SUBCHAPTER XV. CAPITAL PUNISHMENT.

Article 100.

Capital Punishment.

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(a) Separate Proceedings on Issue of Penalty. –

(1) Except as provided in G.S. 15A-2004, upon conviction or adjudication of guilt of a defendant of a capital felony in which the State has given notice of its intent to seek the death penalty, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death.

(2) The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable after the guilty verdict is returned. If prior to the time that the trial jury begins its deliberations on the issue of penalty, any juror dies, becomes incapacitated or disqualified, or is discharged for any reason, an alternate juror shall become a part of the jury and serve in all respects as those selected on the regular trial panel. An alternate juror shall become a part of the jury in the order in which he was selected. If the trial jury is unable to reconvene for a hearing on the issue of penalty after having determined the guilt of the accused, the trial judge shall impanel a new jury to determine the issue of the punishment. If the defendant pleads guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose. A jury selected for the purpose of determining punishment in a capital case shall be selected in the same manner as juries are selected for the trial of capital cases.

(3) In the proceeding there shall not be any requirement to resubmit evidence presented during the guilt determination phase of the case, unless a new jury is impaneled, but all such evidence is competent for the jury's consideration in passing on punishment. Evidence may be presented as to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (e) and (f) of this section. Any evidence which the court deems to have probative value may be received.

(4) The State and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The defendant or defendant's counsel shall have the right to the last argument.

(b) Sentence Recommendation by the Jury. – Instructions determined by the trial judge to be warranted by the evidence shall be given by the court in its charge to the jury prior to its deliberation in determining sentence. The court shall give appropriate instructions in those cases in which evidence of the defendant's mental retardation requires the consideration by the jury of the provisions of G.S. 15A-2005. 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.

After hearing the evidence, argument of counsel, and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based upon the following matters:

(1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;

(2) Whether any sufficient mitigating circumstance or circumstances as enumerated in subsection (f), which outweigh the aggravating circumstance or circumstances found, exist; and

(3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life.

The sentence recommendation must be agreed upon by a unanimous vote of the 12 jurors. Upon delivery of the sentence recommendation by the foreman of the jury, the jury shall be individually polled to establish whether each juror concurs and agrees to the sentence recommendation returned.

If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment; provided, however, that the judge shall in no instance impose the death penalty when the jury cannot agree unanimously to its sentence recommendation.

(c) Findings in Support of Sentence of Death. – When the jury recommends a sentence of death, the foreman of the jury shall sign a writing on behalf of the jury which writing shall show:

(1) The statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt; and

(2) That the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty; and,

(3) That the mitigating circumstance or circumstances are insufficient to outweigh the aggravating circumstance or circumstances found.

(d) Review of Judgment and Sentence. –

(1) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of North Carolina pursuant to procedures established by the Rules of Appellate Procedure. In its review, the Supreme Court shall consider the punishment imposed as well as any errors assigned on appeal.

(2) The sentence of death shall be overturned and a sentence of life imprisonment imposed in lieu thereof by the Supreme Court upon a finding that the record does not support the jury's findings of any aggravating circumstance or circumstances upon which the sentencing court based its sentence of death, or upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The Supreme Court may suspend consideration of death penalty cases until such time as the court determines it is prepared to make the comparisons required under the provisions of this section.

(3) If the sentence of death and the judgment of the trial court are reversed on appeal for error in the post-verdict sentencing proceeding, the Supreme Court shall order that a new sentencing hearing be conducted in conformity with the procedures of this Article.

(e) Aggravating Circumstances. – Aggravating circumstances which may be considered shall be limited to the following:

(1) The capital felony was committed by a person lawfully incarcerated.

(2) The defendant had been previously convicted of another capital felony or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a capital felony if committed by an adult.

(3) The defendant had been previously convicted of a felony involving the use or threat of violence to the person or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a Class A, B1, B2, C, D, or E felony involving the use or threat of violence to the person if the offense had been committed by an adult.

(4) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(5) The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(6) The capital felony was committed for pecuniary gain.

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(8) The capital felony was committed against a law-enforcement officer, employee of the Division of Adult Correction of the Department of Public Safety, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty.

(9) The capital felony was especially heinous, atrocious, or cruel.

(10) The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(11) The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons.

(f) Mitigating Circumstances. – Mitigating circumstances which may be considered shall include, but not be limited to, the following:

(1) The defendant has no significant history of prior criminal activity.

(2) The capital felony was committed while the defendant was under the influence of mental or emotional disturbance.

(3) The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act.

(4) The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor.

(5) The defendant acted under duress or under the domination of another person.

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired.

(7) The age of the defendant at the time of the crime.

(8) The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony.

(9) Any other circumstance arising from the evidence which the jury deems to have mitigating value. (1977, c. 406, s. 2; 1979, c. 565, s. 1; c. 682, s. 9; 1981, c. 652, s. 1; 1994, Ex. Sess., c. 7, s. 5; 1995, c. 509, s. 14; 2001-81, s. 1; 2001-346, s. 2; 2011-145, s. 19.1(h).)

Chapter 5: Aggravating Circumstances

This chapter discusses the eleven statutory aggravating circumstances and the case law interpreting them. These aggravating circumstances are listed in subdivisions (1) through (11) of G.S. 15A-2000(e). The eleven aggravating circumstances are as follows:

(e)(1) The murder was committed by an incarcerated defendant.
(e)(2) The defendant was previously convicted of a capital felony.
(e)(3) The defendant was previously convicted of a violent felony.
(e)(4) The murder was committed to prevent arrest or to effect an escape.
(e)(5) The murder was committed during the commission of a specified felony.
(e)(6) The murder was committed for pecuniary gain.
(e)(7) The murder was committed to hinder a governmental function or the enforcement of law.
(e)(8) The murder was committed against a law enforcement officer or specified others.
(e)(9) The murder was especially heinous, atrocious, or cruel.
(e)(10) The defendant created a great risk of death to more than one person by a hazardous weapon.
(e)(11) The murder was part of the defendant's course of violent conduct toward another person or persons.

The following issues concerning aggravating circumstances are discussed in Chapter 2: (1) the prosecutor's decision to seek the death penalty when prosecuting first-degree murder; (2) the mandatory Rule 24 pretrial conference, which includes the existence of aggravating circumstances as a topic; and (3) the pretrial *Watson* hearing to determine the sufficiency of evidence of aggravating circumstances.

General Rules Concerning Aggravating Circumstances

The aggravating circumstances that may be found by the jury are limited to those listed in G.S. 15A-2000(e).[1] A first-degree murder indictment need not allege the aggravating circumstances on which the state will rely.[2] Nor is a defendant entitled

1 The statute provides that "[a]ggravating circumstances . . . shall be limited to" those listed therein. *See also State v. Brown*, 320 N.C. 179 (1987) (noting that because bad reputation is not an enumerated aggravating circumstance, the state may not present evidence thereof in its case in chief).
2 State v. Hunt, 357 N.C. 257 (2003).

to a bill of particulars setting forth these aggravating circumstances.[3] (For a discussion of the Rule 24 mandatory pretrial conference and the state's giving notification of aggravating circumstances, see Chapter 2).

When deciding whether to submit an aggravating circumstance to the jury, the court must view the evidence in the light most favorable to the state and must give the state the benefit of all reasonable inferences from the evidence.[4] However, the state supreme court has also stated that "[w]here it is doubtful whether a particular aggravating circumstance should be submitted, the doubt should be resolved in favor of defendant."[5]

The jury must unanimously find the existence of an aggravating circumstance beyond a reasonable doubt before the jury may consider the circumstance during its deliberations.[6] The jury must give some weight to any aggravating circumstance that it finds, but how much weight to give a particular aggravating circumstance is for the jury to decide.[7]

The Double Jeopardy Clause does not bar the submission of an aggravating circumstance at a capital resentencing hearing even though it was not submitted or found at a prior capital sentencing hearing.[8] The state at a capital resentencing hearing is not bound by a stipulation at a prior capital sentencing hearing that an aggravating circumstance did not exist when evidence supports its submission at the resentencing hearing.[9] However, the state may not appeal a jury's

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3 State v. Holden, 321 N.C. 125 (1987). The state is also not required to give notice of prior convictions that it will use to prove an aggravating circumstance, such as (e)(3). State v. Roper, 328 N.C. 337 (1991).

4 See, e.g., State v. Allen, 360 N.C. 297 (2006).

5 State v. Oliver, 302 N.C. 28 (1981).

6 As to unanimity, see *State v. Kirkley*, 308 N.C. 196 (1983) (holding that "the jury must unanimously find that an aggravating circumstance exists before that circumstance may be considered by the jury in determining its sentence recommendation"). As to beyond a reasonable doubt, see G.S. 15A-2000(c)(1) (referring to "[t]he statutory aggravating circumstance or circumstances which the jury finds beyond a reasonable doubt"). In *Ring v. Arizona*, 536 U.S. 584 (2002), the Court ruled that allowing a judge without a jury to find an aggravating circumstance necessary to impose a death sentence violates the Sixth Amendment right to a jury trial.

7 State v. Laws, 325 N.C. 81 (1989) ("[B]y enacting specific aggravating circumstances to be considered in capital sentencing, the legislature intended that a jury having found one of those statutory aggravating circumstances to exist must give it some weight in aggravation when determining the appropriate sentence to recommend. . . . The amount of weight to be given such statutory aggravating circumstances is, however, left to the determination of the jury."); State v. Holden, 321 N.C. 125 (1987) (jury decides how much weight to give aggravating and mitigating circumstances).

8 State v. Duke, 360 N.C. 110 (2005); State v. Sanderson, 346 N.C. 669 (1997) (disavowing prior contrary statements in State v. Silhan, 302 N.C. 223 (1981)).

9 State v. Adams, 347 N.C. 48 (1997).

recommendation of a life sentence,[10] nor may the state seek the death penalty if a defendant who had received a life sentence is awarded a new trial.[11]

The North Carolina Supreme Court has held that the *corpus delecti* rule, which generally requires that a defendant's confession alone is insufficient evidence to support a criminal conviction,[12] does not apply to proving aggravating circumstances.[13]

The North Carolina Supreme Court has decided several cases concerning the relationship between elements of first-degree murder and aggravating circumstances. In *State v. Cherry*,[14] the court held that when a defendant is convicted of first-degree murder based solely on the felony murder theory, the underlying felony may not be used to support the (e)(5) aggravating circumstance (murder during the commission of a specified felony). The court reasoned that allowing an element of felony murder, namely, the underlying felony, to support an aggravating circumstance would result in an aggravating circumstance being added to *every* felony murder case. This, the court concluded, would unfairly increase the chance that a felony murder defendant would be sentenced to death when compared to a defendant convicted solely of premeditated murder. The reasoning of *Cherry* might also apply, for example, to a case in which a defendant was convicted of first-degree murder by means of a nuclear, chemical, or biological weapon of mass destruction. In such a case, it might be improper to use the fact that the defendant employed such a weapon to support the (e)(10) aggravating circumstance (creating a great risk of death to more than one person by using a hazardous weapon).

It is reasonable to ask whether *Cherry* stands for the broader proposition that evidence necessary to support an element of first-degree murder cannot be used to support an aggravating circumstance. In *State v. Quesinberry*,[15] the court noted

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10 State v. Silhan, 302 N.C. 223 (1981) (so holding, on double jeopardy grounds). See also Arizona v. Rumsey, 467 U.S. 203 (1984) (similar ruling).

11 Bullington v. Missouri, 451 U.S. 430 (1981) (holding that the jury's decision to impose a life sentence at the first trial amounted to an acquittal of the death penalty, meaning that double jeopardy precludes trying the defendant capitally a second time). Bullington does not apply in cases in which a life sentence is imposed as a result of a jury deadlock rather than a unanimous life verdict. Sattazahn v. Pennsylvania, 537 U.S. 101 (2003) (holding that a life sentence in such an instance is not a de facto acquittal of the death penalty and thereby distinguishing Bullington). However, in North Carolina, G.S. 15A-1335, which prohibits a more severe sentence after a successful appeal, bars retrying a defendant capitally after a life sentence is imposed, even if by deadlock.

12 See generally State v. Trexler, 316 N.C. 528 (1986).

13 State v. Lee, 335 N.C. 244 (1994). (holding that the defendant's description of how the victim had died a slow and painful death was sufficient by itself to prove the (e)(9) aggravating circumstance [especially heinous, atrocious, or cruel]).

14 298 N.C. 86 (1979).

15 319 N.C. 228 (1987).

that such a rule exists by statute for non-capital cases,[16] and adopted a related rule – the rule against using the same evidence to support multiple aggravating circumstances – as a matter of equity in capital cases. But the court has never expressly broadened *Cherry* beyond the bounds of felony murder, and several cases suggest that even if there is a general rule against using an element of first-degree murder to establish an aggravating circumstance, there is no general rule against using *evidence that supports* an element of first-degree murder also to support an aggravating circumstance. For example, in *State v. Oliver*,[17] the court held that it was proper to submit the (e)(6) aggravating circumstance (murder for pecuniary gain) based on evidence that the defendant had killed the victim during a robbery, notwithstanding the fact that the robbery formed the basis for the defendant's conviction of felony murder. The court stated that acting for pecuniary gain is not an element of robbery, and that the aggravating circumstance instead addresses the separate consideration of the defendant's motive; the evidence in the case established both the robbery and the motive. Likewise, in *State v. Moore*,[18] the court ruled that evidence that the defendant slowly poisoned the victim, causing protracted suffering followed by death, was properly used to support both a conviction of first-degree murder by poisoning and the (e)(9) aggravating circumstance (murder that was extremely heinous, atrocious, or cruel). The court noted that poisoning may be fast or slow, i.e., that the protracted suffering inflicted by the defendant was not inherent to the commission of murder by poisoning, thereby distinguishing *Cherry*.

The Use of the Same Evidence to Support Multiple Aggravating Circumstances

A somewhat related issue concerns the use of the same evidence to support multiple aggravating circumstances. Generally, the court has ruled that the submission of two or more aggravating circumstances based on the same evidence is prohibited.[19] The court reasoned that this is an unnecessary duplication of aggravating circumstances that unfairly tips the balance of aggravating circumstances versus mitigating circumstances against the defendant.[20] For example, it is improper to submit both (e)(5) (murder committed during the course of a robbery) and (e)(6) (murder committed for pecuniary gain) when the motive

[16] Although *Quesinberry* was decided during the lifespan of the Fair Sentencing Act, a similar provision exists today under Structured Sentencing. See G.S. 15A-1340.16(d) ("Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and the same item of evidence shall not be used to prove more than one factor in aggravation.").
[17] 302 N.C. 28 (1981).
[18] 335 N.C. 567 (1994).
19 See, e.g., State v. Goodman, 298 N.C. 1 (1979).
20 *Goodman*, 298 N.C. 1.

for the robbery was pecuniary gain.[21] This prohibition, however, does not apply when there is some separate evidence to support each aggravating circumstance, even though the evidence supporting each may overlap.[22]

There is an exception to this general rule: the same evidence may be used when multiple aggravating circumstances are directed at different aspects of the defendant's character or the murder for which the defendant is to be punished. For example, the North Carolina Supreme Court has ruled that it was not error to submit both (e)(4) (murder committed for the purpose of avoiding or preventing a lawful arrest) and (e)(8) (murder committed against a law enforcement officer performing lawful duties) because (e)(4) focuses on the defendant's motivation in committing the murder and (e)(8) focuses on the factual circumstances of the murder.[23]

The North Carolina Supreme Court has stated that a trial judge should instruct the jury that it may not use the same evidence to find more than one aggravating circumstance.[24] Such an instruction is located after the instruction for aggravating circumstance (e)(11) in the North Carolina Pattern Jury Instruction—Crim. 150.10.[25] However, the judge need not instruct the jury which specific pieces of evidence it may use to support which aggravating circumstances, so long as he or she makes clear that the same evidence cannot support multiple aggravators.[26]

Case Summaries on the Use of Evidence to Support Multiple Aggravating Circumstances

Note that these case summaries also appear under the particular aggravating circumstances that are discussed later in this chapter.

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21 State v. Quesinberry, 319 N.C. 228 (1987). *But cf.* State v. East, 345 N.C. 535 (1997) (proper to submit aggravating circumstances (e)(5) (murder committed during robbery) and (e)(6) (murder committed for pecuniary gain), because these circumstances were supported by separate evidence on the facts of this case).

22 See, e.g., State v. Jennings, 333 N.C. 579 (1993).

23 State v. Hutchins, 303 N.C. 321 (1981).

24 State v. Gay, 334 N.C. 467 (1993). *But cf.* State v. Rouse, 339 N.C. 59 (1994) (failure to request such an instruction limited appellate review to plain error analysis, and court did not find plain error in this case).

25 The judge is not required to use the pattern instruction, so long as he or she conveys the relevant principle. State v. Smith, 359 N.C. 199 (2005) (the trial judge submitted aggravating circumstance (e)(5) (murder during the commission of a specified felony) twice, once for kidnapping the victim and once for robbing him; although the trial court did not expressly instruct the jury not to use the same evidence to support more than one aggravating circumstance, it achieved the same result by stating that the state was required to prove that the "restraint was a separate complete act independent of and apart from the robbery").

26 State v. Tirado, 358 N.C. 551 (2004).

Multiple Aggravating Circumstances Properly Submitted: Separate Evidence

State v. Waring, 364 N.C. 443 (2010). The defendant and an accomplice stole the victim's wallet, raped her, and murdered her by stabbing her repeatedly. The trial judge submitted aggravating circumstances (e)(5) (murder during the commission of a specified felony, in this case, rape), (e)(6) (murder for pecuniary gain), and (e)(9) (heinous, atrocious, or cruel). Separate evidence supported each and the prosecutor's argument did not ask the jury to find more than one aggravating circumstance based on the same evidence.

State v. Smith, 359 N.C. 199 (2005). The defendant entered the victim's home, choked him into unconsciousness, bound him, and taped over his nose and mouth, leaving him to die of asphyxiation. He then ransacked the residence, stealing several items. The trial judge submitted aggravating circumstance (e)(5) (murder during the commission of a specified felony) twice, once for kidnapping and once for robbery. This was proper as the "binding and taping was not an inherent, inevitable part of the robbery," and therefore provided separate evidence to support the aggravating circumstance regarding the kidnapping. Further, although the trial court did not expressly instruct the jury not to use the same evidence to support more than one aggravating circumstance, it achieved the same result by stating that the state was required to prove that the "restraint was a separate complete act independent of and apart from the robbery."

State v. Tirado, 358 N.C. 551 (2004). The defendant and others trapped a car in a dead-end street and forced the two occupants of the vehicle into its trunk. The defendant and his accomplices drove the vehicle around, then stopped and robbed the occupants of their jewelry. Later, they shot and killed the occupants. The trial judge submitted aggravating circumstances (e)(5) (murder during the commission of a specified felony, in this case, kidnapping), (e)(6) (murder for pecuniary gain), and (e)(11) (course of violent conduct). This was proper as separate evidence supported each: the carjacking supported (e)(5), the jewelry theft supported (e)(6), and the multiple killings supported (e)(11). Further, the trial court was not required to instruct the jury which specific pieces of evidence it could use to support which aggravating circumstances, so long as it made clear that the same evidence could not support multiple aggravators.

State v. Jones, 358 N.C. 330 (2004). The defendant shot and killed his wife and his 14-year-old stepson. The trial court submitted aggravating circumstance (e)(11) (course of violent conduct) for each murder, and aggravating circumstance (e)(9) (heinous, atrocious, or cruel) for the child's murder. The killing of each victim supported the submission of (e)(11) for the other; and the fact that the defendant was a father figure to the child supported the submission of (e)(9).

State v. White, 355 N.C. 696 (2002). The court ruled that separate evidence supported the submission of both (e)(5) (murder committed during commission of robbery) and (e)(6) (murder committed for pecuniary gain). The theft of the victim's keys and car supported (e)(5). The defendant stole the car for transportation, not to sell it. The defendant's theft of the victim's money supported (e)(6). Thus separate, independent evidence supported submission of these aggravating circumstances. The court noted that the jury instructions properly limited the jury's consideration of the evidence supporting each circumstance. *See also* State v. East, 345 N.C. 535 (1997) (similar ruling).

State v. DeCastro, 342 N.C. 667 (1996). The court ruled that separate evidence supported the submission of (e)(9) (murder was especially heinous, atrocious, or cruel) and (e)(11) (murder was committed during violent course of conduct toward others; in this case the defendant killed the murder victim's husband). Evidence supporting (e)(9) included the defendant's infliction of twenty-three stab wounds on the victim. The victim did not die a quick, painless death but remained conscious during the five to ten minutes that elapsed before she died. In addition, her jeans and panties had been pulled to her ankles, her shirt torn open, and her bra pulled above her breasts, exposing her breasts, torso, and lower body. The evidence supporting (e)(11) was entirely different from the evidence supporting (e)(9): before killing the victim, the defendant robbed, beat, and murdered the victim's husband.

State v. Daughtry, 340 N.C. 488 (1995). The court ruled that separate evidence supported the submission of (e)(5) (murder committed during commission of a sex offense) and (e)(9) (especially heinous, atrocious, or cruel). Evidence supporting (e)(5) showed that some object had been inserted into the victim's rectum or vagina. Evidence supporting (e)(9) showed severe blunt trauma wounds to the head and many abrasions about her body. *See also* State v. Kandies, 342 N.C. 419 (1996) (similar ruling).

State v. Conaway, 339 N.C. 487 (1995). The court reviewed the evidence at the sentencing hearing and ruled that separate substantial evidence supported each of the following three aggravating circumstances in a double murder case: (e)(5) (murder committed during the commission of kidnapping); (e)(6) (murder committed for pecuniary gain, in this case by taking money from cash register during armed robbery); and (e)(11) (murder committed during violent course of conduct toward others; in this case, the defendant killed a second person). The court stated that when there is separate substantial evidence to support each aggravating circumstance, it is proper for each circumstance to be submitted even though evidence supporting each may overlap. *See also* State v. Rose, 339 N.C. 172 (1994) [separate evidence supported submission of both (e)(3) (defendant had prior violent felony conviction) and (e)(11) (murder committed during violent course of conduct toward others)].

State v. Rouse, 339 N.C. 59 (1994). Separate evidence supported the submission of both (e)(5) (murder committed during attempted rape and attempted armed robbery) and (e)(9) (murder was especially heinous, atrocious, or cruel). The victim was stabbed seventeen times and suffered for fifteen minutes as she lost one-half of her blood. The court noted that evidence supporting each aggravating circumstance may overlap as long as the same evidence doesn't support more than one aggravating circumstance.

State v. Moseley, 338 N.C. 1 (1994). The court ruled that the jury properly found two statutory aggravating circumstances under (e)(5) (murder committed during commission of specified felony) because the murder was committed while the defendant was engaged in the commission of (1) first-degree sexual offense and (2) first-degree rape. Both aggravating circumstances were supported by distinct and separate evidence, even though they involved the same victim.

State v. Sanderson, 336 N.C. 1 (1994). Distinguishing *State v. Quesinberry*, 319 N.C. 228 (1987), discussed below, the court ruled that the trial judge properly submitted and the jury could properly find both (e)(4) (murder was committed for the purpose of avoiding lawful arrest), and (e)(5) (murder was committed while the defendant was engaged in a kidnapping), because these circumstances were supported by different evidence.

State v. Gibbs, 335 N.C. 1 (1993). The trial judge did not err in submitting both (e)(5) (murder was committed during the course of a burglary) and (e)(11) (murder was committed during course of conduct that involved the commission of other crimes of violence against other people). These circumstances were not supported by the same evidence. Proof that the defendant committed a murder during the burglary did not also require proof of the commission of violence toward the other victims (two other people were murdered). And the defendant need not have engaged in a violent course of conduct to have committed a murder in the course of the burglary. *See also* State v. Gay, 334 N.C. 467 (1993).

State v. Jennings, 333 N.C. 579 (1993). The trial judge properly submitted two aggravating circumstances: (e)(5) (murder committed during sex offense) and (e)(9) (especially heinous, atrocious, or cruel) because they were not based on the same evidence. There was substantial evidence of the especially heinous, atrocious, or cruel nature of the murder (the savage beating of the victim) apart from the evidence that the murder was committed while attempting to penetrate the victim's anus with an object.

State v. Jones, 327 N.C. 439 (1990). Distinguishing *State v. Quesinberry*, 319 N.C. 228 (1987), discussed below, the court ruled that the submission of both aggravating circumstances (e)(6) (murder committed for pecuniary gain) and

(e)(11) (murder committed during course of conduct involving violence to others) was proper. The aggravating circumstances were not supported by the same evidence. Evidence of the robbery of the convenience store supported (e)(6). Evidence that the defendant killed the victim, wounded another, and fired shots endangering others supported (e)(11).

State v. McLaughlin, 323 N.C. 68 (1988). Aggravating circumstance (e)(11) (murder committed during course of conduct involving violence to others) was properly submitted for each of two murders (mother and daughter were killed during the same night) committed by the defendant.

Multiple Aggravating Circumstances Properly Submitted: Different Aspects

State v. Berry, 356 N.C. 490 (2002). The defendant killed a woman "to keep her from talking about a murder he had previously committed" about which he had told her. The trial court submitted the (e)(4) (prevent arrest or effect escape) and (e)(11) (course of violent conduct) aggravating circumstances. Citing *State v. Hutchins*, discussed below, the supreme court affirmed, stating that (e)(4) focused on the defendant's motive, while (e)(11) concerned the "objective facts of the two murders."

State v. Smith, 347 N.C. 453 (1998). The defendant was convicted of first-degree murder in which he set fire to an apartment building by lighting kerosene, killing one person and seriously injuring others. Distinguishing *State v. Quesinberry*, 319 N.C. 228 (1987), the court ruled that the aggravating circumstances (e)(5) (murder committed while defendant engaged in arson) and (e)(10) (using weapon normally hazardous to lives of more than one person) were both properly submitted to the jury because they addressed different aspects of the defendant's murder, although they both relied on the same evidence. Aggravating circumstance (e)(5) addresses the fact that the defendant committed murder while engaging in another felony, arson. Aggravating circumstance (e)(10) addresses a distinct aspect of the defendant's character—he not only intended to kill a particular person when setting fire to the apartment building, but he also disregarded the value of every human life in the building by using an accelerant to set the fire in the middle of the night.

State v. Green, 321 N.C. 594 (1988). In first-degree murder prosecution for the murders of A, B, and C at a bar, the trial judge properly submitted the (e)(4) aggravating circumstance (murder committed for purpose of avoiding or preventing a lawful arrest) in the sentencing for the murder of C, since the evidence showed that C (who was in a defenseless position) was killed to eliminate him as a witness in the killings of A and B. The court also ruled, based on *State v. Hutchins*, discussed below, that it was proper to submit both this (e)(4) aggravating

circumstance and (e)(11) (murder committed during course of conduct involving violence to others). The (e)(11) aggravating circumstance involved the factual circumstances of the defendant's crimes, while the (e)(4) aggravating circumstance involved the defendant's motive in shooting a person in a defenseless position.

State v. Hutchins, 303 N.C. 321 (1981). The court ruled that it was not error to submit two aggravating circumstances in this case: (e)(4) (murder committed for purpose of avoiding or preventing a lawful arrest) and (e)(8) (murder committed against law enforcement officer engaged in performance of lawful duties), although they may have been based on the same evidence. The court stated that it is not error to submit multiple aggravating circumstances if the inquiry prompted by their submission is directed at distinct aspects of the defendant's character or the murder for which the defendant is to be punished. The (e)(4) aggravating circumstance focuses on the defendant's motivation in pursuing his course of conduct. The (e)(8) aggravating circumstance focuses on the factual circumstances of the crime. The court distinguished its ruling in *State v. Goodman*, 298 N.C. 1 (1979), discussed below.

Multiple Aggravating Circumstances Improperly Submitted

State v. Howell, 335 N.C. 457 (1994). Relying on *State v. Quesinberry*, discussed below, the court ruled that trial judge erred in submitting both (e)(5) (murder was committed while defendant was committing burglary) and (e)(6) (murder was committed for pecuniary gain) when these aggravating circumstances were supported by the same evidence. In this case, pecuniary gain was the motive for committing the burglary.

State v. Quesinberry, 319 N.C. 228 (1987). The defendant was convicted of first-degree murder based on premeditation and deliberation and felony murder, the underlying felony being armed robbery. Both aggravating circumstances (e)(5) (murder committed during commission of robbery) and (e)(6) (murder committed for pecuniary gain) were submitted and found by the jury. The court ruled that both circumstances were redundant, since the motive of pecuniary gain provided the impetus for the robbery itself, and therefore it was error to submit both circumstances to the jury. *See also* State v. Davis, 325 N.C. 607, 386 S.E.2d 418 (1989) (similar ruling).

State v. Vereen, 312 N.C. 499 (1985). The trial judge erred in submitting two aggravating circumstances because they were based on the same evidence—the attempted rape of the murder victim's daughter—considering the jury instructions in this case. The jury instruction for (e)(5) set out that the murder was committed while the defendant committed the crime of first-degree burglary or *attempted rape*. The jury instruction for (e)(11) set out that the murder was part of a course of

conduct that included the defendant's commission of violent crimes against others, including felonious assault and *attempted rape*.

State v. Goodman, 298 N.C. 1 (1979). There was sufficient evidence to support the (e)(4) aggravating circumstance (murder committed to avoid lawful arrest or effect escape from custody) when after the victim was shot and cut, but before he was killed, the defendant stated that he "was afraid if the police found [the victim] that he would tell what he had done to him." The defendant and an accomplice then planned to bury the victim. Later they decided to shoot him and place him on a railroad track where his body would be mangled by a passing train. However, it was error to submit both (e)(4) and the (e)(7) aggravating circumstance (murder committed to disrupt lawful exercise of governmental function or enforcement of laws) since they were based on the same evidence. The submission of both was an unnecessary duplication of circumstances that resulted in an automatic accumulation of aggravating circumstances against the defendant. The court noted that sometimes the same evidence may support the finding of more than one aggravating circumstance; for example, an aggravating circumstance showing the defendant's motive and a different aggravating circumstance showing a factual event (see later case of *State v. Hutchins*, discussed above).

Aggravating Circumstance (e)(1): Murder Committed by Incarcerated Defendant

G.S. 15A-2000(e)(1) states: "The capital felony was committed by a person lawfully incarcerated."

This aggravating circumstance applies in cases like *State v. Braxton*,[27] where the defendant, in prison because of prior murder convictions, stabbed another inmate to death. In *State v. Rich*, [28] the supreme court considered the relationship between (e)(1) and (e)(3) (previous conviction of violent felony). The defendant in *Rich* was serving a prison sentence for murder when he killed another inmate. On appeal, he argued that the jury could have relied on the same evidence – his prior murder conviction – to find both (e)(1) and (e)(3). Thus, he contended, the trial court committed plain error in failing to instruct the jury that it could not rely on the same evidence to find multiple aggravating circumstances. The supreme court disagreed, stating that there was no risk that the jury relied on the same evidence to find the two factors. In essence, it reasoned that the fact of the defendant's imprisonment, not the nature of the prior conviction, established (e)(1), while the nature of the prior conviction, not the fact of the defendant's imprisonment, established (e)(3).

[27] 352 N.C. 158 (2000).
28 346 N.C. 50 (1997).

It is unclear whether this aggravating circumstance applies only to a murder committed within a prison or other detention facility or whether it also would apply to an escapee who commits a murder.[29]

Aggravating Circumstance (e)(2): Defendant Previously Convicted of Capital Felony

G.S. 15A-2000(e)(2) states: "The defendant had been previously convicted of another capital felony or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a capital felony if committed by an adult."

What Constitutes a Capital Felony

To qualify as a capital felony, the felony must have been punishable by death when the defendant was convicted—the state need not have sought the death penalty for that felony nor must the defendant have been sentenced to death.[30] However, if the death penalty was not an authorized punishment for the felony at the time of the defendant's conviction because the death penalty had been declared unconstitutional, the conviction cannot be used as an aggravating circumstance under (e)(2).[31] (Of course, it may still qualify as an aggravating circumstance under (e)(3)).

State v. Cummings, 352 N.C. 600 (2000). The court ruled, distinguishing *State v. Bunning*, 338 N.C. 483 (1994) (first-degree murder conviction in Virginia was not a capital felony conviction because the death penalty was not in effect then), that the trial judge did not err in submitting aggravating circumstance (e)(2) for a 1966 North Carolina first-degree murder conviction because the death sentence could have been imposed for first-degree murder in 1966. Although the defendant had pleaded guilty in 1966 under a statute which precluded the death penalty as a punishment if the prosecutor agreed to the plea and it was approved by the presiding judge, the court noted that the test for determining the existence of this aggravating circumstance is not the punishment actually imposed but the maximum punishment that could have been imposed. A crime that is considered a "capital felony" under this aggravating circumstance maintains that status even if a

29 *See*, *e.g.*, Duckett v. State, 919 P.2d 7 (Okla. Crim. App. 1995) (court interpreted "while serving a term of imprisonment" aggravating circumstance to include a murder by an escapee from prison).
30 State v. Cummings, 352 N.C. 600 (2000) (summarized in the text).
31 State v. Bunning, 338 N.C. 483 (1994) (defendant's Virginia conviction for first-degree murder was not an aggravating circumstance under (e)(2) because, at the time of the conviction, the Virginia Supreme Court had ruled that the death penalty was unconstitutional).

defendant's case is not tried as a "capital case." The court stated that the defendant's plea to first-degree murder did not alter the classification of the offense as a capital felony. The court also rejected the defendant's argument that there was not a constitutional death penalty statute when the defendant entered his guilty plea because the statute was later ruled to be unconstitutional—the court stated that the ruling did not affect the validity of the defendant's conviction of a capital crime but merely affected the imposition of the death sentence.

What Constitutes a Conviction

The North Carolina Supreme Court has not decided whether a felony conviction that is being appealed qualifies as a prior felony conviction under this circumstance.[32]

A plea of no contest and the entry of judgment imposing a sentence as a result of that plea constitutes a conviction as long as the no contest plea (in a North Carolina state court) was entered on or after July 1, 1975.[33]

Each prior conviction may be a separate aggravating circumstance.[34]

The General Assembly in 1994 added the language in (e)(2) concerning juvenile adjudications. It applies only to sentencing for a first-degree murder committed on or after May 1, 1994, but both the conduct forming the basis of the adjudication and the adjudication itself may have occurred before May 1, 1994.[35]

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32 The court noted but did not decide the issue (under (e)(3)) in *State v. Silhan*, 302 N.C. 223 (1981). The Structured Sentencing Act specifically includes a conviction being appealed as a prior conviction for the purpose of sentencing. G.S. 15A-1340.11(7). If the state uses a conviction that is being appealed, and the appeal is ultimately successful, any death sentence based in part on the conviction may be subject to attack. *See* Johnson v. Mississippi, 486 U.S. 578 (1988).

33 State v. Holden, 321 N.C. 125 (1987). Although *Holden* was decided under (e)(3), its ruling would apply as well to this aggravating circumstance. Although the court did not say so in *Holden*, a plea of no contest (at least in a North Carolina state court) must have been entered on or after July 1, 1975, to constitute a prior conviction, based on the reasoning in the later case of *State v. Outlaw*, 326 N.C. 467 (1990) (in deciding whether a no contest plea constituted a conviction under Rule 609, the court noted that July 1, 1975, was the effective date of G.S. 15A-1022(c), which requires that a judge must determine that there was a factual basis for a no contest plea; thus, this determination and the entry of judgment constitutes an adjudication of guilt and a conviction). If a no contest plea was entered in a court other than a North Carolina state court, an examination of the court's procedures in taking such a plea may be necessary.

34 State v. Moseley, 338 N.C. 1 (1994). Although *Moseley* was decided under (e)(3), its ruling would apply as well to this aggravating circumstance. Two aggravating circumstances were found under (e)(2) for two prior murders in *State v. Braxton*, 352 N.C. 158 (2000), though the propriety of that finding was not at issue on appeal.

35 State v. Leeper, 356 N.C. 55 (2002). Although *Leeper* was decided under (e)(3), its ruling would apply as well to this aggravating circumstance. *See also* State v. Wiley, 355 N.C. 592 (2002) (no ex

Timing of the Prior Capital Felony

To qualify as a conviction for this aggravating circumstance, the capital felony must have been *committed* before the commission of the first-degree murder for which the defendant is being sentenced. However, the *conviction* of that capital felony may occur at any time before the trial of the first-degree murder for which the defendant is being sentenced.[36]

Method of Proof

A prior conviction under this aggravating circumstance may be proved by the original court judgment, a certified copy of the court judgment, a stipulation by the state and defendant, an admission by the defendant during the trial or sentencing hearing, testimony by a state's witnesses, or other reliable method. In addition, the state may offer evidence of the circumstances underlying the conviction. The North Carolina Supreme Court has stated that the defendant may not—by offering to stipulate to the prior conviction—foreclose the state's offer of other evidence.[37] Thus the state may offer the testimony of witnesses and law enforcement officers about crime that resulted in the prior conviction, although the trial judge may exercise his or her discretion to prevent the sentencing hearing from becoming a minitrial about the prior capital felony.[38]

Submission of (e)(3) Rather than (e)(2)

State v. Prevatte, 356 N.C. 178 (2002). The defendant was convicted of capital murder in Georgia in 1974. He was subsequently convicted of first-degree murder in North Carolina. The state asked the trial trial judge to submit (e)(3) (prior violent felony conviction) rather than (e)(2) (prior capital felony conviction) "as a way of simplifying [issues regarding the constitutionality of the Georgia statute under which defendant was sentenced]." The court agreed. This was permissible; the state's request did not diminish the "integrity of the capital sentencing scheme."

Propriety of Submitting Multiple Aggravating Circumstances

State v. Flowers, 347 N.C. 1 (1997). A capital sentencing jury found aggravating circumstances (e)(2), based on a prior first-degree murder conviction in which the

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post facto violation in applying legislative amendment to adjudication occurring before May 1, 1994).

36 State v. Warren, 348 N.C. 80 (1998) (relying on similar rulings involving aggravating circumstance (e)(3) (previous conviction of violent felony), the court ruled that it was proper to submit aggravating circumstance (e)(2) even though the conviction for the prior capital felony occurred after the date of the murder for which the defendant was being sentenced).

37 State v. Cummings, 323 N.C. 181 (1988).

38 *Id*.

death penalty could have been imposed, and (e)(3) (prior conviction of violent felony), based on five other violent felony convictions arising from the same trial in which the first-degree murder conviction had occurred. The court ruled that separate evidence properly supported these two aggravating circumstances. The court rejected the defendant's argument that the same evidence was used to support both aggravating circumstances because the first-degree murder and the other five felonies arose from the same transaction.

Aggravating Circumstance (e)(3): Defendant Previously Convicted of Violent Felony

G.S. 15A-2000(e)(3) states: "The defendant had been previously convicted of a felony involving the use or threat of violence to the person or had been previously adjudicated delinquent in a juvenile proceeding for committing an offense that would be a Class A, B1, B2, C, D, or E felony involving the use or threat of violence to the person if the offense had been committed by an adult." The constitutionality of this aggravating circumstance has been upheld.[39]

What Constitutes a Violent Felony

To qualify under this circumstance, the felony offense may be either (1) one in which the use or threat of violence is an element of the felony, in which case proof that the defendant used violence in committing the offense is unnecessary,[40] or (2) one in which the use or threat of violence, although not an element, was involved in the commission of the offense.[41] An example of the latter would be a defendant convicted of committing a felonious breaking or entering while pointing a gun at the homeowner.[42] The use or threat of violence is not an element of felonious breaking or entering, but in the example, it was part of the commission of that offense. If a defendant's prior felony conviction occurred in a court other than a North Carolina state court, then the offense of conviction must also constitute a felony in North Carolina.[43] A conviction by a general court martial is included within (e)(3).[44]

State v. Garcell, 363 N.C. 10 (2009). At the defendant's capital sentencing hearing, the state introduced evidence that the defendant had previously been convicted of common law robbery and two counts of second-degree kidnapping. It did not introduce evidence about the facts surrounding the convictions, but a defense

[39] State v. Brown, 320 N.C. 179 (1987) (holding that the definition of aggravating circumstance (e)(3) is not unconstitutionally vague or overbroad).
40 State v. Green, 336 N.C. 142 (1994).
41 State v. McDougall, 308 N.C. 1 (1983).
42 *Id*. The court in *McDougall* gave other examples in footnote one of its opinion.
43 State v. Taylor, 304 N.C. 249 (1983); State v. Green, 336 N.C. 142 (1994).
44 *Green*, 336 N.C. 142.

witness and defense counsel briefly stated that the three convictions arose from a single incident. The trial judge submitted a single (e)(3) aggravating circumstance and instructed the jury that it could consider any or all of the prior convictions when deciding whether to find the circumstance. The jury found the circumstance, and the defendant was sentenced to death. On appeal, he argued that the trial judge erred in submitting the kidnapping convictions because "second-degree kidnapping does not by definition involve the use or threat of violence to the person." The supreme court (1) stated that it had never squarely ruled on that issue, and (2) noted the "well-reasoned conclusions of federal courts" as well as suggestions in its own precedents that kidnapping is inherently violent, but (3) declined to rule on the issue in the abstract because in this case, the defense testimony and statements of counsel showed that the kidnappings were "committed in the same course of action as the inherently violent crime of common law robbery," making the kidnappings violent as well. In any event, (4) any error would have been harmless because the common law robbery alone provided sufficient support for the finding of the circumstance.

State v. Morgan, 359 N.C. 131 (2004). The trial court submitted the (e)(3) aggravator based on the defendant's Georgia conviction of "robbery by sudden snatch." A former officer testified that the defendant grabbed a woman's purse; that she attempted to hold onto it; that they "fought"; and that he "slung her down" and made off with the purse. The supreme court ruled that the aggravator was properly submitted: "While the act of purse snatching may not invariably involve the use or threat of violence, [the officer's] testimony as to the circumstances surrounding this prior felony was sufficient to prove that violence was actually used during the commission of the crime."

State v. Jones, 339 N.C. 114 (1994). Relying on *State v. McDougall*, 308 N.C. 1 (1983), the court ruled that the trial judge, in instructing the jury on (e)(3), did not err in stating that robbery is a felony that by definition involves the use or threatened use of violence. In this case, the defendant had been previously convicted of common law robbery.

State v. Keel, 337 N.C. 469 (1994). Involuntary manslaughter is a violent felony under (e)(3); a killing need not be intentional to constitute a violent felony.

State v. Holden, 336 N.C. 394 (1994). The defendant's conviction of attempted second-degree rape under North Carolina law was automatically a prior violent felony conviction under (e)(3) without the necessity to present evidence that violence was used in committing the offense.

State v. Green, 336 N.C. 142 (1994). Evidence that is sufficient to submit (e)(3) must show that (1) the defendant had been convicted of a felony, (2) the felony for which the defendant was convicted involved the "use or threat of violence to the

person," and (3) the conduct underlying the conviction occurred before the date of the first-degree murder being tried. The state need not show that the defendant in fact acted violently in the prior felony; the state need only show that the prior felony involved the use *or threat* of violence. It is sufficient if the prior felony (a) has an element of the use or threat of violence to the person, such as rape or armed robbery, or (b) was actually committed by the use or threat of violence to the person. The defendant was convicted of attempted rape by a general court martial. The court ruled that attempted rape was defined as a violent crime by military case law and therefore qualified as a prior violent felony conviction under (e)(3) without the necessity to show that the defendant used violence in committing the offense.

State v. Rose, 335 N.C. 301 (1994). (1) A Mississippi conviction of attempted rape, proved by certified court records, was sufficient evidence of a felony involving the "use of threat of violence to the person." Rape under Mississippi law involves the use or threat of violence to the person, since an element of the offense is forcible ravishment. And since attempted rape requires a direct act toward forcible ravishment, it involves the use or threat of violence. (2) The trial judge did not err in peremptorily instructing the jury that if it found that the defendant had committed attempted rape, this would constitute a felony within (e)(3).

State v. Artis, 325 N.C. 278 (1989). An assault with intent to commit rape is, as a matter of law, an offense involving the use or threat of violence to the person.

State v. Brown, 320 N.C. 179 (1987). The defendant's conviction of discharging a firearm into occupied property was sufficient evidence of (e)(3).

State v. Hamlette, 302 N.C. 490 (1981). The defendant's conviction of armed robbery was sufficient to prove (e)(3), since this offense involves the threat or use of violence. The court rejected the defendant's argument that the state must prove that the defendant acted violently in committing this offense.

What Constitutes a Conviction

The North Carolina Supreme Court has not decided whether a felony conviction that is being appealed qualifies as a prior felony conviction under this circumstance.[45]

45 The court noted but did not decide the issue in *State v. Silhan*, 302 N.C. 223 (1981). The Structured Sentencing Act specifically includes a conviction being appealed as a prior conviction for the purpose of sentencing; see G.S. 15A-1340.11(7). If the state uses a conviction that is being appealed, and the appeal is ultimately successful, any death sentence based on the conviction may be subject to attack. *See* Johnson v. Mississippi, 486 U.S. 578 (1988).

A plea of no contest and the entry of judgment imposing a sentence as a result of that plea constitutes a conviction as long as the no contest plea (in a North Carolina state court) was entered on or after July 1, 1975.[46]

Each prior conviction may be a separate aggravating circumstance.[47] However, it is not error to submit multiple prior violent felony convictions in support of a single aggravating circumstance; the jury need not be unanimous with respect to the predicate conviction.[48]

The North Carolina General Assembly in 1994 added the language in G.S. 15A-2000(e)(3) concerning juvenile adjudications.[49] It applies only to sentencing for a first-degree murder committed on or after May 1, 1994, but both the conduct forming the basis for the adjudication the adjudication itself may have occurred before May 1, 1994.[50] A prosecutor who wants to use the record of a defendant's juvenile adjudications must follow the provisions of G.S. 7B-3000(f).[51] Adult convictions incurred while the defendant was under eighteen years old may be used to support aggravating circumstance (e)(3).[52]

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46 State v. Holden, 321 N.C. 125 (1987). Although the court did not say so in *Holden*, a plea of no contest (at least in a North Carolina state court) must have been entered on or after July 1, 1975, to constitute a prior conviction, based on the reasoning in the later case of *State v. Outlaw*, 326 N.C. 467 (1990) (in deciding whether a no contest plea constituted a conviction under Rule 609, the court noted that July 1, 1975, was effective date of G. S. 15A-1022(c) (2001), which requires that a judge must determine that there was a factual basis for a no contest plea; thus, this determination and the entry of judgment constitutes an adjudication of guilt and a conviction). If a no contest plea was entered in a court other than a North Carolina state court, an examination of the court's procedures in taking such a plea may be necessary.

47 State v. Larry, 345 N.C. 497 (1997); State v. Moseley, 338 N.C. 1 (1994).

48 State v. DeCastro, 342 N.C. 667 (1996) (disjunctive jury instruction concerning two violent felony convictions submitted as one aggravating circumstance was not error).

49 The statute is silent on (1) whether the classification of offenses resulting in juvenile adjudications is as they were under the Fair Sentencing Act (if the offenses occurred when that act was effective, on or after July 1, 1981, until September 30, 1994) or (2) how to classify offenses that were not classified at all (those offenses that occurred before the Fair Sentencing Act became effective on or after July 1, 1981). A likely interpretation is to classify all these offenses in the same way they are classified under the Structured Sentencing Act, as provided for sentencing under that act. *See* G.S. 15A-1340.14(c). Presumably, out-of-state adjudications would be classified as the same class to which they are substantially similar, with the state having the burden of proving that a particular out-of-state adjudication was substantially similar to a Class A through E felony under North Carolina law. *Cf*. G.S. 15A-1340.14(e).

50 State v. Leeper, 356 N.C. 55 (2002); see also State v. Wiley, 355 N.C. 592 (2002) (no ex post facto violation in applying legislative amendment to adjudication occurring before May 1, 1994).

51 The statute provides in part that such a record may be used "only by order of the court in the subsequent criminal proceeding, upon motion of the prosecutor, after an in camera hearing to determine whether the record in question is admissible."

52 State v. Garcell, 363 N.C. 10 (2009) (finding no constitutional bar to the use of convictions based on offenses committed by the defendant when he was 16 years and 2 days old).

State v. White, 355 N.C. 696 (2002). The court ruled that the defendant's felonious assault conviction, obtained when, as a juvenile, he was tried as an adult was properly submitted under aggravating circumstance (e)(3).

Johnson v. Mississippi, 486 U.S. 578 (1988). The defendant was convicted of murder and sentenced to death in a Mississippi state court. One of the aggravating circumstances supporting the death sentence was the defendant's prior violent felony conviction in a New York state court. After the defendant's conviction and death sentence was affirmed by the Mississippi Supreme Court, the New York Court of Appeals reversed the defendant's New York conviction. The defendant then filed a motion in the Mississippi Supreme Court seeking to set aside the death sentence based on the reversal of his New York conviction. The court denied the motion, ruling that the New York conviction provided adequate support for the death sentence, even if it was invalid. The United States Supreme Court ruled that allowing the defendant's death sentence to remain in effect, based in part on the invalid New York conviction, violated the Eighth Amendment.

State v. Beal, 311 N.C. 555 (1984). The defendant's prior adjudication of rape as a (non-juvenile) youthful offender under the Alabama Youthful Offender Act was not a prior felony conviction under (e)(3). The court relied on the Alabama statutory provision (and case law interpreting that provision) that the youthful offender adjudication "shall not be deemed a conviction of crime."

Timing of the Prior Violent Felony

To qualify as a conviction for this aggravating circumstance, the prior violent felony must have occurred before the commission of the first-degree murder for which the defendant is being sentenced. However, the *conviction* of that violent felony may occur at any time before the trial of the first-degree murder for which the defendant is being sentenced.[53]

Method of Proof

A prior conviction under this aggravating circumstance may be proved by the original court judgment, a certified copy of the court judgment, a stipulation by the state and defendant, an admission by the defendant during the trial or sentencing hearing,[54] testimony by state's witnesses, or any other reliable method.

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53 State v. Squires, 357 N.C. 529 (2003) (relying on *State v. Burke*, 343 N.C. 129 (1996), the court ruled that the conviction for the prior violent felony may take place after the defendant commits the first-degree murder); State v. Warren, 347 N.C. 309 (1997); State v. Lyons, 343 N.C. 1 (1996).

54 As to admissions by defense counsel, consider *State v. Al-Bayyinah*, 359 N.C. 741 (2005). In *Al-Bayyinah*, the state sought to submit three separate (e)(3) aggravating circumstances, based on the defendant's three separate prior convictions. The defendant authorized his attorneys to admit the existence of the three convictions, but not to admit that he had, in fact, committed the crimes. However, his attorneys essentially admitted the latter during closing arguments. On appeal, the

State v. Thompson, 359 N.C. 77 (2004). The trial judge submitted seven (e)(3) aggravating circumstances based on the defendant's seven prior convictions. Two of the circumstances were based on armed robberies of Bojangles restaurants, but the trial judge instructed the jury to consider whether the defendant had been convicted of armed robberies against "Billy Adams" and "April Dobbins," the Bojangles employees who were present during the crimes. On appeal, the defendant argued that the evidence showed armed robberies against Bojangles, not Adams and Dobbins, and that the court's instructions created a fatal variance, rendering the state's evidence insufficient. The supreme court disagreed, noting that the essence of armed robbery is the danger to human life and that variances concerning the specific owner of the property taken are immaterial. The court stated that all the evidence showed that the defendant had been convicted of armed robberies that involved threatening the lives of Adams and Dobbins, supporting the jury's finding of the aggravating circumstances.

State v. Carroll, 356 N.C. 526 (2002). The defendant was convicted of first-degree murder and sentenced to death. The court ruled that the state properly proved a Florida robbery conviction to support aggravating circumstance (e)(3). The court noted that the rules of evidence do not apply in a capital sentencing hearing. The state called a North Carolina deputy clerk who identified several documents as certified copies of Florida court records involving a person with a name different than the defendant. The documents included a set of fingerprints from the person who had been convicted of robbery in Florida. The state called a fingerprint expert who had compared those fingerprints with a set of the defendant's North Carolina fingerprints and testified that they were made by the same person. The court noted that even if the rules of evidence were applicable, the Florida documents would be admissible under Rule 902 (self-authenticating documents) and the fingerprint card would have been admissible as a business record under the hearsay exception set forth in Rule 803(6).

State v. McLaughlin, 341 N.C. 426 (1995). The defendant was convicted of first-degree murder and sentenced to death. During the sentencing hearing, the defendant stipulated that he had previously been convicted of involuntary manslaughter and that the crime involved the use of violence, thereby establishing aggravating circumstance (e)(3). The North Carolina Supreme Court ordered a new sentencing hearing, based on an error in jury instructions. At the beginning of the new sentencing hearing, the defendant moved to withdraw the stipulation. Without an objection from the state, the judge allowed the withdrawal. However,

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defendant argued that this amounted to ineffective assistance of counsel. The supreme court disagreed, noting (1) that it had previously ruled that *State v. Harbison*, 315 N.C. 175 (1985), does not apply to sentencing hearings, (2) that the defendant "did consent to the overall strategy of admitting the convictions themselves," and (3) that given the convictions, the jury was certainly going to find the aggravating circumstances regardless of the exact wording of counsel's arguments.

during the sentencing hearing, the state sought to reintroduce the stipulation after it presented eyewitness testimony about the circumstances of the shooting that led to the conviction. The court ruled that the stipulation was properly admitted into evidence. The court rejected the defendant's argument that it was an impermissible stipulation about a matter of law. The court concluded that although the stipulation used the language "involved the use of violence," this language addressed the factual circumstances supporting the prior conviction, rather than a legal standard.

State v. Thomas, 331 N.C. 671 (1992). An Administrative Office of the Courts "Criminal Record Check" form was insufficient evidence of a prior violent felony conviction, based on facts in this case. The partially completed form contained a disclaimer that the office of the clerk "cannot guarantee that the records listed herein belong to the individual for whom such record is sought." Neither the file number nor the date of birth of the named person was provided.

State v. Cummings, 323 N.C. 181 (1988). The court stated that although a prior conviction may be proved by the original certified copy of the court record or by stipulation, the state is not precluded from other methods of proof.

State v. Holden, 321 N.C. 125 (1987). Proof of a no contest plea and a final judgment in which a sentence was imposed as a result of that plea constitutes a conviction under (e)(3). Although the court did not say so in this case, a plea of no contest (at least in a North Carolina state court) must have been entered on or after July 1, 1975, to constitute a prior conviction, based on the reasoning in the later case of *State v. Outlaw*, 326 N.C. 467, 390 S.E.2d 336 (1990) (in deciding whether a no contest plea constituted a conviction under Rule 609, the court noted that July 1, 1975, was the effective date of G.S. 15A-1022(c), which requires that a judge must determine that there was a factual basis for a no contest plea; thus, this determination and the entry of judgment constitutes an adjudication of guilt and a conviction). If a no contest plea was entered in a court other than a North Carolina state court, an examination of the court's procedures in taking such a plea may be necessary.

State v. Hamlette, 302 N.C. 490 (1981). The defendant's testimony during the guilt-innocence phase that he had been convicted of armed robbery five years before the commission of the murder being tried was sufficient proof of a prior conviction under (e)(3). *See also* State v. McLaughlin, 323 N.C. 68 (1988) (similar ruling).

Proof of Circumstances Underlying the Conviction

The state may offer evidence of the circumstances underlying the defendant's previous conviction. The North Carolina Supreme Court has stated that the defendant may not—by offering to stipulate to the prior conviction—foreclose the

state's offer of other evidence.[55] Thus the state may offer the testimony of witnesses and law enforcement officers about the conduct that resulted in the prior conviction. The defendant may attempt to mitigate the previous felony conviction through cross-examination, or presumably the introduction of other evidence.[56] However, the trial judge may exercise his or her discretion to prevent the sentencing hearing from becoming a mini-trial about the prior violent felony.[57] Confrontation Clause issues may arise when attempting to prove the facts supporting a prior violent felony conviction.[58]

State v. Campbell, 359 N.C. 644 (2005). The state introduced evidence that the defendant had a prior conviction of second-degree kidnapping, and also introduced evidence about "domestic violence that occurred before the kidnapping and . . . evidence from the victim that defendant kidnapped her at gunpoint, made her drive to South Carolina, and raped her." The defendant argued that second-degree kidnapping is an inherently violent offense and that it was therefore unnecessary and improper to admit evidence about the facts surrounding the conviction. The supreme court ruled, based on prior cases, that the state was entitled to present evidence of the surrounding circumstances and was not limited to the fact of conviction.

State v. Bell, 359 N.C. 1 (2004). The state introduced, in support of the (e)(3) aggravating circumstance, (1) evidence that the defendant had previously been convicted of common law robbery, and (2) evidence about the facts of the crime. Among other evidence, the state elicited testimony from a police officer about the statement provided by the victim of the robbery. The supreme court ruled that the victim's statement was testimonial and that its admission violated the Confrontation Clause, but that the error was harmless because the other evidence offered by the state sufficiently supported the aggravating circumstance.

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55 State v. Moseley, 336 N.C. 710, 445 S.E.2d 906 (1994); State v. McDougall, 308 N.C. 1, 301 S.E.2d 308 (1983).

56 *See*, *e.g.*, State v. Valentine, 357 N.C. 512 (2003) (the sole aggravating circumstance submitted at the penalty phase was (e)(3), based on the defendant's prior conviction for a felony assault; the defendant sought to cross-examine the victim of the assault about an affidavit the victim had signed that stated that the defendant had not committed the assault, but the trial court prohibited the cross-examination; this was error, and a new sentencing hearing was required, because the defendant has a right to rebut and to mitigate evidence submitted by the state concerning (e)(3)).

57 State v. Carter, 357 N.C. 345 (2003) (trial judge properly limited defendant's cross-examination concerning his prior violent felony conviction when it became repetitive); State v. Strickland, 346 N.C. 443 (1997); State v. McDougall, 308 N.C. 1 (1983).

58 *See*, *e.g.*, State v. Bell, 359 N.C. 1 (2004) (the admission of testimony from a police officer about a statement provided by the victim of the defendant's prior violent felony violated the Confrontation Clause because the victim's statement was testimonial, but the error was harmless given the other evidence in the case);State v. Nobles, 357 N.C. 433 (2003) (the defendant had a prior rape conviction; the state introduced the victim's testimony from the rape trial; this violated the Confrontation Clause, as the state did not establish the victim's unavailability for the capital sentencing hearing by showing that it had made a good-faith attempt to procure her presence).

State v. Valentine, 357 N.C. 512 (2003). The sole aggravating circumstance submitted at the penalty phase was (e)(3), based on the defendant's prior conviction for a felony assault. The defendant sought to cross-examine the victim of the assault about an affidavit the victim had signed that stated that the defendant had not committed the assault, but the trial court prohibited the cross-examination. This was error, and a new sentencing hearing was required. The defendant has a right to rebut and to mitigate evidence submitted by the state concerning (e)(3).

State v. Nobles, 357 N.C. 433 (2003). The trial judge submitted (e)(3) to the jury based on the defendant's prior rape conviction. In support of the aggravating circumstance, the state introduced the victim's testimony from the rape trial. This violated the Confrontation Clause, as the state did not establish the victim's unavailability for the capital sentencing hearing by showing that it had made a good-faith but unsuccessful attempt to procure her presence.

State v. Carter, 357 N.C. 345 (2003). The state called a witness to testify about the facts surrounding the defendant's prior violent felony conviction. The defendant cross-examined the witness about prior statements the witness had made to the police that varied somewhat from her testimony at the defendant's sentencing hearing. Eventually, the trial judge forbade "further inquiry" and prohibited the defense from introducing a police report that the witness had signed at that was inconsistent with her trial testimony. On appeal, the defendant argued that these rulings were error. The supreme court affirmed. Although "both the state and the defendant may introduce evidence concerning the circumstances surrounding the defendant's prior crimes when those prior crimes support aggravating circumstances," and the defendant is generally allowed to attempt to "temper" the evidence of his prior crimes, these rights are not unlimited. Here, the trial court properly cut off repetitive cross-examination and precluded the defendant from introducing extrinsic evidence about minor inconsistencies in the witness's story.

State v. Strickland, 346 N.C. 443 (1997). The state offered a wife's testimony about a defendant's prior felony assault conviction under aggravating circumstance (e)(3) in which her husband was the victim. Most of her testimony described the circumstances of the defendant's assault on her husband based on her observations of the assault. She also testified that she was afraid that the defendant would have cut her with the knife if given the chance and that she is reminded daily of the assault. The court ruled, relying on *State v. Moseley*, 336 N.C. 710 (1994), that the wife's testimony was proper to establish for the jury the severity of the defendant's attack on the husband and the fear that the defendant caused.

State v. Rose, 339 N.C. 172 (1994). The state was properly permitted to introduce evidence surrounding the defendant's prior violent felony convictions, even though it had offered certified court judgments of those convictions.

State v. Jones, 339 N.C. 114 (1994). The court rejected the defendant's argument that the trial judge erred in allowing so much evidence of aggravating circumstance (e)(3) that its probative value was outweighed by its prejudicial effect. The three victims of the three prior violent felonies testified at the sentencing hearing.

State v. Moseley, 336 N.C. 710 (1994). The court ruled that the trial judge properly allowed the victim to testify about the details of the prior violent felony convictions, even though the evidence was graphic and the defendant had stipulated to the convictions. For a similar ruling, see *State v. McDougall*, 308 N.C. 1 (1983) (court disavowed dictum in *State v. Silhan*, 302 N.C. 223 (1981) that victim's testimony should ordinarily not be allowed unless necessary to show crime involved violence; court also stated trial judge had discretion to prevent determination of aggravating circumstance (e)(3) from becoming "mini-trial" of the previous charge).

Jury Instructions

The pattern jury instruction for this aggravating circumstance asks the judge to determine whether the defendant's prior conviction is for a felony that, "by definition[] involve[s] the threat or use of violence to the person."[59] If the judge resolves that issue in the affirmative, i.e., determines that the offense has, as an element, the use or threat of violence, then the jury must only determine whether the defendant was, in fact, previously convicted of the felony in question. It need not separately determine whether the felony in question involves the use or threat of violence, for that issue has been resolved by the trial judge as a matter of law. The cases support this procedure.[60]

Propriety of Submitting Multiple Aggravating Circumstances

[59] N.C.P.I. Crim. – 105.10.

[60] See, e.g., State v. Rose, 335 N.C. 301 (1994) (holding that the trial judge did not err in peremptorily instructing the jury that if it found that the defendant had committed attempted rape, this would constitute a felony within (e)(3)); State v. Artis, 325 N.C. 278 (1989) (holding that an assault with intent to commit rape is, as a matter of law, an offense involving the use or threat of violence to the person). Cf. State v. Holden, 346 N.C. 404 (1997) (the state introduced a judgment showing the defendant's prior conviction of attempted second-degree rape, but did not introduce evidence of the underlying facts; the judge's jury instruction on aggravating circumstance (e)(3) was erroneous when it described the felony as involving the use of violence, leaving out the words "or threat," because under some circumstances, attempted rape may involve only the threat of violence; but the error did not rise to the level of plain error).

State v. Flowers, 347 N.C. 1 (1997). A capital sentencing jury found aggravating circumstances (e)(2), based on a prior first-degree murder conviction in which the death penalty could have been imposed, and (e)(3), based on five other violent felony convictions arising from the same trial in which the first-degree murder conviction had occurred. The court ruled that separate evidence properly supported these two aggravating circumstances. The court rejected the defendant's argument that the same evidence was used to support both aggravating circumstances because the first-degree murder and the other five felonies arose from the same transaction.

State v. Rose, 339 N.C. 172 (1994). The court ruled that separate evidence supported submission of both (e)(3) and (e)(11) (murder committed during violent course of conduct toward others). A prior Alabama murder conviction supported (e)(3) and a murder committed in North Carolina during the murder for which the defendant was being sentenced supported (e)(11).

State v. Rich, 346 N.C. 50 (1997). Separate evidence supported (e)(1) and (e)(3) and both were properly submitted. The defendant was lawfully incarcerated when he committed the murder, which supported (e)(1), and he had previously been convicted of second-degree murder and discharging a firearm into occupied property, which supported (e)(3).

Aggravating Circumstance (e)(4): Murder Committed to Prevent Arrest or to Effect Escape

G.S. 15A-2000(e)(4) states: "The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." Appellate case law on this circumstance has primarily focused on whether there was sufficient evidence that the first-degree murder was committed to avoid or to prevent a lawful arrest. Generally, evidence is sufficient if the murder was committed to eliminate a witness or to prevent a law enforcement officer from arresting the defendant. This need not be the defendant's sole purpose in committing the murder, however.[61]

Evidence that a killing merely occurred is insufficient.[62] On the other hand, sufficient evidence may include a defendant's statements before, during, or after the murder that showed the need to kill the victim to prevent, for example, the

[61] State v. Hardy, 353 N.C. 122 (2000) (stating that a trial judge may properly submit the circumstance where there is substantial evidence "from which the jury can infer that at least one of defendant's purposes for the killing" was to prevent arrest or effect escape).
62 State v. Reese, 319 N.C. 110 (1987).

revelation of another crime to law enforcement or others.[63] In multiple murders, this circumstance may exist when the defendant kills a second or third person to eliminate them as witnesses to the first killing.[64] This circumstance also may exist when the defendant kills the victim to prevent the arrest of the defendant's accomplice.[65] In some cases, the facts surrounding the murder and the manner of the killing may provide sufficient evidence of this circumstance even absent any express statement by the defendant regarding the purpose of the murder.[66]

Sufficient Evidence of Aggravating Circumstance (e)(4)

State v. Goss, 361 N.C. 610 (2007). The defendant admitted that he killed the victim only after she stated that she was going to call the police, that he was "going to pay" for assaulting her, and that he was "going to jail." This was sufficient evidence to support the jury's finding of aggravating circumstance (e)(4).

State v. Fowler, 353 N.C. 599 (2001). The defendant was convicted of first-degree murder and sentenced to death. The court ruled, relying on *State v. Green*, 321 N.C. 594 (1988), that there was sufficient evidence of aggravating circumstance (e)(4). The murder was committed during an armed robbery. The court noted that there was no evidence that the victim either posed a threat to the defendant or tried to resist during the robbery. The defendant shot the victim from behind from close range with a .44 caliber handgun. The victim was on the ground when he was shot. The court stated that the jury could reasonably infer from these facts that the defendant shot the victim to avoid being apprehended.

State v. Hardy, 353 N.C. 122 (2000). The court ruled that there was sufficient evidence of aggravating circumstance (e)(4) involving a murder committed during an armed robbery. The court stated that the defendant's comment to a co-worker that "[the victim] won't be able to tell it" because "I'm going to kill him" could lead a reasonable jury to find that one purpose in killing the victim was to avoid apprehension.

State v. Lemons, 348 N.C. 335 (1998). The court reiterated its ruling in *State v. Hunt*, 323 N.C. 407 (1988), that aggravating circumstance (e)(4) may be proved by showing that the murder was committed to avoid or prevent a lawful arrest of the defendant's accomplice; it need not be the defendant's arrest. The court ruled that the evidence was sufficient in this case—although the defendant testified that one

63 *See*, *e.g.*, State v. McCollum, 334 N.C. 208 (1993). *But see* State v. Williams, 304 N.C. 394 (1981) (defendant's statements were insufficient).
64 *See*, *e.g.*, State v. McLaughlin, 323 N.C. 68 (1988); State v. Green, 321 N.C. 594 (1988).
65 State v. Lemons, 348 N.C. 335 (1998); State v. Hunt, 323 N.C. 407 (1988).
66 State v. Fowler, 353 N.C. 599 (2001) (where the defendant killed a prone and non-threatening victim after a robbery, the jury could properly infer that the purpose of the killing was to eliminate a witness).

of his accomplices shot one of the murder victims, he conceded that she was killed to eliminate her as a witness to the earlier murder of the other victim.

State v. McCarver, 341 N.C. 364 (1995). The defendant told two people that he planned to rob an old man who worked at a cafeteria and who had testified against him on a prior occasion. The defendant also told one of these people that if the old man saw him, the defendant would have to kill him because he had testified against the defendant before and was certain to do so again. The defendant robbed and murdered the old man. The court ruled that this was sufficient evidence of (e)(4), since one of the defendant's purposes for the murder was the desire to eliminate a witness who the defendant believed would testify against him.

State v. Gregory, 340 N.C. 365 (1995). The defendant was convicted of the murders of A and B. The court ruled that there was sufficient evidence of (e)(4) for both murders. Shortly after the defendant choked and snapped the neck of victim A until she was dead, he told an accomplice that he killed her "so we would never have to go to prison." After victim B screamed, the defendant told an accomplice to "take care of business" and instructed him to use the shotgun instead of the pistol "because if you use the pistol you are going to have to shoot her three or four times."

State v. McCollum, 334 N.C. 208 (1993). The defendant and his accomplices each raped an eleven-year-old child. One of the accomplices then said, "we got to kill her to keep her from telling the cops on us." The defendant then participated in killing her. The court ruled that the defendant's actions after his accomplice's statement were evidence of his adoption of the accomplice's stated motive for killing her. Therefore, this was sufficient evidence of aggravating circumstance (e)(4).

State v. Hunt, 323 N.C. 407 (1988). (1) The evidence was sufficient to support aggravating circumstance (e)(4) in the murder trial for killing victim B when the defendant aided and abetted the codefendant in killing victim B to avoid being arrested for the murder of victim A. The defendant was aware that victim B was talking to people about the murder of victim A. He also said after the killing of victim B, "That man was about to cause me to pull a life sentence." (2) The court also rejected the defendant's argument that the submission of (e)(4) was improper because the motive for killing victim B was the factual basis for (e)(4). The court noted that the defendant's motive was not an element of the murder, and the ruling in *State v. Cherry*, 298 N.C. 86 (1979) (merger rule involving felony murder and use of underlying felony as an aggravating circumstance) did not preclude its use as an aggravating circumstance. (3) Aggravating circumstance (e)(4) may be found if the defendant acted with the purpose of avoiding his arrest or the arrest of his codefendant, who was his accomplice in committing the murder.

State v. McLaughlin, 323 N.C. 68 (1988). The defendant was convicted of the murders of A (on March 26, 1984), B (on April 29, 1984), and C (on April 29, 1984). Aggravating circumstance (e)(4) was properly found in the sentencing hearing for the murders of B and C. The evidence showed that the defendant and his accomplice killed B to prevent her from exposing their involvement in killing A. They then killed C to prevent her from identifying them as the men who murdered B, her mother.

State v. Green, 321 N.C. 594 (1988). In a first-degree murder prosecution for the murders of A, B, and C at a bar, the trial judge properly submitted (e)(4) in the murder of C, since the evidence showed that C (who was shot while in a defenseless position) was killed to eliminate him as a witness in the killings of A and B. The court rejected the defendant's argument that (e)(4) may be found only when the defendant stated before the killing that a fear of arrest was a motivating factor for the killing. The court reviewed prior cases and stated that (e)(4) has been upheld in two situations: when the murder was committed to prevent the murder victim from capturing the defendant, and when the murder was committed to eliminate a witness.

State v. Holden, 321 N.C. 125 (1987). The defendant's statements that he would have to kill a woman he raped so she would not tell anyone was sufficient evidence of (e)(4).

State v. Oliver, 309 N.C. 326 (1983). This case involved two defendants sentenced to death, Moore and Oliver. The court noted that it had approved the submission of (e)(4) when there was evidence that one of the purposes of the murder was the defendant's desire to avoid detection and apprehension for some underlying crime (in this case, armed robbery). The evidence was sufficient in defendant Moore's case in the murder of the armed robbery victim because defendant Moore said (in recounting the incident to a fellow inmate) "you would have to be crazy to leave any witnesses." The evidence was also sufficient in defendant Oliver's case for his murder of a bystander to the robbery who was outside the store where the robbery occurred. The evidence was insufficient in defendant Oliver's case for the murder of the armed robbery victim because Moore's statement was inadmissible against Oliver: it was made after the conspiracy had ended and other evidence was insufficient to show that Oliver intended to eliminate the victim as a witness.

State v. Goodman, 298 N.C. 1 (1979). There was sufficient evidence to support (e)(4) when, after the victim was shot and cut but before he was killed, the defendant stated that he "was afraid if the police found [the victim] that he would tell what he had done to him."

Insufficient Evidence of Aggravating Circumstance (e)(4)

State v. Reese, 319 N.C. 110 (1987). There was insufficient evidence of (e)(4) when the only evidence to support it was the killing itself.

State v. Oliver, 309 N.C. 326 (1983). See the discussion of this case above, in which the court found the evidence was insufficient for (e)(4) in defendant Oliver's case for the murder of the armed robbery victim.

State v. Williams, 304 N.C. 394 (1981). The defendant was convicted of the murder and armed robbery of a convenience store employee. The court ruled that the evidence was insufficient to submit (e)(4). The defendant's statement, as related by a state's witness, that he wanted to leave the convenience store parking lot at a slow rate of speed to avoid attracting attention, did not support an inference that one purpose motivating the killing was the defendant's desire to avoid later detection and apprehension for his robbery. This statement was made after the killing and likely reflected the defendant's wish to avoid detection. However, the statement did not show his motivation before or at the time of the killing.

Propriety of Submitting Multiple Aggravating Circumstances

State v. Maness, 363 N.C. 261 (2009). The court rule that it was not plain error for the trial judge to submit both (e)(4) and (e)(8) (murder committed against officer performing official duties) where the defendant killed a law enforcement officer to avoid arrest. *See also* State v. Polke, 361 N.C. 65 (2006) (similar).

State v. Berry, 356 N.C. 490 (2002). The court ruled that the trial judge did not err in submitting both aggravating circumstances (e)(4) and (e)(11) (murder part of course of conduct involving commission of violence against another person). The (e)(4) aggravating circumstance focused on the defendant's motive for killing victim A—to prevent her from talking about the defendant's murder of victim B that he had committed seven weeks earlier. The (e)(11) aggravating circumstance required the jury to review the objective facts of the two murders to determine whether the offenses constituted a course of conduct.

State v. Golphin, 352 N.C. 364 (2000). The court ruled, relying on State v. Hutchins, 303 N.C. 321 (1981), that the trial judge did not err in submitting both (e)(4) and (e)(8) (murder committed against officer performing official duties). The two circumstances were directed at distinct aspects of the charged crimes. The (e)(4) circumstance was supported by the defendants' motivation to avoid arrest for a theft of a vehicle. The (e)(8) circumstance involved the officers' official duties: one officer who stopped one of the defendants for not wearing a seat belt and the other officer who was assisting the first officer. *See also* State v. Nicholson, 355 N.C. 1 (2002) (similar ruling).

State v. Sanderson, 336 N.C. 1 (1994). Distinguishing *State v. Quesinberry*, 319 N.C. 228 (1987), the court ruled that the trial judge properly submitted and the jury could properly find both (e)(4) (murder was committed for the purpose of avoiding lawful arrest), and (e)(5) (murder was committed while the defendant was engaged in a kidnapping), because these circumstances were supported by different evidence.

State v. Green, 321 N.C. 594 (1988). The court ruled that the submission of both (e)(4) and (e)(11) (murder committed during course of violent conduct toward others) was proper; they were not based on the same evidence. The (e)(11) circumstance concerned the factual circumstances of defendant's crimes, while the (e)(4) circumstance concerned the defendant's motive in shooting a person in a defenseless position to eliminate him as a witness in the killings of two other people.

State v. Hutchins, 303 N.C. 321 (1981). It was not error to submit both (e)(4) (murder committed for purpose of avoiding or preventing a lawful arrest) and (e)(8) (murder committed against law enforcement officer engaged in performance of lawful duties). The court stated that it is not error to submit multiple aggravating circumstances if the inquiry prompted by their submission is directed at distinct aspects of the defendant's character or the crime for which the defendant is to be punished. The (e)(4) circumstance focuses on the defendant's motivation in pursuing a course of conduct. The (e)(8) circumstance focuses on the factual circumstances of the crime. The court distinguished its ruling in *State v. Goodman*, discussed below.

State v. Goodman, 298 N.C. 1 (1979). There was sufficient evidence to support (e)(4) when, after the victim was shot and cut but before he was killed, the defendant stated that he "was afraid if the police found [the victim] that he would tell what he had done to him." The defendant and an accomplice then planned to bury the victim. Later they decided to shoot him and to place him on a railroad track where his body would be mangled by a passing train. However, it was error to submit both (e)(4) and (e)(7) (disrupt or hinder governmental function or enforcement of law), since they were based on the same evidence. This resulted in an automatic accumulation of aggravating circumstances against the defendant.

Aggravating Circumstance (e)(5): Murder Committed During Specified Felony

G.S. 15A-2000(e)(5) states: "The capital felony was committed while the defendant was engaged, or was an aider or abettor, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any homicide, robbery, rape or a sex offense, arson, burglary, kidnapping, or aircraft piracy or the

unlawful throwing, placing, or discharging of a destructive device or bomb." This aggravating circumstance applies to a defendant who commits first-degree murder while also committing, attempting to commit, or fleeing after committing or attempting to commit specified felonies.[67]

Felony Murder and (e)(5)

If the jury convicts the defendant of first-degree murder based solely on the felony murder theory, (e)(5) may not be submitted at the sentencing hearing based on the underlying felony or felonies submitted as a basis for felony murder.[68] If the jury convicts the defendant of first-degree murder based on premeditation and deliberation as well as felony murder, then (e)(5) based on the felony involved in the felony murder may be submitted at the sentencing hearing.[69] If both theories—premeditation and deliberation and felony murder—are submitted and the jury convicts the defendant of first-degree murder without specifying which theory or theories support its verdict, then aggravating circumstance (e)(5) may not be submitted at the sentencing hearing based on the underlying felony or felonies submitted under the felony murder theory.[70]

When a defendant pleads guilty without limitation to first-degree murder, the defendant is guilty of all theories of first-degree murder that are supported by sufficient evidence.[71] Thus, if evidence supports both theories of felony murder and premeditation and deliberation, then the submission of (e)(5) for the underlying felony of felony murder would be proper.

Schiro v. Farley, 510 U.S. 222 (1994). The jury returned on a verdict sheet a verdict of guilty of felony murder (based on rape) but left blank its verdict on the charge of intentional murder. The trial judge imposed a death sentence, finding as a statutory aggravating factor that the defendant intentionally killed the victim while

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[67] The meaning of some of the terms used in G.S. 15A-2000(e)(5) is not completely clear. For example, it is uncertain whether indecent liberties is a "sex offense," or whether that term refers only to the "sexual offenses" established in G.S. 14-27.2 et seq.

68 State v. Taylor, 304 N.C. 249 (1981); State v. Oliver, 302 N.C. 28 (1981); State v. Cherry, 298 N.C. 86 (1979). However, these rulings do not appear to bar the use under (e)(5) of another felony or other felonies that were not submitted to the jury under the felony murder theory at the guilt phase if there is sufficient evidence to support their submission. *See* State v. Richardson, 342 N.C. 772 (1996) (proper to submit armed robbery under (e)(5) when defendant was convicted of first-degree murder based solely on felony murder theory and the only underlying felony supporting the conviction was first-degree rape). In addition, if the jury specifically indicated in its verdict that it found two felonies to support the felony murder theory, it would appear that one of them could be submitted to support aggravating circumstance (e)(5).

69 State v. Rook, 304 N.C. 201 (1981). Of course, other felony or felonies not submitted to the jury under the felony murder theory at the guilt phase also could be submitted under (e)(5) if there is sufficient evidence to support their submission.

70 State v. Silhan, 302 N.C. 223 (1981).

71 State v. Meyer, 353 N.C. 92 (2000); State v. Johnson, 298 N.C. 47 (1979); *Silhan*, 302 N.C. 223.

committing rape. (1) The Court rejected the defendant's argument that the double jeopardy clause was violated because his sentencing proceeding constituted a successive prosecution for intentional murder. The clause does not apply to a single prosecution in which a sentencing hearing follows a trial. (2) The Court did not address the defendant's argument whether principles of collateral estoppel would bar the use of the "intentional murder" aggravating factor because the defendant failed to meet his burden of establishing the factual predicate for applying that principle, even if it were applicable. That is, the defendant failed to establish that the jury's act in leaving the verdict blank for intentional murder was an acquittal of that theory of murder.

State v. Stroud, 345 N.C. 106 (1996). The defendant was convicted of murder based on the theories of torture and felony murder, with kidnapping as the underlying felony. The court ruled that it was proper to submit kidnapping to support aggravating circumstance (e)(5).

State v. Richardson, 342 N.C. 772 (1996). The defendant was convicted of first-degree murder based solely on the felony murder theory, and the only underlying felony supporting the conviction was first-degree rape. The court ruled that it was proper to submit armed robbery to support aggravating circumstance (e)(5).

State v. Upchurch, 332 N.C. 439 (1992). The jury convicted the defendant of first-degree murder based on premeditation and deliberation but rejected first-degree murder based on felony murder (first-degree burglary). However, the jury convicted the defendant of first-degree burglary. The court ruled, based on *State v. Cherry*, 298 N.C. 86 (1979), that the trial judge properly submitted aggravating circumstance (e)(5) based on burglary.

State v. Reese, 319 N.C. 110 (1987). The defendant was convicted of first-degree murder based on the theories of premeditation and deliberation and felony murder, and the underlying felony was armed robbery. On appeal, the court ruled that there was insufficient evidence of premeditation and deliberation to support the first-degree murder conviction based on that theory. Therefore, the submission of (e)(5) based on armed robbery was error.

State v. Rook, 304 N.C. 201 (1981). When the defendant was convicted of first-degree murder on both premeditation and deliberation and felony murder theories, the trial judge did not err in submitting (e)(5) based on rape, which was the underlying felony of the felony murder theory. For similar rulings, see *State v. Gregory*, 340 N.C. 365 (1995); *State v. Davis*, 340 N.C. 1 (1995); *State v. Sexton*, 336 N.C. 321 (1994); *State v. McNeil*, 324 N.C. 33 (1989); *State v. Williams*, 308 N.C. 47 (1983); *State v. Goodman*, 298 N.C. 1 (1979).

State v. Silhan, 302 N.C. 223 (1981). If both premeditation and deliberation and felony murder theories are submitted and the jury convicts the defendant of first-degree murder without specifying which theory or theories support its verdict, then aggravating circumstance (e)(5) may not be submitted based on the underlying felony or felonies submitted under the felony murder theory.

State v. Oliver, 302 N.C. 28 (1981). When a defendant is convicted of first-degree murder based solely on the felony murder theory, the trial judge may not submit the underlying felony used in the felony murder theory as an aggravating circumstance under (e)(5). In this case, the trial judge erred in submitting (e)(5) based on armed robbery when the defendants were convicted of first-degree murder based on the felony murder theory only, and armed robbery was the underlying felony. *See also* State v. Taylor, 304 N.C. 249 (1981) (similar ruling, but error was harmless beyond a reasonable doubt); State v. Cherry, 298 N.C. 86 (1979).

Connection between Murder and the Specified Felony

Evidence is sufficient to support (e)(5) even if the felony is committed after the murder victim is killed, as long as the felony occurs during a continuous series of events surrounding the victim's death.[72] For example, (e)(5) based on the felony of armed robbery may be submitted to the jury if the evidence shows that the defendant took a person's wallet after the defendant had shot and killed the person, and this is so even if the taking is an afterthought to the murder rather than its motive.[73]

State v. Campbell, 359 N.C. 644 (2005). The defendant and the victim were seen together at a liquor store one evening. The next evening, the defendant "was in possession of the victim's car, wallet, boom box, and other personal property," the victim was dead in his home, the defendant had the victim's blood on his pants, and the defendant's DNA was in the victim's home. The defendant was convicted of felony murder, based on robbery. The supreme court ruled that the evidence, although circumstantial, was sufficient to support the conviction. The jury could reasonably infer that the murder and the robbery were part of the same continuous transaction. For the same reason, the evidence was sufficient to support the (e)(5) aggravating circumstance, which was submitted based on the robbery. (The defendant was also convicted of first-degree murder on the theory of premeditation and deliberation.)

State v. Haselden, 357 N.C. 1 (2003). The defendant shot and killed a neighbor, stealing her purse, clothes, and car. He was convicted of first-degree murder based on premeditation and deliberation and on felony murder, as well as armed

72 State v. Robbins, 319 N.C. 465 (1987).
73 State v. Richardson, 342 N.C. 772 (1996).

robbery. Aggravating circumstance (e)(5) was submitted and found based on the robbery. On appeal, the defendant claimed that there was insufficient evidence of the aggravating circumstance because there was no evidence that the taking of the victim's property was part of a continuous transaction with the murder. The supreme court disagreed, finding that the defendant's own statements before the crime, to the effect that he wanted to take someone's car at gunpoint, provided the necessary connection.

State v. Holden, 346 N.C. 404 (1997). The defendant was sentenced to death at a capital resentencing hearing. The court ruled that four prior unadjudicated sexual assaults, virtually identical to the circumstances surrounding the attempted rape of the murder victim, were properly admitted to show intent in proving (e)(5) (murder committed during attempted rape). The court also ruled that the defendant's offer to stipulate to intent to commit rape did not bar the state from offering this evidence.

State v. Richardson, 342 N.C. 772 (1996). The court ruled that the state is not required to prove that the commission of the felony constituting (e)(5) was the motivation for the murder, rejecting the defendant's argument that "the (e)(5) circumstance excludes robberies committed as afterthoughts." It is sufficient evidence of (e)(5) that the felony and the murder were part of the same criminal transaction.

State v. Carter, 338 N.C. 569 (1994). The court ruled that the evidence was sufficient to submit (e)(5) based on the felony of attempted rape. When the murder victim's body was discovered, her left pant leg was completely off, her panties were down, and her bra was above her breasts. She had multiple abrasions and lacerations. Blood of the same type as the victim's was on the defendant's clothes. In addition, there was evidence that he raped another woman shortly after he committed the murder. This evidence was sufficient to support the inferences that the defendant knocked the murder victim to the ground and forcibly removed her pants and panties in an attempt to rape her.

State v. Jennings, 333 N.C. 579 (1993). There was sufficient evidence in this case to submit (e)(5) when the felony was sexual offense (penetrating the murder victim's anus with an object by force and against the victim's will).

State v. McDowell, 329 N.C. 363 (1991). The (e)(5) aggravating circumstance was erroneously submitted because there was insufficient evidence of the underlying felony of attempted armed robbery. *See also* State v. Irwin, 304 N.C. 1 (1981) (similar ruling; insufficient evidence of underlying felony of kidnapping).

State v. Robbins, 319 N.C. 465, 356 S.E.2d 279 (1987). There was sufficient evidence to support the finding of this (e)(5) based on armed robbery. Based on

State v. Fields, 315 N.C. 191 (1985), the court ruled that the intent to steal and the taking of property may occur after the victim is killed, as long as it occurred during a continuous transaction with the killing of the victim.

State v. Robbins, 319 N.C. 465, 356 S.E.2d 279 (1987). The jury found existence of (e)(5) based on both armed robbery and first-degree kidnapping. The court ruled that evidence of first-degree kidnapping was insufficient. Thus, the submission of that offense as a part of this aggravating circumstance was error. The court ruled that the defendant was entitled to a new sentencing hearing.

Finding of Multiple (e)(5) Circumstances

The jury may properly find multiple circumstances under (e)(5) if they are supported by separate evidence. For example, the jury may properly find two aggravating circumstances under (e)(5) based on a murder committed while the defendant was committing first-degree rape and first-degree sexual offense, even though these felonies were committed against the same victim.[74]

State v. Murrell, 362 N.C. 375 (2008). The defendant told several acquaintances that he was planning to commit a robbery. He approached the victim, who was seated in his parked car, and shot him. The defendant took control of the vehicle, placed the victim in the passenger seat, and began driving. The victim was still alive, so the defendant shot him again. The defendant stole the victim's watch and money. This was sufficient to support two (e)(5) aggravating circumstances, one for armed robbery and one for kidnapping.

State v. Smith, 359 N.C. 199 (2005). The defendant entered the victim's home, choked him into unconsciousness, bound his wrists and ankles, covered his face with tape, pushed him under a bed, and left him to die of asphyxiation while the defendant ransacked his house. At the defendant's capital sentencing proceeding, the trial judge submitted aggravating circumstance (e)(5) twice, once for kidnapping and once for robbery. The defendant argued on appeal that the aggravating circumstances were based on the same evidence and were duplicative. The supreme court ruled that separate evidence supported each circumstance, beacuse the "binding and taping [of the victim] was not an inherent, inevitable part of the robbery. Rather, these forms of restraint exposed the victim to a greater danger than that inherent in the robbery and constituted a kidnapping."

State v. Cheek, 351 N.C. 48 (1999). The defendant and his accomplice abducted a taxicab driver in Jacksonville, put her in the taxicab's trunk, and drove the taxicab to Wilmington. The accomplice then shot the victim and set fire to the taxicab, and

74 State v. Cheek, 351 N.C. 48 (1999); State v. Bond, 345 N.C. 1 (1996); State v. Moseley, 338 N.C. 1 (1994).

the victim died. The court ruled, relying on *State v. Trull*, 349 N.C. 428, 509 S.E.2d 178 (1998), that the trial judge properly submitted both kidnapping and armed robbery as separate aggravating circumstances under (e)(5).

State v. Moseley, 338 N.C. 1 (1994). The court ruled that the jury properly found two statutory aggravating circumstances under (e)(5) because the murder was committed while the defendant was engaged in the commission of (1) first-degree sexual offense, and (2) first-degree rape. Both aggravating circumstances were supported by distinct and separate evidence, even though they involved the same victim. *See also* State v. Bond, 345 N.C. 1 (1996) (separate evidence supported three aggravating circumstances for three felonies committed during murder).

Relationship between Aggravating Circumstances (e)(5) and (e)(6)

The North Carolina Supreme Court has ruled that both (e)(5) and (e)(6) (murder committed for pecuniary gain) may not be submitted if the motive for the felony supporting (e)(5) is pecuniary gain. For example, if the defendant killed the victim during the course of a robbery in which the defendant sought the victim's money and the defendant was convicted of first-degree murder based on both theories of premeditation and deliberation and felony murder, then the trial judge may submit to the jury either (e)(5) (based on the robbery) or (e)(6), but not both.[75] If, however, the defendant was convicted of first-degree murder based only on the felony murder theory and the underlying felony was robbery, the trial judge does not have a choice of which of the two circumstances to submit to the jury—the judge may only submit (e)(6).[76]

The North Carolina Supreme Court has upheld the submission of both (e)(5) and (e)(6) when separate evidence supports each. For example, in *State v. East*,[77] the defendant committed two murders in the course of stealing money from the victims and also in stealing the keys to the victims' car. While pecuniary gain was the motive in stealing the money, which supported (e)(6), there was no evidence that the motive for the theft of the car keys was pecuniary gain. The defendant stole the keys so he could use the car as transportation either to visit his girlfriend or to evade law enforcement, not to sell the car and convert it to cash. Thus, the theft of the keys supported robbery under (e)(5), and this evidence was separate from the evidence supporting (e)(6).

State v. Raines, 362 N.C. 1 (2007). The defendant lived with a friend and the friend's wife. One night, he killed them and stole their guns, credit cards, checks, and truck. At the penalty phase of his capital trial, the trial judge submitted aggravating circumstances (e)(5) and (e)(6) (murder for pecuniary gain). This was

75 State v. Quesinberry, 319 N.C. 228 (1987).
76 *Id.*; State v. Oliver, 302 N.C. 28 (1981).
77 State v. East, 345 N.C. 535 (1997).

proper because "the trial court instructed the jury to consider only the theft of the firearms, credit cards, and checks in determining whether the (e)(6) . . . circumstance was present and to not consider the vehicle theft in making that determination. As to . . . (e)(5) . . . the trial court instructed the jury to consider only the evidence related to the theft of the truck."

State v. White, 355 N.C. 696 (2002). The court ruled that separate evidence supported the submission of both (e)(5) (murder committed during commission of robbery) and (e)(6) (murder committed for pecuniary gain). The theft of the victim's keys and car supported (e)(5). The defendant stole the car for transportation, not to sell it. The defendant's theft of the victim's money supported (e)(6). Thus separate, independent evidence supported submission of these aggravating circumstances. The court noted that the jury instructions properly limited the jury's consideration of the evidence supporting each circumstance.

State v. Davis, 353 N.C. 1 (2000). The court ruled, citing *State v. Gay*, 334 N.C. 467 (1993) and other cases, that the trial judge did not err in submitting both aggravating circumstances (e)(5) (murder committed during commission of felony of armed robbery) and (e)(6) (murder committed for pecuniary gain) because they were not supported by the same evidence. The jury instructions carefully distinguished between the property that was the subject of the armed robbery aggravating circumstance from the different property that was the subject of the pecuniary gain aggravating circumstance.

State v. East, 345 N.C. 535 (1997). The court ruled that it was proper to submit aggravating circumstances (e)(5) (murder committed during robbery) and (e)(6) (murder committed for pecuniary gain), because these circumstances were supported by separate evidence. The court noted that the defendant murdered the victims while engaged in two robberies. The defendant committed the murders not only in the course of stealing money from the victims, but also in the course of stealing the keys to the victims' car. While there was evidence of a pecuniary gain motive in stealing the money, there was no evidence that the motive for the theft of the car keys was pecuniary gain. The evidence showed that the defendant stole the keys to use the car as transportation either to visit his girlfriend or to evade law enforcement, not to sell the car and convert it into cash. Thus, the theft of money supported (e)(6) and the theft of the keys supported (e)(5).

State v. Howell, 335 N.C. 457 (1994). Relying on *State v. Quesinberry*, 319 N.C. 228 (1987), the court ruled that the trial judge erred in submitting both (e)(5) (murder was committed while defendant was committing burglary) and (e)(6) (murder was committed for pecuniary gain) when these aggravating circumstances were supported by the same evidence. In this case, pecuniary gain was the motive for committing the burglary.

State v. Quesinberry, 319 N.C. 228 (1987). The defendant was convicted of first-degree murder based on premeditation and deliberation and felony murder, the underlying felony being armed robbery. The jury found both aggravating circumstances (e)(5) (murder committed during commission of robbery) and (e)(6) (murder committed for pecuniary gain). The court ruled that the circumstances were redundant, since the motive of pecuniary gain provided the impetus for the robbery itself, and therefore it was error to submit both circumstances to the jury. *See also* State v. Davis, 325 N.C. 607 (1989) (similar ruling).

Propriety of Submitting Multiple Aggravating Circumstances

State v. Waring, 364 N.C. 443 (2010). The defendant and an accomplice stole the victim's wallet, raped her, and murdered her by stabbing her repeatedly. The trial judge submitted aggravating circumstances (e)(5) (murder during the commission of a specified felony, in this case, rape), (e)(6) (murder for pecuniary gain), and (e)(9) (heinous, atrocious, or cruel). Separate evidence supported each and the prosecutor's argument did not ask the jury to find more than one aggravating circumstance based on the same evidence.

State v. Elliott, 360 N.C. 400 (2006). The defendant raped and murdered an elderly woman and stole her possessions. He was convicted of, inter alia, first-degree felony murder, based on the rape, and first-degree burglary. (1) At his capital sentencing proceeding, the trial judge submitted the (e)(5) aggravating circumstance based on the burglary, and the jury found it. On appeal, the defendant argued that both the burglary conviction and the aggravating circumstance should be set aside due to insufficient evidence that the crime took place at night. The supreme court disagreed, noting in part that "two witnesses testified defendant left their presence at night and returned later that night with possessions matching the description of items taken from" the victim. (2) The trial judge also submitted, and the jury also found, aggravating circumstance (e)(9) (heinous, atrocious, or cruel). Although some of the evidence supporting (e)(5) and (e)(9) overlapped, the evidence was not completely overlapping and it was therefore proper to submit both circumstances.

State v. Tirado, 358 N.C. 551 (2004). The defendant and others stole a car from victim A, shooting victim A nonfatally. Then, they stole a car from victims B and C, forcing the victims into the trunk, and later stealing their jewelry and killing them. The trial judge did not plainly err in submitting aggravating circumstances (e)(5) (based on the kidnapping of victims B and C), (e)(6) (murder for pecuniary gain) (based on the theft of jewelry from victims B and C), and (e)(11) (course of violent conduct) (based, as to each murder, on the others). Separate evidence supported each aggravating circumstance.

State v. Miller, 357 N.C. 583 (2003). The defendant and an accomplice asked the victim for a ride. When the victim agreed, the defendant drew a knife and forced the victim to drive to a remote area. The defendant and his accomplice killed the victim and stole money he had been planning to deposit in a bank. (1) The trial judge submitted aggravating circumstances (e)(5) and (e)(6) (murder for pecuniary gain). The supreme court held that this was proper, stating that (e)(5) concerns the factual circumstances of the crime while (e)(6) concerns the defendant's motive. (2) The trial judge also submitted aggravating circumstance (e)(9) (heinous, atrocious, or cruel). The supreme court ruled that separate evidence supported (e)(5) and (e)(9): beyond the kidnapping, the "defendant made the victim take off his clothes, put a ball into the victim's mouth, and put electrical tape around the victim's head to secure the ball . . . completely cut[ting] off the victim's oxygen supply. . . . Defendant then stabbed the victim ten to 30 times while the victim was alive."

State v. Holmes, 355 N.C. 719 (2002). "In this case, separate evidence supported both the (e)(5) and (e)(11) [course of violent conduct] aggravating circumstances. The jury found defendant guilty of the first-degree murder of [victim A], the attempted first-degree murder of [victim B], and robbery with a firearm. Based upon these verdicts, separate, independent evidence supported each aggravating circumstance: the robbery supported the (e)(5) aggravating circumstance, while the attempted murder of Hardison supported the (e)(11) aggravating circumstance."

State v. Smith, 347 N.C. 453 (1998). The defendant was convicted of first-degree murder in which he set fire to an apartment building by lighting kerosene, killing one person and seriously injuring others. Distinguishing *State v. Quesinberry*, 319 N.C. 228 (1987), the court ruled that the aggravating circumstances (e)(5) (murder committed while defendant engaged in arson) and (e)(10) (using weapon normally hazardous to lives of more than one person) were both properly submitted to the jury because they addressed different aspects of the defendant's murder, although they both relied on the same evidence. Aggravating circumstance (e)(5) addresses the fact that the defendant committed murder while engaging in another felony, arson. Aggravating circumstance (e)(10) addresses a distinct aspect of the defendant's character—he not only intended to kill a particular person when setting fire to the apartment building, but he also disregarded the value of every human life in the building by using an accelerant to set the fire in the middle of the night.

State v. Daughtry, 340 N.C. 488 (1995). The court ruled that separate evidence supported the submission of (e)(5) (murder committed during commission of a sex offense) and (e)(9) (especially heinous, atrocious, or cruel). Evidence supporting (e)(5) showed that some object had been inserted into the victim's rectum or

vagina. Evidence supporting (e)(9) showed severe blunt trauma wounds to the head and many abrasions about her body.

State v. Conaway, 339 N.C. 487 (1995). The court reviewed the evidence at the sentencing hearing and ruled that separate substantial evidence supported each of the following three aggravating circumstances in a double murder case: (e)(5) (murder committed during the commission of kidnapping), (e)(6) (pecuniary gain: taking money from a cash register during an armed robbery), and (e)(11) (course of conduct by committing a violent crime against others: the defendant killed two victims).

State v. Rouse, 339 N.C. 59 (1994). Separate evidence supported the submission of both (e)(5) (murder committed during attempted rape and attempted armed robbery) and (e)(9) (murder was especially heinous, atrocious, or cruel). The victim was stabbed seventeen times and suffered for fifteen minutes as she lost one-half of her blood. The court noted that evidence supporting each aggravating circumstance may overlap as long as the same evidence doesn't support more than one aggravating circumstance.

State v. Sanderson, 336 N.C. 1 (1994). Distinguishing *State v. Quesinberry*, 319 N.C. 228 (1987), the court ruled that the trial judge properly submitted and the jury could properly find both (e)(4) (murder was committed for the purpose of avoiding lawful arrest), and (e)(5) (murder was committed while the defendant was engaged in a kidnapping), because these circumstances were supported by different evidence.

State v. Gibbs, 335 N.C. 1 (1993). The trial judge did not err in submitting both (e)(5) (murder was committed during the course of a burglary) and (e)(11) (murder was committed during course of conduct that involved the commission of other crimes of violence against other people). These circumstances were not supported by the same evidence. Proof that the defendant committed a murder during the burglary did not also require proof of the commission of violence toward the other victims (two other people were murdered). And the defendant need not have engaged in a violent course of conduct to have committed a murder in the course of the burglary.

State v. Jennings, 333 N.C. 579 (1993). The trial judge properly submitted two aggravating circumstances: (e)(5) (murder committed during sex offense) and (e)(9) (especially heinous, atrocious, or cruel) because they were not based on the same evidence. There was substantial evidence of the especially heinous, atrocious, or cruel nature of the murder (the savage beating of the victim) apart from the evidence that the murder was committed while attempting to penetrate the victim's anus with an object.

State v. Vereen, 312 N.C. 499 (1985). The trial judge erred in submitting two aggravating circumstances because they were based on the same evidence—the attempted rape of the murder victim's daughter—considering the jury instructions in this case. The jury instruction for (e)(5) set out that the murder was committed while the defendant committed the crime of first-degree burglary or *attempted rape*. The jury instruction for (e)(11) set out that the murder was part of a course of conduct that included the defendant's commission of violent crimes against others, including felonious assault and *attempted rape*.

Miscellaneous Matters Concerning Aggravating Circumstance (e)(5)

State v. Polke, 361 N.C. 65 (2006). The defendant shot and killed an officer who was attempting to arrest him. He also shot a second officer, who survived. After he was sentenced to death, he argued on appeal that the evidence at trial supported aggravating circumstance (e)(5), apparently on the theory that the murder took place during the defendant's attempted murder of the second officer. The defendant further argued that the trial judge's failure to submit an aggravating circumstance that was supported by the evidence was arbitrary and constituted structural error requiring the defendant's death sentence to be vacated. The supreme court disagreed, holding that even if the evidence supported the submission of (e)(5), failure to do so was not structural error.

State v. Davis, 353 N.C. 1 (2000). The court ruled that the trial judge's jury instruction (which was not the pattern jury instruction) on (e)(5) was erroneous. The instruction did not require that the murder must be committed while the defendant was engaged in the commission of an armed robbery.

Aggravating Circumstance (e)(6): Murder Committed for Pecuniary Gain

G.S. 15A-2000(e)(6) states: "The capital felony was committed for pecuniary gain." This aggravating circumstance has been upheld over several constitutional challenges.[78]

Connection between the Murder and the Pecuniary Gain

[78] State v. Jennings, 333 N.C. 579 (1993) (jury instruction not unconstitutionally vague); State v. Williams, 317 N.C. 474 (1986) (finding aggravating circumstance (e)(6) in a case when the defendant was convicted of first-degree murder based solely on the felony murder theory (the underlying felony was armed robbery) did not violate the Eighth Amendment; a killing committed for pecuniary gain is a circumstance that effectively differentiates between all people convicted of first-degree murder and those few who are deserving of the death penalty); State v. Oliver, 309 N.C. 326 (1983) (not unconstitutionally vague).

Aggravating circumstance (e)(6) applies when a motive for the first-degree murder is pecuniary gain—for example, when a defendant kills a person to facilitate a theft, a defendant is paid to kill a person, or a defendant kills a person to obtain life insurance proceeds. Financial gain need not be the defendant's sole, or even primary, motivation.[79] Nor must the defendant actually succeed in obtaining anything of value as a result of the murder.[80] However, if the defendant commits a murder for another reason, then takes or attempts to take the victim's property opportunistically after the fact, this aggravating circumstance does not apply.

State v. Taylor, 362 N.C. 514 (2008). The defendant and an accomplice robbed a small grocery store. A gunfight broke out between the proprietors and the robbers. One of the proprietors died. The defendant was convicted of first-degree murder both by premeditation and by felony murder, as well as two counts of armed robbery. At sentencing, the jury found aggravating circumstance (e)(6). (1) The trial judge did not commit plain error in instructing the jury that it could find the circumstance if, "when the defendant killed the victim . . . he intended or expected to obtain money or other things of value" as a result. (2) The prosecutor's argument to the jury that "you have already found that aggravating circumstance [(e)(6)] because you have found the defendant guilty of conspiracy to commit robbery of the store and also robbery of the store," was not so grossly improper as to require the trial judge to intervene ex mero motu. (Note, however, that the argument misstated applicable law.) (3) Given the "abundant" evidence supporting aggravating circumstance (e)(6), defense counsel did not render ineffective assistance of counsel by briefly conceding the issue in closing argument. (4) Because aggravating circumstance (e)(6) concerns the defendant's motive, there is no "requirement that the defendant actually take money from the victim," i.e., that he succeed in obtaining pecuniary gain.

State v. Murrell, 362 N.C. 375 (2008). The defendant told several acquaintances that he was planning to commit a robbery and that he knew of a "chop shop" where he could take a stolen vehicle. He approached the victim, who was seated in his parked car, and shot him, eventually making off with the vehicle. At the penalty phase of the defendant's capital trial, the judge instructed the jury that if it found "that when the defendant killed the victim, the defendant took or intended to take the victim's automobile," then it should find aggravating circumstance (e)(6). The defendant argued that the instruction allowed the jury to find the circumstance even if it concluded that the taking of the vehicle was a mere act of opportunism after a murder committed for another reason. The supreme court disagreed, noting that the trial judge had also instructed "that the pecuniary gain must have been '[obtained] as compensation for committing [the murder]' or '[intended or expected] as a result of the death of the victim.'"

79 State v. Davis, 353 N.C. 1 (2000).

80 See, e.g., State v. Taylor, 362 N.C. 514 (2008).

State v. Allen, 360 N.C. 297 (2006). The defendant shot and killed a friend while walking through a forest, perhaps after some sort of disagreement. The defendant then took the victim's truck, which he soon sold, and had his girlfriend steal the victim's wallet and ATM card from his residence. At the penalty phase of the defendant's trial, the jury found aggravating circumstance (e)(6). On appeal, the defendant argued that the evidence was insufficient to support the circumstance, because he did not take almost $2000 in cash that the victim was carrying. The supreme court affirmed, noting that the victim was armed and apparently survived the shooting for some period of time; "the jury could have reasonably believed defendant did not take the money because of fear of his victim."

State v. Bell, 359 N.C. 1 (2004). The defendant and two accomplices assaulted the victim, stole her car, eventually forced her into the trunk, took her purse, and killed her. At the penalty phase of the defendant's capital trial, the judge submitted aggravating circumstance (e)(5) (murder in the course of a specified felony) on the basis of the kidnapping and the related larceny of the car, and (e)(6) on the basis of the theft of the purse and the money it contained. The defendant argued on appeal that the evidence was insufficient to support (e)(6), but the supreme court disagreed: "The . . . defendant wished to leave Newton Grove but had no car and no job. . . . [I]n order to leave town, defendant needed a means of transportation and money to finance his trip. It is reasonable to infer . . . that defendant acted for his own pecuniary gain when he kidnapped the victim . . . and took her money. While obtaining a car may have been defendant's primary motivation, it may be reasonably inferred from the evidence that he was also motivated by the need for money." Further, "[t]he fact that defendant killed the victim after he had obtained the money from her purse is irrelevant. . . . The hope of pecuniary gain motivated the murder which was ultimately committed in an effort to enjoy the fruits of the crime," by preventing the victim from contacting law enforcement.

State v. Maske, 358 N.C. 40 (2004). The defendant was convicted of first-degree murder based on premeditation and deliberation and felony murder, the felony being robbery. After killing the victim, the defendant took personal property in the apartment where the victim lived. The court ruled that the trial judge erred in instructing on aggravating circumstance G.S. 15A-2000(e)(6) (murder committed for pecuniary gain). After quoting from the pattern jury instruction's general description of the aggravating circumstance, the trial judge stated, "If you find from the evidence beyond a reasonable doubt that when the defendant killed the victim, the defendant took $200 from the victim's purse, you would find this aggravating circumstance . . . ." The court stated that while the general description of the aggravating circumstance was a correct statement of the law, the quoted sentence removed from the jury the requirement that it make a finding whether there was a connection between the killing and the taking of something of value. Because the instruction allowed the jury to find the aggravating circumstance even if the taking

had no causal relationship to the killing – in other words, if the taking was a "mere act of opportunism committed after a murder was perpetrated for another reason" – it was erroneous.

State v. Jones, 357 N.C. 409 (2003). The defendant was convicted of two counts of first-degree felony murder, based on the underlying felony of armed robbery. The court ruled that the trial judge committed plain error in the jury instruction on (e)(6), which stated in part that "If you find from the evidence beyond a reasonable doubt . . . that when the defendant killed the victim, the defendant was in the commission of robbery with a deadly weapon, you would find this aggravating circumstance . . ." The court noted the instruction failed to explain what constitutes pecuniary gain, and the jury's finding of robbery with a dangerous weapon would automatically and thus erroneously mandate the finding of this aggravating circumstance.

State v. Chandler, 342 N.C. 742 (1996). The defendant was convicted of first-degree murder based solely on the felony murder theory, and the underlying felony was first-degree burglary. The court ruled that the trial judge properly submitted (e)(6) because the evidence showed that the defendant broke into and entered the victim's home with the intent to steal. The court stated that it was irrelevant whether the defendant wanted to steal the victim's purse or marijuana to satisfy his drug dependency, because the burglary was motivated by pecuniary gain in either event. The court also ruled that (e)(6) was properly submitted even though the underlying felony was first-degree burglary and one of its elements was larceny. Pecuniary gain under (e)(6) reflects the motive for committing the murder, and pecuniary gain is not an element of first-degree burglary.

State v. Daniels, 337 N.C. 243 (1994). The evidence was sufficient to support (e)(6): The defendant confessed that he intended to and did ask the victim for money. When the victim did not give it to him, he killed her and then took money from her purse. For additional cases finding sufficient evidence of (e)(6), see *State v. Carter*, 342 N.C. 312 (1995); *State v. Alston*, 341 N.C. 198 (1995); *State v. Hunt*, 323 N.C. 407 (1988); *State v. Jerrett*, 309 N.C. 239 (1983).

State v. Bacon, 337 N.C. 66 (1994). The evidence was sufficient for (e)(6) when the defendant was to share in the proceeds of insurance money to be paid to his accomplice, the wife of the murder victim.

State v. Moore, 335 N.C. 567 (1994). The evidence was sufficient for (e)(6) when the defendant sought to be named executor of the murder victim's will and obtained a one-third share of the insurance proceeds plus her distribution from the estate, all as a direct result of the victim's death. It is not required for the submission of this aggravating circumstance that the defendant's primary motivation for the murder is financial gain.

State v. McLaughlin, 323 N.C. 68 (1988). The evidence was sufficient for (e)(6) when the defendant was paid to murder the victim.

State v. Oliver, 309 N.C. 326 (1983). The (e)(6) aggravating circumstance was properly submitted when the first-degree murder verdict was supported by the felony murder theory of armed robbery. *See also* State v. Taylor, 304 N.C. 249 (1981); State v. Irwin, 304 N.C. 93 (1981).

State v. Oliver, 302 N.C. 28 (1981). The defendant murdered a convenience store employee during an armed robbery. After leaving the store, the defendant murdered a bystander who was there to purchase gas. The court rejected the defendant's argument that (e)(6) should not be submitted for the murder of the bystander because the money had already been obtained from the convenience store employee. The court concluded that the hope of pecuniary gain provided the impetus for the murder of both victims. This hope and the two murders were inextricably intertwined.

Relationship between Aggravating Circumstances (e)(5) and (e)(6)

The North Carolina Supreme Court has ruled that both (e)(5) (murder committed during a specified felony) and (e)(6) may not both be submitted if the motive for the felony supporting (e)(5) is pecuniary gain. For example, if the defendant killed the victim during the course of a robbery in which the defendant sought the victim's money and the defendant was convicted of first-degree murder based on both theories of premeditation and deliberation and felony murder, then the trial judge may submit to the jury either (e)(5) (based on the robbery) or (e)(6), but not both.[81] If, however, the defendant was convicted of first-degree murder based only on the felony murder theory and the underlying felony was robbery, the trial judge does not have a choice of which of the two circumstances to submit to the jury—the judge may only submit (e)(6).[82]

The North Carolina Supreme Court has upheld the submission of both (e)(5) and (e)(6) when separate evidence supports each. For example, in *State v. East*,[83] the defendant committed two murders in the course of stealing money from the victims and also in stealing the keys to the victims' car. While pecuniary gain was the motive in stealing the money, which supported (e)(6), there was no evidence that the motive for the theft of the car keys was pecuniary gain. The defendant stole the keys so he could use the car as transportation either to visit his girlfriend or to evade law enforcement, not to sell the car and convert it to cash. Thus, the

81 State v. Quesinberry, 319 N.C. 228 (1987).
82 *Id.*; State v. Oliver, 302 N.C. 28 (1981).
83 State v. East, 345 N.C. 535 (1997).

theft of the keys supported robbery under (e)(5), and this evidence was separate from the evidence supporting (e)(6).

State v. Raines, 362 N.C. 1 (2007). The defendant lived with a friend and the friend's wife. One night, he killed them and stole their guns, credit cards, checks, and truck. At the penalty phase of his capital trial, the trial judge submitted aggravating circumstances (e)(5) (murder in the course of a specified felony) and (e)(6). This was proper because "the trial court instructed the jury to consider only the theft of the firearms, credit cards, and checks in determining whether the (e)(6) . . . circumstance was present and to not consider the vehicle theft in making that determination. As to . . . (e)(5) . . . the trial court instructed the jury to consider only the evidence related to the theft of the truck."

State v. Miller, 357 N.C. 583 (2003). The defendant and an accomplice asked the victim for a ride. When the victim agreed, the defendant drew a knife and forced the victim to drive to a remote area. The defendant and his accomplice killed the victim and stole money he had been planning to deposit in a bank. The trial judge submitted aggravating circumstances (e)(5) (murder in the course of a specified felony) and (e)(6). The supreme court held that this was proper, stating that (e)(5) concerns the factual circumstances of the crime while (e)(6) concerns the defendant's motive. [Author's note: the ruling in this case suggests that (e)(5) and (e)(6) may be submitted based on the same evidence. However, the court did not expressly overrule the *Howell* and *Quesinberry* cases discussed below. This decision may be an outlier.]

State v. White, 355 N.C. 696 (2002). The court ruled that separate evidence supported the submission of both (e)(5) (murder committed during commission of robbery) and (e)(6) (murder committed for pecuniary gain). The theft of the victim's keys and car supported (e)(5). The defendant stole the car for transportation, not to sell it. The defendant's theft of the victim's money supported (e)(6). Thus separate, independent evidence supported submission of these aggravating circumstances. The court noted that the jury instructions properly limited the jury's consideration of the evidence supporting each circumstance.

State v. Davis, 353 N.C. 1 (2000). The court ruled, citing *State v. Gay*, 334 N.C. 467 (1993) and other cases, that the trial judge did not err in submitting both (e)(5) (murder committed during commission of felony of armed robbery) and (e)(6). The jury instructions carefully distinguished between the property that was the subject of the armed robbery aggravating circumstance from the different property that was the subject of the pecuniary gain aggravating circumstance.

State v. East, 345 N.C. 535 (1997). The defendant was convicted of two murders. The court ruled that it was proper to submit aggravating circumstances (e)(5) (murder committed during robbery) and (e)(6), because these circumstances were

supported by separate evidence. The court noted that the defendant murdered the victims while engaged in two robberies. The defendant committed the murders not only in the course of stealing money from the victims, but also in the course of stealing the keys to the victims' car. While there was evidence of a pecuniary gain motive in stealing the money, there was no evidence that the motive for the theft of the car keys was pecuniary gain. The evidence showed that the defendant stole the keys to use the car as transportation either to visit his girlfriend or to evade law enforcement, not to sell the car and convert it into cash. Thus, the theft of money supported (e)(6) and the theft of the keys supported (e)(5).

State v. Howell, 335 N.C. 457 (1994). Relying on *State v. Quesinberry*, 319 N.C. 228 (1987), the court ruled that the trial judge erred in submitting both (e)(5) (murder was committed while defendant was committing burglary) and (e)(6) (murder was committed for pecuniary gain) when these aggravating circumstances were supported by the same evidence. In this case, pecuniary gain was the motive for committing the burglary.

State v. Quesinberry, 319 N.C. 228 (1987). The defendant was convicted of first-degree murder based on premeditation and deliberation and felony murder, the underlying felony being armed robbery. Both aggravating circumstances (e)(5) (murder committed during commission of robbery) and (e)(6) (murder committed for pecuniary gain) were submitted and found by the jury. The court ruled that the circumstances were redundant, since the motive of pecuniary gain provided the impetus for the robbery itself, and therefore it was error to submit both circumstances to the jury. Only one of the circumstances should have been submitted. *See also* State v. Davis, 325 N.C. 607 (1989) (similar ruling).

Propriety of Submitting Multiple Aggravating Circumstances

State v. Waring, 364 N.C. 443 (2010). The defendant and an accomplice stole the victim's wallet, raped her, and murdered her by stabbing her repeatedly. The trial judge submitted aggravating circumstances (e)(5) (murder during the commission of a specified felony, in this case, rape), (e)(6) (murder for pecuniary gain), and (e)(9) (heinous, atrocious, or cruel). Separate evidence supported each and the prosecutor's argument did not ask the jury to find more than one aggravating circumstance based on the same evidence.

State v. Tirado, 358 N.C. 551 (2004). The defendant and others stole a car from victim A, shooting victim A nonfatally. Then, they stole a car from victims B and C, forcing the victims into the trunk, and later stealing their jewelry and killing them. The trial judge did not plainly err in submitting aggravating circumstances (e)(5) (based on the kidnapping of victims B and C), (e)(6) (murder for pecuniary gain) (based on the theft of jewelry from victims B and C), and (e)(11) (course of violent

conduct) (based, as to each murder, on the others). Separate evidence supported each aggravating circumstance.

State v. Jones, 327 N.C. 439 (1990). Distinguishing *State v. Quesinberry*, discussed below, the court ruled that the submission of aggravating circumstances (e)(6) and (e)(11) (course of conduct involving violence to others) was proper. The aggravating circumstances were not improperly supported by the same evidence. Evidence of the robbery of the convenience store employee supported (e)(6). Evidence that the defendant killed the victim, wounded another, and fired shots endangering others supported (e)(11).

State v. Conaway, 339 N.C. 487 (1995). The court reviewed the evidence at the sentencing hearing and ruled that separate substantial evidence supported each of the following three aggravating circumstances in this double murder case: (e)(5) (murder committed during the commission of kidnapping), (e)(6) (pecuniary gain: taking money from a cash register during an armed robbery), and (e)(11) (course of conduct by committing a violent crime against another: the defendant killed two victims).

Aggravating Circumstance (e)(7): Murder Committed to Hinder Governmental Function or Law Enforcement

G.S. 15A-2000(e)(7) states: "The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws." This aggravating circumstance may apply when a defendant commits a murder to prevent (1) a law enforcement officer from arresting the defendant, (2) a person from giving information to law enforcement about the defendant's criminal offenses, or (3) a potential witness from testifying against the defendant.[84] Of course, similar evidence will often also support aggravating circumstance (e)(4) (murder committed to avoid arrest or effect escape). However, if the same evidence supports both (e)(7) and (e)(4), only one of the aggravating circumstances may be submitted to the jury.[85] Aggravating circumstance (e)(7) has been discussed only infrequently in appellate cases, suggesting that prosecutors or judges may typically prefer to submit (e)(4) when the same evidence could support either circumstance.[86]

State v. Anthony, 354 N.C. 372 (2001). The defendant was convicted of first-degree murder and sentenced to death for the murder of his wife. A domestic violence

84 *See generally*, *e.g.*, State v. Goodman, 298 N.C. 1 (1979); State v. Maynard, 311 N.C. 1 (1984) (Frye, J., concurring and dissenting).

85 State v. Goodman, 298 N.C. 1 (1979).

86 One possible reason for this is that (e)(4) may be submitted together with (e)(8) (murder committed against law enforcement officer or specified others) based on the same evidence, while (e)(7) may not be submitted together with (e)(8) based on the same evidence.

protective order had been issued after the murder victim had filed a domestic violence complaint against the defendant. The victim was murdered on the day before she was scheduled to return to court. The defendant was aware of this hearing and was extremely upset about this proceeding. Although the court ruled that there was evidence to support the submission of both aggravating circumstances—(e)(7) (murder committed to disrupt exercise of governmental function) and (e)(8) (murder committed against witness because of exercise of official duty as witness)—the court also ruled that the trial judge erred in submitting both aggravating circumstances because they were based on the same evidence. Both circumstances referred to the domestic violence matter previously initiated by the murder victim and scheduled for hearing the day after the murder. The relationship between the defendant, the murder victim, and their children was a reason the victim had instituted the action and was to be a witness at the upcoming hearing. The court distinguished *State v. Gray*, 347 N.C. 143 (1997), in which the court upheld the submission of both (e)(7) and (e)(8). [**Author's note**: The statements in *State v. Gray*, 347 N.C. 143 (1997), about the kind of evidence that may support aggravating circumstance (e)(8) were disavowed in *State v. Long*, 354 N.C. 534 (2001). See the discussion of *State v. Long* under aggravating circumstance (e)(8) below.]

State v. Gray, 347 N.C. 143 (1997). The court ruled that sufficient evidence supported aggravating circumstance (e)(7) where the defendant killed his wife to "disrupt[] . . . divorce proceedings." The defendant had refused to answer interrogatories in the divorce case concerning the parties' finances and had been served with an order to answer the interrogatories or show cause why he should not be held in contempt. Discovery was to have been competed one week after the defendant killed his wife. The evidence showed that the defendant was determined that his wife would get nothing from the marriage; he had liquidated marital property and put the proceeds in his name. The court ruled that the jury could reasonably find that one reason he killed his wife was to stop the divorce action against him. [**Author's note**: The court's statements about the kind of evidence that may support aggravating circumstance (e)(8) were disavowed in *State v. Long*, 354 N.C. 534 (2001). See the discussion of *State v. Long* under aggravating circumstance (e)(8), below.]

State v. Gregory, 340 N.C. 365 (1995). The court ruled that the judge's instruction on (e)(7), based on the pattern jury instruction, was not error.

State v. Goodman, 298 N.C. 1 (1979). There was sufficient evidence to support aggravating circumstance (e)(4) (murder committed to avoid lawful arrest or effect escape from custody) when, after the victim was shot and cut but before he was killed, the defendant stated that he "was afraid if the police found [the victim] that he would tell what he had done to him." The defendant and an accomplice then

planned to bury the victim. Later they decided to shoot him and place him on a railroad track where his body would be mangled by a passing train. However, it was error to submit both (e)(4) and (e)(7), because they were based on the same evidence. The submission of both was an unnecessary duplication of circumstances that resulted in an automatic accumulation of aggravating circumstances against the defendant.

Aggravating Circumstance (e)(8): Murder Committed against Law Enforcement Officer or Others

G.S. 15A-2000(e)(8) states: "The capital felony was committed against a law-enforcement officer, employee of the Department of Correction, jailer, fireman, judge or justice, former judge or justice, prosecutor or former prosecutor, juror or former juror, or witness or former witness against the defendant, while engaged in the performance of his official duties or because of the exercise of his official duty." In *State v. Long*,[87] the North Carolina Supreme Court ruled that this aggravating circumstance has two prongs. It applies when a member of one of the groups listed in the statute is killed (1) while engaged in the performance of his or her official duties (the "engaged in" prong), or (2) because of the exercise of his or her official duty (the "because of" prong).

To submit the "engaged in" prong, the state must show that the victim was actively engaged at the time of the murder in performing a duty expected of a member of the protected group. For example, if the victim was a witness against the defendant in a pending case, the state would need to show that at the time of the murder, the victim was engaged in an activity such as swearing out a warrant, discussing the case with a prosecutor, going to court to testify, or actively testifying. The court explicitly disavowed language in *State v. Gray*[88] that implied that a witness is engaged in his or her official duties from the time the witness swears out a warrant until the witness completes his or her testimony.

To submit the "because of" prong, the state must show that the defendant's motivation for killing the victim was that he or she was performing a duty expected of a member of the protected group.

The North Carolina Supreme Court has ruled that this aggravating circumstance applies to the murder of a law enforcement officer who was working off-duty, in uniform, pursuant to department regulations, and was killed while performing law enforcement related duties.[89] Although the state supreme court has not decided

87 354 N.C. 534 (2001).
88 347 N.C. 143 (1997).
89 State v. Gaines, 332 N.C. 461 (1992).

whether this circumstance requires proof that the defendant knew or had reasonable grounds to know that the victim was a member of the protected group, the court of appeals has interpreted a similar non-capital aggravating circumstance not to require such knowledge with respect to the "engaged in" prong.[90]

The court has also ruled that it is permissible for a jury to find both (e)(8) and (e)(4) (murder committed to avoid arrest) because these circumstances focus on different aspects of sentencing. Aggravating circumstance (e)(4) focuses on the defendant's motivation and (e)(8) focuses on the factual circumstances of the murder.[91]

State v. Carter, __ N.C. App. __, 711 S.E.2d 515 (2011). The defendant, injured in a melee at a nightclub, sprayed the assembled crowd indiscriminately with bullets, killing a law enforcement officer who had responded to the fracas. The defendant was convicted of second-degree murder, and the jury found the non-capital aggravating circumstance set forth in G.S. 15A-1340.16(d)(6), which is similar to capital aggravating circumstance (e)(8). Deciding an issue of first impression, the court of appeals ruled that the "engaged in" prong was properly submitted, regardless of whether the defendant knew that the victim was a law enforcement officer. In an extensive analysis, the court reasoned that the "engaged in" prong focuses on objective facts, and so "does not require the State to prove that the defendant knew or reasonably should have known that the victim was a member of the protected class."

State v. Augustine, 359 N.C. 709 (2005). The defendant told acquaintances that he wanted to shoot a police officer because the defendant's brother had recently been sentenced to prison. The defendant proceeded to shoot an officer fatally with no warning and no provocation. This evidence "fully support[ed]" aggravating circumstance (e)(8).

State v. Long, 354 N.C. 534 (2001). The defendant lived with his mother and had a history of violently abusing her. As a result of one incident, the defendant was charged with assault on a female. Five days before the trial on that charge was scheduled to begin, the defendant fatally assaulted his mother. At his capital sentencing hearing, the trial judge submitted aggravating circumstance (e)(8) on the theory that the defendant had killed his mother while she was "engaged in" her official duties as a witness against him. On appeal, the defendant argued that the circumstance should not have been submitted because his mother was not actively

[90] State v. Carter, __ N.C. App. __, 711 S.E.2d 515 (2011). But cf. State v. Avery, 315 N.C. 1 (1985) (requiring such knowledge in a prosecution for the criminal offense of assault on a law enforcement officer).

91 See, e.g., State v. Maness, 363 N.C. 261 (2009); State v. Polke, 361 N.C. 65 (2006); State v. Nicholson, 355 N.C. 1 (2002); State v. Golphin, 352 N.C. 364 (2000); State v. Hutchins, 303 N.C. 321 (1981).

engaged in being a witness at the time of the murder. The state, citing *State v. Gray*, 347 N.C. 143 (1997), contended that "a witness is engaged in the official performance of her duties from the time she swears out a warrant until the time she testifies." The supreme court ruled for the defendant. Although his mother may have been a witness against him, she was not "actively engaged at the time of the murder in the performance of a duty expected of a witness, such as swearing out a warrant, discussing the case with a prosecutor, going to court to testify, or actively testifying," so the "engaged in" prong of (e)(8) was not met. The court stated that it was not "intend[ing] to suggest that the fact a victim witness has not yet testified precludes submission of the 'because of' prong of the (e)(8) aggravator."

State v. Anthony, 354 N.C. 372 (2001). The defendant was convicted of first-degree murder and sentenced to death for the murder of his wife. A domestic violence protective order had been issued after the murder victim had filed a domestic violence complaint against the defendant. The victim was scheduled to return to court the morning after her murder. The defendant was aware of this hearing and was extremely upset about this proceeding. Although the court ruled that there was evidence to support the submission of both aggravating circumstances—(e)(7) (murder committed to disrupt exercise of governmental function) and (e)(8) (murder committed against witness because of exercise of official duty as witness)—the court also ruled that the trial judge erred in submitting both aggravating circumstances because they were based on the same evidence. Both circumstances referred to the domestic violence matter previously initiated by the murder victim and scheduled for hearing the day after the murder. The relationship between the defendant, the murder victim, and their children was a reason the victim had instituted the action and was to be a witness at the upcoming hearing. The court distinguished *State v. Gray*, 347 N.C. 143 (1997), in which the court upheld the submission of both (e)(7) and (e)(8). [**Author's note:** Note that statements about the kind of evidence that may support aggravating circumstance (e)(8), discussed in *State v. Gray*, 347 N.C. 143 (1997), was disavowed in *State v. Long*, 354 N.C. 534 (2001). See the discussion of *State v. Long* above.]

State v. Guevara, 349 N.C. 243 (1998). The defendant was convicted of the first-degree murder of Officer A and felonious assault of Officer B. The court ruled that the trial judge did not err in submitting aggravating circumstance (e)(8) even assuming that Officer A illegally entered the defendant's home to arrest him, because the defendant had no right to use deadly force under the circumstances. The court noted that even if the officer in some way improperly performed his official duties, the defendant was still not justified under G.S. 15A-401(f) in using deadly force against the officer.

State v. Alston, 341 N.C. 198 (1995). The murder victim, who had an ongoing relationship with the defendant, was found dead two days after testifying against

the defendant in a trial for an assault against her. The court ruled that this was sufficient evidence of aggravating circumstance (e)(8).

State v. Gaines, 332 N.C. 461 (1992). A Charlotte police officer was working for a motel while off-duty, in uniform, and pursuant to department regulations. The defendants left the motel after a dispute with the officer about their visiting a particular motel room, and they later returned and killed the officer by shooting him while he sat in the motel lobby. The court ruled that aggravating circumstance (e)(8) includes as victims duly sworn law enforcement officers when they are performing off-duty, secondary law enforcement related duties, when it is clear that these duties and compensation are incidental and supplemental to their primary duties of law enforcement on behalf of the general public. The evidence in this case was sufficient to submit (e)(8) under both prongs: the murder was committed against the law enforcement officer (1) while the officer was engaged in the performance of his official duties, and (2) because the officer was exercising his official duties.

State v. Hutchins, 303 N.C. 321 (1981). The court ruled that it was not error to submit two aggravating circumstances in this case: (e)(4) (murder committed for purpose of avoiding or preventing a lawful arrest) and (e)(8) (murder committed against law enforcement officer engaged in performance of lawful duties), although they may have been based on the same evidence. The court stated that it is not error to submit multiple aggravating circumstances if the inquiry prompted by their submission is directed at distinct aspects of the defendant's character or the murder for which the defendant is to be punished. The (e)(4) aggravating circumstance focuses on the defendant's motivation in pursuing his course of conduct. The (e)(8) aggravating circumstance focuses on the factual circumstances of crime. The court distinguished its ruling in *State v. Goodman*, 298 N.C. 1 (1979). *See also* State v. Maness, 363 N.C. 261 (2009) (similar ruling); State v. Polke, 361 N.C. 65 (2006) (similar ruling); State v. Nicholson, 355 N.C. 1 (2002) (similar ruling); State v. Golphin, 352 N.C. 364 (2000) (similar ruling).

Aggravating Circumstance (e)(9): Murder Especially Heinous, Atrocious, or Cruel

G.S. 15A-2000(e)(9) states: "The capital felony was especially heinous, atrocious, or cruel."

The North Carolina Supreme Court has repeatedly ruled that (e)(9) and the pattern jury instruction defining it are constitutional.[92] The court has noted that under this

92 *See*, *e.g.*, State v. Duke, 360 N.C. 110 (2005) (reaffirming constitutionality after *Ring v. Arizona*, 536 U.S. 584 (2002)); State v. Smith, 359 N.C. 199 (2005) (based on prior precedent, aggravating circumstance (e)(9) not unconstitutionally vague); State v. Syriani, 333 N.C. 350 (1993).

circumstance a murder must not be merely heinous, atrocious, or cruel – descriptions that might apply to all first-degree murders – but must be *especially* heinous, atrocious, or cruel. It has described several types of murders that may warrant submission of this aggravating circumstance to the jury:

1. a murder physically agonizing or otherwise dehumanizing to the victim;

2. a murder less violent than described in 1, but conscienceless, pitiless, or unnecessarily torturous to the victim, including a murder that leaves the victim in one's last moments aware of, but helpless to prevent, impending death;

3. a murder that demonstrates a defendant's unusual depravity of mind exceeding what is normally present in first-degree murder cases; and

4. a murder committed in a fashion beyond what was necessary to effectuate the victim's death.[93]

Among the factors that the supreme court has discussed in connection with aggravating circumstance (e)(9) are: the victim's age, i.e., whether the victim was very young or very old;[94] whether the defendant had a racial[95] or satanic[96] motivation; whether the victim was helpless;[97] the number of wounds inflicted by the defendant;[98] the extent to which the defendant planned the murder in advance;[99] whether the victim died a slow death;[100] whether the victim anticipated his or her death;[101] whether the defendant invaded the sanctuary of the victim's

93 State v. Golphin, 352 N.C. 364 (2000); State v. Gibbs, 335 N.C. 1 (1993).
94 State v. Lane, 365 N.C. 7 (2011) (five year old victim); State v. Garcell, 363 N.C. 10 (2009) (71 year old victim); State v. Jones, 358 N.C. 330 (2004) (14 year old victim); State v. Bell, 359 N.C. 1 (2004) (89 year old victim); State v. Huff, 325 N.C. 1 (1989) (nine month old victim); State v. Williams, 339 N.C. 1 (1994) (68 year old victim).
95 State v. Golphin, 352 N.C. 364 (2000).
96 State v. White, 355 N.C. 696 (2002) (satanic motive may show a depravity of mind and thus is relevant in proving this aggravating circumstance).
97 State v. Murrell, 362 N.C. 375 (2008); State v. Hurst, 360 N.C. 181 (2006).
98 State v. Goss, 361 N.C. 610 (2007) (defendant stabbed victim over 50 times); State v. Morgan, 359 N.C. 131 (2004) (48 separate wounds).
99 State v. Hurst, 360 N.C. 181 (2006).
100 State v. Goss, 361 N.C. 610 (2007) (defendant paused while stabbing victim, prolonging her suffering); State v. Elliott, 360 N.C. 400 (2006) (defendant killed victim "by strangulation, a method of murder which takes several minutes").
101 State v. Elliott, 360 N.C. 400 (2006) (victim was "aware of her impending death but helpless to prevent it"); State v. Allen, 360 N.C. 297 (2006) (incapacitated victim was aware of his impending death); State v. Bell, 359 N.C. 1 (2004) (victim trapped in the trunk of her own car for hours, awaiting her death); State v. Tirado, 358 N.C. 551 (2004) (similar).

home;[102] whether children saw, or were likely to see, the murder or its aftermath;[103] and whether the defendant desecrated the victim's body.[104]

There have been many appellate cases on (e)(9). Quite a few are summarized below. The supreme court reversed several cases for insufficient evidence of (e)(9) in the early 1980s. Since 1984, however, the court has found insufficient evidence of (e)(9) in just one case.[105]

Case Summaries on Aggravating Circumstance (e)(9)

Constitutional Issues

Maynard v. Cartwright, 486 U.S. 356 (1988). The Court ruled that the Oklahoma aggravating circumstance of "especially heinous, atrocious, or cruel" was unconstitutionally vague when those words on their face did not offer sufficient guidance to the jury, and Oklahoma courts had not adopted a limiting construction that cured the infirmity.

Godfrey v. Georgia, 446 U.S. 420 (1980). The defendant shot his wife in the forehead with a shotgun, killing her instantly. He then shot his mother-in-law in the head with the shotgun, killing her instantly. The jury, based on this evidence, found as an aggravating factor that the murder was "outrageously or wantonly vile, horrible and inhuman." The Court ruled that the Georgia Supreme Court in this case had not applied a constitutional construction of this aggravating factor. The defendant's crimes did not reflect a consciousness materially more "depraved" than that of any person guilty of murder. His victims were killed instantaneously. There was no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.

State v. Duke, 360 N.C. 110 (2005). The court reaffirmed, after *Ring v. Arizona*, 536 U.S. 584 (2002), that the pattern instruction for aggravating circumstance (e)(9) sufficiently narrows and refines it to render it constitutional.

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[102] State v. Garcell, 363 N.C. 10 (2009) (defendant killed victim "within the perceived sanctuary of her own residence"); State v. Cummings, 361 N.C. 438 (2007) (defendant murdered victim "while she was in the supposed safety of her own home"); State v. Bell, 359 N.C. 1 (2004) (noting that the victim "was kidnapped from her own home").

[103] State v. Goss, 361 N.C. 610 (2007) ("[D]efendant 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['s body]."); State v. McNeill, 360 N.C. 231 (2006) (defendant shot victim in front of many witnesses, including children).

[104] State v. Garcell, 363 N.C. 10 (2009) (defendant "desecrated [the victim's] remains by riding her limp body like a horse"); State v. McNeill, 360 N.C. 231 (2006) (the defendant shot the victim, then, as a final insult, kicked her before leaving her to die).

[105] State v. Lloyd, 354 N.C. 76 (2001).

State v. Smith, 359 N.C. 199 (2005). Based on prior precedent, the court held that aggravating circumstance (e)(9) is not unconstitutionally vague.

State v. Syriani, 333 N.C. 350 (1993). The (e)(9) aggravating circumstance and the pattern jury instruction on (e)(9) are constitutional. *See also* State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1989).

State v. Fullwood, 323 N.C. 371 (1988). The court, upholding the constitutionality of (e)(9) when the pattern jury instruction was given, distinguished the ruling in *Maynard v. Cartwright*, 486 U.S. 356 (1988), by noting that the unconstitutional jury instruction in *Maynard*, unlike the North Carolina pattern jury instruction, did not limit this aggravating circumstance to the "conscienceless or pitiless crime which is unnecessarily torturous to the victim." *Compare also* Smith v. Dixon, 14 F.3d 956 (4th Cir. 1994) (en banc) (stating that the trial judge's very brief jury instruction on aggravating circumstance (e)(9) was unconstitutionally vague, but that the issue was not properly preserved, and in any event, the error was harmless; the unconstitutional instruction was not the North Carolina pattern jury instruction), *with* Fullwood v. Lee, 290 F.3d 663 (4th Cir. 2002) (holding that the pattern instruction provides sufficient guidance to the jury to render aggravating circumstance (e)(9) constitutional).

Jury Instruction Issues

State v. Oliver, 309 N.C. 326 (1983). The trial judge erred in the instruction on (e)(9) when the instruction indicated that the jury could find this circumstance based *solely* on evidence that the murder victim begged for his life, since this factor alone does not always necessitate a finding that a murder was especially heinous, atrocious, or cruel.

State v. Jennings, 333 N.C. 579 (1993). When the defendant was convicted of first-degree murder based on both torture and premeditation and deliberation, the trial judge properly submitted (e)(9). (**Author's note:** it is possible that if a defendant were convicted of first-degree murder based only on torture, the court would rule that (e)(9) may not be submitted, based on the principles set out in *State v. Cherry*, 298 N.C. 86 (1979) (improper to submit underlying felony as (e)(5) aggravating circumstance when defendant is convicted of first-degree murder based solely on felony murder theory, since there is an automatic aggravating circumstance of the underlying felony), because this circumstance is directed at the conscienceless or pitiless crime that is *unnecessarily torturous* to the victim. *Cf.* State v. Moore, 335 N.C. 567 (1994) (aggravating circumstance (e)(9) properly submitted where defendant was convicted of first-degree murder by poisoning; poisoning not inherently torturous).)

Sufficient Evidence of Aggravating Circumstance (e)(9)

State v. Murrell, 362 N.C. 375 (2008). The defendant told several acquaintances that he was planning to commit a robbery. He approached the victim, who was seated in his parked car, and shot him. The defendant took control of the vehicle, placed the victim in the passenger seat, and began driving. The defendant "fired a second, fatal shot at the helpless victim as he lay upside down on the front passenger side of the vehicle and after he begged defendant to put him out of his misery." This supported the jury's finding of aggravating circumstance (e)(9).

State v. Raines, 362 N.C. 1 (2007). The defendant lived with a friend and the friend's wife. One night, he killed them and stole their guns, credit cards, checks, and truck. There was sufficient evidence of aggravating circumstance (e)(9) where the defendant brutally beat his friend with a wrench and then shot him three times because it was "just better to kill him."

State v. Goss, 361 N.C. 610 (2007). The defendant's neighbor confronted him about whether the defendant had raped her daughter. The defendant then assaulted the victim, beating her unconscious several times. Then he "needlessly stabbed her over fifty times . . . pausing several times between series of stabs, thereby prolonging the victim's suffering. Only [then] 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['s body]." This supported the jury's finding of aggravating circumstance (e)(9).

State v. Cummings, 361 N.C. 438 (2007). The defendant murdered the victim "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 supported the jury's finding of aggravating circumstance (e)(9).

State v. Forte, 360 N.C. 427 (2006). The prosecutor's argument in support of aggravating circumstance (e)(9) presented a "plausible scenario" and so was not improper. The state contended that the evidence showed that the defendant entered the home of an elderly couple, attacked and killed the husband as he lay in bed, then killed and sexually assaulted the blind wife as she attempted to come to her husband's aid. The supreme court also stated that the evidence was sufficient to support (e)(9).

State v. Allen, 360 N.C. 297 (2006). The defendant shot a friend twice while walking through a forest, perhaps after some sort of disagreement. One of the shots was to the victim's knee, incapacitating him. The defendant's girlfriend testified that the victim survived for a period of time, and that the defendant periodically threw rocks at the victim to determine whether he was still alive. The throwing of the

rocks, together with the incapacitated victim's awareness of his impending death, supported aggravating circumstance (e)(9).

State v. McNeill, 360 N.C. 231 (2006). The defendant's wife left him and began dating another man. The defendant attacked her at a friend's home in front of many witnesses, including children. He shot her and chased her around the yard as she begged for her life. When she fell to the ground, he shot her many more times and, as a final insult, kicked her before leaving her to die. The evidence was sufficient to support aggravating circumstance (e)(9).

State v. Hurst, 360 N.C. 181 (2006). The prosecutor's closing argument at the penalty phase emphasized that the defendant had planned in advance to kill the victim and that the defendant fired a final shot to the victim's face as he lay helpless on his back. These were relevant to aggravating circumstance (e)(9) and were not improper.

State v. Bell, 359 N.C. 1 (2004). There was sufficient evidence of aggravating circumstance (e)(9) where "the victim, an eighty-nine year old woman, was kidnapped from her own home, repeatedly beaten, and placed in the trunk of her own car to await most certain death. The victim fought to free herself from the trunk of her car, only to have the trunk lid repeatedly slammed down upon her. The victim was trapped in her car for hours, helpless and obviously in fear for her life. . . . ultimately . . . dying alone in the trunk of her own car, which defendant had set on fire."

State v. Barden, 356 N.C. 316 (2002). The defendant was convicted of first-degree murder and sentenced to death. The court ruled that the evidence was sufficient to support (e)(9). The defendant bludgeoned the victim in the head many times, apparently changing weapons during the course of the attack, and the defendant acknowledged that the victim may have been alive after the attack but took no steps to assist him. In addition, the defendant instituted the attack only after the victim, who had already loaned the defendant money once that night, refused to make a second loan of twenty dollars. The defendant's attack began after the victim had turned his back to the defendant to resume his work duties.

State v. Hooks, 353 N.C. 629 (2001). The defendant was convicted of first-degree murder and sentenced to death. The court ruled that there was sufficient evidence of (e)(9). The defendant and the victim were arguing. The defendant stated that he was going to "fuck [the victim] up." The victim began backing away, and the defendant pulled a .38 caliber handgun from his pocket and pointed it at the victim's face. The victim said, "Oh, you're going to shoot me now," and after a silent moment, the defendant shot the victim four times. The victim fell to the ground, and the defendant began kicking him in the face and chest, pistol-whipping him, and taunted him by saying, "you thought I was playing." The defendant then

fled the scene. The victim remained conscious and in obvious extreme pain for at least fifteen minutes.

State v. Brewington, 352 N.C. 489 (2000). The defendant was convicted of two counts of first-degree murder involving the murders of his grandmother and nephew. The murders were committed by his fiancée and a person he had hired. Although the defendant was not present during the commission of the murders, he planned the manner in which they were to be carried out: stabbing the victims and setting fire to their home. Based on the plan, it was reasonable to infer that the deaths of one or both victims would not be instantaneous. The court ruled that there was sufficient evidence to prove (e)(9).

State v. Golphin, 352 N.C. 364 (2000). Two defendants were both convicted of the first-degree murders of two law enforcement officers and sentenced to death for both murders. The court ruled that the evidence was sufficient to support (e)(9) against Defendant A. Defendant B shot an officer, causing him to become incapacitated. Defendant A was therefore able to shake himself free of the officer's grasp and retrieve the officer's pistol. He then shot the officer multiple times as he lay on the ground moaning. Because the officer had the presence of mind to attempt to grab Defendant A after he had been shot, this evidence showed that the officer was aware of his fate and unable to prevent his impending death.

State v. Cheek, 351 N.C. 48 (1999). The state's pathologist testified that he believed that the victim was alive when her taxicab was set on fire because of the presence of soot in her air passages and nose. He also testified that the cause of death was carbon monoxide poisoning. The evidence was unclear whether she was conscious when the fire began. The court ruled that the evidence, although not conclusive, was sufficient for the jury to find that not only was the victim alive when the taxicab was set on fire, but also that she was aware of her impending death. Thus there was sufficient evidence to submit (e)(9).

State v. Flippen, 349 N.C. 264 (1998). The defendant was sentenced to death for the first-degree murder of his two-year-old stepdaughter. The court ruled that the trial judge did not err in submitting (e)(9). The defendant was the victim's primary caregiver on the day he killed her, and she was only two years and four months old. The court stated that she was particularly vulnerable and at the defendant's mercy. The defendant inflicted many blows on her head, neck, and abdomen; the resulting injuries went beyond what would have been necessary to kill her.

State v. Atkins, 349 N.C. 62 (1998). The defendant was convicted of the first-degree murder of his eight-month-old son and sentenced to death. Four medical experts testified about the severity of the murder victim's injuries in comparison to other injuries occurring to other children that the experts had treated in their

respective medical practices. The court ruled that such evidence was admissible in proving (e)(9).

State v. Moseley, 336 N.C. 710 (1994). When determining the sufficiency of evidence to support (e)(9), the court stated that the state is entitled to all reasonable inferences that can be drawn from the evidence. Thus, the court stated that it must assume that the victim received many of the injuries while she was alive. The following evidence was sufficient: the victim was manually strangled, stabbed twelve times and tortured by incisions on her chest and neck, and sexually assaulted with a blunt object and beaten about her body. The murder was characterized by excessive brutality, physical pain, psychological suffering, and dehumanizing aspects not normally found in a first-degree murder.

State v. Ingle, 336 N.C. 617 (1994). The defendant was convicted of first-degree murder committed by an unprovoked beating to death of an elderly man with an ax handle. (He also was convicted at the same trial of first-degree murder of the man's wife, and that murder was committed in a similar manner.) The defendant argued that because the evidence showed that the murder victim was unaware of his presence and was rendered unconscious by the first blow, he did not suffer any of the physical or psychological torture that would cause his murder to be considered sufficient evidence of (e)(9). The court rejected this argument, noting that (e)(9) does not entirely depend on the experience endured by the victim during the killing. The court stated that when a murderer attacks an elderly victim by surprise and repeatedly hits the victim in the head with an ax handle without the slightest provocation, it may be inferred that the murder was conscienceless and pitiless. Evidence that the defendant committed a similar set of murders six weeks later, after a boastful discussion of his murderous capabilities, was further evidence of a lack of pity for his victims. The facts of this murder suggest a depravity of mind not easily matched by even the most egregious of slayings, as well as a level of brutality that exceeded that ordinarily present in first-degree murder.

State v. Sexton, 336 N.C. 321 (1994). The following evidence was sufficient to support (e)(9): the murder victim was sexually assaulted, and then she was strangled with her stockings and would have known what was happening for at least ten seconds before losing consciousness. The murder was physically agonizing and involved psychological terror not normally present in murder cases. For similar sexual assault and strangulation cases in which the circumstance was properly submitted, see *State v. Artis*, 325 N.C. 278 (1989) (manual strangulation during forcible sexual assault) and *State v. Johnson*, 298 N.C. 47 (1979).

State v. Moore, 335 N.C. 567 (1994). The evidence was sufficient to support (e)(9) in a poisoning murder in which the victim suffered prolonged physical agony. The court also rejected the defendant's argument that the rationale of the ruling in *State v. Cherry*, 298 N.C. 86 (1979) (underlying felony may not be used as an

aggravating circumstance when defendant is convicted of first-degree murder based on felony murder only), should apply to bar this aggravating circumstance from being used in a first-degree murder by poisoning, since this aggravating circumstance will always be present. The court noted that neither the fact that poison is administered in small doses over extended periods of time nor the type of poison—slow or fast acting—are elements of the offense.

State v. Lee, 335 N.C. 244 (1994). The evidence was sufficient to support (e)(9). The victim was kidnapped at gun point, stripped naked, driven to another location where she was forced to walk or run to the place where she was beaten on the head, kicked in the throat, and strangled by the defendant. The defendant said that the victim died a slow and painful death.

State v. Gibbs, 335 N.C. 1 (1993). The court ruled that the evidence was sufficient to support (e)(9). The murder victim, tied and gagged at the defendant's direction, suffered under knowledge that her death was imminent. She was helpless and terrorized. The defendant, standing within a few feet of her, placed the muzzle of his rifle on her forehead. Evidence that the defendant shot the victim because her crying made him nervous showed that he acted in a conscienceless, pitiless manner in killing her.

State v. Syriani, 333 N.C. 350 (1993). The evidence was sufficient to support (e)(9), when the victim had been subjected to domestic violence by the defendant (the victim's husband), who stabbed her twenty-eight times with a screwdriver, and she died twenty-eight days later of these wounds.

State v. Oliver, 309 N.C. 326 (1983). Evidence was sufficient to support (e)(9) when the defendant killed the robbery victim in cold blood as the victim was pleading "please don't shoot me." The defendant showed no remorse. The defendant later boasted to his fellow jail inmates that he had pointed the gun at the robbery victim, who begged not to be shot and offered the defendant more money, and the defendant "kind of liked the idea of it" (apparently referring to killing the victim). The court reaffirmed its earlier ruling on the sufficiency of evidence of (e)(9) that it had made in the first appeal, *State v. Oliver*, 302 N.C. 28 (1981).

The following are brief summaries of some other cases in which the court ruled that evidence of (e)(9) was sufficient:

State v. Lane, 365 N.C. 7 (2011) (aggravating circumstance (e)(9) was supported by the evidence where the defendant raped a five-year-old child "before putting her, while still alive, in a garbage bag sealed with duct tape, wrapping her in a tarp, and discarding her body in a creek").

State v. Garcell, 363 N.C. 10 (2009) (aggravating circumstance (e)(9) was supported by the evidence where the defendant "manhandled, brutally choked, and strangled his victim, a seventy-one year old woman, to death within the perceived sanctuary of her own residence" then "desecrated her remains by riding her limp body like a horse").

State v. Morgan, 359 N.C. 131 (2004) (sufficient evidence of aggravating circumstance (e)(9) where the defendant, angry because the victim used his drugs but then refused to give him oral sex, murdered the victim by inflicting 48 separate wounds, apparently with a broken beer bottle).

State v. Tirado, 358 N.C. 551 (2004) (defendant and others stole a car from the victims, forcing the victims into the trunk, and later stealing their jewelry and killing them as they pleaded for their lives; there was sufficient evidence to support aggravating circumstance (e)(9), given the extreme depravity of the killings and the victims' awareness of their impending deaths).

State v. Holman, 353 N.C. 174 (2000) (defendant's method in carrying out the killing of his wife – chasing her in his car, ramming her car, and then approaching her and killing her with his shotgun – was conscienceless and pitiless, inflicting excessive fear and psychological terror).

State v. Anderson, 350 N.C. 152 (1999) (victim was two and a half years old, defendant was her primary caregiver, and the victim was brutally beaten and severely abused by the defendant and another person).

State v. Fleming, 350 N.C. 109 (1999) (victim was repeatedly assaulted with a blunt object in his home; as victim struggled to defend himself, defendant continued to hit him on the head as the victim moved about the house; defendant also manually strangled victim so that his hyoid bone was fractured; evidence supported a reasonable inference that the victim remained conscious during his ordeal and suffered great physical pain and torture).

State v. Hipps, 348 N.C. 377 (1998) (victim was stabbed thirty-four times and existence of a defensive wound on the victim's hand suggested that the victim was conscious and aware of what was happening).

State v. Kandies, 342 N.C. 419 (1996) (victim was savagely beaten, strangled, and sexually assaulted by the defendant, whom she knew and trusted).

State v. Robinson, 342 N.C. 74 (1995) (defendant forced murder victim, by putting sawed-off shotgun to victim's neck, to drive to a certain location; victim kept begging and pleading not to hurt him because he had no money; defendant and accomplice directed victim to side street where he was told to lie down; accomplice

shot victim in the face and defendant took his wallet; murder was physically agonizing or otherwise dehumanizing to the victim).

State v. Frye, 341 N.C. 470 (1995) (defendant murdered victim who knew and trusted defendant; defendant stabbed victim repeatedly, causing pain but not unconsciousness; this amounted to "psychological torture" and supported (e)(9)).

State v. Burr, 341 N.C. 263 (1995) (defendant's murder of defenseless four-month-old baby was not only pitiless, but it also betrayed the special role that the defendant had been given in the child's family; the injuries inflicted on the child were numerous, in excess of what was necessary to kill the victim, and brutal).

State v. Alston, 341 N.C. 198 (1995) (defendant repeatedly beat the victim about her face with a hammer or similar blunt object and, while she was conscious, suffocated her with a pillow placed against her face; based on these and other facts, the court ruled that evidence supported a finding that the killing was physically agonizing and involved psychological torture not normally present in murder).

State v. Lynch, 340 N.C. 435 (1995) (defendant shot twelve-year-old victim nine times, continually shooting her while she tried to crawl across a street to a safe place; victim was aware that she was going to die but was unable to prevent her impending death).

State v. Williams, 339 N.C. 1 (1994) (defendant inflicted seven different wounds to the sixty-eight-year-old victim; four of these head injuries would have been sufficient to disorient or confuse the victim but not render him unconscious; the three remaining head injuries exceeded the normal brutality found in first-degree murder cases; the victim could have remained conscious throughout all seven blows and have been aware of, while incapable of preventing, his impending death; court noted that the victim's age is a factor in determining whether to submit (e)(9)).

State v. Carter, 338 N.C. 569 (1994) (defendant administered abrasions and lacerations all over the victim's body as she struggled with the defendant; she requested the defendant several times not to kill her; he then silenced her by strangling her; she fought him for at least two minutes before losing consciousness and dying; the defendant then pounded her head several times with a brick).

State v. Rose, 335 N.C. 301 (1994) (defendant inflicted multiple stab wounds to the victim's body and manually strangled her to death; victim was conscious while the defendant inflicted lesser knife wounds on her body and could have remained so after she was struck on the head; defendant's strangulation of the victim took between four and five minutes).

State v. Quick, 329 N.C. 1 (1991) (defendant stabbed a practically helpless seventy-eight-year-old man seventeen times in the chest area; seven or eight wounds extended through the heart and right lung; victim could have lived up to ten minutes after sustaining stab wounds).

State v. Bonney, 329 N.C. 61 (1991) (defendant murdered his daughter; victim had twenty-seven gunshot entrance wounds all over her body; wounds to her face and chest occurred before she died; victim was alive and aware of her fate while many of the shots were fired).

State v. Huff, 325 N.C. 1 (1989) (defendant buried nine-month-old infant son alive; jury may properly consider victim's age in determining weight to give (e)(9)).

State v. Laws, 325 N.C. 81 (1989) (both murder victims were unable to defend themselves because of extreme intoxication and the defendant beat them mercilessly with a hammer).

State v. McNeil, 324 N.C. 33 (1989) (defendant not only choked and shot the victim, but he also beat and stabbed her, and hit her in the face with a wooden frame which had nails sticking out of it).

State v. McLaughlin, 323 N.C. 68 (1988) (defendant beat victim with pipe, stuffed her mouth with a rag, dragged her into a bathroom, forced her head under water, and held it there while she struggled for her life).

State v. Lloyd, 321 N.C. 301 (1988) (defendant stabbed victim seventeen times, kicked him with such force as to cause his brain to swell and hemorrhage and ultimately caused his death; victim did not die immediately, lingering for at least five to ten minutes).

State v. Spruill, 320 N.C. 688 (1987) (defendant stalked victim and cut her two separate times, the second time causing her to drown in her own blood).

State v. Reese, 319 N.C. 110 (1987) (defendant repeatedly stabbed robbery victim as if in a "frenzy"; victim remained conscious for many minutes before dying).

State v. Stokes, 319 N.C. 1 (1987) (defendant and accomplices beat robbery victim severely on and about his head; blows fractured his skull and caused hemorrhaging into his brain; victim remained in a semiconscious state for over twelve hours before dying).

State v. Johnson, 317 N.C. 343 (1986) (defendant stabbed victim, took her from car and sexually assaulted her, stabbed her fifty-five times, and fifteen to twenty minutes elapsed from the first stabbing until the victim died).

State v. Gladden, 315 N.C. 398 (1986) (defendant slashed victim's throat, shot him twice, dragged him into a ditch, and then shot him twice more in the head; victim choked to death slowly and suffered extreme pain and anxiety before his death).

State v. Brown, 315 N.C. 40 (1985) (defendant took robbery victim from convenience store to secluded area five miles from the store, bound her hands, and shot her six times; victim may have lived as long as fifteen minutes after being shot).

State v. Huffstetler, 312 N.C. 92 (1984) (murder victim died as a result of blows with a cast-iron skillet so severe that they fractured her skull, neck, jaw, and collarbone and caused her skull to be pushed into her brain).

State v. Craig, 308 N.C. 446 (1983) (court rejected defendant's argument that murder was not heinous, atrocious, or cruel because the victim, with a blood alcohol level of 0.29, was so intoxicated that she must have been practically anesthetized against the torture of the thirty-seven stab wounds inflicted with a pocket knife).

State v. Brown, 306 N.C. 151 (1982) (the defendant stabbed two victims to death; the number, severity, and character of the wounds supported (e)(9); also, the victims' bodies were grossly mutilated).

State v. Pinch, 306 N.C. 1 (1982) (defendant, through the execution of a deliberate plan and with a grin on his face, shot two victims, one of whom pleaded for his life).

State v. Smith, 305 N.C. 691 (1982) (defendant kidnapped, robbed, and raped the victim during several-hour ordeal and then killed her by striking her on the head with a cinder block).

State v. Rook, 304 N.C. 201 (1981) (defendant beat victim, hit her with a tire tool, cut her with a knife, raped her, ran over her with a car, and then left her alone to die).

State v. Martin, 303 N.C. 246 (1981) (during twenty-five-minute ordeal, defendant fired shots at the victim, one of which severed her spine, hit her on the head and face repeatedly with his fist and pistol, fired shots at her in her son's presence, and then shot her to death).

State v. Silhan, 302 N.C. 223 (1981) (victim was stripped from the waist down, had her hands tied behind her back and her brassiere tied around her neck, was marched at knife-point into the woods, and was forced to lie down while she was beaten and murdered).

State v. McDowell, 301 N.C. 279 (1980) (with a two-foot machete, defendant entered victim's house, threatened to rape victim's fourteen-year-old sister, and struck at four-year-old victim while she was in her sister's arms, wounding her nine times and killing her).

State v. Johnson, 298 N.C. 355 (1979) (defendant offered a ten-year-old boy $10 to have sex with him, and when the boy refused, the defendant strangled him with a nylon fish stringer; during or after the killing, the defendant sexually assaulted the victim).

State v. Barfield, 298 N.C. 306 (1979) (defendant placed arsenic in victim's tea and beer because she feared the victim would report the defendant's forgery of checks drawn on the victim's bank account).

State v. Johnson, 298 N.C. 47 (1979) (defendant tried to strangle the victim, rendered her unconscious, sexually molested her, and realizing she was not dead, stabbed her to death).

State v. Goodman, 298 N.C. 1 (1979) (victim was shot several times and cut repeatedly with a knife, placed alive in a car trunk, and begged for his life; he was then driven to another county, taken out of the trunk, and shot twice in the head).

Insufficient Evidence of Aggravating Circumstance (e)(9)

State v. Lloyd, 354 N.C. 76 (2001). The defendant shot the victim four times and death was relatively rapid. The court conducted a detailed review of its cases involving (e)(9) and ruled that the evidence was insufficient.

State v. Hamlet, 312 N.C. 162 (1984). The evidence was insufficient to support the submission of (e)(9). The defendant shot the victim in the head immediately after the victim entered a vestibule. The victim was unaware of the defendant's presence until he had entered the vestibule. The victim was unconscious and unable to feel any pain after the shot to his head. He was shot six more times after the shot to the head. He died about five hours later without regaining consciousness.

State v. Moose, 310 N.C. 482 (1984). The evidence was insufficient to support (e)(9). The defendant, who was in his pickup truck, followed the victim's car down a road, and the pickup truck repeatedly honked its horn and bumped the back of the

car at an intersection. The victim and another person in the car wondered who was behind them, and pulled into a drugstore parking lot. The pickup truck pulled beside the car, the defendant pointed a shotgun at both of them in the car, and the victim said "Oh God, what are they going to do?" The defendant then fired the shotgun, shooting the victim in the head and killing him. The court stated that there was no evidence that either the victim or the other person in the car believed that the ultimate result of the pickup truck following their vehicle would be death. There was insufficient evidence that the victim was stalked and feared that death was likely to result.

State v. Stanley, 310 N.C. 332 (1984). The evidence was insufficient to support (e)(9). The court stated that there was no evidence that the defendant stalked his victim, his estranged wife; the evidence simply showed that the defendant drove past her house several times. The victim and her family, knowing of the defendant's presence in the area, nevertheless went outside the house for a walk. The court stated that obviously they were not being tortured psychologically by the defendant's actions. At no time before the shooting did the defendant threaten the victim or any of her family. Rather, he shot the victim suddenly, nine times in rapid succession, and she was rendered unconscious within minutes and died shortly thereafter. There was no evidence that the defendant intended that the victim suffer a prolonged, torturous death or that she in fact suffered such a death. Although there was evidence that the victim said "Please Stan" before she was shot, there was no evidence that the defendant heard it or what the words may have referred to.

State v. Oliver, 309 N.C. 326 (1983). A statement by the accomplice, made after the conspiracy had ended, that the murder victim had said "Please don't shoot me" was inadmissible against the defendant. Considering all the evidence in this case, the evidence was insufficient to support (e)(9) in the sentencing hearing of the defendant (although it was sufficient as to the accomplice).

State v. Hamlette, 302 N.C. 490 (1981). The evidence was insufficient to support (e)(9) when the defendant, after riding around drinking beer most of the evening, saw the victim and shot him three times from behind without any established motive. The victim lingered for twelve days and died from the gunshot wounds. The court concluded that this murder was not *especially* heinous.

State v. Oliver, 302 N.C. 28 (1981). The evidence was insufficient to support (e)(9). The defendant was running from a convenience store after committing an armed robbery and shot and killed an innocent bystander, who was there to purchase gas. The killing was a sudden act, and the victim died instantaneously. The victim did not suffer unusual pain or suffering. The court concluded that the brutality of this killing did not exceed that normally present in first-degree murder cases.

Propriety of Submitting Multiple Aggravating Circumstances

State v. Waring, 364 N.C. 443 (2010). The defendant and an accomplice stole the victim's wallet, raped her, and murdered her by stabbing her repeatedly. The trial judge submitted aggravating circumstances (e)(5) (murder during the commission of a specified felony, in this case, rape), (e)(6) (murder for pecuniary gain), and (e)(9) (heinous, atrocious, or cruel). Separate evidence supported each and the prosecutor's argument did not ask the jury to find more than one aggravating circumstance based on the same evidence.

State v. Elliott, 360 N.C. 400 (2006). The defendant beat, raped, and murdered an elderly woman in her own home. The beating was brutal and left extensive blood spatter in the victim's home. The defendant killed the victim "by strangulation, a method of murder which takes several minutes, leaving [the victim] aware of her impending death but helpless to prevent it." This was sufficient evidence to support aggravating circumstance (e)(9), and while some of this evidence may have overlapped with the evidence used to support aggravating circumstance (e)(5) (murder in the course of a specified felony, here burglary), the overlap was not complete.

State v. Jones, 358 N.C. 330 (2004). The defendant shot and killed his wife, then his fourteen-year-old stepson. There was sufficient evidence to support aggravating circumstance (e)(9) as to the murder of the stepson, given the child's age and the parental relationship between the victim and the defendant. There was separate evidence, namely, the murder of the defendant's wife, to support aggravating circumstance (e)(11) (course of violent conduct).

State v. DeCastro, 342 N.C. 667 (1996). The court ruled that separate evidence supported the submission of (e)(9) and (e)(11) (murder was committed during violent course of conduct toward others). Evidence supporting (e)(9) included the defendant's infliction of twenty-three stab wounds on the victim. The victim did not die a quick, painless death but remained conscious during the five to ten minutes that elapsed before she died. In addition, her jeans and panties had been pulled to her ankles, her shirt torn open, and her bra pulled above her breasts, exposing her breasts, torso, and lower body. The evidence supporting (e)(11) was entirely different from the evidence supporting (e)(9): before killing the victim, the defendant robbed, beat, and murdered the victim's husband.

State v. Daughtry, 340 N.C. 488 (1995). The court ruled that separate evidence supported the submission of (e)(5) (murder committed during commission of a sex offense) and (e)(9) (especially heinous, atrocious, or cruel). Evidence supporting (e)(5) showed that some object had been inserted into the victim's rectum or vagina. Evidence supporting (e)(9) showed severe blunt trauma wounds to the head and many abrasions about her body.

State v. Rouse, 339 N.C. 59 (1994). Separate evidence supported the submission of both (e)(5) (murder committed during attempted rape and attempted armed robbery) and (e)(9) (murder was especially heinous, atrocious, or cruel). The victim was stabbed seventeen times and suffered for fifteen minutes as she lost one-half of her blood. The court noted that evidence supporting each aggravating circumstance may overlap as long as the same evidence doesn't support more than one aggravating circumstance.

State v. Jennings, 333 N.C. 579 (1993). The trial judge properly submitted two aggravating circumstances: (e)(5) (murder committed during sex offense) and (e)(9) (especially heinous, atrocious, or cruel) because they were not based on the same evidence. There was substantial evidence of the especially heinous, atrocious, or cruel nature of the murder (the savage beating of the victim) apart from the evidence that the murder was committed while attempting to penetrate the victim's anus with an object.

Aggravating Circumstance (e)(10): Defendant's Use of Hazardous Weapon

G.S. 15A-2000(e)(10) states: "The defendant knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." This aggravating circumstance is identical to the non-capital aggravating circumstance set forth in G.S. 15A-1340.16(d)(8). Selected cases concerning the (d)(8) aggravating circumstance are therefore discussed below.

In *State v. Moose*, the North Carolina Supreme Court ruled that there was sufficient evidence of (e)(10) when a defendant fired a shotgun at close range toward two people who were in a motor vehicle.[106] Although the court in that case emphasized that a shotgun is "capable of firing more than one, and in fact, many projectiles in a pattern over a wide impact area rather than a specifically aimed single projectile such as from a rifle or pistol," it appears that firearms other than shotguns may also support the submission of aggravating circumstance (e)(10),[107] at least if they

106 State v. Moose, 310 N.C. 482 (1984); State v. Jones, 339 N.C. 114 (1994).

[107] State v. Brown, 357 N.C. 382 (2003) (evidence supported aggravating circumstance (e)(10) where the defendant shot and killed his girlfriend and an infant with a pistol while both victims slept in the same bed); State v. Sellars, 363 N.C. 112 (2009) (discussing the non-capital aggravating circumstance set forth in G.S. 15A-1340.16(d)(8), and finding ample evidence supporting the circumstance where the defendant fired a semiautomatic weapon at three police officers); State v. Davis, 349 N.C. 1 (1998) (aggravating circumstance (e)(10) properly found in case involving a .30 caliber rifle). See also State v. Bruton, 344 N.C. 381 (1996) (holding that the trial judge did not err, in a non-capital case, in applying a Fair Sentencing Act aggravating circumstance similar to (e)(10) based on the defendant's use of a nine-millimeter semiautomatic pistol). It may also be worth

are not single-shot devices. Fire bombs and other weapons of mass destruction may also be included within (e)(10).[108] Under some circumstances, a motor vehicle may be a qualifying weapon or device.[109]

Case Summaries on Aggravating Circumstance (e)(10)

Sufficient Evidence of Aggravating Circumstance (e)(10)

State v. Brown, 357 N.C. 382 (2003). Without discussion, the court stated that the evidence supported aggravating circumstance (e)(10) where the defendant shot and killed his girlfriend and an infant while both victims slept in the same bed.

State v. Lopez, 363 N.C. 535 (2009). Discussing the non-capital aggravating circumstance set forth in G.S. 15A-1340.16(d)(8), the court stated that a vehicle may be a device that is hazardous to the lives of multiple people, as when it is driven recklessly by an intoxicated driver.

State v. Sellars, 363 N.C. 112 (2009). Discussing the non-capital aggravating circumstance set forth in G.S. 15A-1340.16(d)(8), the court found ample evidence supporting the circumstance where the defendant fired a semiautomatic weapon at three police officers.

State v. Norwood, 344 N.C. 511 (1996). The defendant threw a burning paper bag and gasoline into a convenience store during business hours while there were at least two people inside. The store exploded into flames after the defendant escaped. The court ruled that this evidence was sufficient to prove (e)(10). The court held that a can of gasoline, when used with a burning paper bag, "has the potential to kill more than one person."

State v. Moose, 310 N.C. 482 (1984). The (e)(10) aggravating circumstance addresses two considerations: a great risk of death that the defendant knowingly created and the weapon by which it was created. The following evidence in this case was sufficient to support this circumstance. The defendant knew that there were two people in the front seat of the victim's car. The defendant's firing of a shotgun into the front seat created a risk of death to both of them, even though

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noting that in footnote two in *Moose*, the court cited two Georgia cases upholding the findings of its similarly worded aggravating circumstance. The defendant in one case used two pistols and in another case used a .32 caliber automatic pistol. But cf. State v. Nobles, 350 N.C. 483 (1999) (error for trial judge to instruct jury that a semi-automatic pistol is a weapon that would normally be hazardous to the lives of more than one person because this relieved the state of its burden of proof).

108 State v. Norwood, 310 N.C. 482 (1984) (can of gasoline plus burning paper bag, when thrown into a store).

[109] State v. Lopez, 363 N.C. 535 (2009) (discussing the non-capital aggravating circumstance set forth in G.S. 15A-1340.16(d)(8), the court stated that a vehicle may be a device that is hazardous to the lives of multiple people, as when it is driven recklessly by an intoxicated driver).

only one of the occupants was killed. The crucial consideration in determining whether the weapon or device fits with this aggravating circumstance is its potential to kill more than one person if the weapon is used in its normal fashion—that is, in the manner in which it was designed. A shotgun is such a weapon.

State v. Jones, 339 N.C. 114 (1994). The evidence was sufficient to support this aggravating circumstance when the defendant, from a distance of ten feet, fired a 12-gauge shotgun into the rear seat of a vehicle occupied by the murder victim and three other people. The blast immediately killed one passenger and injured another.

Propriety of Submitting Multiple Aggravating Circumstances

State v. Smith, 347 N.C. 453 (1998). The defendant was convicted of first-degree murder in which he set fire to an apartment building by lighting kerosene, killing one person and seriously injuring others. Distinguishing *State v. Quesinberry*, 319 N.C. 228 (1987), the court ruled that the aggravating circumstances (e)(5) (murder committed while defendant engaged in arson) and (e)(10) were both properly submitted to the jury because they addressed different aspects of the defendant's murder, although they both relied on the same evidence. Aggravating circumstance (e)(5) addresses the fact that the defendant committed murder while engaging in another felony, arson. Aggravating circumstance (e)(10) addresses a distinct aspect of the defendant's character—he not only intended to kill a particular person when setting fire to the apartment building, but he also disregarded the value of every human life in the building by using an accelerant to set the fire in the middle of the night.

State v. Davis, 349 N.C. 1 (1998). The defendant, using a .30 caliber M1 carbine rifle, killed three people and injured two others. He was convicted of three counts of first-degree murder and sentenced to death for each. The court ruled that the trial judge did not err in submitting both aggravating circumstances (e)(10) and (e)(11) (course of conduct involving violent crimes against others). There was independent evidence to support both aggravating circumstances, even though some of the evidence may have overlapped.

Jury Instruction on Aggravating Circumstance (e)(10)

State v. Nobles, 350 N.C. 483, 515 S.E.2d 885 (1999). The trial judge instructed the jury that, concerning aggravating circumstance (e)(10), "a Lorcin 380 caliber semi-automatic pistol is a weapon which would normally be hazardous to the lives of more than one person." The court ruled that the judge erred in giving this instruction because it improperly relieved the state of its burden to prove this element of the aggravating circumstance.

Aggravating Circumstance (e)(11): Murder Part of Violent Course of Conduct

G.S. 15A-2000(e)(11) states: "The murder for which the defendant stands convicted was part of a course of conduct in which the defendant engaged and which included the commission by the defendant of other crimes of violence against another person or persons." The constitutionality of this aggravating circumstance has been upheld.[110]

The North Carolina Supreme Court has stated that the following are some of the factors to consider in determining whether the first-degree murder and other violent crime(s) were part of a course of conduct: the temporal proximity of the crimes to one another, a recurrent modus operandi, a similar motivation to commit the crimes, and a connection, common scheme, or some pattern or psychological thread that ties them together.[111] The closer the temporal proximity of the first-degree murder and the other violent crime(s), the more likely that the acts are a part of a plan or course of action. The further apart the violent acts, the more one must carefully consider other factors, such as modus operandi and motivation. However, the court also has stated that temporal proximity affects the weight of the evidence, not its admissibility.[112]

Case Summaries on Aggravating Circumstance (e)(11)

Sufficient Evidence of Aggravating Circumstance (e)(11)

State v. Jones, 358 N.C. 330 (2004). The defendant killed his wife and stepson. The killing of each victim supported the finding of aggravating circumstance (e)(11) as to the other victim. The North Carolina Supreme Court stated that "the fact that the victims were related to each other and to the accused supports submission of the course of conduct aggravator."

State v. Moses, 350 N.C. 741 (1999). The defendant was convicted of two first-degree murders that had been committed two months apart. The court ruled the trial judge did not err in submitting aggravating circumstance (e)(11) for each first-degree murder conviction. The evidence showed that the drug-related murders had a common modus operandi and motivation.

State v. Hoffman, 349 N.C. 167 (1998). The defendant was convicted of a first-degree murder and armed robbery of a jewelry store that occurred on November

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[110] State v. Roper, 328 N.C. 337 (1991) (not unconstitutionally vague or overbroad on its face or as applied); State v. Williams, 305 N.C. 656 (1982); State v. Pinch, 306 N.C. 1 (1982) (no double jeopardy violation in submitting each of two murders as an (e)(11) aggravating circumstance for the other).

111. State v. Price, 326 N.C. 56 (1990); State v. Cummings, 332 N.C. 487 (1992).

112. *Cummings*, 332 N.C. 487.

27, 1995. In support of aggravating circumstance (e)(11), the state offered evidence of two bank robberies that occurred on October 20, 1995, and September 18, 1995. The court ruled that the trial judge did not err in submitting this aggravating circumstance. The court noted that the time span between the robberies was sufficiently close to be considered part of the same course of conduct. Also, there was a similar modus operandi—all the robberies occurred in small towns near Charlotte and in daylight hours while the businesses were open, shared the same motive (pecuniary gain), and the same sawed-off shotgun, green bag, ski mask, and white Nissan were used.

State v. Cummings, 346 N.C. 291 (1997). The defendant was convicted of first-degree murder for a killing (victim A) that occurred during an armed robbery on April 22, 1994. At the capital sentencing hearing, the state offered evidence of (e)(11) that was based on a pending charge of murder (victim B) that occurred on April 19, 1994. The court ruled that there was sufficient evidence of the murder and a sufficient link between the murders to support (e)(11). Both murders occurred within several days of each other. The evidence showed that both murders were committed to obtain money for cocaine and involved elderly victims. The defendant had a plan involving the murders of both victims.

State v. Boyd, 343 N.C. 699 (1996). The court ruled that (e)(11) does not require that a defendant must be convicted or charged with the "other crimes of violence" to prove (e)(11). The court also ruled that evidence that the defendant assaulted a person with a deadly weapon with intent to kill during the murder of another person supported the finding of (e)(11).

State v. Chapman, 342 N.C. 330 (1995). There was sufficient evidence to submit (e)(11) for two murders committed about two months apart. The murders shared a common modus operandi. Both murder victims were young women with drug habits; the defendant knew both and had smoked crack with each. One victim was nude when found, and the other was nude from the waist down. Both victims suffered blunt-force trauma injuries to the head; one victim died of strangulation, and the pathologist could not exclude the possibility that the other victim had also been strangled. Each body was found in the lowest part of a vacant house; the houses were within two blocks of each other.

State v. Walls, 341 N.C. 1 (1995). There was sufficient evidence to submit (e)(11) when over a period of two days the defendant physically battered the mother of the three-year-old murder victim, threatened to kill her, and ultimately tried to drown her on the day he succeeded in drowning her three-year-old son.

State v. Garner, 340 N.C. 573 (1995). The defendant's fatal shooting of a convenience store clerk four days before the double murders being tried and the shooting of a taxicab driver eighteen days after the double murders were proper evidence to support the submission of (e)(11). The events were close in time and

the modus operandi was similar, because the defendant used the same pistol to kill or attempt to kill each victim and had one or two accomplices with him during each crime. Also, the same motive (committing robbery to obtain money for drugs) existed for all these crimes.

State v. Skipper, 337 N.C. 1 (1994). The defendant's fatal shooting of two people within seconds of each other was sufficient evidence of (e)(11). *See also* State v. Gregory, 340 N.C. 365 (1995) [sufficient evidence of (e)(11) when defendant killed two people and seriously wounded a third person].

State v. Lee, 335 N.C. 244 (1994). The defendant was convicted of first-degree murder for kidnapping, sexually assaulting, and murdering a female jogger (victim A) on September 24, 1989. The state offered evidence under (e)(11) that on September 29, 1989, the defendant kidnapped, raped, sodomized, and robbed another female jogger (victim B), who managed to escape. Relying on *State v. Cummings*, discussed below, the court ruled that this evidence was sufficient to support (e)(11), when the defendant's motivation and modus operandi were the same for both crimes, they were committed within five days of each other, and the defendant believed that both victims were members of an associated group (female joggers from a local university).

State v. Cummings, 332 N.C. 487 (1992). The court ruled that evidence of the defendant's murder of two sisters (one of whom was the murder victim in this case), committed twenty-six months apart, was sufficient evidence to support (e)(11). The court noted (1) that the defendant had a similar motivation to commit both murders—the defendant's overpowering desire to assert his relationship with his children (both victims were mothers of his children)—and (2) that the victims were sisters. The evidence also showed that the defendant had another motive to kill them: he believed they had taken advantage of him in a cocaine deal. Also, the modus operandi was the same for both murders: both victims were shot in the back of the head, were naked when killed, were wrapped in similar plastic and sheets, and were buried in shallow graves. [**Author's note:** See the court's discussion of the factors to consider in determining the sufficiency of evidence to submit (e)(11) to the jury.]

State v. Price, 326 N.C. 56 (1990). The defendant's commission of arson of a former girlfriend's home when she was in the home and a violent hostage-taking incident, both occurring within days after the commission of the murder being tried, were sufficient evidence to support (e)(11).

State v. McLaughlin, 323 N.C. 68 (1988). Aggravating circumstance (e)(11) (murder committed during course of conduct involving violence to others) was properly submitted for each of two murders (mother and daughter were killed during the same night) committed by the defendant.

State v. Rogers, 316 N.C. 203 (1986). There was sufficient evidence to submit (e)(11) when the defendant shot and killed A and then fired his weapon at B, intending to kill him.

State v. Williams, 305 N.C. 656 (1982). There was sufficient evidence to submit (e)(11) when the defendant—after robbing and murdering the victim in Gastonia—drove to Concord where he robbed and murdered a convenience store employee.

Propriety of Submitting Multiple Aggravating Circumstances

State v. Tirado, 358 N.C. 551 (2004). Aggravating circumstances (e)(11), (e)(5) (during specified felony), and (e)(6) (pecuniary gain), were all properly submitted. Separate evidence supported each.

State v. Berry, 356 N.C. 490 (2002). The court ruled that the trial judge did not err in submitting both aggravating circumstances (e)(4) (murder committed to avoid lawful arrest) and (e)(11). The (e)(4) aggravating circumstance focused on the defendant's motive for killing victim A—to prevent her from talking about the defendant's murder of victim B that he had committed seven weeks earlier. The (e)(11) aggravating circumstance required the jury to review the objective facts of the two murders to determine whether the offenses constituted a course of conduct.

State v. Davis, 349 N.C. 1 (1998). The defendant, using a .30 caliber M1 carbine rifle, killed three people and injured two others. He was convicted of three counts of first-degree murder and sentenced to death for each. The court ruled that the trial judge did not err in submitting both aggravating circumstances (e)(10) (use of weapon normally hazardous to more than one person) and (e)(11). There was independent evidence to support both aggravating circumstances, even though some of the evidence may have overlapped.

State v. DeCastro, 342 N.C. 667 (1996). The court ruled that separate evidence supported the submission of (e)(9) (murder was especially heinous, atrocious, or cruel) and (e)(11) (murder was committed during violent course of conduct toward others; in this case the defendant killed the murder victim's husband). Evidence supporting (e)(9) included the defendant's infliction of twenty-three stab wounds on the victim. The victim did not die a quick, painless death but remained conscious during the five to ten minutes that elapsed before she died. In addition, her jeans and panties had been pulled to her ankles, her shirt torn open, and her bra pulled above her breasts, exposing her breasts, torso, and lower body. The evidence supporting (e)(11) was entirely different from the evidence supporting (e)(9): before killing the victim, the defendant robbed, beat, and murdered the victim's husband.

State v. Gibbs, 335 N.C. 1 (1993). The trial judge did not err in submitting both (e)(5) (murder was committed during the course of a burglary) and (e)(11) (murder was committed during course of conduct that involved the commission of other crimes of violence against other people). These circumstances were not supported by the same evidence. Proof that the defendant committed a murder during the burglary did not also require proof of the commission of violence toward the other victims (two other people were murdered). And the defendant need not have engaged in a violent course of conduct to have committed a murder in the course of the burglary. See also *State v. Gay*, discussed below.

State v. Gay, 334 N.C. 467 (1993). The court stated that a trial judge should instruct the jury to ensure that it does not use the same evidence to find more than one aggravating circumstance. *See also* State v. Rouse, 339 N.C. 59 (1994) (failure to request such an instruction limited appellate review to plain error analysis, and court did not find plain error in this case).

State v. Jones, 327 N.C. 439 (1990). Distinguishing *State v. Quesinberry*, 319 N.C. 228 (1987), the court ruled that the submission of both aggravating circumstances (e)(6) (murder committed for pecuniary gain) and (e)(11) (murder committed during course of conduct involving violence to others) was proper. The aggravating circumstances were not supported by the same evidence. Evidence of the robbery of the convenience store supported (e)(6). Evidence that the defendant killed the victim, wounded another, and fired shots endangering others support (e)(11).

State v. McLaughlin, 323 N.C. 68 (1988). Aggravating circumstance (e)(11) (murder committed during course of conduct involving violence to others) was properly submitted for each of two murders (mother and daughter were killed during the same night) committed by the defendant.

State v. Green, 321 N.C. 594 (1988). In first-degree murder prosecution for the murders of A, B, and C at a bar, the trial judge properly submitted the (e)(4) aggravating circumstance (murder committed for purpose of avoiding or preventing a lawful arrest) in the sentencing for the murder of C, since the evidence showed that C (who was in a defenseless position) was killed to eliminate him as a witness in the killings of A and B. The court also ruled, based on *State v. Hutchins*, 303 N.C. 321 (1981), discussed above, that it was proper to submit both this (e)(4) aggravating circumstance and (e)(11) (murder committed during course of conduct involving violence to others). The (e)(11) aggravating circumstance involved the factual circumstances of defendant's crimes, while the (e)(4) aggravating circumstance involved the defendant's motive in shooting a person in a defenseless position.

State v. Vereen, 312 N.C. 499 (1985). The trial judge erred in submitting two aggravating circumstances because they were based on the same evidence—the attempted rape of the murder victim's daughter—considering the jury instructions in this case. The jury instruction for (e)(5) set out that the murder was committed while the defendant committed the crime of first-degree burglary or *attempted rape*. The jury instruction for (e)(11) set out that the murder was part of a course of conduct that included the defendant's commission of violent crimes against others, including felonious assault and *attempted rape*.

State v. Conaway, 339 N.C. 487 (1995). The court reviewed the evidence at the sentencing hearing and ruled that separate substantial evidence supported each of the following three aggravating circumstances in double murder case (e)(5) (murder committed during commission of kidnapping); (e)(6) (murder committed for pecuniary gain—in this case, by taking money from a cash register during an armed robbery); and (e)(11) (murder committed during a violent course of conduct toward others—in this case, the defendant killed a second person). The court stated that when there is separate substantial evidence to support each aggravating circumstance, it is proper for each circumstance to be submitted even though evidence supporting each may overlap. *See also* State v. Rose, 339 N.C. 172 (1994) [separate evidence supported submission of both (e)(3) (defendant had prior violent felony conviction) and (e)(11) (murder committed during violent course of conduct toward others)].

What Constitutes a Crime of Violence

State v. Price, 326 N.C. 56 (1990). Arson of house when the defendant knew people were inside was an act of violence under (e)(11).

State v. Jerrett, 309 N.C. 239 (1983). The kidnapping of another was a crime of violence when the evidence showed that the defendant, after shooting and killing the murder victim, pointed a gun at another person and forced her to come with him in a car.

Jury Instruction on Aggravating Circumstance (e)(11)

State v. Berry, 356 N.C. 490 (2002). The court ruled that the trial judge erred in the jury instruction on aggravating circumstance (e)(11). The instruction allowed the jury to find the aggravating circumstance without also finding that the murder of victim A was part of the course of conduct that included the earlier murder of victim B.

6
Mitigating Circumstances

6
Mitigating Circumstances

This chapter discusses mitigating circumstances, both statutory and nonstatutory, and the case law interpreting them.

Overview

The mitigating circumstances listed in subdivisions (1) through (8) of General Statutes 15A-2000(f) are commonly known as *statutory* mitigating circumstances. These mitigating circumstances are as follows:

(f)(1) The defendant has no significant history of prior criminal activity.
(f)(2) The defendant committed the murder while under the influence of a mental or emotional disturbance.
(f)(3) The victim was a voluntary participant in the murder or consented to the murder.
(f)(4) The defendant was an accomplice in or accessory to a murder committed by another person and the defendant's participation was relatively minor.
(f)(5) The defendant acted under duress or under the domination of another person.
(f)(6) The defendant's capacity to appreciate the criminality of the conduct or to conform his or her conduct to the requirements of law was impaired.
(f)(7) The defendant's age at the time of the murder.
(f)(8) The defendant aided in the apprehension of another capital felon or testified truthfully for the state in another prosecution of a felony.

The mitigating circumstances recognized in the language of subdivision (9) of G.S. 15A-2000(f) are commonly known as *nonstatutory* mitigating circumstances (for example, the defendant was abused by his or her parents), because they are not specifically set out as the mitigating circumstances in subdivisions (1) through (8). When specific nonstatutory mitigating circumstances are submitted to the jury, the judge also will submit the language of subdivision (9) as a separate, additional mitigating circumstance as follows (from North Carolina Pattern Jury Instruction—Criminal 150.10): the jury "may consider any other circumstance or circumstances arising from the evidence which you deem to have mitigating value." The mitigating circumstance reflected in this jury instruction is commonly known as the *catchall* mitigating circumstance, because it allows the jury or an individual juror to find evidence of a mitigating circumstance even though it was not specifically submitted.

For easier reading, mitigating circumstances will be noted by its corresponding number in G.S. 15A-2000(f).

"Mitigating Circumstance (f)(1): No Significant Prior Criminal History" on special jury instructions when a defendant objects to the submission of a statutory mitigating circumstance.] The erroneous failure to submit a statutory mitigating circumstance will require a new sentencing hearing unless the state can prove that the error was harmless beyond a reasonable doubt.[9] Generally, the submission of a nonstatutory mitigating circumstance that is similar to a statutory mitigating circumstance does not cure the error, because the jury is not required to give mitigating value to a nonstatutory mitigating circumstance it finds.[10]

A trial judge does not have a similar duty to submit nonstatutory mitigating circumstances to the jury. A judge's failure to submit such a circumstance is not error absent a defendant's timely written request to the judge to submit the circumstance.[11] A *timely* written request likely means that the request must be made by the time of the jury charge conference at the sentencing hearing.

A trial judge must include nonstatutory mitigating circumstances (which are supported by the evidence and which the jury could consider to have mitigating value) in writing on the issues and recommendation form when the defendant makes a timely written request to do so.[12] Absent such a request, the trial judge's failure to do so is not error.[13]

As with aggravating circumstances, evidence admitted during the guilt-innocence phase is competent and admissible to support the submission of mitigating circumstances without the need to readmit the evidence at the capital sentencing hearing.[14]

Case Summaries on Judge's Duty Regarding Submission of Statutory and Nonstatutory Mitigating Circumstances

State v. McNeil, 350 N.C. 657, 518 S.E.2d 486 (1999). The trial judge specifically mentioned to defense counsel at the jury charge conference that instructions on mitigating circumstances G.S. 15A-2000(f)(2) and (f)(6) would include references to the defendant's chronic alcoholism and personality disorder, but defense counsel did not request a reference to organic brain damage. After the jury had begun its deliberations, defense counsel contended that organic brain damage should have been included. The trial judge refused to reinstruct the jury. The court ruled that the trial judge did not commit error because Rule 21 of the General Rules of Practice for the Superior and District Courts does not permit the defendant to propose a new evidentiary matter if the defendant had the opportunity to raise that issue at the charge conference. Thus the defendant waived any appellate objection to this instruction. The court noted that once the jury has been charged, the defendant may only request the trial judge to correct or withdraw an erroneous instruction or to inform the jury on a point of law that should have been covered in the original instructions.

State v. Flippen, 349 N.C. 264, 506 S.E.2d 702 (1998). The court ruled that the trial judge did not err in failing to require the jury to make separate findings whether nonstatutory mitigating circumstances existed and whether they had mitigating value. The judge's pattern jury instructions on nonstatutory mitigating circumstances were sufficient.

State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994). The defendant submitted a list of several nonstatutory mitigating circumstances for submission to the jury. At the jury charge conference, the trial judge stated that he would submit three statutory mitigating circumstances and thirteen nonstatutory mitigating circumstances, and the judge provided the state and the defendant with a copy of all circumstances to be submitted (it did not include all of the defendant's requested circumstances). The court ruled that, based on defense counsel's express approval of the nonstatutory mitigating circumstances the judge submitted and the failure to object to those not submitted (on the judge's invitation to do so), any error in failing to submit the other circumstances was error resulting from the defendant's own conduct and could not be asserted as error on appeal; see G.S. 15A-1443(c).

9. *See, e.g.*, State v. Quick, 337 N.C. 359, 446 S.E.2d 535 (1994).
10. *Id.*
11. State v. Hill, 331 N.C. 387, 417 S.E.2d 765 (1992).
12. State v. Cummings, 326 N.C. 298, 389 S.E.2d 66 (1990). Of course, a judge would have the duty to do so with statutory mitigating circumstances even absent a request from the defendant.
13. *Id.*
14. N.C. Gen. Stat. § 15A-2000(a)(3) (2001) (hereafter, G.S.).

State v. Holden, 338 N.C. 394, 450 S.E.2d 878 (1994). The court ruled that the trial judge erred in failing to instruct on statutory mitigating circumstance (f)(7) (age of the defendant when murder committed) despite the defendant's withdrawal of a request to instruct on that circumstance. The evidence supported the submission of this circumstance: although the defendant was thirty years old at the time of the murder, the defense psychologist testified that the defendant's mental age was ten years and that his problem-solving skills were closer to those of a ten year old.

State v. Price, 331 N.C. 620, 418 S.E.2d 169 (1992). At the defendant's request, the trial judge did not submit the first prong of (f)(6) (the defendant's diminished capacity to appreciate the criminality of his conduct). The judge submitted only the second prong (the defendant's diminished capacity to conform his conduct to the law). The court ruled that the judge had the duty to submit the first prong because the evidence supported its submission, regardless of the defendant's request not to submit it. (However, the court also ruled that the failure to submit the first prong was harmless beyond a reasonable doubt.)

State v. Hill, 331 N.C. 387, 417 S.E.2d 765 (1992). Absent the defendant's timely written request that a particular nonstatutory mitigating circumstance be submitted to the jury, the trial judge's failure to submit that circumstance to the jury is not error. The court cited *State v. Cummings*, 326 N.C. 298, 389 S.E.2d 66 (1990) (trial judge must put a nonstatutory mitigating circumstance on the issues and recommendation form when defendant makes timely written request for written list on the form). *See also* State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979) (similar ruling).

Sufficient State's Evidence to Require Submission of Mitigating Circumstance

Even if a defendant does not offer evidence to support the finding of a mitigating circumstance, the submission of the mitigating circumstance may be supported solely by evidence offered or elicited by the state from which the jury or an individual juror could reasonably infer that the circumstance exists.[15]

Juror's Consideration of Weight to Give Statutory and Nonstatutory Mitigating Circumstances

Any juror who finds the existence of a *statutory* mitigating circumstance must give it some weight in the process of making the sentence recommendation, but the amount of weight to give the circumstance is left to each juror's discretion.[16]

Any juror who finds the existence of a *nonstatutory* mitigating circumstance must decide whether or not to give any weight to that circumstance in the process of making the sentence recommendation.[17] Thus a nonstatutory mitigating circumstance is mitigating only if a juror considers it to have mitigating value.

The court has ruled that this procedure in giving weight to mitigating circumstances is constitutional.[18]

Case Summaries on Juror's Consideration of Weight to Give Statutory and Nonstatutory Mitigating Circumstances

State v. Walters, 357 N.C. 68, 588 S.E. 2d 344 (2003). The court reiterated the distinctions between "value" and "weight" concerning statutory and nonstatutory mitigating circumstances, and ruled that the jury instructions on the statutory and nonstatutory mitigating circumstances in this case were not erroneous. (See the court's discussion in its opinion.)

15. State v. Stokes, 308 N.C. 634, 304 S.E.2d 184 (1983).

16. State v. Howell, 343 N.C. 229, 470 S.E.2d 38 (1996) (judge erred in informing jury that they could give no weight to statutory mitigating circumstance); State v. Keel, 337 N.C. 469, 447 S.E.2d 748 (1994).

17. *Id.*

18. *Id.*

State v. Jaynes, 342 N.C. 249, 464 S.E.2d 448 (1995). In response to a juror's question, the trial judge effectively told the jurors that they could elect to give no weight to statutory mitigating circumstances they found to exist. This erroneous instruction required a new capital sentencing hearing, since it was impossible to determine whether jurors who had found statutory mitigating circumstances to exist had decided not to give them mitigating weight. See also State v. Howell, 343 N.C. 229, 470 S.E.2d 38 (1996) (trial judge erroneously instructed jury that it could determine whether statutory mitigating circumstances have mitigating value).

State v. Baker, 338 N.C. 526, 451 S.E.2d 574 (1994). The trial judge erred in providing an issues and recommendation form to the jury that permitted the jury to determine that statutory mitigating circumstances it found did not have any mitigating value. The court ordered a new capital sentencing hearing for this error and other errors.

State v. Reeves, 337 N.C. 700, 448 S.E.2d 802 (1994). The trial judge properly instructed the jury that it could refuse to find a nonstatutory mitigating circumstance on the basis that it did not have mitigating value; the court cited *State v. Hill*, 331 N.C. 387, 417 S.E.2d 765 (1993), and *State v. Fullwood*, 323 N.C. 371, 373 S.E.2d 518 (1988). *See also* State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994).

The court also ruled that it was not unconstitutional when the jury failed to find nonstatutory mitigating circumstances that defendant argued were supported by uncontradicted and manifestly credible evidence and had mitigating value as a matter of law (since jurors may refuse to find a nonstatutory mitigating circumstance on the basis that it did not have mitigating value); the court cited *State v. Hill*, 331 N.C. 387, 417 S.E.2d 765 (1992), and *State v. Fullwood*, 323 N.C. 371, 373 S.E.2d 518 (1988).

State v. Keel, 337 N.C. 469, 447 S.E.2d 748 (1994). The court rejected the defendant's argument that the issues contained on the issues and recommendation form, when considered with the jury instructions about nonstatutory mitigating circumstances, violated his constitutional rights under *McKoy v. North Carolina*, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d. 369 (1990). The court noted that when a jury determines that a *statutory* mitigating circumstance exists, it must give it some weight in its final sentencing determinations, but the amount of weight to be given to that circumstance is left to the jury. State v. Huff, 325 N.C. 1, 381 S.E.2d 635 (1985). On the other hand, the jury determines whether any *nonstatutory* mitigating circumstance it finds should be given any mitigating value. State v. Hill, 331 N.C. 387, 417 S.E.2d 765 (1993). Thus *nonstatutory* mitigating circumstances are mitigating only when one or more jurors consider them to be so. The court ruled that this procedure is constitutional. The court also concluded that the jury instructions in this case properly instructed the jurors to consider, in deciding issues three and four, mitigating circumstances each had found in deciding issue two.

Peremptory Jury Instructions for Statutory and Nonstatutory Mitigating Circumstances

A peremptory instruction tells the jury that they must make a finding if they find the facts as all the evidence tends to show. If uncontroverted evidence is presented to support the existence of a mitigating circumstance (both statutory and nonstatutory), a trial judge must give a peremptory jury instruction on that circumstance if the defendant makes a timely request to do so (and that request may need to be in writing).[19] A *timely* written request likely means that the request must be made by the time of the jury charge conference at the sentencing hearing.

19. State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979) (court ruled that a defendant must make a timely request for a peremptory instruction for a mitigating circumstance; although the court did not rule that a timely *written* request must be made, it likely would so rule since G.S. 15A-1231 requires a party to tender *written* instructions). *See also* State v. Gay, 334 N.C. 467, 434 S.E.2d 840 (1993) (trial judge erred in not giving peremptory instructions on mitigating circumstances supported by uncontroverted evidence when defendant had made written request for peremptory instructions); State v. Holden, 338 N.C. 394, 450 S.E.2d 878 (1994) (trial judge erred in not giving peremptory instruction on defendant's request, but court's opinion did not indicate whether request had been made in writing). *See generally* State v. McNeill, 346 N.C. 233, 485 S.E.2d 284 (1997) [trial judge's ruling denying oral request for modification of pattern jury instruction on premeditation and deliberation was not error when defendant failed to submit written request; court cited G.S. 15A-1231(a) and Rule 21 of the General Rules of Practice for the Superior and District Courts].

Even if the trial judge gives a peremptory instruction on a statutory or nonstatutory mitigating circumstance, jurors may decline to find the existence of that circumstance because the supporting evidence is not credible or convincing.[20] In addition, jurors may decline to find the existence of a nonstatutory mitigating circumstance because they do not consider it to have mitigating value.[21]

N.C.P.I.—Crim. 150.11 provides charging language for a peremptory instruction on a *statutory* mitigating circumstance. It is not an appropriate instruction for a *nonstatutory* mitigating circumstance, because jurors may decide that the nonstatutory mitigating circumstance does not have mitigating value even though they find it to exist.[22] In *State v. Lynch*,[23] the North Carolina Supreme Court approved the following peremptory instruction for a nonstatutory mitigating circumstance: "All of the evidence tends to show [name the mitigating circumstance]. Accordingly, as to this mitigating circumstance, I charge that if you find the facts to be as all the evidence tends to show, you will answer, 'Yes,' as to the mitigating circumstance Number [give number of mitigating circumstance] on the issues and recommendation form if one or more of you deems it to have mitigating value."

One circumstance requires a judge to give the jury a mandatory peremptory instruction that requires the jury to find a mitigating circumstance: when the state stipulates to the existence of a mitigating circumstance. In such a case, the judge must instruct the jury to answer "yes" on the issues and recommendation form to the finding of that mitigating circumstance.[24]

Case Summaries on Peremptory Jury Instructions for Statutory and Nonstatutory Mitigating Circumstances

Cases in Which Evidence Did Not Support Peremptory Instruction

State v. Bonnett, 348 N.C. 417, 502 S.E.2d 563 (1998). The court ruled that the trial judge did not err in not giving a peremptory instruction on mitigating circumstance G.S. 15A-2000(f)(4) (defendant's participation was relatively minor). The evidence was not uncontroverted. The court noted that the evidence tended to show that the defendant supplied the murder weapon and took the money box during the robbery and murder.

State v. Stephens, 347 N.C. 352, 493 S.E.2d 435 (1997). The court ruled that, based on the following evidence, the trial judge did not err in failing to give a peremptory instruction for aggravating circumstance G.S. 15A-2000(f)(1) (no significant prior criminal history). The defendant was being sentenced for convictions of murders committed on January 20, 1995. The defendant was convicted (1) in 1982 of hit-and-run involving property damage and driving under the influence; (2) in 1983 of driving while license suspended; and (3) in 1986 of driving under the influence. Also, the defendant had a long history of purchasing and using illegal drugs.

State v. Buckner, 342 N.C. 198, 464 S.E.2d 414 (1995). The court ruled that the defendant was not entitled to a peremptory instruction on the nonstatutory mitigating circumstance that the defendant was a hard worker because there was evidence that the defendant stole from two of his employers and stopped working for another employer after being involved in a fight at work.

State v. Simpson, 341 N.C. 316, 462 S.E.2d 191 (1995). The court examined the evidence supporting mitigating circumstances (f)(1), (f)(2), (f)(6), and (f)(7) and ruled that the trial judge properly refused to give peremptory instructions because the evidence concerning these mitigating circumstances was not uncontroverted.

20. *Johnson*, 298 N.C. 47, 257 S.E.2d 597; Gay, 334 N.C. 467, 434 S.E.2d 840; *Holden*, 338 N.C. 394, 450 S.E.2d 878; State v. Alston, 341 N.C. 198, 461 S.E.2d 687 (1995); State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994); State v. McCollum, 334 N.C. 208, 433 S.E.2d 144 (1993).

21. *Gay*, 334 N.C. 467, 434 S.E.2d 840.

22. State v. Green, 336 N.C. 142, 443 S.E.2d 14 (1994); State v. Gregory, 340 N.C. 365, 459 S.E.2d 638 (1995).

23. 340 N.C. 435, 459 S.E.2d 679 (1995).

24. State v. Flippen, 344 N.C. 689, 477 S.E.2d 158 (1996); State v. Hill, 347 N.C. 275, 493 S.E.2d 264 (1997).

State v. McLaughlin, 341 N.C. 426, 462 S.E.2d 1 (1995). The court examined the evidence supporting several nonstatutory mitigating circumstances and ruled that the trial judge did not err (except for one circumstance, discussed below) in refusing to give peremptory instructions because the evidence supporting the circumstances was not uncontroverted and manifestly credible.

State v. Lynch, 340 N.C. 435, 459 S.E.2d 679 (1995). The trial judge did not err in failing to give a peremptory instruction on (f)(2) (mental or emotional disturbance) and (f)(6) (impaired capacity) mitigating circumstances. The evidence to support these circumstances was not uncontroverted.

State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994). The court ruled that even when a defendant is entitled to a peremptory instruction on a mitigating circumstance because the evidence is uncontroverted, the jury is still free to reject the circumstance if it does not find the evidence credible or convincing. [The court disapproved of language in *State v. Kirkley*, 308 N.C. 196, 302 S.E.2d 144 (1983), that was inconsistent with this ruling.] The court concluded that the jury could have found that the evidence of the mental health experts was not credible or convincing on (f)(6) (impaired capacity). The court stated, however, that a defendant may be entitled to a directed verdict on a statutory mitigating circumstance if the evidence in support of the circumstance is substantial, manifestly credible, and uncontradicted (but the evidence in this case did not support such an instruction).

State v. Lee, 335 N.C. 244, 439 S.E.2d 547 (1994). The trial judge did not err in failing to issue a peremptory instruction to find (f)(6) (impaired capacity). The evidence was not uncontroverted. *See also* State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979) (similar ruling).

State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987). The trial judge did not err in failing to give peremptory instructions for four statutory mitigating circumstances [(f)(1) (no significant prior criminal history, (f)(2) (mental or emotional disturbance), (f)(6) (impaired capacity), and (f)(7) (defendant's age)] and eleven nonstatutory mitigating circumstances.

State v. Spruill, 320 N.C. 688, 360 S.E.2d 667 (1987). The defendant was not entitled to a peremptory instruction on (f)(2) (mental or emotional disturbance) when the expert testimony about the defendant's mental and emotional condition was equivocal.

State v. Gladden, 315 N.C. 398, 340 S.E.2d 673 (1986). The defendant was not entitled to a peremptory instruction on (f)(1) (no significant prior criminal history), based on evidence of his prior criminal convictions and prior criminal history in this case. In addition, the defendant failed to make a timely request for the instruction (in fact, the defendant failed to make a request for the instruction).

The court also ruled that the defendant was not entitled to a peremptory instruction on (f)(3) (victim's voluntary participation in murder). The state produced ample evidence to contradict the defendant's assertion that the victim initially attacked him with a knife. In addition, the defendant failed to make a timely request to give this instruction (in fact, the defendant failed to make a request for the instruction).

State v. Noland, 312 N.C. 1, 320 S.E.2d 642 (1984). The trial judge did not err in failing to give a peremptory instruction on (f)(1) (no significant prior criminal history), since there was evidence of a conviction for communicating threats and prior acts of communicating threats and assaulting a female.

The trial judge also did not err in failing to give a peremptory instruction on (f)(2) (mental or emotional disturbance), since conflicting evidence was offered by the defendant and the state. *See also* State v. Lynch, 340 N.C. 435, 459 S.E.2d 679 (1995) (similar ruling).

State v. Gardner, 311 N.C. 489, 319 S.E.2d 591 (1984). The trial judge did not err in failing to give a peremptory instruction on (f)(7) (defendant's age). The defendant was twenty-four years old at the time of the murders. *See also* State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983) (similar ruling; defendant was nineteen years, eleven months).

State v. Smith, 305 N.C. 691, 292 S.E.2d 264 (1982). The trial judge did not err in failing to give a peremptory instruction on (f)(6) (impaired capacity) when the evidence of the murder—through the testimony of two eyewitnesses—suggested that the defendant was in complete control of his faculties when he committed the murder, in contrast to the defendant's expert testimony that his faculties were impaired.

Cases in Which Evidence Supported Peremptory Instruction

State v. Lloyd, 354 N.C. 76, 552 S.E.2d 596 (2001). The court ruled that the trial judge erred in not submitting a peremptory instruction for the mitigating circumstance G.S. 15A-2000(f)(8) (defendant testified truthfully for state in prosecution of felony). The defendant's evidence in the capital sentencing hearing showed that his truthful testimony at another trial was both uncontroverted and credible.

State v. McLaughlin, 341 N.C. 426, 462 S.E.2d 1 (1995). The court ruled that the trial judge erred in not giving a peremptory instruction concerning the nonstatutory mitigating circumstance that the defendant had achieved a position as a cook in the prison kitchen, since the evidence about this circumstance was both uncontroverted and manifestly credible. (The court, however, found the error to be harmless beyond a reasonable doubt.)

State v. Jones, 339 N.C. 114, 451 S.E.2d 826 (1994). The court ruled that the trial judge erred in not giving a peremptory instruction on sixteen nonstatutory mitigating circumstances. (The court, however, found the error to be harmless beyond a reasonable doubt.)

State v. Holden, 338 N.C. 394, 450 S.E.2d 878 (1994). The court ruled that the defendant offered uncontroverted evidence of (f)(2) (mental or emotional disturbance), and the trial judge erred in denying the defendant's request for a peremptory instruction. The court also ruled that the error was not harmless beyond a reasonable doubt. Although one or more jurors found that the mitigating circumstance existed, it was not known whether all jurors found that it existed. It is possible that had the peremptory instruction been given, more jurors or all jurors would have done so. And that could have affected the balancing of mitigating circumstances against aggravating circumstances, thereby affecting the sentencing recommendation.

State v. Gay, 334 N.C. 467, 434 S.E.2d 840 (1993). At the sentencing hearing, the defendant submitted a written request for peremptory instructions for all mitigating circumstances. The court ruled that the trial judge must, if requested, give a peremptory instruction for any mitigating circumstances—statutory or nonstatutory—if supported by uncontroverted evidence. The court granted a new sentencing hearing because the trial judge erred in failing to give a peremptory instruction for several nonstatutory mitigating circumstances supported by uncontroverted evidence. (The court noted that individual jurors may still reject a mitigating circumstance if the supporting evidence was not convincing or—with nonstatutory mitigating circumstances—they do not consider it to have mitigating value.)

Content of Peremptory Instruction

State v. Lynch, 340 N.C. 435, 459 S.E.2d 679 (1995). The court ruled that the following peremptory instruction for a nonstatutory mitigating circumstance was proper: "All of the evidence tends to show [name mitigating circumstance]. Accordingly, as to this mitigating circumstance, I charge that if you find the facts to be as all the evidence tends to show, you will answer, 'Yes,' as to the mitigating circumstance Number [give number of mitigating circumstance] on the issue and recommendation form if one or more of you deems it to have mitigating value."

State v. Green, 336 N.C. 142, 443 S.E.2d 14 (1994). The trial judge did not err in refusing the defendant's request to give—for *nonstatutory* mitigating circumstances—the peremptory instruction in N.C.P.I. 150.11, because that instruction is only appropriate for *statutory* mitigating factors. Although a peremptory instruction on a nonstatutory mitigating circumstance may direct the jurors that the evidence supports the factual existence of the circumstance, each juror—before "finding" the circumstance—must also decide that the circumstance has mitigating value.

Timely (Written) Request for Peremptory Instruction

State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979). The court ruled that a defendant must make a timely request for a peremptory instruction for a mitigating circumstance. (Although the court did not rule that a timely *written* request must be made, it likely would so rule since G.S. 15A-1231 requires a party to tender *written* instructions.) See *also* State v. Gladden, 315 N.C. 398, 340 S.E.2d 673 (1986) (defendant failed to request peremptory instruction); State v. Gay, 334 N.C. 467, 434 S.E.2d 840 (1993) (trial judge erred in not giving peremptory instructions on mitigating circumstances supported by uncontroverted evidence when defendant had made written request for peremptory instructions).

State v. Skipper, 337 N.C. 1, 446 S.E.2d 252 (1994). The defendant made a written request for a peremptory instruction for all mitigating circumstances. However, on the judge's oral inquiry, the defendant asked for peremptory instructions on just two mitigating circumstances. The court ruled that the trial judge did not err in giving peremptory instructions only for these two mitigating circumstances, based on the defendant's response to the judge's oral inquiry.

State v. Gregory, 340 N.C. 365, 459 S.E.2d 638 (1995). The defendant made a general written request for peremptory instructions for all his requested mitigating circumstances but did not clearly specify that he was seeking a different peremptory instruction for statutory and nonstatutory mitigating circumstances (nor did the defendant propose a different instruction for the nonstatutory mitigating circumstances). Also, the defendant did not specify which nonstatutory mitigating circumstances were supported by uncontroverted evidence and, therefore, entitled him to a peremptory instruction. On appeal, the defendant argued that the trial judge erred in not giving peremptory instructions on twenty-three nonstatutory mitigating circumstances. The court ruled that the defendant's request for peremptory instructions was inadequate under *State v. Green*, 336 N.C. 142, 443 S.E.2d 14 (1994) (different peremptory instructions required for statutory and nonstatutory mitigating circumstances), and therefore the trial judge did not err in not giving peremptory instructions.

Content of Request for Peremptory Instruction

State v. Womble, 343 N.C. 667, 473 S.E.2d 291 (1996). At a capital sentencing hearing, the defendant made a general request that peremptory instructions be given for any uncontroverted mitigating circumstances. On appeal, the defendant argued that the trial judge erred in failing to give a peremptory instruction for the nonstatutory mitigating circumstance that nothing was taken from the murder victim's residence. The court noted that the defendant failed to make a specific request that a peremptory instruction be given for this particular mitigating circumstance and ruled, relying on *State v. Skipper*, 337 N.C. 1, 446 S.E.2d 252 (1994), that the trial judge did not err in failing to give a peremptory instruction for this circumstance.

When Mandatory Peremptory Instruction Is Required

State v. Flippen, 344 N.C. 689, 477 S.E.2d 158 (8 November 1996). At the defendant's capital sentencing hearing, the state and the defendant stipulated that the defendant had no significant history of prior criminal activity under G.S. 15A-2000(f)(1). The trial judge did not give a mandatory peremptory instruction, and the jury failed to find this mitigating circumstance. The court ruled that the trial judge erred in failing to instruct the jury that because of the stipulation, the jury must find the (f)(1) mitigating circumstance to exist and must also give the circumstance mitigating weight in its sentencing recommendation. *See also* State v. Hill, 347 N.C. 275, 493 S.E.2d 264 (1997).

Directed Verdict for a Statutory Mitigating Circumstance

The North Carolina Supreme Court has ruled that a defendant is not entitled to a directed verdict on a statutory mitigating circumstance even if the evidence in support of the circumstance is substantial, manifestly credible, and uncontradicted.[25] However, a defendant in such a case would be entitled to a peremptory instruction upon a written request for the instruction. (Of course, a directed verdict also would not be authorized for a nonstatutory mitigating circumstance.)

Even though a directed verdict is not authorized, one circumstance requires a judge to give the jury a mandatory peremptory instruction that requires the jury to find a mitigating circumstance: when the state stipulates to the existence of a mitigating circumstance. In such a case, the judge

25. State v. Holden, 346 N.C. 404, 488 S.E.2d 514 (1997). In *Holden*, the court ruled, relying on *State v. Carter*, 342 N.C. 312, 464 S.E.2d 272 (1995), that a directed verdict is not appropriate for a statutory mitigating circumstance. The court effectively disavowed contrary dicta in *State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543 (1994). A peremptory instruction is the appropriate instruction when there is uncontradicted evidence supporting a mitigating circumstance.

must instruct the jury to answer "yes" on the issues and recommendation form to the finding of that mitigating circumstance.[26]

Nonstatutory Mitigating Circumstances Subsumed or Combined into Other Mitigating Circumstances

Under some circumstances, a trial judge may decline to submit a nonstatutory mitigating circumstance when it is subsumed in other statutory or nonstatutory mitigating circumstances that are submitted to the jury. Or the trial judge may, under some circumstances, combine two nonstatutory mitigating circumstances into one circumstance. See the cases in the case summaries section below.

Case Summaries on Nonstatutory Mitigating Circumstances Subsumed or Combined into Other Mitigating Circumstances

State v. McLaughlin, 341 N.C. 426, 462 S.E.2d 1 (1995). The defendant asserted that the trial judge erred in not submitting the following nonstatutory mitigating circumstances: the defendant "was of low intelligence with poor judgment and limited insight," "was under a pattern of substance abuse at the time of the commission of the crime," and the defendant's "limited mental capacity at the time of the trial significantly reduced his culpability for the offense." The court ruled that the trial judge did not err, because these nonstatutory mitigating circumstances were subsumed in the submitted statutory mitigating circumstances (f)(2) and (f)(6). Also the judge's instructions on (f)(2) and (f)(6) included the evidence presented under the proposed nonstatutory mitigating circumstances. In addition, the jury could have given this evidence mitigating value under the catchall mitigating circumstance (f)(9).

State v. Spruill, 338 N.C. 612, 452 S.E.2d 279 (1994). The trial judge did not err in combining two aspects of the defendant's educational background into one nonstatutory mitigating circumstance.

State v. Lee, 335 N.C. 244, 439 S.E.2d 547 (1994). The judge did not err in not submitting a requested nonstatutory mitigating circumstance (defendant's inability to conform his conduct to the requirements of the law was by reason of his mental defect and not of his own making) because it was subsumed by other submitted mitigating circumstances [(f)(2) (mental or emotional disturbance), (f)(6) (impaired capacity), and a nonstatutory mitigating circumstance whether the defendant did not know or fully appreciate his mental condition and dangerousness]. *See also* State v. Benson, 323 N.C. 318, 372 S.E.2d 517 (1988) (similar ruling); State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988) (similar ruling); State v. Walls, 342 N.C. 1, 463 S.E.2d 738 (1995) (proposed nonstatutory mitigating circumstances were properly subsumed in both statutory and other nonstatutory mitigating circumstances).

State v. Greene, 324 N.C. 1, 376 S.E.2d 430 (1989). The trial judge did not err in combining three proposed nonstatutory mitigating circumstances (brain damage, poor impulse control, and significant drinking problem) into two separate statutory mitigating circumstances [(f)(2) (mental or emotional disturbance) and (f)(6) (impaired capacity)] and the catchall mitigating circumstance [(f)(9)]. The court rejected the defendant's argument that the jury would have been more impressed with the mitigating value of this evidence if it had been categorized into three separate nonstatutory mitigating circumstances. *See also* State v. Frye, 341 N.C. 470, 461 S.E.2d 664 (1995) [trial judge did not err in not submitting nonstatutory mitigating circumstance that defendant's alcohol intoxication impaired his abilities to conform his behavior to the requirements of law, because it was subsumed within (f)(6), which was submitted and found, and trial judge submitted three similar nonstatutory mitigating circumstances].

Issues Pertinent to Resentencing Hearings

The North Carolina Supreme Court has issued rulings that involve the submission of mitigating circumstances at a capital resentencing hearing. A defendant is not entitled, under the collateral estoppel doctrine, to a jury instruction at a capital resentencing hearing that mitigating circumstances

26. State v. Flippen, 344 N.C. 689, 477 S.E.2d 158 (1996); State v. Hill, 347 N.C. 275, 493 S.E.2d 264 (1997).

unanimously found by the jury at the first capital sentencing hearing are established as a matter of law.[27] A defendant is not entitled to a peremptory jury instruction for a mitigating circumstance based on the state's stipulation of its existence at a prior capital sentencing hearing.[28]

Case Summaries on Issues Pertinent to Resentencing Hearings

State v. Adams, 347 N.C. 48, 490 S.E.2d 220 (1997). The court ruled, relying on *Poland v. Arizona*, 467 U.S. 147, 106 S. Ct. 1749, 90 L. Ed. 2d 123 (1986) (failure to find aggravating circumstance is not equivalent to acquittal under double jeopardy principles), that the defendant was not entitled, under the collateral estoppel doctrine, to a jury instruction at the second capital sentencing hearing that a mitigating circumstance unanimously found by the jury at the first capital sentencing hearing was established as a matter of law. Double jeopardy principles do not preclude the relitigation of the existence of mitigating circumstances.

State v. Flippen, 349 N.C. 264, 506 S.E.2d 702 (1998). At a prior capital sentencing hearing, the state had stipulated to the existence of the statutory mitigating circumstance G.S. 15A-2000(f)(1) (no significant prior criminal history). At the capital sentencing hearing that was the subject of this appeal, the state offered evidence that the defendant had twice assaulted his wife. Relying on *State v. Adams*, 347 N.C. 48, 459 S.E.2d 747 (1997), the court ruled that the prior stipulation did not foreclose the state at a later capital sentencing hearing from offering evidence to rebut the existence of the mitigating circumstance. Thus, the trial judge did not err in failing to give a peremptory instruction on this mitigating circumstance; the existence of the circumstance was not uncontroverted.

Miscellaneous Issues

The cases in the case summaries section below include various rulings about jury instructions.

Case Summaries on Miscellaneous Issues

Use of the Word *May* in Pattern Jury Instruction

State v. Lee, 335 N.C. 244, 439 S.E.2d 547 (1994). The trial judge did not err in using N.C.P.I.—Criminal 150.10 that informs the jury under issue three that each juror *may* consider mitigating circumstances that the juror found to exist when weighing the aggravating and mitigating circumstances. This instruction did not impermissibly, under *McKoy v. North Carolina*, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d. 369 (1990), allow some jurors to disregard relevant mitigating circumstances it found, since the instruction also specifically stated that the evidence in aggravation *must* be weighed against the evidence in mitigation. The court also rejected the defendant's argument that all jurors must consider a mitigating circumstance found by one or more other jurors.

Consideration of Issues Reflected in Issues and Recommendation Form

State v. McCarver, 341 N.C. 364, 462 S.E.2d 25 (1995). After deliberating for several hours, the capital sentencing jury sent a written inquiry to the trial judge concerning issue three on the issues and recommendation form. (Issue three asks: Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found by one or more of you is, or are, insufficient to outweigh the aggravating circumstance or circumstances found unanimously by you in issue one?) The jury asked the judge whether its answer, yes or no, must be unanimous. The judge instructed the jury that it must be unanimous for either answer. The defendant requested that the judge amend the instruction so the jury must answer no (thus recommending a life sentence) if it could not unanimously agree whether the mitigating circumstances were insufficient to outweigh the aggravating

27. State v. Adams, 347 N.C. 48, 490 S.E.2d 220 (1997).
28. State v. Flippen, 349 N.C. 264, 506 S.E.2d 702 (1998).

circumstances. The judge denied this request. The court ruled that, under the North Carolina Constitution and G.S. 15A-2000, any issue that is "outcome determinative" of the sentence in a capital trial must be answered unanimously by the jury. Thus, the jury must answer issues one, three, and four on the issues and recommendation form unanimously yes or unanimously no. [The court noted that issue two, the determination of mitigating circumstances, is not outcome-determinative and, in any event, unanimity in finding mitigating circumstances was found unconstitutional in McKoy v. North Carolina, 494 U.S. 433 (1990).] *See also* State v. Walls, 342 N.C. 1, 463 S.E.2d 738 (1995) (the defendant was properly precluded from arguing to the jury that if the jury failed to unanimously agree that the answers to issue three and issue four were yes, then the jury must answer those issues no and a life sentence would be imposed).

The court stated that requiring unanimity for either yes or no answers for issues one, three, and four "ensures that the jury *properly* fulfills its duty to deliberate *genuinely* for a *reasonable* period of time in reaching a unanimous sentencing recommendation, as required by the Constitution of North Carolina and by our death penalty statute itself [italicized words are in the court's opinion]." The court also stated that if the jury is unable to agree unanimously as to one of these issues, it should simply report that fact to the trial judge, whose duty would be to impose a sentence of life imprisonment. However, the jury should not initially be made aware of the law about their inability to agree unanimously, because to do so "would be an open invitation to the jury—or a single juror—to avoid its responsibility to *fully* deliberate and to force a recommendation of life [imprisonment] by the simple expedient of disagreeing [italicized word is in the court's opinion]." Instead, the judge must inform the jurors that their inability to reach unanimity "should not be their concern but should simply be reported to the court" *only if* the jury makes an inquiry about this issue. Otherwise, no instruction is warranted.

The court examined the facts in this case and ruled that the trial judge did not err in failing to advise the jury of what would happen if it did not reach a unanimous decision on issue three, because the jury's inquiry did not concern that issue. Instead, the jury sought guidance on the procedure for giving an answer to issue three.

State v. McLaughlin, 341 N.C. 426, 462 S.E.2d 1 (1995). On the second day of a capital sentencing jury's deliberations, the jury sent a note to the trial judge indicating it was divided eleven to one on its recommendation as to punishment. The trial judge instructed the jury that its answer to issue four, whether yes or no, must be unanimous. The court noted, based on its ruling in *State v. McCarver*, discussed above, that this instruction was proper. After examining the judge's instructions, the court ruled, distinguishing *State v. Smith*, 320 N.C. 404, 358 S.E.2d 329 (1987), that they were not coercive.

State v. Jones, 336 N.C. 229, 443 S.E.2d 48 (1994). The court rejected the defendant's argument that the pattern jury instruction is improper when it informed the jury that it has a duty to return a recommendation of death if it answered "yes" to issue four. The court cited *State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308 (1983), and *State v. Maynard*, 311 N.C. 1, 316 S.E.2d 197 (1984).

State v. Coffey, 326 N.C. 268, 389 S.E.2d 48 (1990). The trial judge properly instructed the jury on the findings required for a death sentence recommendation. However, in the written form submitted to the jury, the judge inadvertently repeated issue four twice and omitted issue three. The court ruled that the writing signed by the foreperson and returned by the jury was insufficient to support the recommended death sentence because it failed, as required by G.S. 15A-2000(c)(3), to show that the mitigating circumstance or circumstances found by the jury were insufficient to outweigh the aggravating circumstance or circumstances found by the jury. [**Author's note:** N.C.P.I.—Criminal 150.10 provides the proper form questions for issues one through four.] The court vacated the death sentence.

State v. Hunt, 323 N.C. 407, 373 S.E.2d 400 (1988). The court ruled that issue three in the issues and recommendation form is not unconstitutional in requiring the jury to answer the following question: "Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances found is, or are, insufficient to outweigh the aggravating circumstances found?" The defendant argued that this question was improper because if the jury is in equipoise (equally balanced on the weighing issue), it must answer the issue yes. The court rejected this argument. It stated that if the jury must be satisfied beyond a reasonable doubt before finding that the mitigating circumstances

are insufficient to outweigh the aggravating circumstances, and the jury is in a state of equipoise on the issue, it must answer the issue no.

Proposed Instruction on Sympathy for Defendant

State v. Keel, 337 N.C. 469, 447 S.E.2d 748 (1994). The court ruled that the trial judge properly rejected the defendant's proposed instruction: "you are entitled to base your verdict upon any sympathy or mercy you may have for the defendant that arises from the evidence presented in this case." Explaining the ruling in *California v. Brown*, 479 U.S. 538, 107 S. Ct. 837, 93 L. Ed. 2d. 934 (1987) (upholding constitutionality of jury instruction that jury "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling"), the court ruled that the judge's instruction clearly informed the jury that they could consider any circumstance, including sympathy for the defendant, they found to arise from the evidence and considered to have mitigating value. *See also* State v. Jones, 339 N.C. 114, 451 S.E.2d 826 (1994) (trial judge did not err by refusing to instruct the jury that it was entitled to base its recommendation on any sympathy or mercy the jury might have for the defendant that arises from the evidence presented in the case); State v. Hill, 331 N.C. 387, 417 S.E.2d 765 (1992) (court stated that trial judges should not refer to "sympathy" in instructions on mitigating circumstances to avoid giving jurors the suggestion that they have unbridled discretion in the sentencing decision).

Mitigating Circumstance (f)(1): No Significant Prior Criminal History

G.S. 15A-2000(f)(1) states: "The defendant has no significant history of prior criminal activity."

In deciding whether to submit this circumstance to the jury, a trial judge must determine whether any rational juror could conclude based on the evidence that the defendant had no significant history of prior criminal activity. A defendant's criminal history is considered "significant" if it is likely to affect or influence the jury's determination of its recommended sentence; it is not merely the number of prior criminal activities but the nature and recency of these activities that is considered in determining whether to submit this circumstance.[29] In making the determination whether to submit this circumstance, the trial judge may conduct a hearing outside the jury's presence to determine the defendant's history of prior criminal activity.[30]

If neither the state nor the defendant presents any evidence whether or not the defendant has any criminal history, then the trial judge should not submit this circumstance.[31]

Sometimes a defendant as a matter of strategy in the sentencing hearing will not request or even object to the submission of this circumstance because of the state's right to present rebuttal evidence (see discussion below) of the defendant's prior criminal history in opposition to a juror's finding of the circumstance. However, as discussed in an earlier section of this chapter, a trial judge must submit a statutory mitigating circumstance when it is supported by sufficient evidence—even if the defendant does not request its submission or even objects to its submission.[32] However, the North Carolina Supreme Court has set out guidelines for judges and prosecutors for when this (or other) statutory circumstance is submitted despite the defendant's objection:

29. State v. Jones, 339 N.C. 114, 451 S.E.2d 826 (1994); State v. Sexton, 336 N.C. 321, 444 S.E.2d 879 (1994).

30. *See, e.g.*, State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989).

31. State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (1993); Delo v. Lashley, 507 U.S. 272, 113 S. Ct. 1222, 122 L. Ed. 2d. 620 (1993); State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989); State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988).

32. *See, e.g.*, State v. Quick, 337 N.C. 359, 446 S.E.2d 535 (1994) (listing cases). In State v. Walls, 342 N.C. 1, 463 S.E.2d 738 (1995), the court ruled that the defendant was not denied his Sixth Amendment right to the effective assistance of counsel when his attorney argued to the jury that he was not asking them to find in favor of the (f)(1) mitigating circumstance, based on the facts in that case. The court rejected the defendant's argument that because no juror found (f)(1), the jurors used that finding as a *de facto* aggravating circumstance.

- A prosecutor must not argue to the jury that a defendant has requested that a particular mitigating circumstance be submitted or has sought to have the jury find that circumstance.
- The trial judge should instruct the jury that the defendant did not request that the mitigating circumstance be submitted.
- The trial judge also should instruct the jury that the submission of the mitigating circumstance is required as a matter of law because there is some evidence from which the jury could, but is not required to, find the mitigating circumstance to exist.[33]

Evidence to support the submission of this mitigating circumstance may come from evidence offered at the trial or sentencing hearing—including, for example, evidence offered by the state or elicited on its cross-examination of the defendant.[34] Evidence includes the commission of uncharged or unadjudicated crimes as well as criminal convictions.[35] However, evidence is limited to criminal activity that was committed before the date of the murder for which the defendant is being sentenced.[36]

The state may offer evidence of the defendant's prior criminal activity (including uncharged and unadjudicated crimes) to rebut evidence in support of (f)(1). The evidence may consist of testimony by witnesses to this criminal activity and court records of convictions.[37] However, the North Carolina Supreme Court has ruled that the state's evidence may be offered only in the rebuttal stage of the sentencing hearing, not in the state's case-in-chief.[38]

Case Summaries on Mitigating Circumstance (f)(1)

Cases in Which Evidence Was Sufficient to Require Submission of (f)(1)

State v. Parker, 354 N.C. 268, 553 S.E.2d 885 (2001). The court ruled, relying on *State v. Rowsey*, 343 N.C. 603, 472 S.E.2d 903 (1996) and other cases, that the trial judge did not err in submitting (f)(1). The defendant was convicted in 1995 of sixteen counts of obtaining property by false pretenses, nonviolent crimes that arose during one brief period of the defendant's life. The court stated that a rational jury could have concluded that the defendant had no significant prior criminal history.

State v. Blakeney, 352 N.C. 287, 531 S.E.2d 799 (2000). The defendant's prior criminal history included evidence of drug abuse and a conviction of an armed robbery committed in 1989 in which he struck the robbery victim in the head with his gun. Based on this evidence, the court ruled that the trial judge did not err in submitting (f)(1). The court also rejected, citing *State v. Ball*, 344 N.C. 290, 474 S.E.2d 345 (1996), the defendant's argument that this mitigating circumstance should not have been submitted because the court also submitted the statutory aggravating circumstance, G.S. 15A-2000(e)(3) (prior violent felony conviction).

State v. Fletcher, 348 N.C. 292, 500 S.E.2d 668 (1998). The court ruled that the trial judge erred in not submitting (f)(1). The court stated that its analysis in *State v. Jones*, 346 N.C. 704, 487 S.E.2d 714 (1997) [sufficient evidence to submit (f)(1)], had emphasized that the defendant's prior convictions in that case consisted of property crimes rather than violent crimes. A common theme in cases in which (f)(1) should have been submitted is the defendants' predominantly nonviolent criminal histories. The court noted that while the defendant's prior criminal history showed that he stole from others for most of

33. State v. Walker, 343 N.C. 216, 469 S.E.2d 919 (1996). The court also stated that absent extraordinary facts, the erroneous submission of a mitigating circumstance is harmless. *See also* State v. Bone, 354 N.C. 1, 550 S.E.2d 482 (2001) (no extraordinary facts existed that made any possible error by trial judge in submitting mitigating circumstance to be prejudicial to defendant).

34. *Quick*, 337 N.C. 359, 446 S.E.2d 535; *Walls*, 342 N.C. 1, 463 S.E.2d 738.

35. State v. Ingle, 336 N.C. 617, 445 S.E.2d 880 (1994).

36. State v. Slidden, 347 N.C. 218, 491 S.E.2d 225 (1997); State v. Coffey, 336 N.C. 412, 444 S.E.2d 431 (1994).

37. State v. Maynard, 311 N.C. 1, 316 S.E.2d 197 (1984); State v. Roper, 328 N.C. 337, 402 S.E.2d 600 (1991); State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987).

38. State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981); State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985).

his life and he appeared in recent years to have largely supported himself by stealing and occasionally selling drugs—his breaking and enterings and larcenies were not connected to any violent behavior.

State v. Jones, 346 N.C. 704, 487 S.E.2d 714 (1997). The defendant at his capital sentencing hearing argued against the submission of (f)(1) and the judge did not submit it. The court ruled that the trial judge erred because the following evidence was evidence to support its submission. In 1988 the defendant was convicted of four misdemeanor larcenies, which involved stealing from his employer over a period of four or five years. In 1993 the defendant was convicted of two or three felony larcenies for stealing jewelry from a motel in which he worked. The defendant did not receive a prison sentence for any of these convictions. He had smoked marijuana since middle school and had used cocaine since 1988. There was no evidence that he had committed any violent crimes before the murder of the victim in 1993.

State v. Geddie, 345 N.C. 73, 478 S.E.2d 146 (1996). The court ruled that the trial judge did not err in submitting (f)(1), although the defendant had two prior felonious assault convictions that occurred ten and fifteen years before the trial of this case, and an attempted robbery conviction that occurred five years before the trial of this case. The court stated that a rational juror could have found the existence of (f)(1).

State v. Walls, 342 N.C. 1, 463 S.E.2d 738 (1995). The defendant had convictions for driving while impaired, assault, communicating threats, escape, nonfelonious breaking and entering, receiving stolen goods, possessing a stolen vehicle, and possessing stolen credit cards. The court ruled that the trial judge did not err in submitting (f)(1) and noted that it had previously upheld the submission of this circumstance based on criminal activities equal to or greater than the defendant's in this case, citing *State v. Turner*, 330 N.C. 249, 410 S.E.2d 847 (1991) and *State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988). The court stated that an important factor in the trial judge's determination of whether a rational juror could reasonably find this mitigating circumstance is the nature and age of the prior criminal activities, rather than the mere number of them.

State v. Quick, 337 N.C. 359, 446 S.E.2d 535 (1994). Evidence presented at a resentencing hearing showed that the defendant had illegally used drugs and had been convicted of larceny, receiving stolen goods, and forgery. The court ruled, relying on *State v. Mahaley*, 332 N.C. 583, 423 S.E.2d 58 (1992) and *State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988), that the trial judge erred in not submitting (f)(1), and the error was not harmless beyond reasonable doubt. The court also ruled that the submission of a nonstatutory mitigating circumstance that was similar to (f)(1) did not cure the error, since a jury is not required to give mitigating value to a nonstatutory mitigating circumstance.

State v. Ingle, 336 N.C. 617, 445 S.E.2d 880 (1994). The defendant objected to the trial judge's submission of (f)(1) and assigned the judge's submission as error on appeal. The court ruled that the trial judge properly submitted (f)(1), relying on its rulings in *State v. Mahaley*, 332 N.C. 583, 423 S.E.2d 58 (1992), *State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988), and *State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316 (1988). Evidence of the defendant's prior criminal history consisted principally of his use of illegal drugs and that his aunt "took out warrants on him" for communicating threats and trespassing. The court noted that it was proper to consider unadjudicated crimes in determining the sufficiency of evidence under (f)(1). *See also* State v. Frye, 341 N.C. 470, 461 S.E.2d 664 (1995) [trial judge properly submitted (f)(1) when evidence showed defendant's extensive use of illegal drugs and his many prior periods of incarceration].

State v. Mahaley, 332 N.C. 583, 423 S.E.2d 58 (1992). The evidence showed that the defendant had no record of criminal convictions and her prior criminal history consisted of using illegal drugs and stealing money and credit cards to support her drug habit. The court ruled that this evidence required the trial judge to submit (f)(1), without regard to wishes of the state or the defendant. The court ordered a new sentencing hearing because the state did not prove that the failure to submit (f)(1) was harmless beyond a reasonable doubt.

State v. Turner, 330 N.C. 249, 410 S.E.2d 847 (1991). There was sufficient evidence from which a reasonable juror could find (f)(1). Adjudicated criminal activity consisted solely of misdemeanor offenses of receiving stolen goods, larceny, assault with a deadly weapon, and worthless check. Unadjudicated criminal activity included possession of marijuana, theft when the defendant was a juvenile, sale of marijuana to the victim that led to the murder, and possession of a sawed-off shotgun.

State v. McNeil, 327 N.C. 388, 395 S.E.2d 106 (1990). The court ruled that a reasonable juror could find (f)(1) based on evidence that seven years before the murder trial the defendant had been convicted of voluntary manslaughter, which was his only prior conviction.

State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988). The court ruled that the trial judge erred in not submitting (f)(1) when the defendant had a prior felony conviction for second-degree kidnapping of his former wife (who was not the murder victim in this case) committed four years before the murder being tried, had stored illegal drugs in his shed, and had participated in a theft with the murder victim.

State v. Lloyd, 321 N.C. 301, 364 S.E.2d 316 (1988). The court ruled that the trial judge did not err in submitting (f)(1) over the defendant's objection when defendant had two felony convictions about twenty years before the murder and had seven alcohol-related misdemeanor convictions over an eleven-year period up to the time of the murder. *See also* State v. Buckner, 342 N.C. 1, 464 S.E.2d 414 (1995) [no error in submitting (f)(1) when defendant had been convicted of seven felonious breaking and entering offenses, one common-law robbery offense, and one drug trafficking offense over a six-month period that occurred two years before the commission of the first-degree murder for which he was being sentenced; court stated that all of this criminal activity occurred within a brief period of time, most of it was nonviolent, and the defendant received probation for the convictions].

State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1988). The court ruled that the trial judge did not err in submitting (f)(1) over the defendant's objection when the defendant had eighteen prior felony convictions, since these convictions had occurred in 1963 and 1965 when the defendant was under twenty-one years old.

Cases in Which Evidence Was Insufficient to Require Submission of (f)(1)

State v. King, 353 N.C. 457, 546 S.E.2d 575 (2001). The state presented evidence at the capital sentencing hearing that the defendant had previously been convicted of first-degree murder of a former wife (the killing occurred in 1967). The court ruled, relying on *State v. McNeil*, 350 N.C. 657, 518 S.E.2d 486 (1999), that the trial judge did not err in not submitting mitigating circumstance (f)(1).

State v. Greene, 351 N.C. 562, 528 S.E.2d 575 (2000). He beat his father to death in order to steal money from him. The court ruled that the trial judge did not err in failing to submit (f)(1). The court noted that much of the defendant's prior criminal activity was recurrent, recent, and similar to his conduct the day of the robbery and murder of his father, and thus significant. Most of the criminal activity that resulted in the defendant's prior convictions occurred after the defendant was thirty years old and within seven years of the murder of his father. Before robbing his father and beating him to death with a shotgun, the defendant habitually sneaked into his father's house and stole money while his father was outside working. During the same time, the defendant would assault his girlfriend. Thus, the defendant had a significant history of recurrent and escalating criminal conduct, much of which was close in time to the murder.

State v. Hamilton, 351 N.C. 14, 519 S.E.2d 514 (1999). The defendant was convicted of a first-degree murder committed in 1994. The court ruled that the trial judge did not err in failing to submit (f)(1). The defendant had been convicted in 1988 of two counts of rape of a fifteen year old in which he pulled a knife on the victim; the evidence showed that the defendant raped the victim twice in North Carolina (for which he was convicted) and then raped her twice in South Carolina. The defendant was convicted of second-degree murder in 1974 in which he aimed a shotgun at the victim and said he was going to kill the victim—the murder was unprovoked. The defendant was also convicted in 1987 of misdemeanor assault on a female and misdemeanor escape. The court noted the defendant's second-degree murder conviction and its ruling in *State v. McNeil*, 350 N.C. 657, 518 S.E.2d 486 (1999), that a prior criminal history that included a violent felony death is significant under G.S. 15A-2000(f)(1).

State v. McNeil, 350 N.C. 657, 518 S.E.2d 486 (1999). The court ruled that the trial judge did not err in failing to submit (f)(1). Although the court in a prior appeal of this case, 327 N.C. 388, 395 S.E.2d 106 (1990), had stated that there was evidence to support the submission of this mitigating circumstance, the court noted that the state in the resentencing hearing offered new evidence of prior serious criminal activity (burglary, larceny, and hit-and-run) in addition to a voluntary manslaughter conviction. This evidence was more extensive and significant than presented at the first trial and supported the trial judge's ruling not to submit the mitigating circumstance.

State v. Bonnett, 348 N.C. 417, 502 S.E.2d 563 (1998). The court ruled that the trial judge did not err in failing to submit (f)(1). The defendant's prior criminal convictions included accessory after the fact of murder, two counts of accessory after the fact of felonious assault, several drug convictions, and larceny of an automobile. Distinguishing *State v. Jones*, 346 N.C. 704, 487 S.E.2d 714 (1997), the court noted that the defendant in Jones had not been convicted of any violent crimes.

State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (1998). The court ruled that the trial judge did not err in failing to submit (f)(1). The court noted that the defendant had a significant history of violent attacks, including fights in the military and repeated assaults on the victim's mother, even while she was pregnant. He also repeatedly and viciously beat his own son, a completely defenseless infant and the victim of the murder in this case.

State v. Sidden, 347 N.C. 218, 491 S.E.2d 225 (1997). The defendant murdered a father and his two sons. The father was murdered several hours before the two sons were murdered. The defendant was tried only for the murders of the two sons and was convicted. At the death sentencing hearing, the trial judge considered the murder of the father in determining whether to submit (f)(1) in sentencing the defendant for the murder of the two sons. The court, relying on *State v. Coffey*, 336 N.C. 412, 444 S.E.2d 431 (1994) [only crimes committed before the murder being sentenced may be considered in deciding whether to submit (f)(1)], ruled that the judge properly considered the murder of the father in considering this mitigating circumstance. The court rejected the defendant's argument that the father's murder could not be considered because it was part of the course of conduct during which the two sons were murdered. The court ruled that the judge acted properly in not submitting (f)(1) because, in addition to the defendant's murder of the father, the defendant had been involved in the illegal sale of alcohol and drugs during his entire adult life.

State v. Powell, 340 N.C. 674, 459 S.E.2d 219 (1995). The trial judge properly did not instruct on (f)(1) when there was insubstantial evidence about the defendant's prior criminal history. The only evidence consisted of testimony about the defendant's cocaine use and a witness's passing reference that the defendant was temporarily released from jail to attend his father's funeral (nothing was mentioned about the offense for which the defendant was in jail). Neither the state nor the defendant mentioned the defendant's criminal record or introduced it into evidence.

State v. Daughtry, 340 N.C. 488, 459 S.E.2d 747 (1995). The trial judge properly did not instruct on (f)(1) when the evidence showed that the defendant often beat the murder victim, shot an acquaintance in the leg, and was convicted of driving under the influence and assault inflicting serious injury (in which the defendant struck a man on the head with a large stick, causing a concussion and breaking his jaw and ribs). No rational juror could have found that the defendant had no significant history of prior criminal activity. The court cited its ruling in *State v. Sexton*, 336 N.C. 321, 444 S.E.2d 879 (1994), discussed below.

State v. Jones, 339 N.C. 114, 451 S.E.2d 826 (1994). The trial judge properly did not instruct on (f)(1) when the evidence showed that the defendant had three prior violent felony convictions: two counts of felonious assault and one count of robbery. No rational juror could have found that the defendant had no significant history of prior criminal activity.

State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994). The court ruled that the evidence did not entitle the defendant to the submission of (f)(1). The defendant's mother testified that the defendant sustained a head injury in an automobile accident; he had been drinking at the time of the accident and had a 0.19 alcohol concentration. The defendant's mother drove him to work because he "lost his driver's license" and the defendant did not attempt to regain his license because he did not want to. The defendant's mother also testified about his attempted suicide. After his arrest for murder, the defendant became "very combative" with the arresting officer. The defendant used illegal drugs for many years. The court found that the references in this case to the defendant's criminal activity were "cursory and unsubstantiated" [citing *State v. Laws*, 325 N.C. 81, 381 S.E.2d 609 (1989)], and the court stated that testimony about it was "elicited in contexts in which the jury would not have considered it as bearing" on this mitigating circumstance or on the defendant's character. For example, evidence of the defendant's drug abuse was offered to show that the defendant was mentally impaired at the time of the murder. For a later case distinguishing this ruling, see *State v. Frye*, 341 N.C. 470, 461 S.E.2d 664 (1995).

State v. Skipper, 337 N.C. 1, 446 S.E.2d 252 (1994). The court ruled that the trial judge did not err in refusing to submit (f)(1). The defendant had been convicted in 1978, 1982, and 1984 of assault with a deadly weapon inflicting serious injury. The court concluded that these convictions, which occurred within twelve years of the murder being tried and were similar to the murder, were evidence that the defendant had a significant record. Therefore, a juror could not have rationally found this mitigating circumstance, particularly since the jury had unanimously found these prior felony assault convictions as an aggravating circumstance under (e)(3) (prior violent felony conviction).

State v. Sexton, 336 N.C. 321, 444 S.E.2d 879 (1994). The evidence of the defendant's prior criminal activity was a conviction of forgery and uttering on May 1, 1989, and a conviction for two counts of assault on a female on October 22, 1989. The court noted that one of these counts was an assault by choking of a female that occurred less than one year before the strangulation of the murder victim—the defendant testified he did not remember choking the assault victim, a circumstance strikingly similar to his professed lack of memory about the details of the strangulation of the murder victim. The court stated that "[g]iven the nature and recency of his record of assault, we cannot say that the trial court erred in determining that no reasonable juror could have concluded defendant's criminal history was insignificant." Therefore, the trial judge did not err in failing to submit (f)(1). [However, compare the ruling in the following cases in which the court found the evidence sufficient to support the submission of (f)(1): *State v. Mahaley*, 332 N.C. 583, 423 S.E.2d 58 (1992); *State v. Wilson*, 322 N.C. 117, 367 S.E.2d 589 (1988); *State v. Lloyd*, 321 N.C. 301, 364 S.E.2d 316 (1988).]

State v. Jones, 336 N.C. 229, 443 S.E.2d 48 (1994). The trial judge properly refused to submit (f)(1), based on the following evidence, because a jury could not have rationally found the existence of this circumstance. The defendant was using illegal drugs for several weeks before the murder. He had broken into a particular convenience store "six or seven times" and stole various articles. He had broken into a pawn shop and stolen several guns. He sold some of the guns and used one of them to kill the victim in this case. Members of the defendant's family testified that he had shoplifted and "hustled" as a child.

State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994). The trial judge properly refused to submit (f)(1), based on the following evidence, because a jury could not have rationally found the existence of this circumstance. The defendant had been involved in criminal activity since adolescence. (The defendant was thirty-one years old at the time of the sentencing hearing.) He had been a drug user since age thirteen, and he sometimes earned $4,000 to $5,000 a week selling drugs. He made his living selling drugs; he had been seen selling illegal drugs—including cocaine, marijuana, and PCP—in Maryland and two North Carolina cities. Three years before the murder, he was convicted of robbery of a business and two of its employees. Evidence also showed that the defendant, in the murder case for which he was being sentenced, had come from Maryland to sell drugs and to commit a robbery.

State v. Gibbs, 335 N.C. 1, 436 S.E.2d 321 (1993). The trial judge properly refused to submit (f)(1) when neither the state nor the defendant presented any evidence about the defendant's criminal history; that is, whether or not he had any criminal history. The court followed *State v. Laws*, 325 N.C. 81, 381 S.E.2d 609 (1989) and *Delo v. Lashley*, 507 U.S. 272, 113 S. Ct. 1222, 122 L. Ed. 2d. 620 (1993). *See also* State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988) (similar ruling).

State v. McHone, 334 N.C. 627, 435 S.E.2d 296 (1993). The court ruled that the trial judge did not err in refusing to instruct on (f)(1). The defendant, who was twenty years old, had prior convictions for a provisional license violation; failure to stop at the scene of an accident; possession of alcoholic beverage by a person under twenty-one; drunk and disruptive in public; fourteen counts of felonious breaking and entering; thirteen counts of felonious larceny; and conspiracy to break and enter. The defendant's psychiatrist testified that the defendant told him that he had been convicted at age seventeen for stealing a woman's pocketbook to get drugs, and he had also broken into about sixty houses to support his drug problem. The court concluded that no rational juror could have found that the defendant had no significant history of prior criminal activity.

State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989). The trial judge did not err in failing to submit this mitigating circumstance when the defendant had many prior assault and other convictions. The judge made the determination not to submit this circumstance after conducting a hearing outside the jury's presence to learn of the defendant's prior criminal history.

State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989). A witness's cursory and unsubstantiated reference to the defendant's use of marijuana was not substantial evidence to support the submission of (f)(1).
State v. Stokes, 308 N.C. 634, 304 S.E.2d 184 (1983). The court ruled that no reasonable jury could find (f)(1) based on the following criminal activity of the defendant: two break-ins in 1974, a break-in in 1975, assault on a female and two larcenies in 1979, and a break-in in 1981. In addition, the defendant admitted that he sold and possessed marijuana on many occasions, and also had stolen marijuana from other drug dealers. [**Author's note:** The murder for which the defendant was being sentenced occurred in 1981.]
State v. Hutchins, 303 N.C. 321, 279 S.E.2d 788 (1981). The defendant's evidence that he had a good reputation in the community in which he lived was not sufficient evidence by itself to require the trial judge to submit (f)(1).

Cases in Which Evidence Did Not Support Peremptory Instruction

State v. Stephens, 347 N.C. 352, 493 S.E.2d 435 (1997). The court ruled that the trial judge did not err in failing to give a peremptory instruction for (f)(1). The defendant was sentenced to death for convictions of murders committed on January 20, 1995. The defendant had been convicted of (1) hit-and-run involving property damage and driving under the influence in 1982; (2) driving while license suspended in 1983; and (3) driving under the influence. Also, the defendant had a long history of purchasing and using illegal drugs in 1986.
State v. Gladden, 315 N.C. 398, 340 S.E.2d 673 (1986). The defendant was not entitled to a peremptory instruction on (f)(1), based on the evidence of his prior criminal convictions and prior criminal history. In addition, the defendant failed to make a timely request for the instruction.
State v. Noland, 312 N.C. 1, 320 S.E.2d 642 (1984). The trial judge did not err in refusing to give a peremptory instruction for (f)(1), since there was evidence of a conviction for communicating threats and prior acts of communicating threats and assaulting a female. *See also* State v. Simpson, 341 N.C. 316, 462 S.E.2d 191 (1995) (similar ruling).

Requirement That Criminal Activity Occur before Commission of Murder

State v. Gell, 351 N.C. 192, 524 S.E.2d 332 (2000). Relying on *State v. Coffey*, 336 N.C. 412, 444 S.E.2d 431 (1994), the court ruled that it was error to permit the jury to include a defendant's larceny conviction in the jury's consideration of (f)(1) because the larceny occurred after the murder for which the defendant was being sentenced. The court rejected the state's argument that the larceny was properly considered because it was part of a continuous transaction with the murder.
State v. Sidden, 347 N.C. 218, 491 S.E.2d 225 (1997). The defendant murdered a father and his two sons. The father was murdered several hours before the two sons were murdered. The defendant was tried only for the murders of the two sons and was convicted. At the death sentencing hearing, the trial judge considered the murder of the father in determining whether to submit (f)(1) in sentencing the defendant for the murder of the two sons. The court, relying on *State v. Coffey*, 336 N.C. 412, 444 S.E.2d 431 (1994) [only crimes committed before the murder being sentenced may be considered in deciding whether to submit (f)(1)], ruled that the judge properly considered the murder of the father in considering this mitigating circumstance. The court rejected the defendant's argument that the father's murder could not be considered because it was part of the course of conduct during which the two sons were murdered. The court ruled that the judge acted properly in not submitting (f)(1) because, in addition to the defendant's murder of the father, the defendant had been involved in the illegal sale of alcohol and drugs during his entire adult life.
State v. Coffey, 336 N.C. 412, 444 S.E.2d 431 (1994). The court ruled that the only evidence of criminal activity that may be considered under (f)(1) is criminal activity committed before the date of the murder for which the defendant is being sentenced.

State's Evidence Offered in Rebuttal to (f)(1)

State v. Williams, 350 N.C. 1, 510 S.E.2d 626 (1999). The court ruled that the trial judge was not required to determine, before the state presented rebuttal evidence on (f)(1), that a rational juror could find from

the evidence that the defendant had no significant history of criminal activity. This determination need only be made before deciding to submit this mitigating circumstance. The court also ruled that the judge is not required to make findings of fact to explain its decision to submit this mitigating circumstance.
State v. Roper, 328 N.C. 337, 402 S.E.2d 600 (1991). The court ruled that the trial judge properly permitted the state to offer testimony of a person who alleged the defendant raped her before the murder being tried, because it was offered in rebuttal to the defendant's request that (f)(1) be submitted to the jury. The testimony of the alleged rape was admissible even though the defendant had never been convicted of the crime. [The court noted that the defendant withdrew his request for (f)(1) after this evidence was presented.]
State v. Holden, 321 N.C. 125, 362 S.E.2d 513 (1987). The state properly was permitted during the sentencing hearing to offer rebuttal evidence to (f)(1) by offering the testimony of five witnesses who described the defendant's prior criminal activity: two rapes and three assaults.
State v. Brown, 315 N.C. 40, 337 S.E.2d 808 (1985). The trial judge erred in allowing the state to introduce evidence in its case-in-chief at the sentencing hearing in rebuttal to the submission of this mitigating circumstance. (The court ruled, however, that the error was harmless beyond a reasonable doubt.) *See also* State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981) (similar ruling).
State v. Maynard, 311 N.C. 1, 316 S.E.2d 197 (1984). The trial judge properly allowed the state to offer a court clerk's testimony reading the entire judgment (including the original charges) of conviction for prior offenses as the state's rebuttal evidence on (f)(1) and the defendant's good character evidence. The state also was properly permitted to offer testimony setting forth the details of these crimes.

Submission of (f)(1) over Defendant's Objection

State v. Walker, 343 N.C. 216, 469 S.E.2d 919 (1996). Evidence of the defendant's prior criminal activity was (1) the defendant's attempted second-degree murder conviction that occurred nine years before the murder for which the defendant was being sentenced, and (2) that the defendant sold drugs. The court ruled that, assuming that it was error to submit statutory mitigating circumstance (f)(1) (no significant prior criminal history) and the defendant objected to its submission, it was not prejudicial to the defendant. The court noted that a jury's rejection of an erroneously submitted statutory mitigating circumstance is not tantamount to the jury having found an aggravating circumstance. The court then commented as follows:

> Absent extraordinary facts not present in this case, the erroneous submission of a mitigating circumstance is harmless. We caution trial courts and prosecutors, however, that prosecutors must not argue to the jury that a defendant has requested that a particular mitigating circumstance be submitted or has sought to have the jury find that circumstance, when the defendant has in fact objected to the submission of that particular mitigating circumstance. Additionally, the better practice when a defendant has objected to the submission of a particular mitigating circumstance is for the trial court to instruct the jury that the defendant did not request that the mitigating circumstance be submitted. In such instances, the trial court also should inform the jury that the submission of the mitigating circumstance is required as a matter of law because there is some evidence from which the jury could, but is not required to, find the mitigating circumstance to exist.

The court noted that in this case the prosecutor never argued that the defendant requested (f)(1). The court concluded that the defendant was not prejudiced by the assumed, erroneous submission of (f)(1).
State v. Bone, 354 N.C. 1, 550 S.E.2d 482 (2001). The defendant was convicted of first-degree murder and sentenced to death. The murder was committed in 1997. The defendant had four prior violent felony convictions: a 1986 common-law robbery conviction and three convictions (armed robbery, kidnapping, and felonious assault on a law enforcement officer) arising from a single incident in 1990. The trial judge submitted (f)(1). The court found that there were no extraordinary facts making any error by the trial judge in submitting this mitigating circumstance prejudicial to the defendant.
State v. Williams, 350 N.C. 1, 510 S.E.2d 626 (1999). The court ruled that the judge did not err in submitting (f)(1) over the defendant's objection. The defendant had been convicted of many misdemeanor assaults on females (one in 1995, four in 1992, and one in 1989), and other offenses such as communicating threats, trespass, and burglary. The court concluded that a rational juror could have found that the defendant's prior criminal activity was insignificant.

Procedural Issues

State v. Williams, 350 N.C. 1, 510 S.E.2d 626 (1999). The court ruled that the trial judge was not required to determine, before the state presented rebuttal evidence on (f)(1), that a rational juror could find from the evidence that the defendant had no significant history of criminal activity. This determination need only be made before deciding to submit this mitigating circumstance. The court also ruled that the judge is not required to make findings of fact to explain its decision to submit this mitigating circumstance.

Mitigating Circumstance (f)(2): Under Influence of Mental or Emotional Disturbance

G.S. 15A-2000(f)(2) states: "The capital felony was committed while the defendant was under the influence of mental or emotional disturbance."

As stated in the jury instruction on this circumstance in N.C.P.I.—Criminal 150.10, a defendant is under the influence of a mental or emotional disturbance if he or she is in any way affected or influenced by such a disturbance at the time of the murder.[39]

The North Carolina Supreme Court has stated that although some provocation of the defendant (that may have led the defendant to commit the murder) will almost always be present when the defendant suffers from a mental or emotional disturbance, evidence of provocation is not a prerequisite to the submission of this mitigating circumstance to the jury (and the provocation is not legal provocation but simply a triggering event for commission of the murder).[40]

The court has ruled that voluntary intoxication by alcohol or drugs at the time of the murder does not qualify by itself as a mental or emotional disturbance under (f)(2) (nor does drug or alcohol withdrawal stemming from voluntary intoxication).[41] In addition, an inability to control one's drug or alcohol habits or temper is neither a mental nor emotional disturbance.[42] However, evidence would be sufficient for this circumstance if the defendant's underlying mental or emotional condition was exacerbated by alcohol or drug consumption.[43]

Voluntary intoxication, to the extent it affects a defendant's ability to understand and to control his or her actions, is evidence that may support statutory mitigating circumstance (f)(6), commonly known as the impaired capacity circumstance.[44]

Evidence sometimes will support both (f)(2) and (f)(6) and require that both circumstances must be submitted to the jury.[45]

Case Summaries on Mitigating Circumstance (f)(2)

Cases in Which Evidence Was Sufficient to Require Submission of (f)(2)

State v. Fletcher, 348 N.C. 292, 500 S.E.2d 668 (1998). The court ruled the trial judge erred in not submitting (f)(2). The defendant's psychologist testified that under times of stress, the defendant might not perceive reality correctly and that it was likely that the defendant had been in a stress-overload situa-

39. For an extensive discussion of this circumstance, see *State v. Greene*, 329 N.C. 771, 408 S.E.2d 185 (1991).

40. *Id.*

41. State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981); State v. Moose, 310 N.C. 482, 313 S.E.2d 507 (1984); State v. Miller, 339 N.C. 663, 455 S.E.2d 137 (1995).

42. State v. Ward, 338 N.C. 64, 449 S.E.2d 709 (1994); State v. Moose, 310 N.C. 482, 313 S.E.2d 507 (1984).

43. State v. Greene, 329 N.C. 771, 408 S.E.2d 185 (1991); State v. Brogden, 329 N.C. 534, 407 S.E.2d 158 (1991).

44. State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981).

45. State v. Greene, 329 N.C. 771, 408 S.E.2d 185 (1991); State v. Stokes, 308 N.C. 634, 304 S.E.2d 184 (1983).

tion for a very long time based on his environment and psychological problems. He also testified that—given the defendant's lack of any violent history—the defendant must have been "in a very psychotic state or really out of it on drugs" to attack and kill in the manner in which the victim was killed.

State v. Greene, 329 N.C. 771, 408 S.E.2d 185 (1991). (1) Evidence was sufficient to support (f)(2) when the evidence showed that the defendant suffered from organic brain damage that resulted in his having poor judgment and a lack of impulse control, and the defendant would impulsively do whatever his emotions commanded at the time. The defendant's condition was exacerbated by alcohol consumption, and the defendant was drinking on the day he killed his father, with whom there was ill will. (2) The court stated that although some provocation of the defendant will almost always be present when the defendant suffers from a mental or emotional disturbance as set out in (f)(2), evidence of provocation is not a prerequisite to the submission of (f)(2) to the jury. The court disavowed a contrary statement in State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981).

State v. Brogden, 329 N.C. 534, 407 S.E.2d 158 (1991). The court ruled that the evidence was sufficient to support the submission of (f)(2): The defendant consumed five to six liquor drinks on the morning of the murder. In addition, he had drunk two or three cans of beer while he and his wife were driving around. The defendant testified that the alcohol was having an effect on him. More importantly (according to the court), the defendant's wife testified that the defendant was explosive and subject to mood changes in which he would become enraged and threaten her.

State v. Stokes, 308 N.C. 634, 304 S.E.2d 184 (1983). The court ruled that there was sufficient evidence to require the submission of (f)(2), which included the following: there was expert testimony that the defendant was mildly mentally retarded (defendant had an IQ of 63 and a reading level of 2.9 grade level) and had an antisocial personality disorder, which had been unsuccessfully treated with medication. The court apparently concluded that the defendant suffered from the emotional disturbance of antisocial personality disorder at the time of the murder. *See also* State v. Robinson, 327 N.C. 346, 395 S.E.2d 402 (1990) (similar ruling).

Cases in Which Evidence Was Insufficient to Require Submission of (f)(2)

State v. Hooks, 353 N.C. 629, 548 S.E.2d 501 (2001). The court ruled, relying on *State v. Geddie*, 345 N.C. 73, 478 S.E.2d 146 (1996) and distinguishing *State v. Greene*, 329 N.C. 771, 408 S.E.2d 185 (1991), that the trial judge did not err in failing to submit (f)(2). The court stated that the evidence tended to show that the defendant's impoverished skills, which resulted from chronic substance abuse, led to poor impulse control and a failure to understand the consequences of his actions. This evidence showed diminished capacity rather than any mental disturbance at the time of the killing. [**Author's note:** The judge submitted G.S. 15A-2000(f)(6) (impaired capacity).] The court noted that despite the American Psychiatric Association's listing alcohol and drug abuse as mental disorders, the court has consistently ruled that voluntary intoxication is not a mental disturbance under the (f)(2) mitigating circumstance.

State v. Bonnett, 348 N.C. 417, 502 S.E.2d 563 (1998). The court ruled that the trial judge did not err in failing to submit (f)(2). The court noted that one of the defendant's experts testified that testing showed the defendant to be disturbed psychologically and to be socially alienated with a poor self-image, insecurity, and feelings of inadequacy. However, neither of the defendant's experts' testimony suggested any nexus between the defendant's personality characteristics and the crimes he committed, or any mental or emotional disturbance at the time of the killing.

State v. Hill, 347 N.C. 275, 493 S.E.2d 264 (1997). The court ruled that the evidence was insufficient to submit (f)(2). The defendant's expert witnesses did not provide a nexus between the defendant's personality characteristics and the crimes he committed. The manner of the killing and the defendant's later actions indicated that he was not under the influence of a mental or emotional disturbance at the time of the killing. The evidence showed that the defendant raped the victim and deliberately set fire to her body to destroy the evidence. The defendant then returned to the house where he had attacked the victim and set the house on fire. Later, the defendant drove to a pond, where he threw the gun used in the murder into the water.

State v. Strickland, 346 N.C. 443, 488 S.E.2d 194 (1997). The court ruled that the evidence was insufficient to submit (f)(2). After examining the evidence (the defendant shot the victim because he was

angry), the court noted that it had previously ruled, citing *State v. Ward*, 338 N.C. 64, 449 S.E.2d 709 (1994), that an inability to control one's temper is neither a mental nor an emotional disturbance under this mitigating circumstance.

State v. Miller, 339 N.C. 663, 455 S.E.2d 137 (1995). (1) The defendant contended that the evidence showed that at the time of the murder he suffered from cocaine and opiate withdrawal, which is a defined psychiatric disorder. He also contended that this disorder made him more vulnerable to the provocation that led him to shoot the victim. The court ruled that drug withdrawal from voluntary intoxication does not qualify as a mental or emotional disturbance under (f)(2). The court cited *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981) and *State v. Greene*, 329 N.C. 771, 408 S.E.2d 185 (1991). (2) The defendant also contended that a racial slur spoken by the victim provoked him to shoot, indicating that he suffered from a mental disturbance that made him particularly susceptible to provocation. The court noted that although abnormal susceptibility to provocation can show a mental or emotional disturbance (citing *State v. Greene*), the evidence in this case did not show that such abnormal provocation occurred, because the defendant admitted that he committed the murder for money, not as a result of a racial slur.

State v. Ward, 338 N.C. 64, 449 S.E.2d 709 (1994). The court ruled that the trial judge did not err in refusing to submit (f)(2). The defendant's psychiatric expert directly refused to opine that the defendant was under the influence of a mental or an emotional disturbance on the night he committed the murder; instead he stated that the defendant was under the influence of some drugs or alcohol. There was no evidence suggesting a link between the defendant's mental condition and substance abuse, which is required under this circumstance [the court cited *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981)]. Voluntary intoxication properly may be considered instead under (f)(6). The court stated that the inability to control one's drug habits or temper is neither a mental nor an emotional disturbance under (f)(2). The court cited *State v. Moose*, 310 N.C. 482, 313 S.E.2d 507 (1984) [insufficient evidence of (f)(2)]; *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203 (1982) [insufficient evidence of (f)(2)].

State v. Brown, 306 N.C. 151, 293 S.E.2d 569 (1982). The defendant's use of alcohol and drugs on the night of the murder was not sufficient evidence of (f)(2). The trial judge properly instructed on the (f)(6) mitigating circumstance.

State v. Irwin, 304 N.C. 93, 282 S.E.2d 439 (1981). The court ruled that evidence of the defendant's use of a central nervous system depressant and consumption of beer within hours of the murder was insufficient evidence to support the submission of (f)(2). Voluntary intoxication by alcohol or drugs at the time of the murder is not by itself sufficient evidence of (f)(2). It properly may be considered under (f)(6). *See also* State v. Chandler, 342 N.C. 742, 467 S.E.2d 636 (1996) [defendant's voluntary use of alcohol on the night of the murder was insufficient evidence to require submission of (f)(2)].

Cases in Which Evidence Supported Peremptory Instruction

State v. Holden, 338 N.C. 394, 450 S.E.2d 878 (1994). The court ruled that the trial judge erred in denying the defendant's request for a peremptory instruction when the defendant offered uncontroverted evidence of (f)(2) by mental health experts. The court also ruled that the error was not harmless beyond a reasonable doubt. Although one or more jurors found that (f)(2) existed, it was not known whether all jurors found that it existed. It is possible that had the peremptory instruction been given, more jurors or all jurors would have done so. And that could have affected the balancing of mitigating circumstances against aggravating circumstances, thereby affecting the sentencing recommendation. The court ordered a new sentencing hearing.

Cases in Which Evidence Did Not Support Peremptory Instruction

State v. Spruill, 320 N.C. 688, 360 S.E.2d 667 (1987). The defendant was not entitled to a peremptory instruction on (f)(2) when the testimony of two defense experts about the defendant's mental and emotional condition was equivocal.

State v. Noland, 312 N.C. 1, 320 S.E.2d 642 (1984). The trial judge did not err in refusing to give a peremptory instruction on (f)(2), since conflicting evidence was offered by the defendant and the state. *See also* State v. Simpson, 341 N.C. 316, 462 S.E.2d 191 (1995) (similar ruling; conflicting evidence elicited by state's cross-examination of defense expert).

Cases in Which Jury's Failure to Find (f)(2) Was Not Error

State v. McKoy, 323 N.C. 1, 372 S.E.2d 12 (1988). The jury's failure to find (f)(2) was not error because evidence of this circumstance was neither uncontradicted nor inherently credible.

Qualifications of Expert to Testify about (f)(2)

State v. Taylor, 354 N.C. 28, 550 S.E.2d 141 (2001). The defendant was convicted of first-degree murder and sentenced to death. The court ruled that the trial judge in the capital sentencing hearing did not err in prohibiting a defense sociologist from testifying about the defendant's mental capacity to appreciate the criminality of his conduct or whether the defendant was under the influence of a mental or emotional disturbance. The court noted that although the sociologist was clearly qualified to give his opinion about the possible cultural effects of living in a drug-infested environment, he was not qualified—based on his training and experience—to give in essence a medical opinion about any possible mental defect of the defendant.

Mitigating Circumstance (f)(3): Victim Voluntary Participant in Murder

G.S. 15A-2000(f)(3) states: "The victim was a voluntary participant in the defendant's homicidal conduct or consented to the homicidal act."

Case Summaries on Mitigating Circumstance (f)(3)

State v. Locklear, 349 N.C. 118, 505 S.E.2d 277 (1998). The court ruled that the trial judge did not err in failing to submit (f)(3). The defendant asserted on appeal that the victim's fighting words, coupled with a prior altercation, satisfied this mitigating circumstance. The court rejected that assertion, noting that the defendant's homicidal conduct consisted of retrieving his shotgun from a mobile home, shooting the victim in the back, and firing at the victim again as he was lying on the ground.

State v. Larry, 345 N.C. 497, 481 S.E.2d 907 (1997). The defendant robbed a grocery store while an off-duty police officer was there as a customer. The officer chased the defendant as he ran from the store. A struggle ensued, and the defendant killed the officer. The defendant was convicted of first-degree murder. The court ruled that this evidence did not support the submission of (f)(3).

State v. Gladden, 315 N.C. 398, 340 S.E.2d 673 (1986). The defendant was not entitled to a peremptory instruction on (f)(3). The state produced ample evidence to contradict the defendant's assertion that the victim initially attacked him with a knife. In addition, the defendant failed to make a timely request to give this instruction.

Mitigating Circumstance (f)(4): Defendant's Participation Was Relatively Minor

G.S. 15A-2000(f)(4) states: "The defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor."

Case Summaries on Mitigating Circumstance (f)(4)

State v. Roseboro, 351 N.C. 536, 528 S.E.2d 1 (2000). The court ruled that the trial judge did not err in failing to submit (f)(4). The court noted that the evidence in this case shows that the jury could not have found the defendant guilty of first-degree murder by premeditation and deliberation without also finding that the defendant actually killed her. The defendant may not relitigate under (f)(4) whether he had a sufficiently culpable state of mind at the time of the murder. The court concluded that the evidence did not support the submission of this mitigating circumstance.

State v. Anderson, 350 N.C. 152, 513 S.E.2d 296 (1999). The court ruled that the evidence was insufficient to support the submission of (f)(4). Although the defendant may not have inflicted the closed-head injury on the night the child died, she significantly abused her over a long period of time.
State v. Bonnett, 348 N.C. 417, 502 S.E.2d 563 (1998). The court ruled that the trial judge did not err in failing to give a peremptory instruction on (f)(4). The evidence was not uncontroverted. The court noted that the evidence tended to show that the defendant supplied the murder weapon and took the money box during the robbery and murder.
State v. Robinson, 327 N.C. 346, 395 S.E.2d 402 (1990). The court ruled that the defendant's testimony at the sentencing hearing (and other evidence in the case) that he was following his accomplice's instructions and plan to murder the victims was sufficient evidence of (f)(4) to require its submission.
State v. Stokes, 308 N.C. 634, 304 S.E.2d 184 (1983). The state offered the defendant's purported confession that tended to show that the defendant was a lookout but did not deliver the fatal blows. There was other evidence that the defendant actually delivered the blows that caused the victim's death. The defendant testified at trial that he did not participate in the murder. The court ruled that this conflicting testimony required submission of (f)(4).

Mitigating Circumstance (f)(5): Under Duress or Domination of Another Person

G.S. 15A-2000(f)(5) states: "The defendant acted under duress or under the domination of another person."

Case Summaries on Mitigating Circumstance (f)(5)

State v. Anderson, 350 N.C. 152, 513 S.E.2d 296 (1999). The court ruled that the evidence was insufficient to support the submission of (f)(5). Although a male person who was involved in the murder had criminally assaulted the defendant, this evidence failed to support the defendant's assertion that she acted under his domination on the night of the murder or during the abusive treatment of the child that occurred before the murder.
State v. Barnes, 330 N.C. 104, 408 S.E.2d 843 (1991). The court ruled that there was sufficient evidence of (f)(5) to require its submission. There was evidence that in many circumstances surrounding the commission of the murders the accomplice ordered the defendant what to do and the defendant complied. In addition, a psychiatric expert testified that the defendant was passive and was more a follower than a leader.
State v. Robinson, 327 N.C. 346, 395 S.E.2d 402 (1990). The court ruled that the defendant's testimony at the sentencing hearing (and other evidence in the case) that he was following his accomplice's instructions and plan to murder the victims was sufficient evidence of (f)(5) to require its submission.
State v. McLaughlin, 323 N.C. 68, 372 S.E.2d 49 (1988). The trial judge did not err in failing to submit (f)(5) when the evidence failed to show that the defendant was an excessive user of drugs or alcohol that might have brought him under his accomplice's influence in committing the three murders involved in this case.

Mitigating Circumstance (f)(6): Defendant's Impaired Capacity

G.S. 15A-2000(f)(6) states: "The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired."

This mitigating circumstance has two separate prongs: (1) impairment of the defendant's capacity to appreciate the criminality of his or her conduct; and (2) impairment of the defendant's

capacity to conform his or her conduct to the requirements of law.[46] Evidence may be sufficient to require the submission of only one prong or it may be sufficient for both prongs. It is error if the trial judge submits only one prong when the evidence was sufficient for both.[47]

The North Carolina Supreme Court has stated that this circumstance "may exist even if a defendant has capacity to know right from wrong, to know that the act he committed was wrong, and to know the nature and quality of that act. It would exist even under these circumstances if the defendant's capacity to appreciate (to fully comprehend or be fully sensible of) the criminality (wrongfulness) of his conduct was impaired (lessened or diminished), or if defendant's capacity to follow the law and refrain from engaging in the illegal conduct was likewise impaired (lessened or diminished)."[48]

The court has noted that evidence supporting this circumstance must link the defendant's impaired capacity to the time of the murder.[49]

The court has stated that although it never has ruled that expert testimony is required to establish the existence of this circumstance,[50] it has been found to be supported by the court only where there was evidence (expert or lay) of some mental disorder, disease, or defect, or voluntary intoxication by alcohol or drugs, to the degree that it affected the defendant's ability to understand and control his or her actions.[51]

Case Summaries on Mitigating Circumstance (f)(6)

Cases in Which Evidence Was Sufficient to Require Submission of (f)(6)

State v. Price, 331 N.C. 620, 418 S.E.2d 169 (1992). The trial judge submitted only the second prong of (f)(6), the defendant's impaired capacity to conform his conduct to the requirements of law. The defendant specifically requested that the judge not submit the first prong, the defendant's impaired capacity to appreciate the criminality of his conduct. The court ruled that the trial judge erred in not submitting the first prong, because there was sufficient evidence to support its submission and a trial judge has a duty to submit a statutory mitigating circumstance regardless of the defendant's wishes. A psychologist's testimony that the defendant suffered from a mental illness that impaired his ability to make judgments, have appropriate mood responses, and be in touch with reality, considered with evidence of the defendant's past psychiatric problems resulting in hospitalization, was sufficient evidence of the first prong. (However, the court ruled that the error in not submitting the first prong was harmless beyond a reasonable doubt.)

State v. McLaughlin, 330 N.C. 66, 408 S.E.2d 732 (1991). The court ruled that there was sufficient evidence to submit (f)(6) when the defendant had an IQ of 72 and on the day of the murder he had used marijuana and LSD and ingested wine and beer.

State v. Artis, 329 N.C. 679, 406 S.E.2d 827 (1991). The court ruled that the evidence was sufficient to support (f)(6). On the day of the murder the defendant was "high . . . from beer" and "drunk." The defendant's IQ was 67, which placed him in the upper range of mentally retarded people.

State v. Wynne, 329 N.C. 507, 406 S.E.2d 812 (1991). The court ruled that evidence was sufficient to support both prongs of (f)(6). The defendant suffered from an alcohol problem for some time before the murder, and shortly before the commission of the murder the defendant had consumed alcohol and smoked marijuana. Also, the defendant recently had been examined for psychological problems by a mental health professional. The evidence could support a reasonable inference that the defendant had psychological problems and was intoxicated at the time of the murder. As a result,

46. State v. Price, 331 N.C. 620, 418 S.E.2d 169 (1992).

47. *Id.*

48. State v. Johnson, 298 N.C. 47, 68, 257 S.E.2d 597, 613 (1979).

49. *See, e.g.*, State v. Ward, 338 N.C. 64, 449 S.E.2d 709 (1994).

50. State v. Cummings, 329 N.C. 249, 404 S.E.2d 849 (1991) [sufficient evidence of (f)(6) although no mental health expert testified; evidence from the defendant and his family showed his excessive consumption of alcohol, and the defendant could not say exactly what happened the day of the murder because he was "pretty well loaded"].

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

his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.

State v. Thomas, 329 N.C. 423, 407 S.E.2d 141 (1991). Evidence that the defendant was under the influence of heroin at the time of the murder, had blacked out, and had awakened to find the victim dead was sufficient (along with his prior drug use) to submit (f)(6) to the jury.

State v. Cummings, 329 N.C. 249, 404 S.E.2d 849 (1991). The court ruled that there was sufficient evidence (even though no mental health expert testified) to submit (f)(6) when the evidence showed that the defendant had consumed a large quantity of alcohol on the day of the murder and suffered from alcoholism for a number of years.

State v. Fullwood, 329 N.C. 233, 404 S.E.2d 842 (1991). The court ruled that the evidence was sufficient to support the submission of (f)(6). A defense psychologist testified that the defendant had an IQ of 80, which is a borderline level between low normal intelligence and retarded. The defendant suffered from very low feelings of self-esteem and inadequate personality. Another defense psychologist testified that the defendant lacked verbal abilities and his ability to understand and be understood through words was severely limited. Also, the defendant's emotional anguish at the time of the murder aggravated his already limited reasoning ability, low feelings of self-esteem, and inadequate personality. The defendant's judgment was very poor at the time of the murder.

State v. Quick, 329 N.C. 1, 405 S.E.2d 179 (1991). The court ruled that the evidence was sufficient to support the submission of (f)(6). A psychologist testified that the defendant's IQ placed him at the borderline range of intellectual functioning and his low intelligence limited his understanding of social rules and customs. In addition, the defendant's history of substance abuse could "compromise the abilities he has."

State v. Huff, 328 N.C. 532, 402 S.E.2d 577 (1991). The court ruled that the evidence was sufficient to support the submission of (f)(6). Expert testimony showed that the defendant suffered from paranoid schizophrenia and at the time of the murder he was unable to understand the difference between right and wrong and the nature and quality of his acts.

State v. Payne, 328 N.C. 377, 402 S.E.2d 582 (1991). The court ruled that there was sufficient evidence to submit (f)(6). The evidence showed that the defendant had inhaled gasoline from a can on more than one occasion, and he had been drinking alcohol the night before the murder victim's body had been found. After the murder, sheriff's deputies found the defendant smelling like beer and lying in a barn loft strewn with a gasoline can and several beer cans, which could support a reasonable inference that he was intoxicated at the time of the murder.

State v. Quesinberry, 328 N.C. 288, 401 S.E.2d 632 (1991). The court ruled that there was sufficient evidence to submit (f)(6) when the evidence showed that the defendant habitually abused alcohol and drugs for eight years and, over a six-hour period immediately before the murder, he consumed two beers and smoked five marijuana cigarettes.

State v. Sanderson, 327 N.C. 397, 394 S.E.2d 803 (1990). The court ruled that there was sufficient evidence to submit (f)(6) when the evidence showed that the defendant consumed large amounts of drugs on the day the murder was committed and said that he had injected two syringes of "dope" just before stabbing the victim. He also told law enforcement officers that he committed the murder because he was under the influence of drugs.

State v. McNeil, 327 N.C. 388, 395 S.E.2d 106 (1990). The court ruled that there was sufficient evidence to submit (f)(6) when the evidence showed that the defendant had consumed substantial amounts of alcohol on the weekend of the murders, and expert testimony indicated that the defendant was an alcoholic and his consumption of alcohol impaired his judgment and contributed to his behavior.

State v. Sanders, 327 N.C. 319, 395 S.E.2d 412 (1990). The court ruled that there was sufficient evidence to submit (f)(6) when the evidence showed that the defendant had significant mental illness, possibly schizophrenia-paranoid type, and had manic depressive-like symptoms. He also suffered rapid mood changes, resisted medical treatment, and exhibited antisocial traits. His IQ was 72, which is borderline mental retardation.

State v. Stokes, 308 N.C. 634, 304 S.E.2d 184 (1983). The court ruled that there was sufficient evidence to require the submission of (f)(6). Expert testimony showed that the defendant was mildly mentally retarded and had an antisocial disorder. The defendant had a long history of treatment for mental problems that began when he was ten years old.

Cases in Which Evidence Was Insufficient to Require Submission of (f)(6)

State v. Kemmerlin, 356 N.C. 446, 573 S.E.2d 870 (2002). The court ruled that the trial judge did not err in declining to submit (f)(6). The court noted that the judge submitted mitigating circumstance G.S. 15A-2000(f)(2) (murder committed under influence of mental or emotional disturbance). The court stated that the evidence showed that the defendant was depressed and suffering from borderline personality disorder and thus was under the influence of a mental or emotional disturbance. However, the defendant's expert testified that this disturbance did not prevent the defendant from appreciating the criminality of her conduct or controlling her conduct as required by law.

State v. Strickland, 346 N.C. 443, 488 S.E.2d 194 (1997). The court ruled that the evidence was insufficient to submit (f)(6). The court noted that mere evidence that a defendant has consumed alcohol or drugs before the murder does not constitute substantial evidence supporting this mitigating circumstance. The court stated that there was no evidence that the defendant's consumption of alcohol so impaired him as to prevent his understanding of the criminality of his conduct or that the consumption of alcohol affected his ability to control his actions.

State v. Hill, 347 N.C. 275, 493 S.E.2d 264 (1997). The court ruled that the evidence was insufficient to submit (f)(6). The testimony of both of the defendant's experts did not establish that his personality characteristics affected his ability to understand and control his actions. The court noted that, in fact, they testified to the contrary.

State v. Lyons, 343 N.C. 1, 468 S.E.2d 204 (1996). The defendant's psychologist testified that the defendant suffered from bipolar disorder, antisocial personality disorder and substance abuse. However, the psychologist never testified that the defendant was unable to conform his conduct to the requirements of the law or that the defendant was suffering from antisocial personality disorder *at the time of the murder*. The court stated that it is not enough for a defense expert to proffer in general a definition of a disorder without any testimony about the specific symptoms from which a particular defendant suffers. The court ruled that, based on this testimony, the trial judge did not err in not submitting (f)(6).

State v. Garner, 340 N.C. 573, 459 S.E.2d 718 (1995). The defendant presented evidence of his voluntary intoxication through witnesses who testified that he appeared at army formations with alcohol on his breath, drank beer regularly with an army buddy, and had failed a random drug test. His family and friends testified that he underwent a radical and abrupt character change in the month before the murders that was indicative of a mental breakdown. The court ruled that this evidence by itself was insufficient to support the submission of (f)(6).

State v. Miller, 339 N.C. 663, 455 S.E.2d 137 (1995). The defendant presented evidence that he ingested drugs on September 30, 1985, as well as immediately after the murder, which occurred on October 5, 1985. The defendant asked for medicine for withdrawal symptoms while in the hospital on October 6, 1985. A defense psychologist testified that the defendant was prone to addiction, lacked appropriate judgment, and had low-average intelligence. The court ruled that this evidence was insufficient to support the submission of (f)(6) because there was no evidence that the defendant was impaired by drugs or drug withdrawal at the time of the murder or that any of the withdrawal symptoms he may have experienced impaired his capacity. None of the defendant's witnesses, including the psychologist, testified that his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law was impaired. The court cited *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243 (1982).

State v. Williams, 339 N.C. 1, 452 S.E.2d 245 (1994). The court ruled that the trial judge did not err in failing to submit (f)(6). The defendant was a fair student with average grades until age fifteen, after which he barely passed his classes. His ninth-grade school year was interrupted so he could attend a sheltered workshop for the handicapped and retarded. His IQ tests placed him in the borderline range of intelligence. However, there was no evidence of any treatable mental disorder. The court relied on its ruling in *State v. Artis*, 325 N.C. 278, 384 S.E.2d 470 (1989).

State v. Ward, 338 N.C. 64, 449 S.E.2d 709 (1994). The court ruled that the trial judge did not err in failing to submit (f)(6). There was no evidence that would support an inference that the defendant's mental capacity was impaired at the time of the murder. The defendant's smoking crack cocaine more than eight hours before he committed the murder, considered in light of his sister's testimony that he was acting "normal" within one and one-half hours of the murder, was not sufficient evidence of this circumstance. The defendant's own expert witness "could not conclude unconditionally" that the defendant met this circumstance. The court noted that although the evidence tended to show that the defendant historically abused drugs, there was no evidence to support an inference that his mental capacity was impaired at the time of the murder.

State v. Syriani, 333 N.C. 350, 428 S.E.2d 118 (1993). The defendant's testimony that his judgment was affected by his emotional disturbance was insufficient in this case to support submission of (f)(6) to the jury.

State v. Hunt, 330 N.C. 501, 411 S.E.2d 806 (1992). The court ruled that there was insufficient evidence that the defendant's alcohol consumption required submission of either prong of (f)(6). The court noted that there was a dearth of evidence about how much alcohol the defendant had consumed and the effect that the defendant's alcohol consumption had on his abilities. *See also* State v. DeCastro, 342 N.C. 667, 467 S.E.2d 653 (1996); State v. Jones, 342 N.C. 457, 466 S.E.2d 696 (1996).

State v. Artis, 325 N.C. 278, 384 S.E.2d 470 (1989). The court ruled that the evidence was insufficient to support the submission of (f)(6) when evidence of the defendant's mild retardation failed to suggest any link between the retardation and the defendant's inability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. The court distinguished its ruling in *State v. Stokes*, 308 N.C. 634, 304 S.E.2d 184 (1983). The court noted that a low IQ by itself may justify the submission of a nonstatutory mitigating circumstance.

State v. Allen, 323 N.C. 208, 372 S.E.2d 855 (1988). The court ruled that the evidence was insufficient to support the submission of (f)(6) when the evidence only showed that the defendant may have taken a drug several hours before the murder or he may have drunk some beer. The court noted that there was no expert testimony about the defendant's condition.

State v. Williams, 305 N.C. 656, 292 S.E.2d 243 (1982). The court ruled that the evidence was insufficient to support the submission of (f)(6) when there was no expert psychiatric or other evidence to show that his capacity to appreciate the criminality of his conduct was impaired by the defendant's consumption of alcohol on the night of the murder. The mere ingestion of alcohol, by itself, was not sufficient evidence of (f)(6).

Cases in Which Evidence Did Not Support Peremptory Instruction

State v. Smith, 305 N.C. 691, 292 S.E.2d 264 (1982). The trial judge did not err in failing to give a peremptory instruction on (f)(6) because the evidence was conflicting on this circumstance. The evidence of the murder through the testimony of two eyewitnesses suggested that the defendant was in complete control of his faculties when he committed the murder. In contrast, the defendant's experts testified that his faculties were impaired. *See also* State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979) (similar ruling); State v. Lynch, 340 N.C. 435, 459 S.E.2d 679 (1995) (similar ruling); State v. Simpson, 341 N.C. 316, 462 S.E.2d 191 (1995) (evidence insufficient to support peremptory instruction).

Jury Instruction Issues

State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994). To the extent that the trial judge's statement in the jury instruction indicated that the defendant had to show *both* a personality disorder and intoxication to establish (f)(6), it was error. While the consumption of alcohol or drugs may show impaired capacity, it is unnecessary to establish (f)(6).

State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986). The jury instruction on (f)(6) was not erroneous when it required that the defendant must be "substantially" impaired by alcohol.

State v. Johnson, 298 N.C. 47, 257 S.E.2d 597 (1979). The jury instruction on (f)(6) was erroneous because it failed to explain the difference between the defendant's capacity to know right from wrong and the impairment of the defendant's capacity to appreciate the criminality of his or her conduct or

to conform that conduct to the requirements of law. *See also* State v. Johnson, 298 N.C. 355, 259 S.E.2d 752 (1979) (similar ruling).

State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979). The jury instruction on (f)(6) was not erroneous. *See also* State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981).

Qualifications of Expert to Testify about (f)(6)

State v. Taylor, 354 N.C. 28, 550 S.E.2d 141 (2001). The defendant was convicted of first-degree murder and sentenced to death. The court ruled that the trial judge in the capital sentencing hearing did not err in prohibiting a defense sociologist from testifying about the defendant's mental capacity to appreciate the criminality of his conduct or whether the defendant was under the influence of a mental or emotional disturbance. The court noted that although the sociologist was clearly qualified to give his opinion about the possible cultural effects of living in a drug-infested environment, he was not qualified—based on his training and experience—to give in essence a medical opinion about any possible mental defect of the defendant.

Mitigating Circumstance (f)(7): Defendant's Age at Time of Murder

G.S. 15A-2000(f)(7) states: "The age of the defendant at the time of the crime."

The North Carolina Supreme Court has ruled that chronological age is not the determinative factor in deciding whether evidence is sufficient to submit this circumstance to the jury. A defendant's immaturity, youthfulness, or lack of emotional or intellectual development at the time of the murder must also be considered.[52] Also, a defendant's advanced age may require submission of this circumstance.[53]

Case Summaries on Mitigating Circumstance (f)(7)

Cases in Which Evidence Was Sufficient to Require Submission of (f)(7)

State v. Zuniga, 348 N.C. 214, 498 S.E.2d 611 (1998). The court ruled, relying on *State v. Holden*, 338 N.C. 394, 450 S.E.2d 878 (1994), that the trial judge erred in failing to submit (f)(7). The defendant was twenty-seven years old at the time of the murder. However, a mental health expert testified that the defendant had an IQ of 56, signifying an intellectual age of 7.4 years, a history of mild to moderate mental retardation, and moderate organic brain syndrome. Another mental health expert testified that the defendant had an IQ of 64, suffered from mild mental retardation, and had chronic brain damage. Both experts said that the defendant was mentally impaired at the time of the murder.

State v. Holden, 338 N.C. 394, 450 S.E.2d 878 (1994). The court ruled that the trial judge erred in failing to instruct on (f)(7), despite the defendant's withdrawal of his requested instruction on this circumstance, because the evidence supported its submission. Although the defendant was thirty years old at the time of the murder, the defense psychologist testified that the defendant's mental age was ten years and that his problem-solving skills were closer to those of a ten year old.

State v. Turner, 330 N.C. 249, 410 S.E.2d 847 (1991). The court ruled that the defendant's age of twenty-two and his being neglected and abused as a youth was sufficient in this case to submit (f)(7).

Cases in Which Evidence Was Insufficient to Require Submission of (f)(7)

State v. Peterson, 350 N.C. 518, 516 S.E.2d 131 (1999). The court ruled that the trial judge did not err in not submitting (f)(7). The court noted that while the defendant presented evidence that he led a restrained childhood under a strict guardian and did not make many friends, there was no evidence from which a jury could conclude that the defendant was mentally immature. He had completed his

52. State v. Bowie, 340 N.C. 199, 456 S.E.2d 771 (1995).
53. State v. Hill, 331 N.C. 387, 417 S.E.2d 765 (1992).

GED, had normal reading skills, a stable marital relationship, handled his own finances, and had a good employment record.

State v. Atkins, 349 N.C. 62, 505 S.E.2d 97 (1998). The court ruled that the trial judge did not err in failing to submit (f)(7). The defendant was twenty-three years old, had an IQ of 107, was functioning in the average to high-average range of intelligence, and had a relatively good understanding of social nuances. The court stated that while the defendant presented evidence that he suffered from conditions or disorders commonly found in adolescents and participated in an activity or activities often enjoyed by some youngsters, its review of the record revealed no evidence that the defendant exhibited decisional skills and understanding equivalent to an adolescent.

State v. Bonnett, 348 N.C. 417, 502 S.E.2d 563 (1998). The court ruled that the trial judge did not err in failing to submit (f)(7). The defendant had introduced evidence that he was twenty-six years old at the time of the murder, was abandoned at birth by his mother, grew up in a dysfunctional family, and had an IQ of 86 and a learning disability. The court noted that chronological age is not determinative of this mitigating circumstance, citing *State v. Daughtry*, 340 N.C. 488, 459 S.E.2d 747 (1995). The court stated that the defendant did not introduce substantial evidence of his immaturity, youthfulness, or lack of emotional or intellectual development at the time of the murder, and the evidence showed that the defendant had only slightly below-normal intelligence, with no major disturbance of mood or thinking.

State v. Daughtry, 340 N.C. 488, 459 S.E.2d 747 (1995). The court ruled that there was no error in failing to submit (f)(7). The defendant was twenty-seven years old at the time of the murder. He had completed high school, had average intelligence, with no major disturbance of mood or thinking, and was gainfully employed before his arrest. Testimony did not link his impulsive nature and immaturity to his age; rather, these traits apparently stemmed from a personality disorder and somewhat dysfunctional family life.

State v. Bowie, 340 N.C. 199, 456 S.E.2d 771 (1995). The court ruled that there was no error in failing to submit (f)(7). The defendant was twenty years old when the murder was committed. He was placed in a foster home when he was twelve years old; he then developed at a normal rate. He graduated from high school and took classes at a community college. He related well to other students and had many friends. His teachers, coaches, and principal testified that he was polite, cooperative, able to handle criticism, and follow rules. His social worker considered him trustworthy enough that she lent him $2,000 to purchase a truck for which he regularly made payments. The court relied on *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986) and distinguished its ruling in *State v. Turner*, 330 N.C. 249, 410 S.E.2d 847 (1991).

State v. Spruill, 338 N.C. 612, 452 S.E.2d 279 (1994). The court ruled that the trial judge did not err in failing to submit (f)(7). The defendant was thirty-one years old, had worked as an auto mechanic and in a shipyard, moved on to a better position, attended church, and functioned quite well in the community. The defendant contended that he was an immature and dependent person who had borderline intelligence. However, the court noted [relying on *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986)] that evidence showing emotional immaturity is not viewed in isolation, particularly when other evidence shows more mature qualities and characteristics. In this case, evidence of emotional immaturity was counterbalanced by a chronological age of twenty-three years and an apparently normal physical and intellectual development and experience.

State v. Hill, 331 N.C. 387, 417 S.E.2d 765 (1992). The court ruled that the trial judge did not err in failing to submit (f)(7). The defendant's chronological age of fifty-four did not, standing alone, entitle him to have this mitigating circumstance submitted. The court stated that advanced age may qualify under (f)(7). However, the defendant in this case had argued—but did not present evidence—that his physiological age was seventy-five to eighty years old.

State v. Porter, 326 N.C. 489, 391 S.E.2d 144 (1990). The court ruled that the trial judge did not err in failing to submit (f)(7). Although the defendant was sixty-one years old and had a borderline IQ of 71, the defendant had a youthful interest with his victim, he vigorously responded to the prosecutor's cross-examination, and he showed physical prowess in his attempts to escape.

State v. Laws, 325 N.C. 81, 381 S.E.2d 609 (1989). The court ruled that the trial judge did not err in failing to submit (f)(7). Although the defendant was twenty-three years old, there was no substantial evidence of defendant's immaturity, youthfulness, or lack of emotional or intellectual development at the time of the murder. The court stated that chronological age is not the determining factor with this mitigating circumstance. *See also* State v. DeCastro, 342 N.C. 667, 467 S.E.2d 653 (1996); State v. Richardson, 342 N.C. 772, 467 S.E.2d 685 (1996).

State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986). The court ruled that the trial judge did not err in failing to submit (f)(7) when the evidence showed that the defendant was twenty-three years old and had an apparently normal physical and intellectual development, although he was emotionally immature for his age.

Cases in Which Evidence Did Not Support Peremptory Instruction

State v. Gardner, 311 N.C. 489, 319 S.E.2d 591 (1984). The court ruled that the trial judge did not err in failing to give a peremptory instruction on (f)(7). The defendant was twenty-four years old at the time of the murders. *See also* State v. Oliver, 309 N.C. 326, 307 S.E.2d 304 (1983) (similar ruling; defendant was nineteen years, eleven months old at the time of the murder); State v. Simpson, 341 N.C. 316, 462 S.E.2d 191 (1995) (similar ruling; defendant was soon to become a father, had held several employment positions, had a criminal background, and was twenty-one years old at the time of the murder).

Jury Instruction Issues

State v. Simpson, 341 N.C. 316, 462 S.E.2d 191 (1995). The court ruled that the trial judge properly did not give the defendant's requested instruction on this mitigating circumstance, which was as follows: "The statutory mitigating circumstance relating to the age of the defendant is not limited to the defendant's chronological age at the time of the murder. You must also consider the defendant's mental or emotional age at the time of the offense." This instruction improperly dictated a set formula for determining whether the defendant's age had mitigating value. The court ruled that the pattern jury instruction given by the judge properly allowed a broader consideration of factors.

State v. Skipper, 337 N.C. 1, 446 S.E.2d 252 (1994). The trial judge used the pattern jury instruction for (f)(7), which stated that "the mitigating effect of the age of the defendant is for you to determine." The court ruled that this instruction did not unconstitutionally permit a juror to refuse to consider evidence about age as a mitigating circumstance. The actual weight that a jury chooses to give the circumstance is up to the particular juror. The court examined the evidence (defendant's chronological age was forty-eight, his mental age was six, but he had been married, ran his own business, and supported himself and his children) and ruled that the jury was not required to find that this circumstance existed.

Mitigating Circumstance (f)(8): Defendant's Assistance to the State

G.S. 15A-2000(f)(8) states: "The defendant aided in the apprehension of another capital felon or testified truthfully on behalf of the prosecution in another prosecution of a felony."

Case Summaries on Mitigating Circumstance (f)(8)

State v. Lloyd, 354 N.C. 76, 552 S.E.2d 596 (2001). The court ruled that the trial judge erred in not submitting a peremptory instruction for (f)(8). The defendant's evidence in the capital sentencing hearing showed that his truthful testimony at another trial was both uncontroverted and credible.

State v. Bacon, 326 N.C. 404, 390 S.E.2d 327 (1990). The court ruled that there was sufficient evidence to support the submission of (f)(8) when the defendant's version of the murder, while not totally accurate, caused law enforcement officers to focus on the murder victim's estranged wife, who was involved in the planning and commission of the first-degree murder with the defendant. Although the trial judge

instructed on this circumstance, the written issues to be answered by the jury listed the circumstance as aiding in the *prosecution* (instead of *apprehension*) of another capital felon, to which the jury answered "no." This was error, requiring a new capital sentencing hearing.

Mitigating Circumstance (f)(9): Any Other Circumstance Having Mitigating Value

G.S. 15A-2000(f)(9) states: "Any other circumstance arising from the evidence which the jury deems to have mitigating value."

G.S. 15A-2000(f)(9) provides for the submission of mitigating circumstances that are not listed in G.S. 15A-2000(f)(1) through (f)(8). The trial judge has the duty to submit these circumstances when the defendant has made a timely written request to do so, a juror could reasonably find they had mitigating value, and sufficient evidence supports their submission.[54] In addition, the trial judge must submit the language of G.S. 15A-2000(f)(9) as the catchall mitigating circumstance.

There are many potential nonstatutory mitigating circumstances relating to the defendant's character or record or the circumstances of the murder, assuming sufficient evidence is offered to support them. Here is a partial list:

- the defendant is a person of good character and reputation
- the defendant has been gainfully employed
- the defendant has been a good employee
- the defendant has engaged in work that provides direct assistance to others
- the defendant served in the military and was honorably discharged from the military service
- the defendant has earned a high school diploma (college degree)
- the defendant is considerate and loving to his or her family (or specified individuals)
- the defendant has been a good parent
- the defendant has financially supported his or her spouse and children
- the defendant is involved in religious activities
- the defendant was abused by his or her parents
- the defendant was an illegitimate child and had little relationship with his or her natural parents
- the defendant is the product of a deprived and socially deviant environment
- the defendant has a low mental age (see case summaries section below)
- the defendant is mentally retarded
- the defendant's low IQ impairs his or her judgment
- the defendant has low emotional development
- the defendant has no history of violence or violent acts
- the defendant has exhibited good behavior in confinement (see case summaries section below)
- the defendant has shown remorse for the murder
- the defendant cooperated with law enforcement officers
- the defendant voluntarily acknowledged his or her guilt (confessed) to a law enforcement officer
- the defendant acted under the domination of another during the commission of the murder
- the defendant's participation in the murder was relatively minor
- the defendant's character and prior conduct were inconsistent with the murder

54. State v. Green, 336 N.C. 142, 443 S.E.2d 14 (1994).

Case Summaries on Mitigating Circumstance (f)(9)

Defendant's Good Conduct in Jail or Prison or Adjustment to Prison Life

Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986). The Court ruled that evidence of the defendant's good conduct in jail awaiting trial must constitutionally be admitted under *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1 (1982) (constitutional error in not considering as mitigating evidence the defendant's turbulent family history, beatings by his father, and his severe emotional disturbance) as mitigating evidence of the defendant's disposition to make a well-behaved and peaceful adjustment to prison life. [**Author's note:** In *State v. Robinson*, 336 N.C. 78, 443 S.E.2d 306 (1994), the court overruled *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203 (1982) to the extent it conflicted with the ruling in *Skipper*.]

State v. Bunning, 346 N.C. 253, 485 S.E.2d 290 (1997). The court ruled, citing *Skipper v. South Carolina*, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986), and *State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543 (1994), that the judge erred during the capital sentencing hearing in prohibiting a defense expert from testifying that the defendant would not be a danger in prison to himself or other inmates.

State v. Basden, 339 N.C. 288, 451 S.E.2d 238 (1994). The court ruled that the ruling in *Skipper v. South Carolina*, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986) does not prohibit the trial judge from instructing the jury that it could refuse to consider the nonstatutory mitigating circumstance of good conduct in jail if it considered the evidence to have no mitigating value. The court noted that the defendant was allowed, in accordance with the *Skipper* ruling, to offer evidence of his good behavior in jail. *See also* State v. Burr, 341 N.C. 263, 461 S.E.2d 602 (1995) (similar ruling); State v. Garner, 340 N.C. 573, 459 S.E.2d 718 (1995) (similar ruling).

State v. McLaughlin, 341 N.C. 426, 462 S.E.2d 1 (1995). The court ruled that the trial judge erred in not giving a peremptory instruction concerning the nonstatutory mitigating circumstance that the defendant had achieved a position as a cook in the prison kitchen, since the evidence about this circumstance was both uncontroverted and manifestly credible. (The court, however, found the error to be harmless beyond a reasonable doubt.) The court also ruled that the trial judge did not err in failing to give peremptory instructions concerning nonstatutory mitigating circumstances such as his self-improvement during incarceration, his desirable prison record, and assisting other prison inmates to adjust to prison life, because the evidence was either controverted or not manifestly credible.

State v. Rouse, 339 N.C. 59, 451 S.E.2d 543 (1994). The court ruled that the trial judge erred in not allowing a defense psychiatrist who had investigated the defendant's mental health to offer his opinion about the defendant's ability to adjust to prison life, which was proper evidence of a nonstatutory mitigating circumstance. The court disavowed dicta in *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203 (1982) that was inconsistent with its ruling in this case. The court cited *Skipper v. South Carolina*, discussed above.

State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994). The trial judge erred in not submitting as a nonstatutory mitigating circumstance that the defendant in a structured prison environment is able to conform his behavior to prison rules and perform required tasks. The court overruled *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203 (1982) to the extent it conflicted with the ruling in *Skipper v. South Carolina*, discussed above. However, the court found the error to be harmless beyond a reasonable doubt. *See also* State v. Green, 336 N.C. 142, 443 S.E.2d 14 (1994) (improper not to submit as nonstatutory mitigating circumstance that the defendant will continue to adjust well to prison life and be a model prisoner).

Mental Age of the Defendant

State v. Robinson, 330 N.C. 1, 409 S.E.2d 288 (1991). The court ruled that there was sufficient evidence to support the submission of the following nonstatutory mitigating circumstance: the mental age of the defendant at the time of the murder. A psychologist testified that the defendant was functioning in a mentally retarded range of intellect with an IQ of 69, which placed him in the lowest 2 percent of the population.

Defendant's Sentences for Other Criminal Convictions

State v. Price, 337 N.C. 756, 448 S.E.2d 827 (1994). Distinguishing *Simmons v. South Carolina*, 512 U.S. 154, 114 S. Ct. 2187, 112 L. Ed. 2d 133 (1994), the court reaffirmed its ruling in *State v. Price*, 331 N.C. 620, 418 S.E.2d 169 (1992) that the trial judge properly refused to submit as a nonstatutory mitigating circumstance that the defendant had been sentenced to life imprisonment for a Virginia murder conviction. The Virginia life sentence was not a circumstance that tends to justify a sentence of less than death for first-degree murder for which the defendant was being sentenced. *See also* State v. Reeves, 337 N.C. 700, 448 S.E.2d 802 (1994) (similar ruling).

State v. Robinson, 336 N.C. 78, 443 S.E.2d 306 (1994). The court ruled that the trial judge properly refused to submit as nonstatutory mitigating circumstances that the defendant received lengthy terms of imprisonment for convictions of offenses that were tried with the first-degree murder case. Sentencing for other offenses was not a circumstance that tends to justify a sentence of less than death for first-degree murder for which the defendant was being sentenced. Also, references to these additional sentences necessarily and improperly inject parole eligibility into the determination of the sentencing recommendation of death or life imprisonment. *See also* State v. Jones, 336 N.C. 229, 443 S.E.2d 48 (1994) (similar ruling).

State v. Lee, 335 N.C. 244, 439 S.E.2d 547 (1994). The court ruled that the trial judge properly excluded the defendant's proffered evidence at the capital sentencing hearing that the trial judge would sentence the defendant (after the sentencing hearing) for the convictions of kidnapping of the murder victim and for noncapital crimes against another victim. Such evidence was irrelevant in deciding whether the defendant should be sentenced to death.

Consideration of Accomplice's Sentence or Plea Bargain

State v. Jaynes, 353 N.C. 534, 549 S.E.2d 179 (2001). The court reaffirmed prior rulings [see, for example, State v. Meyer, 353 N.C. 92, 540 S.E.2d 1 (2000)] that a codefendant's sentence is not a mitigating circumstance and rejected the argument that *State v. Roseboro*, 351 N.C. 536, 528 S.E.2d 1 (2000), permitted evidence of a codefendant's sentence as a mitigating circumstance.

State v. Meyer, 353 N.C. 92, 540 S.E.2d 18 (2000). The defendant was convicted of two counts of first-degree murder and was sentenced to death for both counts. The court ruled that the trial judge did not err in failing to admit evidence of the accomplice's life sentences for both murders and declining to submit to the jury the nonstatutory mitigating circumstance that the defendant's accomplice received life sentences. The court, citing *State v. Smith*, 352 N.C. 531, 532 S.E.2d 773 (2000) and *State v. Slidden*, 347 N.C. 218, 491 S.E.2d 225 (1997), stated that it had repeatedly ruled that an accomplice's sentence for the same murder is irrelevant in a capital sentencing hearing; it is neither an aspect of the defendant's character or record nor a mitigating circumstance. The court rejected the defendant's argument that *State v. Roseboro*, 351 N.C. 536, 528 S.E.2d 1(2000), acknowledged the relevance of such evidence.

State v. Smith, 352 N.C. 531, 532 S.E.2d 773 (2000). The court ruled, citing *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243 (1982), and *State v. Ward*, 338 N.C. 64, 449 S.E.2d 709 (1994), that an accomplice's punishment is not an aspect of the defendant's character or record and therefore is not a mitigating circumstance. Thus the trial judge properly did not instruct on the proposed mitigating circumstance that the codefendant did not receive a death sentence.

State v. Bond, 345 N.C. 1, 478 S.E.2d 163 (1996). The defendant was convicted of first-degree murder based on the theory of accessory before the fact and sentenced to death. The principal, who was sixteen when he killed the victim, was not eligible for the death penalty under G.S. 14-17. The court ruled that evidence that the principal was ineligible by age to receive the death penalty was inadmissible at the sentencing hearing because it was not a mitigating circumstance. The sentence imposed on an accomplice is not a mitigating circumstance for the defendant being sentenced.

State v. Ward, 338 N.C. 64, 449 S.E.2d 709 (1994). The court ruled that evidence that another participant in the murder received a lesser sentence is not a nonstatutory mitigating circumstance. The court rejected the defendant's argument that the ruling in *Parker v. Dugger*, 498 U.S. 308, 111 S. Ct. 731, 112 L. Ed. 2d 812 (1991) (Florida Supreme Court acted arbitrarily by affirming death sentence without con-

sidering mitigating circumstances found by the trial judge, one of which was more lenient sentencing for accomplice), required the court to reconsider the following prior rulings on this issue: *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243 (1982) (it is not a mitigating circumstance that two accomplices of the defendant received a plea bargain in which their maximum punishment would be ten years' imprisonment) and *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981) (similar ruling); *State v. McLaughlin*, 341 N.C. 426, 462 S.E.2d 1 (1995) (similar ruling). *See also* State v. Garner, 340 N.C. 573, 459 S.E.2d 718 (1995) (it is not a nonstatutory mitigating circumstance that the defendant's accomplice had not been and may not be tried capitally); State v. Goode, 341 N.C. 513, 461 S.E.2d 631 (1995) (it is not a nonstatutory mitigating circumstance that the defendant's accomplice had an extensive prior criminal record for violent crimes).

Absence of Aggravating Circumstance or Bad Character

State v. Miller, 339 N.C. 663, 455 S.E.2d 137 (1995). The court ruled that the trial judge did not err in failing to submit the nonstatutory mitigating circumstance that the defendant neither threatened nor harmed eyewitnesses during his commission of murder and robbery. Not only is the absence of an aggravating circumstance not a mitigating circumstance, but also the absence of bad conduct that could have occurred during the commission of crimes is not a mitigating circumstance. Mitigating circumstances, both statutory and nonstatutory, focus on positive aspects of a defendant's character or behavior.

State v. Green, 336 N.C. 142, 443 S.E.2d 14 (1994). The defendant pled guilty to first-degree murder based on the felony murder theory only. The court ruled that the trial judge did not err in refusing to submit as a nonstatutory mitigating circumstance that the defendant did not kill after premeditation and deliberation. The absence of an alternative theory for establishing that a murder was first-degree murder is not a mitigating circumstance.

State v. Hunt, 330 N.C. 501, 411 S.E.2d 806 (1992). The court ruled that it is not a nonstatutory mitigating circumstance that the murder victims were not tortured. The mere absence of evidence to establish an aggravating circumstance (in this case, especially heinous, atrocious, or cruel) is not evidence of a mitigating circumstance. *See also* State v. Brown, 306 N.C. 151, 293 S.E.2d 569 (1982) (even assuming murders were not committed for pecuniary gain, that fact is not a mitigating circumstance).

Juror's Residual Doubt of Defendant's Guilt

State v. Hill, 331 N.C. 387, 417 S.E.2d 765 (1992). A juror's residual or lingering doubt of the defendant's guilt is not a nonstatutory mitigating circumstance, since it does not involve the defendant's character or record or the circumstances of the murder. The court cited *Franklin v. Lynaugh*, 487 U.S. 164, 108 S. Ct. 2320, 101 L. Ed. 2d 155 (1988) (submission of residual doubt as mitigating circumstance is not constitutionally required). *See also* State v. Goode, 341 N.C. 513, 461 S.E.2d 631 (1995) (similar ruling); State v. Walls, 342 N.C. 1, 463 S.E.2d 738 (1995) (similar ruling).

Miscellaneous Matters

State v. Nicholson, 355 N.C. 1, 558 S.E.2d 109 (2002). The court ruled that the trial judge properly excluded proffered defense evidence of how his death (if sentenced to death) would impact his family. Such evidence does not relate to an aspect of the defendant's character or record or the circumstances of the murder.

State v. Hardy, 353 N.C. 122, 540 S.E.2d 334 (2000). The court ruled the effect on the defendant's friend of the impact of the defendant's execution (if sentenced to death) is not a mitigating circumstance. Citing *State v. Locklear*, 349 N.C. 118, 505 S.E.2d 277 (1998), the court noted that a third party's feelings are irrelevant as a mitigating circumstance.

State v. Blakeney, 352 N.C. 287, 531 S.E.2d 799 (2000). The defendant broke into a house and stole some personal property. When the victim later arrived at the house, the defendant hid in the house as she entered it and then murdered her. A portion of the defendant's statement to law enforcement officers tended to show that the defendant did not intend to kill the victim when he broke into the house. The court ruled, relying on *State v. Green*, 336 N.C. 142, 443 S.E.2d 14 (1994), that the trial judge erred

in failing to submit the nonstatutory mitigating circumstance that the defendant did not set out to kill the victim when he entered the victim's home.

State v. Bowman, 349 N.C. 459, 509 S.E.2d 428 (1998). The court ruled that the opinion of the murder victim's mother whether the defendant should receive the death penalty is inadmissible as a mitigating circumstance. The court stated that such evidence has no bearing on the defendant's character, prior record, or the circumstances of his offense.

State v. Locklear, 349 N.C. 118, 505 S.E.2d 277 (1998). The court ruled that the trial judge did not err in failing to submit a proposed nonstatutory mitigating circumstance that the defendant continues to have family members who care and support him. The court stated that the feelings, actions, and conduct of third parties do not have mitigating value as to the defendant and, therefore, are irrelevant in a capital sentencing hearing.

State v. Williams, 305 N.C. 656, 292 S.E.2d 243 (1982). The following evidence is irrelevant and therefore inadmissible as nonstatutory mitigating circumstances: the lack of any deterrent effect of the death penalty, the rehabilitative nature of people who have committed heinous crimes, and the manner of execution in North Carolina. *See also* State v. Taylor, 304 N.C. 249, 283 S.E.2d 761 (1981) (evidence that capital punishment is imposed in a racially discriminatory manner is not a nonstatutory mitigating circumstance); State v. Cherry, 298 N.C. 86, 257 S.E.2d 551 (1979) (evidence that innocent people have sometimes been executed and capital punishment was objectionable on religious grounds are not nonstatutory mitigating circumstances).

This supplement to NORTH CAROLINA CAPITAL CASE LAW HANDBOOK (2nd ed. 2004) includes a discussion of case law through May 2007 and makes other changes. The page numbers in the text of this supplement refer to the page numbers in the book.

trial judge stated, "If you find from the evidence beyond a reasonable doubt that when the defendant killed the victim, the defendant took $200 from the victim's purse, you would find this aggravating circumstance . . . ." The court stated that while the general description of the aggravating circumstance was a correct statement of the law, the quoted sentence removed from the jury the requirement that it make a finding whether there was a connection between the killing and the taking of something of value. Because the instruction allowed the jury to find the aggravating circumstance even if the taking had no causal relationship to the killing, it was erroneous.

Chapter 6: Mitigating Circumstances

Judge's Duty Regarding Submission of Statutory and Nonstatutory Mitigating Circumstances

Case Summaries (page 234)

State v. Polke, 361 N.C. 65, 638 S.E.2d 189 (2006). The defendant was convicted of first-degree murder and sentenced to death. (1) The defendant at the capital sentencing hearing requested that the trial judge submit mitigating factor G.S. 15A-2000(f)(1) (no significant prior criminal history), and the judge did so. The defendant on appeal argued that the trial judge erroneously submitted this mitigating factor. The court ruled that the doctrine of invited error applies when a trial judge in a capital sentencing hearing erroneously submits this mitigating factor at the defendant's request. The defendant cannot be prejudiced by an error resulting from his own conduct. [Author's note: The court noted, on the other hand, its recent ruling in *State v. Hurst*, 360 N.C. 181, 624 S.E.2d 309 (2006), discussed immediately below, that the doctrine of invited error does not apply when mitigating factor G.S. 15A-2000(f)(1) is withheld at the defendant's request.] (2) The court ruled that a trial judge's failure to submit an aggravating factor in a capital sentencing hearing is not structural error and thus not subject to structured error analysis.

State v. Hurst, 360 N.C. 181, 624 S.E.2d 309 (2006). The defendant was convicted of first-degree murder and sentenced to death. The trial judge declined to submit mitigating circumstance G.S. 15A-2000(f)(1) (no significant history of prior criminal activity). The defendant had asked the trial judge not to submit the circumstance but then argued on appeal that the judge erred in not submitting it. The court reaffirmed prior rulings that the judge has a duty to submit mitigating circumstance (f)(1) when evidence supports its submission, regardless of the defendant's position on whether or not to submit it. The court discussed some of its prior case law on (f)(1). The court noted that some of its cases had resulted in a distortion of capital sentencing as trial judges have focused too closely on the existence, nature, and extent of a defendant's record and have correspondingly failed to consider the aspect of the court's rulings that allows the court to determine whether a reasonable jury would find the defendant's criminal activity to be significant. The court stated that when a judge decides not to submit the circumstance, that determination is entitled to deference. Whenever a defendant contends the trial judge erred in not submitting (f)(1), the court will review the whole record in evaluating whether the judge acted correctly, considering the court's admonition that any reasonable doubt concerning the submission of a statutory or requested mitigating circumstance should be resolved in the defendant's favor. Although the doctrine of invited error is inapplicable, "a whole record review will necessarily include consideration of the parties' positions as to whether the instruction should be given." The court then examined the evidence in this case and upheld the trial judge's decision not to submit (f)(1): A few months before the murder, the defendant broke and entered a residence in West Virginia and stole a firearm. In 1998 the defendant had been convicted of several breaking and entering offenses in North Carolina. He abused marijuana, crack cocaine, and Oxycontin. He had a pending DUI in West Virginia. The court overruled *State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543 (1994), to the extent it implied that if evidence concerning a defendant's criminal history is offered in a context other than to determine whether the (f)(1) instruction should be given, the defendant might not be entitled to the instruction.

Peremptory Jury Instructions for Statutory and Nonstatutory Mitigating Circumstances

A peremptory instruction for a nonstatutory mitigating circumstance (discussed in paragraph two on page 237 of the book) is now available as a pattern jury instruction: N.C.P.I.—Crim. 150.12.

The second and third lines of the summary of *State v. Stephens*, 347 N.C. 352, 493 S.E.2d

435 (1997), on page 237 of the book should refer to "mitigating" circumstance G.S. 15A-2000(f)(1), not an "aggravating" circumstance.

The last sentence of the summary of *State v. Rouse*, 339 N.C. 59, 451 S.E.2d 679 (1994), on page 238 of the book should have noted that the availability of a directed verdict for a statutory mitigating circumstance has been effectively disavowed in *State v. Holden*, 346 N.C. 404, 488 S.E.2d 514 (1997). See note 25 on page 240 of the book.

Mitigating Circumstance (f)(1): No Significant Prior Criminal History

Case Summaries on Mitigating Circumstance (f)(1) (page 245)

See *State v. Polke*, 361 N.C. 65, 638 S.E.2d 189 (2006), and *State v. Hurst*, 360 N.C. 181, 624 S.E.2d 309 (2006), summarized on page 9 of this supplement. The seventh sentence of the summary of *State v. Rouse*, 339 N.C. 59, 451 S.E.2d 543 (1994), on page 248 of the book describes the court as stating that testimony about the defendant's criminal activity was "elicited in contexts in which the jury would not have considered it as bearing" on mitigating circumstance (f)(1). The court in *State v. Hurst*, 360 N.C. 181, 624 S.E.2d 309 (2006), overruled *Rouse* to the extent this statement implied that if evidence concerning a defendant's criminal history is offered in a context other than to determine whether the (f)(1) instruction should be given, the defendant might not be entitled to the instruction.

Mitigating Circumstance (f)(2): Under Influence of Mental or Emotional Disturbance

Cases in Which Evidence Did Not Support Peremptory Instruction (page 254)

State v. Duke, 360 N.C. 110, 623 S.E.2d 11 (2005). The defendant was convicted of two counts of first-degree murder and sentenced to death. The court ruled that the defendant was not entitled to a peremptory instruction on mitigating circumstances G.S. 15A-2000(f)(2) (defendant under influence of mental or emotional disturbance) and -2000(f)(6) (defendant's impaired capacity to appreciate criminality of conduct or to conform conduct to requirements of law). Concerning (f)(2), the defense mental health expert admitted on cross-examination that two clinicians could reach different conclusions about the defendant's mental condition. In addition, the expert testified that other mental health professionals had previously given inconsistent diagnoses of the defendant's condition. Concerning (f)(6), the state offered evidence that the jury could reasonably have found that the defendant knew and appreciated the criminality of his actions.

State v. Roache, 358 N.C. 243, 595 S.E.2d 381 (2004). The defendant, acting with an accomplice, killed five people and was convicted of five counts of first-degree murder. He was sentenced to death for two of the murders. The court ruled that the trial judge did not err in failing to give a peremptory jury instruction on statutory mitigating circumstances G.S. 15A-2000(f)(2) (under influence of mental or emotional disturbance) and G.S. 15A-2000(f)(6) (capacity to appreciate criminality of conduct was impaired). The court, relying on *State v. Richmond*, 347 N.C. 412, 495 S.E.2d 677 (1998), ruled that a peremptory instruction is not required when all the evidence supporting the instruction comes from a mental health professional evaluating the defendant in preparation for trial.

Mitigating Circumstance (f)(6): Defendant's Impaired Capacity

Cases in Which Evidence Did Not Support Peremptory Instruction (page 260)

See the summaries of *State v. Duke*, 360 N.C. 110, 623 S.E.2d 11 (2005), and *State v. Roache*, 358 N.C. 243, 595 S.E.2d 381 (2004), under "Mitigating Circumstance (f)(2): Under Influence of Mental or Emotional Disturbance," above.

Mitigating Circumstance (f)(7): Defendant's Age at Time of Murder

Cases in Which Evidence Was Insufficient to Require Submission of (f)(7)

State v. Thompson, 359 N.C. 77, 604 S.E.2d 850 (2004). The defendant was convicted of first-degree murder and sentenced to death. The court ruled that the trial judge did not err in not submitting mitigating circumstance G.S. 15A-2000(f)(7) (defendant's age when murder committed). Testimony of the defense expert that the defendant was emotionally immature

was contradicted by other evidence tending to show that the defendant functioned emotionally as an adult. **State v. Hurst,** 360 N.C. 181, 624 S.E.2d 309 (2006). The defendant was convicted of first-degree murder and sentenced to death. The court ruled that the trial judge did not err in not submitting mitigating circumstance G.S. 15A- 2000(f)(7) (defendant's age when murder committed). The defendant had argued that he was 23 years old at the time of the murder and emotionally immature. The court concluded that the evidence demonstrated that the defendant's maturity was consistent with his chronological age.

Mitigating Circumstance (f)(9): Any Other Circumstance Having Mitigating Value

Defendant's Sentences for Other Criminal Convictions (page 266)

State v. Squires, 357 N.C. 529, 591 S.E.2d 837 (2003). The court ruled, citing *State v. Price*, 331 N.C. 620, 418 S.E.2d 169 (1992), that trial judge did not err in not submitting as a nonstatutory mitigating circumstance that the defendant had been sentenced to 105 years' imprisonment in Georgia for convictions there. A defendant's prison sentence for other crimes is not a nonstatutory mitigating circumstance.

Defendant's Willingness to Plead Guilty and Accept Life Sentence (new section)

State v. Thompson, 359 N.C. 77, 604 S.E.2d 850 (2004). The defendant was convicted of first-degree murder and sentenced to death. The court ruled, relying on *State v. Carroll*, 356 N.C. 526, 573 S.E.2d 899 (2002), that the defendant's willingness to plead guilty to first-degree murder and accept a life sentence was not a mitigating circumstance. The court noted that the defendant chose to plead not guilty and proceed to trial.

Consideration of Accomplice's Sentence or Plea Bargain (page 266)

State v. Roache, 358 N.C. 243, 595 S.E.2d 381 (2004). The defendant, acting with an accomplice, killed five people and was convicted of five counts of first-degree murder. He was sentenced to death for two of the murders. The court ruled, relying on *State v. Williams*, 305 N.C. 656, 292 S.E.2d 243 (1982), that the trial judge did not err in prohibiting the defendant from introducing evidence in a capital sentencing hearing that the accomplice received life imprisonment for same five murders for which defendant was convicted. The court stated that an accomplice's sentence has no mitigating effect in and of itself. The court rejected, distinguishing *State v. Roseboro*, 351 N.C. 536, 528 S.E.2d 1 (2000), the defendant's argument that evidence of the accomplice's sentences should have been admitted under the catchall mitigating circumstance, G.S. 15A-2000(f)(9). The court stated the accomplice's sentence may be considered under (f)(9) when evidence of the sentence is already before the court, such as when the accomplice testified at trial and evidence of a plea bargain was presented for impeachment.

Juror's Residual Doubt of Defendant's Guilt (page 267)

Oregon v. Guzek, 546 U.S. 517 (2006). The Court ruled that the Eighth and Fourteenth amendments do not grant a defendant a constitutional right to present at a capital sentencing hearing new evidence that he was not present at the murder scene that is inconsistent with the defendant's conviction of that murder.

Penalty Phase Exercise

Jeff Welty

April 2012

You are presiding over the case of State v. Angelos. At the guilt phase, the state's evidence showed the following:

> Eric Angelos is a 22-year-old member of the Chatham County Crips. The highest-ranking member of that "set," Dante Bowman, told Angelos that he could be Bowman's top assistant if Angelos proved his loyalty and toughness by killing Frank Valentine. Bowman disliked Valentine because he had recently started dating Bowman's ex-girlfriend.
>
> Angelos agreed. One night, he waited for Valentine outside the restaurant where Valentine worked. Valentine came out the back door of the restaurant at 11:30 p.m. and headed for his car. As Valentine neared his vehicle, Angelos leaped out from behind a dumpster, pointed a gun at Valentine, and ordered him to the ground. Valentine complied. Angelos said "you're going to die tonight," and Valentine begged Angelos not to kill him.
>
> Angelos took Valentine's car keys. He ordered Valentine to get into the trunk of his own car. Angelos then drove the car to Bowman's house to show Valentine off to Bowman. Bowman got in the car, and Angelos drove to a wooded area near the border with Orange County. They got Valentine out of the trunk. Valentine again pleaded for his life. Bowman said, "we couldn't let you go at this point even if we wanted to. Angelos, do what you have to do." Angelos shot Valentine in the chest. Valentine fell to the ground, then Angelos shot Valentine in the head and killed him. Angelos took Valentine's wallet, which contained $26. Angelos and Bowman covered Valentine's body with leaves and branches and departed.

Angelos presented no evidence at the guilt phase. He was convicted of first-degree murder on the theory of premeditation and deliberation and on the theory of felony murder, with kidnapping as the underlying felony. At the penalty phase, the state presented the following:

> A deputy clerk of court testified that Angelos has a prior conviction for first-degree burglary. The judgment shows that Angelos was charged shortly before he killed Valentine, and was convicted shortly afterwards. His appeal is pending.
>
> A former gang member testified that three months before Angelos killed Valentine, Angelos and Bowman, along with other individuals, initiated the former gang member into the gang by beating him with their hands and feet. The beating was worse than the former gang member expected and he suffered a broken rib, which has healed.

Angelos presented the following:

> Angelos is the third of five children his mother had with four different men. Angelos's father was not involved in his life. Angelos's mother worked intermittently as a housekeeper, drank too

much, and disciplined her children frequently by spanking them with a wooden spoon. The family was poor and moved often. Angelos had few close friends. He achieved an 87 on an IQ test as a child, did poorly in school, and was often suspended. He dropped out in 10th grade. He stayed out late and his mother did not attempt to control him.

He used marijuana daily, and began to sell marijuana to support his habit. He joined the Crips at age 18 and spent most of his time with members of the gang. He looked up to Bowman, who was older, and frequently undertook "missions" assigned by Bowman, including stealing a car and vandalizing the home of a rival gang member. Other than the burglary conviction, Angelos's criminal record consists of a conviction for possession of less than ½ ounce of marijuana at age 18 and a conviction for felony larceny (the car) at age 20.

Angelos fathered a son at age 21, but was never in a serious relationship with the boy's mother. He sees the child every few weeks and sometimes buys him clothes or shoes.

A psychologist diagnosed Angelos as suffering, at the time of the murder, from depression, marijuana dependence, and borderline personality disorder. Based on an interview with Angelos, the psychologist opined that at the time of the murder, Angelos was high on marijuana, which diminished his ability to control his conduct. Finally, he stated that Angelos saw Bowman as a father figure and that he only undertook the murder because Bowman instructed him to do so, though he acknowledged that Bowman did not threaten Angelos.

You are conducting the penalty phase charge conference. The state has asked you to instruct the jury on the following aggravating circumstances:

- (e)(3) – previous violent felony
- (e)(4) – capital felony was committed to avoid/prevent a lawful arrest
- (e)(5) – capital felony was committed during a kidnapping
- (e)(6) – capital felony was committed for pecuniary gain
- (e)(7) – capital felony was committed to disrupt/hinder law enforcement
- (e)(9) – especially heinous, atrocious, or cruel

The defense has asked you not to submit mitigating circumstance (f)(1) (no significant criminal history). It has asked you to submit, and to give peremptory instructions on, the following statutory mitigating circumstances:

- (f)(2) – capital felony committed under the influence of a mental or emotional disturbance
- (f)(5) – capital felony under the domination of another person
- (f)(6) – diminished capacity
- (f)(7) – defendant's age

The defense has also asked you to submit (f)(9), the catchall statutory mitigating circumstance, and has asked you to submit, and to give peremptory instructions on, the following non-statutory mitigating circumstances:

- Angelos was raised without a father
- Angelos is of below average intelligence
- Angelos suffers from substance addiction
- Bowman, rather than Angelos, came up with the idea of the murder

Penalty Phase Worksheet

Aggravating circumstance (e)(3): Previous violent felony

Evidence supporting circumstance, if any: _____

_____

_____

Legal issues to consider other than sufficiency of evidence: _____

_____

_____

Submit circumstance? ___ Yes ___ No

Aggravating circumstance (e)(4): Capital felony was committed to avoid/prevent a lawful arrest

Evidence supporting circumstance, if any: _____

_____

_____

Legal issues to consider other than sufficiency of evidence: _____

_____

_____

Submit circumstance? ___ Yes ___ No

Aggravating circumstance (e)(5): Capital felony was committed during a kidnapping

Evidence supporting circumstance, if any: _____

_____

_____

Legal issues to consider other than sufficiency of evidence: _____

_____

_____

Submit circumstance? ___ Yes ___ No

Aggravating circumstance (e)(6): Capital felony committed for pecuniary gain

Evidence supporting circumstance, if any: _____

_____

_____

Legal issues to consider other than sufficiency of evidence: _____

_____

_____

Submit circumstance? ___ Yes ___ No

Aggravating circumstance (e)(7): Capital felony committed to disrupt/hinder law enforcement

Evidence supporting circumstance, if any: _____

_____

_____

Legal issues to consider other than sufficiency of evidence: _____

_____

_____

Submit circumstance? ___ Yes ___ No

Aggravating circumstance (e)(9): Especially heinous, atrocious, or cruel

Evidence supporting circumstance, if any: _____

_____

_____

Legal issues to consider other than sufficiency of evidence: _____

_____

_____

Submit circumstance? ___ Yes ___ No

Mitigating circumstance (f)(1): No significant criminal history

Evidence supporting circumstance, if any: _____

_____

_____

Legal issues to consider other than sufficiency of evidence: _____

_____

_____

Submit circumstance? ___ Yes ___ No

Peremptory instruction? ___ Yes ___ No

Mitigating circumstance (f)(2): Capital felony committed under the influence of a mental or emotional disturbance

Evidence supporting circumstance, if any: _____

_____

_____

Legal issues to consider other than sufficiency of evidence: _____

_____

_____

Submit circumstance? ___ Yes ___ No

Peremptory instruction? ___ Yes ___ No

Mitigating circumstance (f)(5): Capital felony committed under the domination of another person

Evidence supporting circumstance, if any: _____

_____

_____

Legal issues to consider other than sufficiency of evidence: _____

_____

_____

Submit circumstance? ___ Yes ___ No

Peremptory instruction? ___ Yes ___ No

Mitigating circumstance (f)(6): Diminished capacity

Evidence supporting circumstance, if any: _____

_____

_____

Legal issues to consider other than sufficiency of evidence: _____

_____

_____

Submit circumstance? ___ Yes ___ No

Peremptory instruction? ___ Yes ___ No

Mitigating circumstance (f)(7): Defendant's age

Evidence supporting circumstance, if any: _____

_____

_____

Legal issues to consider other than sufficiency of evidence: _____

_____

_____

Submit circumstance? ___ Yes ___ No

Peremptory instruction? ___ Yes ___ No

Nonstatutory mitigating circumstance: Angelos was raised without a father

Evidence supporting circumstance, if any: _____

_____

_____

Legal issues to consider other than sufficiency of evidence: _____

_____

_____

Submit circumstance? ___ Yes ___ No

Peremptory instruction? ___ Yes ___ No

Nonstatutory mitigating circumstance: Angelos is of below average intelligence

Evidence supporting circumstance, if any: _____

_____

_____

Legal issues to consider other than sufficiency of evidence: _____

_____

_____

Submit circumstance? ___ Yes ___ No

Peremptory instruction? ___ Yes ___ No

Nonstatutory mitigating circumstance: **Angelos suffers from substance addiction**

Evidence supporting circumstance, if any: _____

_____

_____

Legal issues to consider other than sufficiency of evidence: _____

_____

_____

Submit circumstance? ___ Yes ___ No

Peremptory instruction? ___ Yes ___ No

Nonstatutory mitigating circumstance: **Bowman, rather than Angelos, came up with the idea of the murder**

Evidence supporting circumstance, if any: _____

_____

_____

Legal issues to consider other than sufficiency of evidence: _____

_____

_____

Submit circumstance? ___ Yes ___ No

Peremptory instruction? ___ Yes ___ No

Any other thoughts about submitting the aggravating and mitigating circumstances to the jury?

_____

_____

_____

_____

_____