

UNC SCHOOL OF GOVERNMENT

CLOSING ARGUMENTS

Capital Case Law and Death Penalty Litigation

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Question #1:

The State's evidence shows the defendant strangled the victim.

At the sentencing phase, the prosecutor asked the jurors to hold their breath as long as they could "while we are counting all four minutes."

The prosecutor asked the jury to think about the helplessness and fear of the victim "as your air starts to run out."

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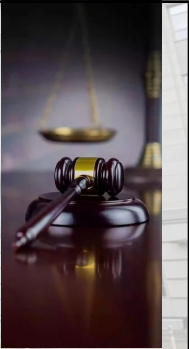
Is this a permissible argument?

0%	0%
Yes	No

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Issue #1: in the victim's shoes

- The emphasis during the sentencing phase is on the circumstances of the crime and the character of the criminal.
- "If the touchstone for propriety in sentencing arguments is whether the argument relates to the character of the criminal or the nature of the crime, then the prosecutor's tactic here was within the bounds of propriety."
- This argument occurred during the sentencing phase, "and we find it neither improper nor prejudicial."
State v. Artis, 325 N.C. 278, 324 (1989).

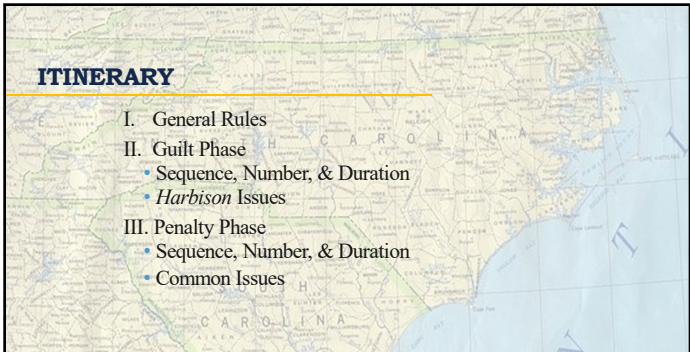


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ITINERARY

- I. General Rules
- II. Guilt Phase
 - Sequence, Number, & Duration
 - *Harbison* Issues
- III. Penalty Phase
 - Sequence, Number, & Duration
 - Common Issues



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General Rules



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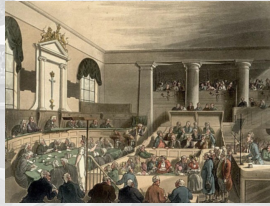
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North Carolina General Statutes

During a closing argument to the jury an attorney may not:

- become abusive,
- inject his personal experiences,
- express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant,
- or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice.

G.S. 15A-1230



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General Rules of Practice



- All personalities between counsel should be avoided. The personal history or peculiarities of counsel on the opposing side should not be alluded to.
- Abusive language or offensive personal references are prohibited.
- 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[.]

N.C. Super. Ct. & Dist. Ct. R. 12

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Rules of Professional Responsibility

A lawyer shall not:

- allude to any matter . . . that will not be supported by admissible evidence,
- assert personal knowledge of facts in issue except when testifying as a witness, . . . or
- state a personal opinion as to the justness of a cause, the credibility of a witness, . . . or the guilt or innocence of an accused[.]

Rule of Prof'l Cond. 3.4



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Guilt Phase

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GUILT PHASE

Sequence, Number, & Duration

Sequence N.C. Super. Ct. & Dist. Ct. R. 10

- If no evidence is introduced by the defendant, the right to open and close the argument belongs to him.
- If any defendant introduces evidence, the closing argument shall belong to the solicitor.

Number G.S. 7A-97

- The court may limit the number of those who may address the jury to three counsel on each side.
- There shall be no limit as to the number of addresses.

Duration G.S. 7A-97

- In capital felonies, the time of argument of counsel may not be limited otherwise than by consent.

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GUILT PHASE

Harbison Issues

- Ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel **admits the defendant's guilt to the jury without the defendant's consent.**
State v. Harbison, 315 N.C. 175, 180 (1985).
- A Harbison violation is not limited to an explicit admission but applies more broadly so as to encompass "situations in which defense counsel **impliedly concedes** his client's guilt without prior authorization."
State v. McAllister, 375 N.C. 455, 473, (2020).

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Penalty Phase




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PENALTY PHASE

Sequence, Number, & Duration



Sequence G.S. 15A-2000(a)(4)

- The State and the defendant shall be permitted to present argument for or against sentence of death.
- The defendant has the right to the last argument.

Number G.S. 7A-97

- The court may limit the number of those who may address the jury to three counsel on each side.
- There shall be no limit as to the number of addresses.

Duration G.S. 7A-97

- In capital felonies, the time of argument of counsel may not be limited otherwise than by consent.

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Question #2

Defense counsel urged the jury to consider the types of things that come to mind when they think about the death penalty.

Counsel gave as examples Dennis Rader, a serial killer, Olympic Park bomber Eric Rudolph, and Scott Peterson, who killed his pregnant wife Laci in California.

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Is this a permissible argument?

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Yes	No

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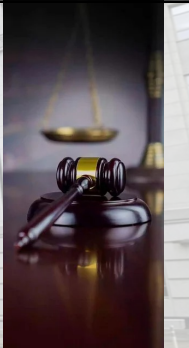
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Issue #2: facts not in evidence

A defendant may not make comparisons between cases and the facts of each case in which a determination favorable to a defendant was made because:

- (1) the facts of the other cases are not pertinent to a jury's consideration of evidence presented in a particular case, and
- (2) the circumstances of other murders, either actual or imagined, are often not present in the record at the time of closing arguments.

State v. Taylor, 362 N.C., 514, 560 (2008).



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Question #3

In his argument to the jury the prosecutor stated, "I'm asking you to impose the death penalty as a deterrent, to set a standard of conduct. . . ."

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Is this a permissible argument?

0%	0%
Yes	No

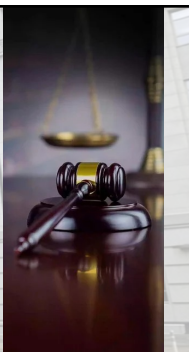
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Issue #3: general deterrence

- The prosecution may argue specific deterrence, i.e., the effect of a conviction on the defendant, but not general deterrence, i.e., the effect of a conviction on others.
- This statement – "I'm asking you to impose the death penalty as a deterrent, to set a standard of conduct" – is an interjection of the prosecutor's personal viewpoint.
- Such a statement is improper.

State v. Kirkley, 308 N.C. 196, 215 (1983).



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Question #4

The prosecutor argued to the jury that if defendant were sentenced to life in prison, he would spend his time comfortably doing things such as playing basketball, lifting weights, and watching television.

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Is this a permissible argument?

0% Yes 0% No

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Issue #4: references to prison life

- It is not improper for the State to argue that defendant deserves the penalty of death rather than a comfortable life in prison.
- Reference to prison amenities emphasizes the State's position that life in prison is not an adequate punishment.
- In light of the wide latitude accorded prosecutors during their arguments, we find that the defendant has failed to show that the prosecutor's argument was improper. *State v. Alston*, 341 N.C. 198, 252 (1995).

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Question #5

The prosecutor stated:
 "They want to talk about compassion, mercy. That's not the law. That's not the standard. If it was, you wouldn't forget about the compassion and mercy that he showed for [the victim.] No, don't base it on any of that."

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Is this a permissible argument?

0% Yes 0% No

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Issue #5: compassion & mercy

- Prosecutors may argue that the sentencing jury's decision should be based not on sympathy or mercy, but on the law.
- While the trial court may not preclude the jury from considering compassionate or mitigating factors, the prosecutor may discourage the jury from having mere sympathy not related to the evidence in the case affect its decision.
- This argument was not improper. *State v. Cummings*, 361 N.C. 438, 469 (2007).



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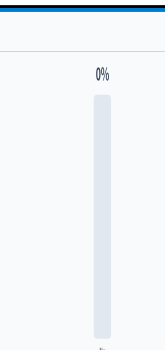
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Question #6

The prosecutor stated:
 "Nowhere in any of the testimony during the sentencing phase has remorse been mentioned about the defendant's remorse for [the victim's] death."

Is this a permissible argument?

0%	0%
Yes	No

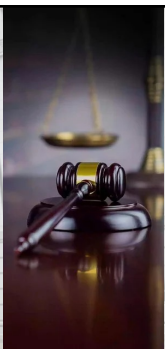


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Issue #6: lack of remorse

- Remorselessness may not be submitted to the jury as an aggravating circumstance in capital sentencing cases.
- A prosecutor may, however, draw attention to a defendant's failure throughout the capital proceeding to demonstrate a sense of remorse.
- Accordingly, the prosecutor's remark was not grossly improper. *State v. Taylor*, 362 N.C. 514, 555 (2008).



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Question #7

The prosecutor argued in part:
 I suggest to you that [there] is Biblical authority for the death sentence. Not a mandate that you do it in any one case, but it is the authority for those of you [who] worry about that.

 Now, listen to this, ladies and gentlemen of the jury. In that Good Book it says this in Numbers 35 The murderer shall surely be put to death.

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Is this a permissible argument?

0% Yes 0% No

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Issue #7: Biblical references

- Biblical argument is within the acceptable parameters allowed to counsel when arguing hotly contested cases.
- Nevertheless, counsel is encouraged to base arguments solely upon secular law and the facts. Religious arguments may distract the jury from its duty of applying secular law.
- The prosecutor’s argument was not so grossly improper as to warrant intervention. *State v. Haselden*, 357 N.C. 1, 22 (2003).

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Question #8

The evidence showed the defendant bound the victim, stuffed paper in her mouth, and covered her mouth with duct tape. She died of asphyxiation.
 During closing argument, the prosecutor characterized defendant as a “monster,” “demon,” “devil,” “a man without morals” and as having a “monster mind.”

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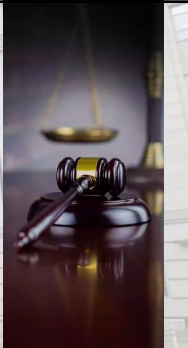
Is this a permissible argument?

0% Yes 0% No

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Issue #8: name-calling

- When the prosecutor becomes abusive, injects his personal views and opinions into the argument before the jury, he violates the rules of fair debate.
- Such characterizations of defendant amounted to no more than name-calling and did not serve the State because the prosecutor was not arguing the evidence and the conclusions that can be inferred therefrom.
- The prosecutor's closing argument was improper.
State v. Matthews, 358 N.C. 102, 111 (2004).



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Question #9

Defense counsel wishes to read and then make argument to the jury based on the last paragraph of G.S. 15A-2000(b).

The relevant part of that subsection provides: "If the jury cannot, within a reasonable time, unanimously agree to its sentence recommendation, the judge shall impose a sentence of life imprisonment."

Is this a permissible argument?

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Yes	No

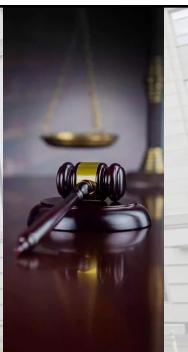
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Issue #9: encouraging holdouts

- An *instruction* that a sentence of life imprisonment would be imposed if the jury was unable to reach unanimous agreement would be improper because:
 - (1) it would be of no assistance to the jury, and
 - (2) it would invite the jury to escape its responsibility to recommend a sentence by the expedient of failing to reach a unanimous verdict.
- This is true whether such a statement is read by counsel or contained within the instructions of the trial court.
State v. Johnson, 317 N.C. 343, 390 (1986).



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Question #10

The State plans to rely on aggravating circumstances (e)(3) (prior violent conviction) and (e)(9) (especially heinous/atrocious/cruel).

Defense counsel wishes to describe to the jury *other* aggravating circumstances – (e)(1)-(2), (4)-(8), and (10)-(11) – and argue that the State has not presented any evidence of those factors.

Is this a permissible argument?

0% Yes 0% No

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Issue #10: absence of aggravators

- Mitigating circumstances, statutory and nonstatutory, focus on positive aspects of a defendant's character or behavior.
- The absence of an aggravating circumstance is not evidence of a mitigating circumstance.
- Accordingly, the trial court did not err by refusing to let the defendant argue that the jury should consider that the crime did not fit within many statutory aggravating circumstances not discussed by the State.

State v. Buckner, 342 N.C. 198, 238 (1995).

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RECAPITULATION

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