JURY ARGUMENTS -- SMALL GROUP DISCUSSIONS
SCENARIOS FOR DISCUSSION—WITH ANSWERS
Prepared by: Judge John W. Smith, October, 2006

INTRODUCTORY PROBLEMS:

For the purposes of discussion, assume that objections may or may not be made in the following situations. How do you respond if you hear the prosecutor in closing argument say:

a. "Now, put yourself in the victim's place."

IMPROPER. State v. McCollum, 334 N.C. 208 (1993): Error to argue, but not reversible on the facts. Outline Sec. 12.

b. "I submit to you, the witness for the defendant is just flat-out lying."

EXERCISE DISCRETION AND CAUTION. Calling witness a liar is improper. Error to argue, unless supported by admissible evidence. If supported, may be able to argue "I submit, I contend, etc, but be careful! Davis, 291 NC 1; Bunning, 338 NC 483.Outline Sec. 6.

c. "And what does the defendant have to say? Nothing! He didn't have the courage to get on the stand and subject himself to cross-examination."

GROSSLY IMPROPER, REQUIRES INTERVENTION. State v. Billings, 104 N.C. App. 362 (1991). A prosecutor's argument which suggests in unmistakable terms that a defendant has failed to testify violates the rule that counsel may not comment upon the failure of a defendant in a criminal prosecution to testify. This is forbidden by N.C. Gen. Stat. § 8-54 (1969). Improper comment on a defendant's failure to testify is curable by the court's immediately instructing that (i) the argument is improper and (ii) the jury is to disregard it. However, improper comment is not cured by subsequent inclusion in the general charge of an instruction on a defendant's right to choose whether to testify. Outline Sec. 1-5.

d. "Now his attorney didn't tell you the truth. Just because he may get life in prison for this doesn't mean he will stay there. There's good time, gain time, and early parole. There is a review by the judge sitting up there and there is review by the judges sitting in Raleigh."

IMPROPER. State v. Small, 328 N.C. 175 (1991): Prosecutor's improper argument that "because of his age, [the defendant] won't stay in jail forever" cured by judge's immediate instruction that comment was improper. Outline Sec. 15.

e. "The powers of public officials, including the police, prosecutors and judges are ordained by God as his representatives on earth and to resist these powers is to resist God."

IMPROPER. See State v. Moose, 310 N.C. 482: "We likewise disapprove of this argument. The prosecutor is cautioned to avoid it at resentencing." State v. Walls, 342 N.C. 1 (1995). Outline Sec. 16.

How do you respond if you hear the defense attorney argue:

f. Now I believe the defendant is innocent, and you should find her not guilty.

IMPROPER EXPRESSION OF OPINION. From our Benchbook, a proposed curative instruction: "Members of the jury, you are to disregard the defense counsel's statement that he believes the defendant is innocent. It is improper for counsel to argue his own personal opinion. You are to disregard this improper statement and not to allow it to affect your decision. [Do you understand my instructions? Can you follow them?] Outline Sec. 11.

g. "You are the judges in this case. Nobody else. If you think the law is wrong and needs to be changed, you have the right to do that in this case."

IMPROPER. State v. Britt 285 NC 256 (1974): "Nor may counsel argue to the jury that the law ought to be otherwise, that the punishment provided thereby is too severe and, therefore, the jury should find the defendant not guilty of the offense charged but should find him guilty of a lesser offense or acquit him entirely."

CASE SCENARIO 1:

Defendant, charged with capital murder, called an expert, Dr. Rogers who testified to defendant's diminished capacity due to a cocaine addiction. He testified he charged $200 per hour. In the course of the evidence, it was disclosed that the defendant had seen another psychological expert, a Dr. Matthews. There was no evidence as to why Dr. Matthews had not testified. In fact, his license to practice had been revoked.

(a) During the guilt phase jury argument, the prosecutor made the following argument.

> DA: "oh yes you have a Dr. Rogers who came in at $200 an hour and who says that the defendant has a cocaine dependency based on some information that she received from talking to the defendant, and some family members, and looking over some records…Dr. Rogers, defendant's expert, had first seen defendant nearly a year after the crime. What happened to Matthews, Dr. Matthews the one -- one that saw him in September? Where's he? Didn't he say the right things?"
> Counsel: OBJECTION
>
> How do you respond to the objection?
>
> Would you intervene without any objection?
>
> > *THIS IS BORDERLINE, NOT SUPPORTED BY THE EVIDENCE. THE TRIAL COURT SUSTAINED THE OBJECTION AND THE APPELLATE COURT FOUND NO ERROR, BUT IT IS LEGITIMATE TO RESPOND TO COUNSEL'S ARGUMENTS, TO ARGUE MATTERS OF CREDIBILITY,TO ARGUE FACTS AND INFERENCES SUPPORTED BY EVIDENCE, AND TO COMMENT ON THE FAILURE TO CALL AVAILABLE WITNESSES SUPPORTED BY THE EVIDENCE.*
> >
> > *State v Smith 359 NC 199 (2005): "Hence, the trial court sustained defendant's objection to the problematic remark which suggested that defendant's first expert may not have provided a favorable opinion to the defense. Although defendant failed to request a curative instruction, the trial court had instructed the jury at the beginning of the trial that, 'when [the trial court] sustains an objection to a question, you as a juror must disregard the question and answer, if one has been given, and draw no inference from the question or answer.' Defendant further argues that the prosecutor's entire argument concerning Dr. Matthews was grossly improper. However, defendant's closing argument focused largely on Dr. Rogers' testimony that defendant's cocaine dependence and consumption on the day of the murder impeded defendant's ability to reason, plan, and think. Accordingly, the prosecutor was entitled to some latitude in responding to this argument. In any event, after thoroughly reviewing the prosecutor's argument, we conclude that the prosecutor was properly challenging the credibility of the opinion of defendant's expert. We thus find no error here and we overrule defendant's assignment of error"*

(b) During the penalty phase jury argument, the prosecutor made the following argument.

> DA: "I would say to you, if you choose not to exercise the option of the death penalty, can you guarantee that Reche Smith would not get a piece of tape, a cord sometime and kill again, can you? He's killed now. The only way to insure that he won't kill again is the death penalty. Justice--justice is making sure that Reche Smith is not ever going to do this again. You--you ladies and gentlemen, you are the only thing standing between the defendant. The only way that you can be sure that this man will never kill again, walk out again, is to give him the death penalty."
>
> How would you respond to an objection?
>
> Would you intervene without any objection?

IN THE ABSENCE OF AN OBJECTION, YOU ARE NOT REQUIRED TO INTERVENE. IF THERE IS AN OBJECTION, THIS IS BORDERLINE; BUT THE SAFER PATH WOULD BE TO CONSTRUE THE LAST COMMENT AS A SUGGESTION THAT "LIFE DOES NOT MEAN LIFE" AND SUSTAIN AND GIVE AN INSTRUCTION. State v Smith 359 NC 199 (2005): "Defendant suggests that this argument was improper because defendant could not 'walk out again' if given a life sentence because defendant would never be eligible for parole. We first note that defendant failed to object to this argument. "'The impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting ex mero motu an argument which defense counsel apparently did not believe was prejudicial when he heard it.'" …In such a circumstance, the prosecutor's closing argument "is subject to appellate review for the existence of gross improprieties which make it plain that the trial court abused its discretion in failing to correct the prejudicial matters ex mero motu." ... While it would be improper for a prosecutor to argue that a defendant's parole eligibility should affect the jury's sentencing considerations, …a prosecutor may urge the jury to reach a death sentence based on a fear of the defendant's future dangerousness. …In the present case, the prosecutor momentarily mentioned that defendant might "walk out again," but the prosecutor never specifically mentioned defendant's being paroled or leaving prison. Further, defendant's closing argument in sentencing began with defendant's attorney informing the jury that its guilty verdict "assured that [defendant] will die in prison" and that the remaining question for sentencing was "will [defendant] die in prison when his Maker calls him or will [defendant] die in prison strapped to a gurney with a needle in his arm--." Accordingly, when both parties' closing arguments are read in their entirety, we cannot conclude that the jury believed that defendant might one day leave prison." Outline Sec. 15.

CASE SCENARIO 2

This is a first degree murder trial in which the defendant admitted the killing but pled insanity as his defense. The evidence informed the jurors of all of the statutory procedures for involuntary commitment following a verdict of not guilty by reason of insanity, including the right to hearings and reviews. Two defense experts testified that defendant's illness could be treated but not cured and that defendant would probably need hospitalization for the rest of his life. Dr. X, a psychologist, testified on cross-examination by the State that although it was a possibility that in nine or ten years a Judge could say prima facie evidence of a homicide committed by defendant was no longer relevant, in his opinion it was a remote possibility. Furthermore, Dr. X stated that he'd never seen a case where there was prima facie evidence of a homicide where a judge found the patient was no longer dangerous.

(a) During the jury argument, the prosecutor makes the following arguments.

> [PROSECUTOR:] The third thing that you know for certain is this; that once you come back and render your verdict, that as of that moment this case, leaves your hands and is out of the hands of the citizens of Graham County forever; that is, the decision process as to what ultimately is done with this man. This trial is the last say so that you'll ever have.
>
> I'm not saying find him guilty or not guilty or whatever because of this. You're not supposed to do that and I'm not supposed to ask you about it. I'm simply saying that I want you to have your eyes wide open, and I do not want you to be deceived. I'll contend this; we don't think or contend necessarily that he's going to be back in our town or back out there life as usual at Tallulah in fifty or ninety days, but he could be. It's possible.
>
> I submit this to you, it's almost 100 percent certain that because of what you know about the hearing that the defendant will have attorneys and more of these hired experts, and sure, they may have neutralized two potential experts, especially Bellard, by getting Bellard to say, I'd never recommend it. What about the other five or ten thousand experts across the country that are willing to do any kind of work for $ 300.00 an hour. There'll be experts, etc., that can say he's no longer a threat and he's under control and look at his age, look at how he acted like a choir boy during the trial, send him to mental health. Sure, as long as he's under medication he's okay, but he doesn't have to be down in Dix Hospital or over there around Central Prison to be fed medication. You heard one of the doctors say that he could be farmed out to local mental health and as long as they monitor him and make sure he takes his medication a Judge could say he's no longer a danger to himself or others. We submit it's 99 percent certain that a Judge someday can and will say that, oh that conviction was six or eight or ten years ago, that's irrelevant, release him.
>
> COUNSEL: Your Honor, I object to that argument.
>
> How do you respond to the objection?
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> > *FAILURE TO SUSTAIN THE OBJECTION WOULD BE PREJUDICIAL ERROR. State v. Millsaps. 169 NCA 340: "When, in a closing argument, an objection was made and overruled, the standard of review on appeal is whether the trial court abused its discretion by failing to sustain the objection. State v. Jones, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). "Although defendant, if found not guilty by reason of insanity, would be provided a hearing fifty days after his commitment, no evidence supported the State's argument that it was 99 percent certain a judge would find the homicide irrelevant, therefore releasing defendant from commitment. The remark was also impermissibly prejudicial as it indicated to the jury that defendant, if found not guilty by*

reason of insanity, would likely be released after a very short period of time. The failure of the trial court to sustain defense counsel's objection was an abuse of discretion." Outline Sec. 15.

(b) The prosecutor proceeded, addressing the evidence presented at trial. When he discussed motive, he continued as follows:

[PROSECUTOR]: They want you to disregard all that evidence of strong motive and say, well he just had this crazy delusion about following God's orders. Yeah, that's like people that fly airplanes into buildings for their ends and claim to be doing God's work.
COUNSEL: I object to this reference.

IMPROPER. PREJUDICIAL ERROR NOT TO SUSTAIN THE OBJECTION. State v. Millsaps 169 NCA 340: "…the comparison of defendant's acts to those of the September 11 terrorists, which had occurred only a little over a year earlier, appealed to the jury's "sense of passion and prejudice" by comparing defendant's acts to infamous events outside the record. We hold the prosecutor's remarks in this case were also improper and prejudicial and defendant's objections should have been sustained." Outline Sec. 7, 16, 22.

CASE SCENARIO 3

While holding court in Wake County in a case in which the defendant is charged with sexual abuse of a child, you hear the district attorney make the following argument to which there is no objection by the defendant's attorney:

> "Not one of us in this courtroom wants to believe that any man is capable of doing what this defendant is charged with doing. No one wants to believe that such a vile, such a amoral, wicked, evil man might live in that community. But ladies and gentlemen, such a man lives here in Wake County. Such a man is seated at the table and his name is Johnny Ray Bullock."

What do you do? Suppose the defendant does not object?

> *EXERCISE CAUTION AND DISCRETION. THIS CASE FOUND NO REVERSABLE ERROR TO ALLOW THE ARGUMENT. NO DUTY TO INTERVENE ON THESE FACTS. BUT BE CAREFUL! THIS IS CLOSE TO THE LINE. State v. Bullock, NC App. 7/18/2006 Defendant did not object to this argument at trial but argued on appeal that the language referring to defendant as "vile", "amoral", "wicked" and "evil" required reversal. Held: The appellate courts of this State have declined to reverse convictions based on closing arguments referring to defendants in the same or similar language. We find nothing in the instant case to warrant departure from these prior holdings. But this case may have gone the other way had the facts been closer or if other factors in combination might have made the verdict more questionable. Outline Sec. 7.*

CASE SCENARIO 4

The prosecutor said the following without objection from defendant:

We live in violent times. There have been many cold-blooded murders that seem to make no sense at all. And if you stop and think about it, you realize that. We've had presidents who were shot, who were assassinated. We've had 3,000 people in New York who were assassinated by the airplane flying into a building. Does it make any sense? Of course not. Is it rational[sic]? Certainly not. Is it murder? Absolutely.
And that's what the defendant did in this case. He executed Mr. Jennings. The word assassinate, in Webster's Dictionary, means a murderer who strikes suddenly and by surprise. The word assassinate means to murder by surprise, to attack, to murder by surprise attack.

Should you intervene *ex mero motu*?

> *IT IS DISCRETIONARY, AND THERE WAS NO ABUSE OF DISCRETION WHEN THE TRIAL JUDGE FAILED TO INTERVENE EX MERO MOTU. State v McCollum NCA 6/6/2006: [I]t is clear the trial court did not err in failing to intervene ex mero motu. First, the context for the prosecutor's comments was to explain that defendant's lack of a specific motive could not absolve him of responsibility for the criminal act. Defendant argued at trial because he lacked motive to murder Mr. Jennings, he also lacked the necessary premeditation and deliberation to commit first-degree murder. Second, the prosecutor's reference to the World Trade Center attack was a reminder to the jury there is not always an explanation for why criminal actions occur, not an attempt to somehow equate defendant's actions with those of terrorists on 11 September 2001. Furthermore, our Supreme Court has "held in numerous cases that argument of counsel must be left largely to the control and discretion of the presiding judge and that counsel must be allowed wide latitude in the argument of hotly contested cases." State v. Monk, 286 N.C. 509, 515, 212 S.E.2d 125, 131 (1975) (citations omitted). Therefore, because the remarks by the prosecutor were not so grossly improper as to require intervention, we hold the trial court was correct in not intervening ex mero motu. Outline Sec. 7, 19, 22.*

CASE SCENARIO 5

The defense calls expert witnesses who testify for the defendant and give opinions harmful to the state's case. In attacking the witnesses during jury argument, the prosecutor makes the following arguments.

a) "You are entitled to weigh and consider the fees charged by any witness in determining the fairness of the witness, any bias the witness may have, and whether or not you will believe the witness, and what weight to give the testimony of the witness. And after you have done that, we respectfully submit you should give the defendant's expert's testimony absolutely no weight. The state contends it is not reasonable and is not consistent with the other believable evidence in the case."

THIS IS PROBABLY A PERFECTLY APPROPRIATE ARGUMENT. Outline Sec. 9.

b) "It is a sad state of our legal system that when you need someone to say something, you can find them. You can pay them enough and they'll say it."

Assume there is no objection, how would you respond?

IMPROPER, BUT NOT SO AS TO REQUIRE INTERVENTION WITHOUT AN OBJECTION. YOU COULD CERTAINLY EXERCISE YOUR DISCRETION TO INTERVENE. State v. Murillo, 349 N.C. 573, 604, 509 S.E.2d 752, 770 (1998): Improper, but was not so grossly improper as to require the trial court to intervene ex mero motu.

Assume there is an objection, how do you respond?

IMPROPER. APPELLATE COURT WILL DO A BALANCING TEST TO DETERMINE IF IT IS PREJUDICIAL IF YOU LET IT IN, BUT WE WERE WARNED IN State v Rogers 355 NC 420 (2002).

c) Prosecutor argued during a capital sentencing proceeding that the defendant's psychiatric expert was "a guy who's making fifteen hundred dollars a day is absolutely going to tell you every time you show him a crime like this that it's the result of mental illness. His way of life depends on that. . . . Nobody's paying someone fifteen hundred dollars a day to say defendant is sane."

Assume there is no objection, how would you respond?

IMPROPER, BUT MAY NOT REQUIRE INTERVENTION. State v. May, 354 N.C. 172, 180, 552 S.E.2d 151, 156 (2001): the trial court did not err in failing to intervene ex mero motu. Note the date of this case.

Assume there is an objection, how do you respond?

PROBABLY IMPROPER, BUT MAY BE JUSTIFIED BY INFERENCES FROM CROSS EXAMINATION. VERY CLOSE. INVITE DISCUSSION. Case says it is improper, but in that case allowing it in was ruled not prejudicial.

d) "'I submit to you, ladies and gentlemen, she's getting paid three thousand dollars to work on this case, she'll say anything he wants her to say.'"

Assume there is no objection, how would you respond?

IMPROPER, BUT COURT FOUND FAILURE TO INTERVEN NOT PREJUDICIAL. THIS IS ALMOST A REPEAT OF THE PREVIOUS PROBLEM, BUT IS INCLUDED BECAUSE IT WAS SPECIFICALLY CITED IN State v. Rogers. [Quote from State v Rogers 355 NC 420 (2002)]: "we assumed arguendo that the statement was improper." State v. Spruill, 338 N.C. 612, 651, 452 S.E.2d 279, 300 (1994)

Assume there is an objection, how do you respond?

IMPROPER, FAILURE TO SUSTAIN WOULD PROBABLY BE PREJUDICIAL. The difference is that the witness is being accused of perjury based solely on the payment of a fee. This is the problem State v. Rogers addresses.

e) During a capital sentencing trial, a prosecutor argued that the defendant's mitigating circumstances "'were developed skillfully by the defense experts who go around this State testifying for defendants in capital cases, selling their services and opinions at rates from $ 75 to $ 125 an hour,'"

IMPROPER, AND AGAIN INCLUDED BECAUSE IT WAS SPECIFICALLY CITED IN State v. Rogers. [Quote from State v Rogers 355 NC 420 (2002)]:"we again assumed the argument was improper but not so grossly improper as to entitle the defendant to a new sentencing hearing." State v. Hill, 347 N.C. 275, 299, 493 S.E.2d 264, 278 (1997)

f) "Now, ladies and gentlemen, I don't mean to degrade, deride anybody personally or any profession, but dag-gone-it, when you come into this court and you put your hand on that Bible up there and you talk about your degrees and where you can practice medicine and where you can't practice medicine, you better not be trying to sell a bill of goods, you better not be looking to pick up your three thousand dollar check and stay on that defense witness testimony list and keep picking up that little ten percent. You need to come in here and get up and tell the truth cause that's what you deserve. That's what you deserve, ladies and gentlemen. And it's a crying shame when education is corrupted for filthy lucre…. You know that when all you can do in mitigation in a capital murder case is to put up a psychiatrist that has spent less time with this defendant than you have and know less about him, that's a mighty small croak in mitigation. And saying it doesn't make it so cause you can pay somebody to say anything."

How to you rule if there is an objection?

IMPROPER. State v Rogers 355 NC 420 (2002), [Found cumulative effect of entire argument to be reversible, but read case carefully.]

If there is no objection, but you hear the argument, what do you do?

PROCEED WITH CAUTION. Prior to Rogers, the decision as to intervention ex mero motu was clearly discretionary. It is an open question, worthy of caution, as to whether the dicta in State v. Rogers signals a clear notice to the trial court that the "balancing test" for prejudice may have become more rigorous in choosing not to intervene in the face of arguments previously declared to be improper.

After your initial discussion, read the dicta in State v Rogers 355 NC 420 (2002), and discuss whether and to what extent that dicta has changed the way you would exercise your discretion in intervening.

State v Rogers 355 NC 420 (2002): "A number of our cases have considered arguments where an attorney has directly or indirectly challenged the veracity of a party or witness. Although we have found grossly improper the practice of flatly calling a witness or opposing counsel a liar when there has been no evidence to support the allegation, … we have also held that it is proper for a party to point out potential bias resulting from payment that a witness received or would receive for his or her services, …. However, where an advocate has gone beyond merely pointing out that the witness' compensation may be a source of bias to insinuate that the witness would perjure himself or herself for pay, we have expressed our unease while showing deference to the trial court. …Although it might be possible to differentiate the particular words in the instant argument from those used in the cases cited above, we would have to slice the salami pretty thin.

Accordingly, consistent with our holdings in Murillo and May, we conclude that while the prosecutor's argument that the expert should not be believed because he would give untruthful or inaccurate testimony in exchange for pay was improper, it was not so grossly improper as to require the trial court to intervene ex mero motu.

Nevertheless, we are disturbed that some counsel have failed to heed our repeated warnings that such arguments are improper, even if not always grossly so. ... One measure of the professionalism that we expect from litigants in North Carolina courts is the avoidance of all known improprieties. State … Our prior holdings, where the conviction was not reversed on the basis of a prosecutor's improper argument only because of the demanding standard of review, should not be construed as an invitation to trial counsel to try the same thing again. 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. …

Our inquiry does not end here, however. In the case at bar, the prosecutor went beyond ascribing the basest of motives to defendant's expert. As detailed above, he also indulged in ad hominem attacks, disparaged the witness' area of expertise, and distorted the expert's testimony. We have observed that "maligning the expert's profession rather than arguing the law, the evidence, and its inferences is not the proper function of closing argument." … "When vigor in unearthing bias becomes personal insult, all bounds of civility, if not of propriety, have been exceeded." Id. Particularly in capital cases, we believe it appropriate to require that practitioners conduct themselves with a probity and dignity consistent with the gravity of the proceedings.

That a prosecutor refrain from improper conduct is especially important in the context of a capital sentencing hearing, where the issue before the jury is whether a human being should live or die and where this decision involves the exercise of the jury's judgment as to how certain aggravating and mitigating circumstances should be weighed against each other.

In light of the cumulative effect of the improprieties in the prosecutor's cross-examination of defendant's expert and the prosecutor's closing argument, we are unable to conclude that defendant was not unfairly prejudiced. …Accordingly, we hold that defendant is entitled to a new capital sentencing proceeding. Because we reach this result, we need not address other issues raised by defendant relating to his sentencing proceeding that are unlikely to recur."

CASE SCENARIO 6

(a) In a capital murder case, the prosecutor begins his argument:

PROSECUTOR: The United States of America, a great country, indeed around the world for its freedoms: freedom of speech, freedom of privacy in your own home. But with those freedoms comes individual responsibility that every citizen of this country must realize; that to have these freedoms, one is responsible for their own conduct; one is responsible for their own behavior.
A year ago the Columbine shootings; five years ago Oklahoma City bombings. When this nation faces such tragedy - the laws of this country come in to bring order to that tragedy, to speak to that tragedy. Here we are addressing a tragedy of a man's life. The tragedy not of this defendant, the tragedy of Ronald Ray Mabe [the victim].
COUNSEL: Objection.

How do you rule on the objection?

IMPROPER. ABUSE OF DISCRETION TO OVERRULE THE OBJECTION.

State v. Jones, 355 N.C. 117 (2002): The argument was improper for at least three reasons: (1) it referred to events and circumstances outside the record; (2) by implication, it urged jurors to compare defendant's acts with the infamous acts of others; and (3) it attempted to lead jurors away from the evidence by appealing instead to their sense of passion and prejudice. The impact of the statements in question, which conjure up images of disaster and tragedy of epic proportion, is too grave to be easily removed from the jury's consciousness, even if the trial court had attempted to do so with instructions. Moreover, the offensive nature of the remarks exceeds that of other language that has been tied to prejudicial error in the past. See, e.g., State v. Wyatt, 254 N.C. 220, 222, 118 S.E.2d 420, 421 (1961) (holding that a prosecutor who {355 N.C. 133} described defendants as "two of the slickest confidence men" committed reversible error); State v. Tucker, 190 N.C. 708, 709, 130 S.E. 720, 720 (1925) (holding that it was prejudicial error for a prosecutor to say that the defendants "looked like. . . (professional) bootleggers"); State v. Davis, 45 N.C. App. 113, 114-15, 262 S.E.2d 329, 329-30 (1980) (holding that it was prejudicial for a prosecutor to call the defendant a "mean S.O.B."). As a result, we hold that the trial court abused its discretion when it allowed, over defendant's objection, the prosecutor's closing argument linking the tragedies of Columbine and Oklahoma City with the tragedy of the victim's death in this case. Outline Sec. 22 and 24.

(b) The Prosecutor continues: “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.”

Assume the defense attorney sits silent as the prosecutor continues in this vein. What do you do?

IMPROPER ARGUMENTS WHICH CONTINUE BECOME SO PREJUDICIAL IT IS ABUSE OF DISCRETION NOT TO INTERVENE.

Does it make any difference if the argument is being made in a capital case during the sentencing phase?

IMPROPER ARGUMENTS WHICH MAY NOT BE PREJUDICIAL IN A STRONG GUILT PHASE MAY BE PREJUDICIAL IN THE SENTENCING PHASE.

State v. Jones, 355 N.C. 117: Defendant also contends that he was prejudiced by the trial court's failure to intervene and stop the prosecutor from infecting closing arguments with improper name-calling and/or personal insults. Again, we must agree…As previously noted, in order to constitute reversible error, the prosecutor's remarks must be both improper and prejudicial. Improper remarks are those calculated to lead the jury astray. Such comments include references to matters

outside the record and statements of personal opinion. See part I, above. Improper remarks may be prejudicial either because of their individual stigma or because of the general tenor of the argument as a whole. Here, the prosecutor's characterizations exceed the boundaries of proper argument by incorporating personal conclusions that ultimately amounted to little more than name-calling. What the prosecutor did not do here was argue the evidence and proper inferences and conclusions that addressed the specific issues submitted as to aggravating and mitigating circumstances. Such tactics risk prejudicing a defendant -- and do so here -- by improperly leading the jury to base its decision not on the evidence relating to the issues submitted, but on misleading characterizations, crafted by counsel, that are intended to undermine reason in favor of visceral appeal. we hold that the prosecutor's repeated degradations of defendant: (1) shifted the focus from the jury's opinion of defendant's character and acts to the prosecutor's opinion, offered as fact in the form of conclusory name-calling, of defendant's character and acts; and (2) were purposely intended to deflect the jury away from its proper role as a fact-finder by appealing to its members' passions and/or prejudices. As a consequence, we deem the disparaging remarks grossly improper and prejudicial.

We should note at this point that in determining prejudice in a capital case, such as the one before us, special attention must be focused on the particular stage of the trial. Improper argument at the guilt-innocence phase, while warranting condemnation and potential sanction by the trial court, may not be prejudicial where the evidence of defendant's guilt is virtually uncontested. However, at the sentencing proceeding, a similar argument may in many instances prove prejudicial by its tendency to influence the jury's decision to recommend life imprisonment or death.

Finally, this Court has tried to strike a balance between giving appropriate latitude to attorneys to argue heated cases and the need to enforce the proper boundaries of closing argument and maintain professionalism. The power and effectiveness of a closing argument is a vital part of the adversarial process that forms the basis of our justice system. A well-reasoned, well-articulated closing argument can be a critical part of winning a case. However, such argument, no matter how effective, must: (1) be devoid of counsel's personal opinion; (2) avoid name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not on appeals to passion or prejudice; and (4) be constructed from fair inferences drawn only from evidence properly admitted at trial. Moreover, professional decorum requires {558 S.E.2d 109} that tactics such as name-calling and showmanship must defer to a higher standard. While the melodrama inherent to closing argument might well inspire some attorneys to favor stage theatrics over reasoned persuasion, such preference cannot be countenanced -- as either a general proposition or on the facts of the case sub judice. As a result, we conclude that the trial court abused its discretion by affording the prosecution undue latitude in its closing arguments at sentencing. Defendant is, therefore, entitled to a new sentencing hearing.

Additional references:

Criminal Benchbook, Jury Argument section

Jessica Smith, Powerpoint Presentation, Oct. 2003:
http://www.judges.unc.edu/200310conference/ppts/200310SmithELecture2.ppt

GS 15A-1230(a)

Rule 12 of the General Rules of Practice for the Superior and District Courts

Rule 4.3(e) of the Code of Professional Conduct