

**Constitutional Law—effective assistance of counsel—failure to request diminished capacity instruction—motion for appropriate relief**

The decision of the Court of Appeals that defense counsel's failure to request an instruction on diminished capacity in a first-degree murder trial constituted ineffective assistance of counsel was reversed for the reason stated in the dissenting opinion that the ineffective assistance of counsel claim should be dismissed without prejudice so as to allow defendant to reassert that claim in a subsequent motion for appropriate relief proceeding in which defense counsel's trial strategy may be considered.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 188 N.C. App. \_\_\_, 656 S.E.2d 597 (2008), vacating a judgment entered on 28 June 2006 by Judge Gary E. Trawick in Superior Court, Brunswick County, and remanding for a new trial. On 11 June 2008, the Supreme Court allowed the State's petition for discretionary review of an additional issue. Heard in the Supreme Court 17 November 2008.

*Roy Cooper, Attorney General, by John G. Barnwell, Assistant Attorney General, and Jonathan P. Babb, Special Deputy Attorney General, for the State-appellant.*

*Center for Death Penalty Litigation, by Lisa Miles, for defendant-appellee.*

PER CURIAM.

For the reasons stated in the dissenting opinion of the Court of Appeals, the decision of the Court of Appeals is reversed and that court is instructed to reinstate the judgment of the trial court. Discretionary review of the additional issue was improvidently allowed. Defendant's claim of ineffective

assistance of counsel is dismissed without prejudice to his right to raise that issue by filing a motion for appropriate relief in the superior court.

REVERSED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.