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33.2 Purpose and Scope of Closing Argument

A. In General

It has been observed that "[a] lawyer's function during closing argument is to provide the jury with a summation of the evidence, which in turn 'serves to sharpen and clarify the issues for resolution by the trier of fact' and should be limited to relevant legal issues." *State v. Jones*, 355 N.C. 117, 127 (2002) (citations omitted) (quoting *Herring v. New York*, 422 U.S. 853, 862 (1975)). "Closing argument is a 'reason offered in proof, to induce belief or convince the mind.'" *Jones*, 355 N.C. 117, 127 (citation omitted); *see also Sandoval v. Calderon*, 241 F.3d 765, 776 (9th Cir. 2000) (purpose of closing argument "is to explain to the jury what it has to decide and what evidence is relevant to its decision"); *United States v. Morris*, 568 F.2d 396, 401 (5th Cir. 1978) ("The purpose of summations is for the attorneys to assist the jury in analyzing, evaluating, and applying the evidence.").

During closing arguments, an attorney may, on the basis of his or her analysis of the evidence, argue any position or conclusion with respect to a matter in issue. G.S. 15A-1230(a). "[C]ounsel are given wide latitude in arguments to the jury and are permitted to argue the evidence that has been presented and all reasonable inferences that can be drawn from that evidence." *State v. Richardson*, 342 N.C. 772, 792–93 (1996).

Although counsel generally enjoys wide latitude in closing arguments, there are some boundaries and limitations. *See Jones*, 355 N.C. 117 (discussing the specific guidelines and parameters of closing argument); *see also* G.S. 15A-1230(a); N.C. GEN. R. PRAC. SUPER. & DIST. CT. 12; N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 3.4(e) (2006). Control of the argument is left largely in the trial judge's discretion and rulings thereon will not be disturbed on appeal in the absence of an abuse of that discretion. *Jones*, 355 N.C. 117.

Examples of permissible and impermissible arguments are collected below. The lists are not intended to be exhaustive. The information below applies to closing arguments by prosecutors and defense attorneys. Additional examples of restrictions on closing arguments by prosecutors are collected *infra* in § 33.7, Limitations on the Prosecution's Argument.

B. Permissible Content

During closing argument, counsel may:

- Argue any position or conclusion with respect to a matter in issue based on his or her analysis of the evidence. G.S. 15A-1230.
- Argue the evidence that has been presented and all reasonable inferences that can be drawn from that evidence. *State v. Forte*, 360 N.C. 427 (2006).
- State the law applicable to the case. G.S. 7A-97; *State v. Monk*, 286 N.C. 509 (1975); *see also infra* § 33.2E, Reading the Law.
- Comment on the demeanor of witnesses before the jury. *State v. Cummings*, 323 N.C. 181 (1988), *vacated on other grounds*, 494 U.S. 1021 (1990).
- Assert the guilt of another as long as there was evidence presented pointing directly to another's guilt. *State v. Bullock*, 154 N.C. App. 234 (2002); *see also Holmes v. South Carolina*, 547 U.S. 319 (2006) (unduly restricting evidence of another's guilt violates defendant's constitutional right to present a defense).
- Argue that a witness is credible or incredible. *See State v. Augustine*, 359 N.C. 709 (2005); *State v. Golphin*, 352 N.C. 364 (2000).
- Draw the jury's attention to the opposing party's failure to produce certain available witnesses (other than the defendant) or introduce particular evidence. *State v. Walters*, 357 N.C. 68 (2003) (prosecutor may comment on a defendant's failure to produce witnesses or exculpatory evidence to contradict or refute evidence presented by the State); *State v. Skeels*, 346 N.C. 147 (1997) (same); *see also State v. Snider*, 168 N.C. App. 701 (2005) (in response to defendant's argument that the State had failed to call two witnesses and the absence of that evidence was "very important," prosecutor properly argued that defense also failed to call those witnesses). *But cf. State v. Ratliff*, 341 N.C. 610 (1995) (in response to defendant's argument that the State failed to introduce a statement made by defendant after arrest, State improperly argued to jury that defendant should have introduced it; State's argument misstated law because evidence rules precluded defendant from introducing his own statement in this case).
- Use illustrations and anecdotes. *State v. Maynor*, 272 N.C. 524 (1968).
- Make arguments based on common knowledge. *State v. Murillo*, 349 N.C. 573 (1998); *State v. Harris*, 338 N.C. 129 (1994).
- Display exhibits and use them in a proper manner as long as they were actually introduced into evidence. *State v. Call*, 349 N.C. 382 (1998) (prosecutor swinging objects through the air and dropping heavy items on counsel table found not to be improper); *see also State v. Oliver*, 309 N.C. 326 (1983) (prosecutor's use of photographs of victim during closing argument in the sentencing phase of a capital case was not improper); *State v. Torres*, 77 N.C. App. 345 (1985) (trial judge erred in allowing prosecutor to display pellet gun during closing argument because it had never been admitted into evidence). *But cf. State v. Golphin*, 352 N.C. 364 (2000) (stating that the court does not condone the pointing of weapons at the jury).
- Tell the jury that it may request review of the exhibits and testimony during their deliberations. *See* G.S. 15A-1233.
- Advise the jury to carefully scrutinize the testimony of a witness. *State v. Brown*, 327 N.C. 1 (1990).

C. Impermissible Content

Generally. During closing argument, counsel may not:

- Become abusive. G.S. 15A-1230(a); *State v. Jones*, 355 N.C. 117 (2002); *see also* N.C. GEN. R. PRAC. SUPER. & DIST. CT. 12 ("Counsel are at all times to conduct themselves with dignity and propriety.").
- Make uncomplimentary or derogatory comments about opposing counsel. *State v. Hembree*, 368 N.C. 2 (2015); *State v. Miller*, 271 N.C. 646 (1967); *State v. Jordan*, 149 N.C. App. 838 (2002); *see also* N.C. GEN. R. PRAC. SUPER. & DIST. CT. 12 ("All personalities between counsel should be avoided. The personal history or peculiarities of counsel on the opposing side should not be alluded to."); *State v. Sanderson*, 336 N.C. 1, 11 (1994) (prosecutor's entire course of conduct during capital trial, including abusive and persistent comments directed at opposing counsel, "may have undermined the ability of defense counsel to provide effective representation"). For cases in which the court found that the prosecutor made improper derogatory comments about the defendant's expert witnesses, see *infra* § 33.7C, Impermissible Content.
- Inject his or her personal experiences. G.S. 15A-1230(a); *State v. Simmons*, 205 N.C. App. 509 (2010).
- Express his or her personal belief as to the truth or falsity of the evidence. G.S. 15A-1230(a); *State v. Smith*, 279 N.C. 163 (1971).
- State a personal opinion as to the credibility of a witness. *State v. Phillips*, 365 N.C. 103 (2011); *State v. Gladden*, 315 N.C. 398 (1986); *State v. Thompson*, 188 N.C. App. 102 (2008); N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 3.4(e) (2006).
- Express his or her personal belief as to the guilt or innocence of the defendant. G.S. 15A-1230(a); N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 3.4(e) (2006); *see also State v. Waring*, 364 N.C. 443 (2010); *State v. Britt*, 291 N.C. 528 (1977).
- Argue facts or make inferences that are not supported by the evidence. *State v. Williams*, 317 N.C. 474 (1986) (granting a new capital sentencing hearing because prosecutor's repeated statements that the victim was killed to prevent her from identifying defendant was not supported by any evidence whatsoever).
- Assert personal knowledge of facts in issue. *State v. Sanderson*, 336 N.C. 1 (1994); *State v. Monk*, 286 N.C. 509 (1975); N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 3.4(e) (2006).
- Reveal legal rulings made by the trial judge outside the presence of the jury. *State v. Allen*, 353 N.C. 504 (2001).
- Engage in name-calling. *State v. Matthews*, 358 N.C. 102 (2004); *State v. Walters*, 357 N.C. 68 (2003); *State v. Jones*, 355 N.C. 117 (2002); *State v. Twitty*, 212 N.C. App. 100 (2011); *State v. Davis*, 45 N.C. App. 113 (1980).
- Assert that a witness is lying or call a witness a liar. *State v. Gell*, 351 N.C. 192, 210 (2000) (although prosecutor's argument that a defense witness was lying and a "convicted liar" was improper, it was not so grossly improper as to require the trial judge to intervene ex mero motu because the evidence supported this argument); *State v. McKenna*, 289 N.C. 668 (1976) (disapproving of language used by both defense

counsel and prosecutor asserting that witnesses and defendant lied), *vacated in part on other grounds*, 429 U.S. 912 (1976). *But see State v. Brice*, 320 N.C. 119, 124 (1987) (trial judge did not abuse discretion in overruling defendant's objection to prosecutor's argument that a witness "did not tell you the truth" where the evidence supported this inference); *State v. Noell*, 284 N.C. 670, 696–97 (1974) (prosecutor's submission to the jury that defense witnesses "have lied to you" was a reasonable comment on the evidence), *vacated in part on other grounds*, 428 U.S. 902 (1976).

- Make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. G.S. 15A-1230(a); *see also Allen*, 353 N.C. 504; *State v. Cousins*, 289 N.C. 540 (1976); N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 3.4(e) (2006).
- Appeal to the jury's passion or prejudice. *State v. Jones*, 355 N.C. 117 (2002).
- Make arguments calculated to mislead or prejudice the jury. *State v. Riddle*, 311 N.C. 734 (1984); *see also* N.C. GEN. R. PRAC. SUPER. & DIST. CT. 12 ("Counsel shall not knowingly misinterpret the contents of a paper, the testimony of a witness, the language or argument of opposite counsel or the language of a decision or other authority . . . .").
- Speculate about the outcome of a possible appeal, parole, executive commutation or pardon. *State v. McMorris*, 290 N.C. 286 (1976).
- Gratuitously interject race into a jury argument where race is otherwise irrelevant to the case being tried. *See State v. Diehl*, 353 N.C. 433 (2001) (no abuse of discretion in denial of defendant's motion for mistrial based on prosecutor's reference to the jury as "twelve white jurors in Randolph County" where defendant's objection to the reference had been sustained and race was an alleged secondary motivation for the crime); *State v. Moose*, 310 N.C. 482 (1984) (prosecutor's repeated references to the victim as an "old black gentleman" and a "black man" were not grossly improper where evidence supported an inference that the murder was, in part, racially motivated).

Capital cases. In addition to the above listed arguments, during the penalty phase of a capital trial, counsel may not:

- Argue the consequences of juror nonunanimity. *State v. Huff*, 325 N.C. 1 (1989), *vacated on other grounds*, 497 U.S. 1021 (1990).
- Argue that capital punishment does not have any deterrent effect. *See State v. Cherry*, 298 N.C. 86 (1979).
- Argue residual doubt as to the offense of first-degree murder or as to a basis underlying the first-degree murder conviction, such as premeditation and deliberation, because residual doubt is not a circumstance of the offense and, thus, is inappropriate. *State v. Fletcher*, 354 N.C. 455 (2001); *State v. Roseboro*, 351 N.C. 536 (2000).
- Describe the execution procedure because it is not based on the evidence presented. *State v. Holden*, 321 N.C. 125 (1987).

D. Informing Jury of Possible Punishment

Fair Sentencing. G.S. 7A-97 provides that "[i]n jury trials the whole case as well of law as of fact may be argued to the jury." In cases decided before structured sentencing took effect, this statute was interpreted by the N.C. Supreme Court to mean that it was permissible for counsel to inform the jury of the possible punishment the defendant faced if convicted of the crimes for which he or she was being tried. *See State v. McMorris*, 290 N.C. 286 (1976) (interpreting G.S. 84-14, the predecessor to G.S. 7A-97); *State v. Britt*, 285 N.C. 256 (1974) (same). The court stated that the purpose of informing the jury of the statutory punishment, at least in serious felony cases, was to impress on the jury the gravity of its duty. It was deemed proper for the defendant to advise the jury of "the possible consequence of imprisonment following conviction to encourage the jury to give the matter its close attention and to decide it only after due and careful consideration." *McMorris*, 290 N.C. 286, 288.

Structured Sentencing. Sentencing procedures changed with the imposition of structured sentencing in 1994. With the exception of Class A felonies and a few other offenses for which a particular punishment is set by statute, a defendant's sentencing range cannot be determined solely based on the statute that defines the offense.

In *State v. Lopez*, 363 N.C. 535 (2009), the N.C. Supreme Court addressed whether a prosecutor's argument about the sentence faced by the defendant was proper under structured sentencing. During the sentencing phase of that case in which the jury had to decide the aggravating factors alleged by the State, the prosecutor attempted to inform the jury of the amount of punishment that the jury's finding of an aggravating factor would empower the judge to impose. The court found the prosecutor's argument to be improper because it understated the potential sentence the defendant was facing. *Id.* at 538 (finding State's discussion of sentencing grids to be "inaccurate"). Specifically, the prosecutor informed the jury of the range of minimum sentences the defendant was facing and failed to inform the jury of the corresponding maximums (120% of the minimum at that time).

In addition, the court found that the State's argument was misleading because "it indicated potential specific sentencing ranges for defendant when defendant's sentencing range had not been, and in this case could not be, determined at the time the argument was made." *Id*. at 538. The court noted that a criminal sentence under structured sentencing is determined only after "numerous interlocking decisions and findings [are] made by the trial court after the jury has completed its work." *Id.* at 540. Therefore, jury arguments forecasting a defendant's sentence "are usually no better than educated estimates." *Id.* Still, the court concluded that "while attempts to forecast a sentence are fraught with risk," *id.* at 541, it is permissible for the parties to explain the impact on the defendant's sentence of aggravating factors alleged by the State, which were the particular sentencing matter at issue in *Lopez.* Relying on G.S. 7A-97, the same statutory provision supporting a defendant's right to inform the jury of the defendant's potential sentence under Fair Sentencing, the court held that "a jury's understanding that its determination of the existence of any aggravating factors may have an effect on the sentence imposed is relevant to its role in a sentencing proceeding." *Id.*

The decision in *Lopez* leaves a number of questions unanswered about the appropriateness of arguments addressing a defendant's possible punishment under structured sentencing. *Lopez* appears to continue to allow the parties to inform the jury of the maximum possible sentence that the defendant is facing (based on the alleged offense, the defendant's prior record level, and any allegations of aggravating factors). *See State v. Minton*, 206 N.C. App. 597 (2010) (unpublished) (citing *Lopez* for the proposition that the penalty prescribed for a criminal offense is part of the law of the case and that it is permissible for a defendant in closing argument to inform the jury of the statutory punishment provided for the charged crime); *cf. State v. Ferguson*, 212 N.C. App. 692 (2011) (unpublished) (finding that the prosecutor's argument stating that if convicted of the charged offense, "you can get as little as 38 months in the jail" was improper under the rationale of *Lopez* because it asserted a sentencing range before one had been determined).

It is less certain whether the parties would be able to inform the jury of the maximum aggravated sentence for the class of offense with which the defendant is charged if the defendant could not receive that sentence, but it appears unlikely that this is a permissible argument. When accepting a guilty plea, judges often inform the defendant of the maximum potential sentence that any defendant could receive for the charged offense. But, if that information does not reflect the sentence that the particular defendant could actually receive, it may not be considered sufficiently relevant for the jury's consideration after *Lopez*. *See State v. Allen,* 246 N.C. App. 362 (2016) (unpublished) (finding no prejudicial error in trial judge's ruling that defendant could not inform the jury that he could receive any sentence longer than the presumptive maximum for prior record level II where the State had not sought to admit evidence of any aggravating factor, defendant had been willing to stipulate to sentencing as a prior record level II prior to closing argument, and he was ultimately found to be a prior record level II; court was unpersuaded that defendant "was somehow prejudiced by being precluded from telling the jury that 'a defendant' could be sentenced to a far higher level of punishment than was ever the case for Allen").

Regardless of the correct "maximum" that may be argued to the jury for an offense subject to structured sentencing, counsel should be able to argue the specific punishment faced by defendants charged with Class A offenses or offenses such as drug trafficking for which a particular punishment is fixed by statute. The maximum sentences for these offenses do not depend on the defendant's particular circumstances and therefore would be appropriate subjects of argument to the jury.

Practice note: If you plan to make a "numbers" argument for a case subject to structured sentencing, you may want to consider informing the judge ahead of time of your intended argument and be prepared to show him or her why your argument as to possible punishment is not misleading. For the judge to know the sentence you intend on arguing to the jury, you may have to stipulate ahead of time to your client's prior record level and other sentencing factors as appropriate. *Cf. State v. Osteen*, 246 N.C. App. 190 (2016) (unpublished) (finding no prejudicial error in trial judge's denial of defendant's request to argue maximum possible sentence for impaired driving based on defendant's prior

convictions; court did not address whether defendant would have been allowed to make argument had she offered to stipulate to her prior convictions, which were alleged as grossly aggravating factors). You may want to clarify with the judge that the stipulated information is for the purpose of identifying the sentencing range to be described to the jury and is not itself admissible—that is, the jury should not be informed of any prior convictions unless your client testifies or the convictions are otherwise admissible. Because such a stipulation bears on your argument to the jury at the guilt-innocence phase, you may need to obtain your client's consent to the stipulation.

In determining the maximum potential sentence specific to your client, calculate the maximum sentence based on the highest minimum that could be imposed. Also consider any aggravating factors the State has alleged. If the trial is bifurcated, with the aggravating factors to be determined by the jury during a separate sentencing phase, you should be able to argue during the sentencing phase about the impact of the aggravators on your client's sentence (which was the situation in *Lopez*); but, the judge might not consider it appropriate for you to include those calculations in your sentencing argument at the trial of the underlying felony. *Cf. State v. Dammons*, 159 N.C. App. 284 (2003) (finding that the defendant was not entitled to inform the jury at the guilt-innocence phase of case of the potential maximum sentence should the jury later find the defendant to be a habitual felon).

Lopez also observed that in cases involving multiple charges, the judge has discretion to run sentences consecutively or concurrently (and, in a few cases, offenses may merge and require a single sentence); however, it is not clear from the decision that you must inform the jury of that possibility in addition to the potential sentence for each offense.

The decision in *Lopez* highlights that "numbers" arguments can be complicated and must be carefully crafted under structured sentencing. If the State attempts to make an argument as to the defendant's potential sentence as it did in *Lopez*, you should pay close attention and make objections as appropriate to limit the argument and ensure that any error will be preserved for appellate review.

Additional consequences of conviction. Since G.S. 7A-97 provides that "[i]n jury trials the whole case as well of law as of fact may be argued to the jury," a defendant should be able to inform the jury during closing arguments about mandatory consequences of conviction other than imprisonment. For example, in *State v. Prestwood*, 211 N.C. App. 198 (2011) (unpublished), the trial judge sustained the State's objection to defense counsel's attempt during closing argument to inform the jury that the defendant would be required to register as a sex offender if convicted of sexual battery. After the jury charge, defense counsel again requested to address the jury in order to let them know the registration consequences of conviction, but this request was denied. The N.C. Court of Appeals found that defense counsel had the right to inform the jury of the consequences of a conviction for sexual battery, including the mandatory registration requirements, and that it was error for the trial judge to sustain the State's objection. The N.C. Court of Appeals relied on *State v. McMorris*, 290 N.C. 286 (1976), and *State v. Britt*, 285 N.C.

256 (1974), which recognized the right of the defendant to impress on the jury the gravity of its duty. *See also State v. Hartley*, 212 N.C. App. 1, 18 (2011) (recognizing that purpose of instruction on mandatory commitment procedures in cases involving insanity defense is to eliminate confusion or uncertainty by jury regarding fate of accused if found insane and remove hesitancy in returning verdict of not guilty by reason of insanity based on fear that the defendant would be released into the community); John Rubin, *Letting the Jury Know about "Collateral" Consequences of a Conviction*, N.C. Crim. L., UNC Sch. of Gov't Blog (Mar. 5, 2019) (discussing *Prestwood*).

Impermissible arguments. Although counsel may be able to inform the jury of the possible punishment in the case (as discussed above), counsel cannot:

- argue that because of the severity of the statutory punishment the jury ought to acquit or convict of a lesser offense;
- question the wisdom or appropriateness of the punishment; or
- state the punishment provision incorrectly.

State v. McMorris, 290 N.C. 286, 288 (1976).

Additionally, counsel may not:

- Attack the validity, constitutionality, or severity of the prescribed punishment for the crime or argue that the law ought to be otherwise. *State v. Britt*, 285 N.C. 256 (1974).
- Inform the jury, during the trial of the *principal felony*, of the possible maximum sentence that might be imposed upon an habitual felon adjudication. *State v. Dammons*, 159 N.C. App. 284 (2003); *State v. Wilson*, 139 N.C. App. 544 (2000). In light of these decisions, a trial judge may not have discretion to grant a defendant's request to inform the jury of the potential habitual felon sentence during trial of the principal felony. *See State v. Johnson*, 232 N.C. App. 185 (2014) (unpublished) (finding no error in trial judge's denial of defendant's request to inform the jury of the minimum habitual sentence of imprisonment he would face if convicted of the principal felony even though defendant offered a signed transcript of plea to the habitual felon charge and asserted that he would not use the term "habitual" in his closing argument; the language of G.S. 14-7.5 establishes the order of habitual felon proceedings and the statutory language logically precludes arguments in the principal felony trial pertaining to the habitual felon proceeding, including punishment).
- Inform a capital jury that the capital punishment statute authorizes the trial judge to impose a life sentence if the jury is unable to return a unanimous verdict. *State v. Huff*, 325 N.C. 1 (1989), *vacated on other grounds*, 497 U.S. 1021 (1990).

Sentence in capital case. In *Simmons v. South Carolina*, 512 U.S. 154 (1994), the U.S. Supreme Court held that if a prosecutor argues "future dangerousness" of the defendant during a capital sentencing proceeding and the defendant's release on parole is prohibited by state law, due process requires the jury to be informed that if the defendant receives a life sentence, that sentence would be life imprisonment without parole. North Carolina

law is broader in that G.S. 15A-2002 requires the judge in every capital case to instruct the jury "that a sentence of life imprisonment means a sentence of life without parole."

Before G.S. 15A-2002 was revised in 1994, there was no right to refer to parole eligibility during closing arguments in a capital sentencing hearing. *See State v. Parker*, 350 N.C. 411, 440 (1999); *State v. Miller*, 339 N.C. 663, 688 (1995). However, since G.S. 15A-2002 now requires instruction on the meaning of life imprisonment, counsel should be free to argue the law in this regard. *Cf. State v. Steen*, 352 N.C. 227, 276 (2000) (defendant's contention that the trial judge erroneously refused to allow him to argue that there would be no parole in this case was without merit since the record revealed that defense counsel did, in fact, assert "that life imprisonment did mean precisely life imprisonment without parole"); *see also infra* § 33.2E, Reading the Law (counsel may read or state to the jury a statute or other rule of law relevant to the case).

E. Reading the Law

Permissible arguments. G.S. 7A-97 states that "the whole case as well of law as of fact may be argued to the jury." This includes reading or stating to the jury a statute or other rule of law relevant to the case. *See State v. McMorris*, 290 N.C. 286 (1976) (interpreting G.S. 84-14, the predecessor to G.S. 7A-97); *State v. Britt*, 285 N.C. 256 (1974) (same); *see also supra* § 33.2D, Informing Jury of Possible Punishment.

Counsel also may read portions of reported cases that relate facts and state the law as long as those portions are relevant to the issues before the jury; however, counsel may not read the facts together with the result and imply that the jury should return a verdict favorable to his or her client. *See State v. Anthony*, 354 N.C. 372 (2001); *State v. Gardner*, 316 N.C. 605 (1986) (interpreting G.S. 84-14, the predecessor to G.S. 7A-97); *Wilcox v. Glover Motors, Inc.*, 269 N.C. 473 (1967) (same); *see also State v. Simmons*, 205 N.C. App. 509 (2010) (prejudicial error found where prosecutor injected his personal experience into closing argument by referring to a prior DWI case he had tried and then read the facts of that published opinion finding no reversible error to imply that the present jury should return the same verdict).

Impermissible arguments. In discussing the law, counsel may not:

- State the law incorrectly or read a statute that has been held unconstitutional. *Britt*, 285 N.C. 256.
- Read dictum. *State v. Austin*, 320 N.C. 276 (1987).
- Read from a dissenting opinion in a reported case unless it has later been adopted as the law of this state. *State v. Thomas*, 350 N.C. 315 (1999); *Gardner*, 316 N.C. 605.
- Read from treatises, medical books, or scientific writings (even if contained within a reported case) unless an expert has given an opinion and cited the treatise as his or her authority. *Austin*, 320 N.C. 276; *Gardner*, 316 N.C. 605.

F. Biblical References

Religious references discouraged. "Neither the 'law' nor the 'facts in evidence' include biblical passages, and, strictly speaking, it is improper for a party either to base or to color his arguments with such extraneous material." *State v. Artis*, 325 N.C. 278, 331 (1989), *vacated on other grounds*, 494 U.S. 1023 (1990). Even so, because counsel is given wide latitude in hotly contested cases, the N.C. Supreme Court has sometimes found biblical references to fall within permissible margins. *Id.*; *see, e.g., State v. Gell*, 351 N.C. 192 (2000); *State v. Call*, 349 N.C. 382 (1998); *State v. Bond*, 345 N.C. 1 (1996); *State v. Walls*, 342 N.C. 1 (1995); *see also State v. Haselden*, 357 N.C. 1, 37 (2003) (Edmunds, J., dissenting) (arguing that "this Court has done a disservice to litigators and to itself by setting a standard of behavior while consistently excusing deviations from that standard").

The N.C. Supreme Court has, however, expressly discouraged prosecutors and defense attorneys from making arguments based on religion. The court has also strongly cautioned all attorneys to make their arguments based solely on the secular law and the facts. To base a jury argument on any of the world religions inevitably poses "a danger of distracting the jury from its sole and exclusive duty of applying secular law and unnecessarily risk[s] reversal of otherwise error-free trials." *State v. Williams*, 350 N.C. 1, 27 (1999) (so stating, but rejecting the defendant's argument that the prosecutor's use of biblical references during closing argument violated the First Amendment's principle of separation of church and state and the defendant's right to due process); *see also State v. Barden*, 356 N.C. 316 (2002) (again discouraging attorneys from making gratuitous biblical references and religious argument); *State v. Davis*, 349 N.C. 1 (1998) (urging caution in the use of biblical references).

Improper references by prosecutors. The N.C. Supreme Court has specifically expressed disapproval of certain types of prosecutorial arguments that make improper use of religious sentiment. *See, e.g., State v. Moose*, 310 N.C. 482 (1984) (court cautioned prosecutor on resentencing not to argue that the powers of public officials, including the police, prosecutors, and judges, are ordained by God as his representatives on earth and that to resist those powers is to resist God himself); *State v. Oliver*, 309 N.C. 326 (1983) (indicating that prosecutorial arguments that the death penalty is divinely inspired are improper); *see also State v. Haselden*, 357 N.C. 1, 34 (2003) (Brady, J., concurring) (biblical arguments fall within the parameters of the law "so long as prosecutors do not contend that the death penalty is divinely mandated" by God for a particular defendant).

Practice note: If the prosecutor's argument can be interpreted as encouraging the jury to base its verdict on biblical law, you should immediately object and argue that the comments are improper because they are based on matters outside the record and on law that is not applicable to the case. Also assert that the prosecutor's argument violates the defendant's state and federal constitutional rights under the Establishment Clause (separation of church and state) and under the Due Process Clause (right to a fair and impartial trial). If the prosecutor injects religion into his or her argument during the sentencing phase of a capital case, also assert that the argument violates the "Eighth

Amendment principle that the death penalty may be constitutionally imposed only when the jury makes findings under a sentencing scheme that carefully focuses the jury on the specific factors it is to consider in reaching a verdict." *Sandoval v. Calderon*, 241 F.3d 765, 776 (9th Cir. 2000).

Invited response. In determining whether the prosecutor erred in referring to the Bible during closing argument, appellate courts will consider whether defense counsel also discussed passages from the Bible. If defense counsel made biblical references or even if it was reasonable for the prosecutor to anticipate that defense counsel would make religious references during closing argument, the court may find that the prosecutor's statements were not prejudicial error requiring reversal. *See, e.g., State v. Haselden*, 357 N.C. 1, 24 (2003) (prosecutor's closing argument was not so grossly improper as to warrant a new sentencing proceeding because he "was addressing a potential defense argument that the death penalty is contrary to Christian doctrine"); *State v. Hunt*, 323 N.C. 407, 427 (1988) (prosecutor's biblical arguments were not grossly improper where he was "merely anticipating any possible reliance by the defense on the commandment 'Thou shalt not kill,' and arguing that the death penalty is not inconsistent with the Bible"), *vacated on other grounds*, 494 U.S. 1022 (1990); *State v. Oliver*, 309 N.C. 326 (1983) (finding no reversible error where the prosecutor made biblical references during closing argument because defense counsel, as anticipated by the prosecutor, argued that the New Testament teaches forgiveness and mercy); *see also infra* § 33.7D, Invited Response (general discussion on invited responses).

Practice note: If you anticipate that the prosecutor will make arguments improperly based on religion, you should file a motion in limine before closing argument asking the judge to prohibit the prosecutor from making such arguments. If you do not plan to use religious arguments during your closing argument, you should assert that in the motion so that the State will be precluded from arguing on appeal that it reasonably made biblical references in anticipation of your argument. A sample "Motion to Restrict Prosecutor's Argument" is located in the Capital Trial Motions Bank on the website of the Office of Indigent Defense Services.
