

Trial Judge Did Not Err in Refusing to Allow Defense Counsel During Jury Argument in Capital Sentencing Hearing to Present Exhibit Containing Statement That Life Imprisonment Is Presumptive Sentence for First-Degree Murder

State v. Cummings, 361 N.C. 438, 648 S.E.2d 788 (24 August 2007).

The defendant was convicted of first-degree murder and sentenced to death. The court ruled that the trial judge did not err in refusing to allow defense counsel during jury argument in the capital sentencing hearing to present an exhibit containing a statement that life imprisonment is the presumptive sentence for first-degree murder unless and until the prosecution proves otherwise.

Sentencing – Capital -- Prosecutor’s Argument -- Ensuring Defendant Will Not Walk Out Again

State v. Smith, 359 NC 199 (2005)

There was no plain error in a capital sentencing proceeding where the prosecutor argued that the death penalty was the only way to ensure defendant would not “walk out again.” The prosecutor did not specifically mention defendant being paroled or leaving prison; the jury could not have believed that defendant might one day leave prison after hearing both closing arguments in their entirety; and, if the jury followed the court’s instructions as presumed, the only possible sentences were death or life without parole.

Defense Counsel's Strategic Decision to Concede to Jury, Without Defendant's Explicit Consent, Defendant's Guilt of First-Degree Murder at Guilt/Innocence Phase of Capital Trial and to Present Evidence and Argue for Life Imprisonment at Penalty Phase, Was Not Per Se Ineffective Assistance of Counsel

Florida v. Nixon, 543 U.S. 175 (December 13, 2004)

The Court ruled that a defense counsel's strategic decision to concede to the jury, without defendant's explicit consent, defendant's guilt of first-degree murder at the guilt/innocence phase of a capital trial and to present evidence and argue for life imprisonment at the penalty phase, was not per se ineffective assistance of counsel under the Sixth Amendment. Defense counsel had attempted to explain this proposed strategy to the defendant at least three times, but the defendant was generally unresponsive; he never verbally approved or protested the strategy. At trial, defense counsel conceded the defendant's guilt of first-degree murder during the opening statement, cross-examined some of the state's witnesses and objected to the introduction of some of the state's evidence, contested aspects of the jury instructions, and in closing argument conceded the defendant's guilt but reminded the jury of the importance of the penalty phase. At the penalty phase, the defense counsel presented eight witnesses, including two mental health experts, and

argued for life imprisonment. The Court rejected a state appellate court's ruling that defense counsel's concession of guilt was per se ineffective assistance of counsel. The Court instead ruled that the issue of ineffective assistance of counsel must be judged under the standard set out in *Strickland v. Washington*, 466 U.S. 668 (1984). The Court stated that a presumption of prejudice is not appropriate based solely on a defendant's failure to provide express consent to a tenable strategy that counsel has adequately disclosed to and discussed with the defendant. [Author's note: Compare the Court's ruling with the legal standard set out in *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985) (there is ineffective assistance of counsel per se under the Sixth Amendment when defendant's counsel admits the defendant's guilt to the jury without the defendant's consent).]

Sentencing -- Prosecutor's Argument -- Gunshot Sound Effects

State v. Jones, 358 NC 330 (2004)

There was no gross error requiring intervention by the trial court ex mero moto in a capital sentencing proceeding where the prosecutor used sound effects while holding the shotgun used to kill the victims. However, the prosecutor's use of sound effects is not condoned.

(1) Evidence -- Prosecutor's Arguments in Codefendant's Case – Not Admissions of Party Opponent – Not Evidence

(2) Criminal Law – Prosecutor's Argument – Comparison of Defendant to Wild Dogs – Acting in Concert

(3) Criminal Law – Prosecutor's Argument – Jurors Put Self in Victims' Places

(4) Criminal Law – Prosecutor's Argument – Expert's Payment for Testimony – Comments Not Grossly Improper

State v. Roache, 358 NC 243 (2004)

(1) The trial court did not err in a multiple murder prosecution by excluding two of defendant's proffered exhibits consisting of excerpts from the State's arguments to the jury in a codefendant's trial in which the prosecutor avowed that the codefendant committed the murders of two of the victims, because: 1) our Supreme Court has already decided that arguments of counsel are not evidence or admissions of a party opponent, and 2) based on the fact that the district attorney's arguments from the codefendant's trial are inadmissible, defendant's constitutional argument also fails. (2) Although the prosecution in a multiple murder case improperly argued during closing arguments that defendant and his coparticipant packed up like wild dogs that were high on the taste of blood and power over their victims, the trial court did not err by failing to intervene ex mero motu given the overwhelming evidence of defendant's guilt and the fact that the

remarks did not so infect the trial with unfairness that they rendered the conviction fundamentally unfair. (3) The prosecutor's closing argument in a multiple murder prosecution did not improperly invite the jurors to put themselves in the victims' places through several comments during closing arguments, because: 1) the prosecutor merely highlighted the random nature of this killing, which has been held to be permissible; and 2) our Supreme Court has repeatedly found no impropriety when the prosecutor asks the jury to imagine the fear and emotions of a victim. (4) Although the prosecutor's comments during closing arguments about defendant's mental health expert's receipt of \$5,000 in compensation for testifying verge on being unacceptable comments that the expert's opinion testimony was bought or was perjured for compensation, particularly the statement that you can "get whatever you want" for \$5,000, such comments were not so grossly improper as to require intervention by the trial court ex mero motu.

(1) Criminal Law -- Prosecutor's Argument -- He Who Hunts With Pack is Responsible for the Kill

(2) Criminal Law -- Prosecutor's Argument -- If Trying the Devil, You Go to Hell to Get Witnesses

(3) Sentencing -- Prosecutor's Argument -- Calling Each Juror by Name to Impose Death Sentence

State v. Bell, 359 NC 1 (2004)

(1) The trial court did not abuse its discretion in a first-degree murder, first-degree kidnapping, and burning of personal property case by allowing the prosecutor to state during closing arguments that "he who hunts with the pack is responsible for the kill," because the prosecutor was employing the use of an analogy to aid in explaining the complex legal theory of acting in concert. (2) The trial court did not abuse its discretion in a first-degree murder, first-degree kidnapping, and burning of personal property case by allowing the prosecutor to state during closing arguments that "if you are going to try the devil, you have to go to hell to get your witnesses," because: 1) the prosecutor made this statement in response to a direct attack by defendant on the credibility of the State's star witness; 2) the prosecutor defended the witness's credibility to the extent that one can defend the credibility of a participant in the crime; and 3) our courts have previously considered and approved use of the phrase to which defendant objects. (3) The trial court did not abuse its discretion in a first-degree murder case by failing to intervene ex mero motu during the prosecutor's sentencing closing argument calling upon each juror by name to impose a sentence of death, because: 1) the prosecutor did not improperly appeal to the jurors' emotions, and the prosecutor did nothing more than argue to the jurors that the State had proven its case and that the jurors should now impose the death penalty; and 2) defendant has failed to show that the prosecutor's sentencing arguments were grossly improper.

Sentencing -- Capital -- Prosecutor's Argument -- Life Sentence

State v. Morgan, 359 NC 131 (2004)

The prosecutor did not imply in a capital sentencing proceeding that defendant might become eligible for parole if given a life sentence based on his arguments that a life sentence would be a travesty of justice, that defendant could pose a danger to guards, inmates, and others within the prison, and by stating that there's only one way to keep that cold-blooded killer from killing again, because: 1) while defendant correctly points out that evidence regarding parole eligibility is not a relevant consideration in a capital sentencing proceeding, our Supreme Court has held that it is not improper for a prosecutor to urge the jury to recommend death out of concern for the future dangerousness of the defendant; 2) the prosecutor's argument did not improperly interject defendant's prior parole eligibility to suggest that defendant would be eligible for parole if death was not imposed; and 3) the prosecutor never used the word "parole" and never mentioned the possibility that a life sentence could mean that defendant would eventually be released, but instead permissibly argued that defendant might endanger others if the jury did not recommend death.

Criminal Law -- Prosecutor's Argument -- Name-Calling -- Scatological Language

State v. Matthews, 358 NC 102 (2004)

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

Criminal Law -- Prosecutor's Argument -- Capital Sentencing -- Biblical References

State v. Haselden, 357 NC 1 (2003)

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

Criminal Law -- Prosecutor's Argument -- Impact on Murder Victim's Family

State v. Berry, 356 NC 490 (2002)

The trial court in a capital first-degree murder prosecution did not abuse its discretion by overruling defendant's objection to the prosecutor's comments about the 16-year-old victim's age, her expression, the fact that her parents are left with only photographs and memories, and his speculation that the victim may have married and had children. The life the prosecutor posited for the victim was a conventional one.

Criminal Law -- Capital Sentencing -- Prosecutor's Argument -- Defendant's Failure to Show Remorse -- Not Comment on Failure to Testify

State v. Smith, 357 NC 604 (2003)

The trial court did not err in a capital sentencing proceeding by failing to intervene ex mero motu during the State's closing argument allegedly commenting on defendant's failure to testify, because: 1) the prosecutor was commenting on defendant's demeanor, and the jury can consider the demeanor of defendant in making its sentencing decision; and 2) the prosecutor's statements were not of such a character that the jury would take the statements to be a reference to defendant's failure to testify.

(1) Criminal Law -- Prosecutor's Argument -- Comparing Defendant to an Animal-- Acting in Concert Theory

(2) Criminal Law -- Prosecutor's Argument -- Defendant a Devil

State v. Sims, 161 NCA 183 (2003)

(1) Although the trial court erred in a first-degree murder, first-degree kidnapping, and burning personal property case by allowing the State during closing arguments to improperly compare defendant to a hyena and an animal of the African plain and to state that "he who hunts with the pack is responsible for the kill" when the reference went beyond a simple analogy to help explain the theory of acting in concert, the improper statements did not deny defendant due process and entitled him to a new trial because: 1) the State did not misstate the evidence or the law in making its argument; 2) the trial court instructed the jury that closing arguments are not evidence; and 3) there was an abundance of evidence, both physical and testimonial, that defendant was guilty of the crimes charged. (But see *State v. Bell*.) (2) The trial court did not commit prejudicial error in a first-degree murder, first-degree kidnapping, and burning personal property case by allowing the State to contend during closing arguments that "if you are going to try the devil, you have to go to hell to get your witnesses," because: 1) the Court of Appeals and our Supreme Court have already concluded that almost exactly this same statement was not reversible error; and 2) although in some contexts such a

statement by the prosecutor may be inappropriate, defendant is not entitled to a new trial given the overwhelming evidence of defendant's guilt.

(1) Sentencing -- Capital -- Prosecutor's Argument -- Defendant's Possible Future Conduct -- Defendant's Courtroom Demeanor

(2) Sentencing - Capital - Prosecutor's Argument - Jury as Voice of Community - Victim Impact Statements

(3) Sentencing - Capital - Prosecutor's Argument - Remuneration of Defendant's Expert Witnesses

State v. Nicholson, 355 N.C. 1 (2002)

(1) The trial court did not err in a double capital first-degree murder sentencing proceeding by failing to intervene ex mero motu during the State's closing arguments referencing defendant's possible future conduct and defendant's courtroom demeanor, because: 1) the State's comment on the possibility of defendant's future dangerousness to prison staff and inmates was appropriate; 2) the State engaged in permissible argument when it asked the jury to recommend death specifically to deter defendant from committing another murder; and 3) the State acted within the bounds of propriety when it characterized defendant as seeming bored with the courtroom proceedings, and the State's remarks pertaining to defendant's courtroom conduct were permissible since his demeanor was before the jury at all times. (2) The trial court did not err in a double capital first-degree murder sentencing proceeding by failing to intervene ex mero motu during the State's closing arguments referencing the jury as the voice of the community and using victim impact statements, because our Supreme Court has upheld arguments that remind the jury that its verdict will send a message to the community or function as the conscience of the community as long as the State does not encourage the jury to consider public sentiment in its deliberations. (3) The trial court did not err in a double capital first-degree murder sentencing proceeding by allowing the State's closing arguments concerning remuneration of defendant's expert witnesses including the statement that the experts would not get paid unless they said what defendant wanted to hear, because: 1) the argument simply illustrated discrepancies between the diagnoses made by two of defendant's expert witnesses; and 2) the experts' conflicting testimony prompted the State to question their credibility and impartiality.

(1) Sentencing - Capital - Prosecutor's Closing Argument - Invocation of Columbine and Oklahoma City

(2) Sentencing -- Capital -- Prosecutor's Argument -- Defendant Lower Than Dirt on a Snake -- Improper

(3) Sentencing -- Capital -- Prosecutor's Argument -- Improper -- Standards

State v. Jones, 355 N.C. 117 (2002)

(1) The trial court in a capital sentencing proceeding abused its discretion by allowing a closing argument which linked the tragedy of the victim's death to the tragedies of Columbine and Oklahoma City. The argument was improper because it referred to events and circumstances outside the record, urged jurors by implication to compare defendant's acts with the infamous acts of others, and attempted to lead jurors away from the evidence by appealing instead to their sense of passion and prejudice. (2) The prosecutor's closing argument in a capital sentencing proceeding was grossly improper and prejudicial where the prosecutor said of defendant, "You got this quitter, this loser, this worthless piece of - who's mean. . . He's as mean as they come. He's lower than the dirt of a snake's belly." The prosecutor's repated degrading comments about defendant shifted the focus from the jury's opinion of defendant's character and acts to the prosecutor's opinion, offered in the form of conclusory name-calling, and were purposely intended to deflect the jury from its proper role as fact-finder by appealing to passion and prejudice. (3) The trial court abused its discretion by allowing a prosecutor undue latitude in a capital sentencing proceeding. An improper argument that was not prejudicial at the guilt phase may be prejudicial during a capital sentencing proceeding, which by its nature involves evidence of defendant's character. It is appropriate for the closing argument in a capital sentencing proceeding to incorporate reasonable inferences and conclusions about defendant drawn from the evidence presented, but conclusory arguments that are not reasonable or that are premised on matters outside the record (such as the name calling and comparisons to infamous acts in this case) cannot be countenanced. An argument must be devoid of counsel's personal opinion, avoid name calling and references to matters beyond the record, be premised on logical deductions rather than appeals to passion or prejudice, and be constructed from fair inferences drawn only from evidence properly admitted at trial.

(1) Criminal Law -- Prosecutor's Argument -- Jury's Duty to Enforce Law

(2) Criminal Law -- Prosecutor's Argument -- Additional Evidence During Sentencing

(3) Criminal Law -- Prosecutor's Argument -- Manipulation of Mental Tests

(4) Sentencing -- Capital -- Prosecutor's Arguments -- Defendant Wrote His Own Judgment

(5) Criminal Law -- Prosecutor's Argument -- Find Defendant Guilty for Justice of Victims' Families

(6) Sentencing -- Capital --Prosecutor's Argument -- Belittling Defendant's Mitigating Circumstances

State v. Prevatte, 356 NC 178 (2002)

(1) The trial court did not err in a first-degree murder and second-degree kidnapping case by allowing the State to argue during closing arguments that the jury's duty is to enforce the law, because: 1) the State used its argument to clear up any jury confusion about the responsibilities of the police, the prosecutors, the judge, and the jury; and 2) the State sought to ensure the jury understood that its proper role included holding defendant accountable. (2) The trial court did not err in a first-degree murder and second-degree kidnapping case by allowing the State to argue during opening and closing arguments that if the jury found defendant guilty it would learn more during sentencing, because: 1) the State's argument merely reemphasized what the jury already knew, including that additional evidence would be submitted on the question of defendant's sentence if defendant was found guilty; and 2) this procedural issue was fully explained to the jury during jury selection. (3) The trial court did not err in a first-degree murder and second-degree kidnapping case by allowing the State to attempt to impeach the insanity defense with the idea that defendant had taken mental tests several times and knew how to manipulate them, because: 1) it was proper for the State to argue that defendant had some expertise portraying his psychological makeup in a favorable manner considering the broad evidence of defendant's mental problems and the evaluations and treatments he received for these problems; and 2) the trial court instructed the jurors that if their recollection of the evidence differed from that presented by the attorneys in argument, the jurors should disregard what the attorneys said and rely solely on their own independent recollection. (4) The trial court did not err in a capital sentencing proceeding by overruling defendant's objections to the State's sentencing argument that defendant wrote his own judgment, because: 1) the State's argument simply emphasized that defendant chose to take another's life; and 2) nothing in the argument relieves the jury of its responsibility of fairness and impartiality. (5) The trial court did not err in a first-degree murder case by overruling defendant's objections to the State's argument during the guilt-innocence phase that the jury should find defendant guilty in order to do justice for the victim and her family, because: 1) a prosecutor may properly argue that the victim's death represents a unique loss to the victim's family; 2) a prosecutor may argue the jury should do justice for the victim and the victim's family if the argument does not specifically relate to the family's opinion about the defendant or the crime; and 3) the reference to the victim's spirit being at the trial was nothing more than a reference to remaining family members and their need for justice. (6) The trial court did not err in a capital sentencing proceeding by allowing the State to belittle the mitigating circumstances submitted by defendant, because: 1) prosecutors may legitimately attempt to belittle or deprecate the significance of a mitigating circumstance; and 2) the State properly argued that the circumstances should not be an excuse for defendant to avoid the consequences of his actions.

(1) Criminal Law--Prosecutor's Argument--Biblical Arguments

(2) Criminal Law--Prosecutor's Argument--Defendant Failed to Corroborate Defense

(3) Criminal Law--Prosecutor's Argument--Voice and Conscience of Community

(4) Criminal Law--Prosecutor's Argument--Defendant's Failure to Call Wife to Testify

State v. Barden, 356 NC 316 (2002)

(1) The trial court did not err by failing to intervene ex mero motu in a capital first-degree murder prosecution during the prosecutor's biblical arguments, because the prosecutor did not argue that the Bible commanded a guilty verdict, but instead analogized the murder of Abel by Cain to the case at bar to emphasize the importance of the evidence derived from the victim's blood and to point out that the blood "spoke" after the victim had been silenced. **(2)** The trial court did not abuse its discretion in a capital first-degree murder prosecution by failing to sustain defendant's objection to the prosecutor's argument that defendant did not call a dentist to corroborate his defense that the victim caused defendant considerable pain by slapping defendant on the cheek when defendant had a toothache, because the prosecutor may argue that a defendant failed to produce a witness or other testimony to refute the State's case. **(3)** The trial court did not abuse its discretion in a capital first-degree murder sentencing proceeding by allegedly allowing the prosecutor to argue that the jury's accountability to its community should lead it to vote for death, because: 1) the prosecutor properly argued to the jury that it was the voice and moral conscience of the community without suggesting that the jury lend an ear to the community; 2) the prosecutor urged the jury to remember that the final responsibility for the case rested with the jury; and 3) the prosecutor did not contend that the community demanded defendant's execution but instead asked the jury not to do itself and the community the disservice of returning a recommendation of life imprisonment. **(4)** Although the trial court erred in a capital first-degree murder sentencing proceeding by failing to give a detailed peremptory curative instruction after the prosecutor improperly commented about defendant's failure to call his wife to testify, the error was not prejudicial because: 1) although the trial court failed to sustain defendant's initial objection when the prosecutor strayed into improper territory, the trial court sustained defendant's renewed objection as soon as the prosecutor began to develop this theme and the trial court instructed the jury to disregard that argument; 2) evidence of defendant's guilt was strong and included a confession; and 3) defendant failed to establish under N.C.G.S. § 15A-1443 that a different verdict would have resulted if the trial court had sustained defendant's objection more promptly and given a properly detailed curative instruction.

Constitutional Law -- Prosecutor's Argument -- Capital Sentencing -- Defendant's Mannerisms

State v. Davis, 353 N.C. 1 2000

A prosecutor's comments about defendant's mannerisms in the courtroom during a capital sentencing proceeding did not constitute references to the defendant's constitutional right to remain silent.

Criminal Law -- Prosecutor's Argument -- Funeral Services for the Victim -- Victim's Sons Prayed for Forgiveness of Defendant

State v. Hardy, 353 N.C. 122 2000

The trial court did not abuse its discretion by failing to intervene ex mero motu in a capital trial when the prosecutor commented during closing arguments on the funeral services for the victim and described how the victim's sons prayed for forgiveness for defendant, because even though the prosecutor traveled outside the record, taken in context the reference was made to illustrate to the jury the necessity for it to follow the law and to leave forgiveness to a higher power.

Criminal Law -- Prosecutor's Argument -- Capital Sentencing -- Addressing Jurors by Name

State v. Gell, 351 N.C. 192 (2000)

The trial court did not err by allowing the prosecutor, after reminding jurors that they had affirmed that they could follow the law if the State proved what was required to impose the death penalty, to address the jurors by name and inform them that it was time for them to impose the death penalty in this case.

Criminal Law -- Prosecutor's Closing Argument -- Capital Sentencing -- Accomplice's Life Sentence -- Opposition to Catchall Mitigating Circumstance

State v. Roseboro, 351 N.C. 536 (2000)

The prosecutor did not improperly imply in his closing argument in a capital sentencing proceeding that an accomplice's life sentence for the same murder could be treated as a nonstatutory aggravating circumstance because he properly argued in opposition to the "catchall" mitigating circumstance that the jury should not give any mitigating value to the fact that the accomplice was not sentenced to death.

(1) Criminal Law -- Defendant's argument -- capital sentencing -- life without parole

(2) Criminal Law – Prosecutor’s argument – capital sentencing – future dangerousness

State v. Steen, 352 N.C. 227 (2000)

(1) The trial court did not abuse its discretion in a capital sentencing proceeding by not allowing defendant to argue to the jury changes in the parole laws and that there would be no parole in this case. Defendant was, in fact, permitted to argue that defendant should be sentenced to life imprisonment without parole and the jury was clearly made aware that life imprisonment meant life imprisonment without parole. (2) The trial court did not abuse its discretion during a capital sentencing proceeding by allowing the prosecutor to argue future dangerousness; even though parole has been eliminated in capital cases, it is permissible to argue the possibility of future dangerousness to prison staff and inmates.

(1) Criminal Law - Prosecutor's Argument - Capital Sentencing - Biblical References

(2) Criminal Law - Defendant's Argument - Quoting Secular Sources - Relevancy

State v. Braxton, 352 N.C. 158 (2000)

(1) The trial court did not err in a capital sentencing proceeding by failing to intervene ex mero motu during the prosecutor's closing arguments, based on the prosecutor's use of biblical references. Regarding biblical references in closing arguments, we recently stated: We continue to hold that it is not so grossly improper for a prosecutor to argue that the Bible does not prohibit the death penalty as to require intervention ex mero motu by the trial court, but we discourage such arguments. We caution all counsel that they should base their jury arguments solely upon the secular law and the facts. ***See Facts*** (2) The trial court did not err in a capital sentencing proceeding by prohibiting defense counsel from quoting from secular sources during his closing argument, because the trial court afforded counsel ample opportunity to argue using ideas and quotes from secular sources and properly prohibited counsel from arguing the facts of other cases since those facts are not pertinent to any evidence in this case and are, thus, improper for jury consideration.

(1) Sentencing – Capital -- Defendant's Argument -- Someone Else Committed Murder -- Residual Doubt as a Mitigating Circumstance

(2) Sentencing – Capital -- Defendant's Argument -- Someone Else Committed Murder -- Residual Doubt as a Mitigating Circumstance -- State's Failure to Object to Evidence

(3) Criminal Law -- Prosecutor's Argument -- General Deterrence -- Voice and Conscience of Community

(4) Criminal Law -- Prosecutor's Argument -- Victim Was Tortured and Begged for Her Life

(5) Criminal Law -- Prosecutor's Argument -- Home Broken Into by Defendant Could Have Been the Home of the Jurors

State v. Fletcher, 354 N.C. 455 (2001)

(1) The trial court did not abuse its discretion in a capital first-degree murder resentencing proceeding by preventing defendant from presenting evidence and arguing during closing arguments that someone else had committed the murder based on the fact that the evidence was improper as residual doubt, because: 1) although a jury may not be prevented from considering any aspect of defendant's character or record and any of the circumstances of the crime as mitigating evidence, this rule in no way mandates reconsideration by capital juries in the sentencing phase of their residual doubts over a defendant's guilt; 2) defendant was convicted of premeditated and deliberate first-degree murder, and no evidence tended to show that defendant acted in concert with another person; 3) defendant may not argue residual doubt as to a basis underlying the first-degree murder conviction, such as premeditation and deliberation; 4) defendant was not deprived of his right to counsel and the right to present a defense since counsel was only prevented from making improper arguments to the jury; and 5) defendant's contention that residual doubt cannot exist in a case before a resentencing jury is meritless. (2) The trial court did not abuse its discretion in a capital first-degree murder resentencing proceeding by preventing defendant from arguing during closing arguments that someone else had committed the murder even though defendant contends the State did not object when the evidence was presented through defendant's testimony, because: 1) the North Carolina **Supreme Court already held that residual doubt is not relevant to mitigation**, and to allow such argument would have served only to confuse the jury and eviscerate the rule prohibiting presentation of residual doubt as a mitigating circumstance; and 2) any error was harmless beyond a reasonable doubt since defendant was not actually prevented from testifying that someone else had committed the murder. (3) The trial court did not abuse its discretion in a capital first-degree murder resentencing proceeding by overruling defendant's objection to the prosecutor's closing argument allegedly urging the jury to consider the general deterrence value of capital punishment, because the portion of the prosecutor's argument where defendant objected urges the jury to act as the voice and conscience of the community and does not improperly argue general deterrence. (4) The trial court did not abuse its discretion in a capital first-degree murder resentencing proceeding by failing to intervene ex mero motu during the prosecutor's argument stating that the victim was tortured and begged for her life, because the prosecutor did not ask the jurors to imagine themselves or a loved one as a victim, but merely asked them to imagine the fear and pain that the victim must have felt. (5) The trial court did not abuse its discretion in a capital first-degree murder resentencing proceeding by failing to intervene ex mero motu during the prosecutor's argument stating that the home broken into by defendant

could have been the home of the jurors, because the prosecutor did not ask the jurors to put themselves in the victim's place, but reiterated the random arbitrariness of the crime.

(1) Capital Case - Jury Argument - Execution Procedure

(2) Capital Case - Jury Argument - Asking Individual Jurors to Spare Defendant's Life

State v. Holden, 321 N.C. 125 (1987)

(1) The trial court in a capital case properly sustained the State's objection to defense counsel's jury argument describing the execution procedure defendant could encounter if he were sentenced to death since such argument was not based on the evidence presented. (2) The trial court in a capital case properly sustained the State's objection to defense counsel's jury argument asking each juror individually to spare defendant's life.

Capital Sentencing - Limiting Each Counsel to One Argument – Prejudicial Error

State v. Barton, 335 N.C. 696 (1994) 441 S.E.2d 295 Page 699

(1) First-Degree Murder - Mitigating Circumstance of Adaptation to Prison Environment -Prosecutor's Argument

(2) First-Degree Murder - Sentencing - Prosecutor's Argument - Deterrent Value of Death Penalty - No Gross Impropriety

State v. Gibbs, 335 N.C. 1 (1993)

(1) A prosecutor's argument in a first-degree murder sentencing proceeding was not so grossly improper as to require intervention by the court where, in response to the nonstatutory mitigating circumstance that defendant had shown the ability to conform and adapt to the prison environment, the prosecutor told the jurors, "You watched them bring him in, bring him out. He's been under guard." The thrust of the prosecutor's argument against finding the circumstance was directed to recapitulating evidence that defendant's dangerousness in the future could not be predicted; nevertheless, the jury was entitled to consider also that while incarcerated, defendant had little opportunity to do anything other than cooperate with his jailors. (2) There was no gross impropriety in a first-degree murder sentencing proceeding from the prosecutor's argument that the jurors should recommend death because "[i]t's the only way that you can be assured that he won't do it again."

(1) Capital Sentencing Proceeding - Prosecutor's Jury Argument - Imposition of Punishment – No Misstatement of Law

(2) Capital Sentencing Proceeding - Prosecutor's Jury Argument - Jury as Conscience of Community

(3) Capital Sentencing Proceeding - Prosecutor's Jury Argument - Attempt to Discredit Expert Witness

(4) Capital Sentencing Proceeding - Arguments for Death Penalty - No Improper Statements of Personal Opinion

State v. Mccollum, 334 N.C. 208 (1993) 433 S.E.2d 144 Page 210

(1) The prosecutor's closing argument in a capital sentencing proceeding that "you aren't the ones that are imposing the punishment yourself. It's your recommendation that's binding on the court..." did not misstate the law. (2) The prosecutor's jury argument during a capital sentencing proceeding that "if you let this man have his life, you will be doing yourself, your community a disservice" was not improper. (3) Where defendant's expert psychologist testified during a capital sentencing proceeding regarding the dates of her meetings with defendant and the length of his imprisonment, and both parties acknowledged that the murder occurred eight years earlier, the prosecutor's jury argument asking the jury to consider why the expert had waited seven years to examine the defendant was a permissible challenge to the accuracy of the psychologist's conclusions in light of the passage of time between the crime and her first examination of defendant (4) The prosecutor's jury arguments during a capital sentencing proceeding that "if the aggravating circumstances don't outweigh the mitigating circumstances that you may find, then there will never be a case where they do" and that "I won't have the opportunity to again get in front of you and try to convince you that this is probably the most cruel, atrocious and heinous crime you'll ever come in contact with" were not improper statements of the prosecutor's personal opinions but were proper arguments.

Capital Sentencing -- Jury Arguments for Death Penalty -- Signal to Others -- Prevention of Defendant From Killing Again

State v. Lee, 335 N.C. 244 (1994) 439 S.E.2d 547 Page 253

It was not improper for the prosecutor to argue to the jury in a capital sentencing proceeding that a recommendation of death would be a signal to others that capital felons would be dealt with severely and that the only way to prevent defendant from killing again was for the jury to return a recommendation of death.

Death Penalty -- Specific Deterrence Jury Argument

State v. Syriani, 333 N.C. 350 (1993) 428 S.E.2d 118

The trial court did not commit plain error in failing to instruct the jury *ex mero motu* to disregard the prosecutor's argument to the jury that "[t]he only way to insure he won't kill again is the death penalty," since specific deterrence arguments are proper.

(1) Capital Sentencing - Jury Argument - Comments About Mitigating Circumstances

(2) Capital Sentencing - Jury Argument - Drug Use After Murder - Comment On Lack Of Remorse

State v. Robinson, 336 N.C. 78 (1994)

(1) The prosecutor's closing argument in a capital sentencing proceeding that defendant's mitigating circumstances can be pretty much grouped into categories like "Society made me do it" or "My family made me do it" was not a misstatement of the law of mitigation or a statement of facts not in evidence but was a rebuttal of circumstances supported by defendant's evidence that he was abused by his father, that his parents were alcoholics, and that defendant was a member of an inner-city culture where illegal activities are the accepted standard. Furthermore, the prosecutor's characterization of defendant's evidence in mitigation as an "evasion of responsibility" was not an improper depreciation of mitigating evidence. (2) The prosecutor's closing argument in a capital sentencing proceeding that scarcely two hours after the murder, defendant was "coming out of a room with a needle in his arm, dancing to the music" was a proper comment on defendant's lack of remorse, not an improper offer of defendant's drug use as an aggravating circumstance.

Capital Sentencing -- Jury Argument -- No Diminishment of Jury's Responsibility

State v. Ingle, 336 N.C. 617 (1994) ___ S.E.2d ___ Page 622

The prosecutor's jury argument in a capital sentencing proceeding that defendant "authored and wrote his own death warrant. We're simply asking that you affix your signature as jurors and representatives of the citizens of Cleveland County" could not have improperly led the jury to believe that it was not responsible for determining the appropriateness of defendant's sentence. Rather, the argument is more properly viewed as having the opposite effect since a request that jurors affix their signatures to the verdict served to remind them that they would decide the propriety of defendant's punishment for crimes committed by him

Capital Sentencing - Jury Arguments for Death Penalty - Signal to Others - Prevention of Defendant From Killing Again

State v. Lee, 335 N.C. 244 (1994) 439 S.E.2d 547

It was not improper for the prosecutor to argue to the jury in a capital sentencing proceeding that a recommendation of death would be a signal to others that capital felons would be dealt with severely and that the only way to prevent defendant from killing again was for the jury to return a recommendation of death.

First-Degree Murder Sentencing Defendant's Argument Restricted Statutory Aggravating Circumstances Not Presented Not Allowed to Argue

State v. Buckner, 342 N.C. 198 (1995) ___ S.E.2d ___

There was no abuse of discretion in a first-degree murder sentencing hearing in the trial court not allowing defendant to tell the jury in his argument about the statutory aggravating factors that the State did not present. The trial court's decision was based upon its a belief that absence of an aggravating circumstance is not evidence of a mitigating circumstance, a reasonable interpretation of *State v. Brown*, 306 N.C. 151.

(1) First-Degree Murder -- Sentencing Hearing -- Argument of Prosecutor -- Two Murders, One Life Sentence

(2) First-Degree Murder -- Sentencing -- Prosecutor's Argument Concerning Victims

State v. Green, 336 N.C. 142 (1994)

(1) A defendant in a first-degree murder prosecution was not denied a fair capital sentencing hearing where the prosecutor argued to the jury that defendant would "get two for the price of one" if he was given life rather than death for two killings. Although defendant contends that this argument was a misstatement of the law because the prosecutor knew that there was the possibility that the defendant would suffer additional punishment for a second life sentence as a result of having his parole eligibility date extended, the argument appears to have been properly directed to the question of the weight the jury should give the course of conduct aggravating circumstance. (2) There was no error requiring the trial court to intervene ex mero motu in a first-degree murder hearing where the prosecutor argued that the victims, who had been killed at 6:00 p.m. at a dry cleaner's, had been at the same place "you and I might be."

(1) First-Degree Murder - Defense Psychiatrist - Written Report -Required to be Disclosed to Prosecutor

(2) First-Degree Murder - Resentencing - Prosecutor's Argument - Death Sentence Justified by Act of Murder

State v. Bacon, 337 N.C. 66 (1994)

(2) A prosecutor's closing argument in a first-degree murder resentencing was not so grossly improper as to require the trial judge to intervene ex mero motu where the prosecutor asked the jurors "Can you say he doesn't deserve the same thing that he imposed?" and "Do you think that he deserves any less for what he did now that he's had a fair trial than the sentence that he imposed and should he get any less than that?"

(1) First-Degree Murder -- Sentencing -- Prosecutor's Argument -- Defendant's Guilty Plea

(2) First-Degree Murder -- Sentencing -- Prosecutor's Argument -- Sympathy

State v. Jones, 336 N.C. 229 (1994)

(1) There was no error in a first-degree murder sentencing hearing where the prosecutor belittled the nonstatutory mitigating circumstance that the defendant pled guilty without any prior promises or concessions, thus insuring the prompt and certain application of correctional measures. (2) There was no error in a first-degree murder sentencing hearing where the prosecutor argued that the jury should not base its decision on its feelings.

First-Degree Murder -- Sentencing -- Prosecutor's Argument -- Biblical References

State v. Daniels, 337 N.C. 243 (1994) ___ S.E.2d ___

Biblical references in the prosecutor's argument in a first-degree murder sentencing hearing were not so grossly improper as to require intervention of the trial court ex mero motu where the Supreme Court did not perceive prejudice and in light of defense counsel's use of the Bible in his closing argument.

Capital Sentencing -- Jury Argument -- Life Sentence -- Like Slap On Wrist

State v. Harris, 338 N.C. 129 (1994) ___ S.E.2d ___.

It was not error for the prosecutor to argue in a capital sentencing hearing that a life sentence was like a "slap on the wrist" or a "pat on the back,"

(1) Capital Sentencing -- Expert Testimony -- Ability to Adjust to Prison Life Mitigating Evidence

(2) Capital Sentencing -- Jury Argument -- Death Penalty as Deterrence -- Characterizations of Defendant

(3) Capital Sentencing -- Jury Argument -- Mere Sympathy

State v. Rouse, 339 N.C. 59 (1994) ___ S.E.2d ___

(1) The trial court erred by refusing to permit a forensic psychiatrist who had conducted an intense investigation into defendant's mental health to state his opinion in a capital sentencing hearing that defendant would adjust well to prison life since such testimony was proper evidence in mitigation. (2) It was not improper for the prosecutor to urge the jury to recommend the death penalty in order to deter the defendant from killing again, and the prosecutor's statements that "it's not too late in saving some officers from seeing any other person in this condition" and that the crime was not a "one-shot deal" or a "one-shot robbery" were permissible. Furthermore, the prosecutor's statements describing defendant as a "maniac," a "mean, cold-blooded killer" and a "violent murderer" were not grossly improper as they were fair characterizations of defendant based on the brutality of the crime and were aimed at the penalty sought by the State. (3) The prosecutor could properly discourage the jury in a capital sentencing proceeding from having its decision affected by mere sympathy not related to the evidence in the case.

(1) Capital Sentencing Proceeding Jury Arguments About Death Penalty -- No Impropriety

(2) Capital Sentencing Proceeding -- No Right to Opening and Closing Arguments

State v. Jones, 339 N.C. 114 (1994) ___ S.E.2d ___

(1) The prosecutor's jury argument during a capital sentencing proceeding that the only way the jury could prevent the defendant from killing again was to return a recommendation that he be sentenced to death was not improper. Furthermore, the prosecutor's arguments that there had never been a more appropriate case for the death penalty and that the defendant had worked for and earned a sentence of death were reasonable arguments in light of the evidence of defendant's history of violent and deadly crimes and the circumstances of the murder for which he was being tried.

First -- Degree Murder -- Sentencing -- Prosecutor's Argument -- Photographs of Victims

State v. Conaway, 339 N.C. 487 (1995) ___ S.E.2d ___

There was no error in a first-degree murder sentencing hearing where defendant contended that photographs of the victims' partially decomposed bodies were not relevant to sentencing and should not have been shown to the jury during the prosecutor's closing argument, but the record reflects only that pictures of the victims while living were shown to the jury during this argument. Assuming that the photographs of the bodies were shown to the jury during the prosecutor's closing argument, all of the evidence properly admitted during the guilt

determination stage is competent for consideration by the jury at sentencing, and photographs which depict the circumstances of the murder are relevant and admissible at sentencing.

Capital Sentencing - Improper Argument Urging Life Sentence

State v. Robinson, 339 N.C. 263 (1994) ___ S.E.2d ___

The trial court properly sustained the prosecutor's objection to defense counsel's closing argument in a capital sentencing proceeding asking the jurors to disregard the facts, "speak from [their] heart(s)," and find "some reason on earth" to recommend a life sentence rather than the death penalty because this argument improperly urges the jurors to base their decision on reasons not based on the mitigating and aggravating evidence presented at the sentencing proceeding.

Capital Sentencing -- Closing Argument -- Victim Impact Statements

State v. Gregory, 340 N.C. 365 (1995) ___ S.E.2d ___

The prosecutor's use of victim impact statements during his closing argument in a capital sentencing proceeding did not render defendant's trial fundamentally unfair where the statements were made as a part of the prosecutor's argument that the deaths of the victims represented a unique loss to their families

Capital Murder - Prosecutor's Argument - Insanity Defense - Evasion of Responsibility - Return to Community - No Prejudice

State v. Lynch, 340 N.C. 435 (1995) ___ S.E.2d ___

Capital Sentencing Prosecutor's Closing Argument Jurors In Position Of Victims No Due Process Violation No Gross Impropriety

State v. Garner, 340 N.C. 573 (1995) ___ S.E.2d ___

(1) Capital Sentencing Closing Argument Thoughts of Victim During Murder Permissible Inferences From Evidence

(2) Capital Sentencing Closing Argument Comment About Mitigating Circumstances

State v. Frye, 341 N.C. 470 (1995) ___ S.E.2d ___

(2) The prosecutor did not improperly criticize the capital sentencing statute or disparage defendant's right to present evidence in mitigation by arguing that the

State is restricted in the presentation of aggravating circumstances while the defense can "play a numbers game" and "come up with as many [mitigating circumstances] as [it] want[s]"

First-Degree Murder Sentencing Prosecutor's Argument Personal Responsibility

State v. Walls, 342 N.C. 1 (1995) ___ S.E.2d ___

The jury in a first-degree murder sentencing hearing could not have understood the prosecutor's argument that "we're the masters of our destiny and we are responsible for the consequences of our actions" to relieve the jury of the responsibility to recommend a sentence, especially when the argument contained no reference to the defendant's right to appeal the jury's sentencing recommendation.

Capital Sentencing Opening and Closing Arguments

State v. Robinson, 342 N.C. 74 (1995) ___ S.E.2d ___

The trial court did not err by refusing to allow defense counsel to open and close final jury arguments in a capital sentencing proceeding since N.C.G.S. 15A-2000(a)(4) gives a capital defendant the right to make only the final argument in the penalty phase.

First-Degree Murder Sentencing Defendant's Argument Restricted Statutory Aggravating Circumstances Not Presented Not Allowed to Argue

State v. Buckner, 342 N.C. 198 (1995) ___ S.E.2d ___

There was no abuse of discretion in a first-degree murder sentencing hearing in the trial court not allowing defendant to tell the jury in his argument about the statutory aggravating factors that the State did not present. The trial court's decision was based upon its a belief that absence of an aggravating circumstance is not evidence of a mitigating circumstance, a reasonable interpretation of *State v. Brown*, 306 N.C. 151.

(1) Capital Sentencing Prosecutor's Argument Crime Rate Jury's Duty

(2) Capital Sentencing Prosecutor's Argument Death Penalty Deterrence Of Defendant

State v. Jones, 342 N.C. 457 (1996) ___ S.E.2d ___

(1) It was not error for the prosecutor to argue in a capital sentencing proceeding that "you read the newspapers and magazines, and you watch TV, and you say, good gracious, look at this crime rate, it is out of hand, why don't they do

something about it? . . . You are they." (2) It was not error for the prosecutor to argue in a capital sentencing proceeding that the "only way you can guarantee that [defendant] won't get out of prison and kill somebody else is to impose the same punishment on him that he imposed on [the victim]."

(1) Capital Murder Sentencing Closing Arguments Final Argument by Both Defense Attorneys

(2) Capital Murder Defendant's Argument Life Imprisonment if Jury Unable to Agree

State v. Williams, 343 N.C. 345 (1996) 471 S.E.2d 379

(1) The law allows but does not require that more than one defense attorney address the jury during the defendant's final argument and the transcript cannot be interpreted to show that the court refused to permit both of defendant's attorneys to argue after the State where they never specifically requested to do so and never objected. (2) There was no error in a capital murder prosecution in the trial court not allowing defendant to argue to the jury that the court was required by law to impose a sentence of life imprisonment if the jury was unable to unanimously agree on a verdict within a reasonable time.

(1) Capital Sentencing Prosecutor's Argument Mitigating Circumstances Weighed Against a Human Life

(2) Capital Sentencing Prosecutor's Argument Sympathy

(3) Capital Sentencing Prosecutor's Argument Sympathy for Victim

State v. Bishop, 343 N.C. 518 (1996) 472 S.E.2d 842

(1) A prosecutor's argument in a capital sentencing proceeding was not grossly improper and the court did not err by not intervening ex mero motu where the prosecutor argued that the mitigating circumstances should be weighed against "a human life, and the way in which [the victim] died, and the reasons why she died." (2) A prosecutor's argument in a capital sentencing proceeding was not so grossly improper that the court erred by not intervening ex mero motu where defendant contended that the prosecutor improperly advised jurors not to let feelings of mercy or sympathy overwhelm their objectivity, but the meaning was not necessarily to ask the jurors to disregard feelings of mercy or sympathy altogether, but to do so only where they were divorced from the evidence, thereby overwhelming the jurors' objectivity. (3) There was no error in a capital sentencing proceeding where defendant contended that the prosecutor improperly urged the jury to impose the death penalty as a result of the victim's good qualities by attempting to play upon sympathy for the victim and by referring to what she could have accomplished had she lived. The United States Supreme Court has

upheld the use of victim impact statements, stating that victim impact evidence is simply another method of informing the sentencing authority about the specific harm, and in this case the prosecutor's arguments about the victim and what she could have accomplished served to inform the jury about the specific harm caused by the crime.

Capital Sentencing Prosecutors' Arguments One of Worst Murders Prosecuted in Courthouse

State v. Fullwood, 343 N.C. 725 (1996) 472 S.E.2d 883

Capital Sentencing Prosecutor's Argument Belittling Mitigating Circumstance

State v. Heatwole, 344 N.C. 1 (1996) 473 S.E.2d 310

There was no gross impropriety in a first-degree murder sentencing hearing where the prosecutor said, "You may find the defendant suffers from a serious mental illness. So what." Prosecutors may legitimately attempt to belittle or deprecate the significance of a mitigating circumstance; this comment constituted a proper argument on the weight of defendant's evidence.

Capital Sentencing Prosecutor's Argument Killing Worst of the Worst Not an Expression of Opinion

State v. Elliott, 344 N.C. 242 (1996) 475 S.E.2d 202

(1) Capital Sentencing Closing Argument Victim Impact Statement

(2) Closing Argument Victim's Fear And Emotions

State v. Bond, 345 N.C. 1 (1996) 478 S.E.2d 163

(1) The prosecutor's closing argument in a capital sentencing proceeding asking if the jurors could imagine themselves in the position of the murder and kidnapping victims' parents was permissible as a type of victim impact statement; in any event, the argument was not so grossly improper as to require the trial court to intervene ex mero motu. (2) The prosecutor's closing argument asking the jury in a capital sentencing proceeding to try to imagine the fear and emotions of a kidnapping victim while she and her brother, the murder victim, were held hostage for eight hours in a small Volkswagen and her brother was forced by defendant to commit armed robberies was not so grossly improper as to require the trial court to intervene in the absence of an objection by defendant.

(1) Capital Sentencing Prosecutor's Argument Mitigating Circumstances as Excuses

(2) capital sentencing prosecutor's argument rights of defendant versus rights of victim

State v. Geddie, 345 N.C. 73 (1996) 478 S.E.2d 146

(1) There was no gross impropriety requiring intervention ex mero motu in a capital sentencing hearing where defendant contended that the prosecutor misstated the law when he argued that a synonym for defendant's mitigating circumstance was "excuses." **(2)** An argument by the prosecutor in a capital sentencing proceeding contending that defendant was the beneficiary of all the constitutional protections of our criminal justice system and asking what right defendant gave the victim was not grossly improper.

Capital Murder Prosecutor's Argument Victim Died Without Trial No Gross Error

State v. Bishop, 343 N.C. 518 (1996) 472 S.E.2d 842

Capital Sentencing Prosecutors' Arguments One Of Worst Murders Prosecuted In Courthouse

State v. Fullwood, 343 N.C. 725 (1996) 472 S.E.2d 883

Capital Murder and Felony Child Abuse Prosecutor's Argument What the Victim Would Have Been Thinking

State v. Elliott, 344 N.C. 242 (1996) 475 S.E.2d 202

The trial court did not abuse its discretion by failing to intervene ex mero motu in a prosecution for capital first-degree murder and felony child abuse where defendant contended that the prosecutor asked the jurors to put themselves in the position of the victim, but the prosecutor's remarks described what the two-year old victim may have been thinking as defendant beat her and did not ask the jurors to put themselves in her position. The argument was based upon the evidence presented at trial and reasonable inferences which could be drawn therefrom.

Capital Sentencing - Prosecutor's Argument - Age, Status, Size of Defendant - Not Grossly Improper

State v. Gray, 347 N.C. 143 (1997)

A prosecutor's jury argument that a first-degree murder defendant's age, status, and size should be considered in determining whether he should receive the death

sentence was not so grossly improper as to require intervention ex mero motu; the character of the defendant is relevant in determining whether the death penalty should be imposed.

**Capital Murder - Prosecutor's Argument - Evidence Not Rebutted By Defendant-
Not A Comment On Defendant's Failure To Testify**

State v. Stephens, 347 N.C. 352 (1997)

There was no violation of a defendant's constitutional rights in a capital prosecution for first-degree murder where the prosecutor in his closing argument challenged the defense to explain why defendant was found in an attic with one of the murder weapons if he was not guilty. The prosecutor did not comment directly on defendant's failure to testify, but fairly argued that defendant had failed to present exculpatory evidence that rebutted the State's evidence relating to where the murder weapon was found.

(1) Capital Sentencing Closing Argument Jurors in Place of Victim no Due Process Violation Improper

(2) Capital Sentencing Closing Argument Defendant Mean Rather Than Mentally Disturbed no Gross Impropriety

State v. Perkins, 345 N.C. 254 (1997) ___ S.E.2d ___

(1) The prosecutors closing argument in a capital sentencing proceeding asking the jurors to put themselves in the position of the seven-year-old rape and murder victim was **improper**, but this argument did not deny defendant due process where the argument did not manipulate or misstate the evidence; (2) The prosecutor's closing argument in a capital sentencing proceeding to the effect that the evidence supported the conclusion that defendant was "just plain mean" rather than under the influence of a mental or emotional disturbance fell within the wide latitude generally afforded counsel during closing argument

(1) Capital Sentencing Prosecutor's Argument Absence of Acknowledgement of Wrongdoing Not a Comment on Failure to Testify

(2) Capital Sentencing Prosecutor's Argument Victim's Family

(3) Capital Sentencing Defense Witnesses Prosecutor's Argument

(4) Capital Sentencing Prosecutor's Argument General Fear of Crime

State v. Woods, 345 N.C. 294 (1997) ___ S.E.2d ___

(2) The prosecutor's closing argument in a capital sentencing proceeding was not so grossly improper as to require intervention ex mero motu where defendant contended that the argument improperly suggested that the jury would be accountable to the victim's family. The argument was a plea for the jury to give serious consideration to the victim's death and the unique loss to her family; these types of arguments have been held not improper. (3) There was no error in a capital sentencing hearing where defendant contended that the prosecutor in his closing argument expressed his opinion that defendant's mother, his sisters, and another witness (who all testified to defendant's stepfather's absence during most of defendant's childhood and adolescence) were liars. The prosecutor was arguing to the jury that it should not find the submitted circumstance that defendant grew up without a father figure during his formative years. Defendant's mother testified that defendant never knew his natural father and that she married his stepfather when defendant was an infant and it was thus reasonable to infer that defendant's biological father might still be alive. (4) The prosecutor in a capital sentencing proceeding did not make an improper argument based on the general public's fear of violent crime and on the jurors' own fears of violent crimes where the prosecutor held up a picture of the exterior of the victim's apartment building and argued that, of all the pictures, that one was the most grotesque because "she was where we all think we can go and be safe," continued to argue the sanctity of the home, and ended with "and that's why this is grotesque, cause it tells each and every one of you are safe nowhere now. You're safe nowhere."

Capital Sentencing Prosecutor's Arguments Victims' Last Moments

State v. Conner, 345 N.C. 319 (1997) ___ S.E.2d ___

There was no error requiring intervention ex mero motu in a capital sentencing proceeding where defendant contended that the State improperly attempted to elicit sympathy for the victims by arguments that the victims would have no futures and vivid descriptions of what the victims might have done and felt in their last moments. Minor references to the rights of the victims are not so grossly improper as to require ex mero motu intervention,

Capital Resentencing - Prosecutor's Argument - Comfortable Life In Prison

State v. Holden, 346 N.C. 404 (1997)

The trial court did not err in a capital resentencing by allowing the prosecutor to comment, over defendant's objection, on the quality of life defendant would have in prison where a prison guard had testified that defendant was permitted to watch television, play cards, lift weights, play basketball, go to the music room, and eat lunch with other inmates. It was reasonable to infer that defendant would continue to enjoy these privileges if sentenced to life imprisonment.

Capital Sentencing -- Prosecutor's Jury Argument -- Value of Statutory Mitigating Circumstances -- No Gross Impropriety

State v. Warren, 347 N.C. 309 (1997)

The prosecutor's jury argument in a capital sentencing proceeding that, if the jury found statutory mitigating circumstances to exist, "**then you should consider them in whatever way you might want to use them,**" while somewhat misleading as to the value the jury must accord to statutory mitigating circumstances, was not so grossly improper as to require the trial court to intervene ex mero motu and was not reversible error where the trial court correctly instructed the jurors on the law regarding statutory and nonstatutory mitigating circumstances, and the court also instructed that the jurors must apply the law as the court gave it to them, not as the attorneys gave it to them or as they might like it to be.

(1) Capital First-Degree Murder - Defendant's Argument - Reasonable Doubt – Moral Certainty

(2) First-Degree Murder -- Strangled Victim -- Prosecutor's Argument -- Premeditation and Deliberation -- Any Point Prior to Death

(3) First-Degree Murder -- Prosecutor's Argument -- Fear and Emotions of Victim

State v. Warren, 348 N.C. 80 (1998)

(1) The trial court did not err during a capital prosecution for first-degree murder by sustaining an objection and later objecting ex mero motu to defense counsel's attempts in his closing argument to explain proof beyond a reasonable doubt and to his use of a quotation from a jury instruction from *State v. Phillip, 261 N.C. 263*, involving "moral certainty." *Cage v. Louisiana, 498 U.S. 39*, and its progeny are not controlling in this case in that here the objectionable statements were not contained in jury instructions. Defense counsel was informed that any references to "moral certainty" as regards proof of reasonable doubt could not be disassociated from the evidence and, (2) There was no prejudicial error in a capital prosecution for first-degree murder where the prosecutor argued that defendant premeditated and deliberated the killing if he intended to kill the victim at any point prior to the victim dying. The evidence was that defendant strangled the victim for several minutes until she was dead and the prosecutor's statement that premeditation and deliberation can be found at any point prior to the victim dying was an accurate statement of the law. Assuming error, any impropriety was promptly corrected by the prosecutor requiring that the jury find premeditation and deliberation prior to the killing. (3) There was no impropriety in a prosecutor's argument in a capital first-degree murder prosecution where the prosecutor asked the jury to imagine being there as the victim was strangled and asked them whether they could imagine anything more degrading. ***An argument asking jurors to put themselves in the place of the victims will not be

condoned, but arguments asking the jury to imagine the fear and emotions of a victim have been found proper.*** The prosecutor's argument here was based on the evidence and did not misstate or manipulate the evidence.

(1) Capital First-Degree Murder -- Prosecutor's Argument -- Defendant's Choices

(2) Capital First-Degree Murder -- Prosecutor's Argument -- Jury as Voice of the Community

State v. Locklear, 349 N.C. 118 (1998)

(1) There was no error in the guilt phase of a capital first-degree murder prosecution where the prosecutor argued that defendant was there because of the choices he had made and that the jury should not let the defense put that fault or blame on the jury. (2) There was no error in the guilt phase of a capital first-degree murder prosecution where the prosecutor argued to the jury that the jury was the voice of the community and represented the community.

Capital Sentencing -- Prosecutor's Argument -- Dysfunctional Families

State v. Richmond, 347 N.C. 412 (1998)

The trial court did not err by not intervening ex mero motu in a capital sentencing hearing when the State argued that we all grew out of dysfunctional families and have psychological problems and that probably about 35 percent of the world had alcoholic fathers. While these comments may have been oversimplifications, they were within the wide latitude allowed parties in hotly contested cases.

(1) Capital Sentencing -- Prosecutor's Argument -- References to Another Murder Victim -- Course of Conduct Aggravating Circumstance

(2) Capital Sentencing -- Comfortable Life in Prison -- Proper Argument for Death Penalty

State v. Smith, 347 N.C. 453 (1998)

(1) In a capital sentencing proceeding wherein evidence concerning defendant's rape, murder and burning of another woman less than one month after the murder in this case was properly admitted to support the (e)(11) course of conduct aggravating circumstance, the prosecutor's references in his final summation to the other murder victim did not amount to improperly asking the jury to sentence defendant to death for a crime for which he was not being tried but was a proper argument that defendant deserved the death penalty based on the evidence supporting the (e)(11) aggravating circumstance. N.C.G.S. § 15A-2000(e)(11). (2) The trial court did not abuse its discretion in failing to intervene ex mero motu when the State argued in a capital sentencing proceeding that if defendant were

sentenced to life in prison, he would spend his time comfortably doing things such as playing basketball, lifting weights, and watching television, since the argument merely emphasized the State's position that defendant deserved the death penalty rather than a comfortable life in prison.

Capital Sentencing -- Prosecutor's Opening Argument -- Reference To Prior Capital Conviction

State v. Warren, 348 N.C. 80 (1998)

There was no gross impropriety requiring intervention ex mero motu in a capital sentencing proceeding where the prosecutor commented to the jury in his opening statement that the evidence would show that defendant had been convicted of "capital or firstdegree murder" in Asheville and non-capital murder in South Carolina. Although it has been held that it is improper for the jury to have knowledge that a capital defendant has been on death row in the same case, the prosecutor accurately depicted the prior convictions, both parties and the judge believed at the time that the South Carolina conviction would be submitted as an (e)(3) aggravating circumstance although defendant subsequently requested that both convictions be submitted under (e)(2), and the prosecutor never mentioned that defendant was sentenced to death for the Asheville conviction. Merely referring to a conviction for "capital or first-degree murder" does not necessarily lead to the conclusion that a death sentence was imposed.

(1) Capital Sentencing -- Prosecutor's Argument -- Mitigating Circumstances -- Request by Defendant -- Absence of Prejudice

(2) Capital Sentencing -- Prosecutor's Argument -- Rejection of Mitigating Circumstances

(3) Capital Trial -- Prosecutor's Argument -- Lack of Remorse

(4) Capital Sentencing -- Prosecutor's Argument -- Audiotape of 911 Call

State v. Billings, 348 N.C. 169 (1998)

(1) Defendant was not prejudiced by the prosecutor's argument that the mitigating circumstances submitted to the jury had been requested by defendant when submission of the (f)(1) mitigating circumstance that defendant had no significant history of prior criminal activity was not requested but was opposed by defendant where one or more jurors found this mitigator to exist and weighed it in favor of defendant. N.C.G.S. § 15A-2000(f)(1). (2) The prosecutor's arguments in a capital sentencing proceeding that jurors should reject mitigating circumstances because many people had the same problems in their lives as defendant but did not commit murder, and that even if the mitigating circumstances were found to exist, they did not justify the killing were not grossly improper and did not require

intervention by the trial court on its own motion. (3) The prosecutor's argument in a capital trial that defendant had not shown any remorse for his actions was not an improper comment on defendant's exercise of his right to silence. The State is allowed to comment upon defendant's demeanor in the courtroom during closing arguments, and bringing defendant's lack of any demonstration of remorse to the attention of the jury is proper so long as the prosecutor does not urge the jury to consider lack of remorse as an aggravating circumstance. (4) Where an audiotape of the call made by the murder victim's brother to the 911 emergency communications center was admitted into evidence in the guilt phase of defendant's capital trial, it was proper for the prosecutor to play the audiotape during closing arguments in the capital sentencing proceeding for the jury's consideration.

Capital Sentencing -- Prosecutor's Argument -- Heinous, Atrocious, or Cruel Aggravating Circumstance -- Lingered Death

State v. Atkins, 349 N.C. 62 (1998)

The prosecutor's closing argument in a capital sentencing proceeding did not mislead the jury into concluding that a decision of the N.C. Supreme Court required a finding of the (e)(9) especially heinous, atrocious, or cruel aggravating circumstance in all cases in which the victim did not die instantly; rather, the prosecutor's reference to the decision merely illustrated that a lingering death may be a factor supporting a finding of the (e)(9) aggravating circumstance. N.C.G.S. § 15A-2000 (e)(9).

Capital Sentencing -- Prosecutor's Argument -- Deterrence

State v. Locklear, 349 N.C. 118 (1998)

There was no error in a capital sentencing proceeding where the court allowed the prosecutor to urge the jury to "save someone else's life"; to never "let him put his hands on another gun or another knife and face down another human being who has made him mad"; that prison would not do defendant any good; and that the death penalty would prevent defendant from taking another life. Arguments invoking specific deterrents are proper.

(1) Capital Sentencing -- Prosecutor's Closing Argument -- Mitigating Circumstances

(2) Capital Sentencing - Prosecutor's Closing Argument - Jury's Role in Law Enforcement System

State v. Hoffman, 349 N.C. 167 (1998)

(1) The prosecutor's closing argument in a capital sentencing proceeding that "[t]hey can drag up anything they think has mitigating value. But just because they say it doesn't make it so" did not improperly inform the jury that defendant could submit any matter as a mitigating circumstance; rather, the prosecutor was merely arguing that the jury had to decide for itself whether the matters submitted by defendant were mitigating. Assuming, arguendo that the argument was improper, defendant was not prejudiced thereby. (2) The prosecutor's closing argument in a capital sentencing proceeding that the thin blue line (police officers) is what keeps persons like defendant out of your home, business, and community, that the jury is the anchor for the thin blue line, that there is no law or order without the jury, and that the jury should "follow the law" did not impermissibly urge the jurors to imagine they were potential crime victims and ask the jury to remedy societal problems via general deterrence. Taken in context, the argument sought to illustrate the importance of the jury's role within the system of law enforcement and was not improper.

(1) Capital Sentencing -- Prosecutor's Closing Argument -- Statutory Mitigating Circumstances -- Absence of Mitigating Value -- Jury Not Misled

(2) Capital Sentencing -- Prosecutor's Closing Argument -- Victim Impact Statement

State v. Guevara, 349 N.C. 243 (1998)

(1) The prosecutor's statement in his concluding argument about statutory and nonstatutory mitigating circumstances in a capital sentencing proceeding that he didn't "see how any of these mitigating factors have any mitigating value whatsoever" could not have misled the jurors to believe that they could accord the statutory mitigating circumstances no mitigating value when viewed in the overall context in which the statement was made. Furthermore, any error was rendered harmless by the trial court's instruction making a clear distinction between statutory and nonstatutory mitigating circumstances, the distinction made on the Issues and Recommendation as to Punishment form, and instructions and closing arguments reiterating the jurors' duty to follow the law as given to them by the trial court. (2) The prosecutor's victim impact argument in a capital sentencing proceeding that the victim "was a good father, husband, son, brother and friend" was supported by the evidence and was not improper.

Capital Sentencing -- Prosecutor's Closing Argument -- Absence of Confession and Lack of Remorse -- Violation of Right to Silence

State v. Call, 349 N.C. 382 (1998)

The trial court erred in a capital sentencing proceeding by allowing the prosecution to argue that defendant should be sentenced to death based upon improperly elicited testimony from four of defendant's jailers that he had not

confessed or expressed remorse. The testimony by the jailers violated the rule in *Doyle v. Ohio*, 426 U.S. 610, and should have been excluded because it resulted in an unconstitutional use of defendant's exercise of his right to silence where the judge at defendant's first appearance informed him of his right to remain silent; defendant never waived that right; defendant made no statement of any kind to any officer who arrested him or investigated his case; defendant did not testify at either the guilt phase or the capital sentence proceeding; and defendant did not present any evidence or argument regarding statements made by defendant relating to the crimes or his feelings or attitude toward the victim.

(1) Capital Sentencing - Prosecutor's Closing Argument - Reference to Defendant as Predator

(2) Capital Sentencing -- Prosecutor's Closing Argument -- Cry by Victim and State for Death Penalty

State v. Trull, 349 N.C. 428 (1998)

(1) The prosecutor's reference to defendant as a "predator" during closing argument in a capital sentencing proceeding was not so grossly improper as to require the trial court to intervene ex mero motu. (2) It was not grossly improper for the prosecutor in a capital sentencing proceeding to speak for the victim by arguing that the victim and the State cry from her body in the woods, "death, death, death for [defendant]." The prosecutor's argument merely reminded the jurors that he was advocating for both the State and the victim.

(1) First-Degree Murder -- Prosecutor's Argument -- Paid Expert Witness

(2) Capital Sentencing -- Prosecutor's Argument -- Death Penalty as Deterrent

(3) Capital Sentencing Proceeding -- Prosecutor's Argument -- Sympathy

State v. Murillo, 349 N.C. 573 (1998)

(1) The prosecutor's arguments in the guilt phase of a capital first-degree murder prosecution concerning payment of defendant's forensic expert were not so grossly improper as to require the trial court to intervene ex mero motu. Prior cases involving arguments from sentencing proceedings are instructive but not controlling and, when defense counsel apparently did not believe the argument was prejudicial at trial, the Court could not conclude that the trial court should have intervened. Even assuming that the argument was improper, it was not prejudicial in light of the substantial evidence of defendant's guilt. [SBI Agent] Tom Trochum said no one identifies stippling from a photograph. It is improper, it is unscientific, and it leads to erroneous results, which is exactly what Kopec testified to you. An erroneous result. It is a sad state of our legal system, that when you need someone to say something, you can find them. You can pay them

enough and they'll say it. **(2)** The trial **court did not err by not intervening ex mero motu** in a capital sentencing proceeding where defendant contended that the prosecutor impermissibly argued for imposition of the death penalty because it would deter crime generally. The prosecutor was reminding the jury of its role and obligation to follow the law, **did not impermissibly cite to general deterrence**, and stayed within the established bounds. America has been confronted, at various stages in its history, with various crises. America's had to fight evil in various places in various ways. We've had to have a fighting for principles, for justice, for decency, for law and for order. World War II, our young men and women had to go off and they had to fight for the principle of liberty against wickedness. Various other wars. And today, America has to fight for principles of decency and liberty within its own boundaries because of the crime. Today, look at where we are, where the decent people are literally imprisoned in their homes, not safe in the streets. And you are the ones that can send a message out of [sic]: We will stand up, we will have our women and children and men able to walk around free and in safety. It doesn't get fixed without Americans being willing to take the duty that they are required to take under the law, that you said you were willing to take. **(3)** The trial court did not err in a capital sentencing proceeding by not intervening ex mero motu where defendant contended that the prosecutor impermissibly told the jury that the law does not permit sympathy. Although the trial court may not preclude the jury from considering compassion, the prosecutor may discourage the jury from having mere sympathy not related to the evidence; moreover, the prosecutor here did not tell the jury that it could not consider sympathy, but suggested that the jury focus on the facts and not consider sympathy. I suggest to you, this is not a matter for sympathy or prejudice at this time. This is a matter for you to look at what you have seen. It is wickedness. Don't let the wickedness spread like a bay tree. Cut it down. It is evil. What you have heard is evil to the core. Like a rattlesnake. Get rid of it, members of the jury. And if you follow the law, that's what you will do. There's no question about it.

Capital Trial - Defendant's Closing Arguments - Number

State v. Barrow, 350 N.C. 640 (1999)

The trial **court erred** in a prosecution for first-degree murder by **not permitting defense counsel to make three closing arguments during the guilt phase**. Defendant was being tried for multiple capital felonies, did not present evidence during the guilt-innocence phase, made a clear request, and obtained a ruling upon the request, thereby preserving the question for appellate review. There was prejudice per se.

(1) Defendant's Closing Argument -- Capital Sentencing -- Individual Responsibility of Each Juror

(2) Prosecutor's Closing Argument -- Capital Sentencing -- Death Penalty as Deterrence

State v. Thomas, 350 N.C. 315 (1999)

(1) There was no abuse of discretion or prejudice to defendant when the trial court prevented defense counsel from arguing to the jury in a capital sentencing proceeding that the ultimate decision as to the sentence recommendation was the individual responsibility of each juror. (2) The prosecutor's closing argument in a capital sentencing proceeding that "if you impose life imprisonment . . . the State will do everything they can to make sure he stays in prison for the rest of his life, but . . . nothing is final" and that "the only way you can make sure that . . . this man does not assault, rob, and kill someone else is to impose the death penalty" was not an improper argument addressing parole but was a proper argument that only the death penalty would deter defendant from committing future crimes.

Prosecutor's Closing Argument -- Not Comment on Defendant's Failure to Testify

State v. Trull, 349 N.C. 428 (1998)

The prosecutor's comment during closing argument in a capital trial concerning defendant's attacks on the victim and the State's witnesses, "It's the shotgun approach. Hide your defendant, hide all the evidence that incriminates him and the, sinister spin," was not an improper comment on defendant's decision not to testify but was simply a response to and rebuttal of defense counsel's claims made during closing argument.

Capital Trial -- Defendant's Closing Arguments -- Number

State v. Barrow, 350 N.C. 640 (1999)

The trial court erred in a prosecution for first-degree murder by not permitting defense counsel to make three closing arguments during the guilt phase. Defendant was being tried for multiple capital felonies, did not present evidence during the guilt-innocence phase, made a clear request, and obtained a ruling upon the request, thereby preserving the question for appellate review. There was prejudice per se.

Prosecutor's Closing Argument -- Capital Sentencing -- Rights Given Defendant -- Not Due Process Violation

State v. Parker, 350 N.C. 411 (1999)

Assuming arguendo that it was improper for the prosecutor to argue to the jury in a capital sentencing proceeding that defendant "has been given food to eat and a warm place to stay. Health care, lawyers, social workers, psychiatrist," that the victims did not have a five-week trial or two lawyers to plead their cases, and that

the victims had a jury of one to decide their fate and didn't get a hearing, these statements did not deny defendant due process since the prosecutor did not directly attack defendant's exercise of his constitutional rights, substantial evidence supported the aggravating circumstances submitted to the jury, the jury was instructed to base its decision on the evidence alone and not on the arguments of counsel, and it is unlikely that the jury's recommendations were influenced by these portions of the prosecutor's closing argument.

Prosecutor's Argument -- Capital Sentencing -- Sympathy for Victims

State v. Mcneil, 350 N.C. 657 (1999)

The prosecutor's argument in a capital sentencing proceeding was not so grossly improper as to require the trial court to intervene ex mero motu where defendant contended that the prosecutor placed undue emphasis upon the personal qualities and future prospects of the victims and sought to improperly invoke sympathy for the victims. The prosecutor's argument about the promising nature of the victim's lives served to inform the jury about the specific harm caused by defendant's crime.