Chapter 33
Closing Arguments

Closing argument is a vital part of the adversarial process that forms the basis of our justice system and can be a critical part of winning a case. *State v. Jones*, 355 N.C. 117, 135 (2002). It is the "last clear chance" for the defense to persuade the trier of fact of the defendant's innocence or lesser culpability. *Herring v. New York*, 422 U.S. 853, 862 (1975). This chapter covers the procedural rules relating to closing arguments as well as the limitations on their scope.

The website of the Office of Indigent Defense Services has a collection of materials on Closing Arguments by various authors that may be accessed in the Training and Reference Materials Index under the topic "Trial Practice." For additional considerations and recommendations on developing closing arguments, as well as objecting to improper arguments by prosecutors, see *infra* Appendix 33-1, Guideline 7.7 Closing Argument from N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL (Nov. 2004). For the complete guidelines, see *infra* Appendix A of this manual.

33.1 Right to Closing Argument

The defendant has a constitutional right under the Sixth Amendment to the U.S. Constitution to have his or her counsel make a closing argument. *Herring v. New York*, 422 U.S. 853 (1975). The trial judge cannot deny the defendant this right no matter how strong the prosecution's case may be. *Id.*; *see also State v. Eury*, 317 N.C. 511 (1986) (the right to make a closing argument is a substantial legal right of which the defendant cannot be deprived by the exercise of a trial judge's discretion).

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.

33.3 Time Limits

Misdemeanor and noncapital felony cases in superior court. Judges in superior court are authorized to limit the time of closing argument to "not less than one hour on each side" in misdemeanor cases and "not less than two hours on each side" in noncapital felony cases. On motion of a party, the trial judge, in his or her discretion, may allow additional time if the interests of justice require it. G.S. 7A-97.

Capital cases. The trial judge may not limit the time of closing argument in capital cases "otherwise than by consent," but the judge may limit the number of attorneys who address the jury to three on each side. G.S. 7A-97.

33.4 Number of Addresses

Misdemeanor and noncapital felony cases in superior court. G.S. 7A-97 (formerly G.S. 84-14) states that "[i]n all trials in the superior courts there shall be allowed two addresses to the jury for the State . . . and two for the defendant." If the defendant does not offer evidence, he or she is entitled to open and close the arguments to the jury. *See* N.C. GEN. R. PRAC. SUPER. & DIST. CT. 10; *see also State v. Eury*, 317 N.C. 511 (1986). If the defendant is represented by two attorneys, one may make the opening argument to the jury and the other the closing, or the defendant can waive opening argument and both attorneys can do a closing. *Eury*, 317 N.C. 511. However, if the defendant does offer evidence, he or she is only entitled to argue to the jury before the State argues. *See infra* § 33.5A, Right to Last Argument. If the defendant has two attorneys, both may address the jury during that closing argument as long as they stay within the time limits set out *supra* in § 33.3, Time Limits. *See Eury*, 317 N.C. 511 (discussing G.S. 84-14, the predecessor to G.S. 7A-97); *State v. Gladden*, 315 N.C. 398 (1986) (same); *State v. McCaskill*, 47 N.C. App. 289 (1980) (same).

Capital cases. There is no limit as to the number of addresses, but the judge may limit the number of attorneys who address the jury to three on each side. G.S. 7A-97. This statute (formerly G.S. 84-14) has been interpreted to mean that if the defendant offers evidence at the guilt-innocence phase, all of his or her addresses to the jury must be made before the State's closing argument. Up to three attorneys may address the jury during this argument, and each attorney may argue as often and for as long as he or she wishes. "Thus, for example, if one defense attorney grows weary of arguing, he may allow another defense attorney to address the jury and may, upon being refreshed, rise again to make another address during the defendant's time for argument." *State v. Gladden*, 315 N.C. 398, 421 (1986).

If the defendant does not offer evidence at the guilt-innocence phase, he or she is entitled both to open and close the arguments to the jury, and the defendant's attorneys (up to three) may address the jury "as many times as they desire during the closing phase of the argument." *State v. Eury*, 317 N.C. 511, 516–17 (1986). In *Eury*, the capital defendant did not present evidence, and her two attorneys sought permission for both to be allowed

to address the jury after the State's closing argument. The trial judge denied this request and ruled that one of the defendant's attorneys could "open" argument, the State would argue, then the defendant's other attorney could make the final argument. The N.C. Supreme Court found that the trial judge erred in refusing the defendant's request and that the defendant was entitled to have both of his attorneys address the jury for as long as they wished after the State's closing argument. *See also State v. Mitchell*, 321 N.C. 650 (1988) (trial judge erred in refusing to permit both of defendant's attorneys to address the jury during final arguments of both phases of his capital trial).

A trial judge's refusal to permit up to three of the defendant's counsel to address the jury if they wish during the defendant's final arguments in both the guilt-innocence and sentencing phases constitutes prejudicial error per se. That error in the guilt-innocence phase entitles the defendant to a new trial as to the capital felony. Also, if a capital felony has been joined for trial with noncapital charges, the trial judge's failure to allow all of the defendant's counsel to make the closing argument is prejudicial error on the noncapital as well as the capital charges. *Mitchell*, 321 N.C. 650; *Eury*, 317 N.C. 511; *see also State v. Campbell*, 332 N.C. 116 (1992) (new trial granted where trial judge only allowed one of defendant's attorneys to address the jury during final argument in the guilt-innocence phase of his trial). If the error is made during the sentencing phase, the defendant is entitled to a new sentencing hearing. *See State v. Simpson*, 320 N.C. 313 (1987).

Practice note: If more than one attorney wishes to argue during final argument of a noncapital case or during either phase of a capital case, you should specifically announce this intention to the court and "request permission" to do so. Unless the record shows a clear refusal of the trial judge to permit more than one attorney to argue during final argument, the error may be waived for appellate purposes. *Compare State v. Williams*, 343 N.C. 345, 369 (1996) (overruling defendant's assignment of error because the court could not interpret the judge's ambiguous statements in the transcript as showing that he "refused to permit both of defendant's attorneys to argue after the State where they never specifically requested to do so and never objected"), *with State v. Barrow*, 350 N.C. 640, 644 (1999) (defense attorney's announcement in the guilt-innocence phase of a capital case in which defendant presented no evidence that the defense wished to make three closing arguments—one opening argument by one defense attorney and two final arguments, one by each of defendant's two attorneys, after the State's closing arguments—was a "clear request" and the trial judge's failure to allow the request was prejudicial error per se).

33.5 Order of Arguments

A. Right to Last Argument

Noncapital cases. A defendant who does not introduce evidence after the State has rested is entitled as a matter of right to open and close argument to the jury. *See* N.C. GEN. R. PRAC. SUPER. & DIST. CT. 10 ("[I]f no evidence is introduced by the defendant, the right

to open and close the argument to the jury shall belong to him."). The right to final argument is a substantial legal right that cannot be taken away by an exercise of judicial discretion, and the erroneous denial of this critically important right entitles a defendant to a new trial. *State v. Raper*, 203 N.C. 489 (1932); *State v. English*, 194 N.C. App. 314 (2008); *State v. Hall*, 57 N.C. App. 561 (1982).

If the defendant introduces evidence within the meaning of Rule 10 of the N.C. General Rules of Practice for the Superior and District Courts, the State has the right to the opening and final closing arguments. *State v. Battle*, 322 N.C. 69 (1988); *State v. Gladden*, 315 N.C. 398 (1986); *State v. Pickard*, 107 N.C. App. 94 (1992); *State v. Curtis*, 18 N.C. App. 116 (1973). Eliciting evidence by the cross-examination of a State's witness is usually not considered the "introduction" of evidence by the defendant and does not deprive him or her of the right to last argument. *See Raper*, 203 N.C. 489; *see also infra* § 33.5B, What Constitutes "Introduction" of Evidence.

Multiple defendants. In a case involving multiple defendants, the State is entitled to the final argument if any one of the defendants introduces evidence. N.C. GEN. R. PRAC. SUPER. & DIST. CT. 10; *see also State v. Taylor*, 289 N.C. 223 (1976); *State v. Diaz*, 155 N.C. App. 307 (2002).

Capital cases. If the defendant offers evidence, then all of his or her addresses to the jury during the *guilt-innocence* phase must be made before the prosecution's closing argument. *State v. Gladden*, 315 N.C. 398 (1986). A defendant always has the right to the last argument in the *sentencing phase* of a capital case even if he or she has presented evidence during the sentencing phase. G.S. 15A-2000(a)(4); *State v. Barrow*, 350 N.C. 640 (1999). While G.S. 15A-2000(a)(4) grants a defendant the right to last argument in the sentencing phase, it does not give him or her the right to make both the first and last arguments. *State v. Wilson*, 313 N.C. 516 (1985).

B. What Constitutes "Introduction" of Evidence

Generally. A defendant clearly "introduces" evidence when he or she offers witness testimony or exhibits during the presentation of his or her case. However, even if a defendant does not formally offer testimony or other evidentiary matter during his or her case, the right to final argument may still be lost if the judge finds that the defendant "introduced" evidence, within the meaning Rule 10 of the N.C. General Rules of Practice for the Superior and District Courts, during the *cross-examination* of a State's witness. This can happen notwithstanding that (1) "any testimony elicited during cross-examination is 'considered as coming from the party calling the witness, even though its only relevance is its tendency to support the cross-examiner's case'"; and (2) the general rule is that there is no right to offer evidence during cross-examination of the other party's witness. *State v. Shuler*, 135 N.C. App. 449, 452–53 (1999) (quoting 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 170, at 559 (5th ed. 1998) [now, § 170 at 646 (8th ed. 2018)]. While there is generally no right to "offer" evidence during cross-examination, the trial judge, in his or her discretion, may vary the

order of proof to allow the introduction of defense evidence during the State's case. *Shuler*, 135 N.C. App. 449, 452–53.

It is not always easy to determine what constitutes the "introduction" of evidence in North Carolina, but recent decisions recognize that cross-examination typically does not constitute the "introduction" of evidence.

The *Hall* test. The N.C. Court of Appeals first attempted to establish a test for determining when evidence has been introduced in *State v. Hall*, 57 N.C. App. 561 (1982). Defense counsel in *Hall* questioned a State's witness on cross-examination about the color of a sweatsuit allegedly worn by the defendant. In order to impeach the witness, defense counsel then showed the witness the sweatsuit and asked him to describe its colors (which were different than those earlier described by the witness). Although the sweatsuit was never formally offered into evidence and it was not given to the jury for examination, the trial judge held that the defendant had "introduced" the sweatsuit into evidence during his cross-examination and thereby lost the right to final argument.

The N.C. Court of Appeals reversed, finding that the trial judge erred in denying the defendant the right to final argument. The court stated that *"the proper test as to whether an object has been put in evidence is whether a party has offered it as substantive evidence or so that the jury may examine it and determine whether it illustrates, corroborates, or impeaches the testimony of a witness." Id.* at 564 (emphasis added). The sweatsuit in *Hall* was not offered into evidence because it was not given to the jury "for the purpose of their determination as to whether it impeached the witness." *Id.* The court further stated that if the party merely shows something to a witness in order to refresh his or her recollection, it has not been "offered" into evidence.

The N.C. Supreme Court relied on the *Hall* test in *State v. Macon*, 346 N.C. 109 (1997). In *Macon*, the defendant asked an officer on cross-examination about statements made by the defendant during an interview with that officer. The officer stated that another officer had made notes during that interview. Defense counsel then had the testifying officer read from the other officer's notes. The notes were marked as an exhibit but were not formally offered into evidence and were not published to the jury. The trial judge found that when defense counsel had the officer read the notes to the jury, the defendant had offered evidence and lost his right to open and close jury argument. The N.C. Supreme Court agreed, quoting the *Hall* test, but the court's reasoning was not entirely consistent with *Hall.* The court found that the contents of the notes were offered for substantive purposes, not impeachment or corroboration, suggesting that had the cross-examination been for impeachment or corroboration purposes, it would not have constituted the introduction of evidence. *Id*. at 114.

The *Shuler* test. In *State v. Shuler*, 135 N.C. App. 449 (1999), the N.C. Court of Appeals revisited the "introduction of evidence" issue. The defendant in *Shuler* was charged with multiple counts of embezzlement. One of the defendant's co-workers testified for the State about statements made by the defendant during an interview that both had attended. On cross-examination, defense counsel questioned the witness further about the interview

and read portions of the transcript of the interviews to the witness to put the defendant's statements in context. Defense counsel also asked the witness about new matters and about the witness's accounting procedures. The trial judge ruled that the defendant had introduced evidence and had thereby lost the right to last argument.

In reviewing the trial judge's decision, the N.C. Court of Appeals stated that *evidence is "introduced" during cross-examination within the meaning of Rule 10 of the N.C. General Rules of Practice for the Superior and District Courts when (1) "it is 'offered' into evidence by the cross-examiner and accepted as such by the trial court"; or (2) "[a]lthough not formally offered and accepted into evidence, . . . new matter is presented to the jury during cross-examination and that matter is* not *relevant to any issue in the case." Id.* at 452–53 (citations omitted and emphasis added). After reviewing the cross-examination testimony in *Shuler*, the court found that the trial judge had committed reversible error when he denied the defendant the right to final argument because the defendant had not "introduced" evidence and the matters that the defendant raised, although new, were relevant to testimony given during direct examination.

Subsequent cases. Cases decided by the N.C. Court of Appeals after *Hall* and *Shuler* have utilized either the *Shuler* or *Hall* test or both the *Hall* and *Shuler* tests. *See, e.g., State v. Hogan*, 218 N.C. App. 305 (2012) (defendant did not introduce evidence under Rule 10 when, during cross-examination of the prosecuting witness, defense counsel read and referenced the witness's police statement; court relied on a case that based its holding on *Shuler* and found that the statements used by defense counsel "were 'directly related to [the witness's] own testimony on direct examination.'") (citation omitted); *State v. Matthews*, 218 N.C. App. 277 (2012) (defendant questioned police officer on cross-examination and identified a report made by that officer in which another man was identified as a suspect; court, citing *Shuler*, granted a new trial and stated that it could not "say that the identification of other suspects by police constituted new evidence that was 'not relevant to any issue in the case.'"); *State v. English*, 194 N.C. App. 314 (2008) (after acknowledging the *Hall* test, the court found that defendant did not introduce evidence by eliciting detective's testimony about a statement taken during the investigation, contained in the detective's report, because the testimony related to evidence introduced on direct examination and could have been an attempt to impeach the co-defendant; it did not amount to "new matter" under *Shuler*); *State v. Hennis*, 184 N.C. App. 536 (2007) (defendant did not offer evidence under either the *Hall* or *Shuler* test when, on cross-examination, he had an officer draw a diagram of the arrest scene and questioned him about changes to an incident report that were added months after it was initially written); *State v. Bell*, 179 N.C. App. 430 (2006) (finding under the *Shuler* test that the defendant did not introduce evidence during his cross-examination of a drug chemist regarding the method and instruments she used to identify the substance seized from the defendant because the cross-examination was relevant and directly related to the chemist's testimony on direct); *State v. Wells*, 171 N.C. App. 136 (2005) (defendant did not introduce evidence under the *Shuler* test when he cross-examined a State's witness about his prior inconsistent statement because the statement directly related to the witness's testimony on direct examination). *But see State v. Lindsey*, ___ N.C. App. ___, 791 S.E.2d 496 (2016) (unpublished) (citing both *Hall* and *Shuler,* and finding that trial

judge did not err in determining that defendant introduced substantive evidence when he played a videotape of the vehicle stop since the playing of the video allowed the jury to hear exculpatory statements by defendant that went beyond officer's direct testimony and introduced new evidence of flashing lights not otherwise in evidence); *State v. Wolfe*, 205 N.C. App. 324 (2010) (unpublished) (court cited both the *Hall* and *Shuler* tests, then upheld ruling by trial judge that defendant lost the last argument when he played a voice mail message during the cross-examination of a detective; following *Hall*, court found that the message was not introduced to illustrate the detective's testimony but was substantive evidence used to exculpate defendant).

Practice note: If you intend to cross-examine a State's witness about an object or document that has not been previously introduced by the State, be prepared to argue that you have not introduced evidence within the meaning of Rule 10 of the N.C. General Rules of Practice for the Superior and District Courts. If the facts permit, you should argue that you have not offered evidence under either the *Hall* test or the *Shuler* test and that the exhibit relates to the witness's testimony on direct examination or, at least, to other issues in the case.

Additional reference. For further discussion of the loss of the right to open and close arguments, see 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 166, at 614 n.517, and § 170, at 647 n.609 (8th ed. 2018). For a quick guide to which party gets last argument with links to supporting cases, see Jonathan Holbrook, *Who Goes Last?*, N.C. CRIM. L., UNC SCH. OF GOV'T BLOG (July 10, 2018).

33.6 Admissions of Guilt During Closing Argument

A. Defendant's Consent Required Prior to Admission of Guilt

If trial counsel concludes that the best trial strategy is to concede a defendant's guilt to a criminal charge in order to secure a conviction for a less serious offense (or a sentence of life instead of death), counsel must obtain the defendant's express informed consent before making such a concession. *See State v. Harbison*, 315 N.C. 175 (1985). The decision to consent "must be made exclusively by the defendant," and it must be "made knowingly and voluntarily . . . after full appraisal of the consequences." *Id.* at 180; *see also State v. Thomas*, 327 N.C. 630 (1990) (remanding case to superior court for an evidentiary hearing to determine whether defendant knowingly consented to concessions of guilt made by trial counsel during closing argument); *State v. Perez*, 135 N.C. App. 543 (1999) (due process requires that a defendant's consent to concede guilt be made knowingly and voluntarily after full appraisal of the consequences). The requirement that a defendant give express consent also applies to admissions made during opening statements, discussed *supra* in § 28.6, Admissions of Guilt During Opening Statement. It also appears to apply to concessions made during jury selection. *Cf. State v. Strickland*, 346 N.C. 443 (1997).

Generally, if counsel admits the defendant's guilt without first obtaining consent, it is per se ineffective assistance of counsel in violation of the Sixth Amendment to the U.S. Constitution and article I, sections 19 and 23 of the N.C. Constitution because counsel's admission deprives the defendant of the right to have his or her guilt or innocence determined by the jury. *See Harbison*, 315 N.C. 175, 180 ("When counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away."); *see also State v. Wiley*, 355 N.C. 592, 619 (2002).

In *Florida v. Nixon*, 543 U.S. 175, 192 (2004), the U.S. Supreme Court held on the facts of the case that, under the U.S. Constitution, counsel's admission during opening statement of the defendant's guilt without his express consent was not per se ineffective assistance of counsel but was subject to the prejudice analysis of *Strickland v. Washington*, 466 U.S. 668 (1984). The Court reasoned, "[I]n a capital case, counsel must consider in conjunction both the guilt and penalty phases in determining how best to proceed. When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent." *Nixon*, 543 U.S. 175, 192. Although the N.C. Supreme Court has had opportunities to do so, it has not disavowed the *Harbison* rule in light of the narrow ruling in *Nixon. See State v. Goss*, 361 N.C. 610 (2007); *State v. Campbell*, 359 N.C. 644 (2005); *see also State v. Maready*, 205 N.C. App. 1 (2010) (discussing *Nixon* and holding that North Carolina continues to adhere to the *Harbison* rule).

In *McCoy v. Louisiana*, ___ U.S. ___, 138 S. Ct. 1500 (2018), the U.S. Supreme Court reinforced the right of the defendant to control his or her defense. In *McCoy*, defense counsel conceded the defendant's guilt on multiple occasions throughout the guilt and sentencing phases of trial despite the defendant's repeated and express objections. The U.S. Supreme Court found that under the Sixth Amendment a defendant retains the autonomy to decide that the objective of his or her defense is to assert innocence, much like the decisions "whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and to forego an appeal." 138 S. Ct. at 1508. The Court distinguished *Florida v. Nixon*, where the defendant remained silent and never expressed any objection to defense counsel's strategy of conceding guilt. The defendant in *McCoy* clearly was opposed to that strategy and made this known "before and during trial, both in conference with his lawyer and in open court." 138 S. Ct. at 1509. The error was not subject to the prejudicial error analysis for ineffective assistance of counsel under *Strickland v. Washington* because the issue was the client's autonomy, not counsel's competence. Instead, this violation ranked as structural error; the defendant did not need to show prejudice to obtain relief.

Under *Harbison*, it remains reversible error in North Carolina for an attorney to concede a defendant's guilt without his or her express informed consent. *Harbison* does not require that a defendant object to this strategy.

The rule prohibiting defense counsel from admitting a defendant's guilt to the jury without the defendant's consent applies only to the guilt-innocence phase of a trial. Our courts have stated that it does not apply to sentencing proceedings. *State v. Boyd*, 343 N.C. 699 (1996); *State v. Walls*, 342 N.C. 1 (1995). As discussed in the following practice note, *Harbison* may apply to *Blakely* sentencing factors.

Practice note: *Boyd* and *Walls*, cited above, were decided before the line of U.S. Supreme Court cases culminating in *Blakely v. Washington*, 542 U.S. 296 (2004), in which the Court recognized that circumstances that increase a defendant's sentence beyond the maximum authorized for an offense are the functional equivalent of an element of a greater offense. *See also Ring v. Arizona*, 536 U.S. 584 (2002) (holding that factors that authorize imposition of the death penalty are subject to the same analysis). The N.C. appellate courts have not specifically considered the impact of *Blakely* and like cases on the application of *Harbison* to what previously were characterized as purely sentencing matters, such as the determination of aggravating factors. *Cf. State v. Harris*, 175 N.C. App. 360 (2006) (observing that North Carolina cases finding that defense counsel's concession of aggravating factors were a sufficient admission by the defendant were not applicable after *Blakely*, which requires a valid waiver by the defendant of the right to a jury trial; the court cites *Harbison* in support of the requirement of a valid waiver), *vacated on other grounds*, 361 N.C. 154 (2006) (remanding for determination whether the failure to submit aggravating factors to the jury was harmless beyond a reasonable doubt). *But cf. State v. Womack*, 211 N.C. App. 309 (2011) (relying on prior cases and rejecting the argument that defense counsel violated *Harbison* by conceding the defendant's prior convictions at the habitual felon phase of the case without the defendant's consent because, among other things, *Harbison* does not apply to proceedings to determine whether the defendant's sentence should be enhanced).

Regardless of how the N.C. appellate courts resolve this issue, as a practical matter defense counsel should ***not*** admit in jury argument a matter that increases the defendant's sentence beyond the statutory maximum for the underlying offense without the client's consent.

B. What Constitutes Admission of Guilt

Admission must be express. There must be an actual admission of guilt to the charged offense or to a lesser included offense for *Harbison* error to occur. *See, e.g., State v. Matthews*, 358 N.C. 102 (2004) (finding per se ineffective assistance of counsel where defense counsel, without permission, conceded defendant's guilt to the lesser included offense of second degree murder).

An express admission of guilt to an offense that is neither charged nor a lesser included offense of the charged offense, will not be found to be erroneous. *See, e.g., State v. Roache*, 358 N.C. 243, 283-84 (2004) (holding that defense counsel's admission that defendant committed a murder not at issue in the case for which defendant was being tried "does not rise to the level of the act condemned by" the *Harbison* court); *State v. Wilson,* 236 N.C. App. 472 (2014) (no error where defense counsel noted in closing that

defendant was guilty of assault pointing a gun because this was not a lesser included offense of the charged crime of attempted first degree murder).

It is not impermissible under *Harbison* to argue that the defendant is innocent or not guilty, but if he or she is found guilty of any crime, it should be of a lesser included offense or of a lesser crime for which he or she has not been charged. *See State v. Gainey*, 355 N.C. 73, 93 (2002) (defense counsel did not admit guilt to murder but only that "if he's guilty of anything, he's guilty of accessory after the fact"); *State v. Harvell*, 334 N.C. 356 (1993) (finding no admission of guilt where defense counsel argued defendant was not guilty of first or second murder and that if the evidence tended to show the commission of any crime, it was voluntary manslaughter); *State v. Greene*, 332 N.C. 565, 572 (1992) (no admission of guilt where defense counsel argued that the defendant was innocent of all charges, but if found guilty of any charge it should be of the lesser crime of involuntary manslaughter "because the evidence came closer to proving that crime than any of the other crimes charged"); *see also State v. Hinson*, 341 N.C. 66 (1995) (defense counsel's statements regarding the guilt of a co-defendant did not amount to an admission that the defendant himself had committed any crime).

Admissions of facts or elements. Merely admitting the existence of a fact or an element of an offense is not the equivalent of an admission of guilt. *See State v. Wiley*, 355 N.C. 592 (2002) (placed in context, defense counsel's remarks that there may be some physical evidence linking the defendant to the murder victim's car did not constitute an admission); *State v. Strickland*, 346 N.C. 443 (1997) (statements by defense counsel during jury voir dire that the uncontroverted evidence showed that the defendant was holding a gun when the victim was killed did not amount to a concession of guilt to which defendant had not agreed); *State v. Fisher*, 318 N.C. 512 (1986) (defense counsel's admission of the existence of malice was not an admission of guilt so it was not per se ineffective assistance of counsel); *State v. Maniego*, 163 N.C. App. 676 (2004) (defense counsel's admission of the fact that the defendant was present at the scene of the crime was not an admission of guilt and was consistent with the theory of defense).

Admission of other non-charged offenses. Defense counsel's admission of a defendant's guilt of an offense for which defendant is not on trial is not prohibited by *Harbison*. *See, e.g., State v. Roache*, 358 N.C. 243, 284 (2004) (holding that defense counsel's admission of defendant's guilt of a murder for which he was not being tried did "not rise to the level of the act condemned by this Court in *Harbison*"); *State v. Wilson*, 236 N.C. App. 472 (2014) (finding no *Harbison* error in an attempted murder case where defense counsel conceded defendant's guilt of assault by pointing a gun; the purported admission by defense counsel did not refer to either the crime charged or to a lesser-included offense).

Assertion of defense. Some defenses may constitute an admission of guilt, at least of a lesser offense, and require the defendant's consent. *See State v. Johnson*, 161 N.C. App. 68 (2003) (defense counsel in opening statement stated that defendant was unable to premeditate and deliberate killings because of his intoxication and jury should return verdict of lesser offense; trial judge's inquiry of defendant was adequate to show consent); *see also State v. Berry*, 356 N.C. 490 (2002) (trial judge conducted *Harbison*

inquiry to determine whether defendant consented to insanity defense, which necessitated admission of critical aspects of charged offense).

C. Procedural Requirements

Although there is no particular procedure that the trial judge "must invariably follow when confronted with a defendant's concession" (*State v. Berry*, 356 N.C. 490, 514 (2002)), an on-the-record exchange between the trial judge and the defendant is the preferred method of determining whether the defendant knowingly and voluntarily consented to an admission of guilt. *See State v. McDowell*, 329 N.C. 363 (1991); *see also State v. Matthews*, 358 N.C. 102, 108 (2004) (holding that *Harbison* requires more than implicit consent based on an overall trial strategy and the defendant's intelligence). A clear record of consent is required, but the trial judge need not engage in the formal colloquy that is required for a guilty plea under G.S. 15A-1022(a). *State v. Perez*, 135 N.C. App. 543 (1999). The trial judge "must be satisfied that, prior to any admissions of guilt at trial by a defendant's counsel, the defendant must have given knowing and informed consent, and the defendant must be aware of the potential consequences of his decision." *State v. Maready*, 205 N.C. App. 1, 7 (2010) (citations omitted) (finding per se ineffective assistance of counsel where defense counsel failed to obtain defendant's express consent before admitting defendant's guilt to two counts of assault and to the lesser included offense of involuntary manslaughter). Appellate courts will not presume the defendant's lack of consent from a silent record. *State v. Boyd*, 343 N.C. 699 (1996).

If a defendant consents to the admission of guilt based on a particular defense strategy, the trial judge should determine whether the consent is contingent on the presentation of the defense or whether consent is withdrawn if the defense is later abandoned during trial. When a trial judge is faced with ambiguous statements regarding the departure from or abandonment of a particular defense strategy, the better practice is for him or her "to question the defendant on the record in order to ascertain, clearly, whether or not a particular defense strategy has been abandoned and whether or not the consent to an admission of guilt previously given has been withdrawn." *State v. Peoples*, 237 N.C. App. 100 (2014) (unpublished) (finding no *Harbison* error where defendant never explicitly withdrew his clear consent to concede guilt even though his concession was based on his erroneous belief that the defense of entrapment was available and he was told by the trial judge prior to trial that it was not available under the facts); *see also Berry*, 356 N.C. 490 (holding that trial judge was justified in assuming defendant's *Harbison* waiver remained valid throughout the trial in light of the absence of notice by defendant that his express consent to admit participation in a murder was conditioned on maintaining his insanity defense).

Practice note: If you decide that a concession of guilt is the best strategy in a particular case, it is imperative that you fully discuss the value of such a concession with the defendant. Before admitting guilt to the charge or to a lesser included offense during any part of the trial, present the defendant's written consent to the trial judge if you have obtained one or ask the judge to inquire of the defendant and obtain his or her express consent on the record. *See State v. House*, 340 N.C. 187, 197 (1995) (urging "both the bar

and the trial bench to be diligent in making a full record of a defendant's consent when a *Harbison* issue arises at trial").

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 853–55 (8th ed. 2018); 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.

33.8 Preservation of Issues for Appellate Review

A. Necessity for Objection

If the prosecutor makes improper and prejudicial statements during closing argument, defense counsel must object before the verdict to preserve the issue for appeal. "Upon objection, the trial court has the duty to censor remarks not warranted by the evidence or law. . . ." *State v. Anderson*, 322 N.C. 22, 37 (1998). Absent an objection, the trial judge only has a duty to intervene, ex mero motu, if the prosecutor's argument is grossly improper. *Id.*; *see also infra* § 33.8B, Waiver.

Generally, when a party objects to an improper argument of counsel, "it is not sufficient for the court merely to stop the argument without instructing the jury, either at the time or in the jury charge, to ignore the improper argument." *State v. Barber*, 93 N.C. App. 42, 48 (1989). However, when an objection to an improper argument is sustained, it is incumbent on the defendant to request a curative instruction. If he or she does not request a curative instruction, the judge does not err in failing to give one. *Id.*; *State v. Goblet*, 173 N.C. App. 112 (2005).

If a timely objection to an improper argument is made, the trial judge's error in failing to sustain the objection will be reviewed by the appellate court for an abuse of the trial judge's discretion. *See State v. Walters*, 357 N.C. 68 (2003); *State v. Jones*, 355 N.C. 117 (2002); *see also State v. Rashidi*, 172 N.C. App. 628 (2005) (to justify a new trial under the abuse of discretion standard of review, a prosecutor's improper remark during closing arguments must have been so grave that it prejudiced the result of the trial), *aff'd per curiam*, 360 N.C. 166 (2005).

Practice note: "It is not impolite to interrupt opposing counsel's summation—it is mandatory to preserve error and stop the prejudice." Ira Mickenberg, *Preserving the Record and Making Objections at Trial: A Win-Win Proposition for Client and Lawyer*, at 4 (North Carolina Defender Trial School, July 2012). Assert both statutory and constitutional grounds for the objection if applicable. State on the record that the improper argument violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution, as well as article I, sections 19, 23, and 27 of the N.C. Constitution. If your objection is sustained, immediately ask the judge to instruct the jury to disregard the improper statements. You should also carefully consider whether further remedy is necessary or whether it would serve to draw further negative attention to the comments. If you decide that the prejudice resulting from a prosecutor's improper argument was severe and in need of further remedy, you may ask the judge to:

- admonish the prosecutor to refrain from that line of argument;
- require the prosecutor to retract the improper argument;
- repeat the curative instruction during the jury charge; or
- grant a mistrial.

See State v. Jones, 355 N.C. 117, 129 (2002) (it is incumbent on trial judge to vigilantly monitor closing arguments, "to intervene as warranted, to entertain objections, and to impose any remedies pertaining to those objections"); *Wilcox v. Glover Motors, Inc.*, 269 N.C. 473 (1967) (listing several methods by which a trial judge, in his or her discretion, may correct an improper argument).

B. Waiver

Failure to timely object to the prosecutor's argument constitutes a waiver of the alleged error. In the absence of an objection, appellate courts will review the prosecutor's argument to determine "'whether it was so grossly improper that the trial court abused its discretion in failing to intervene *ex mero motu* to correct the error.'" *State v. Taylor*, 337 N.C. 597, 613 (1994) (quoting *State v. Allen*, 323 N.C. 208, 226 (1988), *vacated on other grounds*, 494 U.S. 1021 (1990)).

To establish an abuse of discretion in this context, the defendant must show that the prosecutor's comments "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Rose*, 339 N.C. 172, 202 (1994) (citations omitted) (internal quotation marks omitted). This is a much more stringent standard of review than is applied to preserved errors so it is critically important for appellate purposes to timely object to improper statements made by the prosecutor and to request curative instructions if the objection is sustained.

C. Complete Recordation

Requirement for and timing of motion. Pursuant to G.S. 15A-1241(a)(2), trial judges are not required to order the court reporter to record opening statements and closing arguments. However, on the motion of any party (or on the judge's own motion), these proceedings ***must*** be recorded. G.S. 15A-1241(b). "The motion for recordation of jury arguments must be made before the commencement of any argument and if one argument is recorded all must be." *Id.*

If a party suggests during an unrecorded argument that an improper statement has been made, the judge has the discretion to require that the rest of the argument be recorded. G.S. 15A-1241(b).

Sample Motions for Complete Recordation, with or without supporting grounds, can be found on the Office of Indigent Defense Services website in the "Adult Criminal Motions" (indexed under the "Juries" heading). While counsel need not state any grounds to obtain complete recordation, doing so may help the trial judge understand its importance. These motions cover not only jury arguments but also pretrial hearings, jury selection in noncapital cases, motions hearings, and bench conferences since those proceedings are also exempt from mandatory recordation under G.S. 15A-1241(a) unless a request for recordation is made.

Reconstruction of record. If an objection is made to an unrecorded statement or other conduct in the presence of the jury, on motion of either party the trial judge "must reconstruct for the record, as accurately as possible, the matter to which objection was made." G.S. 15A-1241(c); *see also State v. Foster*, 236 N.C. App. 607 (2014). Where a defendant does not undertake the efforts necessary to reconstruct the record with regard to improper statements made by the prosecutor during closing argument, appellate courts will decline review. *See State v. Spellman*, 167 N.C. App. 374 (2004); *State v. Ussery*, 106 N.C. App. 371 (1992).

Practice note: The appellate courts have never held that it is ineffective assistance of counsel per se for defense counsel to fail to request complete recordation. *See, e.g., State v. Hardison*, 326 N.C. 646 (1990) (defendant cannot show ineffective assistance of counsel where there are no specific allegations of prejudice and no attempt to reconstruct the record); *State v. Verrier*, 173 N.C. App. 123, 130 (2005) (denying defendant's request to adopt "a per se rule granting a new trial where counsel neither requests nor the trial court requires that the entire trial, jury selection, arguments of counsel and bench conferences" be recorded). Still, ***there is no good reason not to make the request.*** Opening statements and closing arguments are often fertile ground for appellate issues. You must protect the rights of your client even if it means irritating the judge or court reporter, who may not feel that complete recordation is necessary. Complete recordation will obviate the need for reconstruction of the transcript in the event that improper statements are made and will greatly facilitate appellate review. It may also inhibit prosecutors from "push[ing] the envelope" during closing argument. *See State v. Jones*, 355 N.C. 117, 127 (2002). If, however, you have failed to request complete recordation and an issue arises regarding an improper statement made by the prosecutor or a defense argument that was improperly prohibited, you must take steps to immediately ensure that the record is accurately reconstructed or the court will likely not be able to evaluate the issue on appeal. *See State v. McGill*, 217 N.C. App. 401 (2011) (unpublished) (stating that the court was unable to assess the impact that a defense jury argument would have had if permitted by the trial judge because closing arguments were not recorded and counsel did not attempt to reconstruct them).

D. Absence of Trial Judge During Closing Argument

For a discussion addressing the absence of the trial judge during closing argument (and other parts of the trial, such as jury voir dire), see *supra* § 22.1D, Absence of Trial Judge During Proceedings.

E. Additional Resources

For a short, practical perspective on the topics covered in this section, see Staples Hughes, *Curbing Prosecutorial Misconduct and Preserving the Record in Closing Argument* (Public Defender Conference, Nov. 2008).

Appendix 33-1
Guideline 7.7 Closing Argument*

(a) Counsel should be familiar with the substantive limits on both prosecution and defense summation, including the law governing closing arguments under G.S. 7A-97 and G.S. 15A-1230, Rule 10 of the General Rules of Practice for the Superior and District Courts, and North Carolina case law.

(b) In developing closing argument, counsel should review the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, should consider:

(1) highlighting weaknesses in the prosecution's case;
(2) describing favorable inferences to be drawn from the evidence;
(3) incorporating into the argument:
  (A) the theory of the defense case;
  (B) helpful testimony from direct and cross-examinations;
  (C) verbatim instructions drawn from the expected jury charge;
  (D) responses to anticipated prosecution arguments; and
  (E) visual aids and exhibits; and
(4) the effects of the defense argument on the prosecution's rebuttal argument.

(c) Whenever the prosecutor exceeds the scope of permissible argument, counsel should consider objecting, seeking cautionary instructions, or requesting a mistrial unless sound tactical considerations suggest otherwise. Such tactical considerations may include, but are not limited to:

(1) the possibility that an objection or cautionary instruction might enhance the significance of the information in the jurors' minds;
(2) whether, with respect to a motion for mistrial, counsel believes that the case will result in a favorable verdict for the client; and
(3) the need to preserve the objection for appellate review.

*Reprinted from N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CASES AT THE TRIAL LEVEL (Nov. 2004). For the complete guidelines, see *infra* Appendix A of this manual.