PRESENTATION OF THE PORTRAIT OF THE LATE CHIEF JUSTICE JOHN WALLACE WINBORNE FEBRUARY 9, 1970 BY EMERY B. DENNY EMERGENCY JUSTICE, SUPREME COURT OF NORTH CAROLINA

May it please the Court:

On behalf of the family of the late Chief Justice Winborne, I have the honor and privilege of presenting his portrait to this Court. The portrait was painted by the distinguished New York artist, Everett Raymond Kinstler.

My acquaintance with Chief Justice Winborne covered a period of approximately forty years; and for more than twenty years of that time, I knew him intimately as a close personal friend and colleague on this Court.

John Wallace Winborne was born on the 12th day of July, 1884, on the old plantation of his maternal ancestors on Indian Creek in Chowan County, North Carolina, the son of Dr. Robert H. and Annie F. (Parker) Winborne. He received his early educational training from his sister, Miss Pattie W. Winborne, in a private school conducted by her on the Winborne farm near Holly's Wharf on the Chowan River. He attended Horner Military School at Oxford, North Carolina, and then entered the University of North Carolina, graduating in June, 1906, with the degree of Bachelor of Arts.

While a student at the University, Winborne distinguished himself in athletics as a member of the track, baseball and football teams. Of medium stature and sturdy build he was a halfback on the football team. On the athletic field he learned the value of thorough training, teamwork and sportsmanship. Again and again, as a young man, he saw that victory came most often not to those who relied upon natural adeptness and brilliance, but to those who were willing to make the necessary effort and sacrifice in long and grueling training. Perhaps the outstanding achievement of his college career was his election to the Golden Fleece, the honorary student order which, even today as then, selects for membership only those students who have achieved the rank of outstanding leadership in the student life of the University. Wallace Winborne never lost his affection for the University nor his interest in athletics. He was a regular and faithful attendant at the football games played at Chapel Hill down through the years so long as his health would permit.

Winborne began the study of law during his junior year at the University, receiving his license to practice law and being admitted to the bar in 1906. After teaching in Bingham Military School in Asheville during the school year 1906-07, he located in Marion, North Carolina, and became a member of the law firm of Pless and Winborne from 1907 until 1919, at which time J. W. Pless, Jr., was admitted as a partner in the firm. In 1926, Robert W. Proctor was admitted to the firm, which then consisted of Pless, Winborne, Pless and Proctor. With J. W. Pless, Jr., having been appointed Solicitor of the Eighteenth Solicitorial District and J. W. Pless, Sr., having moved to Asheville where he continued to practice, Messrs. Winborne and Proctor continued the firm's practice in McDowell and adjacent counties from 1928 until July 1, 1937, under the firm name of Winborne and Proctor.

During the 30 years Wallace Winborne practiced law, he enjoyed a wide practice in his section of the State and was known and recognized as one of the outstanding lawyers of the State. His sound practical judgment and his background of experience in the general practice of law, coupled with his talents as a diligent and careful student of the law, qualified him as an able and valued legal adviser. He appeared in many important cases of wide interest. He served as Special Attorney for the State of North Carolina in connection with the condemnation of lands for the Great Smoky Mountain National Park. He served as Attorney for McDowell County and for the Town of Marion from 1918 until July 1, 1937. He was a member of the North Carolina and American Bar Associations and a Fellow of the American Bar Foundation.

When our State Constitution was amended in 1936, authorizing an increase in the membership of this Court from five to seven members, the General Assembly, pursuant to the amendment, authorized the appointment of two additional Associate Justices of the Court, as of July 1, 1937. Governor Hoey appointed Judge M. V. Barnhill, resident judge of the Second Judicial District, and the Honorable J. Wallace Winborne to fill these newly created positions. Since Justice Winborne was appointed directly from the bar and was without previous judicial experience, Governor Hoey signed the commission appointing Judge Barnhill first, thereby making Justice Winborne the junior Justice of the Court. Justice Winborne was elected for terms of eight years in November of 1938, 1946 and 1954. He was appointed Chief Justice by Governor Hodges upon the retirement of Chief Justice Barnhill on August 21, 1956. In

November of that year Chief Justice Winborne was elected to fill the term expiring on December 31, 1958. In November, 1958, he was elected to a full term of eight years. Because of ill health, he retired on March 8, 1962, and returned to his home in Marion, where he died on July 9, 1966.

In my opinion, when we undertake to evaluate the services and achievements of an individual, in order to ascertain just what manner of man he was, we need to know something of the type and character of the organizations and institutions with which he was affiliated and to which he gave his support and leadership, in addition to his accomplishments in his trade or profession.

Justice Winborne was not without experience in the civic, social, business, political and religious life of his community and State before he became a member of this Court. He was a member of the Board of Aldermen of Marion, North Carolina, from 1913 until 1921. He served as a member of the Local Selective Service Board during World War I, as well as being Chairman of the local committee of the American Red Cross and Chairman of the Council of Defense in McDowell County. He was also Chairman of the McDowell County Food Administration and a First Lieutenant in the Marion Company of the North Carolina Reserve Militia, the North Carolina National Guard having been called into service in the United States Army in World War I for the duration of the conflict.

Winborne was Chairman of the Democratic Executive Committee of McDowell County from 1910-1912. He also served as a member of the State Democratic Executive Committee for 21 years from 1916 until 1937. He was a member of the Local Government Commission for two years from 1931-1933. Winborne was Chairman of the State Democratic Executive Committee from 1932 until July 1, 1937.

The Kiwanis Club of Marion was organized in February, 1923. Winborne was a charter member and its first president. He was one of the moving spirits in organizing and building the Marion General Hospital and was one of its incorporators as well as one of the original directors. He continued to serve as a member of the Board of Directors of that institution until his appointment as an Associate Justice of this Court.

Winborne was, for many years, a director of Clinchfield Manufacturing Company and was Chairman of its Board of Directors for several years prior to the time this large textile

plant was merged with Burlington Industries, Inc. He was also one of the organizers of Marion Manufacturing Company and one of the founders of the Marion Lake Club which is now the Country Club of Marion. For many years he was a director of the State Capital Life Insurance Company. He also served as a director of and attorney for the First National Bank of Marion from 1929 until his appointment as a member of this Court. He was an honorary member of the North Carolina Society of the Cincinnati; and in 1946, the University of North Carolina conferred on him the honorary degree of Doctor of Laws.

Justice Winborne was a faithful and devoted member of St. John's Episcopal Church in Marion and served for many years as a vestryman and, from time to time, as Senior Warden. He also served for several years as Superintendent and for many years as a teacher in the Church School. He was a licensed lay reader and frequently held services in his church in the absence of the rector.

Justice Winborne had a distinguished career in the Masonic fraternity. He was active for many years in the local Masonic lodge in Marion and was Master of his Lodge in 1920-21. The Grand Lodge of Ancient, Free and Accepted Masons of North Carolina elected him Grand Master of Masons in North Carolina in 1931. As typical of the man and his keen interest in the care and welfare of the children who were supported and educated at the Masonic Orphanage at Oxford, North Carolina, he served as a member of the Board of Directors of that institution for 32 years from April, 1930 until April, 1962.

Justice Winborne was married to Miss Charlie May Blanton of Marion on the 30th day of March, 1910. To this union, two children were born, Charlotte Blanton, now Mrs. Charles M. Shaffer of Chapel Hill, North Carolina, and John Wallace Winborne, Jr., of Atlanta, Georgia, both of whom are with us today. Mrs. Winborne died on November 4, 1940. On June 14, 1947, Justice Winborne married Mrs. Lalage Oates Rorison, whom we are also delighted to have with us on this occasion. In addition to those just mentioned, he was survived by one stepson, Brainard Blanton Rorison, who is also with us today, and by ten grandchildren, three of whom are the children of his stepson. Justice Winborne was deeply devoted to all the members of his family.

Chief Justice Winborne was inherently a modest man, but that does not mean that he was timid or lacked courage. He was a man of deep convictions and stood staunchly for the things

in which he believed. However, he was not a prima donna nor a publicity seeker in any sense of the word. He worked quietly and assiduously on whatever task he undertook and was perfectly willing to be judged by the result of his labors. In his opinion-writing over a period of almost twenty-five years, he never sought to substitute his own personal views for the law as he construed it to be under our Constitution and laws and in the well-reasoned opinions of the Court. He was a believer in the doctrine of *stare decisis,* particularly with respect to those well-reasoned opinions of the Court which had been accepted as authoritative for a long period of time. He was also firm in his conviction that the enactment of our laws was the exclusive prerogative of the General Assembly; and he was equally firm in his conviction that it was the prerogative of this Court to interpret the law, according to its true intent and meaning as the Court construed it to be, regardless of the status of those involved in the litigation. His written opinions appear first in Volume 212 of our *North Carolina Supreme Court Reports* and end with Volume 256.

In writing his opinions there were two requirements Justice Winborne imposed upon himself with consistency. He would prepare what he considered to be an accurate and comprehensive statement of the facts. He wanted the litigants to know that this Court knew the facts involved in the case, and then he sought to support his conclusions with respect to the applicable law with an abundance of cases in point. He seemed to take a delight in tracing the origin of pertinent statutes and the intervening modifications thereof down through the years.

In 1947 the General Assembly of North Carolina created a commission for the purpose of making a study and submitting recommendations to the 1949 Session of the General Assembly for the improvement of the administration of justice in the State of North Carolina. Among the recommendations made pursuant to this study was the following: "We propose that a recommendation of mercy by the jury in capital cases automatically carry with it a life sentence. Only three other states now have the mandatory death penalty and we believe its retention will be definitely harmful. Quite frequently, juries refuse to convict for rape or first degree murder because, from all the circumstances, they do not believe the defendant, although guilty, should suffer death. Our proposal is already in effect in respect to the crimes of burglary and arson. There is much testimony that it has proved beneficial in such cases. We think the law can now be broadened to include all capital crimes."

The General Assembly of 1949 did amend all four of our statutes covering capital crimes by making an integral part of these statutes the following: "Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury."

The first appeal involving the amendment was in State vs. McMillan, 233 N.C. 630, in which no recommendation was made by the jury and the death penalty was imposed. The pertinent part of the court's charge assigned as error was " . . . the court instructs you that if you return a verdict of guilty of murder in the first degree as charged in the bill of indictment against the defendant, then you have the right and the power in the exercise of your discretion to accompany that verdict with a recommendation of life imprisonment for the defendant, and the statute giving that right and authority and discretion to the jury, also instructs or provides that it is the duty of the court to instruct the jury that they do have the authority, the right and the power to accompany their verdict of first degree murder with a recommendation of that sort if they feel that under the facts and circumstances of the crime alleged to have been committed by the defendant, they are warranted and justified in making that recommendation." Winborne, J., in writing the opinion for the Court, among other things, said: "The language of this amendment stands in bold relief. It is plain and free from ambiguity and expresses a single, definite and sensible meaning—a meaning which under the settled law of this State is conclusively presumed to be the one intended by the Legislature.

"It is patent that the sole purpose of the act is to give to the jury in all cases where a verdict of murder in the first degree shall have been reached, the right to recommend that the punishment for the crime shall be imprisonment for life in the State's prison. No conditions are attached to, and no qualifications or limitations are imposed upon, the right of the jury to so recommend. It is an unbridled discretionary right. And it is incumbent upon the court to so instruct the jury. In this, the defendant has a substantive right. Therefore, any instruction, charge or suggestion as to the causes for which the jury could or ought to recommend is error."

The second opinion written by Winborne, J., involving this amendment was in State vs. Simmons, 234 N.C. 290, in which the jury made no recommendation in the trial below and the

death penalty was imposed. On appeal the exception, assigned as error, was to the following portion of the charge: " . . . and in the event, if you should return a verdict of guilty of murder in the first degree, it would be your duty to consider whether or not under the statute, you desire and feel that it is your duty to recommend that the punishment of the defendant shall be imprisonment for life in the State's prison."

Justice Winborne, in his opinion, granting a new trial, said: " . . . any instruction, charge or suggestion as to the cause or causes for which the jury could or ought to recommend is error sufficient to set aside a verdict when no recommendation is made. . . . the statute prescribes no rule for the guidance of the jury in coming to decision as to whether or not the verdict should carry the recommendation. Thus any attempt by the trial judge to give a rule in this respect must necessarily read into the statute something the language of the Legislature does not encompass. The suggestion that any cause or reason is necessary to support the recommendation would violate the intent and purpose of the statute. True, the statute expressly requires the judge to instruct the jury that in the event a verdict of guilty of murder in the first degree shall have been reached, it has the right to recommend that the punishment therefor shall be imprisonment for life in the State's prison. No more and no less would be accordant with the intent of the amendment to the statute."

During the decade following the enactment of the proviso involved in the McMillan case, twelve other death cases were appealed, in which error was assigned with respect to the charge relating to the proviso or with respect to the argument of counsel to the effect that the jury should not make any recommendation in connection with its verdict. Of these twelve appeals, Winborne, J., or Winborne, C.J., wrote the opinions in six of them. In 1961, the General Assembly did enact a statute to the effect that: "In a trial of capital cases, the solicitor or other counsel appearing for the State may argue to the jury that a sentence of death should be imposed and that the jury should not recommend life imprisonment." G.S. 15-176.1. The General Assembly has, however, never raised any question about the law with respect to the untrammeled right of the jury in capital cases to recommend life imprisonment as laid down by Justice Winborne in the McMillan case and succeeding cases.

In Biblical times, we are told that the children of Israel, under the leadership of Nehemiah, re-built the wall around Je-

rusalem in fifty-two days. An insight as to how it was possible to complete such a great undertaking in so short a time was revealed to us by Nehemiah, when he said: "So built we the wall . . . for the people had a mind to work." (Nehemiah 4:6) One cannot recount the services and accomplishment of Chief Justice Winborne and consider the vast volume of work he did as a private citizen and as a lawyer for 30 years and as a member of this Court for nearly 25 years without concluding that he, too, "had a mind to work."

May I now in conclusion be permitted to summarize briefly what I have tried to say about our friend and longtime member of this Court. John Wallace Winborne was a good man, an active and valuable citizen of his State, a kind and devoted husband and father, a successful and highly respected lawyer, a distinguished and dedicated jurist and, above all, a Christian gentleman.

His portrait will be unveiled by his youngest granddaughter, Miss Eleanor Blanton Winborne, age 9, of Atlanta, Georgia.

REMARKS OF CHIEF JUSTICE WILLIAM H. BOBBITT IN ACCEPTING THE PORTRAIT OF JOHN WALLACE WINBORNE

We are grateful to our beloved friend and former Chief Justice for this informative and impressive memorial address. In addition to bringing to our attention significant events and relationships in the life of former Chief Justice Winborne, he has portrayed him rightly as a man of integrity and compassion and as a jurist who has contributed greatly to the high standards of the Court. All of us knew Judge Winborne as a jurist and as a friend. Two of us (Justice Higgins and I) served with him as members of the Court from 1954 until his retirement in 1962. Incidents come to mind that impressed us and endeared him to us. It is with difficulty that we refrain from speaking of them. However, since Justice Denny has expressed our sentiments so well, the members of the Court will content themselves by saying, in legal parlance, all of us *concur*.

The Court wishes to express appreciation to the Winborne family for the gift of this handsome portrait. When I view it, I sense the presence of our former Chief Justice and friend. It portrays him well during the years we knew him best. The portrait will be a source of inspiration to us and to our successors across the years.

The Marshal will see that the portrait is hung in an appropriate place on the wall of this chamber as directed by the Court, and these proceedings will be spread upon the minutes of the Court and printed in the next volume of the North Carolina Reports.