

Closing Arguments in Capital Cases

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Closing Argument at the Guilt Phase

The legal provisions governing closing arguments include:

- G.S. 15A-1230 (“During a closing argument . . . an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record.”)
- Gen. R. Pract. 12 (“Counsel are at all times to conduct themselves with dignity and propriety. . . . All personalities between counsel shall be avoided. The personal history . . . of counsel on the opposing side should not be alluded to. . . . [Witnesses and parties] should be treated with fairness and due consideration. Abusive language or offensive personal references are prohibited.”)
- N.C. R. Prof’l Cond. 3.4(e) (stating that a lawyer shall not “allude to any matter . . . not . . . supported by admissible evidence, assert personal knowledge of facts in issue . . . or state a personal opinion as to the justness of a cause, the credibility of a witness . . . or the guilt or innocence of an accused”).

Many issues regarding jury arguments at the guilt phase are not unique to capital trials. A lawyer who uses abusive language or who refers to matters not in evidence is outside the bounds of propriety in any kind of trial. Those common issues are not addressed here. This paper focuses on issues that are unique to, or unusually likely to arise in, capital cases.

Number of Arguments and Time Limitations

In the guilt-innocence phase of a capital trial, just as in any noncapital trial, the state has the opening and closing jury arguments when the defendant presents evidence during the trial.¹ The defense has the jury argument between the state’s opening and closing jury arguments. If the defendant does not present evidence, the defense has the opening and closing jury arguments and the state has the jury argument between the defendant’s opening and closing arguments.² Sometimes attorneys will waive the opening jury argument for tactical or other reasons.

¹ Rule 10, General Rules of Practice for the Superior and District Courts. A defendant presents evidence under this rule if the defendant introduces evidence, for example, during cross-examination of a state’s witness. *State v. Skipper*, 337 N.C. 1 (1994); *State v. Macon*, 346 N.C. 109 (1999). If there are multiple defendants, the state has the opening and closing jury arguments if any defendant presents evidence. Rule 10, General Rules of Practice for the Superior and District Courts.

² Rule 10, General Rules of Practice for the Superior and District Courts.

In a capital trial, the judge may limit the number of lawyers who may address the jury to three attorneys per side.³ The judge may not limit argument to a single attorney.⁴ Furthermore, during the defense portion of jury argument, defense counsel may address the jury as many times as they want and as long as they want,⁵ as may the prosecutors during the state's portion of jury argument. For example, one defense lawyer may argue for as long as she wants. When she has finished, a second defense lawyer, and then a third defense lawyer, may do the same. They may continue to follow one another without limitation. If the defendant presents evidence, all the defense attorneys' jury arguments must occur before the state's closing argument, but the number and duration of addresses still may not be limited.⁶

Defense Lawyer's Admission of Defendant's Guilt of Lesser-Included Offenses

Sometimes defense attorneys may want to admit, in arguing that the defendant is not guilty of first-degree murder, that the defendant is guilty of a lesser-included offense of first-degree murder, such as second-degree murder, voluntary manslaughter, or involuntary manslaughter. However, defense counsel likely must receive the defendant's authorization before doing so. The North Carolina Supreme Court ruled in *State v. Harbison*⁷ that a defense lawyer who makes such an admission without the defendant's authorization renders ineffective assistance of counsel, automatically providing the defendant with a new trial. The court reasoned that the attorney, in admitting the defendant's guilt, was not functioning as a defense attorney and instead was effectively entering a guilty plea on behalf of the defendant without the defendant's consent. The court instructed trial judges and attorneys to make a full record of the defendant's authorization if this issue arises at trial.⁸

The continuing vitality of *Harbison* was called into question when the United States Supreme Court decided *Florida v. Nixon*.⁹ *Nixon* was a capital case in which defense counsel wanted to admit that the defendant was guilty of first-degree murder, thereby preserving counsel's credibility for what he viewed as an inevitable penalty phase. Several times, he discussed his plan with the defendant, but the defendant was nonresponsive, neither approving nor disapproving of the strategy. At trial, the lawyer conceded the defendant's guilt, and the defendant was convicted and sentenced to death. The Florida courts, applying a rule similar to *Harbison*, ordered a new trial, but the Supreme Court reversed. It held that an attorney's decision to admit his client's guilt was not *per se* ineffective assistance, but rather should be evaluated under the two-part standard established in *Strickland v. Washington*,¹⁰ which asks whether the attorney performed deficiently and whether the defendant was prejudiced as a result. The

³ G.S. 7A-97. See also *State v. Eury*, 317 N.C. 511 (1986); *State v. Campbell*, 332 N.C. 116 (1992).

⁴ *State v. Barrow*, 350 N.C. 640 (1999). If the trial judge errs in not permitting more than one counsel to make a closing jury argument, the defendant automatically receives a new trial. Harmless error analysis is not conducted. *State v. Mitchell*, 321 N.C. 650 (1988).

⁵ G.S. 7A-97. See also *State v. Eury*, 317 N.C. 511 (1986); *State v. Campbell*, 332 N.C. 116 (1992).

⁶ *State v. Gladden*, 315 N.C. 398 (1986).

⁷ 315 N.C. 175 (1985).

⁸ *State v. House*, 340 N.C. 187 (1995). For cases in which the court ruled that the defendant authorized defense counsel's jury argument, see *State v. Wiley*, 355 N.C. 592 (2002); *State v. Strickland*, 346 N.C. 443 (1997); *State v. McNeill*, 346 N.C. 233 (1997); *State v. Greene*, 332 N.C. 565 (1992); *State v. Thomas*, 329 N.C. 423 (1991); *State v. McDowell*, 329 N.C. 363 (1991).

⁹ 543 U.S. 175 (2004).

¹⁰ 466 U.S. 668 (1984).

Court strongly suggested that the conduct of the defense lawyer in *Nixon* was a reasonable effort to preserve his credibility with the jury for the penalty phase.

Although the reasoning of *Nixon* is somewhat at odds with that of *Harbison*, the court of appeals has ruled that *Harbison* generally remains the law. However, its status in capital cases is unclear. In *State v. Maready*,¹¹ the court distinguished *Nixon* based on “the unique nature of death penalty cases,” suggesting that *Harbison* may remain the law in noncapital cases, but that *Nixon* might apply in capital proceedings. But the *Maready* court also stated that “subsequent to *Nixon*, the North Carolina Supreme Court has continued to apply the analysis set forth in *Harbison*, even in death penalty cases,” and also suggested that *Harbison* might be grounded in the state constitution and so might be more protective of defendants’ rights than the federal standard enunciated in *Nixon*. Thus, it remains advisable for judges in capital cases to determine whether defense counsel plans to admit the defendant’s guilt, and if so, whether the defendant consents to the admission.

Finally, it should be noted that in *State v. Walls*,¹² the court stated that *Harbison* applied only to the guilt-innocence phase and rejected its application to the sentencing phase.¹³

Defense Lawyer’s Statement of Punishment Severity

The defendant’s lawyer during jury argument may properly inform the jury of the maximum punishment for first-degree murder to encourage the jury to consider the case carefully. However, the argument may not suggest to the jury that they should return a verdict of not guilty simply because of the severity of the punishment.¹⁴

Closing Argument at the Penalty Phase

Although closing arguments at the guilt phase of capital trials are generally similar to closing arguments in other criminal trials, closing arguments at the penalty phase of capital trials are distinctive. After evidence has been presented at the penalty phase, the state and the defense present jury arguments. Defense counsel have the statutory right to present the last argument whether or not the defendant presents evidence at the sentencing hearing, but, in contrast to the rule at the guilt phase, they do not

¹¹ ___ N.C. App. ___, 695 S.E.2d 771 (2010).

¹² 342 N.C. 1 (1995).

¹³ See also *State v. Fletcher*, 354 N.C. 455 (2001) (not ineffective assistance of counsel when defense counsel admitted existence of aggravating circumstance in jury argument in capital sentencing hearing).

¹⁴ Among the relevant cases in this area are the following: *State v. Chapman*, 342 N.C. 330 (1995) (the trial judge erred in instructing the jury that defense counsel’s argument discussing the possible punishment should be disregarded, but the error was not prejudicial); *State v. Buckner*, 342 N.C. 198 (1995) (similar); *State v. Smith*, 335 N.C. 539 (1994) (new trial because the trial judge improperly barred defense counsel from stating to the jury the maximum punishment for first-degree murder, in the context of an argument about the gravity of the case and the possibility of the defendant’s innocence); and *State v. McMorris*, 290 N.C. 286 (1976) (delineating proper and improper purposes for informing the jury of the possible punishment). See also G.S. 15-176.5 (“When a case will be submitted to the jury on a charge for which the penalty is a sentence of death, either party in its argument to the jury may indicate the consequences of a verdict of guilty of that charge.”).

have the right to make the first argument as well.¹⁵ As with jury argument at the guilt phase, defense counsel may make as many addresses to the jury as they want and without any time limitations. The trial judge may limit to three the number of defense counsel who may make the last argument.¹⁶

What follows is a discussion of rulings on jury argument that are generally pertinent to capital sentencing hearing issues only.

Parole Eligibility

For first-degree murder offenses committed on or after October 1, 1994, G.S. 15A-2002 requires a judge to instruct the jury that a sentence of life imprisonment means a sentence of life imprisonment without parole. This provision generally ensures compliance with the ruling of the United States Supreme Court in *Simmons v. South Carolina*,¹⁷ which held that when the defendant's future dangerousness is in issue at a capital sentencing hearing,¹⁸ and state law prohibits the defendant's release on parole if sentenced to life in prison, due process requires that the sentencing jury must be informed that the defendant is ineligible for parole.¹⁹

For first-degree murder offenses committed before October 1, 1994,²⁰ it is improper to mention²¹ the parole eligibility of a defendant who is convicted of first-degree murder and sentenced to life imprisonment. If the jury asks the judge about parole eligibility, the judge must instruct the jury that parole is not a proper matter in considering the appropriate punishment for the defendant, and the jury should consider that life imprisonment means imprisonment in the state's prison for life.²²

¹⁵ G.S. 15A-2000(a)(4); *State v. Jones*, 339 N.C. 114 (1994); *State v. Wilson*, 313 N.C. 516 (1985).

¹⁶ G.S. 7A-97; *State v. Barton*, 335 N.C. 696 (1994) (trial judge erred in allowing only one defense counsel to make last argument at capital sentencing hearing).

¹⁷ 512 U.S. 154 (1994).

¹⁸ The Court adopted a relatively expansive view of when dangerousness is in issue in *Kelly v. South Carolina*, 534 U.S. 246 (2002), where it held that any "evidence with a tendency to prove dangerousness in the future" raises the issue, even if the evidence is relevant to other issues in the case or is limited to a defendant's violence in prison or propensity to escape from prison.

¹⁹ Before G.S. 15A-2002 came into effect, the North Carolina Supreme Court had consistently ruled that the *Simmons* ruling did not require the instruction on the grounds that defendants sentenced to life imprisonment would, in fact, eventually be eligible for parole. *See, e.g.*, *State v. Skipper*, 337 N.C. 1 (1994)

²⁰ The legislative amendment requiring the judge to instruct the jury on the parole eligibility of a defendant sentenced to life imprisonment is applicable only to offenses committed on or after October 1, 1994, as explained in footnote four of *State v. Price*, 337 N.C. 756 (1994) (distinguishing *Simmons*, and ruling that the trial judge properly denied the defendant's request to argue to the jury that the defendant had already received a life sentence in Virginia and the judge could make a life sentence in North Carolina run consecutively to the Virginia sentence; the court noted that the defendant would have been eligible for parole if he had received a life sentence in North Carolina, and stated that the *Simmons* ruling was limited to cases in which the alternative to a death sentence was life imprisonment without the possibility of parole). *See also* *State v. Green*, 336 N.C. 142 (1994).

²¹ In *State v. Hill*, 331 N.C. 387 (1992), the prosecutor during jury argument asked whether, if the jury did not recommend the death penalty, the jury could guarantee that the defendant would not get a firearm in the future and kill again. The court rejected the defendant's argument that this improperly prompted the jury to consider the possibility of parole. The court noted that the prosecutor never mentioned the term "parole" and never argued the consequences of a life sentence.

²² *State v. Robbins*, 319 N.C. 465 (1987).

Applicable only to a first-degree murder committed on or after October 1, 1994, and before December 1, 1998, after a defendant has served twenty-five years imprisonment of a life sentence without parole, G.S. 15A-1380.5 requires a review by a superior court judge of the sentence and a recommendation to the governor or designated executive agency whether or not the sentence should be altered or commuted.²³ Absent legislative authorization to do so, it appears to be improper to mention the provisions of G.S. 15A-1380.5.

Addressing Jurors Individually

State v. Gell, 351 N.C. 192 (2000). The court ruled, relying on *State v. Wynne*, 329 N.C. 507 (1991), and distinguishing *State v. Holden*, 321 N.C. 125 (1987), *infra*, that a prosecutor's jury argument at a capital sentencing hearing was not improper when the prosecutor called each juror by name and informed the juror that it was time to impose the death penalty. The court stated that the argument merely sought to remind the jurors that they had affirmed during jury voir dire that they could follow the law if the state proved what was required to impose the death penalty.

State v. Holden, 321 N.C. 125 (1987). The defendant was properly barred during jury argument from asking each juror individually to spare the defendant's life. Such an argument was improper because it asked each juror to decide the sentence recommendation on an emotional basis without following the procedures set out in G.S. 15A-2000 and in disregard of the jurors' duty to deliberate with each other in attempting to reach a unanimous verdict. *Compare with* *State v. Wynne*, 329 N.C. 507 (1991) (not error to allow prosecutor—during jury argument at guilt–innocence phase—to address each juror by name and ask each to have no doubt and not to disregard the duty to deliberate together to reach a unanimous verdict; *Holden* distinguished).

References and Comparisons to People and Events Not in Evidence

State v. Taylor, 362 N.C. 514 (2008). The trial judge properly sustained the state's objection to the defendant's references to Eric Rudolph, serial killers, and those who kill children when discussing whether the defendant's murder was heinous, atrocious, and cruel. These references were improper comparisons to matters not in the record.

State v. Jones, 355 N.C. 117 (2002). The defendant was convicted of first-degree murder and sentenced to death. The court ruled that the prosecutor's jury argument during the capital sentencing hearing was improper and prejudicial to the defendant and ordered a new sentencing hearing. The prosecutor's jury argument was improper in part because the prosecutor referred to the Columbine school shootings and the Oklahoma City federal building bombing in a thinly veiled attempt to appeal to the jury's emotions by comparing the defendant's crime with these two heinous acts. This argument (1) referred to events and circumstances outside the record, (2) by implication, urged jurors to compare the defendant's acts with the infamous acts of others, and (3) attempted to divert jurors from the evidence by appealing

²³ G.S. 15A-1380.5 was repealed by N.C. Sess. Laws 1998-212, effective for first-degree murders committed on or after December 1, 1998.

instead to passion and prejudice. *See also* *State v. Walters*, 357 N.C. 68 (2003) (court stated that, despite comment in *Jones* that jury arguments based on matters outside trial record are inappropriate, court does not restrict jury arguments to matters that are only within trial record to exclusion of any historical references; however, such arguments may not inflame jury by making inappropriate comparisons or analogies—for example, the prosecutor’s inappropriate reference to Adolph Hitler).

State v. Anthony, 354 N.C. 372 (2001). The court ruled, relying on *State v. Gardner*, 316 N.C. 605 (1986) and other cases, that defense counsel was properly prohibited from reading facts from a North Carolina Supreme Court case on the aggravating circumstance of especially heinous, atrocious, or cruel for the purpose of urging the jury not to find this aggravating circumstance.

Prosecutor’s Reference to Victim and Victim’s Family

State v. Waring, 364 N.C. 443 (2010). The prosecutor’s description of an imaginary conversation with the victim’s father about the details of the murder was a “permissible reminder from a different perspective of how the victim had suffered and the nature of defendant’s actions.”

State v. Conaway, 339 N.C. 487 (1995). The prosecutor’s attempt to inform the jury of the unique losses suffered by the parents and siblings of the two victims, and especially by the three-year-old son of one of the victims, was proper argument to enable the jury to assess meaningfully the defendant’s moral culpability and blameworthiness. *See also* *State v. Gregory*, 340 N.C. 365, 459 S.E.2d 638 (1995) (similar ruling).

Prosecutor’s Reference to Deterrence

State v. Garcell, 363 N.C. 10 (2009). The prosecutor told the jury that a death verdict “would be a verdict which says that in this community we’re not going to put up with this.” Although arguably an improper appeal to general deterrence, this argument also could be viewed as asking the jury to act as the conscience of the community; therefore, it was not so grossly improper as to require intervention by the trial judge.

State v. Steen, 352 N.C. 227 (2000). The court ruled, relying on *State v. Richmond*, 347 N.C. 412 (1998) and *State v. Williams*, 350 N.C. 1 (1999), that the prosecutor’s jury argument at the capital sentencing hearing about the defendant’s future dangerousness to prison personnel was proper. A prosecutor may argue that the death penalty would specifically deter the defendant from committing future crimes. However, the court clearly indicated that a prosecutor may not, in an argument on future dangerousness, point out that a defendant may escape from prison when serving a life sentence without parole.

State v. Ward, 338 N.C. 64 (1994). A prosecutor may properly argue for the death penalty based on specific deterrence; that is, the death penalty is a deterrent to the particular defendant’s killing again. For similar rulings, see *State v. Alston*, 341 N.C. 198 (1995); *State v. Basden*, 339 N.C. 288 (1994); *State v. Syriani*, 333 N.C. 350 (1993); and *State v. Zuniga*, 320 N.C. 233 (1987).

State v. Hill, 331 N.C. 387 (1992). The prosecutor during jury argument asked whether, if the jury did not recommend the death penalty, the jury could guarantee that the defendant would not get a firearm in the future and kill again. The court rejected the defendant's argument that this improperly prompted the jury to consider the possibility of parole. The court noted that the prosecutor never mentioned the term "parole" and never argued the consequences of a life sentence.

State v. Kirkley, 308 N.C. 196 (1983). A prosecutor may not argue for the death penalty as a general deterrent; the argument that "I'm asking you to impose the death penalty as a deterrent, to set a standard of conduct" was improper.

Prosecutor's Reference to Quality of Life in Prison

State v. Taylor, 362 N.C. 514 (2008). While the prosecutor improperly argued facts outside the record in listing "various prison amenities defendant would enjoy if sentenced to life imprisonment," the prosecutor's argument was not so grossly improper as to require judicial intervention absent a defense objection.

State v. Holden, 346 N.C. 404 (1997). A prison guard testified during the resentencing rehearing that the defendant was permitted to watch television, play cards, lift weights, play basketball, go to the music room, and eat lunch with other inmates. The court ruled, relying on *State v. Alston*, 341 N.C. 198 (1995), that the prosecutor was properly permitted to comment during jury argument on the quality of life the defendant would have in prison. The court noted that it was reasonable to infer that the defendant would continue to enjoy these privileges if sentenced to life imprisonment.

State v. Smith, 347 N.C. 453 (1998). The prosecutor argued to the jury in a capital sentencing hearing that if the defendant was sentenced to life in prison, he would spend his time comfortably doing things such as playing basketball, lifting weights, and watching television. The court upheld this argument, citing *State v. Alston*, 341 N.C. 198 (1995), noting that the state's argument emphasized the state's position that the defendant deserved the death penalty rather than a comfortable life in prison.

Prosecutor's Reference to Mercy or Sympathy

State v. Cummings, 361 N.C. 438 (2007). The prosecutor stated: "They want to talk about compassion, mercy. That's not the law. That's not the standard. If it was, you wouldn't forget about the compassion and mercy that he showed for her. No, don't base it on any of that." This was a proper argument designed to encourage the jury to decide the case based on the law rather than sympathy.

State v. Price, 326 N.C. 56 (1990). A prosecutor may properly argue that the jurors' feelings of sympathy and forgiveness that are rooted in their hearts but are not based on the evidence may not be permitted to affect their recommendation on the death penalty. The court noted that the prosecutor did not refer to the evidence offered by the defendant in mitigation, about which a sympathetic appraisal by the jurors may be appropriate. The court stated that its ruling was in accord with *California v. Brown*, 479 U.S. 538 (1987).

State v. Artis, 325 N.C. 278 (1989). The prosecutor argued to the jury during the sentencing hearing that the jurors should “try this case without . . . prejudice and sympathy; strictly on the facts” of this case. The court upheld this argument, noting that the import of the prosecutor’s argument was that mitigating circumstances are to be supported by the evidence, not emotion.

Prosecutor’s Reference to Mitigating Circumstances

State v. Raines, 362 N.C. 1 (2007). When discussing several of the defendant’s proposed mitigating circumstances, the prosecutor argued “Where is the connection? Why does it make what he did to [the victims] less deserving of the ultimate penalty? We are here to talk about and deal with what happened on [the date of the murders].” In context, this was not an improper argument that every mitigating circumstance must have a nexus to the crime – a position rejected in *Tennard v. Dretke*, 542 U.S. 274 (2004) – but rather was a proper argument that the proposed circumstances had no mitigating value.

State v. Basden, 339 N.C. 288 (1994). The prosecutor’s jury argument that some of the defendant’s nonstatutory mitigating circumstances “border on the ridiculous” was a legitimate attempt to deprecate or belittle the significance of mitigating circumstances. It was a proper comment of the weight of the defendant’s evidence.

State v. Robinson, 336 N.C. 78 (1994). The prosecutor’s characterization of the defendant’s evidence in mitigation as an “evasion of responsibility” was properly directed to the weight that the jury should give to the defendant’s evidence.

State v. Huff, 325 N.C. 1 (1989). The prosecutor’s description of a mitigating circumstance during jury argument as evidence that lessens or reduces the severity of the crime was proper.

Prosecutor’s Reference to Aggravating Circumstance Not Submitted

State v. Cummings, 361 N.C. 438 (2007). The defendant stabbed his neighbor to death and stole her ATM card; he was convicted of robbery and murder. The trial judge decided to submit only the (e)(5) aggravator [murder during a specified felony], not the (e)(6) aggravator [murder for pecuniary gain], because the same evidence supported both. The prosecutor emphasized during closing that the defendant “did it for money.” The defendant argued on appeal “that this left the impression that the jury could consider defendant’s desire for pecuniary gain although a pecuniary gain aggravating circumstance was not submitted,” but the court ruled that the jury could properly consider the defendant’s motive in connection with the (e)(5) aggravator and the robbery.

State v. Sanderson, 336 N.C. 1 (1994). At the close of evidence during the capital sentencing hearing, the trial judge specifically refused the prosecutor’s request that the judge submit the aggravating circumstance that the murder was committed during the perpetration of rape. Despite this ruling, the prosecutor asserted during argument that the defendant deserved to die, at least in part because he had raped the victim. This argument was improper since there was a lack of forensic evidence to support it; together with other misconduct, it necessitated a new sentencing hearing.

Prosecutor's Reference to Defendant's Demeanor and Lack of Remorse

State v. Taylor, 362 N.C. 514 (2008). The prosecutor stated that “[n]owhere in any of the testimony during the sentencing phase has remorse been mentioned about the defendant's remorse for [the victim's] death.” This properly called the jury's attention to the defendant's lack of remorse without suggesting that lack of remorse is an aggravating circumstance.

State v. Call, 349 N.C. 382 (1998). The court ruled that the trial judge erred in allowing the state to argue that the defendant should be sentenced to death based on improperly elicited testimony that he had not confessed or expressed remorse to his jailers, in violation of his right to due process and privilege against self-incrimination. The court noted that the defendant had been informed of his constitutional right to silence at his first appearance in district court. He never waived that privilege. He never made a statement to law enforcement officers, and he did not testify at his trial or sentencing hearing. The defense never presented evidence or argument concerning statements made by the defendant concerning the alleged crimes or his feelings or attitudes toward the victims. At the capital sentencing hearing, the defendant called four jailers to testify that he had been a model prisoner during his pretrial incarceration. The state then elicited testimony, over the defendant's objection, that the defendant had neither confessed nor shown remorse for the crimes he was accused of committing. The court ruled that this testimony was improperly allowed under *State v. Hoyle*, 325 N.C. 232 (1989) (due process violation when using silence against defendant who has been advised of right to remain silent under *Miranda*). The court stated that the state may alert the jury of the defendant's lack of remorse as long as it does not urge the jury to consider the lack of remorse as an aggravating circumstance. However, the state's questions in this case clearly emphasized to the jury that the defendant had not denied the accusations and encouraged the jury to use the exercise of his right to silence when considering whether to recommend life or death.

State v. Price, 326 N.C. 56, 388 S.E.2d 84 (1990). While lack of remorse is not a statutory aggravating circumstance, a prosecutor's comment on a defendant's lack of remorse is proper argument, as long as the prosecutor does not cite this characteristic as an aggravating circumstance. *See also* *State v. Gell*, 351 N.C. 192 (2000); *State v. McNatt*, 342 N.C. 173 (1995); *State v. Robinson*, 336 N.C. 78 (1994); *State v. Artis*, 325 N.C. 278 (1989).

State v. Brown, 320 N.C. 179, 358 S.E.2d 1 (1987). A prosecutor may properly refer to the defendant's lack of contrition based on the defendant's demeanor in the courtroom. Such an argument does not improperly comment on the defendant's privilege not to testify.

Prosecutor's Request That Jurors Put Themselves in Victim's Place

State v. Garcell, 363 N.C. 10 (2009). Referring to the death of the victim by strangulation, the prosecutor stated: “Think about that instant when you hold your breath too long. What does that feel like? Imagine that.” The court held that this remark properly “asked the jury to appreciate the circumstances of the crime,” which is especially appropriate when the state is arguing for the aggravating circumstance that the murder was heinous, atrocious, and cruel.

State v. Perkins, 345 N.C. 254 (1997). Relying on *State v. McCollum*, 334 N.C. 208 (1993), the court ruled that a prosecutor's jury argument at a capital sentencing hearing that asked jurors to put themselves in the position of the victim was improper. The argument asked jurors to put themselves in the position of the victim as she was raped and murdered. However, the impropriety was not so great as to require a new sentencing hearing.

State v. McCollum, 334 N.C. 208 (1993). The court, quoting from *United States v. Picknarcek*, 427 F.2d 1290 (9th Cir. 1970), stated that asking jurors to put themselves in the place of victims will not be condoned. In *McCollum*, the prosecutor repeatedly asked the jury to imagine the murder victim as their own child. The court, assuming without deciding that the argument was improper, ruled that it did not deny the defendant due process. *See also* *State v. Garner*, 340 N.C. 573 (1995) (similar ruling). *But see* *State v. Green*, 336 N.C. 142 (1994) (prosecutor's argument that murder victims were in the "same place you and I might be at 6:00" was not an argument that asked the jurors to place themselves in the place of the victims; the argument was merely pointing out that the victims were engaging in activity common to all people).

State v. Artis, 325 N.C. 278 (1989). The victim was strangled to death. During closing argument at the sentencing hearing, the prosecutor asked the jurors to hold their breath for as long as they could over a four-minute period so they could understand the dynamics of manual strangulation. The argument was proper in urging jurors to appreciate the circumstances of the crime. The court noted that an argument that might be prejudicially improper in the guilt-innocence phase may be proper in the sentencing phase. *See also* *State v. Gregory*, 340 N.C. 365 (1995) (similar ruling; prosecutor did not ask jurors to put themselves in the place of the victims when describing how they died); *State v. Alston*, 341 N.C. 198 (1995) (similar ruling; prosecutor took three-minute pause that was intended to show the period of time it took for the victim to die of asphyxiation); *State v. Walls*, 342 N.C. 1 (1995) (similar ruling; prosecutor took four-minute pause that was intended to show the period of time it took for the victim to die from drowning); *State v. Warren*, 348 N.C. 80 (1998) (proper for prosecutor during jury argument in trial stage to ask jury to imagine the fear and emotions of the victim as she was being murdered).

Prosecutor's Reference to Community Sentiment

State v. Artis, 325 N.C. 278 (1989). The court stated that it is not improper for a prosecutor to tell the jury during argument in the sentencing hearing that its verdict will "send a message to the community" about what may befall a person convicted of first-degree murder. However, it is improper to intimate to the jury community preferences about capital punishment, which are not evidence or proper considerations for the sentencing jury. For example, a prosecutor may not ask the jury "to lend an ear to the community rather than a voice." On the other hand, it is not improper to remind the jury that its voice is the conscience of the community.

Prosecutor's Biblical References

State v. Haselden, 357 N.C. 1 (2003). The prosecutor's jury argument made several biblical references in arguing for the death penalty. Defense counsel did not object to the prosecutor's jury argument. The

court ruled the prosecutor's use of biblical references was not so grossly improper that the trial judge erred in failing to intervene ex mero motu, although the court strongly encouraged counsel to base their jury arguments solely on secular law and facts. Jury arguments based on any of the world's religions inevitably pose a danger of distracting the jury from its sole and exclusive duty of applying secular law and unnecessarily risk reversal of otherwise error-free trials and sentencing hearings.

State v. Lloyd, 354 N.C. 76 (2001). The prosecutor recited the "Dance, Death" poem during closing argument of the capital sentencing hearing and added the following words: "Let the Judge set the date. The death penalty is the only appropriate punishment in this case for what [the defendant] did to [the victim]." The court noted that it had reluctantly ruled in this case that the prosecutor's recitation of this poem (without the additional language) during jury argument in the guilt-innocence phase did not require the trial judge's intervention ex mero motu (although the court disapproved of and cautioned prosecutors against using such an argument). The court stated: "This additional language, however, crosses the line into impropriety by linking the law enforcement powers of the State, and specifically the judge, to divine powers of God. We admonish the State against making such arguments at defendant's new sentencing proceeding."

State v. Williams, 350 N.C. 1 (1999). The court made the following statements (with citations deleted) about biblical jury arguments:

We continue to hold that it is not so grossly improper for a prosecutor to argue that the Bible does not prohibit the death penalty as to require intervention ex mero motu by the trial court, *but we discourage such arguments* [italics supplied by court]. We caution all counsel that they should base their jury arguments solely upon the secular law and the facts. Jury arguments based on any of the religions of the world inevitably pose a danger of distracting the jury from its sole and exclusive duty of applying secular law and unnecessarily risk reversal of otherwise error-free trials. Although we believe that parts of our law are divinely inspired, it is the secular law of North Carolina which is to be applied in our courtrooms. Our trial courts must vigilantly ensure that counsel for the State and for defendant do not distract the jury from their sole and exclusive duty to apply secular law.

State v. Moose, 310 N.C. 482 (1984). The prosecutor's argument was improper when he cited biblical passages and argued in effect that the powers of public officials, including police, prosecutors, and judges are ordained by God as his representatives on earth and to resist these powers is to resist God.

Prosecutor's Reference to Defendant's Exercise of Rights

State v. Garcell, 363 N.C. 10 (2009). (1) The prosecutor noted that the victim had a right to life, then said of the defendant: "He is big on rights now. He wants his right to a trial, his right to two very good lawyers, his right to due process, to the presumption of innocence, to reasonable doubt. Yes, he wants all of his rights now. But what about [the victim]? What about her rights?" This remark did not require the trial judge to intervene ex mero motu, because the prosecutor's focus was on the defendant's

violation of the victim's rights; the prosecutor "never disparaged [the] defendant for exercising his rights."

Prosecutor's Disparagement of Defendant

State v. Matthews, 358 N.C. 102 (2004). The court stated that the prosecutor made an improper jury argument when the prosecutor engaged in name-calling and used scatological language in referring to the defendant's theory of the case. The prosecutor characterized the defendant as a "monster," "demon," "devil," "a man without morals," and as having a "monster mind." The court stated that these improper characterizations constituted improper name-calling; the prosecutor was not arguing the evidence and conclusions that can be inferred from the evidence. In addition, the prosecutor improperly used scatological language by stating "That's bull crap" in an attack on the defendant's theory of the case. *See also* State v. Maske, 358 N.C. 40 (2004) (prosecutor improperly referred to defendant as an "S.O.B.").

State v. Roache, 358 N.C. 243 (2004). The defendant, acting with an accomplice, killed five people and was convicted of five counts of first-degree murder. The court ruled that the prosecutor's jury argument was improper when it characterized the defendant and his accomplice as wild dogs high on the taste of blood and power over their victims.

State v. Jones, 355 N.C. 117 (2002). The court ordered a new sentencing hearing, in part because the prosecutor engaged in improper name-calling: "You got this quitter, this loser, this worthless piece of . . . who's mean . . . He's as mean as they come. He's lower than the dirt on a snake's belly."

Prosecutor's Disparagement of Witnesses

State v. Waring, 364 N.C. 443 (2010). (1) The prosecutor's references use of the phrase "laugh, laugh" in the course of discussing what he contended were the inconsistent opinions of two defense experts, "may well have been meant to ridicule the defense experts" but was so "ambiguous and confusing in context" that it did not require the trial judge to intervene ex mero motu.

State v. Taylor, 362 N.C. 514 (2008). The prosecutor referred to the defendant's mental health expert as a "professional witness." This was not so improper as to require the trial judge to intervene ex mero motu.

State v. Rogers, 355 N.C. 420 (2002). The court ruled that the prosecutor's improper cross-examination of a defense expert psychiatrist and improper jury argument in a capital sentencing hearing sufficiently prejudiced the defendant to require a new capital sentencing hearing. The court stated that the prosecutor ascribed the basest of motives to the defendant's expert. He also indulged in ad hominem attacks, disparaged the expert's field of expertise, and distorted his testimony. The court also stated: "We admonish counsel to refrain from arguing that a witness is lying solely on the basis that the witness

has been or will be compensated for his or her services. We also instruct trial judges to be prepared to intervene *ex mero motu* if such arguments continue to be made.”

State v. Smith, 352 N.C. 531 (2000). The court found parts of the prosecutor’s jury argument to be improper. The court stated that the prosecutor improperly maligned the mental health expert’s profession. Also, the prosecutor’s scatological references to a witness’s testimony were improper.

Prosecutor’s Reference to Appellate Review

State v. Jones, 296 N.C. 495 (1979). It was improper for the prosecutor during jury argument to read the provisions in G.S. 15A-2000 about the North Carolina Supreme Court’s review of a judgment of conviction and death sentence (and to read the parole statute). A reference to appellate review is irrelevant in the jury’s deliberations in making its sentencing recommendation. *See also* *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (prosecutor’s argument during capital sentencing urging jury not to view itself as finally determining whether defendant would die because death sentence would be reviewed by state supreme court, was improper under Eighth Amendment, based on facts in this case).

Defendant’s Reference to Life Sentence if Jury Does Not Agree

State v. Johnson, 317 N.C. 343 (1986). The defendant was properly barred during jury argument from reading the provision in G.S. 15A-2000(b) that requires that a life sentence be imposed if the jury cannot unanimously agree to its sentence recommendation within a reasonable time.

Defendant’s Description of Execution Procedure

State v. Holden, 321 N.C. 125 (1987). The defendant was properly barred during jury argument from describing the execution procedure. *See also* *State v. Boyd*, 311 N.C. 408, n. 1 (1984) (court stated that defense argument describing execution procedure was improper).

Defendant’s Reference to Absence of Aggravating Circumstances

State v. Buckner, 342 N.C. 198 (1995). Relying on *State v. Brown*, 306 N.C. 151 (1982) (absence of a particular aggravating circumstance is not a mitigating circumstance), the court ruled that the trial judge did not err in prohibiting defense counsel from telling the jury during jury argument of the aggravating circumstances that the state did not present to the jury.

Defense Counsel’s Admission that Defendant Committed Prior Crimes

State v. Al-Bayyinah, 359 N.C. 741 (2005). The defendant was convicted of first-degree murder and sentenced to death. Defense counsel during jury argument at the capital sentencing hearing appeared to admit, without the defendant’s consent, that the defendant had committed the crimes for which he had been previously convicted. The defendant was willing to allow defense counsel to admit that the defendant had been convicted, but not to admit he had committed the crimes. The court ruled that the defendant failed to show that the jury argument prejudiced his defense, and thus the defendant was not provided with ineffective assistance of counsel. The court stated that the state had the necessary proof

of these convictions to support the aggravating circumstance of prior violent felony convictions. The court noted that the United States Supreme Court in *Florida v. Nixon*, 543 U.S. 175 (2004), ruled that whether or not a defendant expressly consented to counsel's argument was not dispositive in finding ineffective assistance of counsel. In addition, the court noted, citing *State v. Walls*, 342 N.C. 1, 463 S.E.2d 738 (1995), that the ruling in *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985) (counsel's admission of defendant's guilt is per se ineffective assistance of counsel), does not apply to sentencing proceedings.

Defendant's Reference to Residual Doubt

State v. Fletcher, 354 N.C. 455 (2001). The court ruled that defense counsel was properly prohibited from arguing residual doubt as mitigating evidence in a capital resentencing hearing. The court stated that just as defense counsel may not argue residual doubt about the first-degree murder conviction during a capital sentencing or resentencing hearing, counsel may not argue residual doubt about the basis underlying a first-degree murder conviction, such as premeditation and deliberation.