court of Iredell County ordering Mr. Moore to appear on 23 May 2005 and show cause why he should not be found in contempt for his failure to comply with the Court's child support order. The motion and order were served on Mr. Moore by registered or certified mail on 29 April 2005.
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> 4. A hearing was held on Ms. Bennett's motion before the Honorable James M. Honeycutt on 23 May 2005. Ms. Bennett was present and appeared *pro se*. Mr. Moore was neither present nor represented. After hearing evidence, Judge Honeycutt entered an order finding that Mr. Moore had been properly served with the

motion, was residing in Kentucky, and had failed to pay child support as ordered. Judge Honeycutt concluded that Mr. Moore was in contempt for failing to pay child support and ordered that he pay ongoing child support for the months of June, July, and August 2004, pay toward his arrearage on a monthly basis, and that he "purge himself of contempt by paying the sum of $1741.35 on or before the 30th day after the filing of this order . . . [and] by paying each monthly payment toward his arrearage in the sum of $580.45. If defendant fails to make any of these payments, on application of the plaintiff, an order for arrest shall issue for [Mr. Moore] and he shall be held in the Iredell County Jail until he purges himself of contempt by paying his arrearage in full."

5. On 28 June 2005, Judge Honeycutt entered an order in which he found that Mr. Moore had failed to make the payment ordered in the 23 May 2005 order, adjudged Mr. Moore in willful contempt, and issued an order for Mr. Moore's arrest and commitment to the Iredell County Jail until "he may purge himself by paying his arrearages in full, $18,530.61."

6. On 13 July 2005, attorney William M. Willis, IV filed a motion to strike Judge Honeycutt's order for Mr. Moore's arrest and to set aside Judge Honeycutt's orders adjudging Mr. Moore to be in contempt. The motion was not served on Ms. Bennett until 22 July 2005.

7. Notwithstanding Mr. Willis's failure to serve the motion upon Ms[.] Bennett, he presented the motion to respondent *ex parte* on 13 July 2005. Respondent engaged in an[]*ex parte* conference with Mr. Willis on 13 July 2005 and entered an order striking the 28 June 2005 order of Judge Honeycutt adjudicating Mr. Moore to be in contempt and recalling the order for Mr. Moore's arrest.

The Commission also found that "[t]he relief requested by Mr. Willis and granted by Judge Royster was not of a nature properly considered *ex parte* under the laws of North Carolina." Based on these findings, the Commission concluded "on the basis of clear and convincing evidence that respondent's conduct constitutes conduct in violation of Canons 1, 2A and 3A(4) of the North Carolina Code of Judicial Conduct and is conduct prejudicial to the administration of justice which brings the judicial office into disrepute."

In his brief to this Court, respondent does not deny that he entered the *ex parte* order without notice to the plaintiff and without

taking evidence. Instead, he argues that because he believed that the defendant did not have proper notice of the previous hearings, he was obligated to protect the defendant's due process rights by striking the earlier order. Respondent also contends that his actions were allowed by N.C.G.S. § 50-13.5, which permits *ex parte* orders for temporary custody and support of minor children pending the issuance of a permanent order. N.C.G.S. § 50-13.5(d)(2) (2005); *Regan v. Smith*, 131 N.C. App. 851, 852-53, 509 S.E.2d 452, 454 (1998). Although the underlying facts are not in dispute, the pivotal issue is whether an *ex parte* order was appropriate in these circumstances.

It is well established that one superior court judge may not ordinarily modify, overrule, or change the judgment or order of another superior court judge previously entered in the same case. *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972). This rule also applies to district court judges. *See Town of Sylva v. Gibson*, 51 N.C. App. 545, 548, 277 S.E.2d 115, 117, *appeal dismissed and disc. review denied*, 303 N.C. 319, 281 S.E.2d 659 (1981).

In the past this Court has emphasized that the *ex parte* disposition of a case can amount to conduct prejudicial to the administration of justice, which can, in turn, potentially bring the judicial office into disrepute. *In re Martin*, 295 N.C. 291, 303, 245 S.E.2d 766, 773 (1978). Respondent here argues that his actions were driven entirely by the desire to see justice done. However, a determination of disrepute "depends not so much upon the judge's motives but more on the conduct itself, the results thereof, and the impact such conduct might reasonably have upon knowledgeable observers." *In re Crutchfield*, 289 N.C. 597, 603, 223 S.E.2d 822, 826 (1975). Any conduct prejudicial to the administration of justice warrants censure, although the conduct may not be as serious as wilful misconduct. *In re Peoples*, 296 N.C. 109, 157, 250 S.E.2d 890, 918 (1978).

Thus, the issue here concerns respondent's conduct, not his motives. Canon 3A(4) specifically states that a "judge should accord to every person . . . or the person's lawyer, full right to be heard and, except as authorized by law, neither knowingly initiate nor knowingly consider *ex parte* or other communications concerning a pending proceeding." Respondent's conduct runs counter to this Canon. His action in setting aside Judge Honeycutt's order in an *ex parte* proceeding enabled Mr. Moore to evade his child support obligations. Mr. Moore has subsequently vanished, causing problems to the other party, who had obtained an order in her favor. Seen in this light, we conclude that respondent has engaged in conduct prejudicial to the

administration of justice, so as to bring his judicial office into disrepute, regardless of his good intentions. *In re Nowell*, 293 N.C. 235, 249-50, 237 S.E.2d 246, 255 (1977).

Although recommendations of the Judicial Standards Commission are not binding on this Court, *Nowell*, 293 N.C. at 244, 237 S.E.2d at 252, this Court "may adopt the Commission's findings of fact if they are supported by clear and convincing evidence." *In re Hayes*, 353 N.C. 511, 514, 546 S.E.2d 376, 378 (2001), *cause dismissed*, 356 N.C. 389, 584 S.E.2d 260 (2002). After carefully reviewing the record and transcript, we conclude that the Commission's findings are supported by clear and convincing evidence. We further conclude that respondent's actions constitute conduct prejudicial to the administration of justice that brings the judicial office into disrepute, N.C.G.S. § 7A-376, and that respondent's conduct violates Canons 1, 2A, and 3A(4) of the North Carolina Code of Judicial Conduct.

Therefore, pursuant to N.C.G.S. §§ 7A-376 and 7A-377 and Rule 3 of the Rules for Supreme Court Review of Recommendations of the Judicial Standards Commission, it is ordered that respondent Theodore S. Royster, Jr. be censured for conduct prejudicial to the administration of justice that brings the judicial office into disrepute in violation of N.C.G.S. § 7A-376 and which violates Canons 1, 2A, and 3A(4).

By order of the Court in Conference, this 23rd day of August, 2007.

s/Hudson, J.
For the Court

STATE OF NORTH CAROLINA v. CURLEY JACOBS AND BRUCE LEE MCMILLIAN

No. 617A05

(Filed 24 August 2007)

1. Indigent Defendants— court-appointed attorney—taxation of fees—subject matter jurisdiction

The Court of Appeals had no subject matter jurisdiction on the issue of taxation of attorney fees against defendant for his court-appointed attorney where the record contained no judgment requiring defendant to pay attorney fees.

2. Sentencing— *Blakely* error—remand—harmless error issue

This case is remanded to the Court of Appeals for consideration of the issue as to whether *Blakely* error in sentencing was harmless beyond a reasonable doubt.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 174 N.C. App. 1, 620 S.E.2d 204 (2005), finding no prejudicial error in a trial which resulted in judgments entered by Judge Gary L. Locklear against defendant Jacobs on 29 September 2003 in Superior Court, Robeson County, but vacating the trial court's imposition of attorney fees and remanding the case for resentencing. On 19 December 2006, the Supreme Court allowed the State's petition for discretionary review as to an additional issue. Heard in the Supreme Court 8 May 2007.

Roy Cooper, Attorney General, by Alexander McC. Peters, Special Deputy Attorney General, for the State-appellant.

C. Scott Holmes for defendant-appellee Curley Jacobs.

PER CURIAM.

The underlying facts of this case appear in the Court of Appeals opinion. *State v. Jacobs*, 174 N.C. App. 1, 620 S.E.2d 204 (2005). Both defendants were convicted in Superior Court on charges of impersonating a law enforcement officer, robbery with a dangerous weapon, first-degree burglary, and two counts of second-degree kidnapping. The Court of Appeals found no prejudicial error in the trial of either defendant. As to defendant Jacobs only, the Court of Appeals vacated the imposition of attorney fees, *id.* at 21, 620 S.E.2d at 217, and remanded for resentencing due to *Blakely* error, *id.* at 20,

620 S.E.2d at 216. (citing, *inter alia*, *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403 (2004); *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2006), *withdrawn*, 360 N.C. 569, 635 S.E.2d 899 (2006)). The dissent addressed the attorney fees issue only. *Id.* at 29-30, 620 S.E.2d at 212 (Levinson, J., concurring in part and dissenting in part). We allowed the State's petition for discretionary review on the sentencing issue.

[1] The Court of Appeals majority vacated the trial court's taxing of attorney fees against defendant because it concluded that the trial court could not properly enter judgment for attorney fees without giving defendant notice and an opportunity to be heard on that issue, pursuant to N.C.G.S. § 7A-455. *Id.* at 20-21, 620 S.E.2d at 216-17 (majority). The dissent noted that the record contained no judgment requiring defendant to pay attorney fees, but that the trial judge merely indicated his intention to enter a future order assessing attorney fees. *Id.* at 30, 620 S.E.2d at 222 (Levinson, J., concurring in part and dissenting in part). We conclude that because there is no civil judgment in the record ordering defendant to pay attorney fees, the Court of Appeals had no subject matter jurisdiction on this issue. *See* N.C. R. App. P. 3(a); *id.* 9(a)(1)(h). Thus, as to the State's appeal of right based on the dissent on this issue, we vacate the majority opinion.

[2] As to the State's argument, heard pursuant to our discretionary review, that the Court of Appeals erred in reversing and remanding for resentencing for *Blakely* error, we reverse. The Court of Appeals concluded that the trial court's finding of aggravating factors not determined by the jury required reversal and remand for resentencing. The State argues that any *Blakely* error was harmless beyond a reasonable doubt. The Court of Appeals issued its opinion prior to this Court's decision in *State v. Blackwell*, 361 N.C. 41, 638 S.E.2d 452 (2006), *cert. denied*, —— U.S ——, 167 L. Ed. 2d 1114 (2007), in which we concluded that *Blakely* error, if it exists, is not structural but is subject to harmless error analysis. Thus, we reverse and remand for the Court of Appeals to consider whether any *Blakely* error here was harmless beyond a reasonable doubt, in light of our decision in *Blackwell*.

VACATED IN PART; REVERSED IN PART AND REMANDED.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

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

Allstate Ins. Co. v. Stilwell Case below: 181 N.C. App. 141	No. 062P07	Def's (Elizabeth Stilwell) PDR Under N.C.G.S. § 7A-31 (COA05-1393-2)	Denied 08/23/07 **Martin, J., and Hudson, J., Recused**
Braswell v. St. Paul Mercury Ins. Co. Case below: 181 N.C. App. 605	No. 129P07	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA06-157) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 08/23/07 2. Dismissed as Moot 08/23/07
Britt v. May Davis Grp., Inc. Case below: 182 N.C. App. 175	No. 164P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-782)	Denied 08/23/07
Business Cabling, Inc. v. Yokeley Case below: 182 N.C. App. — (17 April 2007)	No. 233P07	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-1255)	Denied 08/23/07
Byrd v. Ecofibers, Inc. Case below: 182 N.C. App. — (17 April 2007)	No. 229P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-807)	Denied 08/23/07
Clemmons v. Securitas, Inc. Case below: 183 N.C. App. — (5 June 2007)	No. 324P07	Defs' Motion for Temporary Stay (COA06-1346)	Denied 07/11/07
Foster v. Crandell Case below: 181 N.C. App. 152	No. 073P07	1. Defs' Motion for Temporary Stay (COA05-1140) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed 02/09/07 **361 N.C. 352** Stay dissolved 08/23/07 2. Denied 08/23/07 3. Denied 08/23/07
Gilbert v. N.C. State Bar Case below: 180 N.C. App. 690	No. 041P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-194)	Allowed 08/23/07

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

In re C.N. & J.N. Case below: 183 N.C. App. —— (5 June 2007)	No. 292P07	Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA07-49)	Denied 08/23/07
In re D.S.M. Case below: 182 N.C. App. —— (17 April 2007)	No. 236P07	Respondent's (Juvenile) PDR Under N.C.G.S. § 7A-31 (COA06-1245)	Denied 08/23/07
In re Estate of Rand Case below: 183 N.C. App. —— (5 June 2007)	No. 314P07	Petitioner's (Melanie Shepard) PDR Under N.C.G.S. § 7A-31 (COA06-868)	Denied 08/23/07
In re Mi.T., Kys.T., Ma.T., & Kye.T. Case below: 182 N.C. App. 759	No. 148P07	Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA06-1214)	Denied 08/23/07
In re T.J.D.W. & J.J.W. Case below: 182 N.C. App. 394	No. 202A07	1. Respondent's (Mother) NOA (Dissent) (COA06-1323) 2. Respondent's (Mother) PDR as to Additional Issues	1. —— 2. Denied 08/23/07
In re Will of Turner Case below: 184 N.C. App. —— (19 June 2007)	No. 360P07	Propounder's (Marsha Case-Young) PDR Pursuant to N.C.G.S. § 7A-31 (COA06-1105)	Denied 08/23/07 **Martin, J., Recused**
Jones v. Harrelson & Smith Contrs., LLC Case below: 180 N.C. App. 478	No. 036A07	1. Plt's NOA (Dissent) (COA05-1183) 2. Plt's PDR as to Additional Issues 3. Plt's Counsel's Motion to Withdraw	1. —— 2. Denied 08/23/07 3. Allowed 08/23/07
Kessler v. Shimp Case below: 181 N.C. App. 753	No. 207P07	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-736)	Denied 08/23/07
Lovette v. York Case below: 183 N.C. App. —— (5 June 2007)	No. 312P07	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-1211)	Denied 08/23/07

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

Miller v. Progressive Am. Ins. Co. Case below: 180 N.C. App. 475	No. 049P07	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA06-453) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 08/23/07 2. Dismissed as Moot 08/23/07
N.C. Alliance for Transp. Reform, Inc. v. N.C. Dep't of Transp. Case below: 183 N.C. App. —— (5 June 2007)	No. 308P07	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-490)	Denied 08/23/07
Richardson v. Bank of Am., N.A. Case below: 182 N.C. App. —— (17 April 2007)	No. 240PA07	1. Def's (NationsCredit) PDR Under N.C.G.S. 7A-31 (COA06-211) 2. Plts' Conditional PDR Under N.C.G.S. 7A-31	1. Allowed as to Def's issues 1 and 2 only 07/19/07 2. Denied 07/19/07
Sandy Mush Props., Inc. v. Rutherford Cty. Case below: 181 N.C. App. 224	No. 067P07	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA06-68) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed for the limited purpose of remanding this case to the Court of Appeals for reconsideration of its decision in light of *Robins v. Town of Hillsborough*, 361 N.C. 193, 639 S.E.2d 421 (2007) 08/23/07 2. Dismissed as moot 08/23/07
Sisk v. City of Greensboro Case below: 183 N.C. App. —— (5 June 2007)	No. 305P07	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA06-1253) 2. Def's Motion to Strike Plt's Amendment to PDR 3. Plt's Second Amendment to PDR Under N.C.G.S. § 7A-31(c)	1. Denied 08/23/07 2. Allowed 08/23/07 3. Dismissed *ex mero motu* 08/23/07

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

State v. Apple Case below: 182 N.C. App. —— (3 April 2007)	No. 195P07	1. Def's Petition for Writ of Supersedeas (COA06-652) 2. Def's NOA Based Upon a Constitutional Question 3. AG's Motion to Dismiss Appeal 4. Def's PDR Under N.C.G.S. § 7A-31	1. Denied 08/23/07 2. —— 3. Allowed 08/23/07 4. Denied 08/23/07
State v. Belcher Case below: 183 N.C. App. —— (5 June 2007)	No. 306P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-982)	Denied 08/23/07
State v. Blair Case below: 181 N.C. App. 236	No. 081P07	1. Def's NOA Based Upon a Constitutional Question (COA06-515) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 08/23/07 3. Denied 08/23/07
State v. Borges Case below: 183 N.C. App. —— (15 May 2007)	No. 282P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-476)	Denied 08/23/07
State v. Bowman Case below: 183 N.C. App. —— (5 June 2007)	No. 327P07	1. Def's PDR Under N.C.G.S. 7A-31 (COA06-463) 2. Def's PWC to Review the Decision of the COA	1. Denied 08/23/07 2. Denied 08/23/07
State v. Broadnax Case below: 145 N.C. App. 204	No. 293P07	1. Def's Motion for NOA Under Sec. 7A-30(1) (Constitutional Question) (COA00-1103) 2. Def's Motion for PDR Under Sec. 7A-31 (c) (1) & (2)	1. Dismissed *ex mero motu* 08/23/07 2. Dismissed 08/23/07
State v. Bullock Case below: 183 N.C. App. —— (5 June 2007)	No. 445P02-4	1. Def's NOA Based Upon a Constitutional Question (COA04-665-2) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 08/23/07 3. Denied 08/23/07 **Hudson, J., Recused**

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

State v. Burchfield Case below: 183 N.C. App. —— (5 June 2007)	No. 311A07	1. Def's NOA Based Upon a Constitutional Question (COA06-922) 2. AG's Motion to Dismiss Appeal	1. —— 2. Allowed 08/23/07
State v. Caudle Case below: 182 N.C. App. 171	No. 433P05-2	Def's PDR Under N.C.G.S. 7A-31 (COA03-1576-2)	Denied 08/23/07 **Timmons-Goodson, J. and Hudson, J., Recused**
State v. Coleman Case below: 181 N.C. App. 568	No. 126P07	Def's PDR Under N.C.G.S. 7A-31 (COA06-441)	Denied 08/23/07
State v. Cooke Case below: 182 N.C. App. 347	No. 190P07	1. Def's NOA Based Upon a Constitutional Question (COA06-761) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. 7A-31	1. —— 2. Allowed 08/23/07 3. Denied 08/23/07
State v. Cooper Case below: 184 N.C. App. —— (3 July 2007)	No. 371P07	1. Def's PDR Under N.C.G.S. § 7A-31 (COA06-1076) 2. Def's "Motion to Deny State's Motion to Deem Timely Filed Its Response to Def's PDR"	1. Denied 08/23/07 2. Dismissed 08/23/07
State v. Dorton Case below: 182 N.C. App. 34	No. 514P05-2	Def's PDR Under N.C.G.S. § 7A-31 (COA06-405)	Denied 08/23/07
State v. Edwards Case below: 184 N.C. App. —— (3 July 2007)	No. 345P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-961)	Denied 08/23/07
State v. Fisher Case below: 182 N.C. App. —— (3 April 2007)	No. 222A07	Def's NOA Based Upon a Constitutional Question (COA06-1064)	Dismissed *ex mero motu* 08/23/07
State v. Flores-Renteria Case below: 182 N.C. App. 176	No. 167P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-276)	Denied 08/23/07

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

State v. Goodwin Case below: 183 N.C. App. —— (1 May 2007)	No. 279P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1165)	Denied 08/23/07
State v. Hammett Case below: 182 N.C. App. 316	No. 083P06-2	1. Def's NOA Based Upon a Constitutional Question (COA05-377-2) 2. State's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 08/23/07 3. Denied 08/23/07 **Hudson, J., Recused**
State v. Harris Case below: 184 N.C. App. —— (19 June 2007)	No. 349P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-929)	Dismissed 08/23/07
State v. Hennis Case below: 184 N.C. App. —— (3 July 2007)	No. 342P07	AG's Motion for Temporary Stay (COA06-1134)	Allowed 07/19/07
State v. Hewson Case below: 182 N.C. App. 196	No. 188P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-433)	Denied 08/23/07
State v. James Case below: 184 N.C. App. —— (19 June 2007)	No. 315P07	1. Def's Motion for Temporary Stay (COA06-896) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed 07/09/07 Stay Dissolved 08/23/07 2. Denied 08/23/07 3. Denied 08/23/07
State v. Jessup Case below: 183 N.C. App. —— (5 June 2007)	No. 335P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1062)	Denied 08/23/07
State v. Kitchengs Case below: 183 N.C. App. —— (5 June 2007)	No. 322P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-941)	Denied 08/23/07

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

State v. Lewis Case below: 176 N.C. App. 191	No. 558PA04	1. AG's Motion for Temporary Stay (COA03-785-2) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Dismiss the State's PDR as Improvidently Granted and as Moot	1. Allowed 03/10/06 **360 N.C. 489** Stay Dissolved 08/23/07 2. Dismissed as Moot 08/23/07 3. Dismissed as Moot 08/23/07 4. Dismissed as Moot 08/23/07
State v. Leyva Case below: 181 N.C. App. 491	No. 131P07	1. Def's NOA Based Upon a Constitutional Question (COA06-354) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 08/23/07 3. Denied 08/23/07
State v. Lowe Case below: 183 N.C. App. —— (1 May 2007)	No. 258P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-927)	Denied 08/23/07
State v. Maness Case below: 183 N.C. App. —— (1 May 2007)	No. 266P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-940)	Denied 08/23/07
State v. McLaughlin Case below: 180 N.C. App. 474	No. 648P06	1. Def's PDR Under N.C.G.S. 7A-31 (COA06-212) 2. Def's NOA Based Upon a Constitutional Question	1. Denied 08/23/07 2. Dismissed *ex mero motu* 08/23/07
State v. Moore Case below: 183 N.C. App. —— (5 June 2007)	No. 332P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-937)	Denied 08/23/07
State v. Morrison Case below: 168 N.C. App. 730	No. 289P06-2	Def's PWC to Review Decision of COA (COA04-798)	Denied 08/23/07
State v. Moss Case below: 178 N.C. App. 235	No. 617P06	Def's Motion for "Petition for Discretionary Review" (COA05-1309)	Denied 08/23/07

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

State v. Nelson Case below: 181 N.C. App. 150	No. 042P07	1. Def's NOA Based Upon a Constitutional Question (COA05-1677) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 08/23/07 2. Denied 08/23/07
State v. Potts Case below: 182 N.C. App. 349	No. 197P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-811)	Denied 08/23/07
State v. Pulley Case below: 180 N.C. App. 54	No. 619P06	Def's PDR Under N.C.G.S. 7A-31 (COA05-892)	Denied 08/23/07
State v. Rushdan Case below: 183 N.C. App. —— (15 May 2007)	No. 287P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1229)	Denied 08/23/07
State v. Sarea Case below: 182 N.C. App. —— (17 April 2007)	No. 237P07	1. Def's NOA Based Upon a Constitutional Question (COA06-934) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 08/23/07 3. Denied 08/23/07
State v. Sings Case below: 182 N.C. App. 162	No. 169P07	1. Def's NOA Based Upon a Constitutional Question (COA06-554) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 08/23/07 3. Denied 08/23/07
State v. Stewart Case below: 183 N.C. App. —— (5 June 2007)	No. 319P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-731)	Denied 08/23/07
State v. Tart Case below: 182 N.C. App. 530	No. 215P07	1. Def's NOA Based Upon a Constitutional Question (COA06-592) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 08/23/07 3. Denied 08/23/07

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

State v. Tucker Case below: Forsyth County Superior Court	No. 113A96-3	1. Def's PWC to Review Order of Forsyth County Superior Court 2. Def's Motions to Hold Decision in Abeyance	1. Denied 08/23/07 2. Dismissed as Moot 08/23/07
State v. Woody Case below: 147 N.C. App. 790	No. 301P07	Def's Motion for "Petition for Plain Error Review Pursuant to N.C.G.S. 7A-23" (COA01-188)	Dismissed 08/23/07
Trustees of Wake Technical Cmty. College v. Slaughter Case below: 179 N.C. App. 865	No. 604P06	Def's (Benjamin Slaughter) PDR Under N.C.G.S. 7A-31 (COA06-5)	Dismissed as Moot 08/23/07
Turning Point Indus. v. Global Furn., Inc. Case below: 183 N.C. App. ––– (1 May 2007)	No. 263P07	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-1154)	Denied 08/23/07
Vecellio & Grogan, Inc. v. Piedmont Drilling & Blasting, Inc. Case below: 183 N.C. App. ––– (1 May 2007)	No. 268P07	1. Def's (Piedmont Drilling) PDR Under N.C.G.S. § 7A-31 (COA06-887) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 08/23/07 2. Dismissed as Moot 08/23/07
Ward v. Floors Perfect Case below: 183 N.C. App. ––– (5 June 2007)	No. 339A07	1. Plt's NOA Based Upon a Dissent (COA06-366) 2. Plt's PDR as to Additional Issues	1. ––– 2. Denied 08/23/07

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, INC. v. TERRY DAVIS ARMWOOD, JR.; TERRY DAVIS ARMWOOD, SR., INDIVIDUALLY AND AS PARENT AND GUARDIAN FOR TERRY DAVIS ARMWOOD, JR.; RAMONA ARMWOOD, INDIVIDUALLY AND AS PARENT AND GUARDIAN FOR TERRY DAVIS ARMWOOD, JR.; JIMMY LEE BEST; AND STELLA H. BOSTIC

No. 99A07

(Filed 12 October 2007)

Insurance— not-for-hire commercial vehicle—minimum liability coverage

The decision of the Court of Appeals in this case is reversed for the reason stated in the dissenting opinion that the minimum liability insurance coverage required by N.C.G.S. § 20-309(a1) for not-for-hire commercial vehicles is not written into each policy as a matter of law.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 181 N.C. App. 407, 638 S.E.2d 922 (2007), affirming a judgment entered 13 July 2005 by Judge Howard E. Manning, Jr. in Superior Court, Wake County. Heard in the Supreme Court 11 September 2007.

Young Moore and Henderson P.A., by R. Michael Strickland and Glenn C. Raynor, for plaintiff-appellant.

Law Offices of Frank A. Cassiano, by Frank A. Cassiano, for defendant-appellees Terry Davis Armwood, Sr. and Ramona Armwood, individually and as parents and guardians of Terry Davis Armwood, Jr.

Nexsen Pruet Adams Kleemeier, PLLC, by James W. Bryan and Daniel W. Koenig, for Trucking Industry Defense Association, amicus curiae.

Pinto Coates Kyre & Brown, PLLC, by David L. Brown, for North Carolina Association of Defense Attorneys, amicus curiae.

Rachel Scott Decker for North Carolina Academy of Trial Lawyers, amicus curiae.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed and this matter is remanded to the Court of Appeals for further remand to the trial court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

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

MICKEY PLOTT, EMPLOYEE v. BOJANGLE'S RESTAURANTS, INC., EMPLOYER, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA C/O AIG CLAIM SERVICES, CARRIER

No. 55A07

(Filed 12 October 2007)

Workers' Compensation— disability benefits—refusal of sedentary employment

The decision of the Court of Appeals in a workers' compensation case is reversed for the reasons stated in the dissenting opinion that evidence before the Industrial Commission supported its determination that plaintiff was not entitled to ongoing benefits because defendant employer offered him sedentary employment at his preinjury wage after he was released by his physician to return to work, but plaintiff refused to attempt this employment and has not made reasonable efforts to find suitable employment.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 181 N.C. App. 61, 638 S.E.2d 571 (2007), reversing and remanding an opinion and award filed on 8 July 2005 by the North Carolina Industrial Commission. Heard in the Supreme Court 12 September 2007.

Raymond M. Marshall and Jay A. Gervasi, Jr. for plaintiff-appellee.

Robinson & Lawing, L.L.P., by Jolinda J. Babcock, for defendant-appellants.

PER CURIAM.

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

REVERSED.

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

MARK BLEVINS D/B/A RAINBOW RECYCLING, PETITIONER v. TOWN OF WEST JEFFERSON AND TOWN OF WEST JEFFERSON BOARD OF ADJUSTMENT, RESPONDENTS

No. 210A07

(Filed 12 October 2007)

Appeal and Error— notice of appeal—filing notice with clerk of court—waiver of service of notice

A decision by the Court of Appeals that it did not have jurisdiction to hear respondent board of adjustment's purported appeal from a superior court order is reversed for the reasons stated in the dissenting opinion that respondent's notice of appeal was sufficient to show that the appeal was from the superior court order rather than from its own order, a statement in the record was sufficient to show that the notice of appeal was filed with the clerk of superior court where petitioner stipulated to the record on appeal and thus stipulated to this statement, and petitioner waived respondent's failure to serve the notice of appeal on it by stipulating to the record on appeal, failing to raise any issue as to service, and filing a brief in the Court of Appeals addressing the merits of the appeal.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 182 N.C. App. ——, 643 S.E.2d 465 (2007), dismissing respondents' appeal from an order entered 26 April 2006 by Judge Michael E. Helms in Superior Court, Ashe County. Heard in the Supreme Court 13 September 2007.

Kilby & Hurley Attorneys at Law, by John T. Kilby, for petitioner-appellee.

Vannoy & Reeves, PLLC, by Jimmy D. Reeves and John Benjamin "Jak" Reeves, for respondent-appellants.

PER CURIAM.

For the reasons stated in the dissenting opinion, the decision of the Court of Appeals is reversed and this case is remanded to that court to address the merits of the appeal.

REVERSED AND REMANDED.

AKHTAR MASOOD, EMPLOYEE v. ERWIN OIL COMPANY, EMPLOYER, EMC INSURANCE COMPANIES, CARRIER

No. 94A07

(Filed 12 October 2007)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 181 N.C. App. 424, 639 S.E.2d 118 (2007), reversing and remanding an opinion and award filed on 23 November 2005 by the North Carolina Industrial Commission. Heard in the Supreme Court 13 September 2007.

Patterson Harkavy LLP, by Leto Copeley, for plaintiff-appellee.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Phillip J. Anthony and Christopher J. Derrenbacher, for defendant-appellants.

Hatch, Little & Bunn, LLP, by Elizabeth T. Martin and Harold W. Berry, Jr., for North Carolina Petroleum Marketers Association, Inc., amicus curiae.

PER CURIAM.

As to the appeal of right based on the dissenting opinion, the members of the Court are equally divided. Therefore, the Court of Appeals opinion is left undisturbed without precedential value. *See, e.g., Barham v. Hawk*, 360 N.C. 358, 625 S.E.2d 778 (2006).

AFFIRMED.

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

CHRISTIAN EMERSON DYSART AND MILDRED MAXWELL DYSART v. WILLIAM KENT CUMMINGS AND KIMBERLY N. CUMMINGS

No. 132A07

(Filed 12 October 2007)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 181 N.C. App. 641, 640 S.E.2d 832 (2007), affirming entry of summary judgment for plaintiffs on 1 March 2006 by Judge Kenneth C. Titus in Superior Court, Wake County. Heard in the Supreme Court 12 September 2007.

Boyce & Isley, PLLC, by Philip R. Isley, for plaintiff-appellees.

John Walter Bryant for defendant-appellants.

PER CURIAM.

AFFIRMED.

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

IN RE C.T. & B.T.

[361 N.C. 581 (2007)]

IN THE MATTER OF C.T. AND B.T.

No. 175A07

(Filed 12 October 2007)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 182 N.C. App. 166, 641 S.E.2d 414 (2007), dismissing respondent's appeal from an order entered 17 March 2006 by Judge Edward A. Pone in District Court, Cumberland County. Heard in the Supreme Court 11 September 2007.

Beth A. Hall, Attorney Advocate, for appellee Guardian ad Litem, and Elizabeth Kennedy-Gurnee, Staff Attorney, for petitioner-appellee Cumberland County Department of Social Services.

Lisa Skinner Lefler for respondent-appellant father.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. DENNIS MARSHALL CLEMMONS

No. 91A07

(Filed 12 October 2007)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 181 N.C. App. 391, 639 S.E.2d 110 (2007), finding no error in a judgment entered 5 May 2005 by Judge Steve A. Balog in Superior Court, Harnett County. Heard in the Supreme Court 11 September 2007.

Roy Cooper, *Attorney General*, *by Francis W. Crawley*, *Special Deputy Attorney General*, *for the State.*

Staples S. Hughes, *Appellate Defender*, *by Barbara S. Blackman*, *Assistant Appellate Defender*, *for defendant-appellee.*

PER CURIAM.

AFFIRMED.

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

OUTERBRIDGE v. PERDUE FARMS, INC.

[361 N.C. 583 (2007)]

GENE OUTERBRIDGE, EMPLOYEE v. PERDUE FARMS, INC., EMPLOYER, SELF-INSURED, CRAWFORD & COMPANY, SERVICING AGENT

No. 78A07

(Filed 12 October 2007)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 181 N.C. App. 50, 638 S.E.2d 564 (2007), remanding an opinion and award filed on 9 September 2005 by the North Carolina Industrial Commission. Heard in the Supreme Court 12 September 2007.

Curtis C. Coleman, III for plaintiff-appellee.

Ogletree, Deakins, Nash, Smoak & Stewart, P.C., by Brian M. Freedman, for defendant-appellants.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. DWIGHT EUGENE SLOAN AND KOLANDA KAY WOOTEN

No. 24A07

(Filed 12 October 2007)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 180 N.C. App. 527, 638 S.E.2d 36 (2006), finding no error in judgments entered 19 April 2005 by Judge John W. Smith in Superior Court, Wayne County. Heard in the Supreme Court 13 September 2007.

Roy Cooper, Attorney General, by Charles E. Reece, Assistant Attorney General, for the State.

Richard B. Glazier for defendant-appellant Wooten.

PER CURIAM.

AFFIRMED.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

STATE v. COMBS

[361 N.C. 585 (2007)]

STATE OF NORTH CAROLINA v. ANGELIA SCATES COMBS

No. 219A07

(Filed 12 October 2007)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 182 N.C. App. ——, 642 S.E.2d 491 (2007), finding no prejudicial error in a judgment entered 7 December 2005 by Judge John O. Craig III in Superior Court, Guilford County. Heard in the Supreme Court 12 September 2007.

Roy Cooper, Attorney General, by Amanda P. Little, Assistant Attorney General, for the State.

James N. Freeman, Jr. for defendant-appellant.

PER CURIAM.

AFFIRMED.

DON SETLIFF & ASSOCIATES, INC. v. SUBWAY REAL ESTATE CORP.

No. 413PA06

(Filed 12 October 2007)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 178 N.C. App. 385, 631 S.E.2d 526 (2006), affirming a judgment entered on 15 July 2005 by Judge Thomas G. Foster, Jr. in District Court, Guilford County. Heard in the Supreme Court 10 September 2007.

Wyatt Early Harris Wheeler, LLP, by Stanley F. Hammer, for plaintiff-appellant.

Norman L. Sloan for defendant-appellee.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA v. MICHAEL IVER PETERSON

No. 547A06

(Filed 9 November 2007)

1. Evidence— seizure under inadequate search warrant—admission not prejudicial

Any error in a prosecution for first-degree murder in the admission of evidence of motive seized from defendant's computers and related material pursuant to an invalid search warrant was harmless beyond a reasonable doubt. The prosecution presented copious amounts of evidence relating to the elements of first-degree murder, as well as to motive (which is often important but is not an element).

2. Evidence— similar death—similarities sufficient

The trial court did not err in a first-degree murder prosecution by admitting evidence concerning a similar death where the court's findings indicate significant similarities between the two events and sufficient circumstantial evidence that defendant was involved in the prior death. Remoteness in time between the two deaths might affect the weight of the evidence, but not its admissibility.

3. Criminal Law— prosecutor's closing argument—credibility of State experts—improper but not prejudicial

A prosecutor's closing argument that State's experts were to be believed because they worked for the State of North Carolina was conceded on appeal to be improper, but did not prejudice defendant to the point of a new trial. The offending statements spanned less than five minutes in a five month trial and defendant did not meet his burden of showing, within the totality of the trial and closing arguments, that the outcome would have been different had the court sustained defendant's objection or given a broader curative instruction that applied to these statements.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 179 N.C. App. 437, 634 S.E.2d 594 (2006), finding no prejudicial error in and affirming a judgment entered 10 October 2003 by Judge Orlando F. Hudson, Jr. in Superior Court, Durham County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 10 September 2007.

Roy Cooper, Attorney General, by John G. Barnwell and William B. Crumpler, Assistant Attorneys General, for the State.

Thomas K. Maher for defendant-appellant.

BRADY, Justice.

Defendant Michael Iver Peterson was found guilty by a jury of the first-degree murder of his wife, Kathleen Peterson. Defendant appealed his conviction to the Court of Appeals, which determined, in a divided opinion, that defendant received a fair trial, free of prejudicial error. Defendant has appealed three issues as of right to this Court on the basis of a dissent in the Court of Appeals. First, we must determine whether the trial court's erroneous admission of evidence seized pursuant to an invalid search warrant was harmless beyond a reasonable doubt. We hold the admission of the evidence was harmless. Second, we must determine whether the trial court erred in admitting evidence concerning the 1985 death of Elizabeth Ratliff. We hold that the trial court did not err in admitting this evidence. Third, we must determine whether particular statements made during the prosecution's closing argument warrant a new trial. We hold that these statements do not entitle defendant to a new trial. Accordingly, we affirm the decision of the Court of Appeals.

PROCEDURAL AND FACTUAL BACKGROUND

On 20 December 2001, the Durham County Grand Jury returned a true bill of indictment charging defendant with first-degree murder. Following a lengthy trial that spanned five months, defendant was convicted on 10 October 2003 of the first-degree murder of Kathleen Peterson, and on that same day the trial court entered judgment against defendant and sentenced him to life imprisonment without parole. Defendant appealed to the Court of Appeals, a majority of which affirmed defendant's conviction. However, one judge dissented and would have held that defendant was entitled to a new trial.

Defendant filed a notice of appeal with this Court on 17 October 2006 and contemporaneously filed a petition for discretionary review of additional issues which were not the subject of the dissenting opinion in the Court of Appeals. This Court denied defendant's petition on 25 January 2007.

State's Evidence

The State presented evidence tending to show that defendant's wife, Kathleen Peterson (the victim), had worked for Nortel Networks nearly seventeen years at the time of her death. During her career at Nortel, she rose steadily through the corporate ranks and by 1999 she held an executive position. The victim was to travel to Canada on 10 December 2001 to meet with Helen Prislinger, a Nortel process analyst. On 7 December 2001, Prislinger telephoned the victim, informed her of a planning conference call that was to take place on 9 December 2001, and told her that on 8 December 2001 Prislinger would inform her of the time of the conference call. On 8 December 2001, Prislinger left messages for the victim indicating the conference call would take place at 10:00 a.m. on Sunday, 9 December 2001. The victim later returned Prislinger's telephone calls and advised her to send a document relating to the conference call via e-mail to an address that Prislinger assumed was defendant's e-mail address.

At 2:40 a.m. on 9 December 2001, Durham Emergency Response received a 911 call from an apparently distressed defendant. He informed the operator that his wife "had an accident" and that she was "still breathing." He told the operator that she had fallen down the stairs and that she was unconscious. In response to questioning from the 911 operator, defendant answered that the victim had fallen down "15, 20 [stairs], I don't know." Defendant terminated the call and then again telephoned 911 moments later and told the operator the victim was no longer breathing. Defendant again disconnected the call.

Initial Observations of the Crime Scene

First responders arrived at the scene less than eight minutes after defendant made the initial 911 call. When they arrived, defendant's son Todd Peterson, who had just entered the residence, told defendant that the victim was dead and to "step aside, move, the paramedic's [sic] here." Paramedic James Rose testified that there was an "enormous amount of blood" at the scene and "[a] lot of the blood that [was] on the walls [was] dry. The blood under her head was . . . coagulated. It had already clotted and started to harden." He additionally testified that there was dried blood on the stairs and stairwell, and it "looked like it had been wiped away or wiped on. It had been smeared, instead of just blood droplets just soaking down the wall." Defendant told the paramedics "he had just [gone] outside to turn off the lights, and came back in and found her at the bottom of

the steps." While defendant had indicated at 2:41 a.m. to the 911 operator that the victim was still breathing, Rose examined her at approximately 2:50 a.m. and discovered her pupils were dilated six millimeters—indicating a substantial time period in which she was without oxygen. Rose also testified that he had been to thirty or forty incidents involving falls and the worst injury he had observed was a broken neck. He had never "seen wounding to the back of the head like was present in this case."

Paramedic Ron Paige gave similar testimony concerning the amount of blood, and he noted that the blood on the victim's clothes appeared to be dry. Both paramedics indicated that defendant had blood on his shirt and hands. Rose testified that defendant's "shirt was partially blood-soaked with [spatter] spots, there were speckles of blood over his shirt. Blood on his hands and arms, and I believe his legs and feet." Later observation of defendant's clothing indicated blood spatter on defendant's tennis shoes and inside the right leg of his shorts.

Shortly after the arrival of the paramedics and firefighters, a man and a woman were admitted into the residence. According to a first responder, the woman described herself as a "doctor or something." In addition, other individuals entered the residence. Eventually, the first responders determined that the area should be secured until the arrival of police investigators. Therefore, a police officer stationed at the door was instructed to stop all civilian traffic into the residence until it was determined whether the area was a crime scene.

Soon, investigators from the Durham Police Department Criminal Investigations Division arrived at the scene. Sergeant Francis J. Borden noted a large amount of blood and blood spatter. Sergeant Borden and Detective Art Holland conferred after viewing the crime scene and made a decision to apply for a search warrant for the premises. Detective Holland left the scene to obtain the warrant, which was issued by a magistrate. Dan George of the Forensic Services Unit of the City of Durham observed "large quantities of blood all over the floor, all over the victim, her hands, feet, her clothing, the walls, the stair." He also testified that the blood on the stairway "appeared to have either been wiped or smeared."

Medical and Forensic Evidence

Kenneth Snell, M.D., the local medical examiner, examined the victim's body and discovered a four-inch laceration to the back of the

skull and what appeared to be three or four injuries that may have been caused by a fall. He advised the investigators to look for some sort of instrument that may have been used to cause the lacerations. He was uncertain whether a fall was the cause of the injuries and withheld final determination until an autopsy could be performed. After the autopsy, Dr. Snell opined that the "injuries [were] not consistent with a fall," but were "consistent with an assaultive, beating-type pattern."

North Carolina State Bureau of Investigation Special Agent Duane Deaver was contacted to perform a blood spatter analysis. Dan George, who assisted Deaver, observed a large amount of blood, with the blood being found "on the steps, blood on the risers, blood in the corners . . . blood all over the walls and on the molding, both the inside and out." Forensic unit supervisor Eric Campden also assisted Deaver in his investigation. Campden sprayed luminol, a preliminary indicator of blood, in various portions of the crime scene, being careful not to spray visible blood. Luminol testing revealed barefoot tracks leading to the laundry room and two footprints facing the "janitorial sink." Testing revealed no bloody shoe prints; only bloody barefoot prints were found.

The autopsy of the victim's body was performed by Deborah Radisch, M.D., a forensic pathologist in the Office of the Chief Medical Examiner. She observed multiple blunt traumatic injuries on the victim's body, including bruises, abrasions, and lacerations—many of which were found on the victim's head and face. Dr. Radisch opined that the bruises and abrasions to the victim's face were inconsistent with a fall against a flat surface and that the injuries to her head were primarily found on the back and side of the head. Seven lacerations were present on the back and side of the victim's head, each of which were caused by separate impacts. According to Dr. Radisch, the lacerations were inconsistent with a fall but were consistent with being struck by an object that would have lacerated the flesh without fracturing the skull. While some of the injuries may have been caused by a fall, the collective nature of the injuries was inconsistent with a fall. Dr. Radisch opined that the injuries were consistent with being struck with an object like a blow poke—a fireplace tool—because a blow poke is not solid. The bruises on the victim's arms and hands were considered defensive injuries by Dr. Radisch. In Dr. Radisch's opinion, the victim's death was the result of a homicide, with the cause of death being blunt force trauma to the head and with blood loss as a significant factor. Dr. Radisch testified that she

reviewed two hundred eighty-seven cases in North Carolina involving deaths attributed to falls down stairs and that she particularly studied twenty-nine such deaths in the victim's age range. Of those twenty-nine deaths, seventeen had no scalp lacerations and twelve showed one, as compared to the victim's seven scalp lacerations.

Thomas Bouldin, M.D., a neuropathologist consulting with the Medical Examiner's Office, observed evidence of blunt force trauma to Kathleen's brain. He noted evidence consistent with a significant decrease in blood flow to the victim's brain at least two hours before death, which could have been caused by the extensive bleeding from the lacerations.

Evidence as to Motive

The prosecution additionally presented evidence of defendant's and the victim's financial situation, including the victim's stress arising from her position at Nortel. The financial evidence indicated that defendant and the victim had more money leaving their accounts than coming in, as well as a substantial amount of credit card debt, and that the victim had significant amounts of life insurance and other assets which would benefit defendant upon the victim's death. The prosecution also presented evidence of defendant's extramarital sexual interests, including e-mails in which defendant attempted to arrange a sexual encounter with a male prostitute.

The trial court also admitted, over defense objections, evidence of the circumstances of the death of Elizabeth Ratliff, defendant's friend who died in the Federal Republic of Germany in 1985. The factual background of this evidence will be more thoroughly discussed in conjunction with our analysis of whether the trial court erred in its admission.

Defendant's Evidence

Defendant presented testimony from Jan Leestma, M.D., who was tendered as an expert in forensic neuropathology. Dr. Leestma disagreed with Dr. Radisch's opinion and testified that the wounds to the victim's head were more characteristic of impacts upon a relatively flat and immovable surface, such as the stairs; however, he could not completely rule out that the victim sustained the injuries by being struck with an object.

Dr. Henry Lee, a forensic scientist, testified that the scene of the crime was not consistent with a beating-type death. He explained that

medium velocity blood spatter could be caused by a variety of actions, including the coughing of blood. He noted there were over 10,000 blood drops at the scene of the crime, and those drops appeared to be moving in different directions which would be inconsistent with a typical beating. Dr. Lee testified that he saw evidence of blood in the victim's mouth from scene photographs and that some of the blood at the scene may have been caused by coughing.

Dr. Faris Bandak, a professor of biomechanics at George Washington University, testified that, applying biomechanical principles, the victim's injuries were inconsistent with being struck with an object like a blow poke, but consistent with a fall. He explained how various surfaces in the stairway could have caused the injuries found on the victim's head and then utilized a sequence of illustrations to demonstrate how the victim could have fallen backwards after walking up a few of the stairs, stood up after her first fall, and then fallen once again. According to Dr. Bandak, the two falls would have produced four impacts, which would account for the injuries found.

State's Rebuttal Evidence

John Butts, M.D., the Chief Medical Examiner for the State of North Carolina, testified as a rebuttal witness. He stated that his experience led him to conclude that it would be unusual to find multiple lacerations across the back and top of the victim's head caused merely by a fall. Additionally, Dr. Butts testified that no blood was found in the victim's mouth or airway and that, in his opinion, there was no significant aspiration of blood. Other than a microscopic amount, there was an absence of blood in the victim's lungs, which indicated that it was unlikely she coughed blood.

Dr. James McElhaney, a former professor of biomedical engineering and surgery at Duke University, testified as a rebuttal witness for the prosecution concerning the biomechanics of a possible fall. In his opinion, the injuries were inconsistent with a fall and were consistent with those that might be caused by a beating with a blunt instrument. Dr. McElhaney based his opinion on six factors: (1) location of the lacerations; (2) length of the lacerations; (3) number of lacerations; (4) direction of the lacerations; (5) the velocity of either the victim's head during a possible fall or of an object striking the victim's head; and (6) the amount of energy associated with the injury. Taking these factors into account, Dr. McElhaney opined that while a couple of the lacerations could be attributed to a fall, the other lacerations were not consistent with a fall down the stairs. Moreover,

the velocity which would have been necessary to cause the lacerations during a fall would have been likely to cause skull fracturing. According to Dr. McElhaney, the victim would have had to sustain at least fifteen separate impacts to account for all her injuries.

ANALYSIS

I. The Admission of Evidence Seized Pursuant to the Third Search Warrant

[1] Three search warrants authorizing the search of defendant's residence were applied for and issued, one each on 9 December 2001, 10 December 2001, and 12 December 2001. Only the 12 December 2001 warrant (third warrant) is at issue before this Court. Both the majority and the dissent at the Court of Appeals determined that this warrant, which authorized the search and seizure of items of evidentiary value from defendant's "computers, CPUs, files, software, [and] accessories," was "woefully" inadequate insofar as the probable cause affidavit failed to set out sufficient factual allegations to support the affiant's averment that probable cause existed to support issuance of a warrant. 197 N.C. App. at 450, 634 S.E.2d at 606. However, the majority of the Court of Appeals panel found that the erroneous admission of evidence from this search warrant was harmless beyond a reasonable doubt. The dissent disagreed with this conclusion. Accordingly, the sole determination which we must make is whether the admission of evidence obtained by execution of the third search warrant was harmless beyond a reasonable doubt. *See* N.C. R. App. P. 16(b). We conclude that, because the State presented overwhelming evidence of defendant's guilt, independent and separate from the tainted evidence, no reversible error occurred.

Because admission of the evidence illegally obtained through the invalid third search warrant is an error of constitutional magnitude, we must determine whether the error was harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 24 (1967). The General Assembly has codified this rule and articulated the proper burden of proof as follows: "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C.G.S. § 15A-1443(b) (2005). One way this Court has determined whether an error is harmless beyond a reasonable doubt is by viewing the totality of the evidence against the defendant and determining if the in-

dependent non-tainted evidence is "overwhelming." *See State v. Tirado*, 358 N.C. 551, 581, 599 S.E.2d 515, 536 (2004) (citing *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 (1976)), *cert. denied*, 544 U.S. 909 (2005). The evidence seized pursuant to the invalid third search warrant pertained to two potential motives: (1) the financial situation of defendant and the victim and stress arising from that situation; and (2) defendant's extramarital sexual interests and dialogue with a male homosexual prostitute.

In order to convict a defendant of premeditated, first-degree murder, the State must prove: (1) an unlawful killing; (2) with malice; (3) with the specific intent to kill formed after some measure of premeditation and deliberation. *See* N.C.G.S. § 14-17 (2005); *State v. Hamby*, 276 N.C. 674, 678, 174 S.E.2d 385, 387 (1970), *judgment vacated in part on other grounds*, 408 U.S. 937 (1972). While motive is often an important part of the State's evidence, "[m]otive is not an element of first-degree murder, nor is its absence a defense." *State v. Elliott*, 344 N.C. 242, 273, 475 S.E.2d 202, 216 (1996) (citing *State v. Gainey*, 343 N.C. 79, 84, 468 S.E.2d 227, 230 (1996), and *State v. Van Landingham*, 283 N.C. 589, 600, 197 S.E.2d 539, 546 (1973)), *cert. denied*, 520 U.S. 1106 (1997). The prosecution in the instant case presented copious amounts of evidence relating not only to the elements of premeditated first-degree murder, but to motives defendant may have had to kill his wife. While the evidence seized pursuant to the third search warrant pointed to motive, the evidence was of a cumulative nature and the non-tainted evidence of the same motives is overwhelming.

The prosecution presented evidence from defendant's computer, obtained pursuant to the third warrant, of e-mails between defendant and Brent Wolgamott, a male prostitute, along with other evidence that defendant had viewed sexually explicit photographs of men and visited pornographic websites. Further, defendant had used computer software designed to scrub information from the computer's hard drive. Defendant asserts that the evidence presented of the e-mail exchanges found on the computer between defendant and Wolgamott must have been used by the jury in determining a possible motive because "there is no evidence that Wolgamott's identify [sic] and knowledge of Defendant was discovered independent of the discovery of the e-mails on the computer." Therefore, defendant argues, "the State cannot carry its burden of proving that the search of the computer was harmless as to the discovery of Wolgamott."

However, contrary to defendant's assertion, the State presented evidence in the form of *printed e-mails* obtained from defendant's desk drawer pursuant to the *prior valid search warrants* that contained not only Wolgamott's e-mail address, but his photograph and telephone number. Additionally, these printed e-mails and photographs were commingled with other important papers through which the victim may have searched, such as an itemized telephone bill and a Nortel Flex Benefit Statement. Also contained in the desk drawer was a printed "review" of Wolgamott's services. The printed e-mails between defendant and Wolgamott indicate that an arrangement for sexual services existed "for the set price." This evidence of defendant's planned sexual encounter with Wolgamott, standing apart from any of the tainted evidence found on defendant's computer, unquestionably established that the victim may have found out about defendant's activity and that this discovery led to an ensuing altercation resulting in the victim's death. The evidence found on the computer was merely cumulative evidence of defendant's sexual proclivities and arranged rendezvous with Wolgamott.

The evidence of the financial stress of defendant and the victim found on the computer was likewise cumulative. E-mails written by defendant indicated that the victim was experiencing stress as a result of company layoffs which her employer called "optimization." Additionally, the e-mails showed defendant requested his former wife's assistance in providing living expenses for his adult son and that defendant asked a Ratliff family relative to assist one of the Ratliff daughters with her educational expenses. The properly admitted evidence of the financial stress in the relationship was extensive and overwhelming. Katherine Kayser of Nortel's Human Resources Department testified that defendant received $346,998.59 from the victim's deferred compensation due to the victim's death, and that defendant claimed another $1,450,000.00 in insurance proceeds which were awaiting final approval by the insurance company. Therefore, Ms. Kayser testified that defendant stood to receive a total of $1,796,998.59 as a result of the victim's death. Moreover, after conducting a financial analysis of defendant's situation, Special Agent Raymond Lawrence Young of the State Bureau of Investigation's Financial Crimes Unit, who is also a certified public accountant, testified as to the cash flow problems present in the household and the couple's substantial credit card debt that surpassed $140,000.00. All of Young's testimony was derived from evidence obtained independently of the evidence seized pursuant to the third warrant. Additionally, the victim's sister, Candace Zamperini, testified exten-

sively concerning the tension the victim was under and how the victim relayed to her that "[a]ll I ever do is talk to [defendant] about the stresses at Nortel. I just don't know how to turn things around." The evidence that financial stress existed in the relationship between defendant and the victim, and that defendant stood to gain from the victim's death, is overwhelming even without considering the cumulative evidence retrieved from defendant's computer pursuant to the third warrant.

Because the evidence of defendant's guilt and possible motives is overwhelming, the admission of evidence seized pursuant to the third warrant was harmless beyond a reasonable doubt and "the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

II. The Admission of Evidence Concerning the Death of Elizabeth Ratliff

[2] Defendant asserts that the trial court committed prejudicial error in admitting, over his objection, evidence concerning the death of Elizabeth Ratliff in the Federal Republic of Germany in 1985, in violation of Rules 401, 402, 403, and 404 of the North Carolina Rules of Evidence. The trial court, after having evidence presented to it outside the presence of the jury, made the following findings of fact in ruling upon defendant's motion *in limine* seeking exclusion of this evidence:

1. The Defendant was present and represented by his counsels of record, David Rudolf and Thomas Maher. The State of North Carolina was represented by District Attorney James Hardin, Jr. and Assistant District Attorneys Freda Black and David Saacks.

2. A voir dire hearing was held outside the presence of the jury on August 18, 2003 and August 20-22, 2003. Live testimony was given by Cheryl Appel-Schumacher, a friend of Elizabeth Ratliff, Margaret Blair, a sister of Elizabeth Ratliff, and Dr. Deborah Radisch, a forensic pathologist with the North Carolina Office of the Chief Medical Examiner. The Court also received into evidence several photographs, documents, and a written proffer regarding the testimony of Margaret Blair.

3. Elizabeth Ratliff was a close friend and neighbor of the Defendant and his former wife, Patricia Peterson, when they

lived in Germany in 1985. She had two young daughters named Margaret and Martha. Her husband, George Ratliff, was in the U.S. Air Force and he had passed away while away on assignment in October, 1983.

4. On the morning of November 25, 1985, Elizabeth Ratliff was found dead on the floor at the bottom of her open stairway in her home in Germany. The Defendant was summoned to the scene as were several other friends and associates.

5. The Defendant was with Ms. Ratliff the night before for dinner, and went back with her to her house to help with the children and a household chore.

6. Ms. Ratliff was found wearing her yellow plastic type boots that she would normally wear outdoors. It had snowed in that location two days before.

7. A large amount of blood was present at the scene, including bloodstains on the wall next to the stairway from the top of the stairs to the bottom, and underneath as well. The bloodstains at the top of the stairs contained smaller drops and appeared as if flicked on the wall by a small paintbrush. Bloodstains were also present on the wall opposite the staircase in the foyer area and on a refrigerator in the nearby kitchen. A pool of blood was found on the floor where Ms. Ratliff was found.

8. The Defendant dealt with the German authorities who responded that morning, and later handled the relations with the American military investigators who came to the scene. He also informed the friends and associates that Ms. Ratliff had died from a fall down the stairs.

9. An autopsy performed in Germany at a U.S. Army hospital, with a later review by the Armed Forces Institute of Pathology, determined that Ms. Ratliff died naturally of spontaneous intracranial bleeding and her physical trauma injuries were secondary due to her fall down the stairs.

10. Ms. Ratliff was exhumed in April, 2003 and brought to North Carolina's Office of the Chief Medical Examiner for a subsequent forensic autopsy, which determined her death to be a homicide. During that autopsy, Dr. Radisch found seven severe lacerations to the scalp of Ms. Ratliff, with a linear

skull fracture underneath one of the lacerations. Evidence of other intracranial bleeding was present as well.

11. Pursuant to the Last Will and Testament of Elizabeth Ratliff, Defendant and his former wife became the guardians of Ms. Ratliff's children, Margaret and Martha, and received certain household goods from her estate. The Defendant also received the benefits payments from the government to the children on their behalf.

12. Several similarities exist between the death of Elizabeth Ratliff in Germany in 1985 and the subject of this trial, which is the death of Kathleen Peterson in Durham, North Carolina in 2001. These similarities include:

    a. The deceased being found at the bottom of a stairway.

    b. No eyewitnesses to either alleged fall down the stairs.

    c. A large amount of blood present.

    d. Blood spatter present high and dried on the wall next to the stairway, including a bloodstain with small drops.

    e. No evidence of any forced entry or exit, or of any property being stolen.

    f. No murder weapon being recovered.

    g. The general time of day (late night to early morning) and general period of the calendar (late November to early December).

    h. Both deceased persons were females in their 40's who had a close personal relationship with the Defendant.

    i. Both deceased persons were similar in physical characteristics so that they looked alike and reported of severe headaches in the weeks before their death.

    j. Both deceased persons were planning to go on a trip in the near future and had dinner with the Defendant on the night before their death.

    k. Both deceased persons were later determined to have died from blunt force trauma to the head, including the same number of scalp lacerations and same general location of scalp wounds.

l. Both deceased persons had what could be characterized as defensive wounds on their bodies.

m. The manner of death for both deceased persons was later determined to be homicide.

n. The Defendant was the last known person to see both of these persons alive.

o. By being summoned to the scene in Germany and living at the scene in Durham, the Defendant is then present on the scene when the authorities arrive and reports that the death is the result of an accidental fall down the stairs.

p. The Defendant is in charge of the remains, effects, and household after each death, and is potentially in charge of each estate after death.

q. The Defendant received money or other items of value after each death.

Because these findings of fact by the trial court are supported by competent evidence found in the record, we consider them conclusive on appeal. *See State v. Cummings*, 361 N.C. 438, 471-72, 648 S.E.2d 788, 808 (2007) (citing *State v. Wiggins*, 334 N.C. 18, 38, 431 S.E.2d 755, 767 (1993)). Based upon these findings of fact, the trial court found the evidence regarding the Ratliff death to be relevant as to intent, knowledge, and absence of accident. Additionally, the trial court found that "[s]ubstantial evidence in the form of sufficient similar facts and circumstances exists between the two deaths so that a jury could reasonably find that the Defendant committed both acts," that the remoteness in time between the two deaths did not diminish its admissibility, that the evidence was admissible under Rules 402 and 404(b) of the Rules of Evidence, and that "[t]he probative value of this evidence outweighs any prejudicial effect on the Defendant."

Defendant asserts that the trial court erred in admitting this evidence because there was no evidence which tended to show that defendant was responsible for the death of Elizabeth Ratliff. In *State v. Jeter*, this Court stated:

> [Rule 404(b)] includes no requisite that the evidence tending to prove defendant's identity as the perpetrator of another crime be direct evidence, exclusively. Neither the rule nor its application indicates that examples of other provisions—such as admissibility of evidence of other offenses to prove motive, opportunity,

> intent, preparation, or plan—rest solely upon direct evidence. Under the statutory scheme of Rules 403 and 404, the concern that anything other than direct evidence of a defendant's identity in a similar offense might "mislead [the jury] and raise a legally spurious presumption of guilt" is met instead by the balancing test required by Rule 403: the critical inquiry regarding evidence of other offenses introduced for purposes of showing defendant's identity as the perpetrator of the offense for which he is being tried is not whether it is direct or circumstantial, but whether its tendency to prove identity in the charged offense substantially outweighs any tendency unfairly to prejudice the defendant.

326 N.C. 457, 459, 389 S.E.2d 805, 806-07 (1990) (alteration in original) (internal citation omitted). Thus, the prosecution was not required to present to the trial court direct evidence of defendant's involvement in the death of Elizabeth Ratliff, but could present circumstantial evidence which tends "to support a *reasonable* inference that the same person committed both the earlier and later acts." *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991). In other words,

> evidence is admissible under Rule 404(b) of the North Carolina Rules of Evidence if it is substantial evidence tending to support a reasonable finding *by the jury* that the defendant committed a similar act or crime and its probative value is not limited *solely* to tending to establish the defendant's propensity to commit a crime such as the crime charged.

Id. at 303-04, 406 S.E.2d at 890 (citations omitted). The trial court's findings of fact indicate not only significant similarities between the deaths of the victim and Elizabeth Ratliff, but also indicate sufficient circumstantial evidence that defendant was involved in Ratliff's death—such as defendant being the last known person to see Ratliff alive; defendant being with Ratliff the night of her death; and there being no sign of forced entry and nothing missing from the residence, which indicated that Ratliff likely knew her assailant.

This case is significantly similar to *State v. Stager*, in which the defendant was on trial for the first-degree murder of her second husband. *Id.* at 285, 406 S.E.2d at 879-80. The defendant told emergency responders that she accidently shot her second husband while she was removing a pistol from underneath a pillow. *Id.* at 286, 406 S.E.2d at 880. During their investigation of the death of defendant's second husband, investigators became aware that defendant's first husband

died from a gunshot wound ten years earlier. *Id.* at 291-92, 406 S.E.2d at 883-84. The trial court determined that there were substantial similarities between the two deaths and found as a matter of law that the circumstances surrounding the death of the first husband were admissible "as evidence of intent, plan, preparation, or absence of accident." *Id.* at 303, 406 S.E.2d at 890. This Court rejected the defendant's arguments that the evidence was irrelevant to prove intent or absence of accident. *Id.* at 304, 406 S.E.2d at 891. This Court noted eight similarities in *Stager*:

> (1) each of the defendant's husbands had died as a result of a single gunshot wound, (2) the weapon in each case was a .25 caliber semi-automatic handgun, (3) both weapons were purchased for the defendant's protection, (4) both men were shot in the early morning hours, (5) the defendant discovered both victims after their respective shootings, (6) the defendant was the last person in the immediate company of both victims, (7) both victims died in the bed that they shared with the defendant, and (8) the defendant benefited from life insurance proceeds resulting from both deaths.

Id. at 305-06, 406 S.E.2d at 892. Additionally, this Court rejected the defendant's argument that the temporal proximity of the two deaths weighed against admission of the evidence, stating "remoteness in time is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident; remoteness in time generally affects only the weight to be given such evidence, not its admissibility." *Id.* at 307, 406 S.E.2d at 893.

The similarities in the case *sub judice* are also striking. The trial court considered all of the evidence and found seventeen similarities between the deaths of Elizabeth Ratliff and the victim. Moreover, remoteness in time between the two deaths could affect the weight the jury might give to the evidence, but did not affect its admissibility. *See id.*

We review the trial court's decision to admit the evidence pursuant to Rule 403 for an abuse of discretion. *State v. Al-Bayyinah*, 359 N.C. 741, 747-48, 616 S.E.2d 500, 506-07 (2005) ("Whether to exclude evidence is a decision within the trial court's discretion."), *cert. denied*, 547 U.S. 1076 (2006). An " '[a]buse 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. Elliott*, 360 N.C. 400, 419, 628 S.E.2d 735, 748 (quoting

State v. Hennis, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)), *cert. denied*, —— U.S. ——, 127 S. Ct. 505, 166 L. Ed. 2d 378 (2006). "In our review, we consider not whether we might disagree with the trial court, but whether the trial court's actions are fairly supported by the record." *State v. Lasiter*, 361 N.C. 299, 302, 643 S.E.2d 909, 911 (2007) (citing *Wainwright v. Witt*, 469 U.S. 412, 434 (1985)). The trial court did not act outside the bounds of reason in determining that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. We accordingly hold the trial court did not err in admitting evidence concerning the death of Elizabeth Ratliff.

III. The Prosecution's Closing Arguments

[3] Defendant asserts that the trial court erred in overruling his objections to certain portions of the prosecution's closing arguments. In determining possible prejudice arising from improper arguments, we consider an allegedly improper statement in its broader context, as "particular prosecutorial arguments are not viewed in an isolated vacuum." *State v. Moseley*, 338 N.C. 1, 50, 449 S.E.2d 412, 442 (1994), *cert. denied*, 514 U.S. 1091 (1995). The following exchange took place during the closing argument of Assistant District Attorney Black:

> [MS. BLACK:] Agent Deaver, Doctor Radisch, and Doctor Butts. You know what? They're state employees. Just like most of us that work here in the courthouse. And they work for your state. They work for your state, North Carolina.
>
> MR. MAHER [Defense Counsel]: Objection.
>
> THE COURT: Overruled.
>
> MS. BLACK: Not Chicago, Illinois. Not Connecticut. They work for us. They gave you truthful and accurate information. And you know what? They didn't get paid not one penny extra to come in here. Deaver should have, my goodness what he had to go through on the witness stand, but, no, he didn't get an extra penny.
>
> They might not have written books that they're signing and autographing for everybody. They might not travel to all of the rest of the states and give seminars and lectures. They're not allowed to, actually. It's not that they're not good enough to, it's they're not allowed to. They might not have appeared on Larry King Live or Court TV. But you know what? They are tried and true. Tried and true. Because they work for us.

MR. MAHER: Objection.

MS. BLACK: For our state.

THE COURT: Approach the bench.

(The following bench conference was held on the record:)

MR. MAHER: I'm objecting because the suggestion that these witnesses work for us, including the jurors, is improper. They're not special employees that came in for these jurors, and the suggestion that somehow because they work for us that they are more believable I think is improper, and that's why I'm objecting.

THE COURT: Ms. Black.

MS. BLACK: They do.

MR. MAHER: They don't work for the jurors.

MS. BLACK: They work for the State of North Carolina and the jurors live in the State of North Carolina.

MR. MAHER: That is exactly the point, is that it's improper to suggest that because these jurors live in North Carolina, that employees—or they have no control over—are somehow more credible, and I'm objecting.

MS. BLACK: That's all I'm going to say about it.

MR. MAHER: That's the basis for our objection.

THE COURT: It's overruled in the Court's discretion.

(Conclusion of bench conference.)

THE COURT: All right. Objection is overruled.

MS. BLACK: Now what further distinctions can be drawn about the experts? Well, one thing about Radisch, Deaver and Butts is they have been in this very courtroom before. They have. They've testified in front of people just like you. Durham County juries.

Lee, Leestma, Bandak, Palmbach, they've never been to Durham, as far as I know, in this courthouse before to testify, and they'll probably maybe never come back here again.

But after the tents and the vans are removed from outside of the courthouse, after all of the reporters and the cameras are

gone, after all these cords and tape and everything are taken up from the floor, after we put—get the box down, after the microphones are all removed, Court TV goes to cover another case, after we get our courthouse back to normal, Deaver, Radisch, and Butts will be back in this courtroom again. They will. There will be other cases. Other murder cases. They'll be in that very witness stand again. Because that's what they do for a living. That's their livelihood. That's how they pay their bills.

MR. MAHER: Objection.

THE COURT: Overruled.

MS. BLACK: Doing the jobs that they do. And because they have to go face Durham County juries again, they only face juries from Murphy to Manteo, why in the world would they stake their reputation, their integrity, why would they stick their necks out to ruin their reliability when they know they've got to face people like you again? The answer to that question is they wouldn't. They wouldn't. They wouldn't come in here and give you inaccurate information. They're not going to do that.

MR. MAHER: Objection.

THE COURT: Approach the bench, please.

(The following bench conference was held on the record:)

MR. RUDOLF: I just want to put on the record that I've now heard at least ten times when Ms. Black has vouched for the credibility of a witness. I believe that's reversible error. I think the Court ought to be admonishing the jury that no lawyer ought to be vouching for the credibility of any witness or for their own credibility.

She's vouched for her own credibility, she's vouched for credibility of a witness. I think that's reversible error. Just for the record, I'm asking for a mistrial.

I know the Court is going to deny that, and I'd ask the Court to admonish the jury that Ms. Black ought not be vouching for anybody. Credibility of a witness is for them to decide, not Ms. Black to vouch for.

THE COURT: Well, I think that there were a couple of instances where you gave the Court the impression that you were—your personal opinion. For instance, you said I don't think

they would do that, meaning they would come in and give improper testimony.

MS. BLACK: I didn't use the words, "I don't."

THE COURT: Yeah, I think you did.

But anyway, at this point, the motion for a mistrial in the Court's discretion is denied. I'm not really sure about the "us" and the "them," about they're coming down here, and they're your witnesses, they work for your state. I think that's a close issue. So I think you better be careful about that. I will instruct the jury that the personal opinion of counsel is not allowed.

MR. RUDOLF: Thank you.

THE COURT: Anything else?

MR. HARDIN: No, sir.

MS. BLACK: No, sir.

(Conclusion of bench conference.)

THE COURT: Members of the jury, at several points counsel has indicated to the jury what the Court considers to be her personal opinions. Personal opinions about the credibility of witnesses or about anything else is not allowed by counsel and you ought to disregard that. The credibility of witnesses will be for the jury. Counsel can make arguments as to why she believes you should accept her position, but her personal opinions, such as "I believe," [are] not allowed by counsel.

"In a hotly contested trial . . . '[t]he scope of jury arguments is left largely to the control and discretion of the trial court, and trial counsel will be granted wide latitude.' " *State v. Allen*, 360 N.C. 297, 306, 626 S.E.2d 271, 280 (quoting *State v. Call*, 349 N.C. 382, 419, 508 S.E.2d 496, 519 (1998) (alteration in original)), *cert. denied*, —— U.S. ——, 127 S. Ct. 164, 166 L. Ed. 2d 116 (2006). In cases in which counsel makes a contemporaneous objection to opposing counsel's argument, this Court reviews the decision of the trial court for abuse of discretion. *See State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). "In order to assess whether a trial court has abused its discretion when deciding a particular matter, this Court must determine if the ruling 'could not have been the result of a reasoned decision.' " *Id.* (quoting *State v. Burrus*, 344 N.C. 79, 90, 472 S.E.2d 867, 875 (1996)). This Court has articulated a two-part analysis for determin-

ing whether the trial court abused its discretion in such cases. "[T]his Court first determines if the remarks were improper . . . . Next, we determine if the remarks were of such a magnitude that their inclusion prejudiced defendant, and thus should have been excluded by the trial court." *Id.* (citing *Coble v. Coble*, 79 N.C. 439, 79 N.C. 589 (1878)).

In applying this analysis to the case at bar, we note that the State has conceded that Assistant District Attorney Black's arguments were both "excessive and inappropriate." We will thus assume the statements at issue made by Assistant District Attorney Black to the jury were outside the parameters of acceptable argument and therefore improper. Because we assume the argument was improper, we must determine whether the argument prejudiced defendant to the degree that he is entitled to a new trial.

"[F]or an inappropriate prosecutorial comment to justify a new trial, it 'must be sufficiently grave that it is prejudicial [error].' " *State v. Soyars*, 332 N.C. 47, 60, 418 S.E.2d 480, 487-88 (1992) (quoting *State v. Britt*, 291 N.C. 528, 537, 231 S.E.2d 644, 651 (1977) (alteration in original)). "In order to reach the level of 'prejudicial error' in this regard, it now is well established that the prosecutor's comments must have 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *State v. Green*, 336 N.C. 142, 186, 443 S.E.2d 14, 40 (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974))), *cert. denied*, 513 U.S. 1046 (1994). However, this Court has held that when the trial court instructs the jury to disregard improper arguments and instructs counsel to confine his arguments to those matters contained in evidence, such an instruction renders the error caused by the improper arguments cured. *See State v. Sanders*, 303 N.C. 608, 618, 281 S.E.2d 7, 13, *cert. denied*, 454 U.S. 973 (1981).

Defendant argues that the trial court's curative instruction did not pertain to the portion of the closing argument in which Ms. Black advised the jurors to believe the prosecution's expert witnesses because they "work for us." Additionally, defendant contends that this statement amounts to prejudicial error that warrants a new trial. The State argues that the trial court's instruction did include the statements about which defendant complains and, even in the absence of the curative instruction, the statements did not rise to the level of prejudicial error. We agree with defendant that the curative instruction did not relate to the statements made concerning the State's experts "working for" the jury, but we agree with the State

that any prejudice arising from these statements did not " 'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.' " *Green*, 336 N.C. at 186, 443 S.E.2d at 39 (citations omitted).

Defense counsel objected three times concerning Ms. Black's argument that the prosecution's expert witnesses should be considered credible because they were State employees. All three of those objections were overruled by the trial court. It was not until Ms. Black stated "They wouldn't come in here and give you inaccurate information. They're not going to do that," and defendant objected a fourth time, that the trial court determined it should instruct the jury to disregard the personal opinions of counsel. Although the trial court expressed some concern over the statements by Ms. Black encouraging the jury to consider that the experts were State employees, the trial court only instructed the jury: "Personal opinions about the credibility of witnesses or about anything else is not allowed by counsel and you ought to disregard that." The State's argument here does not take into account the sequence of events in which the trial court overruled defendant's objections as to the "they work for us" statements, but instructed the jury to disregard the statements of personal opinion such as: "They wouldn't come in here and give you inaccurate information. They're not going to do that." Accordingly, the trial court's instruction did not cure the error which arose from Ms. Black's statements that the prosecution's experts were to be believed because they worked for the State of North Carolina.

However, we cannot say that the statements made by Ms. Black rise to the level of reversible error. Defendant cites the cases of *State v. Allen*, 353 N.C. 504, 546 S.E.2d 372 (2001) and *State v. Jones*, 355 N.C. 117, 558 S.E.2d 97 (2002), in support of his position. We determine that these cases are significantly distinguishable so as to warrant a different result.

In *State v. Allen*, this Court reversed the defendant's convictions because the prosecutor advised the jury that the trial court had "found" certain hearsay statements to be "trustworthy and reliable." 353 N.C. at 509, 546 S.E.2d at 375. We noted that "[t]his argument clearly conveyed an opinion as to the credibility of evidence that was before the jury. This opinion was attributed directly to the trial judge in his presence, and he then overruled defendant's objection to this revelation." *Id.* The statement was not improper because it gave the opinion of the prosecutor, but because it improperly stated a "legal opinion of the trial court on the admissibility and credibility of evi-

dence, an opinion which was specifically outside the record." *Id.* at 510, 546 S.E.2d at 376. In the case *sub judice*, there is no support to be found in the record for the contention that Ms. Black was asserting that the trial court in some way endorsed the testimony of the prosecution's witnesses.

This case is also significantly different from *State v. Jones*. In *Jones*, this Court found it was improper for the prosecutor to invoke the Columbine school shootings and the Oklahoma City bombing as examples of tragedies that were analogous to the tragedy of the victim's death. 355 N.C. at 132, 558 S.E.2d at 107. These statements could not "be construed as anything but a thinly veiled attempt to appeal to the jury's emotions by comparing defendant's crime with two of the most heinous violent criminal acts of the recent past." *Id.* Additionally, this Court found it prejudicial when the prosecutor engaged in unnecessary name-calling. The prosecutor stated, "You got this quitter, this loser, this worthless piece of—who's mean . . . . He's as mean as they come. He's lower than the dirt on a snake's belly." 355 N.C. at 133, 558 S.E.2d at 107. There is absolutely no indication in the record that Ms. Black engaged in any name-calling or appealed to the raw emotions of the jurors.

This trial spanned five months, and the record contains thousands of pages of transcripts. The offending statements by Ms. Black spanned less than five minutes. We conclude that defendant has not met his burden of showing, in the totality of the trial and closing arguments, that the jury would have reached a different result had the trial court sustained defendant's objection or instructed the jury in a broader manner so as to preclude consideration of the improper argument. Because this burden has not been met pursuant to N.C.G.S. § 15A-1443(a), we hold that the statements made by Ms. Black were not so egregious as to require a new trial. *See State v. Rosier*, 322 N.C. 826, 829, 370 S.E.2d 359, 361 (1988).

CONCLUSION

Because we hold that admission of the evidence seized pursuant to the third search warrant was harmless beyond a reasonable doubt, that the trial court did not err in admitting evidence concerning the death of Elizabeth Ratliff, and that the prosecutor's closing arguments did not amount to reversible error, we affirm the decision of the Court of Appeals.

AFFIRMED.

STATE OF NORTH CAROLINA v. CHRISTOPHER EDWARD GOSS

No. 316A05

(Filed 9 November 2007)

1. Jury— capital selection—reopening of voir dire—incorrect statements

The trial court did not abuse its discretion in a capital first-degree murder case by reopening the voir dire of two prospective jurors based upon the trial court's finding that both had provided incorrect statements in response to the State's initial voir dire questioning when it was discovered before the jury was impaneled that two jurors had relatives who had been defendants in criminal cases, although neither had indicated this when asked initially, because: (1) the record reveals that the actual question asked by the State was an inquiry into any close friends or relatives; (2) defendant cites no case, statute, or any other authority that suggests the term "relative" in its well-accepted usage does not apply to an individual's biological father even if the child had been adopted; and (3) it would have also been within the trial court's discretion to interpret the State's question as an inquiry into anyone connected to the prospective jurors "by blood or affinity" so that "relatives" would include "distant" cousins. N.C.G.S. § 15A-1214(g).

2. Constitutional Law— right to counsel—no right to consult attorney during psychiatric evaluation

The trial court did not err in a capital first-degree murder case by barring defendant from consulting with counsel during his mid-trial psychiatric evaluation by the State's mental health expert that resulted from a breakdown of communication between prosecutors and defense counsel during pretrial preparation, because: (1) in an effort to remedy the situation in a manner that would be fair to both parties and to spare defendant the harsh consequence of having the testimony of his own mental health expert and the only evidence in support of his theory of defense barred, the trial court ordered the mid-trial examination that is the subject of defendant's assignment of error; and (2) defendant's argument that the trial court's order deprived him of his right to counsel was not preserved as a consequence of his failure to timely object at trial, and defendant also failed to assign plain error to the trial court's order.

3. Constitutional Law— effective assistance of counsel— admission of client's guilt without obtaining permission— lapsus linguae

The trial court did not violate defendant's right to effective assistance of counsel in a capital first-degree murder case by allowing defense counsel to state during closing arguments that defendant's statement alone guarantees he'll serve a substantial amount of time in prison and face the terrible consequences of a first-degree murder conviction, because: (1) a review of the record in the instant case demonstrated that defense counsel's pertinent statement did not amount to *Harbison* error; (2) when this statement is viewed in the context of defense counsel's entire closing argument, it appears that the reference to first-degree murder was accidental and went unnoticed; (3) the only issue contested at defendant's trial was whether he committed first-degree or second-degree murder, and trial counsel's entire closing argument was directed toward undercutting the two theories of first-degree murder advanced by the State; and (4) the statement in question did not amount to a concession of defendant's guilt of first-degree murder, and absent such a concession, defendant failed to carry his burden of showing that his trial counsel's performance fell below an objective standard of reasonableness.

4. Criminal Law— prosecutor's argument—consciousness of guilt

The trial court did not abuse its discretion in a capital first-degree murder case by failing to intervene ex mero motu during the State's closing argument that defendant assaulted another inmate while in jail in retaliation for reporting to authorities an incriminating statement defendant had made to him in regard to the murder in this case, because: (1) even assuming arguendo that the closing argument was grossly improper, any prejudice to defendant was cured by the trial court's instructions to the jury following closing arguments stating that the State's evidence regarding the jail inmate could only be considered for the limited purposes of showing defendant's consciousness of guilt and as a basis for expert opinion regarding defendant's mental state at the time of the alleged murder; and (2) defendant cannot show that the trial court failed to correct any prejudice that might have resulted from the State's closing argument.

5. Sentencing— death penalty—proportionality

The trial court did not err in a first-degree murder case by sentencing defendant to the death penalty, because: (1) two aggravating circumstances were found including the N.C.G.S. § 15A-2000(e)(4) aggravating circumstance that defendant committed the murder for the purpose of avoiding a lawful arrest, and the N.C.G.S. § 15A-2000(e)(9) aggravating circumstance that the murder was especially heinous, atrocious, or cruel; (2) defendant needlessly stabbed the victim over fifty times with at least two different knives, pausing several times between series of stabs, thereby prolonging the victim's suffering; (3) defendant left the victim's three-year-old grandson alone in the residence after the murder, making it highly probable that the child would awaken to discover his grandmother dead on the living room floor, half naked in a pool of blood with knives protruding from her body; (4) defendant was the only assailant, was twenty-eight-years old at the time of the offense, sought no medical treatment for the victim, failed to show any immediate remorse for the murder, and instead expended considerable time and effort toward concealing his identity and misleading investigators; and (5) defendant did not readily and immediately admit his guilt, but instead did so only after becoming the primary focus of the murder investigation and being ordered to submit hair and blood samples that he knew would implicate him in the murder.

6. Appeal and Error— preservation of issues—failure to argue

The remaining assignments of error presented by defendant and not set out or argued in his brief are deemed abandoned under N.C. R. App. P. 28(b)(6).

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge Richard L. Doughton on 8 February 2005 in Superior Court, Ashe County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court 11 September 2007.

Roy Cooper, Attorney General, by Barry S. McNeill, Special Deputy Attorney General, for the State.

Ann B. Petersen for defendant-appellant.

BRADY, Justice.

On 22 September 2003, defendant Christopher Edward Goss stabbed his neighbor Deborah Sturgill Veler to death in her home, inflicting over fifty sharp-force wounds to her back, neck, face, hands, and arms using knives from her kitchen. Defendant was convicted of first-degree murder, and a jury returned a binding recommendation that defendant be sentenced to death. On 8 February 2005, the trial court entered judgment sentencing defendant accordingly.

BACKGROUND

At trial, Kenneth Courtner testified that at approximately noon on Sunday, 21 September 2003, he took his three-year-old son Devin, the grandson of Deborah Sturgill Veler (the victim), to stay overnight with his grandmother at her residence in Jefferson, North Carolina. Denise Veler Courtner, Devin's mother and the victim's daughter, had made arrangements to pick up Devin at approximately 6:30 a.m. the next morning, 22 September 2003, at a church parking lot adjacent to State Highway 221.

Nancy Kerley, Devin's paternal grandmother, testified that sometime after 6:30 a.m. on 22 September 2003 she was driving to work when she passed the church parking lot where the victim had arranged to meet Ms. Courtner. Ms. Kerley observed Ms. Courtner sitting in a truck in the parking lot and stopped to speak with her, whereupon Ms. Kerley learned that Ms. Courtner had been waiting for her mother for approximately one hour. Eventually, Ms. Kerley decided to drive to the victim's residence, and Ms. Courtner contacted law enforcement to request that an officer be sent to check on her mother.

Ashe County Deputy Sheriff Rob Powers was dispatched to the victim's residence in response to Ms. Courtner's request. When Deputy Powers arrived at the residence at approximately 9:15 a.m., he observed Ms. Kerley knocking at the front door of the residence. A neighbor, Rita Wagoner Jordan, testified that she arrived at the scene at about the same time as Deputy Powers, having overheard the dispatch on her police radio scanner. After Deputy Powers began knocking, he eventually observed Devin inside the residence. Ms. Kerley and Deputy Powers were able to instruct Devin to open the front door, at which time he jumped into the arms of Ms. Jordan, appearing to be "hungry, tired, sleepy, [and] in shock." Deputy Powers then entered the residence and found the victim's body on the living room floor.

I. STATE'S INVESTIGATION

A subsequent investigation of the crime scene by law enforcement officials uncovered evidence that the murder may have occurred during the commission of a burglary and a sexual assault on the victim. There was also a substantial amount of blood discovered at the residence, which later testing indicated came from two individuals. Investigators performed a neighborhood canvas on 22 September 2003 and again on 24 September 2003. On both dates, an investigator went to the residence of Jim and Anna Lee Goss, defendant's parents, where defendant resided at the time. On each occasion, defendant was interviewed and denied having left his parents' house at any time during the night of the victim's murder.

On 12 October 2003, defendant was booked on unrelated charges by the Jefferson Police Department. During this process, acting Police Chief David Larry Neaves observed a cut on defendant's arm that caused him to suspect defendant may have been involved in the murder. The same evening, while defendant was still in custody, Chief Neaves and North Carolina State Bureau of Investigation Special Agent Steve Wilson questioned defendant about the murder. Defendant waived his *Miranda* rights and agreed to answer their questions. During the interrogation, defendant gave an account of his whereabouts on 21 and 22 September 2003 that was inconsistent with statements he had provided previously. However, defendant again denied any involvement in the murder and explained that the cut on his arm resulted from a piece of broken glass falling on him while he was cleaning the garage windows at his parents' house.

On 24 October 2003, investigators served a warrant on defendant for the seizure of hair and blood samples. After defendant provided these samples and was transported back to the Ashe County Jail, defendant asked to speak with Chief Neaves and Special Agent Wilson and was taken to an interrogation room, where he waived his *Miranda* rights again. Special Agent Wilson then asked defendant what he wanted to share, and defendant immediately responded that he had "killed" the victim.

II. DEFENDANT'S CONFESSION

Thereafter, defendant provided a statement that contained, *inter alia*, the following facts: At about 3:00 p.m. on Sunday, 21 September 2003, defendant walked from his parents' house to a 7-Eleven convenience store in West Jefferson to purchase beer, carrying with him a

duffle bag. As defendant was returning from the store, the victim stopped her sport utility vehicle (SUV) and offered him a ride. Defendant accepted and got into the front passenger seat. Devin was also in the vehicle. While on their way, the victim asked defendant whether he knew her daughter, Denise, and he replied that he did. When they arrived at the victim's residence, she asked defendant whether he wanted to return later that night, and he indicated that he would do so.

Defendant returned to his parents' house, entering through the basement door, and consumed eight or nine of the beers he had purchased. At approximately 11:00 p.m., he returned to the victim's residence. When he arrived, he knocked on the front door and was invited in by the victim, who led defendant to a couch in the living room. Devin was apparently asleep in a nearby bedroom at the time. Defendant and the victim then engaged in some casual conversation until the victim ultimately returned to the subject of her daughter Denise. She asked defendant whether he had fathered one of Denise's children, and he denied the accusation. She further inquired about a party that defendant and Denise had attended years earlier and said Denise claimed that defendant had raped her at the party. Defendant stood up and stated his intention to leave, but the victim pointed at him and told him, "You're not going nowhere."

As the victim was pointing at defendant, she poked her finger into his forehead. Defendant reacted to this by striking her on the nose with the palm of his hand. The victim said she intended to call the police and rushed into her bedroom. Although she attempted to close the door behind her, defendant followed her, grabbed her hair, and threw her onto the bed. A struggle ensued on the bed as defendant hit the victim "a few times." Defendant released the victim and she started to run, but he grabbed her and pushed her down. She then escaped his grasp, but again he was able to wrestle her down to the floor. Defendant inquired as to whether the victim still intended to call the police, and she replied, "Yes." Although defendant pleaded with her to calm down, she cursed at him and told him he was "going to pay for this." Defendant then struck the victim several times in the face and the back of her head until she stopped moving. He took a break to smoke a cigarette and think about what he was doing.

Defendant left the victim's residence and returned to his parents' house, where he collected a change of clothes, a hammer, and some duct tape, placing these items in his duffle bag. He walked back to

the victim's residence and pushed open the locked rear double doors with the intention "to make it look like a robbery or breaking and entering" and with the hope that the victim would forget who had assaulted her. He went into the kitchen and began to ransack it, but as he did so the victim raised her head and saw him. Defendant got on top of the victim and told her to calm down and not to call the police. When she indicated that she would not follow his instructions, defendant bound her hands behind her back using his duct tape and also bound her feet together. He then struck her repeatedly until she once again stopped moving.

Shortly after defendant resumed ransacking the house, the victim regained consciousness and started to scream. Defendant asked her to be quiet and to remember that she did not know who he was. The victim stated that defendant was "going to jail." Defendant then walked to the kitchen and obtained a ten-inch long knife belonging to the victim. He returned to the victim, straddled her, and began to stab her in the back, "not kind of hard at first, maybe four times." He paused a moment and then stabbed her five more times in the back, harder and deeper than before. The victim was silent and did not struggle.

Defendant at this point asked aloud, "What the hell am I doing?" He laid the knife on the victim's back and returned to the kitchen, but when he heard her mumble something, he obtained a second, longer knife. Defendant straddled the victim again and stabbed her five to eight more times on the left side of her back. He then left the second knife in her body, stood up and saw that the victim was still breathing though she remained silent, and used another knife to slit her throat "to make sure she died."

Defendant soon realized he had cut himself on the left forearm and that he was bleeding "quite a bit." He removed his shirt and wrapped it around his arm in an attempt to stop the bleeding. Then he went to the bedroom to check on Devin. While there, defendant observed he was still bleeding and that some of this blood had gotten onto the bed. After "just walking around thinking what to do," defendant returned to the victim and observed that she was no longer breathing. He noted the time on a nearby clock was 3:45 a.m.

In his statement, defendant further described the actions he took after the murder. He first changed out of his clothes and put on the clothes he had obtained from his parents' house, placing the old clothes in his duffle bag. He then walked back to his parents'

house, cleaned some blood from his chest and shoulder, and bandaged the cut on his left forearm. For the third time, he returned to the victim's residence, again through the rear double doors, but this time he was wearing black leather gloves. He took several actions "just to make it look crazy," including pulling down the victim's pants and panties and pouring out a container of lotion onto her buttocks and legs. He placed an envelope on which he had written "[y]ou owe me money" on the victim's buttocks and put a pair of eyeglasses and a small knife on top of the envelope. He wrote "I will kill" on the couch, "trying to make it look like somebody crazy did that to [the victim]."

Defendant took several additional actions to conceal his identity and to mislead investigators: He used a dampened towel to wipe down the handle of a knife and to wipe off what he thought was blood on the wall above the victim's bed, used scissors to cut out bloody parts of the top sheet and mattress on the victim's bed, went to a rear window on the ground floor and tried to pry it open with his hammer until the lock broke, cut the telephone line, and spread credit cards on top of the victim's body. He placed the pieces of duct tape that he removed from the victim's arms and legs and the pieces of bed sheet and mattress he had removed from the victim's bed in his duffle bag. Defendant took seventeen dollars from the victim's kitchen countertop and her vehicle keys and checked the house to make sure he did not forget anything. He then drove her SUV to the rear of a nearby grocery store in order to dispose of his hat and duffle bag. Returning to the victim's residence, he parked the vehicle in the same place it was before and wiped it down to remove fingerprints.

Defendant went into the victim's residence once more to retrieve his hammer and smoke a cigarette. He also went upstairs to check on Devin, returned the victim's vehicle keys to the kitchen countertop, and turned off all the lights before leaving through the back door of the residence and walking back to his parents' house, entering through the basement door to his room. He smoked another cigarette and reflected on what he had done, then went to sleep at approximately 5:00 a.m.

At the conclusion of his statement, defendant explained that he stabbed the victim because he could not calm her down or convince her not to call the police and that "[i]f she had agreed not to tell on [him], [he] would not have killed her."

III. DEFENDANT'S CONVICTION AND APPEAL AS OF RIGHT

On 15 December 2003, the Ashe County Grand Jury returned a true bill of indictment charging defendant with the first-degree murder of Deborah Sturgill Veler. On 2 February 2005, following defendant's trial in Ashe County Superior Court, a jury returned its verdict finding defendant guilty of first-degree murder on the basis of premeditation and deliberation and under the felony murder rule. On 8 February 2005, following a sentencing hearing, the jury returned its binding recommendation that defendant be sentenced to death. The same day, the trial court entered its judgment consistent with the jury's recommendations. Defendant now appeals his conviction and sentence of death to this Court as of right pursuant to N.C.G.S. § 7A-27(a).

ANALYSIS

I. JURY SELECTION

[1] Defendant assigns error to the reopening of *voir dire* of two prospective jurors based upon the trial court's finding that both had provided incorrect statements in response to the State's initial *voir dire* questioning. The governing statute provides in part:

> (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.

N.C.G.S. § 15A-1214(g) (2005). It is well settled that "the decision to reopen *voir dire* rests in the trial court's discretion" and the trial court's decision will not be overturned absent an abuse of that discretion. *See State v. Bond*, 345 N.C. 1, 19, 478 S.E.2d 163, 172 (1996)

(citing *State v. Parton*, 303 N.C. 55, 70-71, 277 S.E.2d 410, 421 (1981)), *cert. denied*, 521 U.S. 1124 (1997). Applying this standard of review to the instant case, we find no abuse of discretion in the trial court's decision to reopen *voir dire* of either juror.

During the State's *voir dire* on 18 January 2005, prospective jurors Jason Ryan Brown and Dennis Jeffrey Dancy were both questioned as to whether they had "[a]ny close friends or relatives who have either been a witness, a defendant, or a victim in a criminal case." The record indicates that neither Brown nor Dancy raised his hand to respond in the affirmative.

On 19 January 2005, the State passed a panel of twelve jurors that it found acceptable—including Brown and Dancy—to the defense. Subsequently, and before the jury was impaneled, it came to the State's attention that both jurors had relatives who had been defendants in criminal cases, although neither had indicated this when asked initially. When Dancy was questioned by defense counsel on *voir dire*, he mentioned for the first time that he had "[s]ome cousins that have been convicted of capital crimes." Additionally, the State was informed by law enforcement officers that Brown's biological father had been convicted of murder and that his uncle was a fugitive from justice suspected of murder.

Defendant exercised eight peremptory challenges following his *voir dire* of the twelve prospective jurors and found four of them acceptable, including Brown and Dancy. The State then moved to reopen *voir dire* of Brown and Dancy, and the trial court allowed these motions pursuant to N.C.G.S. § 15A-1214(g) over defendant's objection. After further questioning of Brown and Dancy, the State exercised a peremptory challenge for both of these prospective jurors.

With regard to Brown and Dancy, defendant contends that the two prospective jurors did not answer the prosecutor's initial question incorrectly because that question "went only to 'close family members or friends.' " Thus, defendant argues, since neither Brown's biological father and uncle nor Dancy's distant cousins can be considered "close family members," the trial court abused its discretion by reopening *voir dire* as to Brown and Dancy. Defendant relies in part on what he refers to as an "acknowledgment" of prosecutors that the question was an inquiry into "close family members or friends." This reliance is misplaced for two reasons: First, the statement cited by defendant as an "acknowledgment" was not uttered by the prose-

cutor *who actually conducted the voir dire*. Second, throughout the hearing on the State's motions to reopen *voir dire* the word "relative" is used by prosecutors at least three times and the phrase "close family members" only once—the instance cited by defendant.

Instead, the record reveals that the actual question asked by the State was an inquiry into "[a]ny close friends or relatives." This phrase is open to two interpretations with regard to the adjective "close." One is that this adjective modifies both "friends" *and* "relatives." The other is that it only modifies "friends" and therefore the word "relatives" remains unmodified. We cannot say the trial court abused its discretion by relying upon the latter interpretation in determining whether Brown and Dancy provided incorrect statements during the State's *voir dire*.

Defendant further argues that Brown had no "family relationship" with his biological father and uncle, "[b]oth as a practical fact and as a matter of law," as he had been adopted as a teenager. Defendant cites *Crumpton v. Mitchell*, 303 N.C. 657, 281 S.E.2d 1 (1981), to support his contention that legal adoption terminates "all family ties with a biological parent and his kin." However, the Court in *Crumpton* merely stated that "the *legal* relationship with the child's natural parents and family would by virtue of the adoption order be completely severed." *Id.* at 663, 281 S.E.2d at 5 (emphasis added). Defendant cites no case, statute, or any other authority that suggests the term "relative" in its well-accepted usage does not apply to an individual's biological father. In fact, the dictionary definition of "relative" tends to support the opposite conclusion. *See Black's Law Dictionary* 1315 (8th ed. 2004) (defining the term as "[a] person connected with another by blood or affinity; a person who is kin with another"); *Miriam-Webster's Collegiate Dictionary* 987 (10th ed. 1999) (defining the term as "a person connected with another by blood or affinity").

Defendant does not specifically address whether Dancy's cousins could be considered "relatives," but only whether these are included under "close family members." Nevertheless, defendant broadly asserts that the State "never inquired about distant cousins." Again, it was not an abuse of discretion for the trial court to interpret the State's use of "relatives" as unmodified by the word "close." Thus, it would have also been within the trial court's discretion to interpret the State's question as an inquiry into anyone connected to the prospective jurors "by blood or affinity," to include "distant" cousins.

Defendant has failed to demonstrate that the trial court abused its discretion by reopening *voir dire* as to either Brown or Dancy. Rather, the record supports a finding that these two prospective jurors made incorrect statements in the initial *voir dire* questioning by the State. Accordingly, this assignment of error is overruled.

II. GUILT-INNOCENCE PHASE PROCEEDINGS

A. Right to Counsel During Psychiatric Evaluation

[2] Defendant assigns error to an order of the trial court barring him from consulting with counsel during his mid-trial psychiatric evaluation by the State's mental health expert, asserting that this was a violation of his state and federal constitutional rights to counsel. The timing of the evaluation apparently resulted from a breakdown of communication between prosecutors and defense counsel during pretrial preparation. On 10 December 2004, when the State's expert, Robert S. Brown, Jr., M.D., a board-certified forensic psychiatrist on the clinical faculty at the University of Virginia, attempted to evaluate defendant, it was without the prior knowledge of defense counsel. Consequently, when Dr. Brown advised defendant of his right to remain silent, defendant exercised that right, thus terminating the interview. Although the State subsequently informed defense counsel of defendant's refusal, no additional attempts were made by either side to arrange another evaluation.

Instead, on the second day of the State's case-in-chief, the State moved to bar the testimony of defendant's own mental health expert pursuant to *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000), *cert. denied*, 531 U.S. 1130 (2001), on the basis of defendant's refusal to submit to the State's evaluation. When the State made its motion, it was the first time the trial judge was apprised of the issue. In an effort to remedy the situation in a manner that would be fair to both parties and to spare defendant the harsh consequence of having the only evidence in support of his theory of defense barred, the trial court ordered the 27 January 2005 examination that is the subject of defendant's assignment of error. However, the trial court also admonished the State for its delay in bringing the matter to the court's attention. Needless to say, better communication between the attorneys on both sides would have spared all of the parties this unnecessary burden. *See State v. Maske*, 358 N.C. 40, 62, 591 S.E.2d 521, 535 (2004) (Brady, J., concurring) (noting how such lapses of judgment by counsel in capital cases "are unacceptable given the gravity of the setting,

the dwindling resources available to our judiciary, and the expanding caseload of the judiciary" (citation omitted)).

Defendant's argument that the trial court's order deprived him of his right to counsel was not preserved as a consequence of his failure to timely object at trial. *See* N.C. R. App. P. 10(b)(1). To the contrary, the following exchange took place between the trial court and defense counsel:

> COURT: He doesn't have any right to call for you to come in or right to go talk to you or anything else. He needs to understand that and you need to fully tell him that under these cases, the examination is the doctor's. When he finishes with it, then he comes back and talks to you after it's over.
>
> [DEFENSE COUNSEL]: That's fine, Judge.

"Even alleged errors arising under the Constitution of the United States are waived if defendant does not raise them in the trial court." *State v. Jaynes*, 342 N.C. 249, 263, 464 S.E.2d 448, 457 (1995) (citing *State v. Upchurch*, 332 N.C. 439, 421 S.E.2d 577 (1992); *State v. Mitchell*, 317 N.C. 661, 346 S.E.2d 458 (1986)), *cert. denied*, 518 U.S. 1024 (1996); *see also State v. Golphin*, 352 N.C. 364, 465, 533 S.E.2d 168, 234 (2000), *cert. denied*, 532 U.S. 931 (2001); *State v. Call*, 349 N.C. 382, 410, 412, 508 S.E.2d 496, 514-15 (1998) (citing *Jaynes*). Defendant also failed to assign plain error to the trial court's order. *See* N.C. R. App. P. 10(c)(4) (stating a defendant must "specifically and distinctly" assign plain error to preserve a question for appellate review that is otherwise waived pursuant to N.C. R. App. P. 10(b)(1)); *see also*, *e.g.*, *Golphin*, 352 N.C. at 465, 533 S.E.2d at 234 (holding that a capital defendant's argument was waived when it was not preserved under N.C. R. App. P. 10(b)(1) and defendant did not "specifically and distinctly" assign plain error as required by N.C. R. App. P. 10(c)(4)). This assignment of error has therefore been waived and is dismissed. *See Jaynes*, 342 N.C. at 263, 464 S.E.2d at 457.

B. Defense Counsel's "Concession" During Closing Argument

[3] Defendant asserts that his state and federal constitutional rights to the effective assistance of counsel were denied when defense counsel stated in closing arguments that "[defendant's] statement alone guarantees he'll serve a substantial amount of time in prison and face the terrible consequences of a *first degree* murder conviction." (Emphasis added.) Defendant contends that this amounts to a

concession of defendant's guilt of first-degree murder and that, because this concession was made without his consent, the statement was per se ineffective assistance of counsel and would therefore warrant a new trial.

Generally, this Court "indulges the presumption that trial counsel's representation is within the boundaries of acceptable professional conduct," giving counsel "wide latitude in matters of strategy." *State v. Campbell*, 359 N.C. 644, 690, 617 S.E.2d 1, 30 (2005) (citations and internal quotation marks omitted), *cert. denied*, 547 U.S. 1073 (2006). To prevail on an ineffective assistance of counsel claim, a defendant must show that trial counsel's conduct " 'fell below an objective standard of reasonableness.' " *See id.* at 690, 617 S.E.2d at 29 (quoting *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984))). This requires a showing that, first, trial counsel's performance was so deficient that he or she "was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and second, this deficient performance prejudiced the defense, such that the errors committed by trial counsel deprived the defendant of a fair trial. *Id.* (quoting *Strickland*, 466 U.S. at 687 (internal quotation marks omitted)).

In *State v. Harbison*, this Court held that

> [w]hen counsel admits his client's guilt without first obtaining the client's consent, 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.

315 N.C. 175, 180, 337 S.E.2d 504, 507 (1985) (citation omitted), *cert. denied*, 476 U.S. 1123 (1986). More recently, in *State v. Matthews*, this Court stated that "*Harbison* error" amounts to a per se violation of a defendant's right to the effective assistance of counsel. 358 N.C. 102, 109, 591 S.E.2d 535, 540-41 (2004). Here, defendant asserts that the statement in question was *Harbison* error. We disagree.

In *Harbison*, the defendant maintained throughout the trial that he had acted in self-defense when the State's evidence tended to show that he shot his former girlfriend and shot and killed a man who was with her at the time. 315 N.C. at 177, 337 S.E.2d at 505-06.

Although counsel for the defendant adhered to this theory of self-defense when cross-examining the State's witnesses and presenting the defendant's case-in-chief, during closing arguments counsel expressed his personal opinion that the defendant should be found guilty of manslaughter:

> Ladies and Gentlemen of the Jury, I know some of you and have had dealings with some of you. I know that you want to leave here with a clear conscious [sic] and I want to leave here also with a clear conscious [sic]. I have my opinion as to what happened on that April night, and I don't feel that [the defendant] should be found innocent. I think he should do some time to think about what he has done. I think you should find him guilty of manslaughter and not first degree.

Id. at 177-78, 337 S.E.2d at 506. The Court found this concession of guilt a per se violation of the defendant's right to the effective assistance of counsel and, accordingly, arrested the judgments against the defendant and awarded him a new trial. *Id.* at 180-81, 337 S.E.2d at 507-08.

In *Matthews*, the defense counsel made the following statement in closing arguments:

> There are three possible verdicts in that case. . . . You have a possible verdict of guilty of first-degree murder. . . .
>
> 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*.

358 N.C. at 106, 591 S.E.2d at 539. Trial counsel later added, "When you look at the evidence . . . you're going to find that he's guilty of second-degree murder." *Id.* Noting that counsel made this concession of guilt apparently without advising his client, this Court held this was *Harbison* error and awarded the defendant a new trial. *Id.* at 109, 591 S.E.2d at 540-41.

A review of the record in the instant case demonstrates that the statement of defense counsel to which defendant assigns error clearly did not amount to *Harbison* error. Rather, when this statement is viewed in the context of defense counsel's entire closing

argument, it appears that his reference to first-degree murder was accidental and went unnoticed. The final words of the closing argument bear this out:

> And as you go back into that jury room, I only ask that you keep that open mind as you deliberate, that you consider the evidence objectively, clearly, in consultation with each other, that you remember the rage, the freaking out, the out of control that's evident from the State's own evidence, and you return the verdict that the evidence supports, *guilty of second degree murder*. Thank you.

(Emphasis added.) In fact, the only issue even contested at defendant's trial was whether he had committed first-degree or second-degree murder, and trial counsel's entire closing argument was directed toward undercutting the two theories of first-degree murder advanced by the State: felony murder and murder committed with premeditation and deliberation.

Defendant would have this Court interpret *Harbison* to allow a defendant to seize upon a *lapsus linguae* uttered by trial counsel in order to be awarded a new trial. However, we are unconvinced that the statement in question amounted to a concession of defendant's guilt of first-degree murder. Absent such a concession, defendant has the burden of showing that his trial counsel's performance fell below an objective standard of reasonableness, a burden which defendant has failed to carry. *See Strickland*, 466 U.S. at 687-88. Accordingly, this assignment of error is overruled.

C. Argument by Prosecutor Concerning Attack of Rob Willis

[4] Defendant contends that the trial court should have intervened *ex mero motu* during the State's closing argument. At trial, the State presented testimony of Rob Willis, who was confined with defendant in the Ashe County Jail for a period of time. This testimony tended to prove that defendant assaulted Willis in retaliation for reporting to authorities an incriminating statement defendant had made to him in regard to the murder. Over defendant's objection, the trial court admitted this evidence for the limited purpose of showing defendant's consciousness of guilt at the time of the offense. During closing argument, the prosecutor made the following statements:

> I want to touch on another thing with regard to eliminating [the victim] who was a witness. [Defendant] thought that, you know, he had assaulted her in a very bad way, and when he came

> back, it would be the State's contention that he did that for the purpose of eliminating her ability to testify against him, to put him back in jail. You know, people tend to do things repeatedly. He, basically, attempted to do the same thing by eliminating a witness with regard to Rob Willis in the jail. That is Rob Willis, he knew, was going to testify against him, perhaps. And what did he do with regard to Rob Willis? Does that show his ability to plan and think ahead.

Defendant asserts that the trial court's failure to bar these statements of the prosecutor constitutes reversible error because the prosecutor was arguing the evidence for a different, inadmissible purpose—namely, to prove defendant's bad character—in violation of the North Carolina Rules of Evidence. *See* N.C.G.S. § 8C-1, Rule 404(a) (2005).

We note for purposes of review that defendant did not object to these statements at trial. Thus, "the prosecutor's argument is subject to limited appellate review for gross improprieties which make it plain that the trial court abused its discretion in failing to correct the prejudicial matters *ex mero motu*." *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709 (1995), *cert. denied*, 516 U.S. 1148 (1996); *see also State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002); *State v. Trull*, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998), *cert. denied*, 528 U.S. 835 (1999); *State v. Tyler*, 346 N.C. 187, 205, 485 S.E.2d 599, 609, *cert. denied*, 522 U.S. 1001 (1997).

Generally, "prosecutors are given wide latitude in the scope of their argument" and may "argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom." *Alston*, 341 N.C. at 239, 461 S.E.2d at 709-10 (citing *State v. Syriani*, 333 N.C. 350, 398, 428 S.E.2d 118, 144, *cert. denied*, 510 U.S. 948 (1993)). Statements or remarks in closing argument "must be viewed in context and in light of the overall factual circumstances to which they refer." *Id.* at 239, 461 S.E.2d at 709 (citation omitted). Additionally, as a general rule, a trial court cures any prejudice resulting from a prosecutor's misstatements of law by giving a proper instruction to the jury. *See Trull*, 349 N.C. at 452, 509 S.E.2d at 194.

Even if we assume *arguendo* that the closing argument in this case was grossly improper, we conclude that any prejudice to defendant was cured by the trial court's instructions to the jury following closing arguments. The trial court stated in these instructions that the State's evidence as to Willis could only be considered for the limited purposes of showing defendant's consciousness of guilt and

as a basis for expert opinion regarding defendant's mental state at the time of the alleged murder. Because defendant cannot show that the trial court failed to correct any prejudice that might have resulted from the State's closing argument, this assignment of error is overruled.

III. PRESERVATION ISSUES

Defendant raises three preservation issues. First, defendant assigns error to the trial court's instructions to the jury on Issue 4 of the issues and recommendations as to punishment form, which requires the jury to determine whether the aggravating circumstances are sufficiently substantial to impose the death penalty. Defendant objects to the instruction requiring that the jury must unanimously fail to find the aggravating circumstances sufficiently substantial before they can answer this issue in the negative. This Court rejected the same argument in *State v. McCarver*, 341 N.C. 364, 390, 462 S.E.2d 25, 39 (1995), *cert. denied*, 517 U.S. 1110 (1996), and again in *State v. Elliott*, 360 N.C. 400, 422, 628 S.E.2d 735, 750, *cert. denied*, —— U.S. ——, 127 S. Ct. 505, 166 L. Ed. 2d 378 (2006). We similarly decline to overrule this precedent in the present case.

Second, defendant assigns error to the trial court's instruction to the jury that it had the "duty" to impose the death penalty if it found that the mitigating circumstances failed to outweigh the aggravating circumstances. This argument was rejected in *State v. Skipper*, 337 N.C. 1, 57, 446 S.E.2d 252, 283-84 (1994), *cert. denied*, 513 U.S. 1134 (1995), and again in *Elliott*, 360 N.C. at 422, 628 S.E.2d at 750. We also reject defendant's argument in this case.

Finally, defendant assigns error to the trial court's definition of mitigating circumstances contained in its instructions to the jury as being too narrow and precluding the jury from considering all relevant mitigating information. Again, this Court previously rejected the same argument. *See State v. Conaway*, 339 N.C. 487, 533-34, 453 S.E.2d 824, 853-54, *cert. denied*, 516 U.S. 884 (1995); *Skipper*, 337 N.C. at 52-53, 446 S.E.2d at 280-81. We decline to overrule this established precedent in the present case.

Accordingly, these three assignments of error are overruled.

IV. PROPORTIONALITY ISSUES

[5] Having determined that defendant's trial and sentencing proceeding were free of prejudicial error, we must now consider:

> (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 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 facts of the crime and the defendant.

State v. Cummings, 361 N.C. 438, 477, 648 S.E.2d 788, 811 (2007) (citing N.C.G.S. § 15A-2000(d)(2) (2005)).

In this case, the jury found two aggravating circumstances to exist beyond a reasonable doubt: (1) defendant committed the murder for the purpose of avoiding a lawful arrest, *see* N.C.G.S. § 15A-2000(e)(4) (2005), and (2) the murder was especially heinous, atrocious, or cruel, *see* N.C.G.S. § 15A-2000(e)(9) (2005). The State's evidence clearly supports both of these aggravating circumstances. From defendant's confession alone, a jury could have found that he committed the murder for the purpose of avoiding lawful arrest, as he admitted that he would not have committed the murder if the victim had agreed not to call the police to report his assault upon her. This evidence was sufficient to support the (e)(4) aggravating circumstance.

Also from defendant's confession alone, a jury could have found that the murder was especially heinous, atrocious, or cruel. Defendant twice beat the victim into an unconscious state in an apparent effort to make her forget he was ever at the residence. He needlessly stabbed her over fifty times with at least two different knives, pausing several times between series of stabs, thereby prolonging the victim's suffering. Only after inflicting multiple wounds to the victim's back did defendant finally inflict a wound calculated to end her life, slitting her throat as she was gasping her final breaths. Lastly, defendant left the victim's three-year-old grandson alone in the residence after the murder, making it highly probable that the child would awaken to discover his grandmother dead on the living room floor, half naked in a pool of blood with knives protruding from her body. This evidence was sufficient to support the (e)(9) aggravating circumstance.

There is no indication anywhere in the record that the jury was under the influence of passion, prejudice, or any other arbitrary factor when it recommended a sentence of death for defendant. As it appears instead that the jury carefully considered and weighed each

of the aggravating and mitigating circumstances and entered a reasoned decision in accordance with the law, we are compelled to leave the jury's recommendation of death undisturbed.

Finally, this Court must determine whether defendant's sentence is disproportionate. Ultimately, proportionality review rests upon the experienced judgments of the members of the Court. *Elliott*, 360 N.C. at 425, 628 S.E.2d at 752 (citations omitted). In its determination, the Court must compare defendant's case with all similar cases in this jurisdiction, though we are not bound to cite each of these. *See Cummings*, 361 N.C. at 477-78, 648 S.E.2d at 812 (citations omitted). Although defendant asserts that this process is vague and arbitrary in violation of his state and federal constitutional rights, we decline any invitation from defendant to depart from this well-settled practice. *See Elliott*, 360 N.C. at 425, 628 S.E.2d at 752; *McNeill*, 360 N.C. at 254, 624 S.E.2d at 344.

There have been eight cases in which this Court has determined that the death sentence was disproportionate. *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 (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). As the Court noted in *State v. Cummings*, in only two of these eight cases, *Stokes* and *Bondurant*, did the jury find the aggravating circumstance that the murder was especially heinous, atrocious, or cruel:

> In *Stokes*, the defendant was seventeen years old and the only one of four assailants to receive the death penalty. 319 N.C. at 3-4, 21, 352 S.E.2d at 654-55, 664. In *Bondurant*, the defendant showed immediate remorse for his actions and even directed the victim's transport to the hospital, hoping to see the victim live. 309 N.C. at 694, 309 S.E.2d at 182-83.

361 N.C. at 478, 648 S.E.2d at 812.

Stokes and *Bondurant* can easily be distinguished from this case. Defendant here was the only assailant, was twenty-eight-years old at the time of the offense, sought no medical treatment for the victim,

and failed to show any immediate remorse for the murder, instead expending considerable time and effort toward concealing his identity and misleading investigators. Also in contrast to the defendant in *Bondurant*, defendant here did not readily and immediately admit his guilt. *See Bondurant*, 309 N.C. at 694, 309 S.E.2d at 182-83. He did so only after becoming the primary focus of the murder investigation and being ordered to submit hair and blood samples that he knew would implicate him in the murder. Accordingly, after careful review, we find that defendant's sentence of death is proportionate to the crime he committed.

V. CONCLUSION

[6] The remaining assignments of error presented by defendant and not set out or argued in his brief are deemed abandoned. *See* N.C. R. App. P. 28(b)(6); *Cummings*, 361 N.C. at 479, 648 S.E.2d at 812-13 (citing *McNeill*, 360 N.C. at 241, 624 S.E.2d at 336). We conclude that defendant received a fair trial and sentencing proceeding, that his conviction and sentence were free from prejudicial error, and that the sentence of death is not disproportionate to the crime for which defendant was convicted.

NO ERROR.

LENNIE AND BONNIE HAMBY v. PROFILE PRODUCTS, L.L.C., TERRA-MULCH PRODUCTS, L.L.C., ROY D. HOFFMAN, AND ELECTRIC SERVICE GROUP, INC.

No. 507A06

(Filed 9 November 2007)

Appeal and Error; Workers' Compensation— appealability—partial summary judgment denied—third-party ordinary negligence claim and worker's compensation—possible inconsistent verdicts—summary judgment to be granted

The trial court's interlocutory order denying summary judgment for a limited liability company (Profile) was reviewable on appeal where Profile was managing its subsidiary LLC (Terra-Mulch) when a Terra-Mulch employee was injured. Although plaintiffs argued that there were separate claims against the two companies with Profile being subject to ordinary negligence as a

third-party, Profile was conducting Terra-Mulch's business within the meaning of the Worker's Compensation Act and is thus entitled to the exclusivity provided by statute. Denying summary judgment for Profile while granting summary judgment for Terra-Mulch created a risk of inconsistent verdicts on the same facts and issues. The Court of Appeals' dismissal of Profile's appeal was reversed, and the matter remanded for entry of summary judgment for Profile.

Judge TIMMONS-GOODSON dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 179 N.C. App. 151, 632 S.E.2d 804 (2006), dismissing as interlocutory an appeal from an order entered on 23 June 2005 by Judge Nathaniel J. Poovey in Superior Court, Caldwell County. On 16 November 2006, the Supreme Court allowed defendant's petition for discretionary review as to additional issues. Heard in the Supreme Court 10 April 2007.

Jones Martin Parris & Tessener Law Offices, P.L.L.C., by John Alan Jones and G. Christopher Olson; and Carter G. Bishop for plaintiff-appellees.

Womble Carlyle Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr. and Sarah L. Buthe; and Joseph W. Moss for defendant-appellant Profile Products, L.L.C.

Shumaker, Loop & Kendrick, LLP, by William H. Sturges; Kennedy, Covington, Lobdell & Hickman, LLP, by William G. Scoggin; and Alston & Bird, LLP, by H. Bryan Ives, III, for North Carolina Citizens for Business and Industry and North Carolina Associated Industries, amici curiae.

NEWBY, Justice.

This case presents the issue of whether the exclusivity provision of the Workers' Compensation Act protects the member-manager of a limited liability company ("LLC") with respect to an employee's injuries arising out of employment with the LLC. We hold that the exclusivity provision applies when a member-manager is conducting the business of an employer LLC. Accordingly, we reverse the Court of Appeals.

I. BACKGROUND

This action arises from injuries sustained by plaintiff Lennie Hamby ("Hamby") while working for defendant Terra-Mulch Products, L.L.C. ("Terra-Mulch"). Hamby was hurt when he fell into an auger pit while processing wood chips at Terra-Mulch's plant in Conover, North Carolina. Hamby and his wife ("plaintiffs") sued Terra-Mulch, Profile Products, L.L.C. ("Profile"), Roy D. Hoffman ("Hoffman"), and Electric Service Group, Inc. ("ESG").

Plaintiffs allege ESG was negligent in its performance of contracted electrical work, rendering certain safety equipment inoperable. Profile, Terra-Mulch, and Hoffman filed cross-claims against ESG alleging breach of contract and breach of warranty and seeking contribution in the event plaintiffs recovered damages.

Plaintiffs allege Hoffman, a plant manager and Hamby's coemployee, "breached his duty of care" by "engag[ing] in misconduct which was willful and wanton" and "demonstrat[ing] a manifest indifference to and reckless disregard for the rights and safety" of the plant workers, directly and proximately causing Hamby's injury.

In their complaint, plaintiffs describe Terra-Mulch as "a wholly-owned subsidiary of Profile Products" and assert that "Profile Products controls and directs Terra-Mulch with respect to operation of the business" and "dominates and controls Defendant Terra-Mulch and is the alter ego of Defendant Terra-Mulch." Plaintiffs allege that Profile and Terra-Mulch collectively failed to provide a safe work site for the inherently dangerous work performed by Hamby and that they thus "engaged in misconduct which was grossly negligent, willful and wanton, and substantially certain to lead to death or serious injury with respect to operation of the plant."

Pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, ESG moved for summary judgment on all claims and cross-claims. Profile, Terra-Mulch, and Hoffman also moved for summary judgment on all claims asserted against them on grounds that plaintiffs' exclusive remedy is for workers' compensation benefits under Chapter 97 of the North Carolina General Statutes and thus the North Carolina Industrial Commission has exclusive jurisdiction over the claims at issue. In support of their motion, these defendants submitted, *inter alia*, the affidavit of Stephen Ade, Vice President and Chief Financial Officer for Profile, in which he stated: "Terra-Mulch Products, L.L.C. has at all relevant times been a limited liability com-

pany the sole member and manager of which has been Profile Products, L.L.C." The "Single Member Operating Agreement of Terra-Mulch Products, LLC," dated 24 August 1999 and adopted by Profile, designates Profile as the "sole member" of Terra-Mulch and further states, under the paragraph labeled "Management": "All decisions relating to the management, conduct and control of the business of the Company shall be made by the Member."

On 6 June 2005, the trial court heard arguments on all defendants' summary judgment motions. By orders filed on 23 June 2005, the trial court granted summary judgment for Terra-Mulch and Hoffman, but denied summary judgment for Profile and ESG. Profile appealed to the Court of Appeals, which, in a divided opinion, dismissed Profile's appeal as interlocutory because Profile "failed to show a substantial interest which would be lost if this appeal is dismissed." *Hamby v. Profile Prods., L.L.C.*, 179 N.C. App. 151, 158, 632 S.E.2d 804, 809 (2006). Specifically, the majority found that plaintiffs were actually alleging a gross negligence claim based on *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991) against employer Terra-Mulch; a willful, wanton, and reckless negligence claim based on *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985) against co-employee Hoffman; and an ordinary negligence claim against "third party" Profile. *Hamby*, 179 N.C. App. at 157, 632 S.E.2d at 808. Because the claims were different as to each defendant, the majority concluded that there was no risk of inconsistent verdicts. *Id.* The dissent contended that "[a]s the sole member-manager of Terra-Mulch, Profile could only be found liable to plaintiffs in the superior court under a *Woodson* claim, which plaintiffs acknowledged does not exist" and thus the exclusivity provision of the Workers' Compensation Act protected Profile. *Id.* at 165, 632 S.E.2d at 813 (Tyson, J., dissenting). As such, the dissent would have allowed the interlocutory appeal and reversed the trial court's denial of Profile's motion for summary judgment. *Id.* at 165-66, 632 S.E.2d at 813.

II. ANALYSIS

Profile's appeal from the trial court's denial of its motion for summary judgment is interlocutory because the trial court's order "does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). An interlocutory order is immediately appealable if the trial court certifies that: (1) the order represents a final judgment as to one or more claims in a multiple claim lawsuit or one or more parties in a multi-

party lawsuit, and (2) there is no just reason to delay the appeal. N.C.G.S. § 1A-1, Rule 54(b) (2005). Here, the trial court did not certify this appeal for review. Absent a Rule 54(b) certification, an interlocutory order may be reviewed if it will injuriously affect a substantial right unless corrected before entry of a final judgment. *Harris v. Matthews*, 361 N.C. 265, 269, 643 S.E.2d 566, 569 (2007) (citing *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990)).

This Court has recognized that a substantial right is affected if the trial court's order granting summary judgment to some, but not all, defendants creates the possibility of separate trials involving the same issues which could lead to inconsistent verdicts. *See Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 408 (1982). Profile argues that if the case continues without its appeal being heard, plaintiffs' claims against Terra-Mulch will proceed before the Industrial Commission while plaintiffs' claims against Profile will proceed in civil court, even though the facts and issues before each tribunal would be the same. Specifically, Profile argues that its liability is inseparable from that of Terra-Mulch because Profile was conducting Terra-Mulch's business. Plaintiffs assert, and the Court of Appeals agreed, that the issues in each proceeding would be different because plaintiffs alleged different claims against Terra-Mulch and Profile: gross negligence as to the former and ordinary negligence as to the latter.

Preliminarily, we note that plaintiffs did not cross-assign error to the trial court's grant of summary judgment for Terra-Mulch on grounds that the exclusive remedy plaintiffs have against Terra-Mulch is under the Workers' Compensation Act. Plaintiffs' complaint, amended three times, asserts all claims against Terra-Mulch and Profile jointly, and none of these claims allege ordinary negligence as to those defendants. Before the trial court, the Court of Appeals, and this Court, plaintiffs have argued that Profile's liability is based on ordinary negligence, not gross negligence. The pivotal question presented by this case is whether, as a matter of law, plaintiffs are able to assert an ordinary negligence claim in civil court against Profile, the member-manager of the employer Terra-Mulch. To answer that question and, in so doing, determine whether the trial court's order creates the risk of inconsistent verdicts, we must decide whether Profile, like Terra-Mulch, is entitled to the protection of the exclusivity provision of Chapter 97.

The concept of exclusivity is found in two sections of the Workers' Compensation Act. N.C.G.S. § 97-9 requires employers to secure payment of compensation to their employees in accordance with the Act and states: "[W]hile such security remains in force, [the employer] or those conducting his business shall only be liable to any employee for personal injury or death by accident to the extent and in the manner herein specified." N.C.G.S. § 97-9 (2005). A subsequent section of Chapter 97 specifically excludes other rights and remedies against the employer:

> If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies of the employee, his dependents, next of kin, or representative as against the employer at common law or otherwise on account of such injury or death.

Id. § 97-10.1 (2005). In discussing the exclusivity provision of Chapter 97, this Court has explained:

> [T]he North Carolina Workers' Compensation Act was created to ensure that injured employees receive sure and certain recovery for their work-related injuries without having to prove negligence on the part of the employer or defend against charges of contributory negligence. *See, e.g.*, *Pleasant v. Johnson*, 312 N.C. 710, 712, 325 S.E.2d 244, 246-47 (1985). In exchange for these "limited but assured benefits," the employee is generally barred from suing the employer for potentially larger damages in civil negligence actions and is instead limited exclusively to those remedies set forth in the Act. *Id.*; *Woodson*, 329 N.C. at 338, 407 S.E.2d at 227.

Whitaker v. Town of Scotland Neck, 357 N.C. 552, 556, 597 S.E.2d 665, 667 (2003).

By its plain language, N.C.G.S. § 97-9 extends exclusivity protection beyond the employer to "those conducting [the employer's] business." N.C.G.S. § 97-9. We have noted that this phrase should be liberally construed and that "[o]ne must be deemed to be conducting his employer's business, within the meaning of this statute, whenever he, himself, is acting within the course of his employment, as that term is used in the Workmen's Compensation Act." *Altman v. Sanders*, 267 N.C. 158, 161, 148 S.E.2d 21, 24 (1966) (citing *Essick v. City of*

Lexington, 232 N.C. 200, 60 S.E.2d 106 (1950)). Previously, this Court has found certain individuals and entities, though distinct from the employer, still within the scope of the Act's exclusivity provision. *See, e.g.*, *Woodson*, 329 N.C. 330, 407 S.E.2d 222 (sole shareholder and chief executive officer of the corporate employer); *Abernathy v. Consol. Freightways Corp.*, 321 N.C. 236, 362 S.E.2d 559 (1987) (injured worker's co-employees); *Bryant v. Dougherty*, 267 N.C. 545, 148 S.E.2d 548 (1966) (employer's workers' compensation insurance carrier); *McNair v. Ward*, 240 N.C. 330, 82 S.E.2d 85 (1954) (employer's general manager); *Essick v. City of Lexington*, 232 N.C. 200, 60 S.E.2d 106 (1950) (treasurer and superintendent of the employer's plant).

The decisive question then, whether Profile was conducting the business of Terra-Mulch, requires us to consider the nature of a limited liability company ("LLC") as a business entity and the role of its member-manager. An LLC is a "statutory form of business organization . . . that combines characteristics of business corporations and partnerships." Russell M. Robinson, II, *Robinson on North Carolina Corporate Law* § 34.01, at 34-2 (rev. 7th ed. 2006) [hereinafter *Robinson*]. Similar to statutes enacted in other states, the North Carolina Limited Liability Company Act provides for the formation of a business entity combining the limited liability of a corporation and the more simplified taxation model of a partnership. *Id.* § 34.01, at 34-2 to -3. These state laws provide default rules, most of which can be varied by the parties forming an LLC. *Id.* As such, the "LLC is primarily a creature of contract," allowing for great flexibility in its organization. *Id.* § 34.01, at 34-3. However, as its name implies, limited liability of the entity's owners, often referred to as "members," is a crucial characteristic of the LLC form, giving members the same limited liability as corporate shareholders. *Id.* § 34.03[3], at 34-15. Furthermore, LLC member-managers have authority comparable to corporate directors and officers combined. *Id.* § 34.04, at 34-18. As a corporation acts through its officers and directors, so an LLC acts through its member-managers, which can be natural persons or business entities. *See* Del. Code Ann. tit. 6, §§ 18-101(10), (11), (12), 18-402 (2005); N.C.G.S. §§ 57C-1-03(13), (14), (17), 57C-3-20 (2005).

Both Profile and Terra-Mulch are LLCs formed under Delaware law. The North Carolina LLC Act states that the liability of a foreign LLC's managers and members is governed by the laws of the state under which the LLC was formed. N.C.G.S. § 57C-7-01 (2005). Under Terra-Mulch's operating agreement, Profile is its sole member and is

exclusively charged with management of Terra-Mulch's business. As such, the liability of Profile in its role as Terra-Mulch's member-manager is governed by Delaware law.

The Delaware Limited Liability Company Act is similar to North Carolina's LLC statute. It vests management of an LLC in its managers. Del. Code Ann. tit. 6, § 18-402; *accord* N.C.G.S. § 57C-3-20(b). In turn, "each member and manager has the authority to bind the [LLC]." Del. Code Ann. tit. 6, § 18-402; *accord* N.C.G.S. § 57C-3-23 (2005) ("[T]he act of every manager . . . for apparently carrying on in the usual way the business of the limited liability company of which he is a manager[] binds the [LLC]. . . ."). Under Delaware law, the third-party liability of LLC member-managers is as follows:

> (a) Except as otherwise provided by this chapter, the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company, and no member or manager of a limited liability company shall be obligated personally for any such debt, obligation or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company.
>
> (b) Notwithstanding the provisions of subsection (a) of this section, under a limited liability company agreement or under another agreement, a member or manager may agree to be obligated personally for any or all of the debts, obligations and liabilities of the limited liability company.

Del. Code Ann. tit. 6, § 18-303 (2005); *accord* N.C.G.S. § 57C-3-30(a) (2005).[1]

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1. North Carolina's third-party liability statute, N.C.G.S. § 57C-3-30(a), is substantially similar to that of Delaware, Del. Code Ann. tit. 6, § 18-303(a). Both statutes state that members or managers cannot be held liable for the obligations of an LLC "solely by reason of" being members or managers or participating in management of an LLC. Del. Code Ann. tit. 6, § 18-303(a); N.C.G.S. § 57C-3-30(a). The North Carolina statute also states that members or managers may be held personally liable for their "own acts or conduct." *See* N.C.G.S. § 57C-3-30(a). However, this language appears to simply clarify the earlier principle: the liability of members or managers is not limited when they act outside the scope of managing the LLC. For example,

> personal guaranties executed by LLC members or managers are binding[,] . . . a member or manager can be a co-maker of an LLC obligation[,] . . . [and] a member or manager charged with collecting and paying over income tax withholding and other so-called "trust fund taxes" may be held liable for the failure to do so.

H. Bryan Ives, III, *North Carolina Limited Liability Companies* 93 (1994).

Under these statutes, absent an agreement to the contrary, member-managers are specifically shielded from liability when acting as LLC managers. Thus, when a member-manager acts in its managerial capacity, it acts *for* the LLC, and obligations incurred while acting in that capacity are those *of* the LLC. Accordingly, when a member-manager is managing the LLC's business, its liability is inseparable from that of the LLC.

In the instant case, Terra-Mulch's operating agreement vests full managerial powers in its member-manager Profile and does not alter Profile's limited liability. Thus, under the applicable law and agreement, Profile manages Terra-Mulch's business with limited liability for actions it takes as manager. Plaintiffs do not appear to aver anything other than that Profile managed Terra-Mulch. In their complaint, plaintiffs allege that Profile "control[led] and direct[ed]" the business affairs of Terra-Mulch and do not distinguish their allegations against, nor the actions of, Terra-Mulch and Profile, claiming both were grossly negligent and caused Hamby's workplace injury. Plaintiffs now argue that Profile should be treated as a third party, liable for its ordinary negligence in managing Terra-Mulch's safety program. However, Profile's management of this part of Terra-Mulch's business is no different from its handling of other aspects of Terra-Mulch's business. Indeed, maintenance of a safe workplace is a duty of every employer, *see, e.g.*, N.C.G.S. § 95-129(1)-(2) (2005). Finally, while plaintiffs assert that Terra-Mulch is a wholly-owned subsidiary of Profile, this matter does not affect our analysis. By their nature, members of an LLC *own* the LLC. *See, e.g.*, *Robinson* § 34.03[1], at 34-10. Profile's status as owner of Terra-Mulch does not change the fact that it manages Terra-Mulch, and is thereby conducting Terra-Mulch's business. In summary, plaintiffs' forecast of evidence shows that Profile did nothing other than conduct Terra-Mulch's business within the meaning of the pertinent statutes.

In addition to our statutory analysis, we find support in our case law for the conclusion that Profile was conducting Terra-Mulch's business. As noted, we have recognized that the exclusivity protection under Chapter 97 extends to entities other than the employer. Specifically, we have found that exclusivity applies to officers of a corporation. *See Woodson*, 329 N.C. at 347-48, 407 S.E.2d at 232-33. In *Woodson*, the plaintiff sought to recover from the president and sole shareholder of her corporate employer in his individual capacity. *Id.* at 347, 407 S.E.2d at 232. We concluded that since the president and sole shareholder "was acting in furtherance of corpo-

rate business, . . . any individual liability on his part must be based on the same standard as that applied to the corporation." *Id.*

We find the analysis of *Woodson* equally applicable to a member-manager of an LLC in this context. As one conducting the employer's business and able to bind the employer, the liability of a member-manager is the same as that of the LLC employer it manages. As a final observation, we note that the trial court granted summary judgment in favor of Terra-Mulch employee Hoffman as to plaintiffs' *Pleasant* claim against him. Just as Hoffman as an individual was conducting his employer's business, Profile as a business entity was doing the same and is entitled to the protection of the Workers' Compensation Act's exclusivity provision.

III. DISPOSITION

For the reasons stated, we hold that, as the member-manager of Hamby's employer Terra-Mulch Products, L.L.C., Profile was "conducting [the employer's] business" within the meaning of the Workers' Compensation Act and is thus entitled to the exclusivity provided by statute. We find that the trial court's interlocutory order denying summary judgment for Profile is reviewable because Profile's liability for actions taken while managing Terra-Mulch is inseparable from the liability of Terra-Mulch, and thus the trial court's denial of summary judgment for Profile while granting summary judgment for Terra-Mulch creates a risk of inconsistent verdicts. Accordingly, we reverse the Court of Appeals' dismissal of Profile's appeal. We further conclude the trial court erred in denying Profile's motion for summary judgment because the denial was premised on plaintiffs' assertion of a third-party ordinary negligence claim against Profile, a claim that, as a matter of law, plaintiffs could not bring against Profile. Therefore, we remand this case to the Court of Appeals for further remand to the trial court for entry of summary judgment in favor of Profile.

REVERSED AND REMANDED.

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

Justice TIMMONS-GOODSON dissenting.

Because I believe that Profile's appeal is interlocutory, premised on grounds not raised or ruled on in the trial court, and misinterprets

the LLC statute such that it is likely to have repercussions far beyond the realm of workers' compensation, I respectfully dissent.

Interlocutory Nature

In the first instance, assuming *arguendo* that Profile is entitled to the immunity it seeks under either the Workers' Compensation or the Limited Liability Corporation (LLC) statutes, Profile's reasoning for why this appeal should go forward is unconvincing. It is uncontroverted that Profile's appeal from the trial court's denial of its motion for summary judgment is interlocutory. *See Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950) ("An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy."(citation omitted)). "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990).

There are sound reasons for this. We have previously held that "[t]here is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders." *Veazey*, 231 N.C. at 363, 57 S.E.2d at 382. However, interlocutory orders are immediately appealable if they: "(1) affect a substantial right and (2) [will] work injury if not corrected before final judgment." *Goldston*, 326 N.C. at 728, 392 S.E.2d at 737 (citing *Wachovia Realty Invs. v. Hous., Inc.*, 293 N.C. 93, 232 S.E.2d 667 (1977)). Therefore, the only way Profile can maintain this appeal is if it can show that it will lose a "substantial right" if the case proceeds any further at the trial level.

To that end, Profile argues that it has the substantial right not to be potentially subjected to two trials on the same issue, and therefore to be exposed to inconsistent verdicts. However, Profile's argument overlooks the key fact that *Terra-Mulch obtained summary judgment in its favor.* Therefore, the only potential trial that Profile could face would be as the sole defendant in a court proceeding designed to determine its own liability. With a single defendant and single set of facts, there is absolutely no possibility of inconsistent verdicts. As such, there is no substantial right implicated which would give rise to an immediate appeal.

The majority does not attempt to offer a reason as to why the Court of Appeals erred in finding that there was no substantial right

generating a right of immediate appeal, other than finding merit in appellant's claim that it is entitled to immunity under the LLC or workers' compensation statutes. The majority's approach to this case is backward. The analysis *starts* with evaluating the merits of Profile's claim. Having ruled in Profile's favor on the basis of hitherto unrecognized LLC immunity, only *then* does it somehow bootstrap that into a right of immediate appeal.

I note that both this Court and the Court of Appeals have uniformly rejected similar attempts by non-sovereign appellants claiming "immunity" in order to obtain immediate appellate review of an adverse ruling. We have specifically held that the right to avoid a trial in the wake of an unsuccessful motion for summary judgment is not a substantial right offering the route of immediate appeal. *See, e.g.*, *Tridyn Indus., Inc. v. Am. Mut. Ins. Co.*, 296 N.C. 486, 491-92, 251 S.E.2d 443, 447-48 (1979). Furthermore, we have previously noted that "[p]ractically all courts which have considered the question, including our Court of Appeals, have held that the *denial* of a motion for summary judgment is not appealable." *Waters v. Qualified Pers., Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 344 (1978) (listing cases). *See also Robinson v. Gardner*, 167 N.C. App. 763, 769, 606 S.E.2d 449, 453 *disc. review denied*, 359 N.C. 322, 611 S.E.2d 417 (2005) ("Defendants do not seek to avoid inconsistent decisions; they seek to avoid any litigation at all.")

Since "[i]t is the appellant's burden to present appropriate grounds for this Court's acceptance of an interlocutory appeal," *Johnson v. Lucas*, 168 N.C. App. 515, 518, 608 S.E.2d 336, 338 (quoting *Thompson v. Norfolk S. Ry.*, 140 N.C. App. 115, 121, 535 S.E.2d 397, 401 (2000) (citations and internal quotation marks omitted)), *aff'd per curiam*, 360 N.C. 53, 619 S.E.2d 502 (2005), I would affirm the determination of the Court of Appeals that this appeal is interlocutory.

Procedural Posture

Procedurally, I believe that the issue of immunity premised on the LLC statute is not properly before us. The majority is correct in its assertion that Profile argued before the trial court that its conduct was immune as a member-manager, but it is important to understand that it sought this immunity under the Workers' Compensation Act *not* the LLC statute.

An examination of the pertinent portions of the transcript explains the thrust of Profile's argument:

> [Defendant's attorney]: . . . The cases, as I understand them . . . they hold that *in order to receive the exclusivity of the workers' comp statute*, 97-9, I believe it is, that you must control the business of the employer. . . . Profile Products operated all the business of Terra-Mulch except the plant itself.

It is significant that the rejoinder by plaintiff's attorney also focused on the exclusivity provisions of the Workers' Compensation Act.

Indeed, the first reference to LLC immunity apparently appears in the Court of Appeals dissent and its rejoinder from the majority. *Hamby v. Profile Prods., L.L.C.*, 179 N.C. App. 151, 163, 632 S.E.2d 804, 812 (2006) (Tyson, J., dissenting). It is revealing that a review of the Table of Authorities from defendant-appellant's briefs before the Court of Appeals reveals no citation to either North Carolina's or Delaware's statutory LLC immunity provisions (N.C.G.S. § 57C-3-30(a) or Del. Code Ann. tit. 6, § 18-303(a)), the very basis of this opinion. Granting immunity on a ground different from the one requested in the court below raises the specter of a *Viar* error. "It is not the role of the appellate courts, however, to create an appeal for an appellant." *Viar v. N.C. Dep't. of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005).

Throughout the course of this litigation, Profile has attempted to gain immunity *under the Workers' Compensation Act*. The gist of Profile's argument was that their close nexus with Terra-Mulch entitled it to the same employer immunity enjoyed by the latter. This argument was considered by the Court of Appeals, evaluated in light of our jurisprudence, and soundly rejected. *Hamby*, 179 N.C. App. at 155, 632 S.E.2d at 807 (majority) ("Where a defendant is nothing 'more than a related, but separate entity' from the employer, the exclusivity provisions of the Workers' Compensation Act are not an absolute bar to recovery.") (citing *Cameron v. Merisel, Inc.*, 163 N.C. App. 224, 233, 593 S.E.2d 416, [423] (2004)).

Profile argued on the basis of workers' compensation exclusivity and lost. The majority now grants Profile immunity under the LLC statute, a different basis than the one it argued at the trial and intermediate appellate levels. Such a shift runs contrary to our long standing admonition that parties may not present, nor prevail upon, arguments in the appellate courts that were not argued in the trial court. *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934) (where theory argued on appeal was not raised before the trial court, "the law

does not permit parties to swap horses between courts in order to get a better mount" before an appellate court).

In this case, as reflected in defendant-appellant's Table of Authorities, LLC immunity was not argued before even the Court of Appeals, let alone the trial court. Therefore, I would hold that Profile may not raise it now.

Substantive Concerns

Profile is chartered in Delaware, and therefore the outcome of the case hinges on the application of that state's law. The majority misinterprets the Delaware statute such that virtually any conduct by an LLC member is immunized. This radical expansion of the LLC immunity shield is, in my view, not mandated by the statute itself, and is contrary to our precedent. The Delaware statute states only that liability may not be predicated *solely* on membership in an LLC. *See* Del. Code Ann. tit. 6, § 18-303(a) (2005) ("Except as otherwise provided by this chapter, the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company, and no member or manager of a limited liability company shall be obligated personally for any such debt, obligation or liability of the limited liability company *solely* by reason of being a member or acting as a manager of the limited liability company.") (emphasis added). The majority's opinion appears to disregard the word "solely," which appears twice in the relevant statute. As we have held "[i]n the absence of contrary indication, it is presumed that no word of any statute is a mere redundant expression. Each word is to be construed upon the supposition that the Legislature intended thereby to add something to the meaning of the statute." *Lafayette Transp. Serv., Inc. v. Cty. of Robeson*, 283 N.C. 494, 500, 196 S.E.2d 770, 774 (1973) (citations omitted).

The Delaware Court of Chancery itself, when interpreting the same statute has not read it to confer the same sweeping immunity on member-managers as our *Hamby* opinion. The Delaware Court observed that "Section 18-303(a) protects members and managers of an LLC against liability for any obligations of the LLC solely by reason of being or acting as LLC members or managers. But, [the] phrase, 'solely by reason of being a member [] does imply that there are situations where LLC members and managers would not be shielded by this provision."). *Pepsi-Cola Bottling Co. of Salisbury*,

Md. v. Handy, No. 1973-S, 2000 WL 364199, at *3 (Del. Ch. Mar. 15, 2000) (No. 1973-S) (Mem.).

Other states, following Delaware's lead, have similarly interpreted the statute's plain meaning to shield LLC members from liability premised exclusively on their membership, but not from liability on the basis of their actions. *See e.g.*, *Weber v. U.S. Sterling Sec., Inc.*, 282 Conn. 722, 732, 924 A.2d 816, 824 (2007). Federal courts have arrived at the same conclusion. *See e.g.*, *Equipoise PM LLC v. Int'l Truck & Engine Corp.*, —— F.3d ——, 2006 WL 1594077, at *4 (N.D. Ill. June 5, 2006) (No. 05 C 6008).

Commentators have taken an identical view. *See* 2 R. Franklin Balotti, Jesse A. Finkelstein, Martin I. Lubaroff & Paul M. Altman, *Balotti and Finkelstein's Delaware Law of Corporations and Business Organizations* § 20.7 (2007); Practicing Law Inst, *Organization and Operation of the Limited Liability Company: Substantive Issues* 937 PLI/Corp. 149, 191 (1996).

It is noteworthy that in the only two prior cases interpreting the statute, North Carolina courts have demonstrated a grasp of the key distinction between imposing liability on the basis of a member-manager's actions versus mere membership. In *State ex rel. Cooper v. NCCS Loans, Inc.*, 174 N.C. App. 630, 624 S.E.2d 371 (2005), the Court of Appeals held that where an individual repeatedly set up business entities to evade state usury laws, the trial court was correct in looking beyond the corporate (LLC) form to the substance of the transactions in order to restrain the individuals behind conduct. The majority holding here as applied to *NCCS* would have effectively subordinated the state's usury laws to the corporate LLC form. In *Page v. Roscoe, LLC*, 128 N.C. App. 678, 686-87, 497 S.E.2d 422, 428 (1998), the only case other than *NCCS* construing the LLC immunity statute, our Court of Appeals upheld Rule 11 sanctions against an attorney whose pleadings against an LLC member were premised solely on the defendant's LLC membership, and not his actions.

It is precisely this pivotal membership-action distinction that the majority obfuscates. Here, plaintiff noted that pursuant to undisclosed agreements between Profile and employer Terra-Mulch, Profile had undertaken certain responsibilities regarding the employer's operations, including safety. Alleged negligence in performing those operations, and not Profile's mere status as an LLC member-manager, is the basis for plaintiff's current action. Under the status versus actions scheme of immunity outlined above there-

fore, Profile is not entitled to the blanket immunity the majority awards it.

The Court of Appeals, including the majority in this case, has recognized this distinction between status and actions, as have virtually all other jurisdictions. Strong public policy reasons favor that we follow their lead and not obliterate it. On substantive grounds therefore, I would uphold the Court of Appeals decision.

Relationship Between Profile and Terra-Mulch

The record reveals that Terra-Mulch and Profile are two distinct entities, with different employees, tax identification numbers, assets, liabilities, product lines and businesses. Furthermore, the record contains evidence about Profile's role in managing the safety features of Terra-Mulch's Conover facility, and the deficiencies therein.

Stephen Ade, the Chief Financial Officer of Profile, testified that he coordinated safety activities for the plants. He admitted that the emergency stop button on the machine that maimed plaintiff had been disconnected, and though he blamed a third party vendor for the disconnection, he candidly conceded that the button had not been tested prior to the injury. Surely the failure of the safety program to test a critical emergency feature raises at least a triable issue of fact with respect to Profile's negligence in conducting the safety program.

Similarly, a February 25, 2002 letter on behalf of St. Paul Underwriting to Jim Cebulski, Vice President and Controller of Profile warns that despite "some concern" "there has [*sic*] been very few or no management systems developed or implemented to control employee or premise safety . . ." and that the emphasis remains "on improving productivity." The record also contains an e-mail, apparently from the same individual who wrote the above letter, advising his colleagues at the insurance company:

> Basically, the nine recommendations I submitted with My February Report have not been complied with . . . My viewpoint is that this location of Profile Products continues to be the worst workers comp risk I have seen in a long, long time. We should not insure this one!

It is worth noting that all the individuals and activities referenced above relate to Profile, LLC, not Terra-Mulch, the statutory employer. Given the issues raised with respect to *Profile's* own negligence, and

its undisputed status as a separate entity, I cannot agree with the majority's holding granting Profile immunity on the basis of its LLC status.

Conclusion

Given the importance of the subject, I believe that in light of (i) this case's skimpy, almost skeletal, procedural and factual background, and (ii) its origin from the Court of Appeals in a dissent premised on an issue neither argued nor briefed before that Court, this case is an inappropriate vehicle to issue a ruling with such tremendous ramifications. Therefore, I respectfully dissent.

STATE OF NORTH CAROLINA v. HASEEN HERMAN EVERETTE

No. 452A05

(Filed 9 November 2007)

1. Firearms and Other Weapons— discharging firearm into occupied property—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss and subsequent motion to set aside the verdict on the charge of discharging a firearm into occupied property in violation of N.C.G.S. § 14-34.1 because, when considered together, the evidence was sufficient to support the jury's inference that defendant had reasonable grounds to believe a restaurant might have been occupied when he fired two shots into the building while the owner was inside.

2. Sentencing— aggravating factors—pretrial release—*Blakely* error—admission by counsel or defendant—sufficiently definite and certain admission

The trial court's finding of the pretrial release aggravating factor for the charges of assault with a deadly weapon inflicting serious injury and assault with a firearm on a law enforcement officer did not constitute *Blakely* error and was sufficient to justify the trial court's imposition of aggravated sentences, because: (1) an aggravated sentence imposed solely on the basis of facts "admitted," "stipulated," or "conceded" by a criminal defendant does not implicate the Sixth Amendment right to a trial by jury; (2) defendant admitted through counsel to all of the relevant

facts necessary for the trial court to make a conclusive finding on this aggravator; (3) defendant's *Blakely*-compliant admission served as the sole basis for the trial court's finding of this aggravator, and defendant was not entitled to a jury trial on this aggravator under *Blakely* and its progeny; (4) a *Blakely*-compliant admission may be made either by defendant personally or through counsel; (5) the sentencing hearing transcript reveals an admission sufficiently clear for *Blakely* purposes; and (6) a new sentencing hearing is unnecessary under *State v. Ahearn*, 307 N.C. 584 (1983), because the trial court expressly indicated during sentencing that each of the aggravators independently justified each of defendant's aggravated sentences and outweighed the lone mitigating factor. Thus, the case is remanded to the Court of Appeals for further remand to the trial court for reinstatement of defendant's sentences.

Justice HUDSON concurring in part and concurring in result in part.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 172 N.C. App. 237, 616 S.E.2d 237 (2005), finding no error in part in judgments entered 20 February 2003 by Judge Jerry R. Tillett in Superior Court, Pitt County, but remanding the case for resentencing. On 19 December 2006, the Supreme Court allowed the state's petition for discretionary review and defendant's petition for discretionary review as to an additional issue. Heard in the Supreme Court 7 May 2007.

Roy Cooper, Attorney General, by Daniel S. Johnson, Special Deputy Attorney General, for the state-appellee/appellant.

Richard E. Jester for defendant-appellant/appellee.

MARTIN, Justice.

This case represents the most recent chapter in our jurisprudence concerning the finite number of cases to which *Blakely v. Washington*, 542 U.S. 296 (2004), applies, but North Carolina's remedial sentencing legislation does not. We conclude that no error occurred in defendant's trial and that defendant is not entitled to a new sentencing hearing.

The state's evidence at trial tended to show the following: From 10:30 p.m. on 3 November 2001 until 2:30 a.m. on 4 November 2001, Officer Charles Savage of the Greenville Police Department was working as a security guard at a downtown Greenville store. He was off duty, but was wearing his police uniform at the time. During his shift, Officer Savage repeatedly came across defendant and several young women loitering in the store parking lot, and he told defendant to leave on four occasions.

On his way home after his shift ended, Officer Savage observed several young women fighting in the street in front of BW-3, a restaurant in downtown Greenville. He recognized three of them as having been with defendant earlier in the evening. Officer Savage broke up the fight, and as he dispersed the crowd, he saw defendant standing a couple of feet away from him. Defendant said three times, "F—- the police." Officer Savage responded that defendant needed to "shut [his] mouth and disappear or [defendant would be] going to jail."

Around this time, Officer William Holland, Officer Keith Knox, and Sergeant John Curry arrived at the scene to assist Officer Savage. Officer Holland also told defendant to leave. Officer Holland escorted defendant across the street. Defendant walked slowly, looking back several times.

At this time, a black vehicle pulled up and defendant entered the front passenger seat. The vehicle began to depart as Officer Holland walked back across the street. Officer Holland then heard gunshots, turned, and saw defendant "hanging out of the top of the sunroof of that vehicle shooting" in his direction. Officer Knox and Sergeant Curry had witnessed Officer Holland walking defendant across the street, and they too heard gunshots and saw defendant standing up through the sunroof of the vehicle and firing shots. Although Officer Savage did not personally see defendant firing shots, he heard the gunshots and saw smoke in the air. As Officer Holland chased the vehicle on foot, he heard "bullets . . . impacting the wall on the side of [the street]" and the sound of shattering glass. Officer Holland eventually lost sight of the vehicle.

Officer Knox later found seven shell casings at the scene. Of the seven or more shots defendant fired, several resulted in serious injury to persons and property. Jonathan Williams was eating at BW-3 around 2:30 a.m. when he noticed the young women fighting outside the restaurant. He went outside to observe the commotion. Williams then "heard the shots and ran for the front door." He was struck by a

bullet in the lower midsection of his left thigh, a painful injury that necessitated his temporary withdrawal from college and delayed his graduation. Williams was unable to identify the shooter, but saw a dark-colored vehicle and puffs of smoke.

Howard Howell was in downtown Greenville that night performing with a band at a nightclub. Around 2:30 a.m., he left the nightclub and went outside. After hearing what sounded to him like a "firecracker," he was immediately hit by a bullet in the stomach. Howell survived, but endured several months of painful recovery.

Brad Herring was also in downtown Greenville that night at the Flying Salsa, a restaurant he owned. Herring had only recently ended his practice of keeping the Flying Salsa open until 3:00 a.m. and was staying after closing that night to estimate how much business he was losing by closing earlier. At 2:30 a.m., the lights at the Flying Salsa were not turned off, but were instead turned "down." Herring "heard a sound that sounded like a chain hitting a big metal sheet" and immediately left the Flying Salsa. The next morning when he opened the Flying Salsa, Herring found "glass everywhere" and "jackets and slugs from two bullets." He discovered that two of the windows at the Flying Salsa had holes in them.

Defendant presented no evidence at trial, and a jury found him guilty of two counts of assault with a deadly weapon inflicting serious injury, one count of assault with a firearm on a law enforcement officer, and one count of discharging a firearm into occupied property. At sentencing, the trial court found the following statutory aggravating factors as to the two charges of assault with a deadly weapon inflicting serious injury and the charge of assault with a firearm on a law enforcement officer: (1) the offense was committed to hinder the lawful exercise of a governmental function or the enforcement of laws; (2) defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person; and (3) defendant committed the offense while on pretrial release.

The trial court found as a nonstatutory aggravating factor that "defendant made repeated acts which were more than required for the offense." As to the charge of discharging a weapon into occupied property, the trial court also found as a nonstatutory aggravating factor that "defendant shot more than one time into occupied property in a reckless or hazardous manner." The trial court found as a mitigating factor that "defendant supports [his] family." The trial court

sentenced defendant in the aggravated range to four active, consecutive terms of thirty-six to fifty-three months.

Defendant appealed to the Court of Appeals. While his appeal was pending, the United States Supreme Court issued its decision in *Blakely v. Washington*, 542 U.S. 296 (2004), which held that in most instances, aggravating factors increasing a defendant's sentence must be submitted to a jury and proved beyond a reasonable doubt. On defendant's motion, the Court of Appeals ordered the parties to brief the *Blakely* issue. *See State v. Blackwell*, 361 N.C. 41, 44, 638 S.E.2d 452, 454-55 (2006) (applying *Blakely* to the defendant's case when it was on direct appeal at the time *Blakely* was issued), cert. denied, —— U.S. ——, 127 S. Ct. 2281 (2007). A divided panel of the Court of Appeals found no error in defendant's convictions, but found structural error in defendant's sentences and remanded for resentencing in accordance with *State v. Allen*, 359 N.C. 425, 615 S.E.2d 256 (2005), *withdrawn*, 360 N.C. 569, 635 S.E.2d 899 (2006). *State v. Everette*, 172 N.C. App. 237, 616 S.E.2d 237 (2005). The dissenting judge concluded that the evidence was insufficient to support defendant's conviction for discharging a firearm into occupied property, but concurred with the majority in all other respects. *Id.* at 248-49, 616 S.E.2d at 244-45.

Defendant appealed to this Court on the basis of the dissenting opinion. We subsequently allowed the state's petition for discretionary review of the *Blakely* issue. We also allowed defendant's petition for discretionary review of the additional issue as to whether defendant was entitled to a new sentencing hearing to allow the trial court to reweigh the aggravating and mitigating factors. We now address these issues in turn.

[1] Defendant first argues that the trial court erred by denying his motion to dismiss and subsequent motion to set aside the verdict on the charge of discharging a firearm into occupied property in violation of N.C.G.S. § 14-34.1. At the time of defendant's offenses, this section stated: "Any person who willfully or wantonly discharges or attempts to discharge . . . [a] firearm into any building . . . while it is occupied is guilty of a Class E felony." N.C.G.S. § 14-34.1 (2001) (amended 2005). To support a conviction under this statute, the defendant must have had " 'reasonable grounds to believe that the building might be occupied by one or more persons.' " *State v. James*, 342 N.C. 589, 596, 466 S.E.2d 710, 714-15 (1996) (quoting *State v. Williams*, 284 N.C. 67, 73, 199 S.E.2d 409, 412 (1973)). Defendant argues that the state failed to present sufficient evidence that he had

reasonable grounds to believe that the Flying Salsa might be occupied when he fired into the building.

It is well settled that "[i]n ruling on a motion to dismiss, the trial court must determine whether there is substantial evidence of each essential element of the crime and whether the defendant is the perpetrator of that crime." *State v. Harris*, 361 N.C. 400, 402, 646 S.E.2d 526, 528 (2007) (citing *State v. McNeil*, 359 N.C. 800, 803, 617 S.E.2d 271, 273 (2005)). "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Id.* (citing *McNeil*, 359 N.C. at 804, 617 S.E.2d at 274). "When reviewing claims of sufficiency of the evidence, an appellate court must . . . view[] all the evidence in the light most favorable to the State and resolv[e] all contradictions and discrepancies in the State's favor." *Id.* (citing *State v. Jones*, 303 N.C. 500, 504-05, 279 S.E.2d 835, 838 (1981)). Thus, "[a] case should be submitted to a jury if there is any evidence tending to prove the fact in issue or reasonably leading to the jury's conclusion 'as a fairly logical and legitimate deduction.' " 361 N.C. at 402-03, 646 S.E.2d at 528 (quoting *Jones*, 303 N.C. at 504, 279 S.E.2d at 838) (citations and internal quotation marks omitted). This is true "even though the evidence may support reasonable inferences of the defendant's innocence." *State v. Grigsby*, 351 N.C. 454, 457, 526 S.E.2d 460, 462 (2000) (citations and internal quotation marks omitted).

Here, at the time of the shooting, the lights in the Flying Salsa were on but turned "down," such that a jury could infer that a dim light was emanating from inside. The Flying Salsa was located in an area of downtown Greenville described as "pretty crowded" at 2:30 a.m. on Sunday mornings. On that night in particular, the streets surrounding the Flying Salsa were crowded. Moreover, the Flying Salsa was located in an area where other nearby establishments, including BW-3 and a nightclub, were open until the early morning hours. Before this incident, the Flying Salsa had stayed open until 3:00 a.m.

When considered together, this evidence was sufficient to support the jury's inference that defendant had reasonable grounds to believe the Flying Salsa might have been occupied when he fired two shots into the building while Herring was inside. Accordingly, the Court of Appeals correctly held that the trial court properly denied defendant's motion to dismiss for insufficient evidence. For the same reasons, the Court of Appeals correctly held that the trial court properly exercised its discretion in denying defendant's motion to set aside the verdict on the basis of insufficient evidence. *See State v.*

Fleming, 350 N.C. 109, 146, 512 S.E.2d 720, 745 (citing *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985)) (holding that the trial court's denial of a motion to set aside the verdict for insufficient evidence is reviewable only for abuse of discretion), *cert. denied*, 528 U.S. 941 (1999).

[2] The majority of defendant's remaining arguments concern his contention that *Blakely* error occurred when the trial court found aggravating factors without submitting them to a jury. In its brief to this Court, the state concedes that the trial court's finding of all but one of these aggravators constituted *Blakely* error. It argues, however, as it did before the Court of Appeals, that the trial court's finding that defendant was on pretrial release at the time he committed the instant offenses comported with *Blakely* because defendant admitted to the existence of this aggravating factor.

During the sentencing hearing, the state represented that it would seek a finding that defendant was on pretrial release at the time he committed the instant crimes. The state indicated to the trial court that it was prepared to offer proof of this aggravator in the form of public records, but that it would accept defendant's stipulation to this aggravator in the alternative. Confronted with the state's proffer of overwhelming evidence of this aggravator, defendant's counsel stipulated to its existence:

> [PROSECUTOR]: . . . And finally, No. 12, Your Honor, the defendant committed the offense while on pre-trial release on another charge. . . . To show the Court that, I will hand up 01-CRS-58888, in which the defendant was arrested on September 15th of 2001 for the [sale] of cocaine in which he made bond and was released from the detention center on October 18th of 2001.
>
> . . . .
>
> [PROSECUTOR]: And also, Your Honor, another series of charges, four counts of assault with a deadly weapon with the intent to kill in 01-CRS-56481 through 56484, in which the defendant was arrested on those charges on May 26th of 2001 and was released on bond on June 17th of 2001. I point out the condition of that bond was that he not possess any dangerous or deadly weapons. I'd like to hand those files up. Your Honor, unless the defendant is willing to stipulate to those, I think the Court needs to look at the files.
>
> . . . .

THE COURT: He was under the conditions of pre-trial release at the time.

[DEFENSE COUNSEL]: I just want you to know that in considering—the other charges, Your Honor, were pending at the time. He was on pre-trial release at the time—

[PROSECUTOR]: So you stipulate that he was out on bond on those five charges?

[DEFENSE COUNSEL]: Yes.

Having stipulated to the existence of the aggravator during his sentencing hearing, defendant now argues on appeal that *Blakely* error in fact occurred.

Defendant first argues that his stipulation did not constitute a valid waiver of his *Blakely* rights because it was not "knowing and voluntary" as he alleges is required under *Brady v. United States*, 397 U.S. 742, 748 (1970). This argument is premised on defendant's assertion that, at the time of his stipulation, he did not fully contemplate that *Blakely* would subsequently provide for the right to a jury trial on this aggravator.

Put simply, defendant's argument overlooks the fact that he did not have a *Blakely* right to waive. *Blakely* itself specifically excluded several categories of aggravated sentences from the scope of the right it contemporaneously recognized: (1) those imposed on the basis of "a prior conviction," 542 U.S. at 301 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)); (2) those imposed "solely on the basis of the facts reflected in the jury verdict," *id.* at 303 (emphasis omitted); and (3) those imposed "solely on the basis of the facts . . . admitted by the defendant," *id.* (emphasis omitted), or to which the defendant "stipulates," 542 U.S. at 310. Notably, the precise wording *Blakely* used to describe its textual exceptions has survived verbatim in subsequent articulations of this right. *See Rita v. United States*, —— U.S. ——, ——, 127 S. Ct. 2456, 2466 (2007); *Cunningham v. California*, —— U.S. ——, ——, 127 S. Ct. 856, 860 (2007); *Washington v. Recuenco*, —— U.S. ——, ——, 126 S. Ct. 2546, 2549 (2006); *United States v. Booker*, 543 U.S. 220, 244 (2005). Most recently, the United States Supreme Court in *Rita v. United States* reaffirmed *Blakely's* textual exceptions, explaining that "[t]he Sixth Amendment question, the Court has said, is whether the law forbids a judge to increase a defendant's sentence unless the judge finds facts that the jury did not

find (and the offender did not *concede*)." —— U.S. at ——, 127 S. Ct. at 2466 (third emphasis added, first and second emphases omitted).

Thus, the United States Supreme Court's post-*Blakely* jurisprudence has clarified that an aggravated sentence imposed solely on the basis of facts "admitted," "stipulated," or "conceded" by a criminal defendant does not implicate the Sixth Amendment right to a trial by jury. We recognized this exception to *Blakely* in *State v. Hurt*, 361 N.C. 325, 329, 643 S.E.2d 915, 917 (2007), in which we held that *Blakely* allows a trial judge to "impose an aggravated sentence on the basis of admissions made by a defendant." Similarly, the United States Court of Appeals for the Fourth Circuit in *United States v. Revels* noted: "However a defendant admits to facts, they may serve once admitted as the basis for an increased sentence without being proved to a jury beyond a reasonable doubt." 455 F.3d 448, 450 (4th Cir.) (citing *Booker*, 543 U.S. at 244), *cert. denied*, —— U.S. ——, 127 S. Ct. 299 (2006).

In the instant case, this textual exception to *Blakely* applies whether the exchange between the trial court and counsel during sentencing is viewed as defendant's "admission," "stipulation" (the parties' choice of terminology at trial), or "concession" to the existence of the now-challenged aggravator. The aggravator at issue here concerned the objective question of whether "[t]he defendant committed the offense while on pretrial release on another charge" under N.C.G.S. § 15A-1340.16(d)(12). As the transcript confirms, defendant admitted through counsel to all of the relevant facts necessary for the trial court to make a conclusive finding on this aggravator: namely, that defendant "was on pre-trial release at the time" he committed the instant offenses.[1] Consequently, defendant's *Blakely*-compliant admission served as the sole basis for the trial court's finding of this aggravator, and defendant was not entitled to a jury trial on this aggravator under *Blakely* and its progeny. For that reason, defendant's discussion of whether he could have contemplated the United States Supreme Court's decision in *Blakely* is of no consequence. Indeed, a defendant may not waive that which he does not have.

1. We observe, however, that a *Blakely*-compliant admission to an aggravator requiring a subjective, fact-intensive analysis will seldom, if ever, exist. *See, e.g.*, *Hurt*, 361 N.C. at 326-27, 643 S.E.2d at 916 (concluding that defendant's arguments in mitigation did not constitute an admission that the offense was especially heinous, atrocious, or cruel under N.C.G.S. § 15A-1340.16(d)(7)). This is because a finding of such an aggravator requires a subjective assessment by the factfinder such that the sentence cannot be viewed as having been imposed "solely on the basis of" admitted facts or stipulations. *See Blakely*, 542 U.S. at 303 (emphasis omitted).

Accordingly, we reverse the Court of Appeals as to those portions of its opinion holding otherwise.

Defendant next argues in the alternative that his admission through counsel did not constitute a *Blakely*-compliant "admission," "stipulation," or "concession" because he did not personally admit to the existence of the challenged aggravator. We recently considered this argument in *Hurt*. There the defendant argued that because "he did not personally admit to any aggravating factor in the case," the representations of defense counsel alone could not constitute an admission for *Blakely* purposes. *Hurt*, 361 N.C. at 329, 643 S.E.2d at 918. We rejected this argument and made abundantly clear that a *Blakely*-compliant admission may be made either by the "defendant personally *or through counsel*." *Id.* at 330, 643 S.E.2d at 918 (emphasis added). In doing so, we reaffirmed our pre-*Blakely* cases holding that a trial court may find aggravating factors based on an admission by the defendant's counsel on behalf of the defendant. *See*, *e.g.*, *State v. Swimm*, 316 N.C. 24, 32, 340 S.E.2d 65, 71 (1986).

The federal courts have also rejected the notion that a *Blakely*-compliant admission requires a personal admission by the defendant. Citing federal decisions holding that defense counsel's representations alone constitute admissions for *Blakely* purposes, the United States Court of Appeals for the Fourth Circuit in *Revels* explained:

> Admissions may take a variety of forms, including guilty pleas and stipulations, a defendant's own statements in open court, and representations by counsel, *see*, *e.g.*, *United States v. Devono*, 413 F.3d 804, 805 (8th Cir. 2005) (per curiam); *United States v. Bartram*, 407 F.3d 307, 310-11 (4th Cir. 2005) (opinion of Widener, J.); *id.* at 315 (Niemeyer, J., concurring in part and concurring in the judgment), [*cert. denied*, 546 U.S. 1189 (2006)]. However a defendant admits to facts, they may serve once admitted as the basis for an increased sentence without being proved to a jury beyond a reasonable doubt.

455 F.3d at 450 (emphasis added) (internal citations omitted).

Against the weight of this authority, defendant points to provisions in North Carolina's Blakely Act which now require the trial court to address defendants personally, advise them that they are entitled to a jury trial on any aggravating factors, and ensure that an admission is the result of an informed choice. *See* N.C.G.S. § 15A-1022.1(b), (c) (2005). In defendant's words, "[t]he

legislature carefully crafted a statutory scheme to comply with *Blakely*," and the failure to apply these provisions to defendant would "make the statute an exercise in futility."

This argument, however, defies the Blakely Act's express language, which makes clear that N.C.G.S. § 15A-1022.1 does not apply to defendant's case. *See* Act of June 21, 2005, ch. 145, 2005 N.C. Sess. Laws 253 (codified at N.C.G.S. §§ 15A-924(a), -1022.1, -1340.14, -1340.16 (2005)) (providing that "[p]rosecutions for offenses committed before [30 June 2005] are not abated or affected by [the Blakely Act]," *id.*, sec. 5 at 260). The remedial measures our legislature enacted in the wake of *Blakely* remain in full force when applicable, but we summarily reject defendant's suggestion that we should retroactively engraft these statutory protections onto the federal *Blakely* right under the guise of constitutional interpretation. Accordingly, for those cases arising prior to the effective date of the Blakely Act, we reaffirm our prior cases and follow the federal courts in holding that defense counsel's admissions to the existence of an aggravating factor constitute *Blakely*-compliant admissions upon which an aggravated sentence may be imposed. *See Hurt*, 361 N.C. at 330, 643 S.E.2d at 918; *see also*, *e.g.*, *Revels*, 455 F.3d at 450.

Defendant next argues that his admission was not sufficiently "definite and certain," as *Hurt* suggests is required for stipulations in the *Blakely* context. *See Hurt*, 361 N.C. at 329, 643 S.E.2d at 918 (quoting *State v. Powell*, 254 N.C. 231, 234-35, 118 S.E.2d 617, 619-20 (1961), *superseded by statute on other grounds*, N.C.G.S. § 20-179(a) (2003)). In *Hurt*, the transcript revealed that "at most, defendant's attorney was acknowledging that the aggravating factors might apply as he asked the trial court not to accept the State's argument." *Id.* at 330, 643 S.E.2d at 918. We therefore held that the mere acknowledgment that an aggravator *might* apply was not sufficiently definite and certain to constitute an admission for *Blakely* purposes, but cautioned that such admissions "may take a variety of forms." *Id.*

Revels also addressed this issue, observing that "verbalizations necessarily fall along a spectrum" by which their certainty and clarity should be considered as potential *Blakely* admissions. 455 F.3d at 450. There the Court cited its decision in *United States v. Milam* for the proposition that the "silence" of both defendant and defense counsel would not constitute an admission for *Blakely* purposes. *Revels*, 455 F.3d at 450-51 (citing *Milam*, 443 F.3d 382, 387 (4th Cir. 2006) (holding that no *Blakely*-compliant admission occurred when both the defendant and defense counsel "stood silent" as the trial

court made its finding on the aggravator)). The Court observed, however, that unequivocal "statements such as 'I admit,' or the functional equivalent thereof" are "clearly admissions under [*Blakely*]." *Id.* at 450.

In the present case, the sentencing hearing transcript reveals an admission sufficiently clear for *Blakely* purposes. The transcript confirms that defense counsel admitted to the existence of the pretrial release aggravator ("[T]he other charges . . . were pending[.]"), then rephrased this admission for clarity ("He was on pre-trial release at the time."). In response, the prosecutor sought to clarify defendant's admission ("So you stipulate that he was out on bond on those five charges?"), and defense counsel again admitted to the existence of the pretrial release aggravator ("Yes."). The clarity of this admission is entirely opposite to the ambiguous remarks of defense counsel in *Hurt* and the complete silence of both defendant and defense counsel considered in *Milam* and referenced in *Revels*. *Compare Hurt*, 361 N.C. at 329, 643 S.E.2d at 918-19, *and Revels*, 455 F.3d at 450-51 (citing *Milam*, 443 F.3d at 387), *with Devono*, 413 F.3d at 805 (holding that defendant admitted to the challenged aggravator when defense counsel stated at sentencing, "We didn't object to the factual basis in the Presentence Report because frankly we believed that the facts are true that are set forth in there."), *and Bartram*, 407 F.3d at 310 n.1, 314 (holding that no *Blakely* error occurred when trial court found aggravating factors based on defense counsel's concession that defendant committed the "relevant conduct as stated in [a] presentence report"). Accordingly, defendant's argument that his admission was not sufficiently clear for purposes of *Blakely* is without merit.

Finally, defendant argues that he is entitled to a new sentencing hearing under *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983). Because we hold that the trial court properly found the pretrial release aggravator, and because the state concedes that the trial court's finding of the other aggravators constituted *Blakely* error, we address defendant's argument that the trial court must be given an opportunity to reweigh the pretrial release aggravator against the lone mitigating factor it found.

Defendant is not entitled to a new sentencing hearing under these circumstances. In *Ahearn*, the trial court found three aggravating factors and five mitigating factors, and determined that the aggravating factors outweighed the mitigating factors. 307 N.C. at 592, 300 S.E.2d at 694. On appeal, this Court concluded that one of the aggravating

factors was not supported by the evidence. *Id.* at 599, 300 S.E.2d at 698. The record, however, gave no indication of the weight the trial court accorded each aggravator and mitigator. In addition, the trial court completed only one judgment and commitment form for defendant's two offenses, the practical result of which "treat[ed] both offenses alike for purposes of listing the findings in aggravation and mitigation." *Id.* at 592, 300 S.E.2d at 694. For these reasons, we remanded for resentencing rather than "attempt[ing] to second guess the sentencing judge with respect to the weight given to any particular factor." *Id.* at 602, 300 S.E.2d at 701. We observed, however, that a trial court "may properly determine that one factor in aggravation outweighs more than one factor in mitigation" without any need to "justify the weight [it] attaches to any factor." *Id.* at 596-97, 300 S.E.2d at 697.

Consistent with *Ahearn*, a new sentencing hearing here is unnecessary because the trial court expressly indicated during sentencing that each of the aggravators—including the pretrial release aggravator—independently justified each of defendant's aggravated sentences and outweighed the lone mitigating factor. At the sentencing hearing, the trial court stated:

> I find that each one of the aggravating factors in and of itself independently outweighs all mitigating factors. I find specifically that each one of the aggravating factors independently is in and of itself a sufficient basis for the imposition of the sentence or sentences that are hereinafter imposed and outweighs all mitigating and justifies a sentence from within the aggravated range.

In addition, the trial court completed individual judgment and commitment forms specifying the relevant aggravators and mitigator for each conviction. These forms specifically indicated that "each and every aggravated factor in and of itself outweighs all the mitigating factors and justifies from within the aggravated range this sentence." Thus, the trial court here eliminated the need for any appellate "second guessing" as to the weight it accorded each factor on each sentence, and it properly exercised discretion in "determin[ing] that one factor in aggravation outweigh[ed] more than one factor in mitigation." *Ahearn*, 307 N.C. at 597, 300 S.E.2d at 697; *see also State v. Daniels*, 319 N.C. 452, 454, 355 S.E.2d 136, 137 (1987) (holding that "a trial [court's] weighing of mitigating and aggravating factors will not be disturbed absent a showing that the [trial court] abused [its] discretion"). Accordingly, defendant's argument fails.

To summarize, we conclude that: (1) sufficient evidence existed to support defendant's conviction for discharging a firearm into occupied property in violation of N.C.G.S. § 14-34.1; (2) the trial court's finding of the pretrial release aggravator did not constitute *Blakely* error; (3) the finding of this pretrial release aggravator was sufficient to justify the trial court's imposition of aggravated sentences; and (4) defendant is not entitled to a new sentencing hearing. We therefore affirm in part and reverse in part and remand to the Court of Appeals for further remand to the trial court for reinstatement of defendant's sentences.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Justice TIMMONS-GOODSON did not participate in the consideration or decision of this case.

Justice HUDSON concurring in part and concurring in result in part.

I agree with the majority's analysis of the sufficiency of the evidence issue and with its conclusion that the trial court has discretion to weigh each aggravator separately against the mitigating factors. However, I do not believe that defense counsel's stipulation that defendant was on pretrial release at the time of the offense was an adequate admission under *Blakely*. However, because of the stipulation, I conclude that the *Blakely* error is harmless beyond a reasonable doubt. Thus, I concur in the result on this issue.

The State concedes *Blakely* error as to three of the four sentencing factors. The State argues that as to the fourth, that defendant was on pretrial release at the time of these offenses, defendant "admitted" the facts. The majority agrees and affirms defendant's sentence on that basis.

It is undisputed that the trial court found all of the aggravating factors without submitting them to a jury. The State argued before the Court of Appeals, as it does here, that defendant is not entitled to relief under *Blakely* because defendant admitted the underlying facts supporting the aggravating factor. The State points for support to the following colloquy:

> [DEFENSE COUNSEL]: I just want you to know that in considering—the other charges, Your Honor, were pending at the time. He was on pre-trial release at the time—

> [ASSISTANT DISTRICT ATTORNEY]: So you stipulate that he was out on bond on those five charges?
>
> [DEFENSE COUNSEL]: Yes.

The trial court found as an aggravating factor that defendant committed the offense while on pretrial release on another charge. The Court of Appeals held that defendant did not effectively admit or stipulate to this aggravating factor so as to except it from the Sixth Amendment protection of *Blakely*.

I am not persuaded that any federal court, Fourth Circuit or elsewhere, has held that defense counsel's stipulation to a fact, in the absence of any indication of defendant's personal agreement or even awareness of same, qualifies as an admission for *Blakely or Booker* purposes. *See United States v. Booker*, 543 U.S. 220, 160 L. Ed. 2d 621 (2005) (applying *Blakely* to federal sentencing guidelines). Indeed, my research has found no case in which any federal court has so held when, as here, defendant neither pleaded guilty, personally addressed the court, nor conferred with counsel about the stipulated fact. In *United States v. Revels*, the Fourth Circuit recently described the analysis it applied in order to decide if facts were "admitted" by the defendant:

> In assessing whether a defendant has made an admission for *Booker* purposes, verbalizations necessarily fall along a spectrum. On one end of the spectrum are statements such as "I admit," or the functional equivalent thereof. These are clearly admissions under *Booker*. *See*, *e.g.*, *United States v. Morrisette*, 429 F.3d 318, 323 (1st Cir. 2005) (defendant admitted facts where, inter alia, he and his counsel "both conceded the accuracy of the prosecution's recitation of the facts relevant to the offense"); *Devono*, 413 F.3d at 805 (defendant admitted facts where, *inter alia*, defense counsel stated " 'we believe[] that the facts [in the PSR] are true' "). On the other end of the spectrum is silence. *In United States v. Milam*, 443 F.3d 382, 2006 U.S. App. LEXIS 8310, *13, No. 04-4224, slip op. at 8 (4th Cir. Apr. 6, 2006), we held that a defendant's failure to object to facts in his PSR did not constitute a *Booker* admission. In *Milam*, the defendant "stood silent when the court adopted the finding" that enhanced his sentence, and we explained that "to presume, infer, or deem a fact admitted because the defendant has remained silent . . . is contrary to the Sixth Amendment." *Id.*

455 F.3d 448, 450-51 (4th Cir.), *cert. denied*, ––– U.S. ––––, 127 S. Ct. 299, 166 L. Ed. 2d 226 (2006). The majority here refers to the "complete silence of both defendant and defense counsel mentioned in *Revels*" as supporting the application of that case. My reading of *Revels* does not reveal silence by defendant or counsel. To the contrary, in its opinion, the Fourth Circuit noted that "Revels testified that he had read the PSR [pre-sentencing report] and discussed it with his lawyer." *Id.* at 449. Thereafter, the judge asked defendant directly if he had objections to anything contained in or left out of the report, and he responded, "No, sir." *Id.* at 450. Even so, the court in *Revels* found Sixth Amendment error, but ultimately deemed it harmless. The Fourth Circuit recently reaffirmed the importance of assessing admissions on the *Revels* spectrum for *Booker* (and thus *Blakely*) purposes. *United States v. Britt*, 216 F. App'x 317, 321 (4th Cir. 2007) (unpublished) (holding that the statement of defense counsel that all objections to a pre-sentencing report had been "resolved" was not an admission for *Booker* purposes because it requires the court to draw inferences about "facts admitted by the defendant").

On the *Revels* spectrum, this case appears closer to *Milam* than to *Morrisette* in that here, the defendant personally said nothing, and the record does not show that he discussed the aggravating factor with his attorney. The court in *Revels* noted that " 'to presume, infer, or deem a fact admitted because the defendant has remained silent . . . is contrary to the Sixth Amendment.' " 455 F.3d at 451 (quoting *United States v. Milam*, 443 F.3d at 387). Thus, I conclude that as in *Milam* and *Revels*, there was Sixth Amendment error.

Nor is the majority's conclusion here compelled by this Court's recent decision in *State v. Hurt*, 361 N.C. 325, 643 S.E.2d 915 (2007). In *Hurt*, we held that comments by counsel in his argument during defendant's sentencing hearing were not binding on the defendant as an admission of an aggravating factor for *Blakely* purposes. *Id.* at 330, 643 S.E.2d at 918. There, we acknowledged that admissions through counsel can have binding effect in certain circumstances. Although there may be circumstances in which counsel may bind the defendant to a stipulated fact as an admission for *Blakely* purposes, this record is not clear enough for me to agree that it does so here.

As noted above, the State concedes *Blakely* error on three of the four aggravating factors. Because I do not agree that on this record counsel's stipulation coupled with defendant's silence constituted an admission of the fourth factor, I would find *Blakely* error on all four

aggravating factors. However, because the stipulation establishes a basis for the aggravating factor at issue here, I conclude that the error is harmless beyond a reasonable doubt. Thus, I would affirm defendant's convictions and his sentence.

STATE OF NORTH CAROLINA v. TYWAINE SHERELL DENNY

No. 572PA06

(Filed 9 November 2007)

1. Perjury— motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of perjury in order to obtain court-appointed counsel to defend him for failure to pay child support based on his submission of a sworn indigency affidavit in which he wrote "0" under the category of assets titled "Real Estate" although he was record co-owner of real property, because: (1) there was substantial evidence that the statement was false and that defendant made the statement knowingly, willfully, and designedly; (2) the State provided evidence of defendant's possible motivations for failing to disclose his ownership of the property; (3) the evidence met the heightened standard required for proving falsity through the testimony of two witnesses or one witness and corroborating evidence; (4) defendant's explanation that he did not have an equitable interest in the property created an issue for the jury to evaluate and did not negate the sufficiency of the State's evidence; (5) the jury could reasonably have inferred that defendant and his girlfriend willfully structured the real estate conveyance in a manner that would prevent defendant from receiving income that could be used to make child support payments; and (6) defendant's evidence that he did not intentionally misstate the facts since he believed he had no equitable interest in the property conflicts with the State's evidence and cannot be taken into consideration when determining whether to dismiss defendant's perjury charge.

2. False Pretense— making false statements—motion to dismiss—sufficiency of evidence

The trial court erred by denying defendant's motion to dismiss the charge of making false statements under N.C.G.S.

§ 7A-456 in order to obtain court-appointed counsel to defend him for failure to pay child support based on his submission of a sworn indigency affidavit in which he wrote "0" under the category of assets titled "Real Estate" although he was record co-owner of real property, because the record failed to evidence all of the required elements of making false statements when: (1) there was no evidence that defendant was notified by a judicial officer of the provisions of N.C.G.S. § 7A-456(a), as required by subsection (b); and (2) although the form indicates a deputy clerk was present when defendant submitted the affidavit, presence alone is not evidence of notification.

3. Appeal and Error— appealability—mootness

Defendant's double jeopardy and ineffective assistance of counsel claims in a perjury and making false statements case are dismissed as moot, because: (1) in regard to the double jeopardy claim, defendant's conviction for making a false statement was reversed; and (2) in regard to defendant's ineffective assistance of counsel claim, it was premised on his trial counsel's failure to renew his motion to dismiss the charges for insufficiency of the evidence, and the Court of Appeals considered the merits of defendant's sufficiency argument.

Justice TIMMONS-GOODSON concurring in part and dissenting in part.

Justice HUDSON joins in the dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of the decision of a divided panel of the Court of Appeals, 179 N.C. App. 822, 635 S.E.2d 438 (2006), reversing defendant's convictions for perjury and making false statements and vacating a judgment entered 2 December 2004 by Judge James W. Morgan in Superior Court, Burke County. Heard in the Supreme Court 11 April 2007.

Roy Cooper, Attorney General, by Derrick C. Mertz, Assistant Attorney General, for the State-appellant.

Jarvis John Edgerton, IV for defendant-appellee.

NEWBY, Justice.

The issue presented is whether the State presented substantial evidence to support defendant's convictions for perjury and making false statements. We hold that the evidence of defendant's failure to

disclose his record ownership of real estate was adequate to support his perjury conviction. However, because the record fails to evidence all of the required elements of making false statements, that conviction must be overturned.

Defendant was indicted on 1 December 2003 on charges of perjury and making false statements in order to obtain court-appointed counsel to defend him for failure to pay child support. The evidence tended to show that defendant submitted a sworn indigency affidavit in which he wrote "0" under the category of assets titled "Real Estate" although he was record co-owner of real property. Defendant testified he did not list the property because he believed he had no financial interest in it.

On 2 December 2004, a jury convicted defendant of perjury and making false statements. After finding defendant's prior record level to be III, the trial court consolidated the charges and sentenced defendant in the presumptive range to a prison term of seventeen to twenty-one months. On appeal defendant argued three issues: (1) the evidence was insufficient to support the charges; (2) ineffective assistance of counsel; and (3) double jeopardy. On 17 October 2006, a divided panel of the Court of Appeals addressed only defendant's sufficiency argument and held there was insufficient evidence to support either conviction. *State v. Denny*, 179 N.C. App. 822, 825-26, 635 S.E.2d 438, 441-42 (2006). The majority considered the merits of the issue pursuant to Appellate Rule 2 even though defendant had not properly preserved the issue for appeal by making a motion to dismiss at the close of all the evidence. The dissent disagreed with the majority's decision to invoke Rule 2. *Id.* at 826-27, 635 S.E.2d at 442 (Steelman, J., dissenting).

The State did not appeal based upon the dissent, but petitioned this Court for review of the Court of Appeals decision to reverse defendant's convictions. We allowed the State's motion for temporary stay on 6 November 2006 and the State's petitions for writ of supersedeas and for discretionary review on 14 December 2006.

Defendant's motion to dismiss his convictions should be denied as to each conviction if "there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990) (citing *State v. Mercer*, 317 N.C. 87, 96, 343 S.E.2d 885, 890 (1986)). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a

conclusion." *Id.* (quoting *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982) (citations and internal quotation marks omitted)). It is well established that when considering a motion to dismiss, the evidence must be viewed in the light most favorable to the State, giving the State the benefit of "every reasonable inference to be drawn therefrom." *E.g.*, *State v. Lowery*, 309 N.C. 763, 766, 309 S.E.2d 232, 236 (1983) (citing *State v. Bright*, 301 N.C. 243, 257, 271 S.E.2d 368, 377 (1980)). "The defendant's evidence, unless favorable to the State, is not to be taken into consideration." *State v. Jones*, 280 N.C. 60, 66, 184 S.E.2d 862, 866 (1971). However, when it is consistent with the State's evidence, the defendant's evidence "may be used to explain or clarify that offered by the State." *Id.* (citing *State v. Sears*, 235 N.C. 623, 70 S.E.2d 907 (1952)).

[1] The elements of perjury, as it is defined by common law and statute, are "a false statement under oath, knowingly, wilfully and designedly made, in a proceeding in a court of competent jurisdiction, or concerning a matter wherein the affiant is required by law to be sworn, as to some matter material to the issue or point in question." *State v. Smith*, 230 N.C. 198, 201, 52 S.E.2d 348, 349 (1949) (citations omitted); *see* N.C.G.S. § 14-209 (2005). Further, "it is required that the falsity of the oath be established by the testimony of two witnesses, or by one witness and corroborating circumstances." *State v. King*, 267 N.C. 631, 633, 148 S.E.2d 647, 650 (1966) (citations omitted).

Defendant does not contest that the evidence would permit a finding that he made the statement under oath in a proceeding where he was required to be sworn or that the statement was material. He argues there is insufficient evidence that the statement was false and that he made it knowingly. However, viewed in the light most favorable to the State, there is substantial evidence that the statement was false and that defendant made the statement knowingly, willfully, and designedly.

On 13 January 2003, the twenty-eight year old defendant acquired legal title to real estate as a co-owner with his girlfriend Amber Clark ("Clark"). Four months later on 13 May 2003, defendant appeared in court for proceedings concerning his failure to pay child support. Defendant failed to report any ownership of real estate on the standard Affidavit of Indigency form provided by the Administrative Office of the Courts when he submitted it in an effort to obtain court-appointed legal counsel for the child support proceedings. The form, which is designed to aid the trial court in determining whether an

applicant qualifies for a court-appointed attorney because of lack of income and assets, contains three columns which pertain to different categories of items such as "Cash," "Motor Vehicles," and "Real Estate." The first column requires a description of items in each category. The second column, titled "Assets," requires a monetary value for the items described in column one, and the third column allows a monetary value to be listed for the "liabilities" associated with the items listed in column one. The second page of the form states (1) that information provided thereon may be verified and "[a] false or dishonest answer concerning your financial status could lead to prosecution for perjury" and (2) requires the applicant to swear that the information is true "[u]nder penalty of perjury."

Almost seven months later on 1 December 2003, defendant was indicted for failure to disclose his real estate ownership. Less than three months thereafter, defendant and Clark conveyed the real estate on 19 February 2004 for $57,500, yielding net proceeds of $56,769.12. The property was not encumbered by a deed of trust. The purchaser's real estate attorney, George Goosman, Jr. ("Goosman"), testified that as a record co-owner, defendant was required to sign the deed in order to effectively pass title. Goosman originally provided defendant and Clark with separate checks giving each one-half of the proceeds. However, he ultimately gave all proceeds from the sale to Clark because at closing, defendant told Goosman he had no financial interest in the property. At this point, defendant's acceptance of the proceeds would have been a confession of perjury and subjected the money to child support payments. Goosman also testified that as a record co-owner, defendant was entitled to half the appreciation in the real estate even if he paid none of the purchase price and that had defendant died, his estate would have had a claim to his portion of the asset.

The State also provided evidence of defendant's possible motivations for failing to disclose his ownership of the property. The Department of Social Services case manager assigned to defendant's case testified that ownership of real estate would be relevant to defendant's child support obligations for his two children, as well as whether he should receive court-appointed counsel to defend the charge of failure to pay child support.

This evidence met the heightened standard required for proving falsity through the testimony of two witnesses or one witness and corroborating evidence. *E.g.*, *King*, 267 N.C. at 633, 148 S.E.2d at 650. Defendant, Clark, and Goosman all testified that defendant was

the legal co-owner of the real estate on the date he filled out the affidavit and that defendant and Clark later conveyed the property for net proceeds of $56,769.12. The State also introduced corroborating documentary evidence which included defendant's indigency affidavit and property records. The jury could reasonably infer from this evidence that the property had some value above zero at the time defendant submitted the indigency affidavit, and therefore, that his sworn representation that he had no real property assets was false. Defendant's explanation that he did not have an equitable interest in the property created an issue for the jury to evaluate and did not negate the sufficiency of the State's evidence. *See Sears*, 235 N.C. at 625, 70 S.E.2d at 908-09.

There is also substantial evidence that defendant made the false statement knowingly, willfully, and designedly. The State's evidence would have permitted the jury to infer that defendant knew he was a legal and equitable owner of the real estate on 13 May 2003 and only treated Clark as the sole equitable owner after his indictment, when to do otherwise would have been to confess a crime. Likewise, the jury could reasonably have concluded that defendant made the false statement knowingly, willfully, and designedly in order to avoid reporting assets that could affect his child support obligations and to increase his likelihood of receiving appointed counsel. In fact, the jury could reasonably have inferred that defendant and Clark willfully structured the real estate conveyance in a manner that would prevent defendant from receiving income that could be used to make child support payments.

Defendant's evidence that he did not intentionally misstate the facts because he believed he had no equitable interest in the property conflicts with the State's evidence and cannot be taken into consideration when determining whether to dismiss defendant's perjury charge. *See id.* "Under these circumstances whether [defendant made the false statement] wilfully and corruptly was a matter for the jury to determine and not a conclusion of law." *State v. Dowd*, 201 N.C. 714, 716, 161 S.E. 205, 206-07 (1931) (per curiam). Indeed, the trial court's instruction informed the jury that an element of perjury was "that the defendant acted wilfully and corruptly. That is, made the false statement knowingly, purposefully, and decidedly." Taken together with every inference for the State, substantial evidence was presented to sustain defendant's conviction for perjury.

[2] Defendant was also convicted of making false statements under N.C.G.S. § 7A-456, which provides:

> (a) A false material statement made by a person under oath or affirmation in regard to the question of his indigency constitutes a Class I felony.
>
> (b) A judicial official making the determination of indigency shall notify the person of the provisions of subsection (a) of this section.

N.C.G.S. § 7A-456 (2005).[1] Our examination of the record reveals no evidence that defendant was notified by a judicial officer of the provisions of subsection (a), as required by subsection (b). Although the form indicates a deputy clerk was present when defendant submitted the affidavit, presence alone is not evidence of notification. As the State failed to prove an element of the offense, defendant's conviction on this charge must be reversed.

[3] The decision of the Court of Appeals is modified and affirmed insofar as it reversed defendant's conviction for making false statements. The decision of the Court of Appeals is reversed regarding its reversal of defendant's conviction for perjury. As defendant's conviction for making a false statement is reversed, his assignment of error regarding his double jeopardy claim is moot. Defendant's ineffective assistance of counsel claim was premised on his trial counsel's failure to renew his motion to dismiss the charges for insufficiency of the evidence. Because we have considered the merits of defendant's sufficiency argument, his ineffective assistance of counsel claim is also moot.

MODIFIED AND AFFIRMED IN PART; REVERSED IN PART.

Justice TIMMONS-GOODSON concurring in part and dissenting in part.

I agree with the majority's conclusion that there was insufficient evidence to support defendant's conviction pursuant to N.C.G.S. § 7A-456 for making a false statement under oath. I would also hold that there was insufficient evidence to support defendant's perjury conviction. Therefore, I respectfully dissent.

"In accord with the common law definition and the statutes extending its application, it has been uniformly held that the elements essential to constitute perjury are substantially these: a

1. Although the title of N.C.G.S. § 7A-456 is "False statements; penalty," the text of the statute indicates that a single false statement is sufficient for conviction.

false statement under oath, *knowingly*, *wilfully*, *and designedly made* . . . concerning a matter wherein the affiant is required . . . to be sworn . . . ." *State v. Smith*, 230 N.C. 198, 201, 52 S.E.2d 348, 349 (1949) (emphasis added) (citations omitted). This heightened *mens rea* requirement comports with the additional burden placed on the State, best stated in *State v. Rhinehart*, 209 N.C. 150, 154, 183 S.E. 388, 391 (1935): "In prosecutions for perjury, it is required that the falsity of the oath be established by two witnesses, or by one witness and adminicular circumstances sufficient to turn the scales against the defendant's oath." These unique safeguards are necessary "[b]ecause of the special nature of a perjury charge, pitting as it does the oath of one person against that of another." 60A Am. Jur. 2d *Perjury* § 74 (2006). Indeed, the only crime in which the requirements of proof are greater is treason. *Id.*

In the instant case, defendant appeared in civil court for failure to pay child support. He applied for a court-appointed attorney by completing an affidavit of indigency. In the affidavit, defendant wrote a zero on the line asking for information about real estate assets. The affidavit did not require defendant to state whether he owned or had title to real property. It simply asked him for a "description of" his "assets and liabilities." The meaning of the term "assets" is subject to multiple interpretations, but the term generally implies some value in the object in question. *See*, *e.g.*, *Black's Law Dictionary* 125 (8th ed. 2004) (defining "asset," *inter alia*, as "[a]n item that is owned and has value").

It should also not be lost on us that the purpose of the affidavit was to determine defendant's ability to pay for counsel. While the State presented testimony from one witness indicating that defendant's name appeared on the title to the property at issue, the State presented no evidence that defendant had any financial interest in the property or that the property contained any value at the time defendant signed the affidavit in question. Thus, the evidence presented at trial was also insufficient to establish the element of falsity.

The insufficiency of the evidence supporting defendant's conviction is particularly troubling in light of the heightened burden of proof required by our laws in perjury cases. "The law [of perjury] was intended to afford the defendant a greater protection against the chance of unjust conviction than is ordinarily afforded in prosecuting for crime." *State v. Hill*, 223 N.C. 711, 716, 28 S.E.2d 100, 103 (1943).

Because the evidence that defendant committed perjury is insufficient to sustain his conviction, I would affirm the Court of Appeals. Therefore, I respectfully dissent.

Justice HUDSON joins in this dissenting opinion.

STATE OF NORTH CAROLINA v. JONATHAN DENARD BOYCE

No. 129A06

(Filed 9 November 2007)

Kidnapping— separate from armed robbery—evidence sufficient

The trial court did not err by denying defendant's motion to dismiss a kidnapping charge (as inherent in an armed robbery) where defendant forced his way through his pregnant victim's front door against her resistance, prevented her escape through the back door by grabbing her shirt after she had one foot outside, pulled her back into the house as she attempted to remove her shirt, demanded money at gunpoint, and accepted a check. The kidnapping was a separate complete act that facilitated the subsequent armed robbery.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 175 N.C. App. 663, 625 S.E.2d 553 (2006), finding no prejudicial error in a trial which resulted in judgments entered 23 August 2001 by Judge Clarence W. Carter in Superior Court, Forsyth County. On 8 March 2007, the Supreme Court allowed defendant's petition for discretionary review of additional issues. Heard in the Supreme Court 13 September 2007.

Roy Cooper, *Attorney General*, *by Amar Majmundar*, *Special Deputy Attorney General*, *for the State.*

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

BRADY, Justice.

This case presents the issue of whether defendant's act of restraint and removal in preventing the victim's escape from her

residence, at a time when defendant's subsequent robbery with a dangerous weapon had not yet begun, was sufficient to support a conviction for second-degree kidnapping. Because we find defendant's conduct was legally sufficient to constitute the separate, complete act of second-degree kidnapping and, moreover, that the kidnapping facilitated the accompanying robbery, we affirm the Court of Appeals.

FACTUAL AND PROCEDURAL BACKGROUND

The pivotal facts are as follows: Around noon on 3 July 2000, defendant, Jonathan Denard Boyce, later identified through forensic evidence and distinguishing features, gained entry to Amie Cobb Dunford's residence by fraudulently claiming to be soliciting volunteers for a neighborhood watch program and, thereafter, by forcing open the front door. Dunford, home alone and four and a half months pregnant, struggled to prevent his entry by pushing the door shut and biting his hand. Defendant continued to force his way into the residence. Dunford, realizing further resistance was futile, attempted to flee through the rear of the residence. She managed to open the back door and "got a foot out of the house" before defendant prevented her escape by grabbing her shirt. The victim "reached around the door trying to hold [herself] out of the door and trying to escape." She also attempted to escape by trying to remove her shirt, which was still being held by defendant. Again, she was unsuccessful. Given the time of day, Dunford realized neither neighbors nor construction workers typically present in the area were in close enough proximity to hear her yell. She testified she was afraid defendant intended to harm her should she be pulled back into the residence. While defendant held her shirt, the victim repeatedly screamed, "Don't hurt me," and that she was pregnant. Defendant, holding onto Dunford's shirt with his left hand, pulled her back into the interior of the residence. Dunford fell as a result of the force, looked up, and for the first time observed defendant holding a handgun in his right hand. Defendant then demanded money. Dunford informed him she had no cash. Defendant agreed to accept a personal check for two hundred dollars. Defendant, after obtaining the check, threatened to kill her if she called the police. Undeterred, after defendant left the scene, Dunford immediately called 911 Emergency Response.

Warrants for defendant's arrest were issued on 23 October 2000. The Forsyth County Grand Jury returned true bills of indictment charging him with felony breaking and entering, robbery with a dangerous weapon, and second-degree kidnapping, all of which arose

from the above described incident. Defendant was tried at the 22 August 2001 criminal session of Forsyth County Superior Court. After presentation of the State's case-in-chief and again at the close of all evidence, defendant moved to dismiss the kidnapping charge, asserting that the State's evidence of confinement, restraint, or removal was insufficient to support the kidnapping count as it was inherently a part of and thus merged with the robbery. Defendant's motions were denied. A jury returned guilty verdicts on all counts and the trial court entered judgment accordingly on 23 August 2001. The trial court determined defendant's prior record level to be II and imposed consecutive sentences of ten to twelve months for felony breaking and entering, ninety-five to one hundred twenty-three months for robbery with a dangerous weapon, and thirty-six to fifty-three months for second-degree kidnapping. Defendant appealed his convictions, and a divided panel of the Court of Appeals found no error. *State v. Boyce*, 175 N.C. App. 663, 625 S.E.2d 553 (2006). Defendant, based on the dissent in the Court of Appeals, appeals as of right to this Court pursuant to N.C.G.S. § 7A-30(2).

ANALYSIS

Kidnapping, as codified in North Carolina, is defined in part as:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . . .
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony . . . .

N.C.G.S. § 14-39(a) (2005). Nearly three decades ago this Court recognized that, as written, this statute presents the potential for a defendant to be prosecuted twice for the same act. *See State v. Fulcher*, 294 N.C. 503, 523-24, 243 S.E.2d 338, 352 (1978) (noting that to avoid such a consequence, "the restraint, which constitutes the kidnapping [must be] a separate, complete act, independent of and apart from the other felony").

To be sure, more than one criminal offense may arise out of the same criminal course of action. *State v. Ripley*, 360 N.C. 333, 337-38,

626 S.E.2d 289, 292 (2006) (citing *Fulcher*, 294 N.C. at 524, 243 S.E.2d at 352). When, for example, the kidnapping offense is a wholly separate transaction, completed before the onset of the accompanying felony, conviction for both crimes is proper. *See State v. Newman*, 308 N.C. 231, 239-40, 302 S.E.2d 174, 181 (1983); *see also Fulcher*, 294 N.C. at 525, 243 S.E.2d at 352-53 (noting that "neither the Fourteenth Amendment to the Constitution of the United States nor Article I, § 19, of the Constitution of North Carolina forbids the prosecution and punishment of a defendant for two separate, distinct crimes, even though the second offense follows the first in quick succession and was the purpose for which the first offense was committed").[1]

It remains true that " 'certain felonies (*e.g.*, forcible rape and armed robbery) cannot be committed without some restraint of the victim.' " *Ripley*, 360 N.C. at 337, 626 S.E.2d at 292 (quoting *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351 (noting further that it is "well established that . . . where one offense is committed with the intent thereafter to commit the other and is actually followed by the commission of the other," *id.* at 523-24, 243 S.E.2d at 351-52, conviction for both crimes is proper)). Misconstruing this Court's precedent in *Ripley*, 360 N.C. at 340, 626 S.E.2d at 293-94, and *State v. Irwin*, 304 N.C. 93, 103, 282 S.E.2d 439, 446 (1981), defendant urges this Court to reverse his kidnapping conviction on the grounds that the movement of the victim in the instant case was "a mere technical asportation" and thus an inherent part of the robbery with a dangerous weapon. This Court held the kidnapping charges in both of those cases improper as the victims were merely moved from one location to another during the commission of ongoing robberies. In *Ripley*, the victims in question were ordered at gunpoint from the entranceway of a motel into the lobby after the robbery had already commenced. 360 N.C. at 334-35, 626 S.E.2d at 290. *Irwin* involved a drug store clerk being forced at knifepoint from the front of the store to the prescription counter in the rear—again after the robbery was already underway. 304 N.C. at

1. While not germane to our decision in the case at bar, separate kidnapping convictions have also been affirmed when the defendant exposed the victim to greater danger than that inherent in the separate felony offense. *See, e.g.*, *State v. Beatty*, 347 N.C. 555, 559, 495 S.E.2d 367, 370 (1998) (upholding kidnapping conviction when "defendant bound [the] victim's wrists and kicked him in the back [thereby increasing] the victim's helplessness and vulnerability beyond what was necessary to enable [the robbery]" (citing *State v. Pigott*, 331 N.C. 199, 210, 415 S.E.2d 555, 561 (1992)); *State v. Tucker*, 317 N.C. 532, 536, 346 S.E.2d 417, 419-20 (1986) (holding that the trial judge correctly refused to dismiss kidnapping charges when the victim was exposed to greater danger than that inherent in sexual assault by being dragged to a remote location where the crime was ultimately committed).

96-97, 282 S.E.2d at 442. We find the underlying facts of *Ripley* and *Irwin* distinguishable from the salient facts and sequence of events in the instant case because, here, one felony transaction was complete before the other felony began.

Instead, the holdings and rationale of our decisions in *Newman*, 308 N.C. 231, 302 S.E.2d 174, and *State v. Whittington*, 318 N.C. 114, 347 S.E.2d 403 (1986), are more analogous and thus dispositive of the case at bar. In *Newman*, the defendants abducted the victim from a grocery store parking lot and took her to a wooded area behind the store where she was raped. This Court concluded that:

> Removal of [the victim] from her automobile to the location where the rape occurred was not such asportation as was inherent in the commission of the crime of rape. Rather it was a separate course of conduct designed to remove her from the view of a passerby who might have hindered the commission of the crime. To this extent, the action of removal was taken *for the purpose of facilitating the felony* of first-degree rape.

308 N.C. at 239-40, 302 S.E.2d at 181 (emphasis added); *accord Ripley*, 360 N.C. at 340, 626 S.E.2d at 294 (holding that "a trial court must consider additional factors such as whether the asportation facilitated the defendant's ability to commit a felony offense"). In *Whittington*, the defendant, wielding a knife and claiming to be in possession of a firearm, threatened the victim and dragged her from the front of a car wash, near houses and the highway, to the rear of the facility before committing a sexual assault. *Whittington*, 318 N.C. at 116, 119-20, 122, 347 S.E.2d at 404-05, 406, 408 (holding trial court did not err in denying motion to dismiss kidnapping charge noting that the "[d]efendant could have perpetrated the offense when he first threatened the victim," but chose instead to remove her to a "more secluded area" to facilitate perpetration of the second felony).

The State's evidence in the present case sufficiently established that defendant prevented the victim's escape by pulling her back into her residence before the onset of the robbery with a dangerous weapon. This restraint and removal was a distinct criminal transaction that facilitated the accompanying felony offense and was sufficient to constitute the separate crime of kidnapping under North Carolina law. *See id.*; *see also Newman*, 308 N.C. at 239-40, 302 S.E.2d at 181. That the victim was removed just a short distance and only

momentarily before the robbery is irrelevant, as this Court long ago dispelled the importance of distance and duration. *See Fulcher*, 294 N.C. at 522, 243 S.E.2d at 351 (stating that "resort to a tape measure or a stop watch [is] unnecessary in determining whether the crime of kidnapping has been committed").

As defendant's kidnapping of the victim was a separate criminal transaction, complete before the second felony commenced, and facilitated the subsequent robbery with a dangerous weapon, the trial court did not err in denying his motions to dismiss. Accordingly, we affirm the Court of Appeals decision finding no error in defendant's kidnapping conviction.

As to the additional issues presented in defendant's petition, we conclude that discretionary review was improvidently allowed.

AFFIRMED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA v. PIERRE TOREZ-OMAR FARRAR

No. 527PA06

(Filed 9 November 2007)

Indictment and Information— variance between indictment and instruction—favorable to defendant

There was no prejudicial error in a prosecution for first-degree burglary where the indictment alleged larceny as the underlying felony and the instruction had armed robbery as the underlying felony. The error was favorable to defendant, as armed robbery includes more elements for the State to prove than larceny.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 179 N.C. App. 561, 634 S.E.2d 253 (2006), finding no error in part in judgments entered 15 March 2005 by Judge L. Todd Burke in Superior Court, Guilford County, but vacating defendant's conviction for first-degree burglary and remanding for entry of judgment of non-felonious breaking and entering. Heard in the Supreme Court 10 September 2007.

Roy Cooper, Attorney General, by David L. Elliott, Assistant Attorney General, for the State-appellant.

James R. Parish for defendant-appellee.

NEWBY, Justice.

This case presents the issue of whether it was prejudicial error for the trial court to instruct the jury to find defendant intended to commit robbery with a dangerous weapon as an element of first-degree burglary when the indictment alleged larceny as the underlying felony. We hold that when the variance between the indictment and the jury instructions is favorable to defendant, there is no prejudicial error. Accordingly, we reverse the Court of Appeals as to this issue.

On 18 January 2005, defendant was indicted for robbery with a dangerous weapon and first-degree burglary. On 7 February 2005, defendant was also indicted for attempted robbery with a dangerous weapon. The indictment for first-degree burglary alleged defendant committed the offense by breaking and entering "with the intent to commit a felony therein, larceny." During trial, the State presented evidence regarding the alleged crimes, a summary of which is set out in the Court of Appeals opinion and will not be repeated here. *See State v. Farrar*, 179 N.C. App. 561, 562, 634 S.E.2d 253, 255 (2006). At the close of the evidence, when instructing the jury on the charge of first-degree burglary, the trial court stated that in order for the jury to find defendant guilty of first-degree burglary, the State had to prove, *inter alia*, "that at the time of the breaking and entering, the defendant intended to commit robbery with a firearm[] [o]r attempted to commit robbery with a firearm." There was no objection to the jury instruction by the prosecutor or defendant. On 15 March 2005, the jury convicted defendant of robbery with a dangerous weapon, attempted robbery with a dangerous weapon, and first-degree burglary. The trial court sentenced defendant to two consecutive terms of seventy-two to ninety-six months imprisonment.

On appeal, the Court of Appeals affirmed the trial court's denial of defendant's motion to dismiss the charge of attempted robbery, finding there was sufficient evidence to support the charge. *Id.* at 563-64, 634 S.E.2d at 256. Defendant also argued before the Court of Appeals that the trial court's instructions to the jury constituted plain error because the indictment alleged he committed burglary with the intent to commit the felony of larceny, rather than the felony of rob-

bery with a dangerous weapon. *Id.* at 564, 634 S.E.2d at 256. Relying on this Court's decision in *State v. Silas*, 360 N.C. 377, 627 S.E.2d 604 (2006), the Court of Appeals found that the trial court's jury instructions created a fatal variance in the indictment resulting in prejudicial error and accordingly vacated defendant's conviction of first-degree burglary and remanded to the trial court for entry of judgment of non-felonious breaking and entering. *Id.* at 565-66, 634 S.E.2d at 257-58. Based on its finding of prejudicial error in the first-degree burglary jury instructions, the Court of Appeals determined it unnecessary to address the one remaining assignment of error raised in defendant's brief: whether the trial court erred in failing to dismiss the first-degree burglary charge based upon insufficiency of the evidence. *Id.* at 566, 634 S.E.2d at 258. The Court of Appeals deemed defendant's additional assignments of error abandoned because defendant did not address those assignments in his brief. *Id.* (citing N.C. R. App. P. 28(b)(6)).

We allowed the State's petition for discretionary review as to the sole issue of whether the variance between the first-degree burglary indictment and the trial court's jury instructions on the same charge constituted prejudicial error. 361 N.C. 361, 644 S.E.2d 364 (2007). The State contends that any error in the jury charge was not prejudicial because larceny is a lesser-included offense of robbery with a dangerous weapon, and thus, the jury instructions actually benefitted defendant by adding an additional element for the State to prove. Consistent with our decision in *State v. Beamer*, 339 N.C. 477, 451 S.E.2d 190 (1994), we agree.

Our General Statutes state: "A bill of indictment may not be amended." N.C.G.S. § 15A-923(e) (2005). This Court has construed this statute "to mean a bill of indictment may not be amended in a manner that substantially alters the charged offense." *Silas*, 360 N.C. at 379-80, 627 S.E.2d at 606 (citing *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996)). In considering whether an amendment constitutes a substantial alteration, we have been mindful of the purposes served by indictments, including that of enabling the defendant to prepare for trial. *See id.* at 380, 627 S.E.2d at 606.

In *Silas*, we addressed N.C.G.S. § 15A-923(e) as it applied to a situation different from the instant case: the State's amendment to an indictment charging felonious breaking and entering which significantly changed the underlying felony. *Id.* at 382-84, 627 S.E.2d at 607-08. In that case, the defendant was indicted for felonious breaking and entering with the intent to commit murder. *Id.* at 379, 627

S.E.2d at 606. Relying on the intended felony specified in the indictment, the defendant testified at trial on his own behalf that his intent was to harm the victims, not kill them. *Id.* at 378, 627 S.E.2d at 605. During the charge conference, the trial court notified the parties it intended to instruct the jurors that in order to convict defendant of felonious breaking and entering, they had to find the defendant guilty of the underlying felony of either (1) assault with a deadly weapon with intent to kill inflicting serious injury or (2) assault with a deadly weapon inflicting serious injury. *Id.* at 379, 627 S.E.2d at 606. Subsequently, the prosecutor was allowed to amend the indictment to conform to the evidence presented and the anticipated jury instructions. *Id.* We held the State's amendment of the indictment violated N.C.G.S. § 15A-923(e), reasoning that the amendment "prejudiced [the] defendant as he relied upon the allegations in the original indictment to his detriment in preparing his case upon the assumption the prosecution would proceed upon a theory defendant intended to commit murder." 360 N.C. at 382, 627 S.E.2d at 608. We further observed that the primary purpose of the indictment is " ' "to enable the accused to prepare for trial." ' " *Id.* at 382, 627 S.E.2d at 607 (quoting *State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (citation omitted), *cert denied*, 539 U.S. 985, 124 S. Ct. 44, 156 L. Ed. 2d 702 (2003)). Ultimately in *Silas*, we concluded that an indictment for felonious breaking and entering does not have to specify the underlying felony. *Id.* at 383, 627 S.E.2d at 608. We noted, however, the general rule that when the underlying felony is specified, the defendant's conviction must be based on the same felony specified in the indictment. *Id.*

Our holding in *Silas* was consistent with our holding in an earlier case, *Beamer*, in which we recognized an exceptional situation when such a variance would not be fatal: when the variance actually benefits the defendant. 339 N.C. at 484-85, 451 S.E.2d at 194-95. The facts in *Beamer* are indistinguishable from those in the instant case. In *Beamer*, the indictment alleged larceny as the underlying felony for the commission of first-degree burglary. *Id.* at 484, 451 S.E.2d at 194. However, the trial court instructed the jury that it could find the defendant guilty of first-degree burglary if it found the defendant or someone acting in concert with him intended to commit armed robbery. *Id.* In deciding whether the trial court erred, this Court first noted that larceny is a lesser included offense of armed robbery. 339 N.C. at 485, 451 S.E.2d at 194 (citing *State v. Barton*, 335 N.C. 741, 441 S.E.2d 306 (1994); *State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988)). We then concluded:

> When the [trial] court charged the jury that it could find the defendant guilty of first-degree burglary if it found the defendant or someone acting in concert with him intended to commit armed robbery at the time of the breaking and entering, it charged that it must find the defendant and his accomplice had committed a crime *which included larceny*. The jury had to find he intended to commit a crime *with more elements than* the crime alleged in the indictment. This was error favorable to the defendant.

Id. at 485, 451 S.E.2d at 194-95 (emphasis added). As in *Beamer*, the trial court's charge to the jury in this case benefitted defendant, because the instructions required the State to prove more elements than those alleged in the indictment. Therefore, there was no prejudicial error in the instructions.

For the reasons stated, we reverse the decision of the Court of Appeals as to the issue before this Court on discretionary review, whether the trial court's jury instructions on first-degree burglary constituted prejudicial error, and remand to that court for consideration of the remaining assignment of error presented by defendant on appeal. The other issues addressed by the Court of Appeals are not before this Court, and its decision as to those issues remains undisturbed.

REVERSED IN PART AND REMANDED.

ALICE BINS RAINEY, MICHELE R. ROTOSKY, AND MADELINE DAVIS TUCKER, PETITIONERS v. NORTH CAROLINA DEPARTMENT OF PUBLIC INSTRUCTION AND STATE BOARD OF EDUCATION, RESPONDENTS

No. 143PA07

(Filed 9 November 2007)

Administrative Law— differing decisions by ALJ and agency— superior court review—consideration of agency's construction of statute

In reviewing the final decision of the State Board of Education in a contested case in which the Board did not adopt the decision of the administrative law judge, the Court of Appeals erred in its holding that the superior court is barred from giving any consideration to the agency's construction of the applicable

statute when it conducts a de novo review pursuant to N.C.G.S. § 150B-51(c). Subsection (c) refers only to the agency's decision in the specific case before the court and does not bar the trial court from considering the agency's expertise and previous interpretations of the statutes it administers, as demonstrated in rules and regulations adopted by the agency or previous decisions outside of the pending case.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 181 N.C. App. 666, 640 S.E.2d 790 (2007), reversing an order and judgment entered on 7 September 2005 by Judge Howard E. Manning, Jr. in the Superior Court in Wake County. Heard in the Supreme Court 16 October 2007.

Poyner & Spruill LLP, by Thomas R. West and Pamela A. Scott, for petitioner-appellee Madeline Davis Tucker.

Roy Cooper, Attorney General, by Laura E. Crumpler, Assistant Attorney General, and Thomas J. Ziko, Special Deputy Attorney General, for respondent-appellants.

PER CURIAM.

In reversing the trial court's judgment and order that petitioner-appellee, Madeline Davis Tucker, did not qualify for a twelve percent salary increase under North Carolina's National Board for Professional Teaching Standards program, the Court of Appeals determined, *inter alia*, that the trial court erred in applying the de novo standard of review mandated by N.C.G.S. § 150B-51(c). We reverse and remand to the Court of Appeals for reconsideration.

N.C.G.S. § 150B-51(c), added to the North Carolina Administrative Procedure Act ("APA") by our legislature in 2000, mandates that in cases in which the agency does not adopt the administrative law judge's decision, "the [superior] court shall review the official record, de novo, and shall make findings of fact and conclusions of law." N.C.G.S. § 150B-51(c) (2005). In conducting its de novo review, "the [superior] 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." *Id.*

In its order and judgment here, the superior court discussed N.C.G.S. § 150B-51(c) and concluded that in conducting its de novo

review it "need not defer to any prior decision in the case, or give any greater weight to the Agency's application of the law to the facts, [but] the Court may nevertheless give appropriate weight to an Agency's demonstrated expertise and consistency in applying various statutes." The Court of Appeals concluded that the trial court's "[d]eference to the agency [was] inconsistent with [subsection (c)'s statutory] mandate" and held that "the trial court erred in its application of the standard of review." *Rainey v. N.C. Dep't of Pub. Instruction*, 181 N.C. App. 666, 672, 640 S.E.2d 790, 795 (2007). The Court of Appeals' decision appears to bar the superior court from giving any consideration to the agency's construction of the statute when it conducts de novo review pursuant to N.C.G.S. § 150B-51(c). In our view, the Court of Appeals' decision goes beyond both the plain language and the intent of subsection (c).

On its face, subsection (c) provides that the superior court is not required to defer to prior decisions of the agency made "in the case" and that the court is not bound by the findings of fact or the conclusions of law "in the agency's final decision." N.C.G.S. § 150B-51(c). Subsection (c) refers only to the agency's decision in the specific case before the court. It does not bar the trial court from considering the agency's expertise and previous interpretations of the statutes it administers, as demonstrated in rules and regulations adopted by the agency or previous decisions outside of the pending case.

This reading is consistent with traditional canons of statutory construction. *N.C. Sav. & Loan League v. N.C. Credit Union Comm'n*, 302 N.C. 458, 465-66, 276 S.E.2d 404, 410 (1981) (an agency's interpretation of a statute is traditionally accorded some deference by appellate courts conducting de novo review, but those interpretations are not binding). It is also consistent with a contemporaneous explanation of N.C.G.S. § 150B-51(c):

> [T]he legislation only provides that "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 conclusions of law contained in the agency's final decision." If the *only* authority for the agency's interpretation of the law is the decision in that case, that interpretation may be viewed skeptically on judicial review. If the agency can show that the agency has consistently applied that interpretation of the law, if the agency's interpretation of the law is not simply a "because I said so" response to the contested case, then the agency's interpretation should be accorded the same def-

erence to which the agency's construction of the law was entitled under prior law.

Brad Miller, *What Were We Thinking?: Legislative Intent and the 2000 Amendments to the North Carolina APA*, 79 N.C. L. Rev. 1657, 1665-66 (2001) (footnote omitted) (Former North Carolina State Senator Miller chaired the committee that drafted the bill).

The decision of the Court of Appeals is reversed and remanded for reconsideration in light of this opinion.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA v. DESPERADOS, INC. AND CYNTHIA L. PEREZ

No. 629A06

(Filed 9 November 2007)

Appeal and Error— preservation of issues—constitutional question—failure to raise in trial court

The constitutional issue addressed in the majority opinion of the Court of Appeals was not raised and preserved in the trial court and, therefore, was not properly before the Court of Appeals.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 180 N.C. App. 378, 638 S.E.2d 4 (2006), vacating defendants' convictions which resulted in judgments entered 13 January 2005 by Judge Thomas D. Haigwood in Superior Court, Beaufort County. Heard in the Supreme Court 17 October 2007.

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

Jeffrey S. Miller for defendant-appellees.

PER CURIAM.

The constitutional issue addressed in the Court of Appeals' majority opinion was not raised and preserved in the trial court and, therefore, was not properly before the Court of Appeals. N.C. R. App.

P. 10(b)(1). Accordingly, the decision of the Court of Appeals as to the constitutional issue is reversed, and the case remanded to the Court of Appeals for determination of the remaining issues on their merits.

REVERSED IN PART AND REMANDED.

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

IN THE MATTER OF T.M., A MINOR CHILD

No. 243A07

(Filed 9 November 2007)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 182 N.C. App. ——, 643 S.E.2d 471 (2007), affirming an order entered 12 July 2006 by Judge P. Gwynett Hilburn in District Court, Pitt County. Heard in the Supreme Court 17 October 2007.

Marie Inserra and Janis Gallagher for petitioner-appellee Pitt County Department of Social Services.

Hall & Hall Attorneys at Law, P.C., by Susan P. Hall, for respondent-appellant father.

PER CURIAM.

AFFIRMED.

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

LEVEL 3 COMMUNICATIONS, LLC, PETITIONER v. CHARLES G. COUCH, JR.; JOE C. YOUNG, TRUSTEE, U/A DATED DECEMBER 24, 1992 WITH WAYNE T. UPCHURCH AND ELIZABETH C. UPCHURCH, KNOWN AS THE BARRY UPCHURCH TRUST; JOE C. YOUNG, TRUSTEE, U/A DATED DECEMBER 24, 1992 WITH WAYNE T. UPCHURCH AND ELIZABETH C. UPCHURCH, KNOWN AS THE GRAVES UPCHURCH TRUST, RESPONDENTS

No. 412PA06

(Filed 9 November 2007)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, 178 N.C. App. 390, 631 S.E.2d 237 (2006), affirming a judgment entered on 30 March 2005 and an order entered on 26 May 2005, both by Judge Timothy L. Patti in Superior Court, Mecklenburg County. Heard in the Supreme Court 16 October 2007.

Womble Carlyle Sandridge & Rice, PLLC, by Burley B. Mitchell, Jr., Mark P. Henriques, and Sarah A. Motley, for petitioner-appellant.

James, McElroy & Diehl, P.A., by Bruce M. Simpson, for respondent-appellees.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

STATE OF NORTH CAROLINA v. SCOTT ROBERT ERICKSON

No. 95PA07

(Filed 9 November 2007)

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 181 N.C. App. ——, 640 S.E.2d 761 (2007), finding no error in judgments entered 23 September 2004 by Judge William Z. Wood, Jr. in Superior Court, Wilkes County. Heard in the Supreme Court 15 October 2007.

Roy Cooper, *Attorney General*, *by Neil Dalton*, *Special Deputy Attorney General*, *for the state.*

Thomas K. Maher for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

IN RE A.S. & M.J.W.

[361 N.C. 686 (2007)]

IN THE MATTER OF A.S. AND M.J.W., MINOR CHILDREN

No. 140A07

(Filed 9 November 2007)

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 181 N.C. App. 706, 640 S.E.2d 817 (2007), affirming in part and remanding in part adjudication judgments and dispositional orders entered 24 May 2006 by Judge Marvin P. Pope, Jr. in District Court, Buncombe County. Heard in the Supreme Court 15 October 2007.

Matthew J. Middleton for petitioner-appellant Buncombe County Department of Social Services.

Michael N. Tousey for appellant Guardian ad Litem.

Michael E. Casterline for respondent-appellee father.

PER CURIAM.

AFFIRMED.

In the Matter of a Petition of the North Carolina State Bar Re:	)	
	)	ORDER
INTEREST ON LAWYERS' TRUST ACCOUNTS PROGRAM OF THE NORTH CAROLINA STATE BAR	)	

The North Carolina State Bar, authorized by Chapter 84 of the North Carolina General Statutes to regulate and supervise attorneys practicing law in this State, has petitioned this Court, in the exercise of its inherent power, to authorize and direct the North Carolina State Bar to implement a comprehensive Interest On Lawyers' Trust Accounts (IOLTA) program; and it appearing to the Court from the petition that the legal needs of only a small percentage of those people qualifying for legal assistance are being met, that access to the legal system is necessary to the maintenance of public trust and confidence in the administration of justice, and that mandatory participation in the State Bar's IOLTA program by the eligible active members of the North Carolina State Bar would likely provide substantial increased revenue to fund legal services for the poor in North Carolina and to advance the program's purposes of increasing access to justice and facilitating the administration of justice; and it further appearing that this matter is a proper subject for the exercise of this Court's inherent power to supervise and regulate conduct of members of the Bar; Now, therefore, in the exercise of its inherent power to supervise and regulate the conduct of attorneys in this State, the Supreme Court of North Carolina does hereby order, based upon the premises set forth in the State Bar's petition, that the North Carolina State Bar implement a comprehensive IOLTA program consistent with the purposes expressed in the existing North Carolina State Bar Plan for Interest on Lawyers' Trust Accounts, and that all active members of the North Carolina State Bar who maintain general client trust accounts in North Carolina participate in the program effective January 1, 2008.

By order of the Court in Conference, this 11th day of October, 2007.

s/Hudson, J.
For the Court

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
TINA LYNN LOCKLEAR	)	

No. 430PA06

The State's petition for discretionary review is allowed for the limited purpose of vacating that portion of the Court of Appeals' opinion which remands for re-sentencing. The judgment of the trial court is arrested. *See State v. Pakulski*, 326 N.C. 434, 439, 390 S.E.2d 129, 132 (1990).

By order of the Court in conference this 8th day of November, 2007.

Hudson, J.
For the Court

STATE V. McDOUGALD

[361 N.C. 689 (2007)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	ORDER
	)	
DWIGHT McDOUGALD	)	

No. 64A07

Defendant's petition for discretionary review as to additional issues is allowed with respect to defendant's argument that his appeal of his jury conviction for conspiracy to traffic by possessing 100 or more but less than 500 dosages of methylenedioxyamphetamine was not in violation of the North Carolina Rules of Appellate Procedure. The remainder of defendant's petition for discretionary review as to additional issues is denied.

By order of the Court in conference, this 11th day of October 2007.

Hudson, J.
For the Court

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

Animal Legal Def. Fund v. Woodley Case below: 181 N.C. App. 594	No. 127P07	1. Def's NOA Based Upon a Constitutional Question (COA06-358) 2. Plt's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/11/07 3. Denied 10/11/07
Ard v. Owens-Illinois Case below: 182 N.C. App. 493	No. 220P07	1. Def's PDR Under N.C.G.S. § 7A-31 (COA06-376) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 10/11/07 2. Dismissed as Moot 10/11/07
Atkins v. Mortenson Case below: 183 N.C. App. —— (5 June 2007)	No. 415A07	1. Plt's NOA Based Upon a Constitutional Question (COA06-854) 2. Def's Motion to Dismiss Appeal	1. —— 2. Allowed 10/11/07
Austin v. Continental Gen. Tire Case below: 185 N.C. App. —— (21 August 2007)	No. 073P01-2	1. Def's Motion for Temporary Stay (COA06-1390) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed 09/25/07 Stay dissolved 10/11/07 2. Denied 10/11/07 3. Denied 10/11/07 **Edmunds, J., Recused** **Hudson, J., Recused**
Beksha-Brown v. Mason Case below: 179 N.C. App. 863	No. 565P06	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-350)	Denied 10/11/07
Berryhill v. Shelton Case below: 182 N.C. App. —— (17 April 2007)	No. 232P07	Def's (Alvin Berryhill) PDR Under N.C.G.S. § 7A-31 (COA06-697)	Dismissed 10/11/07
Burgin v. Owen Case below: 181 N.C. App. 511	No. 189P07	Plt's Petition for Writ of Certiorari to Review Decision of the COA (COA06-450)	Denied 10/11/07
Caldwell v. Branch Case below: 181 N.C. App. 107 (2 January 2007)	No. 077P07	Def's (Branch) PDR Under N.C.G.S. 7A-31 (COA06-94)	Denied 11/08/07

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

Cannon & Co., LLP v. Estate of Alexander Case below: 184 N.C. App. —— (19 June 2007)	No. 333P07	Def's PDR Under N.C.G.S. 7A-31 (COA06-1019)	Denied 11/08/07
Capps v. NW Sign Indus. of N.C., Inc. Case below: 185 N.C. App. —— (21 August 2007)	No. 383P05-2	Plt's Motion to Seal Response to Defs' PDR (COA06-1297)	Denied 11/08/07
Clemmons v. Securitas, Inc. Case below: 183 N.C. App. —— (5 June 2007)	No. 324P07	1. Defs' Motion for Temporary Stay (COA06-1346) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31 4. Plt's Motion to Dismiss PDR 5. Defs' Motion for Reconsideration of Denial of Motion for Temporary Stay Under Rule 23 6. Plt's Conditional PDR 7. Def's Motion to Amend PDR	1. Denied 07/11/07 361 N.C. 567 2. Denied 10/11/07 3. Denied 10/11/07 4. Dismissed as Moot 10/11/07 5. Denied 10/11/07 6. Dismissed as Moot 10/11/07 7. Allowed 10/11/07
Crandell v. American Home Assurance Co. Case below: 183 N.C. App. —— (5 June 2007)	No. 321P07	1. Def's PDR Under N.C.G.S. 7A-31 (COA06-533) 2. Plt's Conditional PDR Under N.C.G.S. 7A-31	1. Denied 11/08/07 2. Dismissed as Moot 11/08/07
Crocker v. Roethling Case below: 184 N.C. App. —— (3 July 2007)	No. 374P07	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-802-2)	Allowed 11/08/07
D.A.N. Joint Venture, III, Ltd. P'ship v. Fenner Case below: 181 N.C. App. 759	No. 145P07	Def's PDR Under N.C.G.S. 7A-31 (COA06-628)	Denied 11/08/07

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

Daniels v. Metro Magazine Holding Co. Case below: 179 N.C. App. 533	No. 582P06	1. Plt's NOA Based Upon a Constitutional Question (COA05-1336) 2. Def's Motion to Dismiss Appeal 3. Plt's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 11/08/07 3. Denied 11/08/07
Geitner v. Mullins Case below: 182 N.C. App. —— (17 April 2007)	No. 239P07	Plts' (Diane and Jacques Geitner) PDR Under N.C.G.S. § 7A-31 (COA06-547)	Denied 10/11/07
Hall v. Cohen Case below: 186 N.C. App. —— (18 September 2007)	No. 486P07	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-1531)	Denied 10/11/07 **Hudson, J., Recused**
Hoffman v. Oakley Case below: 184 N.C. App. —— (17 July 2007)	No. 410P07	Plt's and Third-Party Defendant's PDR Under N.C.G.S. § 7A-31 (COA06-932)	Denied 10/11/07
Hospice & Palliative Care Charlotte Region v. N.C. Dep't of Health & Human Servs. Case below: 185 N.C. App. —— (7 August 2007)	No. 425P07	1. Respondent-Intervenor's Motion for Temporary Stay (COA06-1484) 2. Respondent-Intervenor's Petition for Writ of Supersedeas 3. Respondent-Intervenor's PDR Under N.C.G.S. § 7A-31 4. Petitioner's Conditional PDR Under N.C.G.S. 7A-31	1. Allowed 08/28/07 Stay Dissolved 11/08/07 2. Denied 11/08/07 3. Denied 11/08/07 4. Denied 11/08/07
Hospice at Greensboro, Inc. v. N.C. Dep't of Health & Human Servs. Case below: 185 N.C. App. —— (7 August 2007)	No. 522P06-2	1. Respondent-Intervenor's Motion for Temporary Stay (COA06-1204) 2. Respondent-Intervenor's Petition for Writ of Supersedeas 3. Respondent-Intervenor's PDR Under N.C.G.S. 7A-31 4. Petitioners' Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 08/28/07 Stay Dissolved 11/08/07 2. Denied 11/08/07 3. Denied 11/08/07 4. Dismissed as Moot 11/08/07
In re A.L.P. Case below: 182 N.C. App. 528	No. 214P07	Respondent's (Father) PDR Under N.C.G.S. 7A-31 (COA06-1382)	Denied 11/08/07

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

In re B.M. Case below: 186 N.C. App. —— (2 October 2007)	No. 509P07	Petitioner's Motion for Temporary Stay (COA07-525)	Allowed 10/16/07
In re C.M.S. Case below: 184 N.C. App. —— (3 July 2007)	No. 398P07	Respondent's (Mother) PDR Under N.C.G.S. 7A-31 (COA07-108)	Denied 11/08/07
In re Duke Case below: Judicial Standards	No. 464P07	1. Petitioner's (W. Russell Duke, Jr.) Petition for Writ of Prohibition (Judicial Standards —05-207) 2. Respondent's Motion to Dismiss Petition for Writ of Prohibition	1. Dismissed 11/08/07 2. Denied 11/08/07 **Parker, C.J., Recused**
In re Estate Mullins Case below: 182 N.C. App. —— (17 April 2007)	No. 238P07	Petitioners' (Diane and Jacques Geitner) PDR Under N.C.G.S. § 7A-31 (COA06-468)	Denied 10/11/07
In re J.E. & B.E. Case below: 182 N.C. App. —— (17 April 2007)	No. 231A07	Respondent's (Mother) Motion to Withdraw Appeal as Moot (COA06-1553)	Allowed 10/11/07
In re J.S.B., D.K.B., D.D.J., Z.A.T.J. Case below: 183 N.C. App. —— (15 May 2007)	No. 269P07	1. Respondent's (Mother) Motion for Temporary Stay (COA06-1107) 2. Respondent's (Mother) Petition for Writ of Supersedeas 3. Respondent's (Mother) PDR Under N.C.G.S. § 7A-31	1. Denied 06/11/07 361 N.C. 428 2. Denied 10/11/07 3. Denied 10/11/07
In re L.H., L.H. Case below: 185 N.C. App. —— (21 August 2007)	No. 455P07	Respondent's (Mother) PDR Under N.C.G.S. 7A-31 (COA07-496)	Denied 11/08/07
In re M.E.H. Case below: 182 N.C. App. 175	No. 165P07	Respondent's (Cynthia H.) PDR Under N.C.G.S. § 7A-31 (COA06-1349)	Denied 10/11/07
In re S.L.G. Case below: 181 N.C. App. 149	No. 070P07	1. Respondent's (Father) PDR Under N.C.G.S. § 7A-31 (COA06-125) 2. Respondent's (Father) PWC to Review the Decision of the COA	1. Denied 10/11/07 2. Denied 10/11/07

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In re S.T.K. & N.S.K. Case below: 184 N.C. App. —— (17 July 2007)	No. 397P07	Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA06-1361)	Denied 10/11/07
In re T.H. Case below: 183 N.C. App. —— (5 June 2007)	No. 294P07	1. Respondent's (Mother) PDR Under N.C.G.S. § 7A-31 (COA07-25) 2. Respondent's (Mother) Alternative PWC to Review Decision of COA 3. Respondent's (Father) PWC to Review Decision of COA	1. Denied 10/11/07 2. Denied 10/11/07 3. Denied 10/11/07
In re T.M.H. Case below: 186 N.C. App. —— (16 October 2007)	No. 530P07	Respondent (Father's) Motion for Temporary Stay (COA07-609)	Allowed **11/01/07**
In re W.R. Case below: 179 N.C. App. 642	No. 560P06	1. AG's Motion for Temporary Stay (COA05-1602) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed **10/26/06** 2. Allowed 10/11/07 3. Allowed 10/11/07
In re Will of McFayden Case below: 179 N.C. App. 595	No. 576P06	1. Propounder's (Mickey Jackson) PDR Under N.C.G.S. § 7A-31 (COA04-1585-2) 2. Caveators' (Simon & Mary Burney) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 10/11/07 2. Dismissed as Moot 10/11/07 **Hudson, J., Recused**
Intec USA, LLC v. Engle Case below: 184 N.C. App. —— (19 June 2007)	No. 355P07	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-1358)	Denied 10/11/07
Leverette v. Labor Works Int'l Case below: 180 N.C. App. 102	No. 026P07	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-78)	Denied 10/11/07
Lord v. Customized Consulting Speciality, Inc. Case below: 182 N.C. App. —— (17 April 2007)	No. 224P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-725)	Denied 10/11/07

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Myles v. Lucas & McCowan Masonry Case below: 183 N.C. App. —— (5 June 2007)	No. 330P07	1. Plt's NOA Based Upon a Constitutional Question (COA06-1266) 2. Plt's PDR Under N.C.G.S. 7A-31 3. Plt's PWC to Review Decision of COA	1. Dismissed *Ex Mero Motu* 11/08/07 2. Denied 11/08/07 3. Denied 11/08/07 **Hudson, J., Recused**
N.C. Dep't of Transp. v. County of Durham Case below: 181 N.C. App. 346 (2 January 2007)	No. 063P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-283)	Denied 10/11/07 **Hudson, J., Recused**
N.C. State Bar v. Brewer Case below: 183 N.C. App. —— (15 May 2007)	No. 288P07	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-815)	Denied 10/11/07
Nguyen v. Burgerbusters, Inc. Case below: 182 N.C. App. 447	No. 216P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-607)	Denied 10/11/07
Nolan v. Town of Weddington Case below: 182 N.C. App. 486	No. 221P07	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA06-704)	Denied 10/11/07 **Martin, J., Recused**
Price v. N.C. Dep't of Corr. Case below: 182 N.C. App. —— (17 April 2007)	No. 482P07	Plt's PWC to review Decision of COA (COA06-492)	Denied 10/11/07
Ramboot, Inc. v. Lucas Case below: 181 N.C. App. 729	No. 155P07	Plts' PDR Under N.C.G.S. § 7A-31 (COA06-357)	Denied 10/11/07

Reidy v. Whitehart Ass'n, Inc. Case below: 185 N.C. App. —— (7 August 2007)	No. 445P07	1. Plts' NOA Based Upon a Constitutional Question (COA06-1310) 2. Def's Motion to Dismiss Appeal 3. Plts' PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/11/07 3. Denied 10/11/07
Richards v. N.C. Tax Review Bd. Case below: 183 N.C. App. —— (5 June 2007)	No. 329P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1364)	Denied 10/11/07
Sanders v. State Personnel Comm'n Case below: 183 N.C. App. —— (1 May 2007)	No. 262P07	1. Def's PDR Under N.C.G.S. § 7A-31 (COA06-149) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 10/11/07 2. Dismissed as Moot 10/11/07
Spaulding v. Honeywell Int'l, Inc. Case below: 184 N.C. App. —— (3 July 2007)	No. 390P07	Plt-Appellant's PDR (COA06-1221)	Denied 11/08/07
State v. Angram Case below: 185 N.C. App. —— (4 September 2007)	No. 500P07	Def's PDR Under N.C.G.S. 7A-31 (COA07-143)	Denied 11/08/07
State v. Bates Case below: 179 N.C. App. 628	No. 456P05-2	Def's PDR Under N.C.G.S. § 7A-31 (COA04-777-2)	Denied 10/11/07 **Hudson, J., Recused**
State v. Bingham Case below: 182 N.C. App. 347	No. 205P07	1. Def's NOA Based Upon a Constitutional Question (COA06-639) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/11/07 3. Denied 10/11/07
State v. Black Case below: 182 N.C. App. 347	No. 316P07	1. Def's NOA Based Upon a Constitutional Question (COA06-620) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. 7A-31	1. —— 2. Allowed 11/08/07 3. Denied 11/08/07

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State v. Branks Case below: 184 N.C. App. —— (19 June 2007)	No. 344P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1394)	Denied 10/11/07
State v. Braxton Case below: 183 N.C. App. —— (1 May 2007)	No. 259P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-848)	Denied 10/11/07
State v. Brockett Case below: 185 N.C. App. —— (7 August 2007)	No. 448P07	Def's PDR Under N.C.G.S. 7A-31 (COA06-1005)	Denied 11/08/07
State v. Byrd Case below: 185 N.C. App. —— (4 September 2007)	No. 499A07	1. Def's NOA (Dissent) (COA06-1368) 2. Def's PDR as to Additional Issues	1. —— 2. Allowed 11/08/07
State v. Campbell Case below: 186 N.C. App. —— (18 September 2007)	No. 487P07	AG's Motion for Temporary Stay (COA06-1043)	Allowed **10/04/07**
State v. Campbell Case below: 151 N.C. App. 749	No. 300P07	Def's Motion for "Petition for Plain Error Review Pursuant to N.C. 7A-28" (COA01-1301)	Dismissed 10/11/07
State v. Caple Case below: 185 N.C. App. —— (4 September 2007)	No. 437A05-2	1. AG's NOA (Dissent) 2. AG's Motion for Temporary Stay (COA04-860-2) 3. AG's Petition for Writ of Supersedeas	1. —— 2. Allowed **09/21/07** 3. Allowed 10/11/07 **Hudson, J., Recused**
State v. Carter Case below: 183 N.C. App. —— (5 June 2007)	No. 318P07	1. Def's NOA Based Upon a Constitutional Question (COA06-857) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. 7A-31	1.—— 2. Allowed 11/08/07 3. Denied 11/08/07
State v. Carter Case below: 185 N.C. App. —— (4 September 2007)	No. 483P07	Def's PDR Under N.C.G.S. 7A-31 (COA07-324)	Denied 11/08/07

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State v. Caufman Case below: 184 N.C. App. —— (3 July 2007)	No. 368P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1058)	Denied 10/11/07
State v. Colson Case below: 186 N.C. App. —— (2 October 2007)	No. 512P07	AG's Motion for Temporary Stay (COA07-107)	Allowed 10/19/07
State v. Coltrane Case below: 184 N.C. App. —— (19 June 2007)	No. 348A07	1. Def's NOA (Dissent) (COA06-895) 2. Def's PDR as to Additional Issues	1. —— 2. Denied 10/11/07
State v. Cooper Case below: 186 N.C. App. —— (18 September 2007)	No. 490P07	AG's Motion for Temporary Stay (COA06-1356)	Allowed 10/08/07
State v. Covington Case below: 184 N.C. App. —— (19 June 2007)	No. 376P07	Def's Motion for "Notice of Appeal Under N.C.G.S. § 7A-30(1)" (COA06-903)	Denied 10/11/07
State v. Dubose Case below: 184 N.C. App. —— (17 July 2007)	No. 424P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1376)	Denied 10/11/07
State v. Euceda-Valle Case below: 182 N.C. App. 268	No. 211P07	1. Def's Motion for "Notice of Appeal" (COA06-898) 2. Def's Motion for "Petition for Discretionary review or Writ of Certiorari"	1. Dismissed *ex mero motu* 10/11/07 2. Denied 10/11/07
State v. Ewing Case below: 182 N.C. App. 529	No. 218P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-798)	Denied 10/11/07
State v. Goode Case below: Johnston County	No. 010A94-6	Def's PWC to Review the Order of Johnston County Superior Court	Denied 10/11/07
State v. Guzman-Pascual Case below: 184 N.C. App. —— (19 June 2007)	No. 361P07	Def's PDR under N.C.G.S. § 7A-31 (COA06-707)	Denied 10/11/07

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State v. Gwynn Case below: 182 N.C. App. 343	No. 158P07	1. AG's Motion for Temporary Stay (COA06-403) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed 04/04/07 **361 N.C. 363** 2. Allowed 11/08/07 3. Allowed 11/08/07
State v. Haislip Case below: 186 N.C. App. —— (2 October 2007)	No. 513P07	AG's Motion for Temporary Stay (COA06-1488)	Allowed 10/19/07
State v. Harrison Case below: 185 N.C. App. —— (21 August 2007)	No. 467P07	Def's PDR Under N.C.G.S. 7A-31 (COA06-1492)	Denied 11/08/07
State v. Hayes Case below: 183 N.C. App. —— (5 June 2007)	No. 323P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1152)	Denied 10/11/07
State v. Hennis Case below: 184 N.C. App. —— (3 July 2007)	No. 342P07	1. AG's Motion for Temporary Stay (COA06-1134) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed 07/19/07 **361 N.C. 572** Stay dissolved 10/11/07 2. Denied 10/11/07 3. Denied 10/11/07
State v. Hill Case below: 185 N.C. App. —— (7 August 2007)	No. 416A07	1. AG's NOA (Dissent) (COA06-1218) 2. AG's Motion for Temporary Stay 3. AG's Petition for Writ of Supersedeas	1. —— 2. Allowed 08/23/07 3. Allowed 08/23/07
State v. Huckabee Case below: 166 N.C. App. 281	No. 536P04-2	Def's PWC to Review the Decision of the COA (COA03-938)	Denied 10/11/07
State v. Larry Case below: Forsyth County	No. 189A95-4	Def's PWC to Review the Order of Forsyth County Superior Court	Denied 11/08/07
State v. Lincoln Case below: 184 N.C. App. ___ (3 July 2007)	No. 373A07	1. Def's NOA Based Upon a Constitutional Question (COA06-1431) 2. AG's Motion to Dismiss Appeal	1. —— 2. Allowed 10/11/07

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State v. Locklear Case below: 178 N.C. App. 732	No. 430P06	1. AG's Motion for Temporary Stay (COA05-509) 2. AG's Petition for Writ of Supersedeas 3. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed 08/17/06 Stay Dissolved 11/08/07 2. Denied 11/08/07 3. See Special Order Page 688
State v. Love Case below: 184 N.C. App. —— (3 July 2007)	No. 394P07	Def's PDR Under N.C.G.S. 7A-31 (COA06-916)	Denied 11/08/07
State v. McDougald Case below: 181 N.C. App. 41	No. 064A07	1. Def's NOA (Dissent) (COA06-164) 2. Def's NOA Based Upon a Constitutional Question 3. Def's PDR as to Additional Issues	1. —— 2. Dismissed *ex mero motu* 10/11/07 3. See Special Order Page 689
State v. McGee Case below: 182 N.C. App. 348	No. 194P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-830)	Denied 10/11/07
State v. McLamb Case below: 186 N.C. App. —— (18 September 2007)	No. 489P07	AG's Motion for Temporary Stay (COA06-1319)	Allowed 10/08/07
State v. McLean Case below: 183 N.C. App. —— (5 June 2007)	No. 326P07	Def's PDR Under N.C.G.S. 7A-31 (COA06-952)	Denied 11/08/07
State v. Michaux Case below: 185 N.C. App. —— (7 August 2007)	No. 441P07	Def's PDR Under N.C.G.S. 7A-31 (COA06-1040)	Denied 11/08/07
State v. Moffitt Case below: 185 N.C. App. —— (7 August 2007)	No. 437P07	Def's PDR Under N.C.G.S. 7A-31 (COA06-1239)	Denied 11/08/07
State v. Mowery Case below: 184 N.C. App. —— (3 July 2007)	No. 367P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-947)	Denied 10/11/07

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State v. Nicholson Case below: 182 N.C. App. —— (17 April 2007)	No. 230P07	1. Def's NOA Based Upon a Constitutional Question (COA06-1109) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/11/07 3. Denied 10/11/07
State v. Parker Case below: 185 N.C. App. —— (21 August 2007)	No. 462P07	Defs' Motion for Stay of Execution of the Judgment of Imprisonment (COA06-870)	Allowed 09/21/07
State v. Perdomo Case below: 182 N.C. App. —— (17 April 2007)	No. 246P07	1. Def's PDR Under N.C.G.S. § 7A-31 (COA06-651) 2. AG's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 10/11/07 2. Dismissed as Moot 10/11/07
State v. Reber Case below: 182 N.C. App. 250	No. 196P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-594)	Denied 10/11/07
State v. Reed Case below: 182 N.C. App. 109	No. 141P07	1. AG's Motion for Temporary Stay (COA06-400) 2. AG's Petition for Writ of Supersedeas 3. AG's NOA Based Upon a Constitutional Question 4. AG's PDR Under N.C.G.S. § 7A-31	1. Allowed 03/23/07 **361 N.C. 435** Stay dissolved 10/11/07 2. Denied 10/11/07 3. Dismissed *ex mero motu* 4. Denied 10/11/07
State v. Ridgeway Brands Mfg. LLC Case below: 184 N.C. App. —— (17 July 2007)	No. 408A07	1. Defs' (Ridgeway Brands Manufacturing, LLC and Heflin) NOA (Dissent) (COA06-422) 2. Defs' (Ridgeway Brands Manufacturing, and Heflin) PDR as to Additional Issues 3. Plt's NOA (Dissent)	1. —— 2. Denied 10/11/07 3. ——
State v. Robinson Case below: 182 N.C. App. 349	No. 204P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-722)	Denied 10/11/07

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State v. Shannon Case below: 182 N.C. App. 350	No. 177A07	AG's Motion to Withdraw NOA and PDR (COA06-418)	Allowed 11/05/07
State v. Sharpe Case below: 183 N.C. App. —— (5 June 2007)	No. 295P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1443)	Denied 10/11/07
State v. Simon Case below: 185 N.C. App. —— (7 August 2007)	No. 453P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1483)	Denied 10/11/07
State v. Taylor Case below: 179 N.C. App. 227	No. 458P07	Def's PWC to Review Decision of COA (COA05-1535)	Denied 11/08/07
State v. Theer Case below: 181 N.C. App. 349 (16 January 2007)	No. 098A07	1. Def's NOA Based Upon a Constitutional Question (COA05-1640) 2. AG's Motion to Dismiss Appeal	1. —— 2. Allowed 10/11/07
State v. Vanburen Case below: 183 N.C. App. —— (5 June 2007)	No. 331P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-768)	Denied 10/11/07
State v. Watts Case below: 185 N.C. App. —— (21 August 2007)	No. 449P05-2	1. Def's PDR Under N.C.G.S. 7A-31 (COA04-874-2) 2. Def's Alternative PWC to Review Decision of COA	1. Denied 11/08/07 2. Dismissed as Moot 11/08/07 **Hudson, J., Recused**
State v. White Case below: 184 N.C. App. —— (3 July 2007)	No. 384P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1264)	Denied 10/11/07
State v. White Case below: 184 N.C. App. ___ (3 July 2007)	No. 385P07	1. Def's NOA Based Upon a Constitutional Question (COA06-1387) 2. AG's Motion to Dismiss Appeal 3. Def's PDR Under N.C.G.S. § 7A-31	1. —— 2. Allowed 10/11/07 3. Denied 10/11/07

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State v. Wiggins Case below: 185 N.C. App. —— (21 August 2007)	No. 446P07	Def's (Cartwright) PDR Under N.C.G.S. § 7A-31 (COA06-1481)	Denied 10/11/07
State v. Williams Case below: 184 N.C. App. —— (19 June 2007)	No. 350P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-850)	Denied 10/11/07
State v. Williamson Case below: 175 N.C. App. 796	No. 139P06-2	Def's Motion for "Petition for Discretionary Review" (COA05-290)	Dismissed 10/11/07
State v. Wilson Case below: 183 N.C. App. —— (1 May 2007)	No. 257A07	1. Def's Emergency Motion for Temporary Stay (COA06-509) 2. Def's Petition for Writ of Supersedeas	1. Allowed **06/11/07** 361 N.C. 437 2. Allowed 08/28/07
State v. Winchester Case below: 184 N.C. App. —— (19 June 2007)	No. 353P07	1. Def's NOA Based Upon a Constitutional Question (COA06-1505) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 10/11/07 2. Denied 10/11/07
State v. Wood Case below: 185 N.C. App. —— (7 August 2007)	No. 443P07	Def's PDR Under N.C.G.S. 7A-31 (COA06-1391)	Denied 11/08/07
Stealth Props., LLC v. Town of Pinebluff Bd. of Adjust. Case below: 183 N.C. App. —— (5 June 2007)	No. 375P07	Respondent's PDR Under N.C.G.S. § 7A-31 (COA06-705)	Denied 10/11/07
Steve Mason Enters., Inc. v. City of Gastonia Case below: 184 N.C. App. —— (19 June 2007)	No. 405P07	Def's PDR Under N.C.G.S. § 7A-31 (COA06-1339)	Denied 10/11/07
Stott v. Nationwide Mut. Ins. Co. Case below: 183 N.C. App. —— (1 May 2007)	No. 264P07	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-1117)	Denied 10/11/07

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Town of Green Level v. Alamance Cty. Case below: 184 N.C. App. —— (17 July 2007)	No. 417P07	Def's PDR Under N.C.G.S. 7A-31 (COA06-1304)	Denied 11/08/07
Watts v. N.C. Dep't of Envt'l & Natural Res. Case below: 182 N.C. App. 178	No. 191A07	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA06-299) 2. AG's NOA (Dissent) 3. AG's PDR as to Additional Issues	1. Denied 10/11/07 2. —— 3. Denied 10/11/07
Webb v. Alamance Reg'l Med. Ctr., Inc. Case below: 185 N.C. App. —— (7 August 2007)	No. 449P07	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-446)	Denied 10/11/07
Webb v. Hardy Case below: 182 N.C. App. 324	No. 187P07	Plt's PDR Under N.C.G.S. § 7A-31 (COA06-907)	Denied 10/11/07
West v. Consolidated Diesel Co. Case below: 184 N.C. App. —— (3 July 2007)	No. 393P07	Defs' PDR Under N.C.G.S. § 7A-31 (COA06-1282)	Denied 10/11/07
West Durham Lumber Co. v. Meadows Case below: 179 N.C. App. 347	No. 606P06	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA05-1181) 2. Def's (National Bank of Commerce) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 11/08/07 2. Dismissed as Moot 11/08/07
Wilson v. Green Case below: 185 N.C. App. —— (21 August 2007)	No. 473P07	Defs' PDR Under N.C.G.S. § 7A-31 (COA06-186)	Denied 11/08/07
Wooten v. Newcon Transp., Inc. Case below: 178 N.C. App. 698	No. 429P06	Def's PDR Under N.C.G.S. 7A-31 (COA05-1107)	Denied 11/08/07 **Hudson, J., Recused**

APPENDIXES

PRESENTATION OF
ASSOCIATE JUSTICE J. FRANK HUSKINS
PORTRAIT

JUDICIAL STANDARDS COMMISSION RULES

RULES OF APPELLATE PROCEDURE

AMENDMENT TO THE RULES AND
REGULATIONS OF THE NORTH CAROLINA
STATE BAR CONCERNING THE STANDING
COMMITTEES OF THE COUNCIL

AMENDMENTS TO THE RULES AND
REGULATIONS OF THE NORTH CAROLINA
STATE BAR CONCERNING THE FEE DISPUTE
RESOLUTION PROGRAM

AMENDMENTS TO THE RULES AND
REGULATIONS OF THE NORTH CAROLINA
STATE BAR CONCERNING THE
IOLTA PROGRAM

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE CONTINUING LEGAL EDUCATION PROGRAM

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PLAN FOR CERTIFICATION OF PARALEGALS

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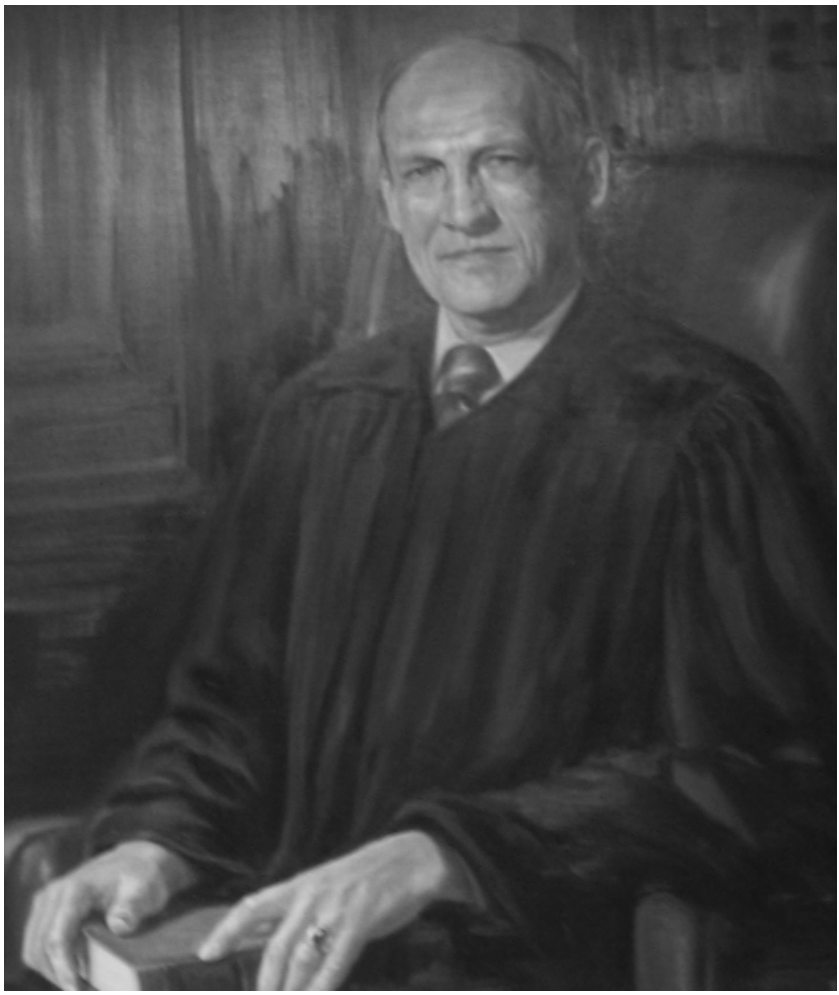
RULES IMPLEMENTING MEDIATION IN MATTERS PENDING IN DISTRICT CRIMINAL COURT

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA BOARD OF LAW EXAMINERS



Presentation of the Portrait of

J. FRANK HUSKINS

Associate Justice

Supreme Court of North Carolina

1968-1982

November 8, 2007

OPENING REMARKS
and
RECOGNITION OF
M. KEITH KAPP
by
CHIEF JUSTICE SARAH PARKER

The Chief Justice welcomed the guests with the following remarks:

Good afternoon Ladies and Gentlemen. It is my distinct pleasure to welcome each of you to your Supreme Court on this very special occasion in which we honor Associate Justice J. Frank Huskins, who was truly one of the great members not only of this Court but also of the Judicial Branch of Government. As I am sure you will hear more in a few minutes, in addition to serving on this Court, Justice Huskins tackled a very challenging task when he accepted Chief Justice Denny's request to become our first Director of the Administrative Office of the Courts in 1965. Under his leadership the first employees were hired, and processes and procedures were set in motion that allowed that office to grow to over 5,000 employees that it has today. For Justice Huskins' vision and leadership as he charted the course for the Administrative Office of the Courts, we in the Judicial Branch of Government are indeed grateful.

The presentation of Justice Huskins' portrait today will make a significant contribution to our fine portrait collection. This contribution allows us to appropriately remember an important part of our history and also to honor the memory of a valued member of our Court family.

At this time, it is my distinct pleasure to recognize Keith Kapp, a former research assistant to Justice Huskins and a friend of the family, who will present the portrait to the Court.

Presentation of Portrait

by

M. Keith Kapp

MAY IT PLEASE THE COURT:

I appear before you today on behalf of Mrs. Ruth H. Huskins, widow of the Honorable J. Frank Huskins. I have been asked to present to this Honorable Court a portrait of Judge Huskins.

I present these comments from the perspective of a former law clerk of the judge, someone who appeared before him to argue a case, someone who worked with him on several cases when he returned to private practice following his retirement from the bench, and as a friend with whom I tried to have lunch every other month at each other's mutual expense during his retirement years until his health declined. He was a friend and mentor. I will refer to him as "Judge" rather than "Justice" because that was the title of his era and the title he used.

J. Frank Huskins was a mountain man, born in the Toledo community near Burnsville, Yancey County, North Carolina, on 10 February 1911 to Joseph Irwin Huskins and his wife, Mary Etta Peterson Huskins. He had two brothers and five sisters. He knew the life of a small, close-knit mountain community. From his mountain origins, he gathered a firm foundation in family love and faith in God.

His formal education began at the Yancey Collegiate Institute and continued thereafter at the Burnsville High School from which he graduated in 1927. Judge Huskins stayed in his mountains to attend Mars Hill Junior College from 1927 to 1929. Thereafter began a love that would last him all his earthly life and that was his love of the University of North Carolina at Chapel Hill. He earned an A.B. degree from the University in 1930 and a degree from its law school in 1932. He remained a loyal son of his alma mater. Before I entered law school, I have a vivid memory of coming to a football game early and observing two older men in hats shouting encouragement from the stands to the team as it was warming up. I was told by a law school student friend walking with me, "Those are Supreme Court Justices." It was Carlisle W. Higgins and J. Frank Huskins giving vociferous support to their football team. All 13 of his law clerks were UNC law graduates.

Upon graduation from law school, Judge Huskins returned to Burnsville and began his law practice. He fondly told of his first case

wherein a farmer came in with problems about a stolen horse and proclaimed matter of factly to the judge that the lawyer up the street said he didn't need much of a lawyer for this case, so he had suggested Frank Huskins. Judge Huskins won that case and quickly proved that he was plenty of lawyer. He soon had a number of clients streaming through his Burnsville doors to handle criminal and civil cases in State and Federal Court, where he employed, in his words, "good horse sense."

He embarked upon a political career in Burnsville as a mountain Democrat. In 1939, at the age of 28, he was elected Mayor of the Town of Burnsville, where he served until he joined the Navy for World War II. He served from 1942 to 1946 and was honorably discharged as a Lieutenant Commander.

He returned to Burnsville, and in 1947 began his service in the North Carolina House of Representatives. Judge Huskins chalked up a remarkable achievement as a freshman legislator in developing a compromise on the road bill which guaranteed funds for small counties such as his, as well as the larger counties, for paving and road improvements. The compromise that he worked out caught the eye of a number of folks in Raleigh, particularly a string of future Governors.

Judge Huskins had not supported Kerr Scott for Governor, although he did support Governor Scott's program in the General Assembly. One evening in 1949, he got a call from Governor Scott who asked him to serve as Chairman of the Industrial Commission. Judge Huskins' response was to ask the Governor if he was sure he had the right number. The Governor confirmed he had the right number and the right man. Judge Huskins served as Chairman of the Industrial Commission from 1949 until 1955.

He was appointed by Governor Luther Hodges to the Superior Court bench in 1955 for the Western Division, which included his home county of Yancey. He served as a Superior Court Judge for ten years, holding court with distinction in a number of counties. He enjoyed his years on the Superior Court. He was known as a fair judge. He never embarrassed a lawyer in front of his client or a jury. Quiet discussion with counsel in chambers was the rule in his courtroom. Many lawyers and judges of the generation ahead of mine have told me how much they learned from Judge Huskins.

In 1965, he was called upon by Chief Justice Emory Denny to hold a newly-created post as Director of the Administrative Office of the Courts. This was a new position which required someone who

had total respect of those in the judicial system, which was undergoing major reformation. Even after leaving the Administrative Office of the Courts, he continued to help the administrative arm of the General Court of Justice. He spoke out while on the bench about "random legislative additions of personnel to various offices without following any particular formula," and in his words the "keg of worms" that results "if you get everybody coming in and recommending Court personnel."

He held this position until 5 February 1968, when Governor Dan K. Moore appointed him to the North Carolina Supreme Court as an Associate Justice. He was re-elected in 1968 and 1976. His victories were by landslides. One of the editorial endorsements said of him:

> He enjoys an excellent personal reputation, and has earned the professional respect of many of this State's ablest lawyers during his more than 20 years on the State's trial and appellate courts.

As a member of the Court, he had notable impact upon the civil and criminal laws of this State. His opinions were the major interpretations of the Workers' Compensation Act prior to his retirement. He was a stickler for precise language. His participation on the Court was marked by wit and a down to earth approach to all matters.

His opinions were clear. His instructions to his law clerks were that "we want them to know what we said, even if we are wrong." His opinions were concise in structure. He seldom used footnotes, which he characterized as a way for a Court to "take away" or "befuddle" what was said in the body of the opinion. His opinions were also commonsensical. Occasionally, the wit of his private conversations also appeared in the reported cases. He wrote 306 majority opinions, 25 dissenting opinions, and 4 concurring opinions during his service on the Court.

His good friend and fellow member of the Court, Chief Justice Joseph Branch, said of Judge Huskins:

> He can be as unyielding as the granite of his beloved mountains, yet his strength of conviction and character is mellowed by a fine sense of humor and real compassion that he does not like to display. A wise and courageous legislator, a talented administrator and an outstanding lawyer and a member of the judiciary whose contributions have enhanced the dignity and the stature of our judicial system.

The Warren Court criminal decisions were not popular with him. His dissent to those opinions does not appear in his reported cases

as he dutifully and fully followed binding precedent. However, in a 1976 speech to the North Carolina State Bar, he said that "concern for whether the criminal defendant is guilty or innocent is lost in technicalities imposed by activist judges."

On 1 February 1982, he retired from the Court, and Burley Mitchell was appointed to his seat. Judge Huskins entered private practice in Raleigh with Ransdell, Ransdell and Cline. He argued several cases before the Supreme Court. He was also quite active as a mediator and arbitrator. In 1991, the Young Lawyers of this State recognized and honored him with the Liberty Bell Award on Law Day.

Judge Huskins' personal life was marked with both love and tragedy. He was a loving husband. His first wife, Mary Bailey, died after a long battle with cancer. On 20 October 1963, he married Ruth H. McNeill, a lovely widow. Her children by her first marriage, Robert Glenn McNeill and Ruth Elizabeth McNeill Webb, known as Libby, became his children in every sense of the word. He was a loving father, who grieved terribly, when Libby was tragically killed in an automobile accident. I think it can truly be said that no birth father loved and cherished the memory of any child as much as Judge Huskins cherished that of Libby.

His last two years were troubled by a clouded mind. That once great intellect; that command of concise language; that humor and wisdom—all were lost to earthly colleagues. However, I have no doubt that when J. Frank Huskins met his Maker on 19 November 1995, he did so with a clear mind and a sound spiritual body, as well as tribute and legacy on earth as an outstanding servant of the people of this State.

Now, Judge Huskins was a lover of stories and jokes, and with this Court's permission, I want to tell two; one by him and one on him.

On the day of the interview for a certain clerk, not me, with the Judge, Judge Huskins came out to greet the interviewee and escorted him into his chambers and to the interviewee's immediate horror, what he saw prominently displayed on his desk (clearly placed there for his unavoidable consumption!) was a copy of the North Carolina Law Review opened to the note the law student interviewee had authored lambasting an opinion authored by Judge Huskins. Judge Huskins made the prospective law clerk sit there staring at the law review article during the entire interview. As they were finishing up, Judge Huskins finally made reference to the law review article, say-

ing something to the effect of, "Well, I guess you've noticed this here on my desk," as he picked up the "offending" volume. The law student stammered, "Yes Sir, I'm familiar with it," and sat back fully expecting the worst. It was then that the unmistakable twinkle appeared in the Judge's eyes that he used to get whenever he felt he had managed to play a trick on us or his secretary, Carolyn Dalton (or both), as he concluded the interview with this comment about the note: "Well, you certainly took me to task, boy, but you know what? You darn near even convinced me that I was wrong myself, so much so that I figured I'd rather have somebody who could do that with me rather than against me, so if you want to come clerk for me for the next year, son, the job is yours!"

The second story is about marriage, religion – and who is or isn't a Godly man! In 1980, Judge Huskins authored the opinion in *State v. Lynch*, in which the Supreme Court overturned a bigamy conviction on the grounds that the husband's alleged first marriage wasn't proven by the State. The evidence in part was that the first ceremony had been performed by the alleged father-in-law of the defendant, who had sent off in the mail for a $10.00 certificate entitled "Credentials of Minister" from the Universal Life Church, Inc., of Modesto, California. The certificate was signed by one Kirby J. Hensley. Several months after the publication of the opinion, the Judge received an irate letter from Mr. Hensley who, like the Judge, was a native of the North Carolina mountains. His letter began, "For shame, for shame!" and proceeded to chastise the Judge for his failure to recognize the authority of the Universal Life Church and thus not protecting freedom of religion, freedom of speech, God, sovereignty and a host of other cherished ideals and institutions. Mr. Hensley's letter claimed, as though it was a good thing, that the Universal Life Church "will ordain anyone, without question of his/her faith, for life."

Well, guess who else got ordained for life in the Universal Life Church, with credentials issued by Kirby J. Hensley? Judge J. Frank Huskins, thanks to his then law clerk John Sasser and his long-time secretary, Carolyn Dalton. Thereafter, the Judge on occasion would, when he launched into a story, say, "Now mind you, I'm not preaching, even though certificated to do so!"

Above all else, I will always remember what a good man Frank Huskins was. Good lawyer, good judge, good public servant of the great State he so loved—yes, he was all these things. But I think I knew him well enough to know that what he would most want to be remembered for was the good husband, good parent, good friend, and just good, decent man that he was.

The portrait, I am pleased to present on behalf of Mrs. Huskins was painted by Kenneth Fox. With the Court's leave, I now present and tender this portrait to you, his successors, the Justices of our great Court.

Thank you!

ACCEPTANCE OF JUSTICE HUSKINS' PORTRAIT

by

CHIEF JUSTICE PARKER

Thank you, Mr. Kapp, for those wonderful and excellent remarks about our former colleague. At this time, I am privileged to call upon Cameron Smith, Madison Smith, and Redmond Smith, to unveil the portrait of their great, great uncle.

Thank you Cameron, Madison, and Redmond. We are delighted that you could be with us today and to have this opportunity to participate in this ceremony. Also, thank you on behalf of the Supreme Court to the family and on behalf of the Court, I am indeed honored and privileged to accept this portrait of Justice Huskins as a part of our collection. We are delighted to have this fine work of art, and we sincerely appreciate the efforts of all who helped to make this presentation a reality.

On behalf of the Huskins family and Justice Huskins' former research assistants, I invite all of you to a reception in the Historical Society room on the first floor of this building. The reception will begin after you have had an opportunity to greet Mrs. Huskins and the members of the Court in a receiving line that we will form in front of the Bench and beside the portrait, immediately following this ceremony.

I thank all of you for being with us today. I look forward to having a chance to meet with you and to talk with you at our reception.

IN THE SUPREME COURT OF NORTH CAROLINA

Order Approving the Rules of the Judicial Standards Commission

WHEREAS, section 7A-375(g) of the North Carolina General Statutes authorizes the Judicial Standards Commission to adopt, and amend from time to time, its own rules of procedure for the performance of the duties and responsibilities prescribed by Article 30 of Chapter 7A of the General Statutes, subject to approval of the Supreme Court, and

WHEREAS, the Judicial Standards Commission has adopted Rules of the Judicial Standards Commission which shall be effective on the 1st day of January, 2007, a copy of which are attached hereto.

NOW, THEREFORE, pursuant to section 7A-375(g) of the North Carolina General Statutes, such Rules of the Judicial Standards Commission are hereby approved.

Adopted by the Court in Conference the 5th day of October, 2006. The Appellate Division Reporter shall publish the Rules of the Judicial Standards Commission in their entirety at the practicable date.

s/Timmons-Goodson, J.
For the Court

RULES OF THE JUDICIAL STANDARDS COMMISSION

The Rules of the Judicial Standards Commission are hereby amended to read as follows:

RULE 1. AUTHORITY

These rules are promulgated pursuant to the authority contained in N.C. Gen. Stat. § 7A-375(g), and are effective January 1, 2007.

RULE 2. ORGANIZATION

(a) The Commission shall have a Chairperson, who is the Court of Appeals member, and two Vice-Chairpersons, each of whom shall be a superior court judge. The Vice-Chairperson with the longest tenure of service on the Commission shall preside in the absence of the Chairperson. The Executive Director shall serve as the secretary to the full Commission and to each panel, and shall perform such duties as the full Commission or a panel may assign.

(b) The Chairperson shall divide the Commission into two six (6) member panels, one to be designated Panel A and the other Panel B. Each panel shall include one (1) superior court judge, one (1) district court judge, two (2) members appointed by the North Carolina State Bar, one (1) citizen appointed by the Governor, and one (1) citizen appointed by the General Assembly. Membership on the panels may rotate in a manner determined by the Chairperson of the Commission, provided that no member, other than the Chairperson, shall sit on both the hearing and investigative panel for the same proceeding. The Chairperson of the Commission shall preside over all panel meetings. The two Vice-Chairpersons shall be assigned to different panels and each shall preside over their respective panel meetings in the absence of the Chairperson. No member, other than the Commission Chairperson who shall preside over all disciplinary hearings, who has served on an investigative panel for a particular inquiry shall serve upon the hearing panel for the same matter.

(c) The full Commission shall meet on the call of the Chairperson or upon the written request of any five (5) members. Each panel of the Commission shall meet every other month, alternating such meetings with the other panel, or upon the call of the Chairperson. Hearing panels shall also meet as needed to conduct disciplinary hearings upon the call of the Chairperson. Each member of the Commission, including the Chairperson, Vice-Chairpersons, or other presiding member shall be a voting member.

(d) A quorum for the conduct of business of the full Commission shall consist of any nine (9) members. A quorum for the conduct of

the business of a panel shall consist of five (5) members. The affirmative vote of five (5) members of a panel is required to issue a public reprimand pursuant to Rule 11. A quorum for the conduct of any disciplinary proceeding instituted pursuant to Rule 12 shall consist of five (5) members of the panel assigned to hear the proceeding. The affirmative vote of five (5) members of a hearing panel is required to make a recommendation to the Supreme Court that a judge be censured, suspended, or removed from office.

(e) The Commission shall ordinarily meet in Raleigh, but may meet anywhere in the State. The Commission's address is P.O. Box 1122, Raleigh, N.C. 27602.

RULE 3. EXECUTIVE DIRECTOR

The Executive Director shall have duties and responsibilities prescribed by the Commission including but not limited to:

(1) Receive and screen complaints and allegations as to misconduct or disability, and make preliminary evaluations with respect thereto;

(2) Maintain the Commission's records;

(3) Maintain statistics concerning the operation of the Commission and make them available to the Commission and to the Supreme Court;

(4) Prepare the Commission's budget for approval by the Commission and administer its funds;

(5) Employ and supervise other members of the Commission's staff;

(6) Prepare an annual report of the Commission's activities for presentation to the Commission, to the Supreme Court and to the public;

(7) Employ, with the approval of the Chairperson, a special counsel, and an investigator as necessary to investigate and process matters before the Commission and before the Supreme Court.

RULE 4. COUNSEL

Commission counsel shall have duties and responsibilities prescribed by the Commission including but not limited to:

(1) Advise the Commission during its investigations and to draft decisions, orders, reports and other documents;

(2) Supervise investigations involving alleged misconduct or disability;

(3) Direct letters of notice to respondents when directed to do so by the Commission;

(4) Prosecute disciplinary proceedings before the Commission;

(5) Appear on behalf of the Commission in the Supreme Court in connection with any recommendation made by the Commission;

(6) Perform other duties at the direction of the Executive Director or Commission Chairperson.

RULE 5. INVESTIGATOR

The Investigator shall have duties and responsibilities prescribed by the Commission including, but not limited to:

(1) Conduct preliminary investigations;

(2) Conduct formal investigations, upon authorization of the Commission;

(3) Assist Counsel in the preparation and coordination of disciplinary proceedings initiated pursuant to Rule 12;

(4) Maintain records of the investigations and subsequent proceedings as set forth above;

(5) Perform other duties at the direction of the Executive Director or Commission Chairperson.

RULE 6. CONFIDENTIALITY

(a) During investigative and initial proceedings.

(1) Except as otherwise provided herein, or unless waived by the judge, at all times prior to the issuance of a public reprimand or the institution of a disciplinary proceeding alleging misconduct by or incapacity of a judge, all Commission proceedings including Commission deliberations, investigative files, records, papers and matters submitted to the Commission, shall be held confidential by the Commission, its Executive Director, Counsel, Investigator and staff except as follows:

(A) With the approval of the Commission, the investigative officer may notify respondent that a complaint has been received and may disclose to respondent the name of the person making the complaint.

(B) The Commission may inform a complainant or potential witness of the date when respondent is first notified that a complaint alleging misconduct or incapacity has been filed with the Commission.

(C) The Commission may disclose information upon written waiver by the subject judge when:

(i) Public statements that charges are pending before the Commission are substantially unfair to respondent; or

(ii) Respondent is publicly accused or alleged to have engaged in misconduct or with having a disability, and the Commission, after a formal investigation, has determined that no basis exists to warrant further proceedings or a recommendation of discipline or retirement.

(D) When the Commission has determined that there is a need to notify another person or agency in order to protect the public or the administration of justice.

(E) In any case in which a complaint filed with the Commission is made public by the complainant, the judge involved, independent sources, or by rule of law, the Commission may issue such statements of clarification and correction as it deems appropriate in the interest of maintaining confidence in the justice system. Such statements may address the status and procedural aspects of the proceeding, the judge's right to a fair hearing in accordance with due process requirements, and any official action of disposition by the Commission, including release of its written notice to the complainant or the judge of such action or disposition.

(2) The fact that a complaint has been made, or that a statement has been given to the Commission, shall be confidential during the investigation and initial proceeding except as provided in this Rule.

(3) No person providing information to the Commission shall disclose information they have obtained from the Commission concerning the investigation, including the fact that an investigation is being conducted, until the Commission issues a public reprimand, files a complaint and disciplinary proceeding, or dismisses the complaint.

(b) After Public Reprimand or Initiation of Disciplinary proceedings.

(1) Upon the issuance by the Commission of a public reprimand or the initiation of a complaint and disciplinary proceeding by the Commission, all subsequent proceedings shall be public, except as may be provided by protective order.

(2) The Commission complaint alleging misconduct or incapacity shall be available for public inspection after it has been served upon the respondent judge. Investigative files and records shall not be disclosed unless they formed the basis for probable cause. Those records of the initial proceeding that were the basis of a finding of probable cause shall become public as of the date of the Commission's hearing.

(3) The work product of the Commission members, its Executive Director, Commission Counsel and investigator shall be confidential and shall not be disclosed.

(c) Commission Deliberations. All deliberations of the Commission in reaching a decision on the statement of charges shall be confidential and shall not be disclosed.

(d) General Applicability.

(1) No person shall disclose information obtained from Commission proceedings or papers filed only with the Commission, except information obtained from documents disclosed to the public by the Commission pursuant to this Rule. All information disclosed publicly at disciplinary hearings conducted by the Commission is not deemed confidential.

(2) Any person violating the confidentiality requirements of this Rule 6 may be subject to punishment for contempt.

(3) A judge shall not intimidate, coerce, or otherwise attempt to induce any person to disclose, conceal or alter records, papers, or information made confidential by the Rule. A violation of this subsection may be charged as a separate violation of the Code of Judicial Conduct.

(4) All written communications from the Commission or its employees to a judge or his or her counsel which are deemed confidential pursuant to these rules shall be enclosed in a securely sealed inner envelope which is clearly marked "Confidential."

RULE 7. DISQUALIFICATION

A judge who is a member of the Commission is disqualified from acting in any case in which he or she is a respondent, except in his or her own defense.

RULE 8. ADVISORY OPINIONS

(a) A judge may seek an informal advisory opinion as to whether conduct, actual or contemplated, conforms to the requirements of the Code of Judicial Conduct. Such informal advisory opinion may be requested verbally or in writing. The Chairperson, Executive Director, or Counsel may grant or deny a request for an informal advisory opinion. Information contained in a request for an informal advisory opinion shall be confidential, however, when a request for an informal advisory opinion discloses actual conduct which may be actionable as a violation of the Code of Judicial Conduct, the Chairperson, Executive Director, or Counsel shall refer the matter to an investigative panel of the Commission for consideration. The Chairperson, Executive Director, or Counsel may issue an informal advisory opinion to guide the inquiring judge's own prospective conduct if the inquiry is routine, the responsive advice is readily available from the Code of Judicial Conduct and formal Commission opinions, or the inquiry requires immediate response to protect the inquiring judge's right or interest. An informal advisory opinion may be issued verbally, but shall be confirmed in writing and shall approve or disapprove only the matter in issue and shall not otherwise serve as precedent and shall not be published. An inquiry requesting an opinion concerning past conduct or that presents a matter of first impression shall be referred to the Commission for formal opinion. Such informal advisory opinions shall be reviewed periodically by the Commission and, if upon such review, a majority of the Commission present and voting decided that such informal advisory opinion should be withdrawn or modified, the inquiring judge shall be notified in writing by the Executive Director. Until such notification, the judge shall be deemed to have acted in good faith if he or she acts in conformity with the informal advisory opinion which is later withdrawn or modified. If an inquiring judge disagrees with the informal advisory opinion issued by the Chairperson, Executive Director, or Counsel, such judge may submit a written request, in accordance with subsection (b), for consideration of the inquiry by the Commission at its next regularly scheduled meeting.

(b) Any person may request that the Commission issue a formal opinion as to whether actual or contemplated conduct on the part of a judge conforms to the requirements of the Code of Judicial Conduct. Such requests for formal opinions shall be submitted to the

Executive Director. Information contained in a request for a formal opinion shall not be confidential. The Commission shall determine whether to issue a formal opinion in response to such request; if the Commission determines to issue a formal opinion, it shall prepare a formal written opinion which shall state its conclusion with respect to the question asked and the reason therefor. Such formal opinions shall be provided to interested parties in the manner deemed appropriate by the Chairperson and a copy shall be provided the Appellate Reporter for publication and such Reporter shall, from time to time as directed by the Commission, publish an index of advisory opinions. Formal advisory opinions shall have precedential value in determining whether similar conduct conforms to the Code of Judicial Conduct, but shall not constitute controlling legal authority for the purposes of review of a disciplinary recommendation by a reviewing court. A formal opinion may be reconsidered or withdrawn by the Commission in the same manner in which it was issued. Until a formal advisory opinion is modified or withdrawn by the Commission or overturned by a reviewing court, a judge shall be deemed to have acted in good faith if he or she acts in conformity therewith.

(c) All inquiries, whether requesting a formal opinion or an informal advisory opinion, shall present in detail all operative facts upon which the inquiry is based, but should not disclose privileged or sensitive information which is not necessary to the resolution of the question presented.

RULE 9. PROCEDURE UPON RECEIPT OF COMPLAINT OR INFORMATION

(a) The Executive Director and Commission Counsel shall review each complaint or information received by the Commission to determine whether the complaint or information, if true, discloses facts indicating that a judge has engaged in conduct which is in violation of the Code of Judicial Conduct, has engaged in willful misconduct in office, has willfully and persistently failed to perform the duties of his or her judicial office, has engaged in conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or is habitually intemperate, or alleging that a judge is suffering from a mental or physical incapacity interfering with the performance of his duties, which incapacity is, or is likely to become, permanent. If such initial review discloses no such facts so that the complaint is obviously unfounded or frivolous, the Executive Director shall notify the Chairperson who, if he or she agrees, may dismiss the complaint. The Chairperson shall inform the investigative panel of any such dismissal at the panel's next meeting and, upon the request of any member, such determination may be reconsidered;

otherwise the dismissal of the complaint shall be final and the complainant shall be notified.

(b) If a complaint or information is not dismissed as frivolous or unfounded, the Executive Director and Investigator shall conduct such preliminary review as may be necessary to apprise the investigative panel of the nature thereof, and such panel shall review the complaint or information at the next meeting occurring after the complaint or information is received.

(c) If the investigative panel, by the affirmative vote of not less than five (5) members, determines that the complaint alleges, or information discloses, facts indicating that a judge has engaged in conduct which is in violation of the Code of Judicial Conduct, has engaged in willful misconduct in office, has willfully and persistently failed to perform the duties of his or her judicial office, has engaged in conduct prejudicial to the administration of justice that brings the judicial office into disrepute, or is habitually intemperate, or alleging that a judge is suffering from a mental or physical incapacity interfering with the performance of his duties, which incapacity is, or is likely to become, permanent, such panel shall order a formal investigation to determine whether disciplinary proceedings should be instituted.

(d) The judge shall be notified of the formal investigation, the nature of the allegations which the Commission is investigating, and whether the formal investigation is on the Commission's own motion or upon written complaint. The notice shall afford the judge a reasonable opportunity to present such relevant information as he or she may deem advisable. Such notice shall be in writing and may be personally delivered by the Chairperson, Executive Director, Commission Counsel, or Investigator, or it may be delivered by certified mail, return receipt requested.

(e) If, upon ordering an formal investigation in accordance with subparagraph (d) above, the investigative panel determines that immediate suspension of the judge is required for the proper administration of justice, it may recommend to the Chief Justice that such judge be temporarily suspended from the performance of his or her judicial duties pending final disposition of the inquiry. A copy of such recommendation shall be provided the judge by certified mail, return receipt requested.

RULE 10. RECORD OF PROCEEDINGS

The Commission shall keep a record of all formal investigations and disciplinary proceedings concerning a judge. In disciplinary hearings, testimony shall be recorded verbatim by a court reporter and by

video recording and, if the Commission recommends to the Supreme Court that the judge be censured, suspended, or removed, a transcript of the evidence and all proceedings therein shall be prepared, including a video recording of the testimony of all witnesses who testify at the disciplinary hearing, and made a part of the record.

RULE 11. LETTER OF CAUTION; PUBLIC REPRIMAND

(a) If the inquiry discloses conduct by a judge which requires attention but is not of such a nature as to warrant a public reprimand or a recommendation by Commission that the judge be disciplined by the Supreme Court, the investigative panel may issue a letter of caution to the judge. No letter of caution may be issued after a disciplinary proceeding has been initiated pursuant to Rule 12.

(b) If, after completion of the formal investigation, the investigative panel determines that probable cause exists that a judge has violated the Code of Judicial Conduct and has engaged in conduct prejudicial to the administration of justice, but such misconduct is minor and does not warrant a recommendation by the Commission that the judge be disciplined by the Supreme Court, the investigative panel may, in the name of the Commission, issue a public reprimand to the judge and may require that the judge follow a corrective course of action. Before issuing a public reprimand to a judge, the Commission shall cause a copy of the proposed reprimand to be served on the judge, who shall be allowed 20 days within which to accept the reprimand or to reject it and demand, in writing, that disciplinary proceedings be instituted in accordance with Rule 12.

RULE 12. INITIATION OF DISCIPLINARY PROCEEDINGS

If, after completion of the formal investigation, the investigative panel determines, by the affirmative vote of not less than five (5) members, that probable cause exists that a judge has violated the Code of Judicial Conduct and has engaged in conduct prejudicial to the administration of justice and that such conduct, if proven, would warrant a recommendation by the Commission that the judge be disciplined by the Supreme Court, or that a judge is temporarily incapacitated or is suffering from an incapacity which is, or is likely to become, permanent, it shall initiate disciplinary proceedings by the filing, at the Commission offices, a Statement of Charges alleging the charge or charges. The Statement of Charges shall identify the complainant and state the charge or charges in plain and concise language and in sufficient detail to give fair and adequate notice of the nature of the alleged conduct or incapacity. The Statement of Charges shall be entitled "BEFORE THE JUDICIAL STANDARDS COMMISSION, Inquiry Concerning a Judge No. ___." A copy of the Statement

of Charges shall be personally served upon the respondent judge by the Chairperson, the Executive Director, the Commission's Investigator, or by some person of suitable age and discretion designated by the Commission. If, after reasonable efforts to do so, personal service upon the respondent judge cannot be effected, service may be made by registered or certified mail with a delivery receipt, and proof of service in accordance with N.C. Gen. Stat. § 1-75.10(4) shall be filed with the Commission. Service of a copy of the Statement of Charges shall constitute notice to the respondent judge of the initiation of disciplinary proceedings.

RULE 13. ANSWER

Unless the time is extended by order of the Commission, the respondent judge shall file at the Commission offices, within twenty (20) days after service of the Statement of Charges, a written original and 10 copies of an Answer, which shall be verified. The Statement of Charges and Answer shall constitute the pleadings. No further pleadings may be filed, and no motions may be filed against any of the pleadings. The assertion of a mental or physical condition as a defense by the respondent judge shall constitute a waiver of medical privilege for the purpose of the Commission proceeding.

Failure to answer the Statement of Charges shall constitute an admission of the factual allegations contained in the Statement of Charges.

RULE 14. EX PARTE CONTACTS

After the filing of a Statement of Charges and disciplinary proceedings by the Commission, members of the Commission shall not engage in *ex parte* communications regarding the matter with the respondent judge, counsel for the respondent judge, Commission counsel, or any witness, except that Commission members may communicate with Commission staff and others with respect to procedural and administrative matters as may be required to perform their duties in accordance with these rules.

RULE 15. DISCOVERY

(a) Upon written demand after the time for filing an Answer has expired, Commission Counsel and respondent judge will each disclose to the other, within 20 days after such demand, the following:

(1) the name and address of each witness the party expects to offer at the disciplinary hearing;

(2) a brief summary of the expected testimony of each witness;

(3) copies of any written statement and a transcript of any electronically recorded statement made by any person the party anticipates calling as a witness;

(4) copies of documentary evidence which may be offered;

(b) Failure to disclose the name of any witness, or to provide any material required to be disclosed by section (a) may result in the exclusion of the testimony of such witness or the documentary evidence which was not provided.

(c) Commission Counsel shall provide the respondent judge with any exculpatory evidence of which he or she is aware and which is relevant to the allegations of the complaint.

(d) Both Commission Counsel and respondent judge shall have a continuing duty to supplement information required to be exchanged under this rule.

(e) The taking of depositions, serving of requests for admission, and other discovery procedures authorized by the Rules of Civil Procedure, shall be permitted only by stipulation of the parties or by order of the Commission Chairperson for good cause shown, and in such manner and upon such conditions as the Chairperson may prescribe.

(f) Disputes concerning discovery shall be determined by the Chairperson, whose decision may not be appealed prior to the conclusion of the disciplinary hearing and the entry of a recommendation for discipline or other final order by the Commission.

(g) Unless the time is extended by order of the Commission, all discovery shall be completed within 60 days of the filing of the answer.

RULE 16. AMENDMENTS TO NOTICE OR ANSWER

At any time prior to the conclusion of the disciplinary hearing, the hearing panel may allow or require amendments to the Statement of Charges or to the Answer. The Statement of Charges may be amended to conform to the proof or to set forth additional facts, whether occurring before or after the commencement of the disciplinary hearing. In the event of an amendment setting forth additional facts, the respondent judge shall be given a reasonable time to answer the amendment and to prepare and present his or her defense to the matters charged thereby.

RULE 17. DISCIPLINARY HEARING

Upon the filing of an Answer, or upon the expiration of the time allowed for its filing, the hearing panel shall order a disciplinary hear-

ing before it upon the charges contained in the Statement of Charges. The disciplinary hearing shall be held no sooner than 60 days after filing of the Answer or, if no Answer is filed, 60 days after the expiration of time allowed for its filing, unless the judge consents to an earlier disciplinary hearing. The Commission shall serve a notice of the disciplinary hearing upon the respondent judge in the same manner as service of the Statement of Charges under Rule 12.

Upon the date set for the disciplinary hearing, such disciplinary hearing shall proceed whether or not the respondent judge has filed an Answer, and whether or not he or she appears in person or through counsel. At least six members, or alternates, shall be present continually during the presentation of evidence at the disciplinary hearing.

Commission Counsel, or other counsel appointed by the Commission for that purpose, shall present evidence in support of the charges alleged in the Statement of Charges. Commission counsel may call the respondent judge as a witness.

The disciplinary hearing shall be recorded verbatim in accordance with the provisions of Rule 10.

RULE 18. RIGHTS OF RESPONDENT; BURDEN OF PROOF

The respondent judge shall have the right to representation by counsel and the opportunity to defend against the charges by the introduction of evidence, examination and cross-examination of witnesses and to address the hearing panel in argument at the conclusion of the disciplinary hearing. The respondent judge shall also have the right to the issuance of subpoenas to compel the attendance of witnesses or the production of documents and other evidentiary material.

Upon the entry of an appearance by counsel for the respondent judge, a copy of any notices, pleadings, or other written communications sent to the respondent judge shall be furnished to such counsel by the Executive Director.

Commission Counsel shall have the burden of proving the existence of grounds for a recommendation of discipline by clear, cogent and convincing evidence, as that term is defined by the Supreme Court.

RULE 19. WITNESSES; OATHS; SUBPOENAS

Every witness who testifies before the hearing panel at a disciplinary hearing shall be required to declare, by oath or affirmation, to testify truthfully. The oath or affirmation may be administered by any member of the Commission.

A subpoena to compel the attendance of a witness at a disciplinary hearing before the Commission, or a subpoena for the production of documentary evidence, shall be issued in the name of the State upon request of any party, and shall be signed by a member of the Commission, by the Executive Director, or by Commission Counsel. A subpoena shall be served, without fee, by any officer authorized to serve a subpoena pursuant to the provisions of N.C. Gen. Stat. § 1A-1, Rule 45(b).

Witnesses shall be reimbursed in the manner provided in civil cases in the General Court of Justice, and their expenses shall be borne by the party calling them unless, when mental or physical disability of the judge is in issue, in which case the Commission shall bear the reasonable expenses of the witnesses whose testimony is related to the disability. Vouchers authorizing disbursements by the Commission for witnesses shall be signed by the Chairperson or Executive Director.

RULE 20. RULES OF EVIDENCE

Except as otherwise provided in these rules, the Rules of Evidence as set forth in Chapter 8C of the North Carolina General Statutes shall apply in all public proceedings under these rules. Rulings on evidentiary matters shall be made by the Chairperson, or by member presiding in the absence of the Chairperson.

RULE 21. MEDICAL EXAMINATION

When the mental or physical condition or health of the respondent judge is in issue, a denial of the alleged condition shall constitute a waiver of medical privilege for the purpose of the Commission proceeding, and the respondent judge shall be required to produce, upon request of Commission Counsel, his or her medical records relating to such condition. The respondent judge shall also be deemed to have consented to a physical or mental examination by a qualified licensed physician or physicians designated by the Commission. A copy of the report of such examination shall be provided to the respondent judge and to the Commission. The examining physician or physicians shall receive the fee of an expert witness, to be set by the Commission.

RULE 22. STIPULATIONS

At any time prior to the conclusion of a disciplinary hearing, the respondent judge may stipulate to any or all of the allegations of the Statement of Charges in exchange for a stated disposition, which may include a stated recommendation to the Supreme Court for discipline. The stipulation shall be in writing and shall set forth all material facts relating to the proceeding and the conduct of respondent.

The stipulation shall be signed by the respondent judge, his or her counsel, and by Commission Counsel. The stipulation shall be submitted to the hearing panel, which shall either approve the stipulation or reject it. If the stipulation provides for a stated recommendation for discipline, it must be approved by the affirmative vote of not less than five members of the hearing panel. If the stipulation is rejected by the hearing panel, it shall be deemed withdrawn and will not be considered in any proceedings before, or deliberations of, the hearing panel. If the hearing panel approves the stipulation, it shall prepare a written recommendation to the Supreme Court consistent therewith and transmit such recommendation in accordance with the provisions of Rules 24 and 25.

RULE 23. CONTEMPT POWERS

The Commission has the same power as a trial court of the General Court of Justice to punish for contempt, or for refusal to obey lawful orders or process of the Commission. See N.C. Gen. Stat. § 7A-377(d).

RULE 24. PROCEDURE FOLLOWING DISCIPLINARY HEARING

At the conclusion of the disciplinary hearing, the hearing panel shall deliberate and determine whether to dismiss the proceeding or to file a recommendation with the Supreme Court. In all cases, the Executive Director shall notify the respondent judge in writing of the decision of the hearing panel within 60 days after the conclusion of the disciplinary hearing, unless the time is extended by order of the Chairperson.

If the hearing panel reaches a decision to recommend the censure, suspension or removal of a judge, the Executive Director shall prepare a proposed record of the proceedings and a written decision setting forth the hearing panel's findings of fact, conclusions of law, and recommendation. The proposed record of the proceeding shall include a verbatim transcript of the disciplinary hearing as well as a copy of the video recording of such disciplinary hearing. Such proposed record and decision shall be served upon the respondent judge and his or her counsel, if any, in the same manner as service of the complaint under Rule 12.

RULE 25. TRANSMITTAL OF RECORD TO THE SUPREME COURT

Unless the respondent judge files objections to the proposed record, or a proposed alternative record, within 10 days after the proposed record and the recommendation of the hearing panel have

been served upon him or her, the proposed record shall constitute the official record. If the respondent judge files objections or a proposed alternative record, the Commission Chairperson shall send written notice to Commission Counsel and to the respondent judge and his or her counsel, setting a time and place for a hearing to settle the record, and the record as settled by the Commission Chairperson shall be the official record.

Within 10 days after the official record has been settled, the Executive Director shall certify the record and decision of the Commission and file it with the Clerk of the Supreme Court. The Executive Director shall concurrently serve upon the respondent judge, in the same manner as service of the complaint under Rule 12, a notice of the filing of such record and decision, specifying the date upon which it was filed in the Supreme Court. The Executive Director shall also transmit to the respondent judge copies of any changes to the official record occurring as a result of the settlement of the record.

RULE 26. PROCEEDINGS IN THE SUPREME COURT

Proceedings in the Supreme Court shall be as prescribed by Supreme Court Rule. See N.C. Gen. Stat. § 7A-33.

Adopted unanimously by the Judicial Standards Commission during its regular business meeting on this the 15th day of September, 2006.

s/ John C. Martin
John C. Martin, Chairman
Judicial Standards Commission

Witness my hand and the Seal of the Judicial Standards Commission, this the 15th day of September, 2006.

s/Paul R. Ross
Paul R. Ross
Executive Secretary

IN THE SUPREME COURT OF NORTH CAROLINA

Order Adopting Amendments to the North Carolina Rules of Appellate Procedure

I. Rules 7, 9, 11, 12, 18, 28, and 37 of the North Carolina Rules of Appellate Procedure are amended as described below:

Rule 7(b) is amended to read:

(b) *Production and Delivery of Transcript.*

(1) In civil cases: from the date the requesting party serves the written documentation of the transcript arrangement on the person designated to prepare the transcript, that person shall have 60 days to prepare and deliver the transcript.

In criminal cases where there is no order establishing the indigency of the defendant for the appeal: from the date the requesting party serves the written documentation of the transcript arrangement upon the person designated to prepare the transcript, that person shall have 60 days to produce and deliver the transcript in noncapital cases and 120 days to produce and deliver the transcript in capitally tried cases.

In criminal cases where there is an order establishing the indigency of the defendant for the appeal: from the date listed on the Appellate Entries as the "Date order delivered to transcriptionist," ~~the clerk of the trial court serves the order upon the person designated to prepare the transcript~~, that person shall have ~~60~~ 65 days to ~~procure~~ produce and deliver the transcript in noncapital cases and ~~120~~ 125 days to produce and deliver the transcript in capitally tried cases.

The transcript format shall comply with Appendix B of these Rules.

Except in capitally tried criminal cases which result in the imposition of a sentence of death, the trial tribunal, in its discretion, and for good cause shown by the appellant may extend the time to produce the transcript for an additional 30 days. Any subsequent motions for additional time required to produce the transcript may only be made to the appellate court to which appeal has been taken. All motions for extension of time to produce the transcript in capitally tried cases resulting in the imposition of a sentence of death, shall be made directly to the Supreme Court by the appellant. ~~Where the clerk's order of transcript is accompanied by the trial court's order establishing the indigency of the~~

~~appellant and directing the transcript to be prepared at State expense, the time for production of the transcript commences seven days after the filing of the clerk's order of transcript.~~

(2) The court reporter, or person designated to prepare the transcript, shall deliver the completed transcript, with accompanying ASCII disk or its functional equivalent, to the parties, as ordered, within the time provided by this rule, unless an extension of time has been granted under Rule 7(b)(1) or Rule 27(c). The court reporter or transcriptionist shall certify to the clerk of the trial tribunal that the parties' copies have been so delivered, and shall send a copy of such certification to the appellate court to which the appeal is taken. The appealing party shall retain custody of the original transcript and shall transmit the original transcript to the appellate court upon settlement of the record on appeal.

(3) The neutral person designated to prepare the transcript shall not be a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, or be financially interested in the action unless the parties agree otherwise by stipulation.

Rule 9 is amended as follows:

Rule 9(a)(1) is amended by replacing the period at the end of item "l" with a semicolon and adding the following language immediately thereafter:

m. a statement, where appropriate, that a supplement compiled pursuant to Rule 11(c) is filed with the record on appeal.

Rule 9(a)(3) is amended by deleting the word "and" at the end of item "j", replacing the period at the end of item "k" with a semicolon, and adding the following language immediately thereafter:

l. a statement, where appropriate, that a supplement compiled pursuant to Rule 11(c) is filed with the record on appeal.

Rule 9(b)(4) is amended to read:

(4) *Pagination; Counsel Identified.* The pages of the printed record on appeal shall be numbered consecutively, be referred to as "record pages" and be cited as "(R p ___)."Pages of the Rule 11(c) or Rule 18(d)(3) supplement to the record on appeal shall be numbered consecutively with the pages of the record on appeal, the first page of the supplement to bear the next consecutive number following the number of the last page of the printed record on appeal. These pages shall be referred to as "record sup-

plement pages," and shall be cited as "(S 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.

Rule 11(c) is amended to read:

(c) *By Agreement, by Operation of Rule, or by Court Order After Appellee's Objection or Amendment.* Within 30 days (35 days in capitally tried cases) after service upon appellee of appellant's proposed record on appeal, 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 and shall specify any item(s) for which an objection is based on the contention that the item was not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that the content of a statement or narration is factually inaccurate. An appellant who objects to an appellee's response to the proposed record on appeal shall make the same specification in his request for judicial settlement. The formatting of the proposed record on appeal and the order in which items appear in it is the responsibility of the appellant.

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 by the appellant with the printed record on appeal in three copies of a volume captioned "Rule 11(c) Supplement to the Printed 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. Subject to the additional requirements of Rule 28(d), items in the Rule 11(c) supplement may be cited and used by the parties as would items in the printed record on appeal.

If a party does not agree to the wording of a statement or narration required or permitted by these rules, there shall be no judicial settlement to resolve the dispute unless the objection is based on a contention that the statement or narration concerns an item that was not filed, served, submitted for consideration, admitted, or tendered in an offer of proof, or that a statement or narration is factually inaccurate. Instead, the objecting party is permitted to have inserted in the settled record on appeal a concise counter-statement. Parties are strongly encouraged to reach agreement on the wording of statements in records on appeal. Judicial settlement is not appropriate for disputes that concern only the formatting of a record on appeal or the order in which items appear in a record on appeal.

The Rule 11(c) supplement to the printed record on appeal shall contain an index of the contents of the supplement, which shall appear as the first page thereof. The Rule 11(c) supplement shall be paginated as required by Rule 9(b)(4) and the contents should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal. If a party does not agree to the inclusion or specification of an exhibit or transcript in the printed record, the printed record shall include a statement that such items are separately filed along with the supplement.

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 made the subject of an offer of proof, or that a statement or narration permitted by these rules is not factually accurate, 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 that 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.

The functions of the judge in the settlement of the record on appeal are to determine whether a statement permitted by these rules is not factually accurate, 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.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, and no judicial settlement of the record is timely sought, the record is deemed settled as of the expiration of the ten-day period within which any party could have requested judicial settlement of the record on appeal under this Rule 11(c).

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 12 is amended as follows:

Rule 12(a) is amended to read:

(a) *Time for Filing Record on Appeal.* Within 15 days after the record on appeal has been settled by any of the procedures provided in ~~this~~ Rule 11 or Rule 18, the appellant shall file the record on appeal with the clerk of the court to which appeal is taken.

Rule 12(c) is amended to read:

(c) *Copies of Record on Appeal.* The appellant ~~need file but a single~~ shall file one copy of the record on appeal, one copy of a transcript designated pursuant to Rule 9(c)(2), three copies of each exhibit designated pursuant to Rule 9(d), and three copies of any supplement to the record on appeal submitted pursuant to Rule 11(c) or Rule 18(d)(3). Upon filing, the appellant may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the costs of reproducing copies of the

record on appeal. The clerk will reproduce and distribute copies as directed by the court.

Rule 18 is amended as follows:

Rule 18(c) is amended by deleting the word "and" at the end of item "10", replacing the period at the end of item "11" with a semicolon, and adding the following language immediately thereafter:

(12) a statement, where appropriate, that a supplement compiled pursuant to Rule 18(d)(3) is filed with the record on appeal.

Rule 18(d) is amended to read:

(d) *Settling the Record on Appeal.* The record on appeal may be settled by any of the following methods:

(1) *By Agreement.* Within 35 days after filing of the notice of appeal or after production of the transcript if one is ordered pursuant to Rule 18(b)(3), the parties may by agreement entered in the record on appeal settle a proposed record on appeal prepared by any party in accordance with this Rule 18 as the record on appeal.

(2) *By Appellee's Approval of Appellant's Proposed Record on Appeal.* If the record on appeal is not settled by agreement under Rule 18(d)(1), the appellant shall, within 35 days after filing of the notice of appeal or after production of the transcript if one is ordered pursuant to Rule 18(b)(3), 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 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. Amendments or objections to the proposed record on appeal shall be set out in a separate paper and shall specify any item(s) for which an objection is based on the contention that the item was not filed, served, submitted for consideration, admitted, or made the subject of an offer of proof, or that the content of a statement or narration is factually inaccurate. An appellant who objects to an appellee's response to the proposed record on appeal shall make the same specification in his request for judicial settlement. The formatting of the proposed record on appeal and the order in which items appear in it is the responsibility of the appellant. Judicial settlement is not appropriate for disputes concerning only the formatting or the

order in which items appear in the settled record on appeal. If all appellees within the times allowed them either file notices of approval or fail to file either notices of approval or objections, amendments, or proposed alternative records on appeal, appellant's proposed record on appeal thereupon constitutes the record on appeal.

(3) *By Agreement, by Operation of Rule, or by Court Order After Appellee's Objection or Amendment.* If any appellee timely files 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, 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 by the appellant with the record on appeal in a volume captioned "Rule 18(d)(3) Supplement to the Printed 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)~~ 18(b) or 18(c); provided that any item not filed, served, submitted for consideration, admitted, or for which no offer of proof was tendered, shall not be included. Subject to the additional requirements of Rule 28(d), items in the Rule 18(d)(3) supplement may be cited and used by the parties as would items in the printed record on appeal.

If a party does not agree to the wording of a statement or narration required or permitted by these rules, there shall be no judicial settlement to resolve the dispute unless the objection is based on a contention that the statement or narration concerns an item that was not filed, served, submitted for consideration, admitted, or tendered in an offer of proof, or that a statement or narration is factually inaccurate. Instead, the objecting party is permitted to have inserted in the settled record on appeal a concise counter-statement. Parties are strongly encouraged to reach agreement on the wording of statements in records on appeal.

The Rule 18(d)(3) supplement to the printed record on appeal shall contain an index of the contents of the supplement, which shall appear as the first page thereof. The Rule 18(d)(3) supplement shall be paginated consecutively with the pages of the record on appeal, the first page of the supplement to bear the

next consecutive number following the number of the last page of the record on appeal. These pages shall be referred to as "record supplement pages," and shall be cited as "(S p ___)." The contents of the supplement should be arranged, so far as practicable, in the order in which they occurred or were filed in the trial tribunal. If a party does not agree to the inclusion or specification of an exhibit or transcript in the printed record, the printed record shall include a statement that such items are separately filed along with the supplement.

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)~~ 18(b) or 18(c) were not filed, served, submitted for consideration, admitted, or offered into evidence, or that a statement or narration permitted by these rules is not factually accurate, 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 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.

The functions of the agency head in the settlement of the record on appeal are to determine whether a statement permitted by these rules is not factually accurate, to settle narrations of proceedings under Rule ~~9(c)(1)~~ 18(c)(6), 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.

If any appellee timely serves amendments, objections, or a proposed alternative record on appeal, and no judicial settlement of the record is sought, the record is deemed settled as of the expiration of the ten day period within which any party could have requested judicial settlement of the record on appeal under this Rule 18(d)(3).

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.

Rule 28 is amended as follows:

The first paragraph of Rule 28(b)(6) is amended to read:

(6) An argument, to contain the contentions of the appellant with respect to each question presented. Each question shall be separately stated. Immediately following each question shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal. Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned. However, in new briefs before the Supreme Court, a party need not reference assignments of error to the extent that party was the appellee (or cross-appellee) before the Court of Appeals and is urging the Supreme Court to reverse the Court of Appeals.

The first paragraph of Rule 28(c) is amended to read:

(c) *Content of Appellee's Brief; Presentation of Additional Questions.* An appellee's brief in any appeal shall contain a subject index and table of authorities as required by Rule 26(g), an argument, a conclusion, identification of counsel and proof of service in the form provided in Rule 28(b) for an appellant's brief, and any appendix as may be required by Rule 28(d). It need con-

tain no statement of the questions presented, statement of the procedural history of the case, statement of the grounds for appellate review, statement of the facts, or statement of the standard(s) of review, unless the appellee disagrees with the appellant's statements and desires to make a restatement or unless the appellee desires to present questions in addition to those stated by the appellant. An appellee's brief may, but is not required to, include a reference to assignments of error as required by Rule 28(b)(6) for an appellant's brief.

Rule 28(d)(1) is amended by replacing the period at the end of item "c." with a semicolon and adding the following language immediately thereafter:

d. relevant items from the Rule 11(c) or Rule 18(d)(3) supplement to the printed record on appeal the study of which are required to determine questions presented in the brief.

Rule 28(d)(3) is amended to read:

(3) *When Appendixes to Appellee's Brief Are Required.* Appellee must reproduce appendixes to his brief in the following circumstances:

a. Whenever the appellee believes that appellant's appendixes do not include portions of the transcript or items from the Rule 11(c) or Rule 18(d)(3) supplement to the printed record on appeal that are required by Rule 28(d)(1), the appellee shall reproduce those portions of the transcript or supplement he believes to be necessary to understand the question.

b. Whenever the appellee presents a new or additional question in his brief as permitted by Rule 28(c), the appellee shall reproduce portions of the transcript or relevant items from the Rule 11(c) or Rule 18(d)(3) supplement to the printed record on appeal as if he were the appellant with respect to each such new or additional question.

Rule 28(i) is amended to read:

(i) *Amicus Curiae Briefs.* A brief of an amicus curiae may be filed only by leave of the appellate court wherein the appeal is docketed or in response to a request made by that Court on its own initiative.

A person desiring to file an amicus curiae brief shall present to the Court a motion for leave to file, served upon all parties~~,~~

~~within ten days after the printed record is mailed by the Clerk and ten days after the record is docketed in pauper cases~~. The motion shall state concisely the nature of the applicant's interest, the reasons why an amicus curiae brief is believed desirable, the questions of law to be addressed in the amicus curiae brief and the applicant's position on those questions. The proposed amicus curiae brief may be conditionally filed with the motion for leave. Unless otherwise ordered by the Court, the application for leave will be determined solely upon the motion, and without responses thereto or oral argument.

The clerk of the appellate court will forthwith notify the applicant and all parties of the court's action upon the application. Unless other time limits are set out in the order of the Court permitting the brief, the amicus curiae shall file the brief within the time allowed for the filing of the brief of the party supported or, if in support of neither party, within the time allowed for filing appellant's brief. Motions for leave to file an amicus curiae brief submitted to the Court after the time within which the amicus curiae brief normally would be due are disfavored in the absence of good cause. Reply briefs of the parties to an amicus curiae brief will be limited to points or authorities presented in the amicus curiae brief which are not presented in the main briefs of the parties. No reply brief of an amicus curiae will be received.

A motion of an amicus curiae to participate in oral argument will be allowed only for extraordinary reasons.

Rule 28(j)(2)(A) is amended as follows:

By adding a new third sentence to sub-subdivision 1, titled "*Page limits for briefs using nonproportional type*," to read:

> Unless otherwise ordered by the Court, the page limit for an amicus curiae brief is 15 pages.

By adding a new third sentence to sub-subdivision 2, titled "*Word-count limits for briefs in proportional type*," to read:

> Unless otherwise ordered by the Court, an amicus curiae brief may contain no more than 3,750 words.

Rule 37 is amended by adding three subsections at the end thereof to read:

(d) *Withdrawal of Appeal in Criminal Cases*. Withdrawal of appeal in criminal cases shall be in accordance with G.S. § 15A-1450. In addition to the requirements of G.S. § 15A-1450, after the record on appeal in a criminal case has been filed in an

appellate court but before the filing of an opinion, the defendant shall also file a written notice of the withdrawal with the clerk of the appropriate appellate court.

(e) *Withdrawal of Appeal in Civil Cases.*

(1) Prior to the filing of a record on appeal in the appellate court, an appellant or cross-appellant may, without the consent of the other party, file a notice of withdrawal of its appeal with the tribunal from which appeal has been taken. Alternatively, prior to the filing of a record on appeal, the parties may file a signed stipulation agreeing to dismiss the appeal with the tribunal from which the appeal has been taken.

(2) After the record on appeal has been filed, an appellant or cross-appellant or all parties jointly may move the appellate court in which the appeal is pending, prior to the filing of an opinion, for dismissal of the appeal. The motion must specify the reasons therefor, the positions of all parties on the motion to dismiss, and the positions of all parties on the allocation of taxed costs. The appeal may be dismissed by order upon such terms as agreed to by the parties or as fixed by the appellate court.

(f) *Effect of Withdrawal of Appeal.* The withdrawal of an appeal shall not affect the right of any other party to file or continue such party's appeal or cross-appeal.

II. **Appendix D** of the North Carolina Rules of Appellate Procedure is amended as follows:

Section 1, titled "NOTICES OF APPEAL," subsection c, titled "to the Supreme Court from a Judgment of the Court of Appeals," is amended by rewording the second sentence thereof to read:

The appealing party shall enclose a ~~certified~~ clear copy of the opinion of the Court of Appeals with the notice.

These amendments to the North Carolina Rules of Appellate Procedure shall be effective on the 1st day of March 2007, and shall apply to cases appealed on or after that date.

Adopted by the Court in Conference this the 5th day of October 2006, with the exception of the amendment to Rule 28(b)(6), which was adopted by the Court on the 16th of November 2006. 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).

s/Edmunds, J.
Edmunds, J
For the Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE STANDING COMMITTEES OF THE COUNCIL

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 20, 2006.

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 standing committees of the Council, as particularly set forth in 27 N.C.A.C. 1A, Section .0700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Organization of the North Carolina State Bar

Section .0700 Standing Committees of the Council

Rule .0701 Standing Committees and Boards

(a) Standing Committees. Promptly after his or her election, the president shall appoint members to the standing committees identified below to serve for one year beginning January 1 of the year succeeding his or her election. . . .

(1) Executive Committee. . . .

(7) Attorney ~~Client~~ Assistance Committee. It shall be the duty of the Attorney Client Assistance Committee to develop and oversee policies and programs to help clients and lawyers resolve difficulties or disputes, including fee disputes, using means other than the formal grievance or civil litigation processes; to establish and implement a disaster response plan, in accordance with the provisions of Section .0300 of Subchapter 1D of these rules, to assist victims of disasters in obtaining legal representation and to prevent the improper solicitation of victims by lawyers; and to perform such other duties and consider such other matters as the council or the president may designate. . . .

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on October 20, 2006.

Given over my hand and the Seal of the North Carolina State Bar, this the 19th day of February, 2007.

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 8th day of March, 2007.

s/Sarah Parker
Sarah Parker, 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 Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2007.

s/Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE FEE DISPUTE RESOLUTION 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 20, 2006.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning fee dispute resolution, as particularly set forth in 27 N.C.A.C. 1D, Section .0700, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar

Section .0700 Procedures for Fee Dispute Resolution

Rule .0701 Purpose and Implementation

The purpose of the Fee Dispute Resolution Program shall be to assist lawyers and clients to settle disputes over fees. In doing so, the Fee Dispute Resolution Program shall assist the lawyers and clients in determining ~~determine~~ the appropriate fee for legal services rendered. The State Bar shall implement ~~a~~ the ~~f~~Fee ~~d~~Dispute ~~r~~Resolution ~~p~~Program under the auspices of the Attorney Client Assistance Committee (the committee), which shall be offered to clients and their lawyers at no cost.

Rule .0703 Coordinator of Fee Dispute Resolution

The secretary-treasurer of the North Carolina State Bar shall designate a member of the staff to serve as coordinator of the ~~f~~Fee ~~d~~Dispute ~~r~~Resolution ~~p~~Program. The coordinator shall develop forms, maintain records, and provide statistics on the ~~f~~Fee ~~d~~Dispute ~~r~~Resolution ~~p~~Program. The coordinator shall also ~~assist the chairperson of the committee in developing~~ develop an annual report to the council.

Rule .0706 Processing Requests for Fee Dispute Resolution

(a) . . . . All requests for resolution of a disputed fee must be filed before the statute of limitation has run or within three years of the ending of the client/attorney relationship, whichever comes ~~first~~ last.

(b) . . . . If the chairperson of the Attorney Client Assistance Committee of the State Bar concurs with the recommendation, the matter shall be dismissed and the parties notified.

(c) If the chairperson disagrees with the recommendation for dismissal, ~~or the fee dispute coordinator concludes that a matter is suitable for fee dispute resolution, an attempt will be made through informal means to resolve the issue. If informal methods are not successful, the parties will be notified and the case scheduled for mediation~~ an attempt to resolve the dispute will be made pursuant to Rule .0707 below or the chair may recommend review by the full committee.

Rule .0707 Mediation Proceedings

(a) The coordinator shall assign the case to a mediator who shall conduct a mediated settlement conference. The ~~fee dispute coordinator or~~ mediator shall be responsible for reserving a place and making arrangements for the conference at a time and place convenient to all parties.

(b) The attorney against whom a request for fee ~~arbitration~~ dispute resolution is filed must attend the mediated settlement conference in person and may not send another representative of his or her law firm. If a party fails to attend a mediated settlement conference without good cause, the mediator may either reschedule the conference or recommend dismissal.

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 20, 2006.

Given over my hand and the Seal of the North Carolina State Bar, this the 19th day of February, 2007.

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 8th day of March, 2007.

s/Sarah Parker
Sarah Parker, 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 Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2007.

s/Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE IOLTA 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 January 19, 2007.

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 IOLTA program, as particularly set forth in 27 N.C.A.C. 1D, Section .1300, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar

Section .1300, Rules Governing the Administration of the Plan for Interest on Lawyers' Trust Accounts

Rule .1302 Jurisdiction: Authority

The Board of Trustees of the North Carolina State Bar Plan for Interest on Lawyers' Trust Accounts (IOLTA) is created as a standing committee by the North Carolina State Bar Council pursuant to Chapter 84 of the North Carolina General Statutes for the disposition of funds received by the North Carolina State Bar from interest on trust accounts or from other sources intended for the provision of legal services to the indigent and the improvement of the administration of justice.

. . .

Rule .1312 Source of Funds

Funding for the program carried out by the board shall come from funds remitted from depository institutions by reason of interest earned on trust accounts established by lawyers pursuant to Rule 1.15-4 of the Revised Rules of Professional Conduct, voluntary contributions from lawyers, and interest, dividends or other proceeds earned on the board's funds from investments or from other sources intended for the provision of legal services to the indigent and the improvement of the administration of justice.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments

to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 19, 2007.

Given over my hand and the Seal of the North Carolina State Bar, this the 19th day of February, 2007.

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 8th day of March, 2007.

s/Sarah Parker
Sarah Parker, 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 Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2007.

s/Hudson, 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 January 19, 2007.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the continuing legal education program, as particularly set forth in 27 N.C.A.C. 1D, Section .1500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar

Section .1500, Rules Governing the Administration of the Continuing Legal Education Program

Rule .1501 Scope, Purpose and Definitions

(a) Scope

. . . .

(b) Purpose

The purpose of these continuing legal education rules is to assist lawyers licensed to practice and practicing law in North Carolina in achieving and maintaining professional competence for the benefit of the public whom they serve. . . .

It has also become clear that in order to render legal services in a professionally responsible manner, a lawyer must be able to manage his or her law practice competently. Sound management practices enable lawyers to concentrate on their clients' affairs while avoiding the ethical problems which can be caused by disorganization. ~~These rules therefore provide for the administration of a law practice assistance program which is expected to emphasize training in law office management.~~

It is in response to such considerations that the North Carolina State Bar has adopted these minimum continuing legal education requirements. The purpose of these minimum continuing legal education requirements is the same as the purpose of the Revised Rules of Professional Conduct themselves—to ensure that the public at large is served by lawyers who are competent and maintain high ethical standards.

(c) Definitions

(1) "Accredited sponsor" . . . .

~~(11) "Law practice assistance program" shall mean a program administered by the board to provide training in the area of law office management.~~

~~(12)~~ (11) A "newly admitted active member" . . . .

[Renumbering remaining paragraphs.]

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 19, 2007.

Given over my hand and the Seal of the North Carolina State Bar, this the 19th day of February, 2007.

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 8th day of March, 2007.

s/Sarah Parker
Sarah Parker, 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 Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2007.

s/Hudson, 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 January 19, 2007.

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 Rules of the Standing Committees of the North Carolina State Bar

Section .1600 Regulations Governing the Administration of the Continuing Legal Education Program

Rule .1602 Course Content Requirements

(a) Professional Responsibility Courses on Substance Abuse, Chemical Dependency, and Debilitating Mental Conditions— . . . .

(b) Law School Courses. . . . .

(c) Law Practice Management Courses—A CLE accredited course on law practice management must satisfy the accreditation standards set forth in Rule .1519 of this subchapter with the primary objective of increasing the participant's professional competence and proficiency as a lawyer. The subject matter presented in an accredited course on law practice management shall bear a direct relationship to either substantive legal issues in managing a law practice or a lawyer's professional responsibilities, including avoidance of conflicts of interest, protecting confidential client information, supervising subordinate lawyers and nonlawyers, fee arrangements, managing a trust account, ethical legal advertising, and malpractice avoidance. The following are illustrative, non-exclusive examples of subject matter that may earn CLE credit: employment law relating to lawyers and law practice; business law relating to the formation and operation of a law firm; calendars, dockets and tickler systems; conflict screening and avoidance systems; law office disaster planning; handling of client files; communicating with clients; and trust accounting. If appropriate, a law practice management course may qualify for professional responsibility (ethics) CLE credit. The following are illustrative, non-exclusive examples of subject matter that

will NOT receive CLE credit: marketing; networking/rainmaking; client cultivation; increasing productivity; developing a business plan; improving the profitability of a law practice; selling a law practice; and purchasing office equipment (including computer and accounting systems).

(d) Skills and Training Courses—A course that teaches a skill specific to the practice of law may be accredited for CLE if it satisfies the accreditation standards set forth in Rule .1519 of this subchapter with the primary objective of increasing the participant's professional competence and proficiency as a lawyer. The following are illustrative, non-exclusive examples of subject matter that may earn CLE credit: legal writing; oral argument; courtroom presentation; and legal research. A course that provides general instruction in non-legal skills shall NOT be accredited. The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit: learning to use computer hardware, non-legal software, or office equipment; public speaking; speed reading; efficiency training; personal money management or investing; career building; marketing; and general office management techniques.

(e) Activities That Shall Not Be Accredited ~~(e) 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 .1601(b), (e), and (g) of this subchapter; if appropriate, up to three hours of professional responsibility credit may be granted for such course or course segment. Except as noted in the preceding sentence or in extraordinary circumstances, approval~~ CLE credit will not be given for general and personal educational activities. ~~For example, the following types of courses will not receive approval:~~ The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit:

(1) courses within the normal college curriculum such as English, history, social studies, and psychology;

(2) courses ~~which~~ that deal with the individual lawyer's human development, such as stress reduction, quality of life, or substance abuse unless a course on substance abuse or mental health satisfies the requirements of Rule .1602(c);

(3) ~~courses which deal with the development of personal skills generally, such as public speaking (other than oral argument and courtroom presentation), nonlegal writing, and financial management~~;

~~(4)~~ courses designed primarily to sell services or products or to generate greater revenue, such as marketing or advertising (as distinguished from courses dealing with development of law office procedures and management designed to raise the level of service provided to clients).

(f) Service to the Profession Training—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 .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)~~(g) 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(c)(10) of this subchapter or as provided in Rule .1604(e) of this subchapter.

~~(e)~~(h) 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.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on January 19, 2007.

Given over my hand and the Seal of the North Carolina State Bar, this the 19th day of February, 2007.

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 8th day of March, 2007.

s/Sarah Parker
Sarah Parker, 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 Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2007.

s/Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE PLAN FOR CERTIFICATION OF PARALEGALS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on October 20, 2006.

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 for Certification of Paralegals, as particularly set forth in 27 N.C.A.C. 1G, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1G, Certification of Paralegals

Section .0100, The Plan for Certification of Paralegals

Rule .0105 Appointment of Members; When; Removal

(a) Appointment. The council shall appoint the members of the board, provided, however, after the appointment of the initial members of the board, each paralegal member shall be selected by the council from two nominees determined by a vote by mail of all active certified paralegals in an election conducted by the board.

(b) Procedure for ~~nomination by mail~~ Nomination of Candidates for Paralegal Members.

(1) Composition of Nominating Committee. At least ~~30~~ 60 days prior to a meeting of the council at which one or more paralegal members of the board are subject to appointment for a full three year term, the board shall appoint a nominating committee comprised of certified paralegals as follows:

(i) A representative selected by the North Carolina Paralegal Association;

(ii) A representative selected by the North Carolina Bar Association Legal Assistants Division;

(iii) A representative selected by the North Carolina Academy of Trial Lawyers Legal Assistants Division;

(iv) Three representatives from three local or regional paralegal organizations to be selected by the board; and

(v) An independent paralegal (not employed by a law firm, government entity, or legal department) to be selected by the board.

(2) Selection of Candidates. The nominating committee shall meet within 30 days of its appointment to select five (5) certified paralegals as candidates for each paralegal member vacancy on the board for inclusion on the ballot to be mailed to all active certified paralegals.

(3) Vote of Certified Paralegals. At least 30 days prior to the meeting of the council at which a paralegal member appointment to the board will be made, a ~~notice~~ ballot shall be mailed to all active certified paralegals at each certified paralegal's address of record on file with the North Carolina State Bar. ~~The notice shall state how many paralegal positions on the board are subject to appointment, state that nominees will be selected by means of written ballots distributed to and returned by certified paralegals by mail, and identify how, by when and to whom nominations may be made. The board shall mail a ballot to each active certified paralegal at the certified paralegal's address of record on file with the North Carolina State Bar.~~ The ballot shall be accompanied by written instructions, and shall state how many paralegal member positions on the board are subject to appointment, the names of the candidates selected by the nominating committee for each such position, and ~~state~~ when and where the ballot should be returned. Write-in candidates shall be permitted and the instructions shall so state. Each ballot shall be sequentially numbered with a red identifying numeral in the upper right hand corner of the ballot. The board shall maintain appropriate records respecting how many ballots were mailed to prospective voters in each election as well as how many ballots are returned. Only original ballots will be accepted. Ballots received after the deadline stated on the ballot will not be counted. The names of the two ~~nominees~~ candidates receiving the most votes for each open paralegal member position shall be the nominees submitted ~~forwarded~~ to the council.

(c) Time of Appointment. . . . .

Rule .0119 Standards for Certification of Paralegals

(a) To qualify for certification as a paralegal, an applicant must pay any required fee, and comply with the following standards:

(1) Education. The applicant must have earned one of the following:

A. an associate's, bachelor's, or master's degree ~~or post baccalaureate certificate~~ from a qualified paralegal studies program; or

B. an associate's or bachelor's degree in any discipline from any institution of post-secondary education that is accredited by an accrediting body recognized by the United States Department of Education~~;~~ and ~~successfully completed at least the equivalent of 18 semester credits at a qualified paralegal studies program, any portion of which credits may also satisfy the requirements for the associate's or bachelor's degree or~~ a certificate from a qualified paralegal studies program.

(2) Examination. The applicant must achieve a satisfactory score on a written examination designed to test the applicant's knowledge and ability. The board shall assure that the contents and grading of the examinations are designed to produce a uniform minimum level of competence among the certified paralegals.

(b) Alternative Qualification Period. For a period not to exceed two years after the date that applications for certification are first accepted by the board, an applicant may qualify by satisfying one of the following:

(1) earned a high school diploma, or its equivalent, worked as a paralegal and/or a paralegal educator in North Carolina for not less than 5000 hours during the five years prior to application, and during the 12 months prior to application, completed three hours of continuing legal education in professional responsibility, as approved by the board;

(2) obtained and maintained at all times prior to application the designation Certified Legal Assistant (CLA)/Certified Paralegal (CP), PACE-Registered Paralegal (RP), or other national paralegal credential approved by the board and worked as a paralegal and/or a paralegal educator in North Carolina for not less than 2000 hours during the two years prior to application; or

(3) worked as a paralegal and/or a paralegal educator in North Carolina for not less than 2000 hours during the two years prior to application and fulfilled ~~the~~ one of the following educational requirements:

(A) as set forth in Rule .0119(a)(1)~~a~~., or

(B) earned an associate's or bachelor's degree in any discipline from any institution of post-secondary education that is accredited by an accrediting body recognized by the United States Depart-ment of Education and successfully completed at least the equivalent of 18 semes-

ter credits at a qualified paralegal studies program, any portion of which credits may also satisfy the requirements for the associate's or bachelor's degree. ~~and worked as a paralegal and/or a paralegal educator in North Carolina for not less than 2000 hours during the two years prior to application.~~

(c). . . .

Rule .0122 Right to Review ~~Hearing~~ and Appeal to Council

(a) An individual who is denied certification or continued certification as a paralegal or whose certification is suspended or revoked shall have the right to a review ~~hearing~~ before the board pursuant to the procedures set forth below and, thereafter, the right to appeal the board's ruling thereon to the council under such rules and regulations as the ~~board and~~ council may prescribe.

(b) Notification of the Decision of the Board. Following the meeting at which the board denies certification for failure to meet the standards for certification, including failing the examination, denies continued certification, or suspends or revokes certification, the executive director shall promptly notify the individual in writing of the decision of the board. The notification shall specify the reason for the decision of the board and shall inform the individual of his or her right to request a review before the board.

(c) Request for Review by the Board. Except as provided in paragraph (e) of this rule, within 30 days of the mailing of the notice from the executive director described in paragraph (b) of this rule, the individual may request review by the board. The request shall be in writing and state the reasons for which the individual believes the prior decision of the board should be reconsidered and withdrawn. The request shall state whether the board's review shall be on the written record or at a hearing.

(d) Review by the Board. A three-member panel of the board shall be appointed by the chair of the board to reconsider the board's decision and take action by a majority of the panel. At least one member of the panel shall be a lawyer member of the board and at least one member of the panel shall be a paralegal member of the board. The decision of the panel shall constitute the final decision of the board.

(1) Review on the Record. If requested, the panel shall review the entire written record including the individ-

ual's application, all supporting documentation, and any written materials submitted by the individual within 30 days of mailing the request for review. The panel shall make its decision within sixty (60) days of receipt of the written request for review from the individual.

(2) Review Hearing. If requested, the panel shall hold a hearing at a time and location that is convenient for the panel members and the individual provided the hearing occurs within sixty (60) days of receipt of the written request for review from the individual. The hearing shall be informal. The Rules of Evidence and the Rules of Civil Procedure shall not apply. The individual may be represented by lawyer at the hearing, may offer witnesses and exhibits, and may question witnesses for the board. The panel may ask witnesses to appear and may consider exhibits on its own request. Witnesses shall not be sworn. The hearing shall not be reported unless the applicant pays the costs of the transcript and arranges for the preparation of the transcript with the court reporter.

(3) Decision of the Panel. The individual shall be notified in writing of the decision of the panel and, if unfavorable, the right to appeal the decision to the council under such rules and regulations as the council may prescribe.

(e) Failure of Written Examination. Within 30 days of the mailing of the notice from the board's executive director that an individual has failed the written examination, the individual may review his or her examination at the office of the board at a time designated by the executive director. The individual shall be allowed not more than three hours for such review and shall not remove the examination from the board's office or make photocopies of any part of the examination.

(1) Request for Review by the Board. Within 30 days of individual's review of his or her examination, the individual may request review by the board pursuant to the procedures set forth in paragraph (c) of this rule. The request should set out in detail the area or areas which, in the opinion of the individual, have been incorrectly graded. Supporting information may be filed to substantiate the individual's claim.

(2) Regrading Subcommittee. Upon receipt of a request for review of a failed examination, the chair of the

Certification Committee shall appoint a subcommittee consisting of at least three members of the Certification Committee. All information shall be submitted to the subcommittee in blind form by the staff. The subcommittee shall re-grade the entire examination and shall make a report and recommendation on whether to change the grade to passing to the panel appointed by the chair of the board to hear the review. The review shall thereafter follow the procedures set forth in paragraph (d) of this rule.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules 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 20, 2006.

Given over my hand and the Seal of the North Carolina State Bar, this the 19th day of February, 2007.

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 8th day of March, 2007.

s/Sarah Parker
Sarah Parker, 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 Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2007.

s/Hudson, J.
For the Court

AMENDMENTS TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

The following amendments to the Rules of Professional Conduct were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on January 19, 2007.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct, as particularly set forth in 27 N.C.A.C. 2, Rule 1.15-4, Interest on Lawyers' Trust Accounts, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 2, Rules of Professional Conduct

Rule 1.15-4, Interest on Lawyers' Trust Accounts

(a) Pursuant to a plan promulgated by the North Carolina State Bar and approved by the North Carolina Supreme Court, a lawyer may elect to create or maintain an interest-bearing trust account for those funds of clients which, in the lawyer's good-faith judgment, are nominal in amount or are expected to be held for a short period of time. . . .

(b) Lawyers or law firms electing to deposit client funds in a general trust account under the plan shall direct the ~~depository institution~~ bank:

(1) to remit interest or dividends, as the case may be (less any deduction for bank service charges, fees ~~of the depository institution~~, and taxes collected with respect to the deposited funds) at least quarterly to the North Carolina State Bar;

(2) . . . .

(c) As used herein, "Confidential Information" means all information regarding IOLTA account(s) other than (1) a lawyer's or law firm's status as a participant, former participant or non-participant in the IOLTA program, and (2) information regarding the policies and practices of any bank in respect of IOLTA trust accounts, including rates of interest paid, service charge policies, the number of IOLTA accounts at such bank, the total amount on deposit in all IOLTA accounts at such bank, the total amounts of interest paid to the IOLTA program and the total amount of service charges imposed by such bank upon such accounts.

Confidential Information shall not be disclosed by the staff, or trustees of NC IOLTA to any person or entity, except that Confidential

Information may be disclosed (1) to any chairperson of the grievance committee, staff attorney, or investigator of the North Carolina State Bar upon his or her written request specifying the information requested and stating that the request is made in connection with a grievance complaint or investigation regarding one or more trust accounts of a lawyer or law firm; or, (2) in response to a lawful order or other process issued by a court of competent jurisdiction, or a subpoena, investigative demand, or similar notice issued by a federal, state, or local law enforcement agency.

~~(c)~~ (d) . . . . [Re-lettering remaining paragraphs.]

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 February 19, 2007.

Given over my hand and the Seal of the North Carolina State Bar, this the 19th day of February, 2007.

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 8th day of March, 2007.

s/Sarah Parker
Sarah Parker, 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 Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of March, 2007.

s/Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING RULEMAKING PROCEDURES

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 20, 2007.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar be amended by adding a new section as follows (new language is underlined):

27 N.C.A.C. 1A, Organization of the North Carolina State Bar

Section .1400, Rulemaking Procedures

Rule .1401 Publication for Comment

(a) As a condition precedent to adoption, a proposed rule or amendment to a rule must be published for comment as provided in subsection (c).

(b) A proposed rule or amendment to a rule must be presented to the Executive Committee and the council prior to publication for comment, and specifically approved for publication by both.

(c) A proposed rule or amendment to a rule must be published for comment in an official printed publication of the North Carolina State Bar that is mailed to the membership at least 30 days in advance of its final consideration by the council. The publication of any such proposal must be accompanied by a prominent statement inviting all interested parties to submit comment to the North Carolina State Bar at a specified postal or e-mail address prior to the next meeting of the Executive Committee, the date of which shall be set forth.

Rule .1402 Review by the Executive Committee

At its next meeting following the publication or republication of any proposed rule or amendment to a rule, the Executive Committee shall review the proposal and any comment that has been received concerning the proposal. The Executive Committee shall then:

(a) recommend the proposal's adoption by the council;

(b) recommend the proposal's adoption by the council with non-substantive modification;

(c) recommend to the council that the proposal be republished with substantive modification;

(d) defer consideration of the matter to its next regular business meeting;

(e) table the matter; or

(f) reject the proposal.

Rule .1403 Action by the Council and Review by the North Carolina Supreme Court

(a) Whenever the Executive Committee recommends adoption of any proposed rule or amendment to a rule in accordance with the procedure set forth in Rule .1402 above, the council at its next regular business meeting shall consider the proposal, the Executive Committee's recommendation, and any comment received from interested parties, and:

(1) decide whether to adopt the proposed rule or amendment, subject to the approval of the North Carolina Supreme Court as described in G.S. 84-21;

(2) reject the proposed rule or amendment; or

(3) refer the matter back to the Executive Committee for reconsideration.

(b) Any proposed rule or amendment to a rule adopted by the council shall be transmitted by the secretary to the North Carolina Supreme Court for its review on a schedule approved by the Court, but in no event later than 120 days following the council's adoption of the proposed rule or amendment.

(c) No proposed rule or amendment to a rule adopted by the council shall take effect unless and until it is approved by order of the North Carolina Supreme Court.

(d) The secretary shall promptly transmit the official text of any proposed rule or amendment to a rule adopted by the council and approved by the North Carolina Supreme Court to the Office of Administrative Hearings for publication in the North Carolina Administrative Code.

(e) Any action taken by the council or the North Carolina Supreme Court in regard to any proposed rule or amendment to a rule shall be reported in the next issue of the printed publication referenced in Rule .1401 above.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 20, 2007.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of August, 2007.

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 23rd day of August, 2007.

s/Sarah Parker
Sarah Parker, 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 Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 23rd day of August, 2007.

s/Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING JUDICIAL DISTRICT GRIEVANCE COMMITTEES

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 13, 2007.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning judicial district grievance committees, as particularly set forth in 27 N.C.A.C. 1B, Section .0200, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1B, Discipline and Disability Rules

Section .0200, Rules Governing Judicial District Grievance Committees

Rule .0202 Jurisdiction & Authority of District Grievance Committees

(a) District Grievance Committees are Subject to the Rules of the North Carolina State Bar . . .

(c) Grievances Referred to District Grievance Committee—The district grievance committee shall also investigate and consider such grievances as are referred to it for investigation by the counsel of the North Carolina State Bar.

(d) Grievances Involving Fee Disputes

(1) Notice to Complainant of Fee ~~Arbitration~~ Dispute Resolution Program. If a grievance filed initially with the district bar consists solely or in part of a fee dispute, the chairperson of the district grievance committee shall notify the complainant in writing within 10 working days of receipt of the grievance that the complainant may elect to participate in the North Carolina State Bar Fee Dispute ~~Arbitration~~ Resolution Program . . .

(3) Handling Claims Not Submitted to ~~Arbitration~~ Fee Dispute Resolution by Complainant—If the complainant elects not to participate in the State Bar's Fee Dispute ~~Arbitration~~ Resolution Program, or fails to notify the chairperson that he or she elects to participate within 20 days following mailing of the notice referred to in Rule .0202(d)(1) above,

the grievance will be handled in the same manner as any other grievance filed with the district grievance committee.

(4) Referral to Fee Dispute ~~Arbitration~~ Resolution Program—Where a complainant timely elects to participate in fee ~~arbitration~~ dispute resolution, and the judicial district in which the respondent attorney maintains his or her principal office has a fee ~~arbitration~~ dispute resolution committee, the chairperson of the district grievance committee shall refer the portion of the grievance involving a fee dispute to the judicial district fee ~~arbitration~~ dispute resolution committee. If the judicial district in which the respondent attorney maintains his or her principal office does not have a fee ~~arbitration~~ dispute resolution committee, the chairperson of the district grievance committee shall refer the portion of the grievance involving a fee dispute to the State Bar Fee Dispute ~~Arbitration~~ Resolution Program for resolution. If the grievance consists entirely of a fee dispute, and the complainant timely elects to participate in ~~arbitration~~ fee dispute resolution, no grievance file will be established.

(e) . . .

Rule .0208 Letter to Complainant Where Local Grievance Alleges Fee Dispute Only

John Smith
Anywhere, NC
Re: Your complaint against Jane Doe

Dear Mr. Smith:

The [ ] district grievance committee has received your complaint against the above-listed attorney. Based upon our initial review of the materials which you submitted, it appears that your complaint involves a fee dispute. Accordingly, I would like to take this opportunity to notify you of the North Carolina State Bar Fee Dispute ~~Arbitration~~ Resolution Program. The program is designed to provide citizens with a means of resolving disputes over attorney fees at no cost to them and without going to court. A pamphlet which describes the program in greater detail is enclosed, along with an application form.

If you would like to participate in the fee ~~arbitration~~ dispute resolution program, please complete and return the form to me within 20 days of the date of this letter. If you decide to ~~go through arbitration~~ participate, ~~in mediation~~ no grievance file will be opened and the [ ] district bar grievance committee will take no other action against the attorney.

If you do not wish to participate in the fee ~~arbitration~~ dispute resolution program, you may elect to have your complaint investigated by the [ ] district grievance committee. If we do not hear from you within 20 days of the date of this letter, we will assume that you do not wish to participate in fee ~~arbitration~~ dispute resolution, and we will handle your complaint like any other grievance. However, the [ ] district grievance committee has no authority to attempt to resolve a fee dispute between an attorney and his or her client. Its sole function is to investigate your complaint and make a recommendation to the North Carolina State Bar regarding whether there is probable cause to believe that the attorney has violated one or more provisions of the Rules of Professional Conduct which govern attorneys in this state.

Thank you for your cooperation.

Sincerely yours,
[ ] Chairperson
[ ] District Bar Grievance Committee
cc: PERSONAL & CONFIDENTIAL
Director of Investigations, The NC State Bar

Rule .0209 Letter to Complainant Where Local Grievance Alleges Fee Dispute and Other Violations

John Smith
Anywhere, NC
Re: Your complaint against Jane Doe

Dear Mr. Smith:

The [ ] district grievance committee has received your complaint against the above-listed attorney. Based upon our initial review of the materials which you submitted, it appears that your complaint involves a fee dispute as well as other possible violations of the rules of ethics. Accordingly, I would like to take this opportunity to notify you of the North Carolina State Bar Fee Dispute ~~Arbitration~~ Resolution Program. The program is designed to provide citizens with a means of resolving disputes over attorney fees at no cost to them and without going to court. A pamphlet which describes the program in greater detail is enclosed, along with an application form. Please be advised that our rules prevent the filing of a Request for Fee Dispute Resolution and a grievance at the same time.

If you would like to participate in the fee ~~arbitration~~ dispute resolution program, please complete and return the form to me within 20 days of the date of this letter. If you decide to ~~go through arbitration~~ participate, the fee ~~arbitration~~ dispute resolution committee will

handle those portions of your complaint which involve an apparent fee dispute. ~~The remaining parts of your complaint which do not involve a fee dispute will be investigated by the [ ] district grievance committee.~~

If you do not wish to participate in the fee ~~arbitration~~ dispute resolution program, you may elect to have your entire complaint investigated by the [ ] district grievance committee. If we do not hear from you within 20 days of the date of this letter, we will assume that you do not wish to participate in fee ~~arbitration~~ dispute resolution, and we will handle your entire complaint like any other grievance. However, the [ ] district grievance committee has no authority to attempt to resolve a fee dispute between an attorney and his or her client. Its sole function is to investigate your complaint and make a recommendation to the North Carolina State Bar regarding whether there is probable cause to believe that the attorney has violated one or more provisions of the Rules of Professional Conduct which govern attorneys in this state.

Thank you for your cooperation.

Sincerely yours,
[ ] Chairperson
[ ] District Bar Grievance Committee
cc: PERSONAL & CONFIDENTIAL
Director of Investigations, The NC State Bar

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing 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 13, 2007.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of August, 2007.

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 23rd day of August, 2007.

s/Sarah Parker
Sarah Parker, 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 Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 23rd day of August, 2007.

s/Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE LEGAL SPECIALIZATION PROGRAM

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 13, 2007.

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 legal specialization program, as particularly set forth in 27 N.C.A.C. 1D, Section .2500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Rules of the Standing Committees of the North Carolina State Bar

Section .2500 Certification Standards for the Criminal Law Specialty

Rule .2505 Standards for Certification as a Specialist

Each applicant for certification as a specialist in criminal law, the subspecialty of state criminal law, or the subspecialty of criminal appellate practice shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification:

(a) Licensure and Practice

. . .

(e) Examination.

The applicant must pass a written examination designed to test the applicant's knowledge and ability.

(1) Terms . . .

(2) Subject Matter

~~(A)~~ The examination shall cover the applicant's knowledge in the following topics in criminal law, in the subspecialty of state criminal law, and/or in the subspecialty of criminal appellate practice, as the applicant has elected:

(A) ~~(i)~~ the North Carolina and Federal Rules of Evidence;

(B) ~~(ii)~~ state and federal criminal procedure and state and federal laws affecting criminal procedure

(C) ~~(iii)~~ constitutional law;

(D) ~~(iv)~~ appellate procedure and tactics;

(E) ~~(v)~~ trial procedure and tactics;

(F) ~~(vi)~~ criminal substantive law;

(G) ~~(vii)~~ the North Carolina Rules of Appellate Procedure.

(3) ~~(B)~~ Required Examination Components.

(A) Criminal Law Specialty.

An applicant for certification in the specialty of criminal law ~~shall take~~ must pass part I ~~(covering state law)~~ of the examination on general topics in criminal law and part II of the examination on ~~(covering~~ federal and state criminal law~~) of the criminal law examination~~.

(B) State Criminal Law Subspecialty.

An applicant for certification in the subspecialty of state criminal law ~~shall take~~ must pass part I of the ~~criminal law~~ examination on general topics in criminal law and part III of the examination on state criminal law.

(C) ~~(3) Requirement of Criminal Law Examination for~~ Criminal Appellate Practice Subspecialty.

An applicant for certification in the subspecialty of criminal appellate practice must ~~successfully~~ pass the criminal appellate practice examination in addition to passing part I of the criminal law examination (on general topics in criminal law) and passing part II (on federal and state criminal law) or part III (on state criminal law) of that examination ~~in criminal law~~. If an applicant for certification in criminal appellate practice is already certified as a specialist in the specialty of criminal law or the subspecialty of state criminal law, ~~then~~ the applicant ~~must take part II (covering federal law) of the examination in criminal law as well as~~ is only required to take and pass the criminal appellate practice examination.

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 13, 2007.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of August, 2007.

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 23rd day of August, 2007.

s/Sarah Parker
Sarah Parker, 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 Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 23rd day of August, 2007.

s/Hudson, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE REGISTRATION OF PREPAID LEGAL SERVICES PLANS

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 13, 2007.

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 registration of prepaid legal services plans, as particularly set forth in 27 N.C.A.C. 1E, Section .0300, be amended by deleting entirely the existing provisions and substituting therefor the provisions set forth below (all new language is underlined).

27 N.C.A.C. 1E, Regulations for Organizations Practicing Law

Section .0300, Rules Concerning Prepaid Legal Services Plans

Rule .0301 State Bar May Not Approve or Disapprove Plans

The North Carolina State Bar shall not approve or disapprove any prepaid legal services plan or render any legal opinion regarding any plan. The registration of any plan under these rules shall not be construed to indicate approval or disapproval of the plan.

Rule .0302 Registration Requirement

A prepaid legal services plan ("plan") must be registered with the North Carolina State Bar before its implementation or operation in North Carolina. No licensed North Carolina attorney shall participate in a prepaid legal services plan in this state unless the plan has registered with the North Carolina State Bar and has complied with the rules set forth below. No prepaid legal services plan may operate in North Carolina unless at least one licensed North Carolina attorney has agreed to provide the legal services offered under the plan at all times during the operation of the plan. No prepaid legal services plan may operate in any manner that constitutes the unauthorized practice of law. No plan may operate until its registration has been accepted by the North Carolina State Bar in accordance with these rules.

Rule .0303 Definition of Prepaid Plan

A prepaid legal services plan or a group legal services plan ("a plan") is any arrangement by which a person, firm or corporation, not otherwise authorized to engage in the practice of law, in exchange for any valuable consideration, offers to provide or arranges the provision of specified legal services that are paid for in advance of any

immediate need for the specified legal services ("covered services"). In addition to covered services, a plan may provide specified legal services at fees that are less than what a non-member of the plan would normally pay. The North Carolina legal services offered by a plan must be provided by a North Carolina licensed lawyer who is not an employee, director, or owner of the plan. A prepaid legal services plan does not include the sale of an identified, limited legal service, such as drafting a will, for a fixed, one-time fee. [This definition is also found in Rule 7.3(d) of the Revised Rules of Professional Conduct.]

Rule .0304 Registration Procedures

To register with the North Carolina State Bar, a prepaid legal services plan must comply with all of the following procedures for initial registration:

(a) A prepaid legal services plan seeking to operate in North Carolina must file an initial registration statement form with the secretary of the North Carolina State Bar, using a form promulgated by the State Bar, requesting registration.

(b) The owner or sponsor of the prepaid legal services plan must fully disclose in its initial registration statement form filed with the secretary at least the following information: the name of the plan, the name of the owner or sponsor of the plan, a principal address for the plan in North Carolina, a designated plan representative to whom communications with the State Bar will be directed, all persons or entities with ownership interest in the plan and the extent of their interests, all terms and conditions of the plan, all services provided under the plan and a schedule of benefits and fees or charges for the plan, a copy of all plan documents, a copy of all plan marketing and advertising materials, a copy of all plan contracts with its customers, a copy of all plan contracts with plan attorneys, and a list of all North Carolina attorneys who have agreed to participate in the plan. Additionally, the owner or sponsor will provide a detailed statement explaining how the plan meets the definition of a prepaid legal services plan in North Carolina. The owner or sponsor of the prepaid legal services plan will certify or acknowledge the veracity of the information contained in the registration statement, an understanding of the rules applicable to prepaid legal services plans, and an understanding of the law on unauthorized practice.

(c) The Authorized Practice Committee ("committee"), as a duly authorized standing committee of the North Carolina State Bar Council, shall review the initial registration statements submitted by each prepaid legal services plan to determine if the plan, as repre-

sented in its registration statement, meets the definition of a prepaid legal services plan as defined in Rule .0303, and therefore should be registered in North Carolina. The committee may appoint a subcommittee to conduct an initial review and to recommend to the committee whether the plan meets the definition of a prepaid legal services plan. The committee shall also establish any deadlines by when registrations may be submitted for review and any additional, necessary rules and procedures regarding the initial and annual registrations, and the revocation of registrations, of prepaid legal services plans.

Rule .0305 Registration

The committee shall review the plan's initial registration statement form to determine whether the plan meets the definition of a prepaid legal services plan. If the plan, as submitted, meets the definition, the committee shall instruct the secretary to issue a certificate of registration to the plan's sponsor. If the plan does not meet the definition, the secretary shall advise the plan's sponsor of the committee's decision and the reasons therefore. Upon notice that the plan's registration has not been accepted, the plan sponsor may resubmit an amended plan registration form or request a hearing before the committee pursuant to Rule .0313 below.

Rule .0306 Requirement to File Amendments

Amendments to prepaid legal services plans and to other documents required to be filed upon registration of such plans shall be filed in the office of the North Carolina State Bar no later than 30 days after the adoption of such amendments. Plan amendments must be submitted in the same manner as the initial registration and may not be implemented until the amended plan is registered in accordance with Rule .0305.

Rule .0307 Annual Registration

After its initial registration, a prepaid legal services plan may continue to operate so long as it is operated as registered and it renews its registration annually on or before January 31 by filing a registration renewal form with the secretary and paying the annual registration fee.

Rule .0308 Registration Fee

The initial and annual registration fees for each prepaid legal services plan shall be $100.

Rule .0309 Index of Registered Plans

The North Carolina State Bar shall maintain an index of the prepaid legal services plans registered pursuant to these rules. All docu-

ments filed in compliance with this rule are considered public documents and shall be available for public inspection during normal business hours.

Rule .0310 Advertising of State Bar Approval Prohibited

Any plan that advertises or otherwise represents that it is registered with the North Carolina State Bar shall include a clear and conspicuous statement within the advertisement or communication that registration with the North Carolina State Bar does not constitute approval of the plan by the State Bar.

Rule .0311 State Bar Jurisdiction

The North Carolina State Bar retains jurisdiction of North Carolina licensed attorneys who participate in prepaid legal services plans and North Carolina licensed attorneys are subject to the rules and regulations of the North Carolina State Bar.

Rule .0312 Revocation of Registration

Whenever it appears that a plan no longer meets the definition of a prepaid legal services plan; is marketed or operates in a manner that is not consistent with the representations made in the initial or amended registration statement and accompanying documents upon which the State Bar relied in registering the plan; is marketed or operates in a manner that would constitute the unauthorized practice of law; is marketed or operates in a manner that violates state or federal laws or regulations, including the rules and regulations of the North Carolina State Bar; or has failed to pay the annual registration fee, the committee may instruct the secretary to serve upon the plan's sponsor a notice to show cause why the plan's registration should not be revoked. The notice shall specify the plan's apparent deficiency and allow the plan's sponsor to file a written response within 30 days of service by sending the same to the secretary. If the sponsor fails to file a timely written response, the secretary shall issue an order revoking the plan's registration and shall serve the order upon the plan's sponsor. If a timely written response is filed, the secretary shall schedule a hearing, in accordance with Rule .0313 below, before the Authorized Practice Committee at its next regularly scheduled meeting and shall so notify the plan sponsor. All notices to show cause and orders required to be served herein may be served by certified mail to the last address provided for the plan sponsor on its most current registration statement or in accordance with Rule 4 of the North Carolina Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process. The State Bar will not renew the annual registration of any plan that has received a

notice to show cause under this section, but the plan may continue to operate under the prior registration until resolution of the show cause notice by the council.

Rule .0313 Hearing before the Authorized Practice Committee

At any hearing concerning the registration of a prepaid legal services plan, the committee chair will preside to ensure that the hearing is conducted in accordance with these rules. The committee chair shall cause a record of the proceedings to be made. Strict compliance with the Rules of Evidence is not required, but may be used to guide the committee in the conduct of an orderly hearing. The plan sponsor may appear and be heard, be represented by counsel, offer witnesses and documents in support of its position and cross-examine any adverse witnesses. The counsel may appear on behalf of the State Bar and be heard, and may offer witnesses and documents. The burden of proof shall be upon the sponsor to establish the plan meets the definition of a prepaid legal services plan, that all registration fees have been paid, and that the plan has operated in a manner consistent with all material representations made in its then current registration statement, the law, and these rules. If the sponsor carries its burden of proof, the plan's registration shall be accepted or continued. If the sponsor fails to carry its burden of proof, the committee shall recommend to the council that the plan's registration be denied or revoked.

Rule .0314 Action by the Council

Upon the recommendation of the committee, the council may enter an order denying or revoking the registration of the plan. The order shall be effective when entered by the council. A copy of the order shall be served upon the plan's sponsor as prescribed in Rule .0312 above.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 13, 2007.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of August, 2007.

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 23rd day of August, 2007.

s/Sarah Parker
Sarah Parker, 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 Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 23rd day of August, 2007.

s/Hudson, J.
For the Court

AMENDMENTS TO THE NORTH CAROLINA STATE BAR RULES OF PROFESSIONAL CONDUCT

The following amendments to the Rules of Professional Conduct were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 13, 2007.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules of Professional Conduct, as particularly set forth in 27 N.C.A.C. 2, Rule 7.3, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 2, Rules of Professional Conduct

Rule 7.3 Direct Contact with Potential Clients

(a) A lawyer shall not by in-person, live telephone, or real-time electronic contact solicit professional employment from a potential client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted:

. . .

(d) Notwithstanding the prohibitions in paragraph (a), a lawyer may participate with a prepaid or group legal services plan subject to the following:

> (1) Definition. A prepaid legal services plan or a group legal services plan ("a plan") is any arrangement by which a person, firm, or corporation, not otherwise authorized to engage in the practice of law, in exchange for any valuable consideration, offers to provide or arranges the provision of legal services that are paid for in advance of ~~the~~ any immediate need for the specified legal service ("covered services"). In addition to covered services, a plan may provide specified legal services at fees that are less than what a non-member of the plan would normally pay. The North Carolina legal services offered by a plan must be provided by a licensed lawyer who is not an employee, director, or owner of the plan. A prepaid legal services plan does not include the sale of an identified, limited legal service, such as drafting a will, for a fixed, one-time fee.

(e) . . .

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 13, 2007.

Given over my hand and the Seal of the North Carolina State Bar, this the 16th day of August, 2007.

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 23rd day of August, 2007.

s/Sarah Parker
Sarah Parker, 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 Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 23rd day of August, 2007.

s/Hudson, J.
For the Court

IN THE SUPREME COURT OF NORTH CAROLINA

ORDER ADOPTING THE RULES IMPLEMENTING MEDIATION IN MATTERS PENDING IN DISTRICT CRIMINAL COURT

WHEREAS, section 7A-38.3D of the North Carolina General Statutes codifies a system of court-ordered mediations to be implemented in participating district court judicial districts in order to facilitate the resolution of criminal matters within the jurisdiction of those districts, and

WHEREAS, N.C.G.S. § 7A-38.3D(d) requires this Court to adopt rules concerning said mediations,

NOW, THEREFORE, pursuant to N.C.G.S. § 7A-38.3D(d), the Rules Implementing Mediation In Matters Pending In District Criminal Court are hereby adopted to read as in the following pages. These Rules shall be effective on the 8th day of November, 2007.

Adopted by the Court in conference the 8th day of November, 2007. The Appellate Division Reporter shall promulgate by publication as soon as practicable the Rules of the North Carolina Supreme Court Implementing Mediation In Matters Pending In District Criminal Court in the advance sheets of the Supreme Court and the Court of Appeals.

Hudson, J.
For the Court

RULES IMPLEMENTING MEDIATION IN MATTERS PENDING IN DISTRICT CRIMINAL COURT

TABLE OF CONTENTS

RULE 1. INITIATING VOLUNTARY MEDIATION IN DISTRICT CRIMINAL COURT.

A. PURPOSE OF MEDIATION. Pursuant to G.S. 7A-38.3D, these Rules are promulgated to implement programs for voluntary mediation of certain cases within the jurisdiction of the district criminal courts. These procedures are intended to assist private parties, with the help of a neutral mediator, in discussing and resolving their disputes and in conserving judicial resources. The Chief District Court Judge, the District Attorney and the Community Mediation Center shall determine whether to establish a program in a district court judicial district. Because participation in this program and in the mediation process is voluntary, no defendant, complaining witness or any other person who declines to participate in mediation or whose case cannot be settled in mediation, shall face any adverse consequences as a result of his/her failure to participate or reach an agreement and the case shall simply be returned to court. Consistent with G.S. 7A-38.3D(j) a party's participation or failure to participate in mediation is to be held confidential and not revealed to the court or the district attorney.

B. DEFINITIONS.

(1) **Court.** The term "court" as used throughout these rules, shall refer both to a criminal district court judge or his/her designee, including a district attorney or designee, or personnel affiliated with a Community Mediation Center.

(2) **Mediation Process.** The term "mediation process" as used throughout these rules, shall encompass intake, screening, and mediation through impasse or until the case is dismissed.

(3) **District Attorney.** The term "district attorney" as used throughout these rules, shall refer to the District Attorney, assistant district attorneys and any staff or designee of the District Attorney.

C. INITIATING THE MEDIATION.

(1) **Suggestion by the court.** In districts that establish a program, the court may encourage private parties to attend mediation in certain cases or categories of cases. In determining whether to encourage mediation in a case or category of cases, the judge or designee may consider among other factors:

(a) whether the parties are willing to participate;

(b) whether continuing prosecution is in the best interest of the parties or of any non-parties impacted by the dispute;

(c) whether the private parties involved in the dispute have an expectation of a continuing relationship and there are issues underlying their dispute that have not been addressed and which may create later conflict or require court involvement;

(d) whether cross-warrants have been filed in the case; and

(e) whether the case might otherwise be subject to voluntary dismissal.

(2) **Multiple charges.** Multiple charges pending in the same court against a single defendant or pending against multiple defendants and involving the same complainant or complainants may be consolidated for purposes of holding a single mediation in the matter. Charges pending in multiple courts may be consolidated for purposes of mediation with the consent of those courts.

(3) **Timing of suggestion.** The court shall encourage parties to attend and participate in mediation as soon as practicable. Since there is no possibility of incarceration

resulting from any agreement reached in mediation, the judge is not required to provide a court-appointed attorney to a defendant prior to his/her mediation.

(4) **Notice to parties.** The court shall provide to parties who have agreed to attend mediation notice of the following either orally or in writing on an AOC approved form: (1) the deadline for completion of the mediation process, (2) the name of the mediator who will mediate the dispute or the name of the community mediation center who will provide the mediator, and (3) and that the defendant may be required to pay the dismissal fee set forth in Rule 5.B.(2). In lieu of providing this information orally or in writing, the court may refer the complaining witness and defendant to a community mediation center whose staff shall advise the parties of the above information.

(5) **Motion for mediation.** Any complainant or defendant may file an oral or written request with the court to have a mediation conducted in his or her dispute and the court shall determine whether the dispute is appropriate for referral. If in writing, the motion may be on an AOC form.

(6) **Screening.** A mediator as defined by Rule 7 below or a Community Mediation Center to which the parties are referred for mediation shall advise the court, if it is determined upon screening of the case or parties, that the matter is not appropriate for mediation.

RULE 2. PROGRAM ADMINISTRATION.

Pursuant to G.S. 7A-38.3D(c), a Community Mediation Center may assist a judicial district in administering and operating its mediation program for district court criminal matters. The court may delegate to a Center responsibility for the scheduling of cases and the Center may provide volunteer and/or staff mediators to conduct the mediations. The Center shall also maintain files in such mediations; record caseload statistics and other information as required by the court, the Dispute Resolution Commission or the Administrative Office of the Courts, including tracking the number of cases referred to mediation and the outcome of those mediations; and, in accordance with G.S.7A-38.7 and G.S. 7A-38.3D(m), oversee the dismissal process for cases resolved in mediation.

RULE 3. APPOINTMENT OF MEDIATOR.

A. AUTHORITY TO APPOINT. When the parties have agreed to attend mediation, the court shall appoint a Community Mediation Center mediator by name or shall designate a Center to appoint a mediator to conduct the mediation. The mediator appointed shall be qualified pursuant to Rule 8 of these rules.

B. DISQUALIFICATION OF MEDIATOR. For good cause shown, a complainant or defendant may move the court to disqualify the mediator appointed to conduct their mediation. If the mediator is disqualified, the court or designee shall appoint a new one to conduct the mediation. Nothing in this provision shall preclude a mediator from disqualifying him or herself.

RULE 4. THE MEDIATION.

A. SCHEDULING MEDIATION. The mediator appointed to conduct the mediation or the Community Mediation Center to which the matter has been referred by the court for appointment of a mediator, shall be responsible for any scheduling that must be done prior to the mediation, any reporting required by these rules or local rules, and the maintenance of any files pertaining to the mediation.

B. WHERE MEDIATION IS TO BE HELD. Mediation shall be held in the courthouse or if suitable space is available, in the offices of a Community Mediation Center, or at any other place as agreed upon between the mediator and parties.

C. REQUEST TO EXTEND DEADLINE FOR COMPLETION OF MEDIATION. A mediator or Community Mediation Center staff may for good cause, request that the court extend the deadline for completion of the mediation process set pursuant to Rule 1.C.(4) above.

D. RECESSES. The mediator may recess the mediation at any time and may set times for reconvening. If the time for reconvening is set before the mediation is recessed, no further notification is required for persons present at the mediation. In recessing a matter, the mediator shall take into account whether the parties wish to continue mediating and whether they are making progress toward resolving their dispute.

RULES 5. DUTIES OF THE PARTIES.

A. ATTENDANCE.

(1) Complainant(s) and defendant(s) who agree to attend mediation will physically attend the proceeding until an agreement is reached, or the mediator has declared an impasse.

(2) The following may attend and participate in mediation:

(a) Parents or guardians of a minor party. Parent(s) or guardian(s) of a minor complainant or defendant who have been encouraged by the court to attend. However, a court shall encourage attendance by a parent or guardian only in consultation with the mediator and a mediator may later excuse the participation of a parent or guardian if the mediator determines his/her presence is not helpful to the process.

(b) Attorneys. Attorneys representing parties may physically attend and participate in mediation. Alternatively, lawyers may participate indirectly by advising clients before, during and after mediation sessions, including monitoring compliance with any agreements reached.

(c) Others. In the mediator's discretion, others whose presence and participation is deemed helpful to resolving the dispute or to addressing any issues underlying it, may be permitted to attend and participate unless and until the mediator determines their presence is no longer helpful. Mediators may exclude anyone wishing to attend and participate, but whose presence and participation the mediator deems would likely be disruptive or counterproductive.

(3) **Exceptions to Physical Attendance.** A party or other person may be excused from physically attending the mediation and allowed to participate by telephone or through any attorney:

(a) by agreement of the complainant(s) and defendant(s) and the mediator, or

(b) by order of the court.

(4) **Scheduling.** The complainant(s) and defendant(s) and any parent, guardian or attorney who will be attending the mediation will:

(a) Make a good faith effort to cooperate with the mediator or Community Mediation Center to schedule the mediation at a time that is convenient for all participants,

(b) Promptly notify the mediator or Community Mediation Center to which the case has been referred of any significant scheduling concerns which may impact that person's ability to be present for mediation, and

(c) Notify the mediator or the Center about any other concerns that may impact a party or person's ability to attend and participate meaningfully, *e.g.*, the need for wheelchair access or for a deaf or foreign language interpreter.

B. FINALIZING AGREEMENT.

(1) **Written agreement.** If an agreement is reached at the mediation, the complainant and defendant are to insure that the terms are reduced to writing and signed. Agreements that are not reduced to writing and signed will not be deemed enforceable. If no agreement is reached in mediation, an impasse will be declared and the matter will be referred back to the court or its designee.

(2) **Dismissal Fee.** To be dismissed by the District Attorney, the defendant, unless the parties agree to some other apportionment, shall pay a dismissal fee as set by G.S. 7A-38.7 and G.S. 7A-38.3D(m) to the Clerk of Superior Court in the county where the case was filed and supply proof of payment to the Community Mediation Center administering the program for the judicial district. Payment is to be made in accordance with the terms of the parties' agreement. The Center shall, thereafter, provide the District Attorney with a dismissal form, which may be an approved AOC form. In his or her discretion, a judge or his/her designee may waive the dismissal fee pursuant to G.S. 7A-38.3D(m) when the defendant is indigent, unemployed, a full-time college or high school student, is a recipient of public assistance or for any other appropriate reason. The mediator shall advise the parties where and how to pay the fee.

RULE 6. AUTHORITY AND DUTIES OF THE MEDIATOR.

A. AUTHORITY OF THE MEDIATOR.

(1) **Control of Mediation.** The mediator shall at all times be in control of the mediation process and the procedures to be followed.

(2) **Private Consultation.** The mediator may communicate privately with any participant or counsel prior to and during the mediation. The fact that previous communications have occurred with a participant shall be disclosed to all other participants at the beginning of the mediation.

(3) **Inclusion and Exclusion of Participants at Mediation.** In the mediator's discretion, he or she may encourage or allow persons other than the parties or their attorneys, to attend and participate in mediation, provided that the mediator has determined the presence of such persons to be helpful to resolving the dispute or to addressing issues underlying it. Mediators may also exclude persons other that the parties and their attorneys whose presence the mediator deems would likely be or which has, in fact, been counter-productive.

(4) **Scheduling the Mediation.** The mediator or Community Mediation Center staff involved in scheduling shall make a good faith effort to schedule the mediation at a time that is convenient for the parties and any parent(s), guardian(s) or attorney(s) who will be attending. In the absence of agreement, the mediator or Community Mediation Center staff shall select the date for the mediation and notify those who will be participating. Parties are to cooperate with the mediator in scheduling the mediation, including providing the information required by Rule 5.A.(4).

B. DUTIES OF THE MEDIATOR.

(1) The mediator shall define and describe the following at the beginning of the mediation:

(a) The process of mediation;

(b) That the mediation is not a trial and the mediator is not a judge, attorney or therapist;

(c) That the mediator is present only to assist the parties in reaching their own agreement;

(d) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(e) Whether and under what conditions communications with the mediator will be held in confidence during the mediation;

(f) The inadmissibility of conduct and statements as provided in G.S. 7A-38.3D(i);

(g) The duties and responsibilities of the mediator and the participants;

(h) That any agreement reached will be by mutual consent;

(i) That if the parties are unable to agree and the mediator declares an impasse that the parties and the case will return to court; and

(j) That if an agreement is reached in mediation and the parties agree to request a dismissal of the charges pending in the case, the defendant, unless the parties agree to some other apportionment, shall pay a dismissal fee in accordance with G.S. 7A-38.7 and G.S. 7A-38.3D(m), unless a judge in his or her discretion has waived the fee for good cause. Payment of the dismissal fee shall be made to the Clerk of Superior Court in the county where the case was filed and the Community Mediation Center must provide the District Attorney with a dismissal form and proof that the defendant has paid the dispute resolution fee before the charges can be dismissed.

(2) **Disclosure.** Consistent with the Standards of Professional Conduct for Mediators, 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.** Consistent with the Standards of Professional Conduct for Mediators, it is the duty of the mediator to determine in a timely manner that an impasse exists and that the mediation should conclude. To that end, the mediator shall inquire of and consider the desires of the parties to cease or continue the mediation.

(4) Distributing Informational Brochure. The mediator shall distribute to the parties a copy of an informational brochure explaining the mediation process and advising them where they may file a complaint if they are unhappy with their mediator's conduct. The Dispute Resolution Commission shall develop, print, and distribute the informational brochure to participating community mediation centers and each center may add an insert to the brochure which more fully explains the operations of that center's program.

(5) Reporting results of mediation. The mediator or Community Mediation Center shall report the outcome of mediation to the court or its designee in writing on an AOC approved form by the date the case is next calendared. If the criminal court charges are on the court docket the same day as the mediation, the mediator shall inform the attending District Attorney of the outcome of the mediation before close of court on that date unless alternative arrangements are approved by the District Attorney.

(6) Scheduling and holding the mediation. It is the duty of the mediator and Community Mediation Center staff to schedule the mediation and conduct it prior to any deadline set by the court or its designee. Deadlines shall be strictly observed by the mediator and Center staff unless the deadline is extended orally or in writing by a judge or his/her designee.

(7) Distribution of mediator evaluation form. At the mediation, the mediator shall distribute a mediator evaluation form provided by the Dispute Resolution Commission to the parties, one copy per party with additional copies available on request. The mediator shall deliver any completed evaluation forms to the Community Mediation Center with which he or she is affiliated.

RULE 7. MEDIATOR CERTIFICATION AND DECERTIFICATION.

The Dispute Resolution Commission may receive and approve applications for certification of persons to be appointed as district criminal court mediators. For certification, an applicant shall:

A. At the time of application, be affiliated with a Community Mediation Center established pursuant to G.S. 7A-38.5 as

either a volunteer or staff mediator and have received the Center's endorsement that he or she possesses the training, experience, and skills necessary to conduct district court criminal mediations.

B. Have the following training and experience:

(1) Have both:

(a) Attended at least 24 hours of training in a district criminal court mediation training program certified by the Dispute Resolution Commission, and

(b) Have a four-year degree from an accredited college or university; or have four years of post high school education through an accredited college, university or junior college or four years of full-time work experience, or any combination thereof; or have two years experience as a staff or volunteer mediator at a Community Mediation Center, or

(2) Be a Mediated Settlement Conference or Family Financial Settlement mediator certified by the North Carolina Dispute Resolution Commission or be an Advanced Practitioner Member of the Association for Conflict Resolution.

C. Observations and Mediation Experience:

(1) Observe at least two court-referred criminal district court mediations conducted by a mediator certified pursuant to these rules or, for a one year period following the initial adoption of these rules, observe any mediator who is affiliated with a Community Mediation Center established pursuant to G.S. 7A-38.5 and who has mediated at least ten (10) criminal district court cases.

(2) Co-mediate or mediate at least three court-referred district criminal court mediations under the observation of staff affiliated with a Community Mediation Center whose criminal district court mediation training program has been certified by the Dispute Resolution Commission pursuant to Rule 9 of these Rules.

D. Demonstrate familiarity with the statutes, rules, and practice governing district criminal court mediations in North Carolina.

E. Be of good moral character, submit to a criminal background check within one year prior to applying for certification

under these Rules, 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 district criminal court mediators shall report to the Commission any criminal convictions, disbarments, or other disciplinary complaints and actions or any judicial sanctions as soon as the applicant or mediator has notice of them.

F. Commit to serving the district court as a mediator under the direct supervision of a Community Mediation Center authorized under §7A-38.5 for a period of at least two years.

G. Comply with the requirements of the Dispute Resolution Commission for continuing mediator education or training.

H. Submit proof of qualifications set out in this Section on a form provided by the Dispute Resolution Commission.

Community Mediation Centers participating in the program shall assist the Dispute Resolution Commission in implementing the certification process established by this Rule by:

(1) Documenting sections A-F for the mediator and Commission;

(2) Reviewing its documentation with the mediator in a face-to-face meeting scheduled no less than 30 days from the mediator's request to apply for certification;

(3) Making a written recommendation on the applicant's certification to the Dispute Resolution Commission; and

(4) Forwarding the documentation for sections A-F and its recommendation to the Dispute Resolution Commission along with the mediator's completed certification application form.

Through December 31, 2008, an applicant may be certified pursuant to these rules without compliance with Rules 7 B,C,D,E,F,G or H above provided that he or she is certified by and affiliated with a Community Mediation Center established pursuant to G.A. 7A-38.5 at the time of his/her application and is endorsed by the Center as possessing the training, experience and skills necessary to conduct district criminal court mediations. However, such certification shall be for the period of one year only and it is expected that during the course of that year that the mediator will work toward complying with all the requirements established by Rule 7.

Certification may be revoked or not renewed at any time it is shown to the satisfaction of the 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 renewal shall be required every two years.

A Community Mediation Center may withdraw it's affiliation with a mediator certified pursuant to these rules. Such disaffiliation does not revoke said mediator's certification. A mediator's certification is portable and a mediator may agree to be affiliated with a different Center. However to mediate under this program in the district criminal court, a mediator must be affiliated with the Community Mediation Center providing services in that court. A mediator may be affiliated with more than one center and provide services in the county served by those centers.

RULE 8. CERTIFICATION OF MEDIATION TRAINING PROGRAMS.

A. Certified training programs for mediators seeking certification as District Criminal Court Mediators shall consist of a minimum of 24 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 district court criminal mediation;

(3) Agreement writing;

(4) Communication and information gathering;

(5) Standards of conduct for mediators including, but not limited to the Standards of Professional Conduct for Mediators adopted by the Supreme Court;

(6) Statutes, rules, forms and practice governing mediations in North Carolina's district criminal courts;

(7) Demonstrations of district criminal court mediations;

(8) Simulations of district criminal court mediations, involving student participation as mediator, victim, offender and attorneys which shall be supervised, observed and evaluated by program faculty;

(9) Courtroom protocol;

(10) Domestic violence awareness, and

(11) Satisfactory completion of an exam by all students testing their familiarity with the statutes, rules and practice governing district court mediations in North Carolina.

B. A training program must be certified by the Dispute Resolution Commission before attendance at such program may be deemed as satisfying Rule 8. Training programs attended prior to the promulgation of these rules or attended in other states may be approved by the Dispute Resolution Commission if they are in substantial compliance with the standards set forth in this rule.

C. Renewal of certification shall be required every two years.

RULE 9. LOCAL RULE MAKING. The Chief District Court Judge of any district conducting mediations under these Rules is authorized to publish local rules, not inconsistent with these rules and G.S. 7A-38.3D, implementing mediation in that district.

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA BOARD OF LAW EXAMINERS

The following amendments to the Rules and Regulations of the North Carolina Board of Law Examiners were duly adopted by the North Carolina Board of Law Examiners on October 17, 2007, and approved by the Council of the North Carolina State Bar at its quarterly meeting on October 19, 2007.

BE IT RESOLVED by the North Carolina Board of Law Examiners that the Rules and Regulations of the North Carolina Board of Law Examiners, particularly Rule .1001 and Rule .1002 of the Rules Governing Admission to the Practice of Law in the State of North Carolina, be amended as follows (additions are underlined, deletions are interlined):

SECTION .1000—REVIEW OF WRITTEN BAR EXAMINATION

.1001 REVIEW

An unsuccessful applicant to the bar examination may examine the test booklets containing the applicant's essay examination along with ~~the model answers~~ such answers to the examination as the Board determines will be of assistance to the applicants and the essay examination in the Board's offices.

.1002 FEES

The Board will furnish an unsuccessful applicant a copy of the applicant's essay examination at a cost to be determined by the Secretary, not to exceed $20.00. No copies of ~~any model answers~~ the Board's grading guide will be made or furnished to the applicant.

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 Board of Law Examiners were duly approved by the Council of the North Carolina State Bar at a regularly called meeting on October 19, 2007.

Given over my hand and the Seal of the North Carolina State Bar, this the 7th day of November, 2007.

s/L. Thomas Lunsford II
L. Thomas Lunsford II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina Board of Law Examiners as approved 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 8th day of November, 2007.

s/Sarah Parker
Sarah Parker, Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations of the North Carolina Board of Law Examiners be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of November, 2007.

s/Hudson, J.
For the Court

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WORD AND PHRASE INDEX

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APPEAL AND ERROR—Continued

conviction for making a false statement was reversed; and (2) in regard to defendant's ineffective assistance of counsel claim, it was premised on his trial counsel's failure to renew his motion to dismiss the charges for insufficiency of the evidence, and the Court of Appeals considered the merits of defendant's sufficiency argument. **State v. Denny, 662.**

Appealability—partial summary judgment denied—possible inconsistent verdicts—The trial court's interlocutory order denying summary judgment for a limited liability company (Profile) was reviewable on appeal where Profile was managing its subsidiary LLC (Terra-Mulch) when a Terra-Mulch employee was injured. Denying summary judgment for Profile while granting summary judgment for Terra-Mulch created a risk of inconsistent verdicts on the same facts and issues. **Hamby v. Profile Prods., L.L.C., 630.**

Appellate rules violation—dismissal not required—Any interpretation of prior cases to require dismissal in every case in which there is a violation of the Appellate Rules is disavowed. Language that an appeal is "subject to" dismissal for rules violations means that dismissal is a possible sanction, not that an appeal shall be dismissed for any violation. **State v. Hart, 309.**

Assignment of error—different legal basis in argument—overbroad language—An assignment of error that a police officer's testimony constituted an opinion on an ultimate issue did not provide a basis for a different argument, that the testimony violated Rule 701 (personal knowledge of the witness). The remainder of the assignment of error (that the testimony otherwise violated the Rules of Evidence and denied defendant a fair trial) was too broad and thus ineffectual. **State v. Hart, 309.**

Church finances—First Amendment rights—immediate appeal—First Amendment rights are substantial and are implicated when a party asserts that a civil court action cannot proceed without impermissibly entangling the court in ecclesiastical matters. The defendant here had an immediate right of appeal from the denial of his motion to dismiss claims involving the conversion of church funds and the breach of fiduciary duty by a pastor, church secretary, and the chairman of the church's Board of Trustees. **Harris v. Matthews, 265.**

From Court of Appeals to Supreme Court—dissent—commingled issues—Arguments concerning statutory construction and the constitutionality of applying the crime against nature statute to the juveniles without an age requirement were so intertwined by the defendant and the Court of Appeals dissent that both were heard, even though it was not clear that the constitutionality argument was a basis for the dissent. There is no prejudice to the State, which argued the issue below and addressed it in the alternative in its brief. **In re R.L.C., 287.**

From Court of Appeals to Supreme Court—dissent—issues properly before the Court—In determining the issues properly before the Supreme Court in an appeal based upon a dissent, the Supreme Court considers whether the issue was raised at trial and in the Court of Appeals, whether the error was properly assigned in the record on appeal, and whether the issue was a point of dispute set out in the dissenting opinion of the Court of Appeals. Moreover, the issue must be stated in the notice of appeal and properly argued and presented in the appellant's new brief. The Supreme Court here declined to address arguments concerning equal protection or the facial validity of the North Carolina crime against nature statute. **In re R.L.C., 287.**

APPEAL AND ERROR—Continued

Notice of appeal—filing notice with clerk of court—waiver of service of notice—A decision by the Court of Appeals that it did not have jurisdiction to hear respondent board of adjustment's purported appeal from a superior court order is reversed for the reasons stated in the dissenting opinion that respondent's notice of appeal was sufficient to show that the appeal was from the superior court order rather than from its own order, a statement in the record was sufficient to show that the notice of appeal was filed with the clerk of superior court where petitioner stipulated to the record on appeal and thus stipulated to this statement, and petitioner waived respondent's failure to serve the notice of appeal on it by stipulating to the record on appeal, failing to raise any issue as to service, and filing a brief in the Court of Appeals addressing the merits of the appeal. **Blevins v. Town of W. Jefferson, 578.**

Preservation of issues—constitutional question—failure to raise in trial court—The constitutional issue addressed in the majority opinion of the Court of Appeals was not raised and preserved in the trial court and, therefore, was not properly before the Court of Appeals. **State v. Desperados, Inc., 682.**

Preservation of issues—failure to argue—The remaining assignments of error presented by defendant and not set out or argued in his brief are deemed abandoned under N.C. R. App. P. 28(b)(6). **State v. Goss, 610.**

Preservation of issues—failure to argue—failure to cite authority—Defendant's remaining assignments of error that he provided no argument or supporting authority for in his brief are deemed abandoned and are therefore dismissed under N.C. R. App. P. 28(b)(6). **State v. Cummings, 438.**

Preservation of issues—incriminating statement—failure to renew objection at trial—failure to allege plain error—review under Appellate Rule 2—Although defendant failed to preserve the admissibility of his in-custody incriminating statement for review when he failed to renew his objection at trial following the denial of his pretrial motion *in limine* and failed to argue plain error because the amendment to N.C.G.S. § 8C-1, Rule 103(a)(2) is unconstitutional and Rule of Appellate Procedure 10(b)(1) thus applied, the Supreme Court exercised its discretion under Rule of Appellate Procedure 2 to review his contention where the amendment to Rule 103(a)(2) was presumed constitutional at the time of defendant's trial and defendant may have relied to his detriment on that law. **State v. Oglesby, 550.**

Rule 2—may be applied by Court of Appeals—caution required—*Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, does not mean that the Court of Appeals cannot apply Appellate Rule 2 to suspend or vary the requirements or provisions of the rules to prevent manifest injustice or to expedite a decision. However, Rule 2 must be applied cautiously: fundamental fairness and the predictable operation of the courts for which the Rules of Appellate Procedure were designed depend upon the consistent exercise of that authority. **State v. Hart, 309.**

Supreme Court jurisdiction—review of Court of Appeals MAR decision—The Supreme Court had jurisdiction to review the decision of the Court of Appeals regarding defendant's motion for appropriate relief (MAR), because: (1) while N.C.G.S. §§ 7A-28(a) and 7A-31 ordinarily preclude the Supreme Court's review of Court of Appeals decisions on MARs in noncapital cases, a statute cannot restrict the Supreme Court's constitutional authority under Article IV, Section

JUDGES—Continued

Code of Judicial Conduct for participating in an *ex parte* conference with a defendant's attorney and entering an order as a result thereof, without notice to plaintiff and without taking evidence, striking an order entered by another district court judge which had found defendant in contempt for failure to comply with child support orders and had ordered his arrest. **In re Royster, 560.**

Removal from office—guilty plea to crime—A district court judge who pled guilty to one count of failure to file a federal income tax return was removed from office for conduct in violation of Canons I, 2A and 2B of the North Carolina Code of Judicial Conduct, conviction of a crime involving moral turpitude, and conduct prejudicial to the administration of justice that brings the judicial office into disrepute. **In re Inquiry of Balance, 338.**

JURISDICTION

Personal—out-of-state mortgage trust—insufficient activity in North Carolina—Personal jurisdiction was not invoked under N.C.G.S. § 1-75.4(1) (activity within North Carolina) against a New York trust which holds mortgage loans. This trust (the 1997-1 Trust) was created after the origination of the loan, only about 3% of its loans relate to North Carolina indebtedness, and the loan payments are received by a separate servicer, not the trust. **Skinner v. Preferred Credit, 114.**

Personal—out-of-state mortgage trust—insufficient minimum contacts—A New York trust which held a loan secured by a deed of trust on North Carolina property had tenuous connections to North Carolina and there was no personal jurisdiction under N.C.G.S. § 1-75.4(6) (property within North Carolina). The trust did not participate in the transaction giving rise to the deed of trust and does not directly collect payments from North Carolina residents; even assuming that the long-arm statute authorizes jurisdiction, there are insufficient minimum contacts to satisfy due process. **Skinner v. Preferred Credit, 114.**

Personal—out-of-state mortgage trust—things of value shipped from North Carolina—insufficient evidence—Transactions related to a mortgage loan in North Carolina which was later sold to a New York trust did not fall within N.C.G.S. § 1-75.4(5) (jurisdiction over things of value shipped from North Carolina) where the loan origination occurred before creation of the trust and the only things of value shipped from the state are the loan payments. All aspects of payment are handled by a separate servicer; there is no direct contact between plaintiffs and the trust. **Skinner v. Preferred Credit, 114.**

Standing—individual taxpayers—diverting tax levies appropriated for one purpose but disbursed for another—The trial court erred by concluding that individual taxpayers did not have standing to seek relief when they allege government officials violated statutory and constitutional provisions by diverting tax levies appropriated for one purpose but disbursed for another (plaintiffs alleged the transfers of $80,000,000 by the Governor and $125,000,000 by the General Assembly from the Trust Fund to the General Fund were unlawful diversions of Trust Fund assets since disbursement of those funds is not allowed for any projects other than those specified by statute), and a declaratory judgment was the proper remedy for such a claim. **Goldston v. State, 26.**

JURY

Capital selection—challenge for cause—automatic vote for death penalty—The trial court did not abuse its discretion in a first-degree murder case by denying defendant's challenge for cause of a prospective juror who would allegedly vote automatically for the death penalty in every first-degree murder case because the prospective juror who at first appeared confused and a strong proponent of the death penalty in premeditated murder cases later indicated to counsel that he would follow the law and that he would return a recommendation of life imprisonment without parole if the State failed to meet its burdens of proof and persuasion during the penalty proceeding. **State v. Cummings, 438.**

Capital selection—challenge for cause—police lieutenant—The trial court did not abuse its discretion in a first-degree murder case by denying defendant's challenge for cause of a police lieutenant during the jury selection process, because: (1) the record fairly supported the conclusion that the prospective juror could perform his duties as a juror consistent with the trial court's instructions when considering mitigating evidence; (2) the prospective juror indicated numerous times that he would follow the law as instructed by the trial judge, and it is reasonable to believe that he understood that law including the presumption of innocence; (3) neither the qualifications nor the grounds for challenging a juror for cause lead to a recognition of any type of rule prohibiting members of the law enforcement community from entering the jury pool; and (4) exchanges between defense counsel and the prospective juror about his law enforcement employment and how that might influence his determinations of credibility demonstrate that he would view each witness on the facts of the case and not automatically give the prosecution's law enforcement witnesses more weight. **State v. Cummings, 438.**

Capital selection—reopening of voir dire—incorrect statements—The trial court did not abuse its discretion in a capital first-degree murder case by reopening the voir dire of two prospective jurors based upon the trial court's finding that both had provided incorrect statements in response to the State's initial voir dire questioning when it was discovered before the jury was impaneled that two jurors had relatives who had been defendants in criminal cases, although neither had indicated this when asked initially, because: (1) the record reveals that the actual question asked by the State was an inquiry into any close friends or relatives; (2) defendant cites no case, statute, or any other authority that suggests the term "relative" in its well-accepted usage does not apply to an individual's biological father even if the child had been adopted; and (3) it would have also been within the trial court's discretion to interpret the State's question as an inquiry into anyone connected to the prospective jurors "by blood or affinity," so that "relatives" would include "distant" cousins. **State v. Goss, 610.**

Capital selection—voir dire—costs of life imprisonment versus the costs of death sentence—The trial court did not abuse its discretion in a first-degree murder case by prohibiting defense counsel from questioning prospective jurors on whether their decisions would be influenced by their ideas about the costs of life imprisonment versus the costs of a death sentence in light of *State v. Elliott*, 360 N.C. 400 (2006). **State v. Cummings, 438.**

Capital selection—voir dire—stake out questions—The trial court did not abuse its discretion in a first-degree murder case by sustaining prosecution objections to alleged stake out questions asked by defense counsel during voir dire including asking prospective jurors what they might view as harm experi-

SENTENCING—Continued

tences imposed and suspended in 11 March 2004 trial court judgments based on *Blakely v. Washington*, 542 U.S. 296 (2004), when appealing from the 9 March 2005 trial court order revoking his probation and activating his sentences, because: (1) such a challenge is an impermissible collateral attack on the sentences imposed pursuant to his 2004 guilty plea; and (2) *Blakely* is inapplicable to this case when the United States Supreme Court decided *Blakely* on 24 June 2004, and defendant's aggravated sentences entered on 11 March 2004 were not under direct appeal at the time of *Blakely* nor are they now under direct review. **State v. Holmes, 410.**

***Blakely* error—harmlessness**—A *Blakely* error (the aggravating factor of commission of the offense while on pretrial release was found by the judge, not the jury) was harmless beyond a reasonable doubt where there was uncontroverted and overwhelming evidence of the factor. **State v. Blackwell, 41.**

***Blakely* error—harmlessness**—Assuming that the trial court committed *Blakely* error in finding an aggravating factor and sentencing defendant in the aggravated range, any such error was harmless beyond a reasonable doubt. **State v. Cobb, 414.**

***Blakely* error—not harmless**—The Supreme Court exercised its discretionary powers under N.C. R. App. P. 2 and determined that the trial court's *Blakely* error of sentencing defendant in the aggravated range for his attempted robbery conviction, based on the trial court's finding of the statutory aggravating factor that defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy, was not harmless beyond a reasonable doubt, because evidence was presented that only one other person joined with defendant in committing the offense. The case is remanded to the Court of Appeals for further remand to the trial court so that defendant may receive a new sentencing hearing for the attempted robbery conviction, with instructions to submit any aggravating factors to a jury. **State v. Lasiter, 299.**

***Blakely* error—not structural**—The North Carolina Supreme Court relied on *State v. Blackwell*, 361 N.C. 41, in rejecting arguments that *Blakely* error was structural and violated of the North Carolina Constitution. **State v. Hurt, 325.**

***Blakely* error—remand—harmless error review**—The Court of Appeals finding of *Blakely* error in aggravated sentences imposed for armed robberies, which it treated as structural error, is vacated and the cases are remanded to the Court of Appeals for harmless error review pursuant to *State v. Blackwell*, 361 N.C. 41 (2006). **State v. Oglesby, 550.**

***Blakely* error—remand—harmless error review**—This case is remanded to the Court of Appeals for consideration of the issue as to whether *Blakely* error in sentencing was harmless beyond a reasonable doubt. **State v. Jacobs, 565.**

Capital—defendant's argument—denial of exhibit about presumption of life imprisonment—The trial court did not abuse its discretion in a capital sentencing proceeding by refusing to allow defendant to present to the jury during closing argument an exhibit containing the statement that life imprisonment is the presumptive sentence for first-degree murder unless and until the prosecution proves otherwise, because defendant's admission that his assertion that life was the presumptive sentence was nothing more than defense counsel's con-

SENTENCING—Continued

SENTENCING—Continued

through the N.C.G.S. § 15A-2000(e)(5) robbery with a dangerous weapon aggravating circumstance; and (2) considering the statement in context, the record indicated that the prosecution was alluding to the fact that there were sixteen jurors in the jury box sitting on their wallets right now, and not that the jury should find sixteen pecuniary gain aggravating circumstances. **State v. Cummings, 438.**

Capital—prosecutor's argument—letter shown in photograph—The trial court did not abuse its discretion in a capital sentencing proceeding by failing to intervene ex mero motu in the prosecution's closing argument when the prosecution read a letter from the victim's son that was shown in a crime scene photograph of the victim's living room but the actual letter was not in evidence, because: (1) considering the entirety of the record, the reading of the letter by the prosecution without defendant's objection was not so grossly improper that it rendered the trial and sentence fundamentally unfair; and (2) the trial court admonished the jurors to rely solely upon their recollection of the evidence in their deliberations and stated that final arguments are not evidence. **State v. Cummings, 438.**

Capital—prosecutor's argument—no mercy—intervention ex mero motu not required—There was no plain error in a capital sentencing proceeding where the court did not intervene ex mero motu when the prosecutor argued to the jurors that their decision should not be motivated by mercy but by the evidence and the law. **State v. Polke, 65.**

Concurrent versus consecutive—erroneous plea agreement—attempted armed robbery—armed robbery—The Court of Appeals erred by failing to vacate the superior court's 10 July 2003 order allowing defendant's eighteen-year sentence for attempted robbery with a dangerous weapon and fourteen-year sentence for robbery with a dangerous weapon to run concurrently, and by failing to remand the case for the proceedings described in *State v. Wall*, 348 N.C. 671 (1998), because: (1) at the time defendant entered his guilty plea on the charge of armed robbery, N.C.G.S. § 14-87(d) required that a term of imprisonment for armed robbery run consecutively with and commence at the expiration of any other sentence being served by the offender; (2) the imposition of a concurrent sentence for this offense was contrary to law since it provided for specific performance of the illegal 1992 plea arrangement; and (3) according to *Wall*, defendant can either withdraw his guilty plea and proceed to trial on the criminal charges, or he may withdraw his plea and attempt to negotiate another plea agreement that does not violate former N.C.G.S. § 14-87(d). **State v. Ellis, 200.**

Death penalty—proportionality—The trial court did not err in a first-degree murder case by sentencing defendant to the death penalty, because: (1) defendant was found guilty of first-degree murder on the basis of malice, premeditation and deliberation, and under the felony murder rule; (2) there was substantial evidence of premeditation and deliberation including that defendant stabbed the victim, then physically restrained him from using his telephone to call for help before watching him bleed to death, at some point in the struggle defendant also used the pocketknife to slash the victim's right arm leaving a significant wound, and the folding pocketknife used to murder the victim had to be pulled open before it could be used; (3) the jury found the existence of the (e)(3) aggravating circumstance based upon the defendant's prior killing, and the jury's finding of

SENTENCING—Continued

SENTENCING—Continued

Failure to submit aggravating circumstance—no structural error—There was no structural error in a capital sentencing proceeding in the failure to submit the aggravating circumstance that defendant was engaged in the commission or attempt to commit a homicide (N.C.G.S. § 15A-2000(e)(5)). The error cited by defendant is not similar in type or degree to the group of errors that the United States Supreme Court has determined to be structural. **State v. Polke, 65.**

Jury selection—question concerning relative cost of punishments—The trial court did not abuse its discretion at a capital sentencing proceeding by denying defendant's pretrial motion to ask prospective jurors whether they had formed a belief about the relative cost of life imprisonment versus the cost of execution. Defendant was allowed to ask this question after renewing the motion during jury selection. **State v. Polke, 65.**

Mitigating circumstances—impaired capacity—The trial court did not err in a capital first-degree murder case by failing to submit the N.C.G.S. § 15A-2000(f)(6) mitigating circumstance that the murder was committed while the capacity of defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired, because: (1) there is insufficient evidence in the record that defendant suffered from intermittent explosive disorder; and (2) the same evidence of deliberation which makes submission of the (f)(2) mitigator improper also makes submission of the (f)(6) mitigator improper when defendant's initial lies to police about his involvement in the murder and his washing and disposal of the murder weapon tended to show that defendant fully appreciated the criminality of his conduct. **State v. Badgett, 234.**

Mitigating circumstances—mental or emotional disturbance—The trial court did not err in a capital first-degree murder case by failing to submit the N.C.G.S. § 15A-2000(f)(2) mitigating circumstance that the murder was committed while defendant was under the influence of mental or emotional disturbance, because: (1) the testimony supporting defendant's claim that he suffered from intermittent explosive disorder was inadequate and highly controverted at best; (2) the trial court's refusal to admit the (f)(2) mitigating circumstance is appropriate when the events before, during, and after the killing suggest deliberation, and not the frenzied behavior of an emotionally disturbed person; (3) nothing tantamount to substantial evidence of brain damage was introduced into evidence at defendant's trial, and to the contrary, the evidence introduced revealed the plain inability of defendant to control his temper when the mentally disabled victim pointed at defendant and yelled; and (4) an inability to control one's temper is neither mental nor emotional disturbance as contemplated by the (f)(2) mitigator. **State v. Badgett, 234.**

Right to jury trial—aggravating factor found by court—admission by defendant—Defendant's Sixth Amendment right to a jury trial was not violated because his probationary status, which was used to increase his sentences, was found by the trial court instead of by the jury where defendant voluntarily declared in open court during his presentencing statement that he "was on . . . probabtion" at the time of the offenses since this statement constituted an admission of the necessary facts relied on by the trial court to increase defendant's sentences. **State v. Cupid, 417.**

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