
33.7 Limitations on the Prosecution's Argument

A. Duty of the Prosecutor

It is the duty of the prosecutor "to present the State's case with earnestness and vigor and to use every legitimate means to bring about a just conviction." *State v. Monk*, 286 N.C. 509, 515 (1975). In discharging this duty, he or she "should not be so restricted as to discourage a vigorous presentation of the State's case to the jury." *Id.*

However, it is as much the prosecutor's "duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1935) (stating that while a prosecutor "may strike hard blows, he is not at liberty to strike foul ones"). A prosecutor has a duty to the state that he or she represents and to the court as its officer to hold himself or herself "'under proper restraint and avoid violent partisanship, partiality, and misconduct'" that may tend to deprive the defendant of a fair trial. *State v. Britt*, 288 N.C. 699, 711 (1975) (citation omitted). "Derogatory comments, epithets, stating personal beliefs, or remarks regarding a witness's truthfulness reflect poorly on the propriety of prosecutors and on the criminal justice system as a whole." *State v. Wardrett*, ___ N.C. App. ___, 821 S.E.2d 188, 196 (2018) (stating that remarks by prosecutors that exceed statutory and ethical limitations will not be condoned); *see also State v. Matthews*, 358 N.C. 102 (2004) (after finding that prosecutor's closing argument exceeded proper boundaries, the court admonished him "that the State's interest 'in a criminal prosecution is not that it shall win a case, but that justice shall be done'") (citation omitted).

"'When the prosecutor becomes abusive, injects his [or her] personal views and opinions into the argument before the jury,'" the rules of fair debate are violated and "'it becomes the duty of the trial judge to intervene to stop improper argument and to instruct the jury not to consider it.'" This is especially true in a capital case. *State v. Jones*, 355 N.C. 117, 130 (2002) (citation omitted).

Examples of permissible and impermissible arguments by prosecutors are collected below. The lists are not intended to be exhaustive.

B. Permissible Content

In addition to the permissible arguments set out *supra* in § 33.2B, Permissible Content, courts have found that a prosecutor may engage in the following arguments or, at least, have found that the trial judge did not abuse his or her discretion in not intervening and limiting the prosecutor's argument. In some instances, the courts have drawn fine lines between permissible and impermissible arguments, illustrated by the contrasting cases cited below. Counsel therefore should continue to object to arguments in these contested areas (for example, arguments that appeal to the jury's relationship to the community).

Generally. The courts have permitted prosecutors to:

- Create scenarios of the crime or surrounding circumstances as long as they are based on reasonable inferences drawn from the facts. *See State v. Ingle*, 336 N.C. 617 (1994); *State v. Syriani*, 333 N.C. 350 (1993); *State v. Kirkley*, 308 N.C.196 (1983).
- Comment on the defendant's failure to produce exculpatory evidence or witnesses (other than the defendant) to corroborate the truth of an alibi or to contradict evidence presented by the State. *State v. Hester*, 343 N.C. 266 (1996); *State v. Hunt*, 339 N.C. 622 (1994); *State v. Brown*, 320 N.C. 179 (1987). However, if the prosecutor's comments could be construed as shifting the burden of proof to the defendant, the argument would be improper and counsel should immediately object. *See, e.g.*, *United States v. Parker*, 903 F.2d 91, 98 (2d Cir. 1990) (while a prosecutor may comment on a defendant's failure to call witnesses to contradict the factual character of the government's case or to support the defendant's case, he or she may not "suggest that the defendant has any burden of proof or any obligation to adduce any evidence whatever"); *see also United States v. Mares*, 940 F.2d 455 (9th Cir. 1991) (prosecutor should not argue that the defendant's failure to adequately explain the weaknesses of his or her case requires a guilty verdict because this may impermissibly shift the burden of proof to the defendant).
- Urge the jury "to act as the voice and conscience of the community." *State v. Gell*, 351 N.C. 192, 216 (2000) (although court disapproved of biblical references by prosecutor, his statement, "and let the people of Bertie County say amen," fell within "the permissible practice of 'urg[ing] the jury to act as the voice and conscience of the community'" (quoting *State v. Peterson*, 350 N.C. 518, 531 (1999)); *State v. Walls*, 342 N.C. 1, 62 (1995) (finding prosecutor's argument permissible because it merely reminded jury that its verdict would "send a message" to the people of the county and did not improperly relay to the jury that it should buckle under the pressure of the community). *But see State v. Golphin*, 352 N.C. 364, 471 (2000) (prosecutor cannot encourage the jury to "lend an ear to the community"); *State v. Boyd*, 311 N.C. 408, 418 (1984) (jury's decision cannot be based on "the jury's perceived accountability to the witnesses, to the victim, to the community, or to society in general"); *State v. Privette*, 218 N.C. App. 459 (2012) (finding no prejudicial error but citing *Golphin* and stating that "the prosecutor would have been better advised to have refrained from making some of the comments" about the jury's responsibility to the community that were challenged by defendant on appeal).

- Comment on the defendant's demeanor in the courtroom, including his or her apparent lack of remorse. *State v. Brown*, 320 N.C. 179 (1987); *State v. Myers*, 299 N.C. 671 (1980); *see also State v. Nicholson*, 355 N.C. 1 (2002) (prosecutor stated that defendant seemed bored), *vacated in part on other grounds sub nom. Nicholson v. Branker*, 739 F. Supp. 2d 839 (E.D.N.C. 2010); *State v. Flippen*, 349 N.C. 264 (1998) (prosecutor characterized defendant's demeanor at trial as sniveling). *But see infra* § 33.7C, Impermissible Content (citing cases disapproving of inappropriate characterizations of the defendant).
- Impeach the credibility of an expert witness hired by the defendant, including pointing out that the witness will be remunerated for his or her testimony. *State v. Nicholson*, 355 N.C. 1 (2002); *State v. Norwood*, 344 N.C. 511 (1996). *But see State v. Rogers*, 355 N.C. 420, 463 (2002) (advising counsel that arguments that impute "perjury to a witness on the basis of evidence no more substantial than the mere fact the witness was compensated" are improper).
- Use evidence of the defendant's prior convictions to impeach his or her credibility. *See State v. Tucker*, 317 N.C. 532, 543 (1986) (trial judge erred in allowing prosecutor, during closing argument, to use evidence of defendant's prior convictions as substantive evidence of guilt because impeachment "was the only legitimate purpose for which the evidence was admissible").
- Address the defendant's sexual orientation but only if it is relevant to the issues in the case. *See State v. Ross*, 100 N.C. App. 207 (1990) (permissible for State to argue that the defendant was a homosexual pedophile because it was a reasonable inference from the evidence and it supported the State's theory that the defendant killed the victims to keep his criminal activities from being exposed to the community), *aff'd on other grounds*, 329 N.C. 108 (1991).

Capital cases. "Prosecutors have a duty to advocate zealously that the facts in evidence warrant imposition of the death penalty, and they are permitted wide latitude in their arguments." *State v. Williams*, 350 N.C. 1, 25 (1999).

While wide latitude is allowed in closing arguments in both the guilt and sentencing phases of a trial, "the foci of the arguments in the two phases are significantly different." Thus, rhetoric that might be acceptable in the sentencing phase may be prejudicially improper in the guilt phase of a trial. *State v. Artis*, 325 N.C. 278, 324 (1989), *vacated on other grounds*, 494 U.S. 1023 (1990). "[T]he touchstone for propriety in sentencing arguments is whether the argument relates to the character of the [defendant] or the nature [or circumstances] of the crime." *State v. Brown*, 320 N.C. 179, 203 (1987); *see also State v. Oliver*, 309 N.C. 326 (1983).

Prosecutors have been permitted during the sentencing phase of a capital case to:

- Argue that a death sentence should be imposed and that the jury should not sentence the defendant to life imprisonment. G.S. 15-176.1.
- Argue the possibility that the defendant could pose a future danger to prison staff and inmates if given a sentence of life imprisonment. *State v. Nicholson*, 355 N.C. 1 (2002); *State v. Steen*, 352 N.C. 227 (2000).

- Encourage the jury to sentence the defendant to death to specifically deter that particular defendant from engaging in future murders (as opposed to making a general deterrence argument, which is impermissible). *State v. McNeil*, 350 N.C. 657 (1999); *State v. Syriani*, 333 N.C. 350 (1993).
- Urge the jurors to appreciate the circumstances of the crime. *State v. Gregory*, 340 N.C. 365, 425 (1995) (proper for prosecutor to detail the facts surrounding the murders and to state that "I don't believe any of us are capable of imagining the pure horror that was going on there" because the argument related to the nature of defendant's crimes); *State v. Artis*, 325 N.C. 278, 324 (1989), *vacated on other grounds*, 494 U.S. 1023 (1990) (not improper for prosecutor to ask 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").
- Argue to the sentencing jury that its decision should be based not on sympathy, mercy, or whether it wants to kill the defendant, but on the law. *State v. Rouse*, 339 N.C. 59 (1994).
- Legitimately deprecate the significance of the mitigating circumstances. *See State v. Haselden*, 357 N.C. 1 (2003); *State v. Billings*, 348 N.C. 169 (1998).
- Use victim impact statements regarding the specific harm caused by the murder of the victim and the impact of the murder on the victim's family as long as the victim impact evidence is not so unduly prejudicial that it renders the trial fundamentally unfair. *State v. Bishop*, 343 N.C. 518 (1996) (prosecutor's arguments about the victim and what she could have accomplished served to inform the jury about the specific harm caused by the crime and did not render the trial fundamentally unfair); *Gregory*, 340 N.C. 365 (prosecutor's argument that the deaths of the victims represented a unique loss to their families did not render defendant's trial fundamentally unfair); *see also* G.S. 15A-833 (specifically authorizing the introduction of victim impact evidence in criminal sentencing hearings); *Payne v. Tennessee*, 501 U.S. 808 (1991) (finding that the Eighth Amendment neither prohibits the introduction of victim impact evidence nor bars a prosecutor from arguing such evidence at the sentencing phase of a capital case).
- Ask the jury to imagine the emotions and fear of a victim (*State v. Wallace*, 351 N.C. 481 (2000); *State v. Bond*, 345 N.C. 1 (1996)), or what the victim was thinking at the time of death as long as the argument is fairly premised on evidence and testimony presented at trial. *See State v. Anthony*, 354 N.C. 372 (2001); *State v. Cummings*, 352 N.C. 600 (2000). *But see State v. McCollum*, 334 N.C. 208 (1993) (holding that prosecutor may not ask jurors to put themselves in place of victims and citing *United States v. Pichnarcik*, 427 F.2d 1290 (9th Cir. 1970)).
- Call the jurors each by name and ask them to impose the death penalty as long as it is based on the law and not an attempt to persuade the jury to make a decision on an emotional basis. *See State v. Gell*, 351 N.C. 192 (2000) (no error in allowing prosecutor to address the jurors by name and inform them that it was time for them to impose the death penalty); *State v. Wynne*, 329 N.C. 507, 525 (1991) (no error where prosecutor called each juror by name and "merely asked the individual jurors to have no doubt, not to disregard their duty to deliberate together and reach a unanimous verdict"). *But cf. State v. Holden*, 321 N.C. 125, 163 (1987) (holding that *defense counsel's* argument in which he named each juror individually was improper because

he asked them to spare the defendant's life "on an emotional basis . . . and in disregard of the jurors' duty to deliberate" together toward reaching a unanimous verdict).

- Argue that the defendant deserves the death penalty rather than a "comfortable life in prison." *State v. Forte*, 360 N.C. 427 (2006) (no error where evidence in record supported prosecutor's argument pointing out the amenities that defendant would have if sentenced to life in prison; no objection by defendant at trial); *State v. Alston*, 341 N.C. 198, 252 (1995) (prosecutor's argument "that it is hard to be penitent with televisions, basketball courts, and weight rooms emphasized the prosecution's position that life in prison was not an adequate punishment" for defendant's crime; defendant objected on grounds that this was an improper "general deterrent" argument but there was no specific objection that such argument was based on matters outside the record); *State v. Reeves*, 337 N.C. 700, 732 (1994) (no objection to prosecutor's comment that if sentenced to life, defendant would have a "cozy little prison cell . . . with [a] television set, air conditioning and three meals a day"; court held that the argument was not such an "egregious" use of hyperbole to describe prison life as to require the trial judge to intervene ex mero motu).

Practice note: The prison life argument, discussed immediately above, is another example of a subject in which the courts have sometimes drawn fine lines between improper and proper closing arguments. Counsel therefore should object if the prosecutor argues about a "comfortable" prison life and lists all its amenities since this argument may involve matters outside the record, which are not based on common knowledge, and not all prisons have the same "amenities." *See State v. May*, 354 N.C. 172 (2001) (court acknowledged that prosecutor improperly argued facts not in the record when describing the life that defendant would have in prison (including card games, punching bags, snacks, television, radio, and candy), but held that the trial judge did not abuse his discretion by failing to intervene ex mero motu). For further discussion of this topic, see Jeff Welty, *Evidence and Arguments About Prison Life in Capital Cases*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (Sept. 15, 2014) (noting that prison life evidence has generally been found inadmissible in other jurisdictions, summarizing North Carolina cases that address the propriety of closing arguments that refer to the quality of prison life, and distinguishing generally admissible defense evidence about a defendant's ability to adapt to prison life).

C. Impermissible Content

A prosecutor may argue vigorously, but he or she does not have free reign. In addition to the impermissible arguments discussed *supra* in § 33.2C, Impermissible Content, a prosecutor may not:

- Comment on the defendant's failure to testify. *See* U.S. CONST. amend. V; N.C. CONST. art. I, § 23; G.S. 8-54; *State v. Baymon*, 336 N.C. 748 (1994) (new trial granted where prosecutor's argument directly referred to defendant's failure to testify and was intended to disparage defendant in the eyes of the jury); *State v. Reid*, 334 N.C. 551 (1993) (new trial granted where prosecutor argued that defendant had not

testified, that he had that right, and that the jury was not to hold it against him); *cf. State v. Bovender*, 233 N.C. 683, 689–90 (1951) (*defense counsel* may state the defendant's right not to testify but may not comment on or explain why the defendant did not testify because it "would open the door for the prosecution and create a situation the statute was intended to prevent"). [For a further discussion of commenting on the right not to testify, see *supra* § 21.3B, Right Not to Take the Stand.]

- Comment on the defendant's failure to talk to the police or silence during the investigation, subject to certain exceptions. *See State v. Ward*, 354 N.C. 231 (2001) (trial judge abused his discretion by failing to stop arguments by prosecutor regarding defendant's post-arrest silence where the arguments violated defendant's right to remain silent under the Fifth Amendment of the U.S. Constitution and under article I, section 23 of the N.C. Constitution); *State v. Boston*, 191 N.C. App. 637 (2008) (use of defendant's pre-arrest silence as substantive evidence of guilt violates the Fifth Amendment but if the defendant testifies, the State may use defendant's silence for impeachment purposes if it amounted to a prior inconsistent statement); *see also Doyle v. Ohio*, 426 U.S. 610 (1976) (use of a defendant's post-*Miranda* silence for impeachment purposes violates the Due Process Clause of the Fourteenth Amendment). *But see State v. Buckner*, 342 N.C. 198 (1995) (if *Miranda* warnings were not given, a defendant's post-arrest silence may be used to impeach a defendant without violating a defendant's constitutional rights as long as the evidence is admissible for impeachment purposes under the rules of evidence). For further discussion of the evidentiary use of a defendant's silence, see 2 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 211, at 827–29 (7th ed. 2011); ROBERT L. FARB, ARREST, SEARCH , AND INVESTIGATION IN NORTH CAROLINA, at 676–80 (5th ed. 2016).
- Comment on the defendant's exercise of his or her constitutional right to be free from unreasonable searches to imply guilt. *State v. Davis*, 235 N.C. App. 424 (2014) (unpublished) (holding that prosecutor's statements in closing argument that defendant's refusal to consent to a search of his home was evidence that he was hiding something was clearly improper); *cf. State v. Jennings*, 333 N.C. 579 (1993) (holding that trial judge erred in allowing police officers to testify that defendant refused to allow them to search her room and car because defendant could not be penalized for exercising her constitutional right to refuse a warrantless search).
- Comment on the defendant's failure to plead guilty or his or her exercise of the right to be tried by a jury. *See* U.S. CONST. amend. VI; N.C. CONST. art. I, § 24; *State v. Larry*, 345 N.C. 497 (1997); *see also State v. Degraffenried*, ___ N.C. App. ___, 821 S.E.2d 887, 889 (2018) (admonishing prosecutor "for minimalizing and referring to Defendant's exercise of his right to a trial by jury in a condescending manner"); *State v. Thompson*, 118 N.C. App. 33, 42 (1995) (trial judge erred in overruling defendant's objection to "prosecutor's comments asserting defendant was "hiding behind the law" and "sticking the law in somebody's eye").
- Assert that the defendant is "lying" or call him or her a "liar." *State v. Huey*, 370 N.C. 174 (2017) (finding that while the prosecutor stopped just short of calling defendant a liar, there was no doubt that his argument repeatedly using some variation of "lie" improperly injected his own personal opinion that defendant was lying); *see also*

State v. Sexton, 336 N.C. 321 (1994); *State v. Hunter*, 208 N.C. App. 506 (2010); *State v. Nance*, 157 N.C. App. 434 (2003). *But cf. State v. Tyler*, 346 N.C. 187, 207 (1997) (prosecutor's argument that defendant put his "hand on the Bible and told about 35,000 whoppers" amounted to an argument that the jury should reject defendant's testimony as unbelievable and did "not equate to the type of specific, objectionable language referring to defendant as a liar that would require that defendant be granted a new capital sentencing proceeding"); *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).

- Comment on the defendant's failure to call his or her spouse as a witness. G.S. 8-57 (spousal privilege); *State v. Thompson*, 290 N.C. 431 (1976); *State v. Martin*, 105 N.C. App. 182 (1992). *But see State v. Fearing*, 304 N.C. 471 (1981) (prosecutor properly argued that the State could not call defendant's wife, an occupant of the car, as a witness in response to defendant's argument that the State could have called the occupants of the car as witnesses but did not do so).
- Malign or belittle an expert's profession rather than arguing the law, the evidence, and its inferences. *State v. Smith*, 352 N.C. 531 (2000).
- Impute perjury to an expert witness solely on the basis that the witness had been or will be compensated for his or her services. *State v. Huey*, 370 N.C. 174 (2017); *State v. Rogers*, 355 N.C. 420 (2002).
- Impugn the integrity of defense counsel or assert that he or she should not be trusted. *See State v. Huey*, 370 N.C. 174 (2017); *State v. Hembree*, 368 N.C. 2 (2015).
- Ask the jurors to put themselves in the place of the victims. *State v. McCollum*, 334 N.C. 208, 224 (1993) (citing *United States v. Pichnarcik*, 427 F.2d 1290 (9th Cir. 1970), and assuming argument that asked jurors to imagine the victim was their child was improper).
- Make reference to events and circumstances outside the evidence, such as the infamous acts of others, and make inappropriate comparisons or analogies, either directly or indirectly, to inflame the jury. *State v. Walters*, 357 N.C. 68 (2003) (prosecutor compared the defendant to Hitler in the context of being evil); *State v. Jones*, 355 N.C. 117 (2002) (prosecutor made comparative references to the Columbine school shooting and the Oklahoma City bombing); *State v. Millsaps*, 169 N.C. App. 340 (2005) (prosecutor compared defendant's actions to those of the September 11 terrorists).
- Degrade or compare criminal defendants to members of the animal kingdom. *State v. Roache*, 358 N.C. 243, 297 (2004) (characterizing defendants as a pack of wild dogs "high on the taste of blood and power over their victims"); *State v. Jones*, 355 N.C. 117, 133 (2002) ("lower than the dirt on a snake's belly"); *State v. Richardson*, 342 N.C. 772, 792 (1996) ("animal"); *State v. Smith*, 279 N.C. 163, 165 (1971) ("lower than the bone belly of a cur dog"); *State v. Ballard*, 191 N.C. 122, 124 (1926) ("human hyena").

- Make unfair characterizations about the defendant. *See State v. Bowen*, 230 N.C. 710 (1949) (characterization is not argument and a prosecutor should not be permitted to characterize a defendant or his conduct by uncomplimentary terms that are not supported by the evidence); *State v. Correll*, 229 N.C. 640, 643 (1948) (trial judge "very properly sustained objection to the remarks of counsel characterizing defendant as 'a smalltime racketeering gangster'").
- Make appeals to jurors' racial fears and prejudices. *See McCleskey v. Kemp*, 481 U.S. 279, 309 n.30 (1987) ("the Constitution prohibits racially biased prosecutorial arguments"); *State v. Diehl*, 353 N.C. 433, 439–40 (2001) (Martin, J. dissenting) (stating that prosecutor erred in appealing to "twelve white jurors" in Randolph County because "[t]he jurors' race was wholly irrelevant to the jury's consideration of the evidence in reaching a verdict at defendant's trial"); *see also Bennett v. Stirling*, 842 F.3d 319 (4th Cir. 2016) (reversing defendant's sentence of death because prosecutor's repeated remarks characterizing defendant as King Kong, a subhuman primitive being, and a wild, vicious animal were unmistakably calculated to inflame the jury's racial fears and therefore violated due process); ALYSON A. GRINE & EMILY COWARD, RAISING ISSUES OF RACE IN NORTH CAROLINA CRIMINAL CASES § 8.6E, Closing Argument (2014) (offering practical advice on challenging improper references to race during prosecutor's closing argument).
- Tell the jury that the community demands conviction and punishment of the defendant. *State v. Nicholson*, 355 N.C. 1 (2002), *vacated in part on other grounds sub nom. Nicholson v. Branker*, 739 F. Supp. 2d 839 (E.D.N.C. 2010); *State v. Erlewine*, 328 N.C. 626 (1991); *see also State v. Golphin*, 352 N.C. 364, 471 (2000) (prosecutor cannot encourage the jury to "lend an ear to the community"); *State v. Boyd*, 311 N.C. 408, 418 (1984) (jury's decision cannot be based on "the jury's perceived accountability to the witnesses, to the victim, to the community, or to society in general").
- Argue that evidence admissible only to impeach the defendant's credibility should be considered as substantive evidence. *State v. Tucker*, 317 N.C. 532 (1986).
- Assert that favorable rulings on the defendant's motions to exclude the admission of certain evidence are the result of "an effort on defendant's part to obscure the truth." *State v. Brown*, 327 N.C. 1, 19 (1990).
- Exaggerate the likelihood of a defendant's release if found not guilty by reason of insanity. *State v. Dalton*, 369 N.C. 311 (2016); *State v. Millsaps*, 169 N.C. App. 340 (2005).
- Use scatological language when referring to the defendant's theory of the case. *State v. Matthews*, 358 N.C. 102 (2004) (prosecutor's closing argument during which he called defendant's theory of the case "bull crap" was inappropriate and exceeded proper boundaries); *see also State v. Duke*, 360 N.C. 110 (2005) (noting that the prosecutor's use of the term "crap" during closing argument was "less than professional" but was not so grossly improper as to require the trial judge to intervene ex mero motu).

Capital cases. In the sentencing phase of a capital case, prosecutors are given more latitude to incorporate reasonable inferences and conclusions about the victim and the defendant as long as they are drawn from the evidence. However, mere conclusory

arguments that are not reasonable (such as name-calling) or that are premised on matters outside the record (such as comparing the defendant's crimes to infamous acts) remain inappropriate. *See State v. Walters*, 357 N.C. 68 (2003).

During the sentencing phase of a capital case, prosecutors may not:

- Argue the general deterrent effect of the death penalty. *State v. Hill*, 311 N.C. 465 (1984); *State v. Kirkley*, 308 N.C. 196 (1983); *cf. State v. Cherry*, 298 N.C. 86 (1979) (criminal *defendants* may not offer evidence during the penalty phase to show that capital punishment does not have any deterrent effect).
- Make arguments that minimize the jury's sense of the importance of its role or lead the jury to believe that the responsibility for determining the appropriateness of the death penalty for the defendant rests elsewhere. *State v. Green*, 336 N.C. 142 (1994); *State v. Daniels*, 337 N.C. 243 (1994); *see also Caldwell v. Mississippi*, 472 U.S. 320 (1985).

Practice note: If you suspect that the prosecutor intends to make improper statements during closing argument (such as biblical references or fundamentally unfair victim impact assertions), you should consider filing a motion in limine before closing arguments asking the trial judge to preclude the prosecutor from making those arguments. If the motion is denied, you should also object to the prosecutor's statements *at the time they are made* to preserve the issue for appeal. *See infra* § 33.8, Preservation of Issues for Appellate Review. A sample "Motion to Restrict Prosecutor's Argument" is located on the website of the Office of Indigent Defense Services in the Capital Trial Motions Bank.

D. Invited Response

Statements made by the prosecutor during closing argument are not viewed in "'an isolated vacuum'" on appeal. *State v. Elliott*, 344 N.C. 242, 283 (1996) (citation omitted). Appellate courts will give fair consideration "'to the context in which the remarks were made and to the overall factual circumstances to which they referred.'" *Id.* (citations omitted) (internal quotation marks omitted).

Appellate courts have occasionally found that counsel, in his or her closing argument to the jury, has invited responsive or retaliatory argument by opposing counsel. *See, e.g.*, *Crutcher v. Noel*, 284 N.C. 568 (1974); *State v. Knotts*, 168 N.C. 173 (1914); *State v. Barber*, 93 N.C. App. 42 (1989); *see also State v. Trull*, 349 N.C. 428 (1998) (prosecutor may appropriately respond to defense counsel's closing arguments that are critical of the State's investigation and witnesses); *State v. Larrimore*, 340 N.C. 119 (1995) (prosecutor was allowed to respond to arguments made by defense counsel questioning the credibility of police detective); *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); *State v. Cole*, 147 N.C. App. 637 (2001) (defendant's argument that the victim was a drug dealer and was killed by a disgruntled client invited prosecutor to argue that defendant was a drug dealer and the killing was drug-related); *see also*

supra § 33.2F, Biblical References (discussing invited response specifically in relation to biblical references).

Practice note: In preparing your closing argument, you must carefully consider whether any of your statements "open the door" to what would otherwise be considered improper comments by the prosecutor. If any statements raise that possibility, consider removing them or be prepared to object to the prosecutor's response and to argue why the prosecutor's response is inappropriate.
