370 N.C.—No. 2 Pages 235-442

ADMISSION TO THE PRACTICE OF LAW; PROFESSIONALISM

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

MAY 8, 2018

MAILING ADDRESS: The Judicial Department
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OF
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SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 3 NOVEMBER 2017, 8 DECEMBER 2017, 22 DECEMBER 2017, AND 26 JANUARY 2018

ORDERS

PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

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Constitutional Law—North Carolina—session law creating Bipartisan State Board of Elections and Ethics Enforcement—challenge by Governor—subject matter jurisdiction—Where the legislature created the Bipartisan State Board of Elections and Ethics Enforcement following the election of Roy A. Cooper III as Governor, the three-judge trial court panel erred by dismissing the Governor's complaint for lack of subject matter jurisdiction. This case involved an issue of constitutional interpretation—whether the statutory provisions governing the manner in which the Bipartisan State Board was constituted and required to operate pursuant to Session Law 2017-6 impermissibly encroached upon the governor's executive authority to see that the laws are faithfully executed—rather than a nonjusticiable political question, and a decision to the contrary would sharply limit the ability of executive branch officials to advance separation of powers claims. **Cooper v. Berger, 392.**

Constitutional Law—North Carolina—session law creating Bipartisan State Board of Elections and Ethics Enforcement—challenge by Governor—temporary restraining order—moot—Where the legislature created the Bipartisan State Board of Elections and Ethics Enforcement following the election of Roy A. Cooper III as Governor, the Supreme Court dismissed as moot the legislative

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SEXUAL OFFENSES

Sexual Offenses—first-degree sexual exploitation of a minor—digital manipulation of photo—The trial court erred by failing to sustain defendant's objection when the prosecutor asserted in his closing argument that digital manipulation of a photo to make a minor appear to engage in sexual activity constitutes first-degree sexual exploitation of a minor. Despite this error, the trial court gave clear, correct instructions as to this issue, and the error was not prejudicial. **State v. Fletcher, 313.**

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Workers' Compensation—third-party claim settled—no waiver of compensation under Act—subrogation lien—Where plaintiff-employee was injured while driving to his doctor's office to retrieve an out-of-work note for a compensable injury, settled the third-party claim for the automobile accident, and subsequently—when his workers' compensation attorney learned that the accident occurred on plaintiff's way to get his out-of-work note—added a workers' compensation claim for his head injury, plaintiff did not waive his right to compensation under the Workers' Compensation Act. In addition, the Industrial Commission correctly determined that once the subrogation lien amount is determined by agreement of the parties or by a superior court judge, defendant is entitled to reimbursement of its lien from the benefits due to plaintiff. **Easter-Rozzelle v. City of Charlotte, 286.**

SCHEDULE FOR HEARING APPEALS DURING 2018

NORTH CAROLINA SUPREME COURT

Appeals will be called for hearing on the following dates, which are subject to change.

January 8, 9, 10
February 5, 6, 7
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April 16, 17, 18
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October 1, 2, 3, 4
November 6, 7, 8
December 3, 4, 5, 6

FRIDAY INVS., LLC v. BALLY TOTAL FITNESS OF MID-ATL., INC.

[370 N.C. 235 (2017)]

FRIDAY INVESTMENTS, LLC
v.
BALLY TOTAL FITNESS OF THE MID-ATLANTIC, INC. f/k/a Bally Total Fitness of the Southeast, Inc. f/k/a Holiday Health Clubs of the Southeast, Inc. as successor-in-interest to Bally Total Fitness Corporation; and BALLY TOTAL FITNESS HOLDING CORPORATION

No. 248PA16

Filed 3 November 2017

1. Indemnity—tripartite attorney-client relationship—common interest between indemnitor and indemnitee

A contractual duty to defend and indemnify arising from the transfer of leasehold interest created a tripartite attorney-client relationship. An indemnification agreement creates a common interest between the indemnitor and the indemnitee in that the indemnitor contractually shares in the indemnitee's legal well-being.

2. Attorneys—tripartite attorney-client relationship—communications not privileged

Even though a tripartite attorney-client relationship existed arising from an indemnity agreement in the transfer of a lease, the trial court did not abuse its discretion or misapply the law by compelling disclosure of the communications at issue. Neither party requested findings or conclusions in the underlying order compelling discovery, and it is presumed that the trial court found facts sufficient to support its determination that the communications were not privileged. Moreover, defendants did not properly present the allegedly privileged documents for appellate review.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 788 S.E.2d 170 (2016), affirming an order entered on 13 April 2015 by Judge Jesse B. Caldwell III in Superior Court, Mecklenburg County. Heard in the Supreme Court on 29 August 2017.

Horack, Talley, Pharr & Lowndes, P.A., by Keith B. Nichols, for plaintiff-appellee.

Knox, Brotherton, Knox & Godfrey, by Lisa G. Godfrey; and Burt & Cordes, PLLC, by Stacy C. Cordes, for defendant-appellants.

NEWBY, Justice.

In this case we consider whether an attorney–client relationship exists between defendants and a non-party that contractually agreed to indemnify defendants. Recognizing its tripartite nature, we conclude that the contractual duty to defend and indemnify gives rise to an attorney–client relationship. Nonetheless, because defendants failed to request that the trial court provide written findings of fact and did not present in a timely manner the documents at issue for appellate review, we must presume the trial court found facts sufficient to support its conclusion. Given the bare record before us, we cannot conclude that the trial court erroneously determined that the attorney–client privilege did not extend to the communications at issue. Accordingly, we modify and affirm the decision of the Court of Appeals.

In February 2000, the predecessor in interest to defendant Bally Total Fitness of the Mid-Atlantic, Inc. (Bally Mid-Atlantic) entered into a lease agreement with the predecessor in interest to Friday Investments, LLC (plaintiff) for a large commercial space in Charlotte, North Carolina, in which to place a health club.[1] Codefendant Bally Total Fitness Holding Corporation (Bally Holding), the parent company of both Bally Mid-Atlantic and the original tenant, guaranteed the lease. Bally Mid-Atlantic later sold some of its health clubs, including the Charlotte club, to Blast Fitness Group, LLC (Blast). The Asset Purchase Agreement between Bally Mid-Atlantic and Blast transferred any obligations arising under the real property leases of the clubs sold. The Agreement also included an indemnification clause, wherein Blast agreed to "defend, indemnify, and hold [defendants] . . . harmless of, from and against any Losses incurred . . . on account of or relating to . . . any Assumed Liabilities, including those arising from or under the Real Property Leases after the Closing."

On 9 May 2014, plaintiff sued defendants for payment of back rent and other charges due under the lease stemming from Blast's failure to pay rent on the space defendants had assigned to Blast. Defendants notified Blast of the lawsuit, and Blast promptly agreed to indemnify and defend defendants in accord with their Agreement. During discovery, counsel for plaintiff requested copies of "post-suit correspondence and documents exchanged between [defendants] and Blast." After

1. Around 14 February 2000, Tower Place Joint Venture (Original Lessor), as landlord, and Bally Total Fitness Corporation (Original Lessee), as tenant, entered into a lease agreement for the property at issue. Friday Investments, LLC (plaintiff) is the current owner of the property at issue and successor in interest to Tisano Realty Inc., the successor in interest to the Original Lessor. Defendant Bally Mid-Atlantic is the successor in interest to the Original Lessee.

defendants refused to comply, plaintiff moved to compel production of the requested documents. Defendants objected and moved for a protective order, asserting the attorney–client privilege. The trial court orally ordered defendants to produce the documents and a privilege log for *in camera* review.

On 2 April 2015, after completing its *in camera* review, the trial court notified counsel via e-mail that it had denied defendants' motion for a protective order and granted plaintiff's motion to compel. On 13 April 2015, the trial court entered its written order summarily denying defendants' motion for a protective order and granting plaintiff's motion to compel. At no point did either party request that the trial court make written findings of fact and conclusions of law. Defendants appealed the trial court's interlocutory order, successfully contending that the subject of the appeal affects a "substantial right." After settling the record on appeal, and after the briefing deadline had passed, defendants moved to submit the documents at issue under seal for *in camera* review by the Court of Appeals.

The Court of Appeals affirmed the trial court's grant of plaintiff's motion to compel. *Friday Invs., LLC v. Bally Total Fitness of the Mid-Atl., Inc.*, ___ N.C. App. ___, 788 S.E.2d 170 (2016). Before discussing the merits of the appeal, the Court of Appeals denied defendants' request to present the records for appellate review as untimely because the request was made after plaintiff had submitted its brief to the Court of Appeals. *Id.* at ___, 788 S.E.2d at 175; *see* N.C. R. App. P. 9(b)(5)(a). On the merits, the Court of Appeals held that a tripartite attorney–client relationship did not exist between defendants and Blast because "an indemnification provision in an asset purchase agreement, standing alone, is insufficient to create a common legal interest between a civil litigant indemnitee and a third-party indemnitor." *Friday Invs., LLC*, ___ N.C. App. at ___, 788 S.E.2d at 172. The Court of Appeals reasoned that defendants and Blast shared merely a common business interest and that this distinction rendered inapplicable our previous decision in *Raymond v. North Carolina Police Benevolent Ass'n*, 365 N.C. 94, 98, 721 S.E.2d 923, 926 (2011) (recognizing the tripartite attorney–client relationship). As a result, the attorney–client privilege did not extend to the communications between defendants and Blast. This Court allowed discretionary review. *Friday Invs., LLC v. Bally Total Fitness of the Mid-Atl., Inc.*, 369 N.C. 185, 793 S.E.2d 685 (2016).

[1] "The primary purpose of the discovery rules is to facilitate the disclosure prior to trial of any *unprivileged* information that is relevant and material to the lawsuit so as to permit the narrowing and sharpening of

the basic issues and facts that will require trial." *Bumgarner v. Reneau*, 332 N.C. 624, 628, 422 S.E.2d 686, 688-89 (1992) (emphasis added) (citation omitted). Rule 26 provides for a broad scope of discovery, allowing "[p]arties [to] obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action." N.C.G.S. § 1A-1, Rule 26(b)(1) (2015) (emphasis added).

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S. Ct. 677, 682, 66 L. Ed. 2d 584, 591 (1981) (citation omitted). For the privilege to apply and thus exclude relevant evidence, "the relation of attorney and client [must have] existed at the time the [particular] communication was made." *In re Investigation of Miller*, 357 N.C. 316, 335, 584 S.E.2d 772, 786 (2003) (quoting *State v. McIntosh*, 336 N.C. 517, 523, 444 S.E.2d 438, 442 (1994)).

Historically, an attorney–client relationship arises between an attorney and a single client the attorney represents. *See id.* at 335, 584 S.E.2d at 786. This Court, however, has also recognized a multiparty attorney–client relationship in which an attorney represents two or more clients. *See Dobias v. White*, 240 N.C. 680, 685, 83 S.E.2d 785, 788 (1954) (indicating that an attorney–client relationship can exist when "two or more persons employ the same attorney to act for them in some business transaction"). "The rationale for recognizing this tripartite attorney-client relationship is that individuals with a common interest in the litigation should be able to freely communicate with their attorney, and with each other, to more effectively defend or prosecute their claims." *Raymond*, 365 N.C. at 99, 721 S.E.2d at 926 (citation omitted).

In *Raymond* a former police officer and member of the Southern States Police Benevolent Association (SSPBA) contacted the SSPBA and spoke with an SSPBA attorney in confidence, seeking legal advice regarding his recent demotion. *Id.* at 95-96, 721 S.E.2d at 924-25. The SSPBA then referred the officer to outside legal counsel paid for by the SSPBA. As a dues-paying member, the former officer's SSPBA membership entitled him to various SSPBA services, including legal representation in grievance and disciplinary matters. Recognizing the tripartite nature of the arrangement, this Court held that an attorney–client relationship existed between the former police officer, the SSPBA and its attorney, and the outside legal counsel selected by the association to represent the former officer. *Id.* at 99, 721 S.E.2d at 927. As such, any communications between them that also satisfied the five-factor test articulated in *State v. Murvin*, 304 N.C. 523, 531, 284 S.E.2d 289,

294 (1981), were privileged. *Raymond*, 365 N.C. at 100-01, 721 S.E.2d at 927-28.

Our decision in *Raymond* analogized the relationship between the officer, the SSPBA and an attorney for the association, and outside defense counsel to those relationships common in the insurance context. *See id.* at 98, 721 S.E.2d at 926 ("In the insurance context, courts find that the attorney defending the insured and receiving payment from the insurance company represents both the insured and the insurer . . . ." (citing *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 602-03, 617 S.E.2d 40, 46 (2005), *aff'd per curiam*, 360 N.C. 356, 625 S.E.2d 779 (2006) (mem.))). As in the insurance context, a tripartite attorney–client relationship arose from the officer and the SSPBA's common interest in the litigation, stemming from the officer's contractual relationship with the SSPBA as a dues-paying member. *See Raymond*, 365 N.C. at 98, 721 S.E.2d at 926 ("[N]otwithstanding that usually only the insured has been sued, a tripartite attorney-client relationship exists because the interests of both the insured and the insurer in prevailing against the plaintiff's claim are closely aligned.").

"[A] contractual duty to defend and indemnify creates a common interest and tripartite relationship between the insurer, the insured, and the defense attorney." *Id.* at 98-99, 721 S.E.2d at 926 (citing *Bourlon*, 172 N.C. App. at 603-05, 617 S.E.2d at 46-47). Like the common interest found between the insurer and the insured, an indemnification agreement creates a common interest between the indemnitor and the indemnitee in that the indemnitor contractually shares in the indemnitee's legal well-being because the agreement subjects the indemnitor to the "damages assessed and loss resulting from an adverse judgment." *Queen City Coach Co. v. Lumberton Coach Co.*, 229 N.C. 534, 536, 50 S.E.2d 288, 289 (1948) (citation omitted); *see also Dixie Container Corp. of N.C. v. Dale*, 273 N.C. 624, 627, 160 S.E.2d 708, 711 (1968) (noting that an indemnity contract "will be construed to cover all losses, damages, and liabilities which reasonably appear to have been within the contemplation of the parties"). The fact that indemnification relates to a business purpose does not sever but strengthens that common interest. *See Dobias*, 240 N.C. at 685, 83 S.E.2d at 788 (recognizing an attorney–client relationship between more than two individuals when "two or more persons employ the same attorney to act for them in some business transaction"). As a result, a tripartite attorney–client relationship arises because the interests of both the indemnitor and indemnitee in prevailing against the plaintiff's claim are contractually aligned, notwithstanding that usually only the indemnitee has been sued. *See Raymond*, 365 N.C. at 98, 721 S.E.2d at 926.

In all significant ways, the question of the formation of an attorney–client relationship here is indistinguishable from that resolved by our decision in *Raymond*. Blast contractually agreed to indemnify and defend defendants against any losses incurred relating to their real property lease. After this litigation commenced, defendants notified Blast of the litigation, and Blast engaged counsel to defend the case under the indemnification agreement. Like the common interest found in the insurance context, Blast's interest in defendants' legal well-being as indemnitees creates the common interest in this litigation: The indemnification provision subjects Blast to any damages that result from an adverse judgment against defendants. Accordingly, a tripartite attorney–client relationship exists between defendants, Blast, and their defense counsel.

[2] The mere fact that an attorney–client relationship exists, however, does not automatically trigger the attorney–client privilege. *See Dobias*, 240 N.C. at 684, 83 S.E.2d at 788 (Simply because "the evidence relates to communications between attorney and client alone does not require its exclusion."). For the attorney–client privilege to apply, the communication must satisfy the five-factor *Murvin* test:

> (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted, (4) the communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated and (5) the client has not waived the privilege.

Murvin, 304 N.C. at 531, 284 S.E.2d at 294 (citing 1 Henry Brandis, Jr., *Stansbury's North Carolina Evidence* § 62 (1973)). "[I]f any one of these five elements is not present in any portion of an attorney-client communication, that portion of the communication is not privileged." *Brown v. Am. Partners Fed. Credit Union*, 183 N.C. App. 529, 534, 645 S.E.2d 117, 121 (2007) (quoting *In re Miller*, 357 N.C. at 335, 584 S.E.2d at 786). "The trial court is best suited to determine, through a fact-sensitive inquiry, whether the attorney-client *privilege* applies to a specific communication." *Raymond*, 365 N.C. at 100, 721 S.E.2d at 927 (emphasis added) (citing *In re Miller*, 357 N.C. at 336, 584 S.E.2d at 787).

"Findings of fact and conclusions of law are necessary on decisions of any motion . . . only when requested by a party . . . ." N.C.G.S. § 1A-1, Rule 52(a)(2) (2015). The purpose of requiring findings of fact

and conclusions of law by the trial court "is to allow meaningful review by the appellate courts." *O'Neill v. S. Nat'l Bank of N.C.*, 40 N.C. App. 227, 231, 252 S.E.2d 231, 234 (1979) (citation omitted). "When the trial court is not required to find facts and make conclusions of law and does not do so, it is presumed that the court on proper evidence found facts to support its judgment." *Estrada v. Burnham*, 316 N.C. 318, 324, 341 S.E.2d 538, 542 (1986), *superseded by statute*, N.C.G.S. § 1A-1, Rule 11(a) (Cum. Supp. 1988), *on other grounds as stated in Turner v. Duke Univ.*, 325 N.C. 152, 163-64, 381 S.E.2d 706, 712-13 (1989) (citations omitted).

A trial court's discovery ruling is reviewed for abuse of discretion, *see Firemen's Mut. Ins. Co. v. High Point Sprinkler Co.*, 266 N.C. 134, 143, 146 S.E.2d 53, 62 (1966), and will be overturned "only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision," *In re Foreclosure of Lucks*, 369 N.C. 222, 228, 794 S.E.2d 501, 506 (2016) (quoting *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986)).

Though a tripartite attorney–client relationship exists, we cannot conclude, given the bare record before us, that the trial court abused its discretion or misapplied the law in compelling disclosure of the communications at issue. The underlying trial court order compelling discovery contains neither findings of fact nor conclusions of law, as neither party requested them. Therefore, we must presume that the trial court found facts sufficient to support its determination that the communications at issue were not privileged. Moreover, defendants did not properly present the allegedly privileged documents for appellate review. *See State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983) ("It is the appellant's duty and responsibility to see that the record is in proper form and complete."). As such, the record merely contains a privilege log that briefly describes each of the allegedly privileged documents. Nothing in the privilege log or the trial court's order suggests that the trial court erroneously concluded that a tripartite attorney–client relationship had not formed or that the court misapplied the five-factor *Murvin* test. Given the record before us, we cannot conclude that the trial court's decision was so arbitrary that it could not have been the result of a reasoned decision.

In sum, we hold that Blast's contractual duty to defend and indemnify defendants created a tripartite attorney–client relationship. Nonetheless, the record before us fails to indicate that the trial court abused its discretion in determining that the post-litigation communications between defendants and Blast were not privileged. Accordingly,

we modify and affirm the decision of the Court of Appeals. We remand this case to the Court of Appeals for further remand to the trial court for additional proceedings not inconsistent with this opinion.

MODIFIED AND AFFIRMED; REMANDED.

IN THE MATTER OF A.E.C.

No. 82PA15-2

Filed 3 November 2017

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order of the Court of Appeals entered on 24 October 2016 dismissing an appeal from orders signed on 2 February 2016 by Judge Edward A. Pone in District Court, Cumberland County. Heard in the Supreme Court on 11 October 2017.

Elizabeth Kennedy-Gurnee, *Christopher L. Carr*, *and James D. Dill for Cumberland County Department of Social Services*, *petitioner-appellant.*

Beth A. Hall, *Attorney Advocate for appellee Guardian ad Litem.*

Joyce L. Terres, *Assistant Appellate Defender*, *for respondent-appellee-father.*

PER CURIAM.

CERTIORARI IMPROVIDENTLY ALLOWED.

KB AIRCRAFT ACQUISITION, LLC v. BERRY

[370 N.C. 243 (2017)]

KB AIRCRAFT ACQUISITION, LLC
v.
JACK M. BERRY, JR. AND 585 GOFORTH ROAD, LLC

No. 349PA16

Filed 3 November 2017

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 790 S.E.2d 559 (2016), affirming an order of summary judgment entered on 6 February 2015 by Judge Richard L. Doughton in Superior Court, Watauga County. Heard in the Supreme Court on 9 October 2017.

Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by Byron L. Saintsing, for plaintiff-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Clint S. Morse and John H. Small, for defendant-appellees.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA
v.
SANDRA MESHELL BRICE

No. 244PA16

Filed 3 November 2017

Indictment and Information—habitual misdemeanor larceny—prior convictions—statutory requirement—not jurisdictional

Where the indictment charging defendant with habitual misdemeanor larceny failed to comply with N.C.G.S. § 15A-928—which provided that the element of the prior convictions be charged in a separate special indictment or a separate count—the indictment was not fatally defective, and the trial court had jurisdiction over the case. The provision contained in section 15A-928 was not a jurisdictional issue that defendant was entitled to raise on appeal without having objected or otherwise sought relief before the trial court.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 786 S.E.2d 812 (2016), vacating and remanding a judgment entered on 12 February 2015 by Judge Michael D. Duncan in Superior Court, Catawba County. Heard in the Supreme Court on 30 August 2017.

Joshua H. Stein, Attorney General, by Kristin J. Uicker, Assistant Attorney General, for the State-appellant.

Glenn Gerding, Appellate Defender, by Daniel L. Spiegel, Assistant Appellate Defender, for defendant-appellee.

ERVIN, Justice.

After defendant Sandra Meshell Brice was convicted of committing the felony of habitual misdemeanor larceny, a unanimous panel of the Court of Appeals vacated defendant's conviction and remanded this case to the trial court for the entry of a new judgment and resentencing based upon a misdemeanor larceny conviction on the grounds that the indictment returned against defendant in this case was fatally defective. We reverse the Court of Appeals' decision.

On 22 July 2013, the Catawba County grand jury returned a single-count bill of indictment purporting to charge defendant with habitual

misdemeanor larceny. The charge against defendant came on for trial before the trial court and a jury during the 9 February 2015 criminal session of the Superior Court, Catawba County. After the jury was empaneled and prior to the making of the parties' opening statements, defendant admitted, outside the presence of the jury and after an appropriate colloquy with the trial court, to having been convicted of the four prior larcenies delineated in the indictment. On 12 February 2015, the jury returned a verdict convicting defendant of habitual misdemeanor larceny. Based upon the jury's verdict, the trial court entered a judgment sentencing defendant to an active term of ten to twenty-one months imprisonment, suspended defendant's active sentence, and placed defendant on supervised probation for a period of twenty-four months on the condition that defendant comply with the usual terms and conditions of probation, serve a seventy-five-day term of imprisonment, and pay a $300.00 fine, attorney's fees, and the costs. Defendant noted an appeal to the Court of Appeals from the trial court's judgment.

In her sole challenge to the trial court's judgment before the Court of Appeals, defendant argued that the indictment's failure to comply with the requirements spelled out in N.C.G.S. § 15A-928 deprived the trial court of "jurisdiction to enter judgment and sentence against [defendant] for felony habitual misdemeanor larceny," so that her "conviction for habitual misdemeanor larceny must be vacated and remanded for entry of judgment on misdemeanor larceny."

The State, on the other hand, noted defendant's failure to challenge the validity of the indictment that had been returned for the purpose of charging her with habitual misdemeanor larceny before the trial court and pointed out that defendant had not contended that "the indictment fails to describe each element of the crime with sufficient specificity" or that she had been "prejudiced in preparing her defense as a result of the indictment." Thus, in the State's view, any "variation" between "the strict requirements of N.C.[G.S.] § 15A-928" and the indictment returned against defendant in this case "is not reversible" error. As a result, the State urged the Court of Appeals to leave the trial court's judgment undisturbed.

In vacating the trial court's judgment and remanding this case to the Superior Court, Catawba County, for resentencing based upon a conviction for misdemeanor, rather than habitual misdemeanor, larceny, the Court of Appeals concluded that "an indictment for habitual misdemeanor larceny is subject to the provisions of N.C.[G.S.] § 15A-928" and that, "[o]n its face, the indictment here failed to comply with" that statutory provision. *State v. Brice*, ___ N.C. App. ___, ___, 786 S.E.2d 812, 815

(2016). The Court of Appeals rejected the State's argument in reliance upon the decision in *State v. Jernigan*, 118 N.C. App. 240, 455 S.E.2d 163 (1995), in which the Court of Appeals had held that noncompliance with the arraignment procedures set out in N.C.G.S. § 15A-928(c) constituted harmless error given that the defendant, who had stipulated to his prior convictions prior to trial, "was fully aware of the charges against him . . . , understood his rights and the effect of the stipulation, and . . . was in no way prejudiced by the failure of the court to formally arraign him and advise him of his rights." *Brice*, ___, N.C. App. at ___, 786 S.E.2d at 815 (quoting *Jernigan*, 118 N.C. App. at 245, 455 S.E.2d at 167). In reaching this result, the Court of Appeals stated that, while "a formal arraignment under [N.C.G.S. §] 15A-928(c) is not a matter of jurisdictional consequence," the indictment requirements set out in N.C.G.S. § 15A-928(b) had been held to be jurisdictional in *State v. Williams*, 153 N.C. App. 192, 568 S.E.2d 890 (2002), *disc. rev. improvidently allowed*, 357 N.C. 45, 577 S.E.2d 618 (2003) (per curiam). *Id.* at ___, 786 S.E.2d at 815. As a result, since the failure of the indictment returned against defendant in this case to comply with the requirements of N.C.G.S. § 15A-928 deprived the trial court of jurisdiction to enter judgment against defendant based upon a conviction for habitual misdemeanor larceny, the Court of Appeals vacated defendant's conviction for that offense and remanded this case to the trial court for the entry of judgment and resentencing based upon a conviction for misdemeanor, rather than habitual misdemeanor, larceny. *Id.* at ___, 786 S.E.2d at 815.

The State sought discretionary review of the Court of Appeals' decision by this Court on the grounds that "bills of indictment [should not be quashed] for mere informality or minor defects which do not affect the merits of the case," quoting *State v. Brady*, 237 N.C. 675, 679, 75 S.E.2d 791, 793 (1953), and that this Court "do[es] not favor the practice of quashing an indictment or arresting a judgment for informalities which could not possibly have been prejudicial to the rights of defendant in the trial court," quoting *State v. Russell*, 282 N.C. 240, 248, 192 S.E.2d 294, 299 (1972). According to the State, the Court of Appeals implicitly held in *State v. Stephens*, 188 N.C. App. 286, 293, 655 S.E.2d 435, 439-40, *disc. rev. denied*, 362 N.C. 370, 662 S.E.2d 389 (2008), that "an indictment that alleges all the felony offense's essential elements, including the prior conviction, properly alleges the felony offense" "despite not complying with [the] form requirements" set out in N.C.G.S. § 15A-928(b). In the State's view, the Court of Appeals erred by relying upon *Williams*, which had been "wrongly decided." Finally, the State asserted that, assuming that noncompliance with N.C.G.S. § 15A-928 constituted a jurisdictional

defect, the Court of Appeals had erred by failing to simply arrest judgment given that the trial court lacked jurisdiction to convict defendant of, and sentence defendant for, a misdemeanor in this case.

Defendant, on the other hand, argued that compliance with N.C.G.S. § 15A-928 "is no mere formality, but rather is the formal mechanism by which the purpose of [N.C.G.S.] § 15A-928 is achieved." "If a defendant is not apprised of the opportunity to admit the prior convictions outside of the presence of the jury," "the defendant will be unable to avoid the certain prejudice that would result from evidence of prior convictions being presented to the jury." In defendant's view, the State is requesting the Court to disturb settled North Carolina law, in accordance with which "the statute must be strictly followed in order to apprise [the] defendant of the offense for which he is charged and to enable him to prepare an effective defense," quoting *State v. Jackson*, 306 N.C. 642, 652 n.2, 295 S.E.2d 383, 389 n.2 (1982). Finally, defendant asserted that the remedy that the Court of Appeals afforded to defendant in this case has been "applied . . . time and time again" and "should remain undisturbed." This Court granted the State's discretionary review petition on 8 December 2016.

In seeking to persuade us to overturn the Court of Appeals' decision, the State points out that this Court has held that "[a]n indictment is sufficient if it charges all essential elements of the offense with sufficient particularity to apprise the defendant of the specific accusations against him and (1) will enable him to prepare his defense and (2) will protect him against another prosecution for that same offense," quoting *State v. Bowden*, 272 N.C. 481, 483, 158 S.E.2d 493, 495 (1968), and, citing *State v. House*, 295 N.C. 189, 200, 244 S.E.2d 654, 660 (1978), that noncompliance with provisions couched in mandatory terms is not necessarily fatal to the validity of an indictment. The State contends that a decision to invariably quash an indictment under circumstances such as those present here would attribute "to the Legislature an intent to paramount [sic] mere form over substance," quoting *House*, 295 N.C. at 203, 244 S.E.2d at 662. As a result, the State argues that, given that "we are no longer bound by the 'ancient strict pleading requirements of the common law' " and that "contemporary criminal pleadings requirements have been 'designed to remove from our law unnecessary technicalities which tend to obstruct justice,' " quoting *State v. Williams*, 368 N.C. 620, 623, 781 S.E.2d 268, 271 (2016) (quoting *State v. Freeman*, 314 N.C. 432, 436, 333 S.E.2d 743, 746 (1985)), "[t]his Court should hold that a pleading that does not conform to [N.C.G.S. §] 15A-928's form requirements is not jurisdictionally defective for that reason alone."

Defendant, on the other hand, contends that the failure of the indictment returned against him in this case to separate the allegations setting out the substantive offense from the allegations delineating defendant's prior convictions renders that indictment fatally defective and insufficient to confer jurisdiction upon the trial court to enter judgment against defendant based upon an habitual misdemeanor larceny conviction. The fact that N.C.G.S. § 15A-928 utilizes mandatory terms such as "must" and "may not" in describing the manner in which allegations concerning a defendant's prior convictions should be set out indicates that these requirements should be treated as jurisdictional in nature, particularly given that the relevant statutory provisions do not explicitly state that noncompliance with the provisions of N.C.G.S. § 15A-928 is not a jurisdictional defect and that the General Assembly has failed to amend the relevant statutory provision to reflect the State's interpretation despite several Court of Appeals opinions finding that noncompliance with the separate indictment provisions of N.C.G.S. § 15A-928 constitutes a fatal defect.

> The crime of larceny is a felony, without regard to the value of the property in question, if the larceny is . . . [c]ommitted after the defendant has been convicted in this State or in another jurisdiction for any offense of larceny under this section, or any offense deemed or punishable as larceny under this section, or of any substantially similar offense in any other jurisdiction, regardless of whether the prior convictions were misdemeanors, felonies, or a combination thereof, at least four times. A conviction shall not be included in the four prior convictions required under this subdivision unless the defendant was represented by counsel or waived counsel at first appearance or otherwise prior to trial or plea. If a person is convicted of more than one offense of misdemeanor larceny in a single session of district court, or in a single week of superior court or of a court in another jurisdiction, only one of the convictions may be used as a prior conviction under this subdivision; except that convictions based upon offenses which occurred in separate counties shall each count as a separate prior conviction under this subdivision.

N.C.G.S. § 14-72(b)(6) (2015). As a result, a criminal defendant is guilty of the felony of habitual misdemeanor larceny in the event that he or she "took the property of another" and "carried it away" "without the owner's consent" and "with the intent to deprive the owner of his property permanently," *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815

(1982) (citations omitted), *overruled in part on other grounds by State v. Mumford*, 364 N.C. 394, 402, 699 S.E.2d 911, 916 (2010), after having been previously convicted of an eligible count of larceny on four prior occasions. N.C.G.S. § 14-72(b)(6).

N.C.G.S. § 15A-924 (a) provides, in pertinent part, that:

> A criminal pleading must contain . . . [a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation.

N.C.G.S. § 15A-924(a)(5) (2015). "To be sufficient under our Constitution, an indictment 'must allege lucidly and accurately all the essential elements of the offense endeavored to be charged.' " *State v. Hunt*, 357 N.C. 257, 267, 582 S.E.2d 593, 600 (quoting *State v. Greer*, 238 N.C. 325, 327, 77 S.E.2d 917, 919 (1953)), *cert. denied*, 539 U.S. 985, 124 S. Ct. 44, 156 L. Ed. 2d 702 (2003). "It is hornbook law that a valid indictment is a condition precedent to the jurisdiction of the Superior Court to determine the guilt or innocence of the defendant, and to give authority to the court to render a valid judgment." *State v. Ray*, 274 N.C. 556, 562, 164 S.E.2d 457, 461 (1968) (citing, *inter alia*, N.C. Const. art. I, § 12). "A criminal pleading . . . is fatally defective if it 'fails to state some essential and necessary element of the offense of which the defendant is found guilty.' " *State v. Ellis*, 368 N.C. 342, 344, 776 S.E.2d 675, 677 (2015) (quoting *State v. Gregory*, 223 N.C. 415, 418, 27 S.E.2d 140, 142 (1943) (citations omitted)). "[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (citations omitted), *cert. denied*, 531 U.S. 1018, 121 S. Ct. 581, 148 L. Ed. 2d 498 (2000). "As to other less serious defects, objection must be made by motion to quash the indictment or, in proper cases, a bill of particulars may be demanded." *Gregory*, 223 N.C. at 418, 27 S.E.2d at 142.

The indictment returned against defendant in this case alleged that:

> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above [Sandra Meshell Brice] unlawfully, willfully, and feloniously did steal, take, and carry away FIVE PACKS OF STEAKS, the personal property of FOOD

> LION, LLC, such property having a value of SEVENTY DOLLARS ($70.00), and the defendant has had the following four prior larceny convictions in which [s]he was represented by counsel or waived counsel:
>
> On or about MAY 8, 1996 the defendant committed the misdemeanor of LARCENY in violation of the law of the State of North Carolina, G.S. 14-72, and on or about SEPTEMBER 10, 1996 the defendant was convicted of the misdemeanor of LARCENY in the District Court of Lincoln County, North Carolina; and that
>
> On or about FEBRUARY 19, 1997, the defendant committed the misdemeanor of LARCENY in violation of the law of the State of North Carolina, G.S. 14-72, and on or about JULY 29, 1997 the defendant was convicted of the misdemeanor of LARCENY in the District Court of Catawba County, North Carolina; and that
>
> On or about JUNE 13, 2003 the defendant committed the misdemeanor of LARCENY in violation of the law of the State of North Carolina, G.S. 14-72, and on or about OCTOBER 17, 2003 the defendant was convicted of the misdemeanor of LARCENY in the District Court of Catawba County, North Carolina; and that
>
> On or about JULY 7, 2007 the defendant committed the misdemeanor of LARCENY in violation of the law of the State of North Carolina, G.S. 14-72, and on or about SEPTEMBER 24, 2007 the defendant was convicted of the misdemeanor of LARCENY in the District Court of Catawba County, North Carolina.

A careful reading of the indictment returned against defendant in this case clearly indicates that the Catawba County grand jury alleged that defendant had stolen, taken, and carried away the property of another with the requisite intent after having been previously convicted of misdemeanor larceny at times when she had either been represented by or waived counsel in various North Carolina District Courts on four separate occasions. As a result, given that the indictment returned against defendant in this case alleged all of the essential elements of habitual misdemeanor larceny, it sufficed to give the trial court jurisdiction over this case under the traditional test utilized in evaluating the facial validity of a criminal pleading. On the other hand, the indictment returned against defendant in this case unquestionably failed to comply with the

requirements of N.C.G.S. § 15A-928(a) and (b), which provide that, in instances in which "the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter, an indictment or information for the higher offense may not allege the previous conviction," N.C.G.S. § 15A-928(a) (2015), and must, instead, "be accompanied by a special indictment or information, filed with the principal pleading, charging that the defendant was previously convicted of a specified offense," or the special indictment may be contained "in the principal indictment as a separate count," *id.* § 15A-928(b) (2015). As a result, the ultimate issue presented for our consideration in this case is whether the fact that the indictment returned against defendant in this case failed to comply with the separate indictment or separate count requirement set out in N.C.G.S. § 15A-928 constituted a fatal defect sufficient to deprive the trial court of jurisdiction to enter judgment against defendant.

Admittedly, this Court has stated on a number of occasions that, "[w]here jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction." *In re T.R.P.*, 360 N.C. 588, 590, 636 S.E.2d 787, 790 (2006) (quoting *Eudy v. Eudy*, 288 N.C. 71, 75, 215 S.E.2d 782, 785 (1975), *overruled on other grounds by Quick v. Quick*, 305 N.C. 446, 457-58, 290 S.E.2d 653, 661 (1982), *superseded in part by statute*, N.C.G.S. § 50-13.4(f)(9) (1983)). The extent, if any, to which a particular statutory provision creates a jurisdictional requirement hinges upon the meaning of the relevant statutory provisions. *In re D.S.*, 364 N.C. 184, 187, 694 S.E.2d 758, 760 (2010) (stating that "[o]ur principal task here is to interpret the statute"). According to well-established North Carolina law, "[t]he primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990) (citation omitted). "The best indicia of [the legislative] intent are the language of the statute . . . , the spirit of the act, and what the act seeks to accomplish." *Coastal Ready-Mix Concrete Co. v. Bd. of Comm'rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980) (citations omitted).

The statutory scheme created in N.C.G.S. § 15A-928 serves two important purposes. *State v. Ford*, 71 N.C. App. 452, 454, 322 S.E.2d 431, 432 (1984) (stating that the "purpose of [N.C.G.S. § 15A-928] is to insure that defendants are informed of the prior convictions they are charged with and are given a fair opportunity to either admit or deny them before

the State's evidence is concluded"). As an initial matter, the provision set out in N.C.G.S. § 15A-928(b) requiring "a special indictment or information" "charging that the defendant was previously convicted of a specified offense" serves the purpose of ensuring that "the defendant has notice that he is to be charged as a recidivist before pleading . . . , eliminating the possibility that he will enter a guilty plea on the expectation that the maximum punishment he could receive would be that provided for in the statute defining the present crime." *State v. Allen*, 292 N.C. 431, 435, 233 S.E.2d 585, 588 (1977) (quoting Harold Dubroff, Note, *Recidivist Procedures*, 40 N.Y.U. L. Rev. 332, 348 (1965) [hereinafter *Recidivist Procedures*]) (discussing the North Carolina Habitual Felons Act and noting, at 292 N.C. at 434, 233 S.E.2d at 587, the procedural similarities between that Act and the provisions of N.C.G.S. § 15A-928).[1] Secondly, the requirement set out in N.C.G.S. § 15A-928(a) and (b) that the defendant's prior conviction be alleged in a special indictment or information or in a separate count is intended to prevent "any prejudice due to the introduction of evidence of prior convictions before the trier of guilt for the present offense." *Id.* at 435, 233 S.E.2d at 588 (quoting *Recidivist Procedures* at 348). The separate indictment requirement operates to prevent such prejudice using the procedures prescribed in N.C.G.S. § 15A-928(c), which requires the trial court, out of the presence of the jury, to "arraign the defendant upon the special indictment or information" after advising him or her that "he [or she] may admit the previous conviction alleged, deny it, or remain silent," N.C.G.S. § 15A-928(c) (2015), with an admission of the prior conviction element sufficing to preclude the admission of evidence concerning the defendant's prior conviction before the jury, *id.* § 15A-928(c)(1), and with a denial of the prior conviction element sufficing to authorize "the State [to] prove that element of the offense charged before the jury as a part of its case," *id.* § 15A-928(c)(2).

An examination of the language in which N.C.G.S. § 15A-928 is couched and the purposes sought to be achieved by N.C.G.S. § 15A-928 do not persuade us that noncompliance with the relevant statutory

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1. This Court has stated, in dicta, that, "when [N.C.]G.S. § 15A-928 does apply, the statute must be strictly followed." *Jackson*, 306 N.C. at 652 n.2, 295 S.E.2d at 389 n.2. The quoted statement was made in a case involving a special indictment alleging a prior conviction that had been returned nearly two months after the indictment charging the substantive offense. *Id.* at 652 n.2, 295 S.E.2d at 389 n.2. In stating that the indictment charging the prior conviction or convictions "must be filed *with* the principal pleading," *id.* at 652 n.2, 295 S.E.2d at 389 n.2, the Court was clearly referring to the notice-related concerns sought to be addressed by N.C.G.S. § 15A-928.

provisions constitutes a jurisdictional defect. Although the separate indictment provisions contained in N.C.G.S. § 15A-928 are couched in mandatory terms, that fact, standing alone, does not make them jurisdictional in nature. *Cf. House*, 295 N.C. at 200-03, 244 S.E.2d at 660-62 (stating that the word "must" or "shall" in a statute does not always "indicate a legislative intent to make a provision of the statute mandatory, and a failure to observe it fatal to the validity of the purported action" and holding that, though N.C.G.S. § 15A-644(a)(5) directs that an indictment "must contain" the grand jury foreman's signature "attesting the concurrence of 12 or more grand jurors in the finding of a true bill of indictment," an indictment lacking the express statement that "12 or more grand jurors concurred in such finding" was nevertheless valid "where the foreman's statement upon the bill is clearly so intended and there is nothing to indicate the contrary."). Similarly, the notice and prejudice-related purposes that underlie N.C.G.S. § 15A-928 are not the sort of goals typically sought to be achieved by the imposition of additional jurisdictional requirements over and above those otherwise required. Although the provision of sufficient notice does appear to have jurisdictional overtones, a defendant can obtain sufficient notice of the exact nature of the charge that has been lodged against him or her through compliance with the traditional facial validity requirements set out in N.C.G.S. § 15A-924(a)(5) without the necessity for compliance with the separate indictment provisions of N.C.G.S. § 15A-928. Similarly, compliance with the separate indictment requirement set out in N.C.G.S. § 15A-928 is not absolutely necessary to ensure the absence of prejudice to defendant stemming from the disclosure of defendant's prior convictions to the jury given that defendant was separately arraigned on the prior conviction allegations in this case as required by N.C.G.S. § 15A-928(c), admitted to the prior convictions, and was convicted by a jury that had no knowledge of her prior larceny convictions. As a result, a careful examination of the language in which N.C.G.S. § 15A-928 is couched, coupled with an analysis of the purposes sought to be served by the enactment of the relevant statutory language, persuades us that the separate indictment provision contained in N.C.G.S. § 15A-928 is not a jurisdictional issue that defendant was entitled to raise on appeal without having lodged an appropriate objection or otherwise sought relief on the basis of that claim before the trial court.[2]

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2. Although defendant asserts that similar language contained in the statutory provisions governing the sentencing of habitual felons was held to be jurisdictional in *State v. Patton*, 342 N.C. 633, 635, 466 S.E.2d 708, 709-10 (1996), we do not understand *Patton* to involve a jurisdictional holding.

In response to questions posed during oral argument, defendant asserted that there were only two categories of indictment-related error—facial defects that deprived the trial court of jurisdiction and errors for which no relief could be afforded even if the alleged defect in the indictment was brought to the trial court's attention by objection, a motion to dismiss or quash, or otherwise. *See*, *e.g.*, *State v. Cheek*, 307 N.C. 552, 555, 299 S.E.2d 633, 636 (1983) (rejecting the defendant's argument that the omission of "with force and arms" rendered a rape indictment fatally defective); *State v. Corbett*, 307 N.C. 169, 173-75, 297 S.E.2d 553, 557-58 (1982) (same); *State v. Dudley*, 182 N.C. 822, 825, 109 S.E. 63, 65 (1921) (stating that, while "[i]t may have been the better form to have added to the bill that the alleged default was also 'contrary to the statute in such case made and provided,' but this, if it be a defect, is one cured in express terms by our Statute of Jeofails"); *State v. Sykes*, 104 N.C. 694, 698-99, 10 S.E. 191, 192-93 (1889) (opining that "the grounds assigned in support of the motion to quash are untenable" given that "it was not necessary that the affidavit or warrant should conclude 'against the statute' "); *State v. Howard*, 92 N.C. 772, 778 (1885) (holding that it was not necessary for an indictment for murder to allege that the "prisoner, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil" or that the "deceased was in the peace of God and the State").[3] In advancing this argument, however, defendant has overlooked a third category of indictment-related errors involving deficiencies that must be brought to the trial court's attention as a prerequisite for the assertion of that indictment-related claim on appeal. *See*, *e.g.*, *State v. Green*, 266 N.C. 785, 788-89, 147 S.E.2d 377, 379-80 (1966) (per curiam) (stating that the defendant, "by going to trial on this warrant without making a motion to quash, waived any duplicity in the warrant" (citing *State v. Best*, 265 N.C. 477, 144 S.E.2d 416 (1965))); *State v. Strouth*, 266 N.C. 340, 342, 145 S.E.2d 852, 853 (1966) (observing that, "by going to trial without making a motion to quash, defendant waived any duplicity in the warrant" (quoting *Best*, 265 N.C. at 481, 144 S.E.2d at 418)); *State v. Merritt*, 244 N.C. 687, 688, 94 S.E.2d 825, 826 (1956) (stating that "[t]he defendant could have required separate counts, one charging operation of a motor vehicle while under the influence of intoxicating liquor" and "the other charging the operation

3. A number of the decisions cited at this point in the text rely upon N.C.G.S. § 15-155, which is entitled "Defects which do not vitiate" and which provides, in pertinent part, that "[n]o judgment upon any indictment for felony or misdemeanor . . . shall be stayed or reversed for the want of the averment of any matter unnecessary to be proved, nor for omission of the words . . . 'with force and arms,' . . . nor for omission of the words 'against the form of the statute' or 'against the form of the statutes.' "

while under the influence of narcotics," but, "[b]y going to trial without making a motion to quash, [the defendant] waived any duplicity which might exist in the bill" (citing multiple cases)). The Court of Appeals applied a similar analysis in evaluating claims arising from noncompliance with the separate indictment provisions of N.C.G.S. § 15A-928 in *State v. Sullivan*, 111 N.C. App. 441, 442, 432 S.E.2d. 376, 377 (1993), in which the defendant successfully filed a "motion to strike the surplus language" from an indictment that violated the separate pleading requirement set out in N.C.G.S. § 15A-928, and *Stephens*, 188 N.C. App. at 288, 293, 655 S.E.2d at 437, 440, in which the Court of Appeals upheld the trial court's decision to allow the State to amend an indictment in order to ensure compliance with N.C.G.S. § 15A-928 by separating the substantive allegations from the allegations concerning the defendant's prior convictions. As a result, we hold that the claim that defendant has sought to present on appeal in this case is similar to other sorts of claims which, while not involving challenges to noncompliance with formalities that have little practical purpose, do involve deviations from statutory requirements that attempt to effectuate significant legislative policy goals and, for that reason, may well support an award of appellate relief in appropriate cases in the event that those claims are properly preserved for purposes of appellate review.

In this case, however, defendant did not challenge before the trial court the failure of the indictment returned against her to comply with the separate indictment provision set out in N.C.G.S. § 15A-928. For that reason, given that the claim that she has presented for our consideration is not jurisdictional in nature, she is not entitled to seek relief based upon that indictment-related deficiency for the first time on appeal.[4] As a result, we reverse the decision of the Court of Appeals and instruct that court to reinstate the judgment of the trial court.

REVERSED.

4. For the reasons set forth in the text of this opinion, the Court of Appeals' decision in *Williams*, 153 N.C. App. 192, 568 S.E.2d 890, is also overruled.

STATE OF NORTH CAROLINA
v.
MICHAEL ANTONIO BULLOCK

No. 194A16

Filed 3 November 2017

Search and Seizure—traffic stop—reasonable suspicion of drug activity—prolonged stop

Where a police officer pulled over defendant for multiple traffic violations, performed a safety frisk, asked defendant to sit in the front seat of the patrol car while he ran his database checks, asked permission to search defendant's car, and, a few minutes later, was joined by another officer, whose police dog alerted on a bag from defendant's trunk containing a large amount of heroin, the stop was not unlawfully prolonged. Defendant behaved nervously, had two cell phones, was driving a rental car that had been rented in someone else's name, had $372 of cash on his person, told an inconsistent story about his destination, and broke eye contact when answering questions about his destination—giving the officer reasonable suspicion of drug activity that justified the prolonged stop.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 785 S.E.2d 746 (2016), reversing an order denying defendant's motion to suppress entered on 4 August 2014, and vacating defendant's guilty plea entered on 30 July 2014 and a judgment entered on 30 July 2014, all by Judge Orlando F. Hudson, Jr. in Superior Court, Durham County, and remanding the case for further proceedings. Heard in the Supreme Court on 10 April 2017.

Joshua H. Stein, *Attorney General*, *by Derrick C. Mertz*, *Special Deputy Attorney General*, *for the State-appellant.*

Glenn Gerding, *Appellate Defender*, *by Jon H. Hunt and Michele Goldman*, *Assistant Appellate Defenders*, *for defendant-appellee.*

MARTIN, Chief Justice.

Officer John McDonough pulled defendant over for several traffic violations on I-85 in Durham. During the traffic stop that followed, Officer McDonough and another police officer discovered a large amount of heroin inside of a bag in the car that defendant was driving. Before the

superior court, defendant moved to suppress all evidence derived from this search, arguing that the search had violated the Fourth Amendment. The trial court denied defendant's motion to suppress, defendant appealed, and the Court of Appeals reversed the trial court's order. *State v. Bullock*, ___ N.C. App. ___, ___, 785 S.E.2d 746, 747 (2016). The Court of Appeals concluded that the traffic stop that led to the discovery of the heroin had been unlawfully prolonged under the standard that the Supreme Court of the United States set out in *Rodriguez v. United States*, 575 U.S. ___, 135 S. Ct. 1609 (2015). *Bullock*, ___ N.C. App. at ___, ___, 785 S.E.2d at 750, 752. We hold that the stop was not unlawfully prolonged under that standard, and therefore reverse.

After the superior court denied defendant's motion to suppress, defendant pleaded guilty but specifically reserved the right to appeal the denial of his motion. Before the Court of Appeals, defendant raised three arguments: first, that Officer McDonough unlawfully prolonged the traffic stop; second, that the consent to search defendant's car that defendant gave during the stop was not voluntary; and third, that the superior court erred in accepting defendant's guilty plea. In a divided opinion, the Court of Appeals agreed with defendant's first argument, which made it unnecessary for the court to rule on his other two arguments. *See id.* at ___, 785 S.E.2d at 755. The State exercised its statutory right of appeal to this Court based on the dissenting opinion in the Court of Appeals.

The Fourth Amendment to the United States Constitution states that "[t]he right of the people to be secure . . . , against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. "A traffic stop is a seizure 'even though the purpose of the stop is limited and the resulting detention quite brief.' " *State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) (quoting *Delaware v. Prouse*, 440 U.S. 648, 653 (1979)). Under *Rodriguez*, the duration of a traffic stop must be limited to the length of time that is reasonably necessary to accomplish the mission of the stop, *see* 575 U.S. at ___, 135 S. Ct. at 1612 (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)), unless reasonable suspicion of another crime arose before that mission was completed, *see id.* at ___, ___, 135 S. Ct. at 1614, 1615. The reasonable duration of a traffic stop, however, includes more than just the time needed to write a ticket. "Beyond determining whether to issue a traffic ticket, an officer's mission includes 'ordinary inquiries incident to [the traffic] stop.' " *Id.* at ___, 135 S. Ct. at 1615 (alteration in original) (quoting *Caballes*, 543 U.S. at 408). These inquiries include "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance." *Id.*

In addition, "an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely." *Id.* at ___, 135 S. Ct. at 1616. These precautions appear to include conducting criminal history checks, as *Rodriguez* favorably cited a Tenth Circuit case that allows officers to conduct those checks to protect officer safety. *See id.* (citing *United States v. Holt*, 264 F.3d 1215, 1221-22 (10th Cir. 2001) (en banc), *abrogated on other grounds as recognized in United States v. Stewart*, 473 F.3d 1265, 1269 (10th Cir. 2007)); *see also United States v. McRae*, 81 F.3d 1528, 1536 n.6 (10th Cir. 1996) ("Considering the tragedy of the many officers who are shot during routine traffic stops each year, the almost simultaneous computer check of a person's criminal record, along with his or her license and registration, is reasonable and hardly intrusive."), *quoted in Holt*, 264 F.3d at 1221. Safety precautions taken to facilitate investigations into crimes that are unrelated to the reasons for which a driver has been stopped, however, are not permitted if they extend the duration of the stop. *Rodriguez*, 575 U.S. at ___, 135 S. Ct. at 1616. But investigations into unrelated crimes during a traffic stop, even when conducted without reasonable suspicion, are permitted if those investigations do not extend the duration of the stop. *See id.* at ___, ___, 135 S. Ct. at 1612, 1614.

The reasonable suspicion standard is "a less demanding standard than probable cause" and a "considerably less [demanding standard] than preponderance of the evidence." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). In order to meet this standard, an officer simply must "reasonably . . . conclude in light of his experience that criminal activity may be afoot." *Terry v. Ohio*, 392 U.S. 1, 30 (1968). The officer "must be able to point to specific and articulable facts," and to "rational inferences from those facts," that justify the search or seizure. *Id.* at 21. "To determine whether reasonable suspicion exists, courts must look at 'the totality of the circumstances' as 'viewed from the standpoint of an objectively reasonable police officer.' " *State v. Johnson*, ___ N.C. ___, ___, 803 S.E.2d 137, 139 (2017) (citations omitted) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981), and *Ornelas v. United States*, 517 U.S. 690, 696 (1996)).

When reviewing a ruling on a motion to suppress, we analyze whether the trial court's "underlying findings of fact are supported by competent evidence . . . and whether those factual findings in turn support the [trial court's] ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982).

In summary, the trial court found the facts as follows. Officer McDonough is an experienced police officer, having served with the

Durham Police Department since 2000 and specifically on the drug interdiction team within the special operations division of the department since 2006. On 27 November 2012, while monitoring I-85 South in Durham, Officer McDonough observed a white Chrysler speeding, following a truck too closely, and weaving briefly over the white line marking the edge of the road. Officer McDonough pulled the Chrysler over, then walked up to the passenger-side window and spoke to defendant, who was the car's driver and sole occupant. Officer McDonough asked to see defendant's driver's license and vehicle registration. Defendant's hand trembled when he handed his license to Officer McDonough. The car was a rental, but defendant was not listed as an authorized driver on the rental agreement. Officer McDonough saw that defendant had two cell phones in the rental car, and, in Officer McDonough's experience, people who transport illegal drugs have multiple phones. I-85 is a major thoroughfare for drug trafficking between Atlanta and Virginia.

Officer McDonough asked defendant where he was going. Defendant said that he was going to his girlfriend's house on Century Oaks Drive in Durham, and that he had missed his exit. Officer McDonough knew that defendant was well past his exit if defendant was going to Century Oaks Drive. Specifically, defendant had gone past at least three exits that would have taken him where he said he was going. Defendant said that he had recently moved from Washington, D.C., to Henderson, North Carolina. Officer McDonough asked defendant to step out of the Chrysler and sit in the patrol car, and told defendant that he would be receiving a warning, not a ticket. Behind the Chrysler, Officer McDonough frisked defendant. The frisk revealed a wad of cash totaling $372 in defendant's pocket. After the frisk, defendant sat in Officer McDonough's patrol car.

While running defendant's information through various law enforcement databases, Officer McDonough and defendant continued to talk. Defendant gave contradictory statements about his girlfriend, saying at one point that his girlfriend usually visited him in Henderson but later saying that the two of them had never met face-to-face. While talking with Officer McDonough in the patrol car, defendant made eye contact with the officer when answering certain questions but looked away when asked specifically about his girlfriend and about where he was travelling. The database checks, moreover, revealed that defendant had been issued a North Carolina driver's license in 2000, and that he had a criminal history in North Carolina starting in 2001. These facts appeared to contradict defendant's earlier claim to have just moved to North Carolina.

Officer McDonough asked defendant for permission to search the Chrysler. Defendant gave permission to search it but not his possessions—namely, a bag and two hoodies—within it.[1] A few minutes later, another officer arrived, and Officer McDonough opened the trunk of the Chrysler. Officer McDonough found the bag and two hoodies, but defendant quickly objected that the bag was not his (contradicting his earlier statement) and said that he did not want it to be searched. Officer McDonough put the bag on the ground and had his police dog sniff the bag. The dog alerted to the bag, and, on opening it, the officers found a large amount of heroin.

At the suppression hearing, the trial court heard testimony from Officer McDonough and reviewed video footage of the stop captured by his patrol car's dash cam. Officer McDonough testified about his experience patrolling I-85 and his knowledge that the highway serves as a major thoroughfare for drug trafficking. Officer McDonough also testified that he observed defendant going about 70 miles per hour in a 60 mile-per-hour zone, crossing over the white shoulder line twice, and coming within a car length and a half of a truck in front of him. The dash-cam video shows Officer McDonough pulling defendant over, asking him for his driver's license, and telling him not to follow other vehicles too closely. In recounting what he observed during the traffic stop, Officer McDonough testified that defendant had two phones: one smartphone and one flip phone. The video shows Officer McDonough asking defendant about his destination and defendant giving an answer that does not match his driving route. Officer McDonough then asks for defendant's rental agreement and receives it from defendant. Shortly after this, the officer asks defendant to exit the rental car, and defendant complies. On camera, behind the rental car, Officer McDonough says that defendant will receive only a warning, and then, after asking permission, briefly frisks defendant, finding a wad of cash. After that, Officer McDonough asks defendant to sit in the front passenger seat of the patrol car, which defendant does.

During his testimony, Officer McDonough gave details about the three databases that he generally runs a driver's information through during a traffic stop: one local, one statewide, and one national. He also explained that his conversation with defendant in the patrol car happened while he was running the database checks, which ran in the background during the conversation. He testified that these checks inherently

1. In this opinion, we do not decide whether the permission that defendant gave constituted legal consent to search the car.

take a few minutes to run. The video captured the conversation that Officer McDonough had with defendant while the checks were running. On the video, defendant gives self-contradictory statements about when and where he has seen his girlfriend previously.

The video then shows Officer McDonough asking defendant about a list of controlled substances that might be in the car. Defendant denies possession of all of them. He objects to any search of his bag or his hoodies, but says that Officer McDonough can search the Chrysler if he wants to. After this conversation, Officer McDonough tells defendant that he is waiting for another officer to arrive. The video shows the time after the second officer has arrived, and shows the removal of a bag from the Chrysler's trunk. Defendant suddenly says that the bag is not his and repeats that he does not want it searched. The actual dog sniff that Officer McDonough's police dog performed, and that resulted in an alert on the bag, occurs offscreen, but Officer McDonough testified about it and about the subsequent search of the bag. Officer McDonough can also be heard on the video discussing the heroin that he and the other officer have found.

The dash-cam video, combined with Officer McDonough's suppression hearing testimony, provides more than enough evidence to support the trial court's findings of fact. We therefore turn to the second part of our review: namely, "whether those factual findings in turn support the [trial court's] ultimate conclusions of law." *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619. We review conclusions of law de novo. *E.g.*, *State v. Williams*, 366 N.C. 110, 114, 726 S.E.2d 161, 165 (2012).

The initiation of the traffic stop here—which defendant does not challenge—was justified by Officer McDonough's observations of defendant's driving. "[R]easonable suspicion is the necessary standard for traffic stops, regardless of whether the traffic violation was readily observed or merely suspected," *Styles*, 362 N.C. at 415, 665 S.E.2d at 440, and Officer McDonough reasonably suspected multiple traffic violations. Defendant was driving ten miles per hour over the speed limit; following a truck too closely, which is forbidden by N.C.G.S. § 20-152; and weaving over the white line marking the edge of the road, which is forbidden by N.C.G.S. § 20-146(d)(1). These facts allowed Officer McDonough to pull defendant over based on reasonable suspicion of those violations.

Once the traffic stop had begun, Officer McDonough could and did lawfully ask defendant to exit the rental car. "[A] police officer may as a matter of course order the driver of a lawfully stopped car to exit his vehicle . . . ." *Maryland v. Wilson*, 519 U.S. 408, 410 (1997) (citing

Pennsylvania v. Mimms, 434 U.S. 106 (1977) (per curiam)). Asking a stopped driver to step out of his or her car improves an officer's ability to observe the driver's movements and is justified by officer safety, which is a "legitimate and weighty" concern. *See Mimms*, 434 U.S. at 110. "[T]he government's officer safety interest stems from the mission of the stop itself." *Rodriguez*, 575 U.S. at ___, 135 S. Ct. at 1616; *see also id.* at ___, 135 S. Ct. at 1614 (indicating that the proper duration of a traffic stop includes time spent to "attend to related safety concerns"). So any amount of time that the request to exit the rental car added to the stop was simply time spent pursuing the mission of the stop.

After defendant left the rental car, Officer McDonough lawfully frisked him for weapons without unconstitutionally prolonging the stop, for two independent reasons.

First, frisking defendant before placing him in Officer McDonough's patrol car enhanced the officer's safety. "Traffic stops are 'especially fraught with danger to police officers,' so," as we have already noted, "an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely." *Id.* at ___, 135 S. Ct. at 1616 (citation omitted) (quoting *Arizona v. Johnson*, 555 U.S. 323, 330 (2009)). Once again, because officer safety stems from the mission of the traffic stop itself, time devoted to officer safety is time that is reasonably required to complete that mission. As a result, the frisk here did not "prolong[ ]" a stop "beyond the time reasonably required to complete th[e] mission" of the stop under *Rodriguez*. *Id.* at ___, 135 S. Ct. at 1612 (second alteration in original) (quoting *Caballes*, 543 U.S. at 407). "Highway and officer safety are interests different in kind from the Government's endeavor to detect crime in general or drug trafficking in particular." *Id.* at ___, 135 S. Ct. at 1616.

Second, traffic stops "remain[ ] lawful only 'so long as [unrelated] inquiries do not *measurably* extend the duration of the stop.' " *Id.* at ___, 135 S. Ct. at 1615 (second set of brackets in original) (emphasis added) (quoting *Johnson*, 555 U.S. at 333). It follows that there are some inquiries that extend a stop's duration but do not extend it measurably. In *Rodriguez*, the government claimed that extending a traffic stop's duration by seven or eight minutes did not violate the Fourth Amendment. *Id.* at ___, ___, 135 S. Ct. at 1613, 1615-16. The Supreme Court disagreed. *Id.* at ___, 135 S. Ct. at 1616. But here, the frisk lasted eight or nine seconds. While we do not need to precisely define what "measurably" means in this context, it must mean something. And if it means anything, then *Rodriguez*'s admonition must countenance a frisk that lasts just a few

seconds. So this very brief frisk did not extend the traffic stop's duration in a way that would require reasonable suspicion.[2]

Asking defendant to sit in the patrol car did not unlawfully extend the stop either.[3] Officer McDonough had three database checks to run before the stop could be finished: one check for information covering the Durham area, one for statewide information, and one for out-of-state information. It takes a few minutes to run checks through these databases, and it takes no more time to run the checks when a defendant is in a patrol car than when a defendant is elsewhere. Indeed, as the trial court found here and as both the dash-cam video and Officer McDonough's testimony also established, Officer McDonough spoke with defendant while the checks were running. With these checks running in the background, Officer McDonough was free to talk with defendant at least up until the moment that all three database checks had been completed.

The conversation that Officer McDonough had with defendant while the database checks were running enabled Officer McDonough to constitutionally extend the traffic stop's duration. The trial court's findings of fact show that, by the time these database checks were complete, this conversation, in conjunction with Officer McDonough's observations from earlier in the traffic stop, permitted Officer McDonough to prolong the stop until he could have a dog sniff performed.

Officer McDonough came into the stop with extensive experience investigating drug running, and he knew that I-85 is a major drug trafficking corridor. Shortly after pulling defendant over, Officer McDonough observed defendant's nervous demeanor and two cell phones—including a flip phone—in the Chrysler that defendant was driving, and the officer learned that the Chrysler was a rental car that had been rented

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2. In addition to arguing that the frisk unconstitutionally prolonged the stop, defendant also argues in his brief to this Court that the frisk itself was unconstitutional. When an appeal of right is based solely on a dissent in the Court of Appeals, we limit our review to the issue or issues "specifically set out in the dissenting opinion as the basis for that dissent," unless a party successfully petitions this Court for discretionary review of additional issues. N.C. R. App. P. 16(b). In this case, the Court of Appeals did not decide whether defendant had consented to the frisk because it decided the case on other grounds, *see State v. Bullock*, ___ N.C. App. at ___, 785 S.E.2d at 752, and neither party petitioned this Court for discretionary review of this issue. The issue is therefore not properly before us.

3. In his brief, defendant also appears to argue that Officer McDonough independently violated the Fourth Amendment when he had defendant sit in his patrol car, regardless of whether this extended the stop. But, like the issue of whether defendant consented to the frisk, this issue was not "the basis for th[e] dissent" in the Court of Appeals, N.C. R. App. P. 16(b)(1), and no party has petitioned us to review it. It is thus not before us.

in someone else's name. All of this information suggested possible drug-running, even before defendant began talking.

Defendant's conversation with Officer McDonough, and other aspects of their interaction, quickly provided more evidence of drug activity. Defendant gave an illogical account of where he was going, given that he had driven past at least three different exits that he could have taken to reach his purported destination. The $372 in cash that Officer McDonough discovered during the frisk behind the car added to Officer McDonough's suspicion of drug crime. And Officer McDonough certainly gained reasonable suspicion of drug activity that justified a prolonged stop shortly after defendant entered the patrol car.[4] There, as he continued his conversation with Officer McDonough, defendant gave mutually contradictory statements about his girlfriend, whom he claimed to be visiting, and the database check revealed, among other things, that defendant had apparently not been truthful when he said that he had recently moved to North Carolina. On top of all of this, defendant broke eye contact when discussing his girlfriend and his travel plans, after maintaining eye contact while giving apparently honest answers to other questions. So, after Officer McDonough had spoken with defendant in his patrol car and finished the database checks, the officer legally extended the duration of the traffic stop to allow for the dog sniff.

The Supreme Court indicated in *Rodriguez* that reasonable suspicion, if found, would have justified the prolonged seizure that led to the discovery of Rodriguez's methamphetamine. *See* 575 U.S. at ___, 135 S. Ct. at 1616-17. Officer McDonough prolonged the traffic stop of defendant's rental car only after the officer had formed reasonable suspicion that defendant was a drug courier, which allowed for the dog sniff that ultimately led to the discovery of heroin in the bag that was pulled from the rental car. Because this extension of the stop's duration was properly justified by reasonable suspicion, it poses no constitutional problem under *Rodriguez*.

It is worth noting just how different the procedural posture of this case is from the one that the Supreme Court confronted in *Rodriguez*.

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4. As we have already said, unless a party has successfully petitioned this Court for discretionary review of other issues, we limit our review to the issue or issues "specifically set out in the dissenting opinion as the basis for that dissent." N.C. R. App. P. 16(b). The dissent in this case agreed with the majority that reasonable suspicion was not formed before defendant had entered the patrol car, *see Bullock*, ___ N.C. App. at ___, 785 S.E.2d at 756 (McCullough, J., dissenting), and the State did not petition this Court for review of this issue. We therefore take no position on whether reasonable suspicion existed earlier in the stop.

There, the Eighth Circuit had not reached the question of reasonable suspicion in its opinion. *See id.* at ___, ___, 135 S. Ct. at 1614, 1616-17. As a result, the Supreme Court essentially had to assume, for the purposes of its Fourth Amendment analysis, that no reasonable suspicion had existed at any time before the dog sniff in that case occurred. *See id.* at ___, 135 S. Ct. at 1616-17. And in *Rodriguez*, the officer had issued a written warning and therefore completed the traffic stop before the dog sniff occurred. *Id.* at ___, 135 S. Ct. at 1613. So the Supreme Court found that the stop was necessarily prolonged beyond the time needed to complete the stop's mission, *see id.* at ___, 135 S. Ct. at 1614-16, but did not determine whether reasonable suspicion to prolong the stop existed, *see id.* at ___, 135 S. Ct. at 1616-17. Instead, the Supreme Court remanded the case to the Eighth Circuit and noted that the reasonable suspicion question "remain[ed] open for Eighth Circuit consideration on remand." *Id.* at ___, 135 S. Ct. at 1616-17. Here, by contrast, the question of reasonable suspicion is squarely before us.

Officer McDonough did not extend the duration of the traffic stop in this case beyond the time needed to complete the mission of the stop until he had reasonable suspicion to do so. It is worth reiterating that we are addressing only the issue that formed the basis of the dissenting opinion in the Court of Appeals, as we are required to do under Rule 16(b) of our Rules of Appellate Procedure. We therefore reverse the decision of the Court of Appeals and remand this case to the Court of Appeals to consider defendant's remaining arguments on appeal.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA
V.
CALVIN RENARD CARTER

No. 193PA16

Filed 3 November 2017

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 786 S.E.2d 432 (2016), vacating and remanding a judgment entered on 7 May 2015 by Judge Michael D. Duncan in Superior Court, Forsyth County. Heard in the Supreme Court on 28 August 2017.

Joshua H. Stein, Attorney General, by Kristin J. Uicker, Assistant Attorney General, for the State-appellant.

Richard J. Costanza for defendant-appellee.

PER CURIAM.

For the reasons stated in *State v. Brice*, ___ N.C. ___, ___ S.E.2d ___ (Nov. 3, 2017) (No. 244PA16), the decision of the Court of Appeals is reversed.

REVERSED.

STATE v. REED

[370 N.C. 267 (2017)]

STATE OF NORTH CAROLINA
v.
DAVID MICHAEL REED

No. 365A16

Filed 3 November 2017

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 791 S.E.2d 486 (2016), reversing a judgment entered on 20 July 2015 by Judge Thomas H. Lock in Superior Court, Johnston County, following defendant's plea of guilty after entry of an order by Judge Gale Adams on 14 July 2015 denying defendant's motion to suppress. Heard in the Supreme Court on 13 June 2017.

Joshua H. Stein, *Attorney General*, *by Kathleen N. Bolton*, *Assistant Attorney General*, *for the State-appellant* .

Paul E. Smith for defendant-appellee.

PER CURIAM.

The decision of the Court of Appeals is vacated, and this case is remanded to the Court of Appeals for reconsideration in light of our decision in *State v. Bullock*, ___ N.C. ___, ___ S.E.2d ___ (2017) (194A16).

VACATED AND REMANDED.

STATE v. ROUSSEAU

[370 N.C. 268 (2017)]

STATE OF NORTH CAROLINA
v.
RYAN SAMUEL ROUSSEAU

No. 10A17

Filed 3 November 2017

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 793 S.E.2d 292 (2016), finding no error after appeal from a judgment entered on 1 April 2015 by Judge Richard S. Gottlieb in Superior Court, Forsyth County. Heard in the Supreme Court on 10 October 2017.

Joshua H. Stein, Attorney General, by Phillip T. Reynolds, Assistant Attorney General, for the State.

Michael E. Casterline for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE v. WILSON

[370 N.C. 269 (2017)]

STATE OF NORTH CAROLINA
v.
JENNIFER MARIE WILSON

No. 28A17

Filed 3 November 2017

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 794 S.E.2d 921 (2016), finding no error after appeal from a judgment entered on 2 December 2015 by Judge Benjamin G. Alford in Superior Court, Lenoir County. Heard in the Supreme Court on 11 October 2017.

Joshua H. Stein, Attorney General, by Brenda Menard, Special Deputy Attorney General, for the State.

Russell J. Hollers, III and Adam Elkins for defendant-appellant.

PER CURIAM.

AFFIRMED.

ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA	)	
v.	)	From Wake County
PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; AND THE STATE OF NORTH CAROLINA	)	

No. 52PA17-2

ORDER

Having received the three-judge panel's 31 October 2017 order in this case, the Court sets the following supplemental briefing schedule:

1. Plaintiff-appellant may file a supplemental brief on or before 16 November 2017.

2. Defendant-appellees may file a supplemental brief on or before 30 November 2017.

3. Plaintiff-appellant may file a supplemental reply brief on or before 6 December 2017.

By order of the Court in Conference, this the 2nd day of November, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 2nd day of November, 2017.

s/Christie S. Cameron Roeder
CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

IN RE: APPEAL OF THE FEE AWARD OF THE NORTH CAROLINA INDUSTRIAL COMMISSION IN N.C.I.C. NOS. W82780 & W98474	)	
KEITH SAUNDERS	)	
v.	)	From Buncombe County
ADP TOTALSOURCE FI XI, INC., EMPLOYER, AND LIBERTY MUTUAL/HELMSMAN MANAGEMENT SERVICES, CARRIER	)	

No. 399P16

ORDER

Upon Consideration of Plaintiff's Petition for Discretionary Review, Plaintiff's Petition for Discretionary Review is allowed as to issue number three only. The petition is denied as to any remaining issues.

By order of the Court in Conference, this 1st day of November, 2017.

s/Morgan, J
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3rd day of November, 2017.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. BATTLE

[370 N.C. 272 (2017)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Duplin County
	)	
TERRIL COURTNEY BATTLE	)	

No. 464P16

ORDER

Upon consideration of the Petition For Discretionary Review filed by the State on the 12th day of January, 2017, the Court allows the State's Petition For Discretionary Review for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of our decision in *State v. Brice*, ___ N.C. ___, ___ S.E.2d ___ (3 November 2017).

By order of the Court, this the 1st day of November, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3rd day of November, 2017.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. NORMAN

[370 N.C. 273 (2017)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Washington County
	)	
AILKEEM ANTHONY NORMAN	)	

No. 153P17

ORDER

Upon consideration of the Petition For Discretionary Review filed by the State on the 6th day of June, 2017, the Court allows the State's Petition For Discretionary Review for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of our decision in *State v. Brice*, ___ N.C. ___, ___ S.E.2d ___ (3 November 2017).

By order of the Court, this the 1st day of November, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3rd day of November, 2017.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Nash County
	)	
CHRISTOPHER ANGELO WHITEHEAD	)	

No. 465P16

ORDER

Upon consideration of the Petition for Discretionary Review filed by the State on the 12th day of January, 2017, the Court allows the State's Petition For Discretionary Review for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of our decision in *State v. Brice*, ___N.C.___, ___ S.E.2d___ (3 November 2017).

By Order of this Court, this the 1st day of November, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 3rd day of November, 2017.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

1 NOVEMBER 2017

004P16-2	State v. Jamonte Dion Baker	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Mecklenburg County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed **Ervin, J., recused**
012PA17	Eli Global, LLC, et al. v. Heavner	Joint Motion to Continue Oral Argument	Allowed **10/27/2017**
032P17	State v. Dwayne Robinson	Def's PDR Under N.C.G.S. § 7A-31 (COA16-490)	Denied
075P17-3	Ocwen Loan Servicing v. Margaret Ann Reaves	Def's *Pro Se* Motion for Petition for Injunction	Denied
082PA15-2	In the Matter of A.E.C.	Respondent Father's Motion to Dismiss Appeal	Dismissed as moot
112P17	State v. Anthonio Shontari Farrar	1. State's Motion for Temporary Stay (COA16-679) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/10/2017** Dissolved **11/01/2017** 2. Denied 3. Denied
121P15-2	State v. Aggrey Winston Manning	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP16-824)	Denied **10/17/2017** **Ervin, J., recused**
140P17	Jacqueline Renee Crocker v. Transylvania County Department of Social Services Director Tracy Jones	1. Respondent's PDR Under N.C.G.S. § 7A-31 (COA16-875) 2. Petitioner's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
142P17	State v. Terance Germaine Malachi	1. State's Motion for Temporary Stay (COA16-752) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/04/2017** 2. Allowed 3. Allowed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

1 NOVEMBER 2017

153P17	State v. Ailkeem Anthony Norman	1. State's Motion for Temporary Stay (COA16-1005) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/17/2017** Dissolved **11/01/2017** 2. Dismissed as moot 3. Special Order
159P17	In re: Foreclosure of Real Property Under Deed of Trust from Vicque Thompson and Christalyn Thompson, in the Original Amount of $205,850.00, and Dated September 26, 2007 and Recorded on September 28, 2007 in Book 2953 at Page 653 and Rerecorded/ Modified/Corrected on February 27, 2015 in Book 4266, Page 911, Onslow County Registry Trustee Services of Carolina, LLC, Substitute Trustee	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA16-1014) 2. Def's (USAA Federal Savings Bank) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
161P17-2	David Felton v. Paul G. Butler, Jr.; James L. Forte; Willis J. Fowler; Danny G. Moody; Pat McCrory; and Roy Cooper	1. Plt's *Pro Se* Motion for Notice of Appeal 2. Plt's *Pro Se* Motion for Reconsideration	1. Dismissed 2. Dismissed
164P17	Wasco, LLC v. N.C. Department of Environment and Natural Resources, Division of Waste Management	1. Petitioner's PDR Under N.C.G.S. § 7A-31 (COA16-414) 2. Petitioner's Motion for Withdrawal and Substitution of Counsel	1. Denied 2. Allowed
173P17	State v. Melvin Leroy Fowler	1. State's Motion for Temporary Stay (COA16-947) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/05/2017** 2. Allowed 3. Allowed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

1 NOVEMBER 2017

189P17-2	State v. Robert A.D. Waldrup	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Lincoln County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel 4. Def's *Pro Se* Motion to Append Motion for Appropriate Relief	1. Dismissed 2. Allowed 3. Dismissed as moot 4. Dismissed
203P17	Shaun Weaver, Employee v. Daniel Glenn Dedmon d/b/a Dan the Fence Man d/b/a Bayside Construction, Employer, Noninsured, and Daniel Glenn Dedmon, Individually, and Seegars Fence Company, Inc. of Elizabeth City, Employer, and Builders Mutual Insurance Company, Carrier	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA16-55) 2. Defs' (Seegars Fence Company, Inc. of Elizabeth City and Builders Mutual Insurance Company) PDR Under N.C.G.S. § 7A-31 3. Plt's and Defs' (Seegars Fence Company, Inc. of Elizabeth City and Builders Mutual Insurance Company) Joint Motion to Hold PDRs in Abeyance	1. 2. 3. Allowed
211P17-2	Christopher Buckner, Employee v. United Parcel Service, Employer Liberty Mutual Insurance Company, Carrier	Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA	Dismissed
213P17	Blake J. Geoghagan v. Bernadette M. Geoghagan	Plt's PDR Under N.C.G.S. § 7A-31 (COA16-711)	Denied

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

1 NOVEMBER 2017

219P17	Courtney NC, LLC DBA Oakwood Raleigh at Brier Creek v. Monette Baldwin AKA Nell Monette Baldwin	1. Def's *Pro Se* Motion to Request that Arrest Warrant Be Delivered to the Honorable Supreme Court for Review 2. Def's *Pro Se* Motion to Quash Arrest Warrants 3. Def's *Pro Se* Motion to Sanction Plt and Their Attorneys for Fraud Upon the Court and Abuse of Process 4. Def's *Pro Se* Motion for Deferral of Fees	1. Dismissed as moot **10/05/2017** 2. Dismissed as Moot **10/05/2017** 3. Dismissed as Moot **10/05/2017** 4. Dismissed as moot **10/05/2017** **Beasley and Morgan, JJ, recused**
221P17	State v. Willie James Langley	1. State's Motion for Temporary Stay (COA16-1107) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/06/2017** 2. Allowed 3. Allowed
231P17-2	Antwone D. Archie v. Johnney Hawkins/ Jose Stein	1. Petitioner's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Forsyth County (COAP17-362) 2. Petitioner's *Pro Se* Motion to Review Defendant's Capacity to Proceed 3. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Dismissed 3. Allowed **Hudson, J., recused**
233PA16	State v. Alonzo Antonio Murrell	Def's Motion to Expedite Issuance of Mandate	Allowed **10/03/2017**
234P17	Eagle Services & Towing, LLC, George K. Clardy, Jr., and Sylvia W. Clardy v. Ace Motor Acceptance Corp.	Def's PDR Under N.C.G.S. § 7A-31 (COA16-693)	Denied

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1 NOVEMBER 2017

243P17	State v. Pierre Je Bron Moore	1. Def's Petition for *Writ of Mandamus* (COA16-999) 2. Def's Petition for Writ of Prohibition 3. Def's Motion for Temporary Stay 4. Def's Petition for *Writ of Supersedeas* 5. Def's PDR Under N.C.G.S. § 7A-31 6. Def's Motion to Hold PDR in Abeyance	1. Denied 2. Denied 3. Denied **07/28/2017** 4. Denied 5. Denied 6. Dismissed as moot
244P17	In the Matter of J.L.T. and S.J.R.T.	1. Petitioner's Motion for Temporary Stay (COA16-1242) 2. Petitioner's Petition for *Writ of Supersedeas* 3. Petitioner's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/24/2017** Dissolved **11/01/2017** 2. Denied 3. Denied
246P17-2	State v. Jerimy Rashaud Love	Def's *Pro Se* Motion for Notice of Appeal (COAP17-337)	Dismissed *ex mero motu* **Ervin, J., recused**
248P15-2	Paul Frampton v. The University of North Carolina and The University of North Carolina at Chapel Hill	Def's PDR Under N.C.G.S. § 7A-31 (COA16-1236)	Denied
253P17	State v. Darrell Lee Melton	Def's PDR Under N.C.G.S. § 7A-31 (COA16-1088)	Allowed
256P17	State v. Kirk Deanglo Evans	Def's PDR Under N.C.G.S. § 7A-31 (COA16-1216)	Denied
257P17	State v. Michael Deshawn Gilchrist	Def's PDR Under N.C.G.S. § 7A-31 (COA16-956)	Denied
263P17	NNN Durham Office Portfolio 1, LLC, et al. v. Highwoods Realty Limited Partnership, et al.	Plt's PDR Prior to a Decision of COA (OA17-756)	Denied

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

1 NOVEMBER 2017

265P17	State v. Shannon Dale Isom	1. Def's Motion for Temporary Stay (COA16-1052) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/04/2017** Dissolved **11/01/2017** 2. Denied 3. Denied
271PA15-2	State v. Felix Ricardo Saldierna	1. State's Motion for Temporary Stay (COA14-1345-2) 2. State's Petition for *Writ of Supersedeas* 3. State's Petition for Discretionary Review Under N.C.G.S. § 7A-31	1. Allowed **08/03/2017** 2. Allowed 3. Allowed
273P17	Jacqueline Freeman v. State of N.C., Administrative Office of the Courts, Kirk Douglas Freeman	1. Petitioner's *Pro Se* Motion for Constitutional Challenge to a Statute 2. Petitioner's *Pro Se* Motion for Petition for Writ of Mandate, Prohibition, Injunction, or Other Appropriate Relief 3. Petitioner's *Pro Se* Motion for Expedited Hearing	1. Dismissed 2. Dismissed 3. Dismissed
274P17	Nathaniel R. Webb v. Wake County Detention Center	1. Petitioner's *Pro Se* Petition for Prohibition 2. Petitioner's *Pro Se* Petition for *Writ of Mandamus* 3. Petitioner's *Pro Se* Motion for Request for Order to Show Cause (Petition for Writ of Prohibition) 4. Petitioner's P*ro Se* Motion for Request for Order to Show Cause (Petition for *Writ of Mandamus*) 5. Petitioner's *Pro Se* Motion for Summary Disposition	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed
280A17	State v. James Edward Arrington	1. State's Motion for Temporary Stay (COA16-761) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **08/18/2017** 2. Allowed 3. ---

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1 NOVEMBER 2017

286P17	Friends of Crooked Creek, L.L.C.; Mark Bertrand; Donna Bertrand; Sylvia T. Terry; Robert F. Zahn; and Michelle R. Zahn v. C.C. Partners, Inc. and Crooked Creek Golfland LLC	Plts' PDR Under N.C.G.S. § 7A-31 (COA17-32)	Denied
287P17	John Fitzgerald Moore, Jr. v. Board of Elections of Henderson County	1. Petitioner's Motion for Temporary Stay (COAP17-594) 2. Petitioner's Petition for *Writ of Supersedeas* 3. Petitioner's Petition for Writ of Prohibition 4. Petitioner's Petition for *Writ of Certiorari* to Review Order of COA	1. Denied **08/28/2017** 2. Denied 3. Denied 4. Denied
288P17	Thomas & Craddock Sales, Inc., a North Carolina Corporation v. Gift Bag Lady, Inc. d/b/a Bag Lady, a California Corporation	Def's PDR Under N.C.G.S. § 7A-31 (COA16-936)	Denied
299P17	Jason Kyle v. Helmi L. Felfel and Laura C. Felfel	Plt's PDR Under N.C.G.S. § 7A-31 (COA16-1318)	Denied
300P17	State v. Corey Lopez Johnson	1. Def's *Pro Se* Motion for Notice of Appeal (COA16-954) 2. Def's *Pro Se* Petition for Writ of Certiorari to Review Decision of COA	1. Dismissed *ex mero motu* 2. Denied
301P17	Valerie Arroyo v. Daniel J. Zamora, Zamora Law Firm, PLLC	1. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP17-510) 2. Plt's P*ro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed **Ervin, J., recused**
302P17	State v. Marc Fellner	Def's PDR Under N.C.G.S. § 7A-31 (COA16-1092)	Denied **Morgan, J., recused**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

1 NOVEMBER 2017

303P17	State v. Oscar Gallegos	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-1058) 2. Def's Motion to Deem PDR Timely Filed 3. Def's Motion in the Alternative to Consider PDR a Petition for *Writ of Certiorari*	1. Dismissed 2. Denied 3. Denied
306P17	David R. Shipp and wife, Cassandra R. Shipp v. City of Fayetteville, a North Carolina Municipal Corporation	Plts' *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COA17-789)	Denied
307P17	Soma Technology, Inc. v. Photios Dalamagas; Denova Medical, Inc.; and Hiren Desai	Def's (Hiren Desai) PDR Prior to a Decision of the COA	Allowed
309P17	State v. Guss Bobby Carter, Jr.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-854) 2. State's Motion to Deem Response to PDR as Timely Filed	1. Denied 2. Allowed
310P17	State v. Milton Calonie Morris	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-121)	Denied
314A17	State v. Montanelle Deangelo Posey	Def's Motion to Withdraw Appeal	Allowed **10/20/2017**
318A17	Andrea Morrell, G. Pony Morrell, and The Pasta Wench, Inc. v. Hardin Creek, Inc., John Sidney Greene, and Hardin Creek Timberframe and Millwork, Inc.	1. Defs' Notice of Appeal Based Upon a Dissent (COA16-878) 2. Defs' PDR as to Additional Issues 3. Plts' Motion to Supplement the Printed Record on Appeal 4. Plts' Conditional PDR Under N.C.G.S. § 7A-31 5. Plts' Motion to Amend Response to PDR	1. --- 2. Allowed 3. 4. Denied 5. Allowed
319A17	State v. Ahmad Jamil Nicholson	1. State's Motion for Temporary Stay (COA17-28) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **09/22/2017** 2. Allowed 3. ---

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1 NOVEMBER 2017

321P17	State v. Anthony Lamont Boulware	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-22)	Denied
322P17	State v. Abdullah Hamid (A.K.A. Antonio Mosley)	1. Def's *Pro Se* Petition for *Writ of Certiorar*i to Review Order of Superior Court, Mecklenburg County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
323P17	Nathaniel R. Webb v. Melanie Shekita	Petitioner's *Pro Se* Petition for Writ of Prohibition	Dismissed
325P17	State v. Jose Joel Torres-Gonzalez	Def's Petition for *Writ of Certiorari* to Review Decision of COA (COA12-831)	Dismissed
326P17	State v. Ricky D. Wagoner	Def's *Pro Se* Motion for PDR (COAP17-575)	Denied
328P06-2	State v. Robert Walter Huffman	Def's *Pro Se* Motion for PDR	Denied **10/17/2017**
328P17	State v. Juan Manuel Villa	1. Def's Motion for Temporary Stay (COA16-1104) 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **10/05/2017** 2.
329A09-3	State v. Martinez Orlando Black	Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Mecklenburg County	Denied **Jackson, J., recused**
331P17	State v. Amia Smith Ervin	1. State's Motion for Temporary Stay (COA17-324) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **10/05/2017** 2.
332P17	Joris Haarhuis, Administrator of the Estate of Julie Haarhuis v. Emily Cheek	1. Def's Motion for Temporary Stay (COA16-961) 2. Def's Petition for *Writ of Supersedeas* 3. Def's Notice of Appeal Based Upon a Constitutional Question 4. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed w/o prejudice **10/06/2017** 2. 3. 4.
333P17	N.C. State Board of Education v. The State of North Carolina, and Mark Johnson, in his Official Capacity	1. Plt's Motion for Temporary Stay (COAP17-687) (16CvS15607) 2. Plt's Petition for *Writ of Supersedeas*	1. Allowed **10/16/2017** 2. **Martin, C.J., recused**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

1 NOVEMBER 2017

338P16	Candie L. Willoughby and Jerome Willoughby, Plaintiffs v. Johnston Memorial Hospital Authority; Johnston Memorial Hospital Authority d/b/a Johnston Health; Johnston Memorial Hospital Authority d/b/a Johnston Medical Center-Smithfield, Defendants and Third-Party Plaintiffs v. Steris Corporation and General Electric Company	1. Defs' and Third-Party Plts' PDR Under N.C.G.S. § 7A-31 (COA15-832, 833, 834) 2. Third-Party Def's (Steris Corporation) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied **Ervin, J., recused**
345P17	Eddricco Li'shaun Brown v. State	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **10/16/2017**
349P17	Christopher C. Harris v. State	Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP17-595)	Denied **10/18/2017**
351P17	Matthew J. Medlin v. Donnie Harrison	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **10/19/2017**
365P17	Alexey David McCoy v. Donnie Harrison	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **10/26/2017**
382P10-7	State v. John Lewis Wray, Jr.	Def's *Pro Se* Motion to Appeal (COAP17-43)	Dismissed
395A16	XPO Logistics, Inc. v. Fouzi Anis	1. Def's Motion to Supplement the Record 2. Def's Motion to Withdraw Appeal	1. Dismissed as moot **10/06/2017** 2. Allowed with prejudice **10/06/2017**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

1 NOVEMBER 2017

399P16	In re Appeal of the Fee Award of The North Carolina Industrial Commission in N.C.I.C. Nos. W82780 & W98474 Keith Saunders v. ADP TotalSource FI XI, Inc., Employer, and Liberty Mutual/Helmsman Management Services, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA15-1390)	Special Order
402PA15-2	State v. Donna Helms Ledbetter	1. Def's Motion for Temporary Stay (COA15-414-2) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/22/2016** Dissolved 2. Allowed 3. Allowed
427P09-3	State v. Jonathan Leigh Henslee	Def's *Pro Se* Motion for Notice of Appeal (COAP17-681)	Dismissed **Ervin, J., recused**
464P16	State v. Terril Courtney Battle	1. State's Motion for Temporary Stay (COA16-355) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **12/22/2016** Dissolved **11/01/2017** 2. Dismissed as moot 3. Special Order
465P16	State v. Christopher Angelo Whitehead	1. State's Motion for Temporary Stay (COA16-294) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Deem Response Timely Filed	1. Allowed **12/22/2016** Dissolved **11/01/2017** 2. Dismissed as moot 3. Special Order 4. Allowed

DAVID EASTER-ROZZELLE, EMPLOYEE
v.
CITY OF CHARLOTTE, EMPLOYER, SELF-INSURED

No. 52PA16

Filed 8 December 2017

Workers' Compensation—third-party claim settled—no waiver of compensation under Act—subrogation lien

Where plaintiff-employee was injured while driving to his doctor's office to retrieve an out-of-work note for a compensable injury, settled the third-party claim for the automobile accident, and subsequently—when his workers' compensation attorney learned that the accident occurred on plaintiff's way to get his out-of-work note—added a workers' compensation claim for his head injury, plaintiff did not waive his right to compensation under the Workers' Compensation Act. In addition, the Industrial Commission correctly determined that once the subrogation lien amount is determined by agreement of the parties or by a superior court judge, defendant is entitled to reimbursement of its lien from the benefits due to plaintiff.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 780 S.E.2d 244 (2015), reversing an opinion and award filed on 2 March 2015 by the North Carolina Industrial Commission. Heard in the Supreme Court on 28 August 2017.

Sumwalt Law Firm, *by Vernon Sumwalt; and Fink & Hayes*, *PLLC*, *by Steven B. Hayes*, *for plaintiff-appellant.*

Jones, *Hewson & Woolard*, *by Lawrence J. Goldman*, *for defendant-appellee.*

Wallace and Graham, *P.A.*, *by Edward L. Pauley*, *for North Carolina Advocates for Justice*, *amicus curiae.*

HUDSON, Justice.

Defendant, the City of Charlotte, appealed the opinion and award of the North Carolina Industrial Commission awarding plaintiff, David Easter-Rozzelle, benefits arising out of a 29 June 2009 automobile

accident. *Easter-Rozzelle v. City of Charlotte*, ___ N.C. App. ___, 780 S.E.2d 244 (2015). On appeal, the Court of Appeals reversed, holding that because plaintiff had elected to settle his personal injury claim against the third-party tortfeasor without the consent of defendant and had received disbursement of the settlement proceeds, plaintiff was barred from pursuing compensation for that claim under the Workers' Compensation Act (Act). *Id.* at ___, 780 S.E.2d at 250. Because the Act protects both the employer's lien against third-party proceeds and the employee's right to pursue workers' compensation benefits in these circumstances, we reverse.

Background

On 18 June 2009, while working as a utility technician, plaintiff injured his neck and shoulder when he slipped while handling a manhole cover. Defendant City, plaintiff's self-insured employer, accepted plaintiff's claim as compensable under the Act by filing a Form 60 with the North Carolina Industrial Commission. Defendant authorized treatment with Scott Burbank, M.D. at OrthoCarolina for plaintiff's injury. Dr. Burbank restricted plaintiff from work until 29 June 2009, at which point plaintiff contacted and informed defendant that he was still in too much pain to report to work. Following defendant's instructions, plaintiff contacted Dr. Burbank's office, which informed plaintiff that they would provide him with an out-of-work note that he could pick up at their office.

While driving to Dr. Burbank's office to retrieve the note, plaintiff was involved in an automobile crash and suffered a traumatic brain injury. That same day, after being transported to the hospital, plaintiff gave his wife a card containing the name and contact information for his supervisor, Mr. William Lee, and asked her to call Mr. Lee and inform him of the incident. Plaintiff's wife contacted Mr. Lee and told him that plaintiff had been in a wreck while traveling to Dr. Burbank's office to get an out-of-work note and that plaintiff would not be coming to work that day. In the ensuing three-day period, plaintiff had at least two conversations with Mr. Lee about the circumstances of the injury. Plaintiff also informed his safety manager and multiple employees in defendant's personnel office that he had been in a car crash on the way to his doctor's office to get an out-of-work note for defendant.

Plaintiff underwent surgery in May and November 2010 for his shoulder injury. On 18 November 2011, Dr. Burbank assigned plaintiff a ten percent permanent partial disability rating to the right shoulder and imposed permanent work restrictions. Defendant has continued to pay plaintiff weekly temporary total disability benefits.

Meanwhile, plaintiff received treatment for the traumatic brain injury sustained in the car wreck from David R. Wiercisiewski, M.D. of Carolina Neurosurgery & Spine and Dr. Bruce Batchelor of Charlotte Neuropsychologists. Dr. Wiercisiewski diagnosed plaintiff with a concussion and post-concussion syndrome, and both physicians referred plaintiff to a psychologist for ongoing post-traumatic stress disorder symptoms, memory loss, and cognitive deficits.

Plaintiff retained separate attorneys for his personal injury claim relating to the crash and for his workers' compensation claim relating to his original shoulder injury. Plaintiff's personal injury lawyer informed his personal health insurance carrier, Blue Cross Blue Shield, that he was not "at work" when he sustained the injuries from the crash, and therefore, medical bills for these injuries should be covered by Blue Cross Blue Shield. On 1 August 2011, the third-party claim settled for $45,524.20. The settlement proceeds were disbursed and plaintiff received his share of the funds.

As his workers' compensation claim proceeded, plaintiff and defendant agreed to mediation. At the 9 April 2012 mediation, plaintiff's workers' compensation attorney first learned that plaintiff had been traveling to the office of his authorized physician to get an out-of-work note when the wreck occurred. The mediation was suspended and plaintiff filed an amended Form 18 Notice of Accident to Employer in which he restated his initial claim for injuries and added a claim for his closed head and brain injury which occurred while he "was driving to see authorized treating physician and was involved in a car wreck." On 13 December 2012, defendant filed a Form 61 with the Commission denying the head injury claim. In its filing, defendant stated that it had no notice of the car accident or that plaintiff claimed that the car accident was related to his workers' compensation claim until the April 2012 mediation. Defendant asserted that plaintiff should be estopped from claiming compensation for the head injury because "the motor vehicle accident resulted in a settlement with a third party and the distribution of the settlement funds without preserving defendant's lien." Because the parties were unable to agree on compensability of the head injury, plaintiff filed a Form 33 with the Commission in January 2013 requesting that the claim be assigned for a hearing.

Deputy Commissioner Phillip A. Holmes heard this matter on 11 December 2013. On 7 March 2014, Deputy Commissioner Holmes entered an opinion and award denying plaintiff's claim for benefits. The deputy commissioner concluded that N.C.G.S. § 97-10.2 "provides the only method in which the employer's lien is satisfied from a third party

settlement." The deputy commissioner further concluded that under *Hefner v. Hefner Plumbing Co.*, 252 N.C. 277, 113 S.E.2d 565 (1960), when an employee settles and disburses funds from a third-party settlement without preserving the defendant's lien, or applying to a superior court judge to reduce or eliminate the lien, the employee is barred from recovering under the Act. Accordingly, Deputy Commissioner Holmes determined that plaintiff here was estopped from claiming benefits from his 29 June 2009 car wreck because he did not contend it was compensable until after the third-party claim settled and the settlement proceeds were distributed. Plaintiff appealed to the Full Commission.

The Full Commission heard the case on 15 August 2014, and on 2 March 2015, issued an opinion and award reversing the decision of the deputy commissioner. In so doing, the Commission considered the record of the proceedings before the deputy commissioner, which included the parties' stipulations, exhibits, and testimony from witnesses, including plaintiff and his wife. The Commission assigned credibility to the testimony of plaintiff and his wife and found that plaintiff was not aware that his injuries from the car crash were arguably compensable until the April 2012 mediation. Further, the Commission found and concluded that plaintiff provided timely actual notice of the car wreck to defendant and that defendant knew of the collision and its attendant circumstances. Regarding defendant's lien and the applicability of *Hefner*, the Commission found, in relevant part:

> 25. The Full Commission finds that the present case is distinguishable from *Hefner*. In *Hefner*, the Plaintiff was injured in an automobile collision arising out of and in the course of his employment. Plaintiff's attorney advised the Defendant-Carrier that Plaintiff was proceeding against the third-party and was not making a claim for workers' compensation benefits at that time. The Plaintiff's attorney did provide periodic correspondence and informed the carrier of the status of Plaintiff's injuries and the developments in the negotiations with the third-party. The Plaintiff then settled his claim against the third-party and executed a release and thereafter filed a claim with the North Carolina Industrial Commission. The Plaintiff in *Hefner* contended that although Plaintiff chose to settle with the third-party tortfeasor, Defendant-Carrier should now be made to pay a proportionate part of Plaintiff's attorney fees in the third-party matter. The Supreme Court specifically stated in *Hefner* that the Court based

> its decision upon the interpretation of N.C. Gen. Stat. § 97-10 as it existed prior to June 20, 1959, which restricted an employee from recovering both under a workers' compensation action and an action at law against a third party tortfeasor. The Supreme Court in *Hefner* held that pursuant to the repealed provisions of N.C. Gen. Stat. § 97-10, an employee may waive his claim against his employer and pursue his remedy against the third party. The Plaintiff in *Hefner* had elected to pursue his remedy against the third party instead of pursuing benefits under the Workers' Compensation Act and was therefore barred from recovering under the Act. The present matter is controlled by the current provisions of N.C. Gen. Stat. § 97-10.2 which do not include the waiver provisions in effect in the *Hefner* case. The *Hefner* holding is not applicable to the present case.

(Punctuation inconsistencies in original.) Furthermore, the Commission concluded that

> 5. With regard to Plaintiff's distribution of third party settlement funds without Defendant's knowledge and consent and without the prior approval of the Industrial Commission, or applying to a Superior Court Judge to determine the subrogation amount, the Full Commission concludes that the North Carolina Supreme Court decision in *Hefner v. Hefner Plumbing Co., Inc*[.], 252 N.C. 277, 113 S.E.2d 565 (1960) does not preclude Plaintiff from pursuing benefits under the Workers' Compensation Act for his June 29, 2009 automobile accident. The Supreme Court in *Hefner* stated:
>
> > This is the determinative question on this appeal: May an employee injured in the course of his employment by the negligent act of a third party, after settlement with the third party for an amount in excess of his employer's liability, and after disbursement of the proceeds of such settlement, recover compensation from his employer in a proceeding under the Workman's Compensation Act. In light of the provisions of the Act as interpreted by this Court, the answer is "No."
>
> However, the Full Commission concludes that the present case is distinguishable from *Hefner*. As stated in

the findings of fact above, in *Hefner*, the Plaintiff was injured in an automobile collision arising out of and in the course of his employment. Plaintiff's attorney advised the Defendant-Carrier that Plaintiff was proceeding against the third-party and was not making a claim for workers' compensation benefits at that time. The Plaintiff's attorney did provide periodic correspondence and informed the carrier of the status of Plaintiff's injuries and the developments in the negotiations with the third-party. The Plaintiff then settled his claim against the third-party and executed a release and thereafter filed a claim with the North Carolina Industrial Commission. The Plaintiff in *Hefner* contended that although Plaintiff chose to settle with the third-party tortfeasor, Defendant-Carrier should now be made to pay a proportionate part of Plaintiff's attorney fees in the third-party matter. The Supreme Court specifically stated in *Hefner* that the Court based its decision upon the interpretation of N.C. Gen. Stat. § 97-10 as it existed prior to June 20, 1959, which restricted an employee from recovering both under a workers' compensation action and an action at law against a third party tortfeasor. The Supreme Court in *Hefner* held that pursuant to the repealed provisions of N.C. Gen. Stat. § 97-10, an employee may waive his claim against his employer and pursue his remedy against the third party. The Plaintiff in *Hefner* had elected to pursue his remedy against the third party instead of pursuing benefits under the Workers' Compensation Act and was therefore barred from recovering under the Act. The present matter is controlled by the current provisions of N.C. Gen. Stat. § 97-10.2 which do not include the waiver provisions in effect in the *Hefner* case. The *Hefner* holding is not applicable to the present case. *Hefner v. Hefner Plumbing Co., Inc*[.], 252 N.C. 277, 113 S.E.2d 565 (1960).

. . . .

11. An employer's statutory right to a lien on recovery from the third party tortfeasor is mandatory in nature. *Radzisz v. Harley Davidson of Metrolina, Inc.*, 346 N.C. 84, 484 S.E.2d 566 (1997). The employer's lien is in existence even before payments have been made by the employer. *Id.* Even though Defendant has not accepted

> Plaintiff's claim for his June 29, 2009 accident and has not paid any medical bills related to his June 29, 2009 accident, Defendant is entitled to a statutory lien on recovery from the third party settlement proceeds. Although the third party settlement funds have been disbursed, Defendant is still entitled to a reimbursement for its statutory lien after the subrogation lien amount has been determined. *Id.*

(Punctuation inconsistencies in original.) Accordingly, the Commission awarded plaintiff benefits arising out of the 29 June 2009 automobile crash and ordered defendant to pay all related medical expenses incurred by plaintiff when those bills are approved by the Commission under established procedures. The Commission further ordered that defendant be reimbursed "for its statutory lien against the third party settlement in this matter when the subrogation amount is determined by agreement of the parties or by a Superior Court Judge." The Commission ordered defendant to continue paying plaintiff temporary total disability benefits. Defendant appealed from the Commission's opinion and award.

In a unanimous opinion filed on 1 December 2015, with one judge concurring separately, the Court of Appeals reversed the Full Commission. *Easter-Rozzelle*, ___ N.C. App. at ___, 780 S.E.2d at 250. The majority opined that the Commission misstated the law by asserting that *Hefner* precluded an employee from recovering both from his employer under the Act and from a third-party tortfeasor in an action at law. *Id.* at ___, 780 S.E.2d at 248. The majority noted that the provision requiring an employee to elect between the two remedies was removed in 1933 and observed that *Hefner* recognized that an employee could pursue both remedies under the formerly applicable statute, N.C.G.S. § 97-10. *Id.* at ___, 780 S.E.2d at 248; *see also Hefner*, 252 N.C. at 282-83, 113 S.E.2d at 569 ("Indeed the applicable statute contemplates that where employee pursues his remedy against the employer and against the third party, a determination of benefits due under the Act must be made prior to the payment of funds recovered from the third party.").

Furthermore, relying upon this Court's decision in *Pollard v. Smith*, 324 N.C. 424, 426, 378 S.E.2d 771, 773 (1989), the Court of Appeals majority stated that under the current statute, N.C.G.S. § 97-10.2, a settlement requires the written consent of the employer in order to be valid, even when the case is settled in accord with subsection (j), which allows either party to apply to the superior court to determine the subrogation amount of the employer's lien. *Id.* at ___, 780 S.E.2d at 248-49. The majority opined that the General Assembly intended for employers to have involvement and consent in the settlement process and added that

allowing defendant to be reimbursed "from settlement funds already paid and disbursed does not accomplish the statute's purpose and intent, and is unfair to Defendant." *Id.* at ___, 780 S.E.2d at 249-50. The majority concluded that, "[i]n light of the requirement of N.C. Gen.[ ]Stat. § 97-10.2(h) that the employer provide written consent to the Plaintiff's settlement with a third party, the reasoning of the *Hefner* case is applicable here." *Id.* at ___, 780 S.E.2d at 250. Because plaintiff here settled his claim with the third party and disbursed the proceeds without the written consent of defendant, and without an order from the superior court or the Commission, the majority held that plaintiff was barred from recovery under the Act. *Id.* at ___, 780 S.E.2d at 250.[1]

Plaintiff sought this Court's review of the Court of Appeals' unanimous decision. On 8 December 2016, the Court allowed plaintiff's petition for writ of certiorari.

Analysis

Plaintiff argues that in reversing the Full Commission, the Court of Appeals relied upon cases that had been superseded by statute, including *Hefner* and *Pollard*, and misinterpreted the provisions of the Act. We agree, and thus reverse the decision of the Court of Appeals.

We review an order of the Full Commission to determine only "whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000); *see also* N.C.G.S. § 97-86 (2015). "The Commission's conclusions of law are reviewed *de novo*." *McRae v. Toastmaster, Inc.*, 358 N.C. 488, 496, 597 S.E.2d 695, 701 (2004) (citation omitted). We review decisions of the Court of Appeals for errors of law. *Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 611, 781 S.E.2d 282, 284 (2016) (citing N.C. R. App. P. 16(a)).

1. Writing separately, Judge Dietz concurred in the result, but opined that plaintiff is barred from recovery under the Act by the doctrine of quasi-estoppel. *Id.* at ___, 780 S.E.2d at 250 (Dietz, J., concurring) ("This case presents a hornbook example of the doctrine of quasi-estoppel.") Because plaintiff accepted the benefit of a settlement without defendant's consent and without court approval, Judge Dietz opined that plaintiff later "took a plainly inconsistent position by asserting that his injury was, in fact, subject to the [Act] despite having just settled the claim in a manner that indicated it was not." *Id.* at ___, 780 S.E.2d at 250.

Here the Court of Appeals majority concluded that the Commission misstated the holding in *Hefner* and that *Hefner* bars plaintiff from recovering compensation under the Act. This reliance on *Hefner* is misplaced because the provisions relating to claims against third-party tortfeasors were substantially amended in 1959, and *Hefner* was decided under the previous statute. Further, we note that the Commission did slightly misstate this Court's holding in *Hefner* by suggesting that under the old statutory framework, an employee could never recover both under a workers' compensation claim and against a third-party tortfeasor. This is understandable on the part of the Commission in that the Court in *Hefner* was applying N.C.G.S. § 97-10, a "somewhat prolix enactment," *Lovette v. Lloyd*, 236 N.C. 663, 667, 73 S.E.2d 886, 890 (1953), which was the last in a line of provisions not heralded for their clarity. *See A Survey of Statutory Changes in North Carolina in 1943*, 21 N.C. L. Rev. 323, 382 (1943) [hereinafter *Survey*] ("Section 11 of the Act has always been a source of difficulty." (footnote omitted)).

The original Workers' Compensation Act, enacted in 1929, required an employee to choose between recovering compensation from his employer under the Act or recovering damages against the third-party tortfeasor. The North Carolina Workmen's Compensation Act, ch. 120, sec. 11, 1929 N.C. Pub. [Sess.] Laws 117, 122. Specifically, section 11 provided that when an employee

> may have a right to recover damages for such injury, loss of service, or death from any person other than such employer, he may institute an action at law against such third person or persons before an award is made under this act, and prosecute the same to its final determination; *but either the acceptance of an award hereunder, or the procurement of a judgment in an action at law, shall be a bar to proceeding further with the alternate remedy.*

Id. (emphasis added). This express "election of remedies" language was removed in 1933 when the General Assembly deleted section 11 and replaced it with a new version, Act of May 12, 1933, ch. 449, sec. 1, 1933 N.C. Pub. [Sess.] Laws 798, 798, which was further amended in 1943, Act of Mar. 8, 1943, ch. 622, sec. 1, 1943 N.C. Sess. Laws 728, 728-29. The amended section, which was codified at N.C.G.S. § 97-10, provided that "after the Industrial Commission shall have issued an award, or the employer or his carrier has admitted liability . . . the employer or his carrier shall have the *exclusive right* to commence an action" against the third party for a period of six months, after which the employee

possessed the right to bring the action.[2] N.C.G.S. § 97-10 (1943) (emphasis added). Because an employee who had received either an award from the Commission or an admission of liability from the employer could—after the employer's exclusive six-month period expired—also proceed against the third-party tortfeasor, this amended section, which was applicable in *Hefner*, was no longer a wholesale bar to an employee pursuing both remedies. *See Lovette*, 236 N.C. at 667, 73 S.E.2d at 890 ("Under [N.C.G.S. § 97-10], the right to maintain a common law action still exists in behalf of an employee against a third party through whose negligence he is injured, even though the injury is compensable under the Act, and even though the employee actually receives compensation for it under the Act."). Yet, the amended section gave little guidance in situations when an employee had filed a claim for compensation, but there had been no award and no admission of liability, or in situations in which the employee had yet to file a claim at all.[3]

A variation of the latter situation arose in *Ward v. Bowles*, 228 N.C. 273, 45 S.E.2d 354 (1947). There, after the plaintiff was injured in a car accident while in the course of his employment, he brought a negligence action against the third party. *Id.* at 274-75, 45 S.E.2d at 354-55. The

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2. Following the 1933 amendments, the Act

> seemed to intend that compensation claims should be determined and the employer (or insurer) should then be assured of reimbursement from any common law recovery to which the employee was entitled by giving the employer the exclusive right to assert such claim for a period of six months. The section as interpreted, however, did not prevent the employee from getting his common law action under way and collecting both a judgment and compensation without the employer knowing of the suit at common law.

Survey at 382; *see also Whitehead & Anderson, Inc. v. Branch*, 220 N.C. 507, 17 S.E.2d 637, (1941) (holding that an employer who had paid benefits to a deceased employee's dependents under the Act could not proceed in a wrongful death action against an independent third-party tortfeasor when the administrator of the deceased employee had already obtained a judgment against that third party). This may explain why in 1943 the legislature added the word "exclusive" to the employer's right to bring the action, and also provided that the right existed not just after an award by the Commission, but also upon an admission of liability by the employer. *Survey* at 382-83; *see also* ch. 622, sec. 1, 1943 N.C. Sess. Laws at 728-29.

3. *See Survey* at 383 ("Whether an action already started by the employee would abate on the commission's awarding of compensation (it certainly would not automatically) or whether the employer could then join as party plaintiff and take charge of the suit, the statute does not say. It should have gone farther and dealt with these and other specific and highly practical problems in detail.").

third-party defendant contended that, because the plaintiff had never filed a claim for compensation against his employer, and because there had been no award issued by the Commission and no admission of liability by the employer, the plaintiff was precluded from pursuing damages against the defendant under N.C.G.S. § 97-10. *Id.* at 274-75, 45 S.E.2d at 354-55. The Court disagreed, concluding that "[w]hile the rights of the employee, as against a third party after claim for compensation is filed, are limited, G.S. 97-10, there is nothing in the Act which denies him the right to waive his claim against his employer and pursue his remedy against the alleged tort-feasor by common law action for negligence." *Id.* at 275, 45 S.E.2d at 355. Thus, while N.C.G.S. § 97-10, as interpreted, allowed an employee who had filed a claim for compensation against his employer to also seek recovery from the third party in the limited circumstances prescribed by the statute, section 97-10 still provided for an election of remedies for a plaintiff who sought to avoid those limitations. This decision became the basis for the holding in *Hefner*.

In *Hefner*, after the plaintiff was injured in a car accident, he informed the insurance carrier that he was making no workers' compensation claim at that time and was proceeding against the third-party tortfeasor. 252 N.C. at 278, 113 S.E.2d at 565-66. The plaintiff reached a settlement with the third party, and the settlement funds were disbursed. *Id.* at 278-79, 113 S.E.2d at 566-67. The plaintiff then filed a workers' compensation claim seeking to have the defendant insurance carrier pay a proportionate part of the attorney's fee in the third-party action. *Id.* at 278, 113 S.E.2d at 566. The Court first noted that, although N.C.G.S. § 97-10 had recently been repealed and replaced with new provisions, the new provisions did not apply in *Hefner* based on the date of the plaintiff's injuries. *Id.* at 281, 113 S.E.2d at 568. The Court then stated:

> Under the language of the deleted statute, G.S. 97-10, it appears that several courses of action are open to an employee who is injured, in the course of his employment by the negligent act of a person other than his employer. Among the remedies, he may waive his claim against his employer and pursue his remedy against the third party. *Ward v. Bowles*, 228 N.C. 273, 45 S.E.2d 354. This is the course taken by plaintiff here.

Id. at 282, 113 S.E.2d at 568-69. The Court did recognize that an employee could recover compensation under the Act and also seek damages from a third party, but in accordance with *Ward*, *see* 228 N.C. at 275, 45 S.E.2d at 355 ("[T]he rights of the employee, as against a third party after claim for compensation is filed, are limited, G.S. 97-10 . . . ."), concluded that in

those cases the specific procedures of the section needed to be followed. *Hefner*, 252 N.C. at 282-83, 113 S.E.2d at 569 ("Indeed the applicable statute contemplates that where [the] employee pursues his remedy against the employer and against the third party, a determination of benefits due under the Act must be made prior to the payment of funds recovered from the third party.").

Accordingly, the Court of Appeals majority here correctly noted that the "*Hefner* opinion was not a blanket preclusion of an employee's right to recover from his employer as well as the third party tortfeasor under N.C. Gen.[ ]Stat. § 97-10." *Easter-Rozzelle*, ___ N.C. App. at ___, 780 S.E.2d at 248 (majority opinion). Nonetheless, *Hefner* did apply an election of remedies that is incompatible with the current statutory framework.

In 1959 the General Assembly repealed N.C.G.S. § 97-10 and enacted N.C.G.S. §§ 97-10.1 and 97-10.2. Act of June 20, 1959, ch. 1324, sec. 1, 1959 N.C. Sess. Laws 1512, 1512-15. Notably, these new provisions gave *to the employee* the exclusive right to bring the third-party action for the first twelve months from the date of the injury. *Id.* at 1512-13. More importantly, subsection 97-10.2(i), which was not addressed here by the Court of Appeals, provides, as it has continuously since 1959, that:

> Institution of proceedings against or settlement with the third party, or acceptance of benefits under this Chapter, shall not in any way or manner affect any other remedy which any party to the claim for compensation may have except as otherwise specifically provided in this Chapter, and *the exercise of one remedy shall not in any way or manner be held to constitute an election of remedies so as to bar the other.*

N.C.G.S. § 97-10.2(i) (2015) (emphasis added); *see also* ch. 1324, sec. 1, 1959 N.C. Sess. Laws at 1515. We can hardly envision a stronger legislative mandate against an election of remedies doctrine. The Court's pronouncement in *Hefner* that among an employee's remedies, "he may waive his claim against his employer and pursue his remedy against the third party," 252 N.C. at 282, 113 S.E.2d at 568-69, is contrary to the express language of N.C.G.S. § 97-10.2. Accordingly, *Hefner* does not apply here to bar plaintiff's claim under the Act.

Nor does the employer's lack of consent to the settlement revive *Hefner*'s application for a new era. *See Easter-Rozzelle*, ___ N.C. App. at ___, 780 S.E.2d at 250 ("In light of the requirement of N.C. Gen.[ ]Stat.

§ 97-10.2(h) that the employer provide written consent to the Plaintiff's settlement with a third party, the reasoning of the *Hefner* case is applicable here."). Subsection (h) of the original N.C.G.S. § 97-10.2 required the employee or employer to obtain the written consent of the other before making a settlement or accepting payment from a third party and provided that no release or agreement obtained without consent was valid or enforceable. N.C.G.S. § 97-10.2(h) (1959); *see also* ch. 1324, sec. 1, 1959 N.C. Sess. Laws at 1514-15. In 1983 the legislature added N.C.G.S. § 97-10.2(j), which provided:

> In the event that a judgment is obtained which is insufficient to compensate the subrogation claim of the Workers' Compensation Insurance Carrier, or in the event that a settlement has been agreed upon by the employee and the third party when said action is pending on a trial calendar and the pretrial conference with the judge has been held, either party may apply to the resident superior court judge of the county in which the cause of action arose or the presiding judge before whom the cause of action is pending, for determination as to the amount to be paid to each by such third party tortfeasor. If the matter is pending in the federal district court such determination may be made by a federal district court judge of that division.

Act of June 30, 1983, ch. 645, sec. 1, 1983 N.C. Sess. Laws 604, 604. In *Pollard* we opined that "subsection (j) must be read *in pari materia* with the rest of the section," specifically subsection (h), and therefore, written consent was still required before a case was settled in accord with subsection (j). 324 N.C. at 426, 378 S.E.2d at 773; *see also Williams v. Int'l Paper Co.*, 324 N.C. 567, 572, 380 S.E.2d 510, 513 (1989) ("This statute, by its terms, makes it clear that neither the employer nor the employee may make a valid settlement without the written consent of the other. . . . N.C.G.S. § 97-10.2(j) does not supersede § 97-10.2(h) and subsection (j) should be read *in pari materia* with the other provisions of the statute."). Here the Court of Appeals majority correctly recited the Court's holding in *Pollard*, but failed to account for the statutory revisions that followed.

Specifically, in 1991 the legislature substantially overhauled subsections (h) and (j), Act of June 26, 1991, ch. 408, sec. 1, 1991 N.C. Sess. Laws 768, 771-72, and made further revisions to subsection (j) in 1999 and 2004, Act of June 9, 1999, ch. 194, sec. 1, 1999 N.C. Sess. Laws 401, 401; Act of July 18, 2004, ch. 199, sec. 13.(b), 2003 N.C. Sess. Laws (Reg.

Sess. 2004) 786, 792. Unlike the applicable statute in *Pollard*, the current version of N.C.G.S. § 97-10.2 provides that no consent is required when a case is settled in accord with subsection (j). Specifically, subsection (h) states:

> Neither the employee or his personal representative nor the employer shall make any settlement with or accept any payment from the third party without the written consent of the other and no release to or agreement with the third party shall be valid or enforceable for any purpose unless both employer and employee or his personal representative join therein; *provided, that this sentence shall not apply*:
>
> (1) If the employer is made whole for all benefits paid or to be paid by him under this Chapter less attorney's fees as provided by (f)(1) and (2) hereof and the release to or agreement with the third party is executed by the employee; or
>
> (2) *If either party follows the provisions of subsection (j) of this section.*

N.C.G.S. § 97-10.2(h) (2015) (emphases added). Furthermore, subsection (j) has been amended to further obviate the need for consent:

> (j) Notwithstanding any other subsection in this section, in the event that a judgment is obtained by the employee in an action against a third party, or in the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the resident superior court judge of the county in which the cause of action arose or where the injured employee resides, or to a presiding judge of either district, to determine the subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, *and with or without the consent of the employer*, the judge shall determine, in his discretion, the amount, if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, and the amount of cost of the third-party litigation to be shared between the employee and employer.

Id. § 97-10.2(j) (2015) (emphasis added). Accordingly, it is clear that consent is no longer required for a valid settlement and that either party can

avail itself of subsection (j). *See, e.g.*, *Fogleman v. D&J Equip. Rentals, Inc.*, 111 N.C. App. 228, 232, 431 S.E.2d 849, 852 ("*Pollard* endowed subrogation lienholders . . . with the right not to have their lien abridged without their consent. The amended version of section 97-10.2 affected that right by allowing a party to apply to Superior Court to have it determine the amount of the lien, *regardless of whether the lienholder had consented.*"), *disc. rev. denied*, 335 N.C. 172, 436 S.E.2d 374 (1993).

Defendant attempts to draw a distinction between the situation here and the statute based on the settlement funds having been disbursed, asserting that allowing plaintiff to pursue workers' compensation benefits is unfair when defendant had no participation in the settlement process. The court below agreed. *See Easter-Rozzelle*, ___ N.C. App. at ___, 780 S.E.2d at 249-50 ("[T]he General Assembly clearly intended for the employer to have involvement and consent in the settlement process . . . . Allowing Defendant to recoup its lien from settlement funds already paid and disbursed does not accomplish the statute's purpose and intent, and is unfair to Defendant."). This argument is without merit. Any distinction based upon the timing of the disbursement of a third-party settlement ignores the entirety of N.C.G.S. § 97-10.2. We conclude that barring a plaintiff who has received funds from a third party from pursuing a workers' compensation claim contravenes the express language of subsection (i). *See* N.C.G.S. § 97-10.2(i) ("[T]he exercise of one remedy *shall not in any way or manner* be held to constitute an election of remedies so as to bar the other." (emphasis added)).

Further, we note that an employer's lien interest in third-party proceeds is "mandatory in nature," and thus, there is no "windfall of a recovery" to plaintiff here because defendant is entitled to recover the amount of its lien by means of a credit against plaintiff's ongoing workers' compensation benefits. *Radzisz v. Harley Davidson of Metrolina, Inc.*, 346 N.C. 84, 88-90, 484 S.E.2d 566, 568-70 (1997) (holding that although the defendants had denied liability and there had been no award from the Commission, as contemplated by subsection (f), the defendants were still entitled to a lien interest in settlement proceeds that had been disbursed to the plaintiff). Subsection (j) contains no temporal requirement, and either party here may apply to the superior court judge to determine the amount of defendant's lien. As the Commission found:

> Plaintiff's distribution of the third party funds does not affect Defendant's right to a subrogation lien on the third party settlement funds. Plaintiff is still receiving Workers' Compensation benefits and Defendant can still pursue reimbursement of its lien from benefits due Plaintiff after

> the subrogation amount is determined by agreement of the parties or by a Superior Court Judge.

The Commission's approach was entirely consistent with the current statutes, which protect both the employee's right to pursue his workers' compensation claim and the employer's right to reimbursement if a third party also has some liability for the injuries.

Moreover, while the Court of Appeals expressed concern with the fairness of the notice given by plaintiff here, we conclude that the applicable statute, N.C.G.S. § 97-22, as well the unchallenged findings of the Commission, addresses this concern. Specifically, the statute provides:

> Every injured employee or his representative shall immediately on the occurrence of an accident, or as soon thereafter as practicable, give or cause to be given to the employer a written notice of the accident, and the employee shall not be entitled to physician's fees nor to any compensation which may have accrued under the terms of this Article prior to the giving of such notice, unless it can be shown that the employer, his agent or representative, had knowledge of the accident, or that the party required to give such notice had been prevented from doing so by reason of physical or mental incapacity, or the fraud or deceit of some third person; but no compensation shall be payable unless such written notice is given within 30 days after the occurrence of the accident or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.

N.C.G.S. § 97-22 (2015); *see also* N.C.G.S. § 97-18(j) (2015) ("The employer or insurer shall promptly investigate each injury reported or known to the employer and at the earliest practicable time shall admit or deny the employee's right to compensation or commence payment of compensation . . . .").

Here the Commission made findings and conclusions that plaintiff gave defendant notice of the car accident. The Commission found, in relevant part:

> 6. The Full Commission finds the testimony of Plaintiff's wife and Plaintiff to be credible.

7. Based upon a preponderance of the evidence, the Full Commission finds as fact that Plaintiff notified Mr. Lee, his supervisor, Ms. Brown, his safety manager, and some other employees in Defendant's personnel office that he was injured in an automobile accident on June 29, 2009 while traveling to his doctor's office to get an out-of-work medical note related to his shoulder injury.

. . . .

20. With regard to Defendant's notice of Plaintiff's June 29, 2009 automobile accident and injury and the fact that his injury from the automobile accident occurred while he was driving to see Dr. Burbank for treatment relating to his compensable right shoulder, the Full Commission finds, based upon a preponderance of the credible evidence, that Defendant had actual notice from Plaintiff's wife on the day of his automobile accident and from Plaintiff within three days following his automobile accident that Plaintiff was injured on June 29, 2009 while traveling to Dr. Burbank's office to obtain an out-of-work note related to his work-related right shoulder injury, which had been requested by Defendant-Employer.

21. The Full Commission further finds that the notice to Defendant-Employer given by Plaintiff's wife and Plaintiff advising that Plaintiff was injured in an automobile accident on June 29, 2009 while traveling to his doctor's office to get an out-of-work medical note for his compensable shoulder injury as requested by his employer was timely given and constituted sufficient actual notice to alert Defendant that Plaintiff's injury from the automobile accident flowed directly from and was causally related to his compensable right shoulder injury. At a minimum, Defendant had sufficient actual notice to investigate whether the automobile accident was compensable under the Act and to direct medical treatment for Plaintiff, if appropriate.

22. The Full Commission also finds that Plaintiff had a reasonable excuse for his delay in giving written notice to Defendant that he was injured in an automobile accident on June 29, 2009 while traveling to his doctor's office to get

> an out-of-work medical note for his compensable shoulder injury as requested by his employer, as Defendant was given actual notice on the day of the accident and again within three days thereafter. Thus, Defendant had actual notice that Plaintiff's automobile accident either was, or was likely compensable under the Act because it occurred under circumstances where Plaintiff was seeking medically related treatment for his compensable right shoulder condition. Additionally, Plaintiff did not know that his injuries from the automobile accident were arguably compensable as part of his Workers' Compensation claim until the date of mediation on April 9, 2012.

We note that these findings were unchallenged by defendant, and they therefore are binding on our review. *See Medlin v. Weaver Cooke Constr., LLC*, 367 N.C. 414, 423, 760 S.E.2d 732, 738 (2014) ("[W]here findings of fact are not challenged and do not concern jurisdiction, they are binding on appeal." (citing, *inter alia*, N.C.G.S. § 97-86 (2013))). Further, the Commission concluded:

> 4. The Full Commission concludes that Defendant had actual notice from Plaintiff's wife on the day of his automobile accident and from Plaintiff within three days following his automobile accident that Plaintiff was injured on June 29, 2009 while traveling to Dr. Burbank's office to obtain an out-of-work note related to his work-related right shoulder injury, which had been requested by Defendant-Employer. The notice provided to Defendant was timely given and constituted sufficient actual notice to alert Defendant that Plaintiff's injury from the automobile accident flowed directly from and was causally related to his compensable right shoulder injury. At a minimum, Defendant had sufficient actual notice to investigate whether the automobile accident was compensable under the Act and to direct medical treatment for Plaintiff, if appropriate. Plaintiff had a reasonable excuse for his delay in giving written notice to Defendant as Defendant had actual notice of the automobile accident and Plaintiff's resulting injury and that the automobile accident flowed directly from and was causally related to travel related to medical treatment for his compensable shoulder condition. Additionally, Plaintiff did not know that his injuries from the automobile accident were arguably compensable

> as part of his Workers' Compensation claim until the date of mediation on April 9, 2012.

This conclusion is supported by the unchallenged findings of fact.

Accordingly, defendant had an opportunity to participate in the settlement process with the third-party tortfeasor but did not do so. Plaintiff had no reason to delay negotiations with the third party or disbursement of the settlement proceeds because, based on the unchallenged findings of the Commission, he did not know that his injuries were potentially compensable under the Act. On the other hand, because defendant received actual notice, it had an opportunity to promptly investigate the accident and determine its compensability. Had defendant done so, it would have discovered what became apparent in the 9 April 2012 mediation—that plaintiff suffered compensable injuries—and it could have participated in the settlement process.

Conclusion

In sum, we hold that the Commission correctly concluded that *Hefner* is inapplicable here and that plaintiff had not waived his right to compensation under the Act. Further, the Commission correctly determined that once the subrogation lien amount is determined by agreement of the parties or by a superior court judge, defendant is entitled to reimbursement of its lien from the benefits due to plaintiff. Accordingly, we reverse the decision of the Court of Appeals, and remand this case to that court for further remand to the Commission for additional proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

STATE v. DICK

[370 N.C. 305 (2017)]

STATE OF NORTH CAROLINA
V.
QUENTON LEE DICK

No. 386PA16

Filed 8 December 2017

Sexual Offenses—first-degree sexual offense—aided and abetted by another individual—actual or constructive presence not required

The trial court did not err by instructing the jury on the theory that defendant committed a first-degree sexual offense by being aided and abetted by another individual in the commission of the sexual act. The other men who entered the victim's apartment helped to bind the victim with duct tape, moved her into the bedroom, removed her clothes, and touched her inappropriately. It was unnecessary to address the other men's physical proximity to defendant or the victim at the time of the offense in order to prove defendant's guilt under the theory of aiding and abetting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 791 S.E.2d 873 (2016), vacating defendant's conviction after appeal from a judgment entered on 18 June 2015 by Judge Susan E. Bray in Superior Court, Guilford County. Heard in the Supreme Court on 10 October 2017.

Joshua H. Stein, *Attorney General*, *by James M. Stanley, Jr.*, *Special Deputy Attorney General*, *for the State-appellant.*

Mark Montgomery for defendant-appellee.

MORGAN, Justice.

I. Background and Procedural History

In this appeal we consider whether a jury was properly instructed on the theory that Quenton Lee Dick (defendant) committed a first-degree sexual offense by being aided and abetted by another individual in the commission of the sexual act. The Court of Appeals concluded that there was not sufficient evidence to submit the instruction to the jury. We hold that, based upon our enunciated test used to establish the principle of aiding and abetting, the evidence was sufficient to allow the jury to be instructed on the theory of aiding and abetting.

The State presented evidence at trial tending to show that at around 2:00 a.m. on 4 December 2013, E.M.[1] was studying in her apartment for an examination and conversing with three of her friends, all of whom were college students. Those in the apartment included E.M.'s roommate. They were all getting ready for bed when there was a knock at the door, and E.M.'s roommate answered it because she was expecting a guest. The person at the door asked for someone who did not live in the apartment.

A short time later, there was another knock on the door and when the door was opened, a man wearing a bandanna on his face walked into the kitchen of the apartment, looked around, and walked back out. E.M. and her friends were under the impression that someone was playing a trick on them. E.M.'s roommate tried to push the door to close it, but four men prevented her from doing so by charging into the apartment. All of the men were wearing bandannas across their faces and hoods on their heads. At least two of the men had handguns. Three of the men headed to the back of the apartment and started to ransack it. The last man stayed in the living room with E.M. and the other students. E.M. and her friends were ordered to go into their rooms and bring back everything they had. The men took several items, including cell phones, laptop computers, and a television.

Next, the four college students were ordered to sit back down on the couch in the living room. The intruders duct taped the students' hands behind their backs. The man in the living room ordered E.M. to get up from the couch and walk into one of the bedrooms in the back of the apartment. Three of the men were walking in the bedroom. E.M. attempted to step into the bathroom that was connected to the bedroom, but one of the men grabbed her and told her to go into the bedroom. E.M. started crying and begged the men not to rape her. One of the men replied, "Shut up, bitch. We're not going to rape you." In response, E.M. "kept crying and saying stuff." One of the men responded, "Well, I see we're going to have to . . . tape her mouth because she won't shut up." He then taped shut E.M.'s mouth. Another of the men left the room at that time in order to tape shut the other students' mouths.

E.M. had been left in the bedroom with two of the intruders, one of whom was defendant. The two men took off E.M.'s pants, lifted her shirt and began touching her inappropriately. A third man stepped into the room and said something indicating "that maybe they ha[d] to go or

1. We use initials to protect the victim's privacy.

they need[ed] to hurry up or something." All of the men then departed, leaving E.M. in the bedroom alone; however, defendant quickly returned to the room, ripped off the tape from E.M.'s mouth, and forced her to perform oral sex on him. E.M. could see a gun in defendant's pocket while performing the sexual act. During this time, E.M.'s shirt had been lifted and she was not wearing any underwear. E.M.'s hands were still duct taped behind her back. The sexual act lasted about thirty seconds. Defendant ejaculated on E.M.'s face and shirt. Subsequently, he ran out of the apartment.

E.M. and her friends went to her neighbor's apartment and called the police. Law enforcement officers arrived and questioned the victims. They then took E.M. to a local hospital, where she completed a rape kit. Defendant's DNA profile was later determined to match the semen on E.M.'s shirt.

On 3 February 2014, defendant was indicted on four counts of first-degree kidnapping, one count of first-degree burglary and four counts of robbery with a dangerous weapon. Defendant was also charged with conspiracy to commit robbery with a firearm, but that charge was subsequently dismissed by the State. On 2 June 2014, defendant was indicted on one count of first-degree sexual offense. After all of the evidence was presented at trial, defendant moved to dismiss all charges for insufficiency of the evidence. These motions were denied. A jury returned unanimous verdicts of guilty on all the charges. The four robbery with a firearm convictions and the four kidnapping convictions were consolidated for judgment, with defendant being sentenced to four consecutive terms of 83 to 112 months each followed by a term of 276 to 392 months on the sexual offense charge and another consecutive term of 73 to 100 months on the first-degree burglary conviction. Defendant gave written notice of appeal.

At the Court of Appeals, defendant argued that the trial court erred by improperly instructing the jury on the first-degree sexual offense charge. The jury was given a disjunctive instruction at trial, allowing it to find defendant guilty of first-degree sexual offense if defendant "employed a dangerous and deadly weapon or was aided and abetted by another person or persons" when he committed the sexual act. In considering this issue and ultimately finding error by the trial court, the Court of Appeals reasoned that when a jury is given instructions at trial indicating that a defendant can be found guilty of a crime under two separate theories, there must be sufficient evidence to find such a defendant guilty under both theories. *State v. Dick*, ___ N.C. App. ___, 791 S.E.2d 873, 2016 WL 5746395 (2016) (unpublished). The Court of Appeals noted

in the instant case that defendant did not dispute that there was sufficient evidence to properly allow the jury to consider whether he had employed a dangerous or deadly weapon in the commission of the sexual offense, *Dick*, 2016 WL 5746395, at *3; on the other hand, however, the Court of Appeals held that there was not sufficient evidence presented that defendant was aided or abetted by another individual during the act giving rise to defendant's first-degree sexual offense conviction, *id.* at *4[2] This latter determination by the Court of Appeals regarding the lack of sufficient evidence of defendant's guilt on the theory of aiding and abetting, which was a part of the disjunctive jury instruction, is erroneous and must be reversed.

II. Standard of Review

Defendant contends that the trial court erred in submitting the disjunctive instruction to the jury because the evidence was insufficient for the jury to determine that defendant was aided or abetted when he committed the sexual act. "Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *Scott*, 356 N.C. at 597, 573 S.E.2d at 869. We have held that there must be sufficient evidence to find a defendant guilty under either theory of criminal culpability for the disjunctive instruction to be properly given to the jury. *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990) (holding that insufficient evidence regarding one theory submitted to the jury, when prejudicial, was reversible error requiring new trial). In our view, in the case sub judice the evidence was sufficient to instruct the jury to consider both whether defendant employed a dangerous or deadly weapon in the commission of the sexual offense, as well as whether defendant was aided or abetted by another individual during the act giving rise to defendant's first-degree sexual offense conviction. There was substantial evidence to support each of these two theories of defendant's guilt of this offense, thus legitimizing the disjunctive jury instruction.

III. Analysis

The trial court did not err in giving the jury the disjunctive instruction at issue because the evidence was sufficient to find defendant guilty of first-degree sexual offense under the theory that he employed

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2. The Court of Appeals went on to conclude that there was error which prejudiced defendant based on our precedent in *State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (1987); however, we do not reach this issue for analysis because it is our determination that there was sufficient evidence presented by the State to allow the jury to find that defendant was aided or abetted by another individual when he committed the sexual offense.

a dangerous or deadly weapon in the commission of the sexual act as well as under the theory that he was aided and abetted by one or more persons in the perpetration of the crime.

Defendant was charged with first-degree sexual offense. A first-degree sexual offense is committed when

> the person engages in a sexual act with another person by force and against the will of the other person, and does any of the following:
>
> 1) Employs or displays a dangerous or deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon.
>
> 2) Inflicts serious personal injury upon the victim or another person.
>
> 3) The person commits the offense aided and abetted by one or more other persons.

N.C.G.S. § 14-27.26 (2015). In *State v. Bell* we reasoned that:

> Two lines of cases have developed regarding the use of disjunctive jury instructions. *State v. Diaz* [,317 N.C. 545, 346 S.E.2d 488 (1986), and its progeny] stand[ ] for the proposition that "a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, *either of which is in itself a separate offense*, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense." In such cases, the focus is on the conduct of the defendant.
>
> In contrast, this Court has recognized a second line of cases [stemming from *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990),] standing for the proposition that "if the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied." In this type of case, the focus is on the intent or purpose of the defendant instead of his conduct.

359 N.C. 1, 29-30, 603 S.E.2d 93, 112-13 (2004) (citing and quoting *State v. Lyons*, 330 N.C. 298, 302-03, 412 S.E.2d 308, 312 (1991)), *cert. denied*, 544 U.S. 1052 (2005). The current case is consistent with the *Hartness* line of cases. Whether defendant employed or displayed a dangerous or

deadly weapon during the commission of the offense, or whether he was aided and abetted by at least one other individual, are different acts that will establish an element of first-degree sexual offense. The properness of the disjunctive jury instruction involved in the present case depends on whether there is sufficient evidence to instruct the jury on the theory that defendant was aided and abetted when he committed the sexual act. The Court of Appeals opined that a person is guilty of aiding or abetting another when he is

> actually or constructively present at the scene of the crime and . . . aids, advises, counsels, instigates or encourages another to commit the offense. Even though not actually present during the commission of the crime, a person may be an aider or abettor if he shares the criminal intent of the perpetrator and if, during the commission of the crime, he is in a position to render any necessary aid to the perpetrator.

Dick, 2016 2016 WL 5746395, at *3 (alteration in original) (quoting *State v. Barnette*, 304 N.C. 447, 458, 284 S.E.2d 298, 305 (1981) (citations omitted)).

In stating this test, the Court of Appeals cited this Court's decision in *Barnette*. That case applied the then-existing case law regarding aiding and abetting a crime. However, in *State v. Bond*, we recognized that

> [a]lthough several of our cases decided before 1981 state that actual or constructive presence is required to prove a crime under an aiding and abetting theory, this is no longer required. Our legislature abolished all distinctions between accessories before the fact and principals in the commission of felonies by enacting N.C.G.S. § 14–5.2, effective 1 July 1981. Thus, accessories before the fact, who do not actually commit the crime, and indeed may not have been present, can be convicted of first-degree murder under a theory of aiding and abetting. A showing of defendant's presence or lack thereof is no longer required.

345 N.C. 1, 23-24, 478 S.E.2d 163, 174 (1996), *cert. denied*, 521 U.S. 1124 (1997). Thus, distinctions between individuals actually or constructively present at the scene and those not present at the scene are now irrelevant with respect to aiding and abetting. The abolition of this distinction is further demonstrated by our decision in *State v. Francis* in which we upheld jury instructions concerning aiding and abetting advising the jury that it must

> find three things in order to convict the defendant of first-degree murder on [the] theory [of aiding and abetting]: (1) that the crime was committed by another; (2) that the defendant knowingly advised, instigated, encouraged, procured, or aided the other person; and (3) that the defendant's actions or statements caused or contributed to the commission of the crime by the other person.

341 N.C. 156, 459 S.E.2d 269 (1995) (citing *State v. Allen*, 339 N.C. 545, 453 S.E.2d 150 (1995), *abrogated by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396 (1997)). Noticeably missing from this instruction is any reference to the defendant's location when the crime was committed. A year later in *Bond*, we concluded that giving a jury the pattern jury instructions with respect to aiding and abetting and its "accordance with the requirements delineated in *Francis* was sufficient." 345 N.C. at 24, 478 S.E.2d at 175. Consistent with this evolution in the law pursuant to the 1981 legislative enactment, this Court stated in *Gaines*, that "to the extent our cases decided after N.C.G.S. § 14–5.2 became applicable suggest that actual or constructive presence is necessary to prove a crime under an aiding and abetting theory, these cases are no longer authoritative on this issue." 345 N.C. at 676, 483 S.E.2d at 414 (citations omitted), *cert. denied* 522 U.S. 900 (1997). Two years later, we reiterated the aiding and abetting test approved in *Francis* and reemphasized in *Gaines*. *State v. Goode* 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999). Accordingly, we now apply this same three-prong test to the case at bar because it aligns with the legislature's intent to remove any required analysis concerning a person's proximity to the alleged criminal incident.

In the instant case, the elements needed to satisfy the principle of aiding or abetting are met. Although the other individuals left the room before defendant committed the sexual act, there is sufficient evidence for the jury to conclude that the individuals aided and abetted defendant. E.M. testified that "two of [the men], I think, began to tape us up behind our backs with duct tape." Three of the men worked together to separate E.M. from the rest of the group. One of the men grabbed E.M. and ordered her to come back into the bedroom when she instead tried to go into the adjoining bathroom. In the bedroom defendant and another individual inappropriately groped E.M., removed all of her clothes below her waist, and fondled her body. The majority of these acts were executed by defendant, along with others. The acts of taping shut E.M.'s mouth, taping her hands behind her back, moving her to the bedroom, removing her clothing, and inappropriately touching E.M. equate to encouragement, instigation, and aid which collectively readily meet the standards

of the aiding and abetting test that we articulated in *Bond* and its progeny. Thus, there is evidence here tending to show that defendant committed the crime of first-degree sexual offense while other individuals instigated, encouraged and aided him. By joining defendant in unclothing and immobilizing E.M., while performing a series of overt acts that created an atmosphere to subvert the will of E.M., others are deemed to have contributed to the commission of the crime.

Defendant argues that there is insufficient evidence for a jury to find that he was aided or abetted by another during the commission of the sexual act because he was the only individual in the room with the victim when the incident occurred, thereby demonstrating that no one was in a position to render any necessary aid to him. While the trial evidence regarding the precise physical locations of the other men who accompanied defendant is inexact during the time that defendant committed the sexual act, the evidence nonetheless supports the conclusion that there was sufficient evidence for a jury to find that defendant was aided and abetted by at least one other individual, since under the *Bond* rationale, neither actual nor constructive presence was required to prove a crime under the theory of aiding and abetting based upon legislation that became effective the same year this Court issued our opinion in *Barnette*.

In view of our holding in *Bond* and its succeeding line of cases, the other men aided, instigated or encouraged defendant to commit this offense. We reach this conclusion in light of the evidence adduced at trial, and find it unnecessary to address the other men's physical proximity to defendant or the victim at the time of the offense in order to prove defendant's guilt under the theory of aiding and abetting. Due to the sufficiency of the evidence as to defendant being one who employed or displayed a dangerous or deadly weapon, and that he was aided and abetted by one or more other persons in the commission of the crime of first-degree sexual offense, the trial court gave a proper disjunctive jury instruction.

Therefore, the Court of Appeals erroneously reversed the trial court by vacating defendant's conviction for this offense and remanding the matter for a new trial on this charge. Accordingly, this Court reverses the judgment of the Court of Appeals and instructs that court to reinstate the trial court's judgment and defendant's conviction for first-degree sexual offense.

REVERSED.

STATE OF NORTH CAROLINA
v.
HAROLD LAMONT FLETCHER

No. 94PA16

Filed 8 December 2017

1. Sexual Offenses—first-degree sexual exploitation of a minor—digital manipulation of photo

The trial court erred by failing to sustain defendant's objection when the prosecutor asserted in his closing argument that digital manipulation of a photo to make a minor appear to engage in sexual activity constitutes first-degree sexual exploitation of a minor. Despite this error, the trial court gave clear, correct instructions as to this issue, and the error was not prejudicial.

2. Sexual Offenses—first-degree sexual exploitation of a minor—oral intercourse—no penetration requirement

In defendant's trial for numerous sexual offenses against his step-daughter, the trial court did not err by denying defendant's request to instruct the jury that the "oral intercourse" element of first-degree sexual exploitation of a minor involves "penetration, however slight." The Supreme Court declined to adopt defendant's definition of "oral intercourse," which would narrow the scope of the protections from sexual exploitation of minors afforded by the statute.

Justice MORGAN concurring in part and concurring in the result only in part.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 782 S.E.2d 926 (2016), finding no error at trial after appeal from judgments entered on 23 May 2014 by Judge Phyllis M. Gorham in Superior Court, New Hanover County. Heard in the Supreme Court on 13 February 2017.

Joshua H. Stein, Attorney General, by Laura E. Crumpler, Special Deputy Attorney General, for the State.

Glenn Gerding, Appellate Defender, by James R. Grant, Assistant Appellate Defender, for defendant-appellant.

ERVIN, Justice.

The issues before us in this case include whether the trial court abused its discretion by overruling defendant's objection to alleged misstatements of law contained in the prosecutor's final argument to the jury and whether the trial court erroneously denied defendant's request that the jury be instructed that the "oral intercourse" element of first-degree sexual exploitation of a minor involves "penetration, however slight." We hold that the challenged prosecutorial argument, while erroneous, was not prejudicial and that the trial court did not err by refusing to deliver defendant's requested "oral intercourse" instruction. As a result, we modify and affirm the Court of Appeals' decision.

On 26 May 2002, defendant Harold Lamont Fletcher married "Theresa," who had two young children from a previous marriage, including "Diane."[1] Diane referred to defendant, who had become involved in Diane's life when she was one year old, as "Dad." Theresa had known since the beginning of the couple's marriage that defendant had a pornography-related addiction and eventually insisted that defendant receive counseling for this problem. As a result, both defendant and Theresa underwent counseling that was intended to address defendant's pornography-related addiction.

During her third or fourth grade year, Diane noticed that defendant had begun to enter her bedroom after she had gone to bed. On one occasion, Diane found defendant standing over her with his hand on her chest. On another occasion, defendant told Diane that "he was picking a piece of cotton or lint out of [her] mouth from [her] blanket" when she confronted him about being in her room at night. In early March 2012, when she was fifteen years old, Diane saw a red light outside of her bedroom window. A few weeks later, on 12 March 2012, Diane saw a camera outside the same window as she dressed. Defendant was outside the family home on both occasions.

In early December 2012, after Diane told Theresa that she believed that defendant was entering her bedroom and "touching her chest," Theresa took Diane to speak with the counselor who had assisted defendant and Theresa with defendant's addiction to pornography, given that the "counselor was aware of [defendant's] habits." After consulting with the counselor, Theresa contacted the New Hanover County Department of Social Services.

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1. "Theresa" and "Diane" are pseudonyms used for ease of reading and to protect the identity of the persons involved.

Subsequently, the State Bureau of Investigation initiated an investigation into defendant's activities. During a search of the family home, investigating officers seized multiple videos and photographs of Diane from files stored on defendant's computer, including several images depicting Diane in various states of undress and four images depicting a hand holding a penis against or near Diane's mouth while she slept. According to Theresa, the hand and the penis depicted in the second set of images belonged to defendant.

Although defendant admitted that he had recorded images of Diane "in the bathroom getting ready to take a shower, dressing, undressing," and "asleep in her bed" for purposes of "sexual gratification," he denied having ever touched her in an inappropriate manner. At trial, defendant admitted to having committed secret peeping and having taken indecent liberties with a child. However, defendant denied his guilt of statutory sex offense and first-degree sexual exploitation of a minor on the grounds that the images depicting his penis near Diane's mouth did not show actual conduct and had, instead, been digitally manipulated to produce that appearance. Although Lars Daniel, an expert in digital imaging manipulation, testified that defendant "display[ed] an advanced level of ability [with] Photoshop" and that it was "highly likely" that at least one of the images depicting a penis near Diane's mouth had been digitally manipulated, he could not formulate an opinion concerning the extent, if any, to which any of the other images depicting defendant's penis against or near Diane mouth had been digitally altered.

On 18 March 2013, the New Hanover County grand jury returned bills of indictment charging defendant with one count of first-degree sexual exploitation of a minor; statutory sex offense with a fifteen year-old; eighteen counts of secret peeping; and six counts of taking indecent liberties with a child, with these offenses allegedly having occurred between 24 December 2009 and 3 December 2012. The charges against defendant came on for trial before the trial court and a jury at the 19 May 2014 criminal session of the Superior Court, New Hanover County.

During the jury instruction conference, the trial court rejected defendant's request that the trial court instruct the jury that the "oral intercourse" necessary for a finding of guilt of first-degree sexual exploitation of a minor "requires something more than a mere touching" and could require proof of "penetration, however slight." After the State asserted that proof of penetration was not required to establish "oral intercourse" and that "oral intercourse" and "fellatio" were interchangeable terms, the trial court refused to instruct the jury in accordance with defendant's request and permitted the parties to advance their

competing definitions of "oral intercourse" before the jury during their closing arguments.

Once defendant had asserted in his closing argument that the images depicting his penis on or near Diane's mouth had been digitally altered and that these images, even in their unaltered state, did not depict his penis in physical contact with Diane's mouth, the trial court allowed the prosecutor to argue, over defendant's objection, that:

> The other charge is sexual exploitation of a minor. That's a very fancy way for saying manufacturing or producing child pornography. You have to know the content of the material, using a minor for the purposes of producing material that contains a visual representation depicting sexual activity. Does not matter if the image was altered. If I take a picture of a child from the newspaper at a tennis match and I go back to my house and I take a picture of myself unclothed and I am able to manipulate those photos to show that I am engaged in a sexual act with that child, that's manufacturing child pornography. The child does never have to actually be involved in the sexual act itself.

Although the trial court did instruct the jury that, in order to find defendant guilty of first-degree sexual exploitation of a minor, it had to find beyond a reasonable doubt that "defendant used, induced, coerced, encouraged or facilitated a [minor] to engage in [oral intercourse] for the purpose of producing material that contains a visual representation depicting this activity," the trial court never defined "oral intercourse" during its final instructions to the jury.

On 22 May 2014, the jury returned verdicts finding defendant guilty of first-degree sexual exploitation of a minor, attempted statutory sex offense, eighteen counts of secret peeping, and six counts of taking indecent liberties with a child. On 23 May 2014, the trial court arrested judgment with respect to each of the secret peeping charges; entered judgments sentencing defendant to consecutive terms of 16 to 20 months imprisonment based upon each of defendant's convictions for taking indecent liberties with a child, to a consecutive term of 73 to 97 months based upon defendant's conviction for first-degree sexual exploitation of a minor, and to a consecutive term of 157 to 198 months imprisonment based upon defendant's conviction for attempted statutory sex offense; and ordered that defendant register as a sex offender following his release from imprisonment. Defendant noted an appeal to the Court of Appeals from the trial court's judgments.

In seeking relief from the trial court's judgments before the Court of Appeals, defendant argued that the trial court had erred by allowing the prosecutor "to misstate the law to the jury regarding an essential element of sexual exploitation" of a minor and by failing to instruct the jury that guilt of first-degree sexual exploitation of a minor required proof of "penetration, however slight." In rejecting defendant's challenge to the prosecutor's closing argument, the Court of Appeals determined that "the prosecutor's remarks [constituted] reasonable inferences of the law" given that first-degree sexual exploitation "include[s] digitally manipulated photos that had been produced without a minor being *actually engaged* in sexual activity, provided that the image depicted an *actual minor* engaged in sexual activity." *State v. Fletcher*, -- N.C. --, 782 S.E.2d 926, 2016 WL 797895 (2016) (unpublished), at *5. The Court of Appeals further noted that, "to the extent that the prosecutor's argument could be construed as a misstatement of law, it was remedied by the trial court's multiple reiterations that it will instruct on the law and its instructing was in accordance with the pattern jury instructions." *Id.* at *6.

Secondly, the Court of Appeals rejected defendant's contention that " 'oral intercourse' requires some evidence that that defendant's male sex organ penetrated Diane's mouth." *Id.* at *9. After acknowledging long-standing precedent to the effect that both vaginal intercourse and anal intercourse require penetration, the Court of Appeals stated that, "[g]iven the ambiguity of the phrase and these indicators of meaning," it would decline "to impose the requirement that, when the State proceeds under 'oral intercourse,' it must prove that the victim's mouth was penetrated." *Id.* at *10. As a result, the Court of Appeals found no error in the proceedings leading to the entry of the trial court's judgments.

In seeking further review of the Court of Appeals' decision by this Court, defendant argued that "the prosecutor misstated the law during his closing argument when he told the jury that it could convict [defendant] of first degree exploitation even if it determined that the images were fabricated or manipulated" and that the trial court's decision to overrule his objection to the prosecutor's argument "endorsed the prosecutor's misstatement in the presence of the jury." In addition, defendant argued that the Court of Appeals' decision to the effect that " 'oral intercourse' as contemplated by N.C.G.S. § 14-190.16 does not require penetration" "conflict[s] with this Court's well-established precedent regarding the definition of sexual 'intercourse.' " The State, on the other hand, urged us to refrain from granting further review in this case on the grounds that the Court of Appeals had correctly determined that

the challenged prosecutorial argument rested upon " 'reasonable inferences' derived from the sexual exploitation statute"; that, "even assuming some impropriety, the trial court's instruction to the jury cured any such improper argument"; and that the Court of Appeals had "relied upon several well established principles of statutory construction" in determining that "oral intercourse" as that term is used in N.C.G.S. § 14-190.13(5)(b) did not involve penetration. We granted defendant's petition for discretionary review of the Court of Appeals' decision on 9 June 2016.

In seeking to persuade us that the trial court erred by overruling his objection to the prosecutor's argument that the images utilized to support the first-degree sexual exploitation of a minor charge did not need to depict actual sexual activity, defendant contends that the relevant statutory provision requires "that a minor actually be exposed to sexual activity" on the grounds that the presence or absence of such activity "is one distinction separating first-degree sexual exploitation from the two lesser degrees of sexual exploitation," citing N.C.G.S. §§ 14-190.17 and 14-190.17A. The trial court's failure to sustain defendant's objection to the challenged prosecutorial argument clearly prejudiced defendant given that his "primary defense" "was that the images of Diane sleeping" had been "digitally manipulated through the use of computer software" and, "at worst, simulated sexual activity." In defendant's view, the trial court's jury instructions did not suffice to cure the prejudice arising from the prosecutor's argument given that "the pattern instruction employed by the trial court merely tracked the language of the statute, and . . . did not explicitly address the prosecutor's misstatement." Finally, defendant asserted that "the jury's logically inconsistent verdicts of *attempted* statutory sex offense and *completed* first-degree sexual exploitation" highlighted the prejudicial effect of the trial court's error.

Secondly, defendant contends that the trial court's failure to instruct the jury that "oral intercourse" required proof of "penetration, however slight," constituted prejudicial error. After noting that a "trial court is required to give [a requested] instruction, at least in substance, if it is a correct statement of the law and supported by the evidence," citing *State v. Shaw*, 322 N.C. 797, 804, 370 S.E.2d 546, 550 (1988), defendant contends that, because "this Court has consistently held that the phrases 'vaginal intercourse' and 'anal intercourse' both entail penetration, however slight," the statutory reference to "oral intercourse" should be understood to require "penetration" as well given that "it is conclusively presumed that the intention of the Legislature must be taken to be in the import of the words previously judicially construed," quoting *Jones v. Commissioners*, 137 N.C. 579, 608, 50 S.E. 291, 301 (1905).

The State, on the other hand, contends that the Court of Appeals correctly determined that the challenged portion of the prosecutor's argument, rather than misstating the law, reflected a "reasonable inference" "derived from the exploitation statute." Moreover, even if the trial court erred by failing to sustain defendant's challenge to the relevant portion of the prosecutor's argument, "[d]efendant cannot demonstrate prejudicial error" given the overwhelming evidence of defendant's guilt and the fact that the trial court correctly instructed the jury concerning the issue of defendant's guilt of first-degree sexual exploitation of a minor, with any inconsistency between the jury's verdicts concerning the issue of defendant's guilt of statutory sex offense and first-degree sexual exploitation of a minor failing to establish prejudice "stemming from the prosecutor's brief statement concerning manipulated images," citing *State v. Davis*, 214 N.C. 787, 794, 1 S.E.2d 104, 108 (1939) (holding that, if the record contains sufficient evidence to support a verdict, "mere inconsistency will not invalidate the verdict").

In addition, the State asserts that the trial court's jury instructions "adequately addressed each essential element" of the offense of first-degree sexual exploitation of a minor, so that "the trial judge was not required to read [d]efendant's requested jury instruction." According to the State, defendant's requested instruction concerning the definition of "oral intercourse" "would narrow the scope of the statute and . . . [allow] an adult [to] escape prosecution even if he actively filmed or produced a picture of his penis touching the lips, tongue or mouth of a minor" despite the General Assembly's clear intention to protect minors "from the physiological and psychological injuries resulting from sexual exploitation and abuse," quoting *State v. Williams*, 232 N.C. App. 152, 159, 754 S.E.2d 418, 423-24, *appeal dismissed and disc. rev. denied*, 367 N.C. 784, 766 S.E.2d 846 (2014). As a result, the State urges us to affirm the Court of Appeals' decision.

[1] As a general proposition, parties are given "wide latitude" in their closing arguments to the jury, *State v. Monk*, 286 N.C. 509, 515, 212 S.E.2d 125, 131 (1975) (citations omitted), with the State being entitled to "argue to the jury the law, the facts in evidence and all reasonable inferences drawn therefrom," *State v. Goss*, 361 N.C. 610, 626, 651 S.E.2d 867, 877 (2007) (quoting *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709-10 (1995), *cert. denied*, 516 U.S. 1148, 116 S. Ct. 1021, 134 L. Ed. 2d 100 (1996)), *cert. denied*, 555 U.S. 835, 129 S. Ct. 59, 172 L. Ed. 2d 58 (2008). However, "[i]ncorrect statements of law in closing arguments are improper, and upon [a] defendant's objection, the trial judge should . . . sustain [the] objection and instruct the jury to disregard the statement."

State v. Ratliff, 341 N.C. 610, 616-17, 461 S.E.2d 325, 328-29 (1995) (citation omitted).[2] A challenge to the trial court's failure to sustain a defendant's objection to a comment made during the State's closing argument is reviewed for an abuse of discretion, *State v. Walters*, 357 N.C. 68, 101, 588 S.E.2d 344, 364 (citing *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002)), *cert. denied*, 540 U.S. 971, 124 S. Ct. 442, 157 L. Ed. 2d 320 (2003), with the reviewing court being required to "first determine if the remarks were improper" and then "determine if the remarks were of such a magnitude that their inclusion prejudiced [the] defendant." *Id.* at 101, 588 S.E.2d at 364 (citing and quoting *Jones*, 355 N.C. at 131, 558 S.E.2d at 106). Assuming that the trial court's refusal to sustain the defendant's objection was erroneous, the defendant must show that there is a reasonable possibility that the jury would have acquitted him had the challenged argument not been permitted. *Ratliff*, 341 N.C. at 617, 461 S.E.2d at 329 (citing, *inter alia*, N.C.G.S. § 15A-1443(a) (1988), which is identical to the current statute).

The statutory framework governing criminal liability arising from the creation and distribution of child pornography was initially enacted by the General Assembly in 1985. *Cinema I Video, Inc. v. Thornburg*, 320 N.C. 485, 489, 358 S.E.2d 383, 384 (1987). Under the current statutory scheme, a defendant can be convicted of sexual exploitation of a minor in the event that he commits a variety of acts, with the defendant's conduct being subject to varying degrees of punishment depending upon the nature and extent of the defendant's involvement with the minor in question. *See* N.C.G.S. §§ 14-190.16, -190.17 (2015); *see also id.* § 14-190.17A (2015) (enacted in 1989). For example, the offense of third-degree sexual exploitation of a minor prohibits the mere possession of child pornography. *See id.* § 14-190.17A(a) (stating that "[a] person commits the offense of third degree sexual exploitation of a minor if, knowing the character or content of the material, he possesses material that contains a visual representation of a minor engaging in sexual activity"). On the other hand, a defendant commits the offense of second-degree sexual exploitation of a minor if he or she "[r]ecords, photographs, films,

2. Although the State contends that defendant's general objection did not suffice to preserve his challenge to the trial court's failure to sustain his objection to the challenged portion of the prosecutor's argument for purposes of appellate review, no statement of the basis for an objection is required unless the ground for the objection is "not apparent from the context." N.C. R. App. P. 10(a)(1). When the relevant portions of the State's final argument are considered in the context of the basic thrust of defendant's defense, the basis for defendant's objection is obvious. As a result, we conclude that defendant's challenge to the trial court's refusal to sustain defendant's objection to a portion of the prosecutor's final argument is properly preserved for purposes of appellate review.

develops, or duplicates material that contains a visual representation of a minor engaged in sexual activity; or . . . [d]istributes, transports, exhibits, receives, sells, purchases, exchanges, or solicits material that contains a visual representation of a minor engaged in sexual activity," *id.* § 14-190.17(a)(1)-(2), with the common thread running through the conduct statutorily defined as second-degree sexual offense being that the defendant had taken an active role in the production or distribution of child pornography without directly facilitating the involvement of the child victim in the activities depicted in the material in question. Finally, the offense of first-degree sexual exploitation of a minor is committed if the defendant, "knowing the character or content of the material or performance":

> (1) Uses, employs, induces, coerces, encourages, or facilitates a minor to engage in or assist others to engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity; or
>
> (2) Permits a minor under his custody or control to engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity; or
>
> (3) Transports or finances the transportation of a minor through or across this State with the intent that the minor engage in sexual activity for a live performance or for the purpose of producing material that contains a visual representation depicting this activity; or
>
> (4) Records, photographs, films, develops, or duplicates for sale or pecuniary gain material that contains a visual representation depicting a minor engaged in sexual activity.

Id. § 14-190.16(a).[3] As a result, the acts necessary to establish the defendant's guilt of first-degree sexual exploitation of a minor can be categorized as involving either direct facilitation of the minor's involvement in sexual activity or the production of child pornography for sale or profit. *See id.*

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3. The definition of "sexual activity" as set out in N.C.G.S. § 14-190.13(5) (2015) is discussed in more detail below. The "act" of being photographed while sleeping does not, however, fall within any component of the statutory definition of "sexual activity" contained in that statutory provision.

The indictment returned against defendant for the purpose of charging him with first-degree sexual exploitation of a minor alleged that defendant "use[d] or induce[d] or coerce[d] or encourage[d] or facilitate[d] [Diane] to engage in sexual activity, oral intercourse, for the purpose of producing material containing a visual representation depicting this activity" while "knowing the character of the material." As a result, the record clearly establishes that the State sought to prosecute defendant for committing the offense delineated in N.C.G.S. § 14-190.16(a)(1). According to the plain language of the relevant statutory provision, the minor in question is required to have engaged in sexual activity. *See Williams v. Williams*, 299 N.C. 174, 180, 261 S.E.2d 849, 854 (1980) (stating that, "[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give it plain and definite meaning") (citations omitted); *see also Cinema I Video, Inc., v. Thornburg*, 83 N.C. App. 544, 566, 351 S.E.2d 305, 319 (1986) (concluding that the statutory provisions prohibiting the sexual exploitation of a minor contemplate "live performance or photographic or other visual reproduction of live performances") (quoting *New York. v. Ferber*, 458 U.S. 747, 765, 102 S. Ct. 3348, 3358, 73 L. Ed. 2d 1113, 1127 (1982)), *aff'd*, 320 N.C. 485, 358 S.E.2d 383 (1987). Thus, when the minor depicted in an image appears to have been shown as engaged in sexual activity as the result of digital manipulation, the defendant has not committed the offense of first-degree sexual exploitation of a minor. As a result, both the prosecutor's assertion that it "[d]oes not matter if the image [appearing to depict sexual activity involving a minor] was altered" and the prosecutor's statement that, "[i]f I take a picture of a child from the newspaper . . . and I take a picture of myself unclothed, and I am able to manipulate those photos to show that I am engaged in a sexual act with that child, that's manufacturing child pornography" constitute misstatements of the applicable law.

The State's reliance upon the decision of the United States Supreme Court in *United States v. Williams*, 553 U.S. 285, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008), to support its defense of the prosecutor's argument is misplaced. As an initial matter, the issue before the Court in *Williams* was whether a federal statute that "criminalizes, in certain specified circumstances, the pandering or solicitation of child pornography" was impermissibly "overbroad under the First Amendment [to the United States Constitution] or impermissibly vague under the Due Process Clause of the Fifth Amendment." *Id.* at 288, 128 S. Ct. at 1835, 170 L. Ed. 2d at 659. In other words, *Williams* addressed the issue of whether a legislative body could constitutionally criminalize certain conduct rather than whether the General Assembly, in enacting N.C.G.S. § 14-190.16(a)

(1), actually did criminalize certain types of conduct.[4] Secondly, the federal statutory provision at issue in *Williams*, unlike N.C.G.S. § 14-190.16(a)(1), explicitly defined prohibited "sexually explicit conduct" as including various acts that could be either "actual or simulated." *Id.* at 290, 128 S. Ct. at 1837, 170 L. Ed. 2d at 661. As a result, even though "[t]he emergence of new technology and the repeated retransmission of picture files over the Internet could make it nearly impossible to prove that a particular image was produced using real children," *id.* at 290, 128 S. Ct. at 1837, 170 L. Ed. 2d at 661, the United States Supreme Court's decision in *Williams* has no bearing upon the proper resolution of defendant's first challenge to the trial court's judgments.

Although the trial court erred by failing to sustain defendant's objection to the challenged prosecutorial argument, the commission of such an error, standing alone, does not suffice to justify a decision to award defendant a new trial, *see State v. Jennings*, 333 N.C. 579, 618, 430 S.E.2d 188, 208, *cert. denied*, 510 U.S. 1028, 114 S. Ct. 644, 126 L. Ed. 2d 602 (1993), given that a party's misstatement of the law during the course of its final argument is deemed to have been "cured by the court's correct jury instructions on [the issue misstated]," *State v. Phillips*, 365 N.C. 103, 140, 711 S.E.2d 122, 148 (2011), *cert. denied*, 565 U.S. 1204, 132 S. Ct. 1541, 182 L. Ed. 2d 176 (2012); *see also State v. Anderson*, 322 N.C. 22, 38, 366 S.E.2d 459, 469, *cert. denied*, 488 U.S. 975, 109 S. Ct. 513, 102 L. Ed. 2d 548 (1988). As defendant concedes, the trial court instructed the jury that it could only convict defendant of first-degree sexual exploitation of a minor in the event that it found beyond a reasonable doubt that "the defendant used, induced, coerced, encouraged or facilitated a person to engage in sexual activity for the purpose of producing material that contains a visual representation depicting this activity," with "[o]ral intercourse [constituting] sexual activity." Although this instruction explicitly informed the jury that, in order for it to return a guilty verdict, it had to find that defendant "used, induced, coerced, encouraged or facilitated" Diane's involvement in sexual activity, defendant contends that a finding that the trial court's failure to sustain his objection to the prosecutor's misstatement of the law constituted harmless error would be inappropriate given the centrality of the issue addressed in the challenged portion of the prosecutor's argument to defendant's defense

4. We do not, of course, wish the textual discussion to be understood as expressing any opinion concerning the extent, if any, to which digitally altering otherwise innocent photographs of minors so as to create images that appear to depict the minor engaged in sexual activity or the possession of such digitally altered images constitute either second-degree sexual exploitation of a minor or third-degree sexual exploitation of a minor.

and the fact that the trial court's decision to overrule his objection to the relevant portion of the prosecutor's argument placed the imprimatur of the trial court's approval on the challenged argument. However, given the clarity of the language used in the trial court's instruction and the absence of any North Carolina authority tending to support defendant's contention, we do not find defendant's contentions with respect to the prejudice issue persuasive.[5]

Moreover, the fact that the jury returned what defendant describes as "inconsistent" verdicts has no tendency to show that it failed to understand and heed the trial court's instructions concerning the showing that the State was required to make in order for the jury to convict defendant of first-degree sexual exploitation of a minor, which clearly required proof beyond a reasonable doubt that defendant used Diane to engage in actual sexual activity. Although the jury's verdicts might have some tendency to suggest that the jury had difficulty determining whether defendant's penis actually touched Diane's lips, its verdicts do not in any way tend to suggest that the jury accepted the prosecutor's contention that a conviction for first-degree sexual exploitation of a minor can rest upon digitally altered images rather than evidence of some sort of actual sexual activity. As a result, we do not believe that there is any reasonable possibility that, but for the trial court's failure to sustain defendant's objection to the prosecutor's misstatement of the applicable law, the jury would have acquitted defendant of first-degree sexual exploitation of a minor. *Ratliff*, 341 N.C. at 617, 461 S.E.2d at 329; *see also* N.C.G.S. § 15A-1443(a) (2015)).

[2] "The jury charge is one of the most critical parts of a criminal trial." *State v. Walston*, 367 N.C. 721, 730, 766 S.E.2d 312, 318 (2014). "The purpose of . . . a charge to the jury is to give a clear instruction to assist the jury in an understanding of the case and in reaching a correct verdict," *Shaw*, 322 N.C. at 803, 370 S.E.2d at 549, including how "the law . . . should be applied to the evidence," *State v. Sutton*, 230 N.C. 244, 247,

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5. Although defendant did cite the United States Supreme Court's decision in *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), in support of the prejudice argument discussed in the text, his reliance on *Bruton* is unavailing given that this case involves a prosecutorial misstatement of the law that was corrected in the trial court's jury instructions while *Bruton* involved the admission of a codefendant's confession that also implicated the defendant subject to an instruction that the jury should only consider the information contained in the codefendant's confession against the codefendant. Unlike the evidence at issue in *Bruton*, the challenged prosecutorial argument cannot reasonably be described as "of the most persuasive sort, ineradicable, as a practical matter, from the jury's mind[.]" *Kansas v. Carr*, 577 U.S. ___, ___, 136 S. Ct. 633, 645, 193 L. Ed. 2d 535, 548 (2016) (citations omitted).

52 S.E.2d 921, 923 (1949) (citations omitted). As a result, the trial court has a duty "to instruct the jury on all substantial features of a case raised by the evidence." *Shaw*, 322 N.C. at 803, 370 S.E.2d at 549 (citing *State v. Ferrell*, 300 N.C. 157, 163, 265 S.E.2d 210, 214 (1980), *disapproved of on other grounds by State v. Collins*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993)). In the event that a "defendant's request for [an] instruction [is] correct in law and supported by the evidence in the case, the trial court [is] required to give the instruction, at least in substance." *Shaw*, 322 N.C. at 804, 370 S.E.2d at 550 (citing *State v. Howard*, 274 N.C. 186, 199, 162 S.E.2d 495, 504 (1968)). "[I]n giving jury instructions," however, " 'the court is not required to follow any particular form,' as long as the instruction adequately explains 'each essential element of the offense.' " *Walston*, 367 N.C. at 731, 766 S.E.2d at 319 (quoting *State v. Avery*, 315 N.C. 1, 31, 337 S.E.2d 786, 803 (1985)). Even if a trial court errs by failing to give a requested and legally correct instruction, the defendant is not entitled to a new trial unless there is "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a); *see also Shaw*, 322 N.C. at 804, 370 S.E.2d at 550.

As we have already noted, defendant was charged with "us[ing], employ[ing], induc[ing], coerc[ing], encourag[ing], or facilitat[ing] a minor to engage in . . . sexual activity . . . for the purpose of producing material that contains a visual representation depicting this activity." N.C.G.S. § 14-190.16(a)(1). "Sexual activity" for purposes of N.C.G.S. § 14-190.16(a)(1) consists of:

> a. Masturbation, whether done alone or with another human or an animal.
>
> b. Vaginal, anal, or oral intercourse, whether done with another human or with an animal.
>
> c. Touching, in an act of apparent sexual stimulation or sexual abuse, of the clothed or unclothed genitals, pubic area, or buttocks of another person or the clothed or unclothed breasts of a human female.
>
> d. An act or condition that depicts torture, physical restraint by being fettered or bound, or flagellation of or by a person clad in undergarments or in revealing or bizarre costume.
>
> e. Excretory functions; provided, however, that this subsubdivision shall not apply to [N.C.]G.S. [§] 14-190.17A.

f. The insertion of any part of a person's body, other than the male sexual organ, or of any object into another person's anus or vagina, except when done as part of a recognized medical procedure.

g. The lascivious exhibition of the genitals or pubic area of any person.

Id. § 14-190.13(5) (2015). In rejecting defendant's request that the trial court instruct the jury that "oral intercourse" for purposes of N.C.G.S. § 14-190.13(5)(b) involves penetration, the trial court stated that, since "the indictment indicates that the sexual activity was oral intercourse," he would "instruct the jury that the sexual activity was oral intercourse" without further defining that term and would "allow counsel to argue definitions of oral intercourse and fellatio."[6]

The extent to which "oral intercourse," as that term is used in N.C.G.S. § 14-190.13(5)(b), requires penetration presents a question of first impression for this Court. "When construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself." *State v. Ward*, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010). "If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005). Aside from the fact that neither the General Assembly[7] nor the courts[8]

6. As an aside, we urge the members of the trial bench to refrain from avoiding the necessity for instructing the jury concerning all of the essential elements of first-degree sexual exploitation of a minor or any other offense by allowing the parties to argue alternative definitions of a relevant statutory expression in lieu of defining that expression during the trial court's final instructions. As we have already indicated, "[i]t is the duty of the trial court to instruct the jury on all substantial features of a case," including the definition of statutory terms such as "oral intercourse," to the extent that it is necessary to clarify the nature of the decision that the jury is required to make. *Shaw*, 322 N.C. at 803, 370 S.E.2d at 549.

7. The term "oral intercourse" does appear, without further definition, in N.C.G.S. § 14-190.1(c)(1), which defines "sexual conduct" in the context of punishing "[o]bscene literature and exhibitions," and N.C.G.S. § 15A-615, which permits testing defendants charged with committing offenses that "involve[ ]nonconsensual vaginal, anal, or oral intercourse" or "vaginal, anal, or oral intercourse" with a victim under the age of sixteen for the presence of sexually transmitted diseases. N.C.G.S. §§ 14-190.1(c)(1), 15A-615(a) (2015).

8. Although the term "oral intercourse" does appear in some of this Court's opinions, these references consist of quotations from various statutory provisions or portions of the pattern jury instructions or of references to factual information contained in the record. None of these references shed any light upon the proper resolution of the question that we are called upon to decide in this case. *See, e.g.*, *State v. Autry*, 321 N.C. 392, 395, 364

have defined "oral intercourse," that term lacks an unambiguous "plain and definite meaning" as well. *Id.* at 614, 614 S.E.2d at 277. Although courts often consult dictionaries for the purpose of determining the plain meaning of statutory terms, *see State v. Ludlum*, 303 N.C. 666, 671, 281 S.E.2d 159, 162 (1981), that approach is of no avail in this case given the absence of any definition of "oral intercourse" in reference volumes such as *Webster's Third New International Dictionary* (1971), *The American Heritage Dictionary of the English Language* (4th ed. 2000), and the *New Oxford American Dictionary* (3d ed. 2010), or in online dictionaries, *see, e.g.*, *Merriam-Webster*, https://www.merriam-webster.com (last visited May 25, 2017).[9] As a result, given the absence of any generally accepted understanding of the meaning of the statutory reference to "oral intercourse," "judicial construction must be used to ascertain the legislative will." *Beck*, 359 N.C. at 614, 614 S.E.2d at 277 (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136-37 (1990)).

According to well-established North Carolina law, "[t]he intent of the Legislature controls the interpretation of a statute." *State v. Joyner*, 329 N.C. 211, 217, 404 S.E.2d 653, 657 (1991) (quoting *State v. Perry*, 305 N.C. 225, 235, 287 S.E.2d 810, 816 (1982), *overruled by State v. Mumford*, 364 N.C. 394, 402, 699 S.E.2d 911, 916 (2010)). "In ascertaining such intent, a court may consider the purpose of the statute and the evils it was designed to remedy, the effect of the proposed interpretations of the statute, and the traditionally accepted rules of statutory construction." *State v. Tew*, 326 N.C. 732, 738-39, 392 S.E.2d 603, 607 (1990) (citation omitted); *see also State v. Barnett*, 369 N.C. 298, 304, 794 S.E.2d 306, 311 (2016) (stating that, "[i]n ascertaining the legislative intent, courts should consider the language of the statute, the spirit of the statute,

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S.E.2d 341, 344 (1988); *State v. Locklear*, 320 N.C. 754, 756, 360 S.E.2d 682, 683 (1987); *State v. Tucker*, 317 N.C. 532, 535, 346 S.E.2d 417, 419 (1986); *State v. Ford*, 314 N.C. 498, 503, 334 S.E.2d 765, 769 (1985); *State v. Jean*, 310 N.C. 157, 159, 311 S.E.2d 266, 267 (1984); *State v. Riddle*, 300 N.C. 744, 745, 268 S.E.2d 80, 81 (1980); *State v. Self*, 280 N.C. 665, 667, 187 S.E.2d 93, 94 (1972).

9. The dictionaries that have been consulted in the drafting of this opinion do consistently define "oral sex" as the oral stimulation of the sex organ of another without making any reference to any sort of penetration requirement. *See, e.g.*, *New Oxford American Dictionary* 1233 (3d ed. 2010) (defining "oral sex" as "sexual activity in which the genitals of one partner are stimulated by the mouth of the other; fellatio or cunnilingus"); *The American Heritage Dictionary of the English Language* 1236 (4th ed. 2000) (defining "oral sex" as "oral stimulation of one's partner's sex organs"); *Merriam-Webster*, https://www.merriam-webster.com/dictionary/oral%20sex (last visited May 25, 2017) (defining "oral sex" as "oral stimulation of the genitals: cunnilingus, fellatio").

and what it seeks to accomplish" (quoting *State ex rel. Utils. Comm'n v. Pub. Staff*, 309 N.C. 195, 210, 306 S.E.2d 435, 444 (1983))). Although the title given to a particular statutory provision is not controlling, it does shed some light on the legislative intent underlying the enactment of that provision. *Brown v. Brown*, 353 N.C. 220, 224, 539 S.E.2d 621, 623 (2000) (first citing *In re Forsyth County*, 285 N.C. 64, 71, 203 S.E.2d 51, 55 (1974); and then citing *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 812, 517 S.E.2d 874, 879 (1999)). Similarly, "[w]hile a criminal statute must be strictly construed against the State, the courts must nevertheless construe it with regard to the evil which it is intended to suppress." *Tew*, 326 N.C. at 739, 392 S.E.2d at 607 (citation omitted). "A construction of a statute which operates to defeat or impair its purpose must be avoided if that can reasonably be done without violence to the legislative language." *Id.* at 739, 392 S.E.2d at 607 (citation omitted).

Statutory provisions criminalizing the making, dissemination, and possession of child pornography have been enacted by "virtually all of the States and the United States" out of concern "that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child." *New York v. Ferber*, 458 U.S. at 758, 102 S. Ct. at 3355, 73 L .Ed. 2d at1123. Such laws

> are designed to prevent the victimization of individual children, and to protect "minors from the physiological and psychological injuries resulting from sexual exploitation and abuse." This Court has noted that child pornography poses a particular threat to the child victim because "the child's actions are reduced to a recording [and] the pornography may haunt him in future years, long after the original misdeed took place."

State v. Howell, 169 N.C. App. 58, 63, 609 S.E.2d 417, 420-21 (2005) (alteration in original) (quoting *Cinema I Video*, 83 N.C. App. at 5552, 568-69, 351 S.E.2d at 311, 320)). Thus, as is evidenced by the legislative decision to title the relevant legislation as "An Act To Strengthen the Obscenity Laws of this State and the Enforcement of These Laws, To Protect Minors from Harmful Material that Does Not Rise to the Level of Obscenity, and To Stop the Sexual Exploitation and Prostitution of Minors," *see* Act of July 11, 1985, ch. 703, 1985 N.C. Sess. Laws 929, we have no hesitation in concluding that the General Assembly enacted N.C.G.S. § 14-190.16(a)(1) for the purpose of protecting minors from the harms arising from the "use[ ], employ[ment], induce[ment], coerc[ion], encourage[ment], or facilitat[ion] [of] a minor to engage in or assist

others to engage in sexual activity for live performance or for the purpose of producing material that contains a visual representation depicting this activity." N.C.G.S. 14-190.16(a)(1). As a result, we believe that the General Assembly intended that the relevant statutory language be construed broadly in order to provide minors with the maximum reasonably available protection from sexual exploitation.

Adoption of the definition of "oral intercourse" as requiring proof of penetration as contended for by defendant would contravene this understanding of the relevant legislative intent by narrowing the scope of the protections from the sexual exploitation of minors afforded by N.C.G.S. § 14-190.16(a)(1). Although this Court has consistently held that other forms of "intercourse" require "penetration, however slight," that definition appears to have been limited in recent years to sexual acts that inherently involve penetration of the body of another by the male sex organ. *See, e.g.*, *State v. Brown*, 312 N.C. 237, 244-45, 321 S.E.2d 856, 861 (1984) (defining vaginal intercourse as the "*slightest* penetration of the female sex organ by the male sex organ"); *State v. Atkins*, 311 N.C. 272, 275, 316 S.E.2d 306, 308 (1984) (stating that anal intercourse "requires penetration of the anal opening . . . by the penis"). "When a term has long-standing legal significance, it is presumed that legislators intended the same significance to attach by use of that term, absent indications to the contrary." *Black v. Littlejohn*, 312 N.C. 626, 639, 325 S.E.2d 469, 478 (1985) (quoting *Sheffield v. Consol. Foods Corp.*, 302 N.C. 403, 427, 276 S.E.2d 422, 437 (1981)). For that reason, we conclude that the references to vaginal and anal intercourse contained in N.C.G.S. § 14-190.13(5)(b) assume the existence of a penetration requirement. On the other hand, we believe that, when read in context, "oral intercourse" was intended as a gender-neutral reference to cunnilingus and fellatio, which are the only components of the definition of "sexual act" as currently set out in N.C.G.S. § 14-27.20(4) that are not otherwise explicitly included in the definition of "sexual activity" contained in N.C.G.S. § 14-190.13(5).[10] As we have previously recognized, neither fellatio nor cunnilingus, as those

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10 Appellate courts in other jurisdictions have reached similar conclusions. For example, the South Carolina Court of Appeals held that cunnilingus constituted "sexual battery," statutorily defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening of another person's body," despite the absence of penetration. *State v. Morgan*, 352 S.C. 359, 365, 574 S.E.2d 203, 206 (S.C. Ct. App. 2002) (emphasis omitted) (quoting S.C. Code Ann. § 16-3-651(h) (1985)); *see also Stephan v. State*, 810 P.2d 564, 568 (Alaska Ct. App. 1991) (stating that cunnilingus constituted "sexual penetration," defined as "genital intercourse, cunnilingus, fellatio, anal intercourse, or an intrusion, however slight, of an object or any part of a person's body into the genital or anal opening

terms are currently used in N.C.G.S. § 14-27.20(4), require penetration. *State v. Goodson*, 313 N.C. 318, 319, 327 S.E.2d 868, 869 (1985) (defining "fellatio" as "oral sex" performed by a female upon a male consisting of "contact between the mouth of one party and the sex organs of another" without making any mention of penetration); *Ludlum*, 303 N.C. at 669, 281 S.E.2d at 161 (stating that "[w]e do not agree, however, that penetration is required before cunnilingus, as that word is used in the statute, can occur"). In light of the obvious legislative intent to provide broad protection against the sexual exploitation of minors, the fact that the existence of a penetration requirement with respect to "vaginal intercourse" and "anal intercourse" does not logically compel a determination that "oral intercourse" includes a penetration requirement as well, the inconsistent treatment between the offense of sexual exploitation of a minor and sexual offense that would result from the interpolation of a penetration requirement into the definition of "oral intercourse," and the desirability of avoiding "saddl[ing] the criminal law with hypertechnical distinctions and the prosecution with overly complex and in some cases impossible burdens of proof," *Ludlum*, 303 N.C. at 672, 281 S.E.2d at 162,[11] we decline to adopt defendant's proposed definition of "oral intercourse" as containing a penetration requirement and conclude, that since defendant's requested instruction did not constitute an accurate statement of the applicable law, *see Shaw*, 322 N.C. at 804,

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of another person's body," despite the absence of penetration) (quoting Alaska Stat. Ann. § 11.81.900(b)(53) (1991)); *State v. Beaulieu*, 674 A.2d 377, 378 (R.I. 1996) (per curiam) (concluding that cunnilingus, in the absence of evidence of penetration, establishes a defendant's guilt of first-degree sexual assault given that R.I. Gen. Laws 1956 § 11-37-1(8) "does not require *actual penetration*, only sexual penetration"); *State v. Marcum*, 109 S.W.3d 300, 303 & n.4, 304 (Tenn. 2003) (holding that a defendant was not entitled to a jury instruction concerning the issue of his guilt of attempted rape of child based upon fellatio, without evidence of actual penetration, given the statutory definition of "sexual penetration" as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of [the] person's body or of any object into the genital or anal openings of the victim's, the defendant's, or any other person's body") (quoting Tenn. Code Ann. § 39-13-501(7) (1997)).

11. The fact that defendant's conviction for first degree sexual exploitation of a minor rests upon conduct that would also be included within the scope of another subsection of definition of "sexual activity" set out N.C.G.S. § 14-190.13(5) does not necessitate the inclusion of a penetration requirement into the definition of "oral intercourse" given that there is much overlap in the conduct described in the various components of that definition. For example, both vaginal and anal intercourse, as this Court has defined those terms, would appear to involve "[t]ouching, in an act of apparent sexual stimulation or sexual abuse, of the clothed or unclothed genitals, pubic area, or buttocks of another person or the clothed or unclothed breasts of a human female." N.C.G.S. § 14-190.13(5)(c).

370 S.E.2d at 550, the trial court did not err by refusing to instruct the jury in accordance with defendant's request. As a result, for the reasons set forth above, the decision of the Court of Appeals, as modified in this opinion, is affirmed.

MODIFIED AND AFFIRMED.

Justice MORGAN concurring in part and concurring in the result only in part.

I concur with the majority decision's reasoning and holding that the prosecutor's challenged statements—that manipulating innocent images so that they *appear* to show a child engaged in a sexual act is manufacturing child pornography and thus constitutes first-degree sexual exploitation of a minor—were erroneous, but not prejudicial.

With regard to the denial of defendant's request for a jury instruction defining "oral intercourse," I further concur with the majority's ultimate determination that defendant is not entitled to a new trial on that basis. Nonetheless, I reach this result only because I believe that defendant cannot establish prejudice, and not on the basis that the trial court did not err in refusing to give defendant's requested definition. Proper application of principles of statutory interpretation demonstrates that the term "oral intercourse" as used in the sexual exploitation statutes is defined as requiring penetration, however slight, of the mouth by the male sex organ. Accordingly, the trial court should have so instructed the jury at defendant's request.

Before addressing the divergence of my analysis from that of the majority on this issue, I first note three key points of agreement with my esteemed colleagues. First, the issue of whether, in the context of our State's sexual exploitation statutes, "oral intercourse" requires penetration presents a matter of first impression for this Court. Second, because "oral intercourse" is not clearly defined in case law, statutes, or general usage dictionaries, we must employ principles of statutory construction to determine the meaning of the term. Third, and most critically, I emphatically agree with the majority that the General Assembly undoubtedly intended for the sexual exploitation statutes to apply to the sex acts that defendant committed against Diane.

For purposes of sexual exploitation, as well as other public morality and decency offenses concerning minors, N.C.G.S. § 14-190.13 (the definitions statute) defines "[s]exual activity" to encompass numerous acts, including "[m]asturbation"; "[v]aginal, anal, or oral intercourse"; the

sexually stimulating or sexually abusive touching of the genitals, pubic area, or buttocks of another, or of the female breasts; sexualized torture, bondage, and sadomasochistic behaviors; "[e]xcretory functions"; penetration of the vagina or anus by an object or a body part other than the male sex organ; and "lascivious exhibition of the genitals or pubic area." N.C.G.S. § 14-190.13(5)(a)-(g) (2015). This review illustrates the broad range and diverse nature of the acts that the General Assembly sought to prohibit in protecting children from the harms of pornography and sexual exploitation. In light of this important purpose and the lengthy enumeration of acts that constitute sexual activity, I consider it to be beyond question that the General Assembly intended that, for purposes of the crime of sexual exploitation of a minor, the term "sexual activity" should include *both* the penetration of the mouth by the male sex organ as well as the mere touching of the male sex organ with the mouth, even without penetration.

It is at this stage, however, that my analysis of the proper means to arrive at the correct outcome in this case diverges from the rationales employed by my learned colleagues. The necessary goal of the protection of society's vulnerable minors from sexual exploitation can still be accomplished in our courts without compromising this Court's well-established and long-standing recognition of the need to construe statutes consistently. Such expected consistency would certainly include a construction of terminology that is harmonious throughout the spectrum of statutory enactments which address a given area of the criminal law. While these fundamental principles of statutory construction are deeply embedded in analyses routinely applied by this Court, the majority unfortunately departs from them in its interpretation of the term "intercourse" when we are called upon to ascribe a definition to the term "oral intercourse."

Upon this premise, I do not subscribe to the majority's unsupported assertion that "[a]doption of the definition of 'oral intercourse' as requiring proof of penetration . . . would contravene this understanding of the relevant legislative intent by narrowing the scope of protections" under the sexual exploitation statute.[1] Application of the well-established

1. Likewise, the State argued that mere touching of a sex organ with the mouth can only fall under subdivision (5)(b) as a form of "oral intercourse" and asserted that, were this Court to hold that "oral intercourse" requires penetration, a visual representation depicting the act of touching a child's lips with a penis could not support a prosecution for sexual exploitation. As with all cases, the State must simply take care to indict a defendant correctly under the applicable statutory provision in light of the behavior constituting a criminal offense.

rules of statutory construction reveals that the mere touching of the male sex organ with the mouth falls under subdivision (5)(c) of the definitions statute—"[t]ouching, in an act of apparent sexual stimulation or sexual abuse, of the clothed or unclothed genitals"—while the penetration of the mouth by the male sex organ falls under subdivision (5)(b), which includes, *inter alia*, "oral intercourse." *Id.* § 14-190.13(5)(b), (c). Therefore, the specific sexual activity for which defendant allegedly used Diane is a form of sexual exploitation of a minor, namely, sexual touching and not "oral intercourse." This distinction is neither trivial nor academic since, as defendant observes, here "the State elected to exclusively indict under a theory of 'oral intercourse,' and it was bound to prove that theory." *See State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980) (A defendant may not be "convict[ed] upon some abstract theory not supported by the bill of indictment.").

When, as here, a statutory term is not clear, any "ambiguity should be resolved so as to effectuate the true legislative intent." *State ex rel. Comm'r of Ins. v. N.C. Auto. Rate Admin. Office*, 287 N.C. 192, 202, 214 S.E.2d 98, 104 (1975) (citing *Duncan v. Carpenter & Phillips*, 233 N.C. 422, 64 S.E.2d 410 (1951), *overruled on other grounds by Taylor v. J. P. Stevens & Co.*, 300 N.C. 94, 265 S.E.2d 144 (1980), *McLean v. Durham Cty. Bd. of Elections*, 222 N.C. 6, 21 S.E.2d 842 (1942), and *State ex rel. Thomasson v. Patterson*, 213 N.C. 138, 195 S.E. 389 (1938)). In my view, the point of ambiguity here is simply whether the General Assembly intended to regard the undefined act of "oral intercourse" in the same manner as the other acts listed in N.C.G.S. § 14-190.13(5)(b) that contain the word "intercourse" and are clearly defined, or in the same manner as acts included in N.C.G.S. § 14-190.13(5)(f) as a form of sexual touching. In construing a statute, we presume that none of its subdivisions are redundant. *Sheffield v. Consol. Foods Corp.*, 302 N.C. 403, 421-22, 276 S.E.2d 422, 434 (1981) (citing *Jones v. Cty. Bd. of Educ.*, 185 N.C. 303, 307, 117 S.E. 37, 39 (1923)). Accordingly, I proceed on the presumption that the subdivisions of the definitions statute are not duplicative and that the touching of a male sex organ to the mouth or lips without penetration is covered under only one of them.

As acknowledged in the majority decision, this Court has consistently held that other forms of "intercourse" require penetration with the male sex organ, however slight. *See*, *e.g.*, *State v. Brown*, 312 N.C. 237, 244-45, 321 S.E.2d 856, 861 (1984) (stating that vaginal intercourse includes the "*slightest* penetration of the female sex organ by the male sex organ"); *State v. Atkins*, 311 N.C. 272, 275, 316 S.E.2d 306, 308 (1984) (stating that anal intercourse "requires penetration of the anal opening

. . . by the penis"). The majority suggests that this definition of "intercourse" has "been limited in recent years[2] to sexual acts that inherently involve penetration of the body of another by the male sex organ." While this observation may have some interesting historic validity, it bears no substantive legal applicability. The legal terms "anal intercourse" and "vaginal intercourse" are explicitly *defined* as the penetration of the anus and vagina, respectively, by the male sex organ. Thus, the penetration element of "anal intercourse" and "vaginal intercourse" is only "inherent" to these acts in the way that the *defining* characteristics of *any* sex act are. In this regard, elementary principles of statutory construction yield the conclusion that a consistent interpretation of the word "intercourse" inherently contemplates "penetration."

In determining legislative intent, I discern no evidence that the General Assembly intended to "limit" or alter the meaning of the term "intercourse" when it drafted the sexual exploitation laws in 1985. The definition of "intercourse" as requiring penetration by the male sex organ appears in decisions of this Court dating back at least to the middle of the twentieth century, nearly seven decades ago.[3] *See, e.g.*, *State v. Bowman*, 232 N.C. 374, 375-76, 61 S.E.2d 107, 108 (1950) ("There is 'carnal knowledge' or 'sexual intercourse' in a legal sense if there is the slightest penetration of the sexual organ of the female by the sexual organ of the male."). As noted by the majority, "[w]hen a term has longstanding legal significance, it is presumed that legislators intended the same significance to attach by use of that term, absent indications to the contrary." *Black v. Littlejohn*, 312 N.C. 626, 639, 325 S.E.2d 469, 478 (1985) (quoting *Sheffield*, 302 N.C. at 427, 276 S.E.2d at 437). Because our case law as demonstrated in *Bowman* had clearly defined "intercourse" as requiring penetration by the male sex organ some thirty-five years before the enactment of the sexual exploitation statutes in 1985, the General Assembly must be viewed to have intended this same word in the phrase "oral intercourse" to also require penetration.

This legislative intent appears even clearer in light of the other terms that the General Assembly has employed to encompass contact between the mouth and sexual organs without the requirement

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2. I would observe that the sexual exploitation statutes were first enacted in 1985. The General Assembly's understanding and intent in its statutory enactments before 1985 that are still valid, and the applicable case law interpreting them that also is still valid, should not be discounted merely because they are older.

3. Similarly, general usage dictionaries define "sexual intercourse" as "sexual contact between individuals *involving penetration*, esp. *the insertion of a man's erect penis* into a woman's vagina." *New Oxford American Dictionary* 1601 (3d ed. 2010) (emphasis added).

of penetration. *See*, *e.g.*, N.C.G.S. § 14-27.20(4), (5) (2015) (defining, for purposes of rape and other sex offenses, the term "sexual act" as excluding vaginal intercourse, but including "*cunnilingus*, *fellatio*, analingus, . . . anal intercourse," and "the penetration, however slight, by any object into the genital or anal opening of another person's body," and the term "[s]exual contact" as "(i) touching the sexual organ, anus, breast, groin, or buttocks of any person, (ii) *a person touching another person with their own sexual organ*, anus, breast, groin, or buttocks, or (iii) a person ejaculating, emitting, or placing semen, urine, or feces upon any part of another person") (emphases added). Further, it is evident that the General Assembly was aware of other phraseology for conduct that involves touching of sex organs with the mouth but without a penetration requirement. *See also State v. Goodson*, 313 N.C. 318, 319, 327 S.E.2d 868, 869 (1985) (defining fellatio and oral sex, neither of which require penetration); *State v. Ludlum*, 303 N.C. 666, 672, 281 S.E.2d 159, 162 (1981) (defining cunnilingus as not requiring penetration).[4] The majority's efforts to deftly move between and among this myriad of sexual acts in an effort to harmonize their definitions with the majority's brittle approach to statutory construction here present an awkward fit in the symmetry of the pertinent laws. Yet, in its wisdom, the General Assembly did not use any of those terms for purposes of sexual exploitation, instead selecting a word with a well-known, longstanding meaning: "intercourse."

Further indication of the intended meaning of the term "oral intercourse" can be derived from the General Assembly's focus in the definitions statute on distinguishing between sexual acts that involve penetration by the male sex organ and those which do not. The legislature chose to separately list "vaginal intercourse" and "anal intercourse"—acts the majority agrees require penetration of the vagina and anus with the male sex organ—in N.C.G.S. § 14-190.13(5)(b); penetration of the vagina and anus with any other body part or object—in N.C.G.S. § 14-190.13(5)(f); and mere touching of the male or female genital area—in N.C.G.S. § 14-190.13(5)(c). Despite this plain language regarding vaginal

4. Likewise, in contrast to the dearth of definitions for "oral intercourse" in general usage dictionaries, the term "oral sex" is defined—consistently—in such sources as the oral stimulation of another's sex organ, without any requirement of penetration. *See*, *e.g.*, *New Oxford American Dictionary* 1233 (3d ed. 2010) (defining oral sex as "sexual activity in which the genitals of one partner are stimulated by the mouth of the other; fellatio or cunnilingus"); *The American Heritage Dictionary of the English Language* 1236 (4th ed. 2000) (defining oral sex as "oral stimulation of one's partner's sex organs"); *Merriam-Webster*, https://www.merriam-webster.com/dictionary/oral%20sex (last visited Nov. 27, 2017) ("oral stimulation of the genitals: cunnilingus, fellatio").

and anal sexual activity, the majority concludes that "oral intercourse" alone does not require penetration because the term was intended by the General Assembly "as a gender-neutral reference to 'cunnilingus' or 'fellatio,' " neither of which requires penetration.[5] The majority's interpretation results in a rather haphazard categorization of various types of sexual activity replete with redundancy and inconsistency.

In conclusion, I therefore would deem the touching of the genitals by the mouth without penetration to be included in N.C.G.S. § 14-190.13(5)(c) of the definitions statute. I would hold that, as used in N.C.G.S. § 14-190.13, the General Assembly intended that the term "oral intercourse," like "vaginal intercourse" and "anal intercourse," requires penetration by the male sex organ, however slight. Therefore, I determine that the instruction requested by defendant was "correct in law." *See State v. Shaw*, 322 N.C. 797, 804, 370 S.E.2d 546, 550 (1988).

Because defendant's requested instruction was raised by the evidence presented and is legally correct, I would further hold that the trial court erred in refusing to give it, "at least in substance." *See id.* at 804, 370 S.E.2d at 550 (citing *State v. Howard*, 274 N.C. 186, 162 S.E.2d 495 (1968)). Nonetheless, I do not believe defendant should receive a new trial based on this error, because a defendant is not entitled to a new trial unless he can also show prejudice, meaning there is "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a) (2015); *see also Shaw*, 322 N.C. at 804, 370 S.E.2d at 550. When a defendant fails to meet this burden, an instructional error will not merit relief. N.C.G.S. § 15A-1443(a); *see also Shaw*, 322 N.C. at 804, 370 S.E.2d at 550. In my view, defendant has failed to show prejudice and therefore is not entitled to a new trial. Accordingly, I ultimately concur with the result reached by the majority, although based on different reasoning.

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5. I would note that if the legislature wished to refer to "cunnilingus" and "fellatio," it could have simply used those two well-defined words in lieu of the previously undefined two-word phrase "oral intercourse." *See, e.g.*, *Ludlum*, 303 N.C. at 672, 281 S.E.2d at 162 (holding that "the Legislature intended by its use of the word cunnilingus to mean stimulation by the tongue or lips of any part of a woman's genitalia" and not requiring penetration); *State v. Smith*, 362 N.C. 583, 593, 669 S.E.2d 299, 306 (2008) (defining "fellatio" as "any touching of the male sexual organ by the lips, tongue, or mouth of another person" and thus not requiring penetration) (quoting *State v. Johnson*, 105 N.C. App. 390, 393, 413 S.E.2d 562, 564, *appeal dismissed and disc. review denied*, 332 N.C. 348, 421 S.E.2d 158 (1992)). If the General Assembly wished to employ a gender-neutral term, it could have used another two-word phrase—"oral sex"—which "describe[es] a sexual act involving 'contact between the mouth of one party and the sex organs of another,' " but not requiring penetration. *Goodson*, 313 N.C. at 319, 327 S.E.2d at 869 (quoting *People v. Dimitris*, 115 Mich. App. 228, 234, 320 N.W.2d 226, 228 (1981) (per curiam)).

STATE v. JACKSON

[370 N.C. 337 (2017)]

STATE OF NORTH CAROLINA
v.
ADAM ROBERT JACKSON

No. 397A16

Filed 8 December 2017

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 791 S.E.2d 505 (2016), affirming an order entered on 13 March 2015 and a judgment entered on 11 February 2015 by Judge Joseph N. Crosswhite in Superior Court, Alexander County. Heard in the Supreme Court on 7 November 2017.

Joshua H. Stein, Attorney General, by Joseph A. Newsome, Assistant Attorney General, for the State.

Glenn Gerding, Appellate Defender, by Jillian C. Katz, Assistant Appellate Defender, for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
PIERRE JE BRON MOORE

No. 22A17

Filed 8 December 2017

Probation and Parole—probation revocation hearing—notice—statement of the violations alleged

Defendant received adequate notice of his probation revocation hearing pursuant to N.C.G.S. § 15A-1345(e) where the probation violation reports filed by the State included a list of the criminal offenses that defendant allegedly had committed and the trial court found that defendant had violated the condition of probation to commit no criminal offense. The phrase in the statute "a statement of the violations alleged" referred to a statement of the actions a probationer took to violate his conditions of probation, and it did not require a statement of the underlying conditions that were violated.

Justice ERVIN, concurring, in part, and concurring in the result, in part.

Justice HUDSON joins in this concurring opinion.

Justice BEASLEY dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 795 S.E.2d 598 (2016), finding no error after appeal from judgments entered on 15 January 2016 by Judge R. Allen Baddour in Superior Court, Orange County. Heard in the Supreme Court on 11 October 2017.

Joshua H. Stein, Attorney General, by Jessica V. Sutton and Teresa M. Postell, Assistant Attorneys General, for the State.

Allegra Collins for defendant-appellant.

MARTIN, Chief Justice.

Defendant was convicted of committing four crimes over a two-month period. He received two suspended sentences and was placed on probation. His probation was revoked after he was charged with

committing additional crimes. We now consider whether defendant received adequate notice of his probation revocation hearing pursuant to N.C.G.S. § 15A-1345(e). We modify and affirm the decision of the Court of Appeals and uphold the revocation of defendant's probation.

In August 2012, defendant was arrested for and charged with breaking and entering and larceny after breaking and entering. Defendant was released on bond and then, in September 2012, was arrested for and charged with committing those same offenses again. Defendant pleaded guilty to the August crimes and entered an *Alford* plea for the September crimes. Defendant received a suspended sentence of eight to nineteen months and supervised probation for twenty-four months for the August crimes. He received a suspended sentence of six to seventeen months and supervised probation for twenty-four months for the September crimes. The punishments for these crimes were to run consecutively. The judgments in both instances listed many of the "regular conditions of probation" under N.C.G.S. § 15A-1343(b). The listed conditions included that "defendant shall . . . [c]ommit no criminal offense in any jurisdiction," consistent with the language of N.C.G.S. § 15A-1343(b)(1).

Defendant's probation for the September crimes was modified and extended a number of times due to violations of probation conditions. On 3 June 2015, the State filed two probation violation reports relating to defendant's probation for the August and September 2012 crimes, respectively. The reports alleged violations of monetary conditions of probation. Each report also alleged an "Other Violation" that listed various pending criminal charges. Specifically, under "Other Violation" the reports each stated the same thing:

> The defendant has the following pending charges in Orange County. 15CR 051315 No Operators License 6/8/15, 15CR 51309 Flee/Elude Arrest w/MV 6/8/15. 13CR 709525 No Operators License 6/15/15, 14CR 052225 Possess Drug Paraphernalia 6/16/15, 14CR 052224 Resisting Public Officer 6/16/15, 14CR706236 No Motorcycle Endorsement 6/29/15, 14CR 706235 Cover Reg Sticker/Plate 6/29/15, and 14CR 706234 Reg Card Address Change Violation.

(Original in all uppercase.)

In January 2016, after many months of continuances, the trial court held a hearing on these violation reports.[1] Defendant's probation officer

1. During the time period covered by the continuances, defendant was also charged with first-degree murder.

testified about the new offenses alleged in the reports, and two police officers testified about defendant's fleeing to elude arrest two different times. The trial court found that defendant had violated the condition of probation to commit no criminal offense, and specifically found that defendant had "committed the charges of" fleeing to elude arrest and of not having an operator's license. The trial court accordingly revoked defendant's probation and activated the suspended sentences for defendant's August and September 2012 crimes, to be served consecutively.

Defendant appealed to the Court of Appeals, claiming that the probation violation reports did not give him adequate notice because they did not specifically state the condition of probation that he allegedly violated. In a divided opinion, the Court of Appeals affirmed the trial court's judgments. *State v. Moore*, ___ N.C. App. ___, ___, 795 S.E.2d 598, 600 (2016). The Court of Appeals concluded that the notice was adequate—that there was "no ambiguity"—because the allegations in the violation reports could point only to the revocation-eligible violation of the condition to commit no new criminal offense. *Id.* at ___, 795 S.E.2d at 600. Defendant appealed to this Court based on the dissenting opinion in the Court of Appeals.

Before revoking a defendant's probation, a trial court must conduct a hearing to determine whether the defendant's probation should be revoked, unless the defendant waives the hearing. N.C.G.S. § 15A-1345(e) (2015). "The State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged." *Id.* Probation can be revoked only if a defendant (1) commits a criminal offense in any jurisdiction in violation of N.C.G.S. § 15A-1343(b)(1); (2) absconds from supervision in violation of N.C.G.S. § 15A-1343(b)(3a); or (3) has already served two periods of confinement for violating other conditions of probation according to N.C.G.S. § 15A-1344(d2). *Id.* § 15A-1344(a) (2015). Only the first of these statutorily-enumerated instances—the commission of a criminal offense—is at issue here.

Defendant argues that, because the probation violation reports did not specifically list the "commit no criminal offense" condition as the condition violated, the reports did not provide the notice that subsection 15A-1345(e) requires. We must address whether these reports complied with the statute's notice requirement. To do that, we need to examine what exactly that statutory provision means. This is a matter of first impression for this Court.

"In resolving issues of statutory construction, this Court must first ascertain legislative intent to assure that both the purpose and the intent

of the legislation are carried out. In undertaking this task, we look first to the language of the statute itself." *Poole v. Miller*, 342 N.C. 349, 351, 464 S.E.2d 409, 410 (1995) (citation omitted). "[O]rdinarily words of a statute will be given their natural, approved, and recognized meaning." *Victory Cab Co. v. City of Charlotte*, 234 N.C. 572, 576, 68 S.E.2d 433, 436 (1951).

Subsection 15A-1345(e) provides that "[t]he State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged." Neither the term "violation" nor the term "violations," as used in the statutory framework of which subsection 15A-1345(e) is a part, are defined by statute. *Black's Law Dictionary* defines "violation" as "1. An infraction or breach of the law; a transgression. . . . 2. The act of breaking or dishonoring the law; the contravention of a right or duty." *Violation*, *Black's Law Dictionary* (10th ed. 2014). Similarly, *Merriam-Webster's Collegiate Dictionary* defines "violation" as "the act of violating" and indicates in its definition of "violate" that "violating" means "break[ing]" or "disregard[ing]." *Merriam-Webster's Collegiate Dictionary* 1396 (11th ed. 2007). These definitions show that a violation is an action that violates some rule or law; a violation is not the underlying rule or law that was violated. In section 15A-1345, and hence in subsection 15A-1345(e), the words "violation" and "violations" refer to violations of conditions of probation. *See*, *e.g.*, N.C.G.S. § 15A-1345(a) (2015) (discussing when "[a] probationer is subject to arrest for violation of conditions of probation"). It follows that the phrase "a statement of the violations alleged" refers to a statement of what a probationer *did* to violate his conditions of probation. It does not require a statement of the underlying conditions that were violated.

"[I]n effectuating legislative intent, it is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used." *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014). Defendant would have us insert a requirement into the statute that simply is not there: one that requires the State to provide notice of the specific condition of probation that defendant allegedly violated. This approach would effectively add words to the statute so that the statute would read "a statement of the violations alleged *and the conditions of probation allegedly violated*." But the statute as it actually reads, without the italicized words, requires only a statement of the actions that violated the conditions, not of the conditions that those actions violated.

Our straightforward interpretation is further supported by looking at the use of the word "violation" in N.C.G.S. § 15A-1344(a). This provision

appears in the statute that directly precedes the statute in which subsection 15A-1345(e) appears and is part of the same statutory framework regarding probation. Subsection 15A-1344(a) pertains to the authority of trial courts to modify or revoke probation. In discussing when a court can revoke probation, the provision states that "[t]he court may only revoke probation for a violation *of a condition of probation* under" certain specified provisions. N.C.G.S. § 15A-1344(a) (emphasis added). So the word "violation" cannot be synonymous with the phrase "condition of probation," because subsection 15A-1344(a) uses "condition of probation" to *modify* "violation." And that makes sense, because the phrase "condition of probation" is describing what was violated rather than the action that constituted the violation.

This interpretation is also consistent with the notice provision's purpose. Just as with the notice provided by criminal indictments, *see, e.g.*, *State v. Russell*, 282 N.C. 240, 243-44, 192 S.E.2d 294, 296 (1972), "[t]he purpose of the notice mandated by [N.C.G.S. § 15A-1345(e)] is to allow the defendant to prepare a defense and to protect the defendant from a second probation violation hearing for the same act," *State v. Hubbard*, 198 N.C. App. 154, 158, 678 S.E.2d 390, 393 (2009) (citing *Russell*, 282 N.C. at 243-44, 192 S.E.2d at 296). A statement of a defendant's alleged actions that constitute the alleged violation will give that defendant the chance to prepare a defense because he will know what he is accused of doing. He will also be able to determine the possible effects on his probation that those allegations could have, and he will be able to gather any evidence available to rebut the allegations. Our interpretation is therefore consistent with both the language of the statute and its purpose.

The Court of Appeals in this case based its holding on, and the parties primarily argue over, a line of cases with which we disagree. Before the Justice Reinvestment Act (JRA) was enacted in 2011, the Court of Appeals correctly interpreted subsection 15A-1345(e) in *State v. Hubbard*, 198 N.C. App. 154, 678 S.E.2d 390 (2009). In *Hubbard*, the Court of Appeals held that the State had complied with the notice requirement because, "while the condition of probation which Defendant allegedly violated might have been ambiguously stated in the [violation] report, the report also set forth the specific facts that the State contended constituted the violation." *Id.* at 158, 678 S.E.2d at 394. "Defendant received notice of the specific behavior Defendant was alleged and found to have committed in violation of Defendant's probation." *Id.* at 159, 678 S.E.2d at 394. In other words, notice of the factual allegations—the specific behavior—that constituted the violation was enough.

After the JRA was passed, however, the Court of Appeals began imposing an additional notice requirement that is not found in the text of subsection 15A-1345(e). Starting with *State v. Tindall*, 227 N.C. App. 183, 742 S.E.2d 272 (2013), the Court of Appeals began requiring that, when the State seeks to revoke a defendant's probation at a revocation hearing, the notice of the hearing provided by the State must indicate the revocation-eligible condition of probation that the defendant has allegedly violated. *See id.* at 187, 742 S.E.2d at 275. The Court of Appeals noted in *Tindall* that the JRA changed the law by making only some of the conditions of probation revocation-eligible instead of all of them. *Id.* at 185, 742 S.E.2d at 274; *see also* Justice Reinvestment Act of 2011, ch. 192, sec. 4(b), 2011 N.C. Sess. Laws 758, 767-68 (amending N.C.G.S. § 15A-1344(a)). The Court of Appeals then concluded that *Hubbard* did not apply because it was decided before the JRA changed the law. *Tindall*, 227 N.C. App. at 187, 742 S.E.2d at 275. The Court of Appeals reasoned that, after the JRA, a probationer needs to "receive[ ] notice that the alleged violation was the type of violation that could potentially result in a revocation of her probation." *Id.* at 187, 742 S.E.2d at 275.

In *State v. Kornegay*, 228 N.C. App. 320, 745 S.E.2d 880 (2013), the Court of Appeals recognized that it was bound by *Tindall* and applied that decision. *See id.* at 323, 745 S.E.2d at 883. The Court of Appeals stated that, in order "[t]o establish jurisdiction over specific allegations in a probation revocation hearing, the defendant either must waive notice or be given proper notice of the revocation hearing, *including the specific grounds on which his probation might be revoked.*" *Id.* at 324, 745 S.E.2d at 883 (emphasis added). The Court of Appeals later applied the *Tindall* and *Kornegay* line of cases in *State v. Lee*, 232 N.C. App. 256, 753 S.E.2d 721 (2014).

But the JRA did not change the notice requirements for probation revocation hearings. So, to the extent that *Tindall*, *Kornegay*, and *Lee* created a new notice requirement not found in the text of subsection 15A-1345(e), they are overruled.

It is true that, before the JRA was enacted in 2011, trial courts had authority to revoke probation for a violation of any probation condition. *See* N.C.G.S. § 15A-1344 (2010). After the JRA, by contrast, only violations of any of the three conditions specified in N.C.G.S. § 15A-1344(a) are revocation-eligible. Yet the purpose of the JRA had nothing to do with heightened notice requirements for revocation hearings. The JRA's purpose was "to reduce prison populations and spending on corrections and then to reinvest the savings in community-based programs." James M. Markham, *The North Carolina Justice Reinvestment Act* 1 (2012).

Before the JRA was enacted, over half of the individuals entering North Carolina prisons were doing so because of violations of conditions of probation. *Id.* at 2. In fiscal year 2009, moreover, three-quarters of these individuals were entering "for violations of supervision conditions, not the result of a new conviction or absconding." Council of State Gov'ts Justice Ctr., *Justice Reinvestment in North Carolina: Three Years Later* 3 (Nov. 2014). The changes to the law that the JRA effected were consistent with these concerns because subsection 15A-1344(a), as amended by the JRA, now makes only committing a new criminal offense or absconding revocation-eligible unless a defendant has already served two periods of confinement for violating other conditions of probation. *See* Ch. 192, sec. 4(b), N.C. Sess. Laws at 767-68. The decrease in revocation-eligible conditions—that is, the decrease in conditions whose violation would land a probationer back in prison—would have the natural effect of reducing the prison population.

Even more fundamental than purpose, of course, is text. As we have discussed, the phrase "a statement of the violations alleged" in subsection 15A-1345(e)'s notice requirement has a straightforward meaning when each of the words in that phrase is "given [its] natural, approved, and recognized meaning." *Victory Cab Co.*, 234 N.C. at 576, 68 S.E.2d at 436. And the JRA did not change the text of this phrase, *compare* Act of June 23, 1977, ch. 711, sec. 1, 1977 N.C. Sess. Laws 853, 870-71 (captioned "An Act to Amend the Laws Relating to Criminal Procedure"), *with* N.C.G.S. § 15A-1345(e) (2015), so it did not change the phrase's meaning. That should not be surprising, because keeping the notice requirement as-is comports with the JRA's purpose. Just as reducing the number of substantive crimes could reduce the prison population without any change in indictment requirements, reducing the number of revocation-eligible conditions of probation can reduce the prison population without any change in notice requirements.

Turning to the specifics of this case, the State sought to prove that defendant had violated the condition that he commit no criminal offense. As we have seen, subsection 15A-1345(e) required the State to give defendant notice of his probation revocation hearing that "includ[ed] a statement of the violations alleged." This means that the notice needed to contain a statement of the actions defendant allegedly took that constituted a violation of a condition of probation—that is, a statement of what defendant allegedly *did* that violated a probation condition. Here the alleged violation was the act of committing a criminal offense. Defendant therefore needed to receive a statement of the criminal offense or offenses that he allegedly committed.

The violation reports in this case stated that "the defendant has the following pending charges in Orange County," and then went on to list, among other things, the names of the specific offenses and the criminal case file numbers. While incurring criminal charges is not a violation of a probation condition, criminal charges are alleged criminal offenses. And committing a criminal offense is a violation of a probation condition. A statement of pending criminal charges, then, is a statement of alleged violations. The information in the violation reports therefore constituted "a statement of the violations alleged" because it notified defendant of the actions he allegedly took that violated a probation condition.[2] As the Court of Appeals stated in *Hubbard*, "[d]efendant received notice of the specific behavior [d]efendant was alleged and found to have committed in violation of [his] probation." 198 N.C. App. at 159, 678 S.E.2d at 394. That is all that is required under subsection 15A-1345(e).

Both the concurring opinion and the dissenting opinion in this case suggest that our interpretation of subsection 15A-1345(e) could result in due process violations. The dissent appears to take that analysis even further and finds that defendant's due process rights were violated in this case. But defendant appealed this case to this Court based solely on a dissent in the Court of Appeals, and neither party petitioned for discretionary review of additional issues. Our review is therefore limited to the issue or issues "specifically set out in the dissenting opinion as the basis for that dissent." N.C. R. App. P. 16(b). In this case, the basis for the dissent in the Court of Appeals was only that the majority had not properly applied subsection 15A-1345(e). *See Moore*, ___ N.C. App. at ___, 795 S.E.2d at 600-02 (Hunter, Jr., J., dissenting). The Court of Appeals dissent said nothing at all about due process or the Fourteenth Amendment. *See generally id.* As a result, there is no constitutional issue before us. This case is simply about statutory interpretation.

The "statement of the violations alleged" requirement in N.C.G.S. § 15A-1345(e) is satisfied by a statement of the actions that a defendant has allegedly taken that constitute a violation of a condition of probation. We therefore modify the Court of Appeals' decision to the extent that it holds otherwise. In this case, the probation violation reports included a list of the criminal offenses that defendant allegedly committed. That list provided a statement of alleged acts by defendant that, if proved, would violate a probation condition, as required by subsection 15A-1345(e).

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2. We do not hold that a probation violation report must necessarily contain all of the information that these violation reports included in order to constitute "a statement of the violations alleged." We hold only that the information in these reports was enough.

Accordingly, we modify and affirm the decision of the Court of Appeals and uphold the trial court's revocation of defendant's probation.

MODIFIED AND AFFIRMED.

Justice ERVIN, concurring, in part, and concurring in the result, in part.

In this case, the Court holds that the trial court had jurisdiction to revoke defendant's probation because "the probation violation reports included a list of the criminal offenses that defendant allegedly committed" and "[t]hat list provided a statement of defendant's alleged acts that violated a probation condition, as required by subsection 15A-1345(e)." In reaching this conclusion, the Court has overruled the Court of Appeals' decisions in *State v. Lee*, 232 N.C. App. 256, 753 S.E.2d 721 (2014); *State v. Kornegay*, 228 N.C. App. 320, 745 S.E.2d 880; and *State v. Tindall*, 227 N.C. App. 183, 742 S.E.2d 272 (2013), on the grounds that the State is not required to give probationers "notice of the particular revocation-eligible violation," *Lee*, 232 N.C. App. at 260, 753 S.E.2d at 723 (2014), and that a statement of the probationer's alleged conduct is all that is required to support a trial court's revocation decision. Although I fully concur in the Court's decision to uphold the revocation of defendant's probation, I cannot agree with all of the reasoning in which the Court has engaged in order to reach that result or with its decision to overrule the Court of Appeals' decisions in *Tindall*, *Kornegay*, and *Lee*.[1]

As the majority notes, "[a]fter the [Justice Reinvestment Act] was passed" "only some of the conditions of probation [became] revocation-eligible instead of all of them." *See Tindall*, 227 N.C. App. at 185, 742 S.E.2d at 274. More specifically, following the enactment of the Justice Reinvestment Act, a trial court was only entitled to revoke a defendant's probation in the event that the defendant has (1) committed a criminal offense; (2) absconded supervision; or (3) served two periods of confinement in response to violation of other conditions of probation. N.C.G.S. § 15A-1344(a) (2015).

1. As an aside, I note that the State did not seek discretionary review in either *Tindall* or *Kornegay* and has not questioned the correctness of any of the decisions that the Court has overruled in the brief that it filed with us in this case. Instead, the only issue debated in the parties' briefs was the extent to which the allegations contained in the violation notices at issue in this case satisfied the test enunciated in *Tindall*, *Kornegay*, and *Lee*.

> Before revoking or extending probation, the court must, . . . hold a hearing to determine whether to revoke or extend probation and must make findings to support the decision and a summary record of the proceedings. The State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged.

Id. § 15A-1345(e) (2015). The ultimate issue before the Court in this case is the meaning of the statutory requirement that the probationer receive "a statement of the violations alleged" before a trial court can revoke his or her probation.

"A probation revocation proceeding is not a formal criminal prosecution, and probationers thus have 'more limited due process right[s].' " *State v. Murchison*, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014) (alteration in original) (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 789, 93 S. Ct. 1756, 1763, 36 L. Ed. 2d 656, 666 (1973), *superseded by statute*, Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 228 (1976)). As a matter of due process, however,

> [t]he probationer is entitled to written notice of the claimed violations of his probation; disclosure of the evidence against him; an opportunity to be heard in person and to present witnesses and documentary evidence; a neutral hearing body; and a written statement by the fact-finder as to the evidence relied on and the reasons for revoking probation.

Black v. Romano, 471 U.S. 606, 612, 105 S. Ct. 2254, 2258, 85 L. Ed. 2d 636, 642-43 (1985) (citing *Gagnon*, 411 U.S. at 786, 93 S. Ct. at 1761, 36 L. Ed. 2d at 664). The General Assembly has effectuated this notice-related due process requirement by enacting N.C.G.S. § 15A-1345(e), the proper construction of which is the only issue that is before us in this case.

As should be obvious, "[t]he purpose of the notice mandated by this section is to allow the defendant to prepare a defense and to protect the defendant from a second probation violation hearing for the same act." *State v. Hubbard*, 198 N.C. App. 154, 158, 678 S.E.2d 390, 393 (2009) (citation omitted). For that reason, I am inclined to believe that the notice required by N.C.G.S. § 15A-1345(e) must adequately inform the probationer of the condition that he or she is alleged to have violated, given that, following the enactment of the Justice Reinvestment Act,[2]

2. The Court is, of course, correct in pointing out that the enactment of the Justice Reinvestment Act made no change to the notice requirement spelled out in N.C.G.S.

violations of certain conditions of probation justify revocation while violations of other conditions of probation do not. I am frankly at a loss to see how a probationer can adequately prepare a defense in the event that he or she cannot determine the consequences to the continued existence of his "conditional liberty" that might flow from a determination in the State's favor.[3]

According to the Court, the statutory reference to "a statement of the violations alleged" contained in N.C.G.S. § 15A-1345(e) "requires only a statement of the actions that violated the conditions, not of the conditions that those actions violated," with this determination being predicated, at least in part, on the understanding that "the word 'violation' cannot be synonymous with the phrase 'condition of probation,' because subsection 15A-1344(a) uses 'condition of probation' to *modify* 'violation.' " After examining the plain language of N.C.G.S. § 15A-1345(e), I am inclined to refrain from parsing the relevant statutory language that finely. Instead of being limited solely to a statement of conduct, it seems to me that the statutory reference to "a statement of the violations alleged," when read as a unified whole, necessarily refers to both the specific conduct in which a defendant allegedly engaged and the likely effect of that conduct upon the continuation of the defendant's conditional liberty.

A defendant does, in many instances, receive adequate notice as required by N.C.G.S. § 15A-1345(e) in the event that a violation report includes nothing more than "a statement of the actions defendant allegedly took that constituted a violation of a condition of probation." Such a situation exists when the conduct alleged "could only point to a revocation-eligible violation." *State v. Moore*, ___ N.C. App. ___, ___, 795 S.E.2d 598, 600 (2016). For instance, in *State v. Lee*, the violation report alleged that the "defendant had violated four conditions of his probation," including "that he commit no criminal offense," 232 N.C. App. at 258, 753 S.E.2d at 722, and listed "several new pending charges which

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§ 15A-1345(e). On the other hand, the enactment of the Justice Reinvestment Act did substantially change the effect of particular probation violations. Prior to the enactment of the Justice Reinvestment Act, a probationer alleged to have violated any term or condition of probation knew that he or she was subject to having his or her probation revoked. The same is not true in the aftermath of the enactment of the Justice Reinvestment Act. As a result, additional allegations may, in some instances, be necessary before a probationer receives the same notice after the enactment of the Justice Reinvestment Act that he or she received prior to its enactment.

3. This interpretation is reinforced by the language in N.C.G.S. § 15A-1345(e) requiring that the probationer be notified of "the hearing and its purpose."

were specifically identified," *id.* at 259, 753 S.E.2d at 723. I believe that the Court of Appeals correctly held in *Lee* that the notice provided to the defendant in that case sufficed for purposes of N.C.G.S. § 15A-1345(e) given that "[t]he violation report identified the criminal offense on which the trial court relied to revoke defendant's probation."[4] *Id.* at 260, 753 S.E.2d at 724. On the other hand, there are also occasions when a mere statement of the probationer's alleged conduct does not unambiguously "point to a revocation-eligible violation." *Moore*, ___ N.C. App. at ___, 795 S.E.2d at 600. In *State v. Tindall*, for example, the violation report "indicat[ed] that defendant had violated her probation by using illegal drugs . . . and by failing to 'complete Crystal Lakes treatment program' as ordered." 227 N.C. App. at 184, 742 S.E.2d at 274. Unlike the allegations contained in the violation report at issue in *Lee*, the facts alleged in the violation report at issue in *Tindall* sufficed to allege both a violation of the condition of probation that the probationer "[c]ommit no criminal offense in any jurisdiction," N.C.G.S. § 15A-1343(b)(1) (2013), and the condition that the probationer "[n]ot use, possess, or control any illegal drug or controlled substance unless it has been prescribed for him or her by a licensed physician and is in the original container with the prescription number affixed on it," *id.* § 15A-1343(b)(15) (2013). Obviously, a violation of the condition of probation set out in N.C.G.S. § 15A-1343(b)(1) is "revocation-eligible" while a violation of the condition of probation set out in N.C.G.S. § 15A-1343(b)(15) is not. In light of that set of circumstances, I do not believe that the probationer in *Tindall* received an adequate "statement of the violations alleged" and conclude that the Court of Appeals did not err by finding the notice at issue in that case insufficient. *Tindall*, 227 N.C. App. at 187, 742 S.E.2d at 275.[5] As a result, while I share the Court's discomfort with some of the language that the Court of Appeals used in its opinions in these decisions and do not believe that they should be understood as holding that, in each and every case, a violation notice fails to support the revocation

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4. I would, in fact, be inclined to uphold the sufficiency of the notice at issue in *State v. Lee* even if it had not referenced the condition of probation which the defendant was alleged to have violated given that the defendant's alleged conduct could only have been relevant to the "commit no criminal offense" condition of probation.

5. The violation notice before the Court in *State v. Kornegay* was even less likely to give the probationer adequate notice than the violation notice at issue in *Tindall*, given that the trial court in *Kornegay* revoked the probationer's probation based upon a finding that the probationer had violated the conditions of probation set out in N.C.G.S. § 15A-1343(b)(1) despite the fact that the violation notice alleged, among other things, that the probationer had violated the condition that he " '[n]ot use, possess or control any illegal drug' " without making any reference to the "commit no criminal offense" condition. *Kornegay*, 228 N.C. App. at 321, 323, 745 S.E.2d at 881, 883.

of a probationer's probation unless it specifically and explicitly alleges a violation of a "revocation-eligible" condition of probation, I do believe that each of these cases was correctly decided on the facts and cannot, for that reason, join the Court's decision to overrule them.

Admittedly, the violation notice at issue in this case, unlike the violation notice at issue in *Lee*, does not make an explicit reference to an alleged violation of the condition of probation set out in N.C.G.S. § 15A-1343(b)(1). On the other hand, given the terms and conditions of defendant's probation, I am unable to understand, for the reasons stated by the Court, how the allegation that defendant had been charged with committing various criminal offenses could be understood as anything other than an allegation that he had violated the condition of probation that he "[c]ommit no criminal offense in any jurisdiction." N.C.G.S. § 15A-1343(b)(1). In fact, as I read the briefs and record before us in this case, defendant does not seem to have had any doubt that the proceeding held in the trial court was focused upon the issue of whether he had violated the condition of probation set out in N.C.G.S. § 15A-1343(b)(1). As a result, given that defendant had ample notice of the violation of the terms and conditions of probation that he was alleged to have committed and the effect of a determination that he had committed the alleged violation, I agree with both the Court and the majority in the Court of Appeals that the trial court's order revoking defendant's probation should be affirmed.

Justice HUDSON joins in this concurring opinion.

Justice BEASLEY dissenting.

The majority concludes that defendant had adequate notice of the alleged violations of probation, where the probation report contained a laundry list of "Other Violation[s]" and failed to designate a statutory condition under N.C.G.S. §§ 15A-1343(b)(1), 15A-1343(b)(3a), or 15A-1344(d2). The majority further holds that a probation violation report need only describe behavior to provide sufficient notice. This holding does not comport with Fourteenth Amendment Due Process or the Justice Reinvestment Act's changes to North Carolina's probation system because it does not require proper notice to a defendant that her probation may be revoked. Therefore, I respectfully dissent.

Due process under the Federal Constitution and our state statute requires notice to the defendant of the alleged violations against her before a hearing on probation revocation may take place. *See Morrissey*

v. Brewer, 408 U.S. 471, 486-87, 33 L. Ed. 2d 484, 497 (1972) ("[T]he parolee should be given notice that the hearing will take place and that its purpose is to determine whether there is probable cause to believe he has committed a parole violation. The notice should state what parole violations have been alleged."); *see also* N.C.G.S. § 15A-1345(e) (2015) ("The State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged."). In *Morrissey v Brewer*, two Iowa parolees had their parole revoked without the benefit of a hearing. 408 U.S. at 472-73, 33 L. Ed. 2d at 489-90. The United States Supreme Court held in *Morrissey* that when the State attempts to curtail a parolee's constitutionally protected liberty interest by revoking parole, due process mandates certain procedural safeguards. *See id.* at 481-82, 33 L. Ed. 2d at 495. Specifically, the Court said in *Morrissey* that

> the liberty of a parolee, although indeterminate, includes many of the *core values of unqualified liberty and its termination inflicts a "grievous loss"* on the parolee and often on others. . . . By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.

Id. at 482, 33 L. Ed. 2d at 495 (emphasis added).

While *Morrissey* addressed liberty interests of parolees facing parole revocation, in *Gagnon v. Scarpelli* the Court applied the same analysis to conclude that the liberty interests were synonymous for purposes of parole and probation, both requiring notice of the violations alleged against a defendant. *Gagnon v. Scarpelli*, 411 U.S. 778, 782, 786, 36 L. Ed. 2d 656, 664 (1973), *superseded by statute*, Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 228 (1976). The Court in *Gagnon* clarified that probation revocation, like parole revocation "is not a stage of a criminal prosecution, but does result in a loss of liberty." *Id.* at 782, 36 L. Ed. 2d at 662. Because a probationer risks the loss of liberty, she is entitled to notice of the asserted violations in compliance with the due process requirements of the Fourteenth Amendment. *Id.* at 786, 36 L. Ed. 2d at 664.

The import of these cases is that the State must not only give the defendant written notice of the violation at issue but also provide a number of other due process protections, including:

> (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and

> cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Morrissey, 408 U.S. at 489, 33 L. Ed. 2d at 492. Importantly, *Morrissey* and *Gagnon* reject older concepts based on the tenet that because probation was only an "act of grace," a defendant had little recourse to contest the violations asserted against her. *See e.g.*, *State v. Duncan*, 270 N.C. 241, 246, 154 S.E.2d 53, 57 (1967) ("[P]robation or suspension of sentence is an act of grace and not of right[.]"). Definitively, the right to due process during probation proceedings is derived from the Fourteenth Amendment's liberty interest protections, and therefore, the right to proper notice cannot be so lightly dismissed.

The Justice Reinvestment Act of 2011 (JRA), in implementing a plan for criminal justice reform, mirrored the Court's rationale in *Morrissey*, which emphasized the importance probation plays in rehabilitation and reduction in costs of incarceration. *See Morrissey*, 408 U.S. at 477, 33 L. Ed. 2d at 492. Part of the basis for the JRA was a report commissioned in 2009 by North Carolina state government officials. Council of State Gov'ts Justice Ctr., *Justice Reinvestment in North Carolina* 1 (Apr. 2011). The State asked the Council of State Governments Justice Center to provide data-driven analysis, that would produce recommendations for new policies designed to both improve public safety and reduce the costs of our corrections system. *Id.* A key finding of the report was that "[p]robation revocations accounted for greater than 50 percent of admissions to prison in FY 2009," *id.* at 2, which led the Council to recommend three priorities: "strengthen probation supervision, hold offenders accountable in more meaningful ways, and reduce the risk of reoffending," *id.* at 1.

Researchers struck a balance among these three priorities by stressing the importance of holding offenders accountable, while encouraging completion of probation programs through community-driven approaches. *See id.* at 3. One of the Council's recommendations for holding offenders accountable, which is at issue in this case, was to limit revocation to those defendants who have committed a new criminal offense or absconded from supervision. *Id.* at 15. The JRA implemented this recommendation, among others, and codified the requirement that "[t]he court may only revoke probation for a violation of a condition

of probation under G.S. 15A-1343(b)(1)[1] or G.S. 15A-1343(b)(3a),[2] except as provided in G.S. 15A-1344(d2).[3] Imprisonment may be imposed pursuant to G.S. 15A-1344(d2) for a violation of a requirement other than G.S. 15A-1343(b)(1) or G.S. 15A-1343(b)(3a)." Justice Reinvestment Act of 2011, ch.192, sec. 4(b), 2011 N.C. Sess. Law 758, 767-68. Before the insertion of this language, any judge entitled to sit in the court that imposed probation could revoke it, with the exception of drug treatment probation[4] and unsupervised probation,[5] both of which had jurisdictional limits. *See id.*

The majority discusses the JRA's purpose, but fails to consider the changes it has made in North Carolina's probation procedures. While it is true that the JRA did not amend the specific provision relating to notice in N.C.G.S. § 15A-1345(e), the notice requirement cannot be read outside

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1. "(b) Regular Conditions. — As regular conditions of probation, a defendant must: (1) Commit no criminal offense in any jurisdiction." N.C.G.S. § 15A-1343(b)(1) (2015).

2. "(b) Regular Conditions. — As regular conditions of probation, a defendant must: . . . (3a) Not abscond by willfully avoiding supervision or by willfully making the defendant's whereabouts unknown to the supervising probation officer, if the defendant is placed on supervised probation." *Id.* § 15A-1343(b)(3a) (2015).

3. "(d2) Confinement in Response to Violation. — When a defendant under supervision for a felony conviction has violated a condition of probation other than G.S. 15A-1343(b)(1) or G.S. 15A-1343(b)(3a), the court may impose a period of confinement of 90 consecutive days to be served in the custody of the Division of Adult Correction of the Department of Public Safety. The court may not revoke probation unless the defendant has previously received a total of two periods of confinement under this subsection. A defendant may receive only two periods of confinement under this subsection. The 90-day term of confinement ordered under this subsection for a felony shall not be reduced by credit for time already served in the case. Any such credit shall instead be applied to the suspended sentence. However, if the time remaining on the maximum imposed sentence on a defendant under supervision for a felony conviction is 90 days or less, then the term of confinement is for the remaining period of the sentence. Confinement under this section shall be credited pursuant to G.S. 15-196.1." *Id.* § 15A-1344(d2) (2015).

4. "(a1) Authority to Supervise Probation in Drug Treatment Court. — Jurisdiction to supervise, modify, and revoke probation imposed in cases in which the offender is required to participate in a drug treatment court or a therapeutic court is as provided in G.S. 7A-272(e) and G.S. 7A-271(f). Proceedings to modify or revoke probation in these cases must be held in the county in which the drug treatment court or therapeutic court is located." *Id.* § 15A-1344(a1) (2015).

5. "(b) Limits on Jurisdiction to Alter or Revoke Unsupervised Probation. — If the sentencing judge has entered an order to limit jurisdiction to consider a sentence of unsupervised probation under G.S. 15A-1342(h), a sentence of unsupervised probation may be reduced, terminated, continued, extended, modified, or revoked only by the sentencing judge or, if the sentencing judge is no longer on the bench, by a presiding judge in the court where the defendant was sentenced." *Id.* § 15A-1344(b) (2015).

the context of the remainder of the statutory framework for probation created by the JRA. Currently, N.C.G.S. § 15A-1345(e) requires that

> [b]efore revoking or extending probation, the court must, unless the probationer waives the hearing, hold a hearing to determine whether to revoke or extend probation and must make findings to support the decision and a summary record of the proceedings. *The State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged.*

N.C.G.S. § 15A-1345(e) (emphasis added). However, as already explained, before the JRA was enacted a judge could revoke probation for virtually any violation, while after the JRA judges were limited to only three types of probation violations that could result in revocation (i.e., N.C.G.S. §§ 15A-1343(b)(1), 15A-1343(b)(3a), or 15A-1344(d2)).

Therefore, post JRA, probation violations can result in revocable *or* nonrevocable consequences to a defendant. For example, nonrevocable consequences could include probation modification under N.C.G.S. § 15A-1344(d), holding a defendant in contempt under N.C.G.S. § 15A-1344(e1), or ordering a period of confinement under N.C.G.S. § 15A-1343(a1)(3). Additionally, some conditions of probation may fall into *either* category of revocable and nonrevocable violations. An illustration can be found in *State v. Tindall*, in which the defendant had a substance abuse problem and was ordered to submit to substance abuse treatment. 227 N.C. App. 183, 184, 742 S.E.2d 272, 273 (2013). There "the violation reports alleged that defendant violated two conditions of her probation: to '[n]ot use, possess or control any illegal drug' and to 'participate in further evaluation, counseling, treatment or education programs recommended [ ] and comply with all further therapeutic requirements.' " *Id.* at 186, 742 S.E.2d at 275. The Court of Appeals correctly found that this description of the defendant's behavior, while providing notice generally that the defendant's conduct violated her probation, was not enough to support revocation of probation. *Id.* at 187, 742 S.E.2d at 275. The mere allegation that the defendant possessed or used a controlled substance was insufficient to put the defendant on proper notice of a potential revocation because the behavior could constitute a revocable violation (due to the nature of the conduct as a criminal offense) but could also be a technical violation triggering one of a host of nonrevocable consequences. *See*, *e.g.*, *id.* at 187, 742 S.E.2d at 275; *see also* N.C.G.S. § 15A-1343(b)(15) (2015) (requiring as a regular condition of probation that a defendant "[n]ot use, possess, or control any illegal drug or controlled substance").

As defense counsel discussed at oral argument before this Court, the facts of this case provide another example in which allegations of behavior are insufficient to put a defendant on notice of the probation hearing's possible consequences. Here the probation officer's report included in the section labeled "Other Violation[s]" that defendant had the pending charge of "No Operators License," in violation of N.C.G.S. § 20-7(a) (2015) (requiring a license to operate a motor vehicle). However, operating a vehicle without a license can be either an infraction or a criminal misdemeanor. *See* N.C.G.S. § 20-35 (2015) (listing differing circumstances under which the offense of driving a motor vehicle without a driver's license is classified as a misdemeanor or an infraction). Therefore, the infraction relating to driving without an operator's license might result only in a modification of probation because the court may impose additional requirements, such as the defendant surrendering her driver's license, or defendant's probation could be subject to revocation for committing a criminal offense. *Id.* § 15A-1343(b)(1). Thus, only stating the defendant's behavior in the notice, without more specificity, does not always notify the defendant of the class of the offense or if the court plans to modify or revoke her probation.

Similarly, in *State v. Cunningham*, the Court of Appeals found error when the defendant was given notice only of probation violations upon which the trial court did not rely in its decision to revoke the defendant's probation. 63 N.C. App. 470, 475, 305 S.E.2d 193, 196 (1983). The alleged violation was that the defendant created a noise disturbance by playing loud music during late night hours. *Id.* at 474, 305 S.E.2d at 196. But, the trial court found defendant in violation of probation not for the noise disturbance but for trespassing and destroying his neighbor's property, offenses that were not included in his probation violation report and for which he did not have notice. *Id.* at 475, 305 S.E.2d at 196. As the Court of Appeals in *Cunningham* correctly held, only the allegations contained in the violation report can serve as notice to a defendant of conditions for which the trial court can consider revocation. *Id.* at 475, 305 S.E.2d at 196.

The majority's effort to define the word "violation" by using its dictionary definition and its belief that a description of the defendant's behavior is all that is legally required completely fails to reflect the specificity required for proper notice. Despite the majority's contention to the contrary, a statement describing "the specific behavior [d]efendant was alleged and found to have committed," *State v. Hubbard*, 198 N.C. App. 154, 159, 678 S.E.2d 390, 394 (2009), lacks the specificity sufficient to give notice to a defendant that her probation could be revoked at a

hearing. Constitutionally and statutorily, notice requires a description of the violation alleged. *See Morrissey*, 408 U.S. at 486-87, 33 L. Ed. 2d at 497; *see also* N.C.G.S. § 15A-1345 (2015). Logically, to satisfy notice, the term "violation" also requires a specific description of the condition of probation violated (in this case N.C.G.S. § 15A-1343(b)(1)) and *not* simply a description of the behavior that constituted the violation. If the notice describes the defendant's behavior alone without reference to a probation condition violated, the defendant, before entering the hearing, would not know whether the State might seek to revoke her probation or impose some lesser consequence.[6] Describing only general types of behavior that may or may not fall under one of the three revocable conditions is insufficient because such an incomplete description permits the State to pick and choose when to proceed with revocation. Descriptions of general behavior only will cause a defendant to be ill-prepared for the hearing and do not "allow the defendant to prepare a defense and to protect the defendant from a second probation violation hearing for the same act." *Hubbard*, 198 N.C. App. at 158, 678 S.E.2d at 393 (citing *State v. Russell*, 282 N.C. 240, 243-44, 192 S.E.2d 294, 296 (1972)).

The Supreme Court of the United States has ruled that probation implicates "core values of unqualified liberty and its termination inflicts a 'grievous loss,' " and thus the State may not impinge upon that constitutionally protected liberty interest without appropriate process. *Morrissey*, 408 U.S. at 482, 33 L. Ed. 2d at 495. The majority ignores this mandate by failing to ensure that a defendant receives notice before her probation is revoked. Although I do not condone this defendant's alleged behavior,[7] the process required under the Fourteenth Amendment, for him as well as all other defendants is fundamental. As a result, I respectfully dissent.

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6. I also note that the majority's holding that a description of behavior alone is sufficient to provide notice goes far beyond the reasonable inference standard applied by the Court of Appeals below. Furthermore, the majority overrules a line of cases decided by the Court of Appeals that have correctly applied constitutional and statutory mandates since the passage of the JRA. *See generally*, *State v. Lee*, 232 N.C. App. 256, 753 S.E.2d 721 (2014); *State v. Kornegay*, 228 N.C. App. 320, 745 S.E.2d 880 (2013); *State v. Tindall*, 227 N.C. App. 183, 742 S.E.2d 272 (2013).

7. As the majority points out, defendant was also charged with first degree murder during the time defendant's hearing was continued.

STATE v. SANCHEZ

[370 N.C. 357 (2017)]

STATE OF NORTH CAROLINA
v.
JOSHUA SANCHEZ

No. 410PA16

Filed 8 December 2017

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 791 S.E.2d 904 (2016), finding prejudicial error in a judgment entered on 17 April 2015 by Judge Michael J. O'Foghludha in Superior Court, Wake County, and ordering that defendant receive a new trial. Heard in the Supreme Court on 8 November 2017.

Joshua H. Stein, Attorney General, by Ebony J. Pittman, Assistant Attorney General, for the State-appellant.

Rudolph A. Ashton, III for defendant-appellee.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

DENNIS WORLEY, STERLING KOONCE, FLYING A LIMITED PARTNERSHIP L.P., JOSEPH W. FORBES JR., KENNETH CLARK, JAMES BOGGESS, JOEL WEBB, JAIMIE LIVINGSTON, JAMES E. BENNETT JR., DAVID MINER, RONALD ENGLISH, AND MDF, LLC

v.

ROY J. MOORE, PIERCE J. ROBERTS, DAVID BROWN, MICHAEL ADAMS, CHRISTOPHER BAKER, JAMES KERR, FRANK McCAMANT, NEIL KELLEN, GINI COYLE, JOSEPH MOWERY, TOSHIBA CORPORATION, ALAMO ACQUISITION CORP., AND STEPHENS, INC.

No. 310A16

Filed 8 December 2017

Attorneys—Rule of Professional Conduct 1.9(a)—disqualification of counsel—objective test

In a complex business case, the trial court erroneously disqualified defendants' counsel under North Carolina Rule of Professional Conduct 1.9(a). While Rule 1.9(a) permits disqualification of an attorney from representing a new client if there is a substantial risk that the attorney could use confidential information shared by the client in the former matter against that same client in the current matter, the trial court erroneously applied the "appearance of impropriety" test rather than an objective test. The case was remanded with instruction to objectively assess the facts without relying on the former client's subjective perception of the circumstances.

Justice ERVIN did not participate in the consideration or decision of this case.

Appeal pursuant to N.C.G.S. § 7A-27(a)(3) from an order dated 13 May 2016 by Judge Gregory P. McGuire, Special Superior Court Judge for Complex Business Cases appointed by the Chief Justice under N.C.G.S. § 7A-45.4, in Superior Court, Columbus County. Heard in the Supreme Court on 29 August 2017.

Nexsen Pruet, PLLC, by R. Daniel Boyce and David S. Pokela; and Ganzfried Law, by Jerrold J. Ganzfried, pro hac vice, for plaintiff-appellees.

Kilpatrick Townsend & Stockton LLP, by Adam H. Charnes and John M. Moye, for defendant-appellants.

NEWBY, Justice.

In this case we consider whether the trial court properly disqualified defendants' counsel under North Carolina Rule of Professional Conduct 1.9(a). This rule balances an attorney's ethical duties of confidentiality and loyalty to a former client with a party's right to its chosen counsel. The rule permits disqualification of an attorney from representing a new client if there is a substantial risk that the attorney could use confidential information shared by the client in the former matter against that same client in the current matter. This analysis requires the trial court to determine whether confidential information that would normally have been shared in the former matter is also material to the current matter. To do so, the trial court must objectively assess the scope of the representation and whether the matters are substantially related. Rather than applying an objective test, here the trial court disqualified defendants' counsel based on the former client's subjective perception of the past representation as well as the now replaced "appearance of impropriety" test. As a result, we reverse the trial court's decision and remand this matter to that court for application of the appropriate legal standard.

The factual background leading to the instant litigation involves three other disputes, all relating to plaintiff Joseph W. Forbes's former employer Consert, Inc. (Consert): a patent dispute between Forbes and Consert (the patent dispute), Forbes's 220 shareholder inspection rights action against Consert (the 220 action), and a contract dispute between Itron, Inc. (Itron) and Consert (the *Itron* litigation).

Plaintiff Forbes is one of thirteen named plaintiffs in the present action, all former shareholders of Consert. Beginning in 2008, Forbes was a shareholder and member of the Board of Directors of Consert and served as Chief Operating Officer. In the fall of 2011, Forbes was removed as an officer and director but remained a significant shareholder. Soon after his removal, Forbes and Consert disagreed about Forbes's unpaid compensation and ownership of certain patents (the patent dispute), but the dispute never resulted in direct litigation even though Forbes was represented by counsel.

Sometime in 2012, Toshiba, a technology company, expressed interest in purchasing Consert. Concerned about the proposed sale, Forbes sued Consert in December 2012 under Section 220 of the Delaware General Corporation statutes (the 220 action), asserting his shareholder rights and requesting certain corporate records regarding the sale. In the 220 action, Forbes referenced, *inter alia*, the ongoing patent dispute in his allegations concerning Consert's mismanagement.

At the same time, Consert was also defending a lawsuit filed by Itron, a licensee and successor in interest to a development agreement with Consert, over certain payment terms under that agreement (the *Itron* litigation). Based on Forbes's allegations in the 220 action, Itron amended its complaint to include claims based on Consert's failure to disclose the ongoing patent dispute with Forbes.

Amidst the *Itron* litigation, Toshiba acquired Consert on 5 February 2013 as a wholly owned subsidiary. Following the Consert–Toshiba merger, Consert engaged Kilpatrick Townsend & Stockton LLP (Kilpatrick) to represent it in the *Itron* litigation. Itron sought to depose Forbes regarding the Consert–Toshiba merger, the 220 action, and primarily the patent dispute with Consert.[1] By mid-February 2013, Forbes and Consert settled the 220 action, and by May 2013, Forbes and Consert resolved the patent dispute, leaving only the *Itron* litigation unresolved.

In October 2013, counsel from Winston & Strawn, LLP, who represented Forbes at the time, communicated with Joe Bush of Kilpatrick (Bush),[2] counsel to Consert, about Forbes's deposition. Bush disclosed to Forbes's counsel that, in addition to his primary representation of Consert, he also represented former employees and shareholders of Consert in the *Itron* litigation. Bush later offered limited representation to Forbes at Consert's expense as long as Forbes agreed to the proposed engagement terms. Forbes eventually agreed that Bush would represent him in the *Itron* litigation regarding his role as a former Officer and Director of Consert.

On 23 January 2014, Forbes signed an engagement letter that outlined the terms of Bush's limited representation of Forbes (the engagement letter), which began by stating, "As you are aware, this firm is outside litigation counsel to [Consert] in connection with the [*Itron* litigation]." The engagement letter then explained that the representation of Forbes would "be limited to legal services associated with discovery efforts (such as depositions, witness statements, factual development, and document analysis), [Forbes's] potential testimony at trial, and specifically in connection with [Forbes's] former role as Chief Operating Officer of Consert." Forbes agreed that he would be "willing to permit

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1. Forbes produced requested documents during the *Itron* litigation while represented by Winston & Strawn, LLP. Kilpatrick did not assist Forbes with document production.

2. Plaintiff seeks to disqualify both Bush and Kilpatrick, his law firm, from representing defendants. For simplicity, references hereinafter to "Bush" include both him and his law firm as counsel.

Kilpatrick Townsend to disclose to Consert, to any related entities, and to the employees of these entities, any of the information it learns in its communications with [him] if, in [counsel's] discretion, it becomes necessary or appropriate to the defense of this lawsuit." Forbes also agreed that he would "not object to Kilpatrick Townsend continuing to represent Consert and its related entities in this lawsuit" should a conflict of interest arise. Winston & Strawn negotiated the terms of the limited representation on behalf of Forbes.

Forbes's counsel from Winston & Strawn initially prepared him for his deposition and communicated with Forbes via teleconference two to three times for approximately an hour on each occasion. In final preparation, Forbes met with Bush once for approximately two to three hours the night before the deposition. Forbes's privately retained counsel from Winston & Strawn attended approximately an hour of that meeting.

During the deposition the next day, Itron's counsel asked Forbes about his relationship with Consert, the 220 action, the Consert–Toshiba merger, and primarily the patent dispute. Twice during the deposition, Forbes requested a break and spoke with his privately retained counsel from Winston & Strawn, even though Bush was present at the deposition. When asked about the Consert–Toshiba merger, Forbes stated, "I have not read the agreement of the merger between [Toshiba] and Consert. That might come as a surprise to you, but I have not read it." The *Itron* litigation settled on 1 February 2015.

At some point on or before 5 February 2015, Forbes and counsel at Winston & Strawn recognized Forbes's potential claims at issue in the present action. As a result, on 5 February 2015, Winston & Strawn sent a litigation hold letter to Bush, based on his representation of Toshiba affiliates, informing him that Forbes and other former Consert shareholders were considering filing the present action. On 9 November 2015, Forbes and other former Consert shareholders filed the present action against Toshiba (as the parent company of Consert) and former officers, directors, and shareholders of Consert, some of whom were jointly represented by Bush in the *Itron* litigation.[3] Defendants retained Bush to represent them against plaintiffs. Plaintiffs allege that, through the Consert–Toshiba merger agreement, defendants engaged in a "collusive scheme" to "benefit themselves and to defraud Plaintiffs out of millions of dollars that Plaintiffs should have received for the shares

3. On 16 November 2016, the Chief Justice designated this case as a complex business case.

of stock they had purchased and held in Consert."[4] The merger agreement included "earn out" provisions that obligated Toshiba to pay certain future proceeds directly to a "Shareholders Fund" for distribution to Consert stockholders. Two post-merger events, including resolution of the *Itron* litigation, would fund this account. Plaintiffs, however, contend that the earn out provisions were "illusory and a sham" because defendants knew at the time of the agreement that the triggering events required to generate the proceeds at issue would never occur, thus precluding any payment to the shareholders.

Before the trial court, plaintiffs moved to disqualify Bush from the present action based on his past representation of Forbes during the *Itron* litigation. In support of the motion, Forbes filed a declaration stating his views of the prior relationship and outlining his communications with Bush. Defendants responded that the communications between Forbes and Bush were not confidential because the engagement letter expressly limited the nature of Bush's representation of Forbes and specifically authorized Bush to disclose, in his discretion, "any of the information" he learned in his communications with Forbes to "Consert," "any related entities," and their "employees" during the *Itron* litigation.

Recognizing that the facts here presented a "close case," the trial court noted:

> In considering a motion to disqualify counsel, the Court considers the professional obligations imposed on attorneys by the North Carolina Rules of Professional Conduct . . . , as well as the goal of preventing the appearance of impropriety in the profession. Disqualification of counsel is a serious matter . . . and the moving party has a high standard of proof to meet in order to prove that counsel should be disqualified. Nevertheless, a motion to disqualify counsel . . . . should succeed or fail on the reasonableness of a client's perception that confidences it once shared with its lawyer are potentially available to its adversary.

(Second ellipsis in original) (internal citations and quotation marks omitted).

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4. Specifically, plaintiffs assert the following claims against defendants: (1) breach of fiduciary duty, (2) common law fraud, (3) constructive fraud, (4) conspiracy to defraud, (5) fraudulent inducement, (6) violation of the North Carolina Securities Act, (7) unlawful taking, conversion, and unjust enrichment under common law, and (8) violation of the North Carolina Unfair and Deceptive Trade Practices Act.

The trial court found that an attorney–client relationship existed between Bush and Forbes in the past representation and that defendants' position is materially adverse to Forbes's position in the present action, thus leaving unresolved only whether the current matter is "substantially related to the matter in which Bush and Kilpatrick previously represented Forbes." In particular, quoting *Plant Genetic Systems, N.V. v. Ciba Seeds*, 933 F. Supp. 514, 518 (M.D.N.C. 1996), the trial court sought to answer whether "there is a reasonable probability that confidences were disclosed in the prior representation which could be used against the former client in the current litigation."

In its analysis the trial court resolved this issue by trying to discern what actually occurred during the past representation as stated by Forbes and Bush. The trial court relied on Forbes's declaration, which included his characterizations of the attorney–client relationship. The trial court quoted portions of the declaration detailing Forbes's impressions of the nature of his communications with Bush and conversely observed that Bush had not refuted Forbes's "descriptions or characterizations of the information he shared with Bush during the prior representation."

In reviewing the engagement letter, the trial court focused on the absence of evidence showing that Bush actually disclosed any confidential information provided by Forbes while the *Itron* litigation was ongoing. Moreover, by the terms of the engagement letter, Forbes's permission to disclose ended with the *Itron* litigation, thereby limiting future disclosure by Bush. Absent evidence of actual disclosure, the trial court found the engagement letter had little bearing on its analysis. The trial court gave substantial weight to Forbes's "perception" that the prior disclosures could be used to his disadvantage, which the trial court found was not "unreasonable." Ultimately, the trial court determined that "the significant areas of overlap between the issues in the two representations strongly suggest that the two matters are 'substantially related.' "

Notably, the trial court determined, "Even if the matters are not substantially related within the strict meaning of Rule 1.9(a), however, the Court would nonetheless conclude, in its discretion, that Bush and Kilpatrick should be disqualified in order to avoid the appearance of impropriety." As a result, the trial court disqualified Bush because his "continued representation of Defendants in this matter creates an appearance of impropriety that the Court cannot allow." Defendants appealed.

"Decisions regarding whether to disqualify counsel are within the discretion of the trial judge," *Travco Hotels, Inc. v. Piedmont Nat. Gas*

Co., 332 N.C. 288, 295, 420 S.E.2d 426, 430 (1992), but a trial court's exercise of discretion is subject to reversal when the court orders disqualification based on a misunderstanding of the law, *see In re Estate of Skinner*, ___ N.C. ___, ___, 804 S.E.2d 449, 457 (2017); *see also Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S. Ct. 2447, 2461, 110 L. Ed. 2d 359, 382 (1990) (noting that the "[trial] court would necessarily abuse its discretion [in deciding a Rule 11 motion] if it based its ruling on an erroneous view of the law"). The movant seeking to disqualify his former counsel must meet a particularly high burden of proof. *See Gov't of India v. Cook Indus.*, 569 F.2d 737, 739 (2d Cir. 1978) ("[T]here is a particularly trenchant reason for requiring a high standard of proof on the part of one who seeks to disqualify his former counsel . . . .").

Rule 1.9(a), governing the disqualification of counsel for a conflict of interest relating to a former client, balances the prevented use of confidential information against a former client with a current client's right to choose his counsel freely. *See, e.g.*, N.C. St. B. Ethics Op. RPC 48 (Oct. 28, 1988), *reprinted in North Carolina State Bar Lawyer's Handbook 2016*, at 217 (2016) (recognizing, *inter alia*, "the right of clients to counsel of their choice"). The rule prevents an attorney from using confidential material information received from a former client against that client in current litigation. *See* N.C. St. B. Rev. R. Prof'l Conduct r. 1.9 cmt. 1 ("After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest and thus may not represent another client except in conformity with this Rule.").[5]

Rule 1.9(a) provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

N.C. St. B. Rev. R. Prof'l Conduct r. 1.9(a). Under Rule 1.9(a), a party seeking to disqualify opposing counsel must establish that (1) an attorney–client relationship existed between the former client and the opposing

5. *See Nix v. Whiteside*, 475 U.S. 157, 168-70, 106 S. Ct. 988, 994-96, 89 L. Ed. 2d 123, 135-37 (1986) (relying on the guidance offered in the commentary of the Rules of Professional Conduct to interpret the Rules).

counsel in a matter such that confidential information would normally have been shared; (2) the present action involves a matter that is the same as or substantially related to the subject of the former client's representation, making the confidential information previously shared material to the present action; and (3) the interests of the opposing counsel's current client are materially adverse to those of the former client.

In applying Rule 1.9(a), the trial court considers the circumstances surrounding each representation to objectively assess what would "normally" have occurred within the scope of that representation.[6] *See id.* r. 1.9 cmt. 3 ("A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services."). The test is whether, objectively speaking, "a substantial risk" exists "that the lawyer has information to use in the subsequent matter." *Id.*; *see id.* r. 1.9 cmt. 2 ("The underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question."). The test does not rely on the subjective assessment provided by the former client or the attorney. *See* Restatement (Third) of The Law Governing Lawyers § 132A cmt. d(iii) (Am. Law Inst. 2017) ("[It] would be self-defeating if, in order to obtain its protection, the former client were required to reveal in a public proceeding the particular communication or other confidential information that could be used in the subsequent representation.").

Here it is undisputed that the third prong of the test under Rule 1.9(a) is satisfied: the interests of Forbes and defendants in the present action are "materially adverse." For the two remaining prongs, the trial court must consider the scope of the past representation to determine whether the former client would normally have shared confidential information in the course of that representation and, if so, whether that information is material to the present action. *See* N.C. St. B. Rev. R. Prof'l Conduct r. 1.9 cmt. 2 ("The scope of a 'matter' for purposes of this Rule depends on the facts of a particular situation or transaction. The lawyer's involvement in a matter can also be a question of degree.").

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6. *See Normal*, *Black's Law Dictionary* (10th ed. 2014) ("According to a regular pattern; . . . In this sense, its common antonyms are *unusual* and *extraordinary*. . . . According to an established rule or norm . . . ."); *Objective*, *Black's Law Dictionary* (10th ed. 2014) ("Of, relating to, or based on externally verifiable phenomena, as opposed to an individual's perceptions, feelings, or intentions . . . .").

The first prong of Rule 1.9(a) explores the existence and scope of an attorney–client relationship between the attorney and the former client. "[A]n attorney-client relationship is formed when a client communicates with an attorney *in confidence* seeking legal advice regarding a specific claim and with an intent to form an attorney-client relationship." *Raymond v. N.C. Police Benevolent Ass'n*, 365 N.C. 94, 98, 721 S.E.2d 923, 926 (2011) (emphasis added) (citation omitted). The scope of such a relationship, however, is a matter of contract, and a lawyer may reasonably limit the scope and expectations of the representation "by agreement with the client or by the terms under which the lawyer's services are made available to the client." N.C. St. B. Rev. R. Prof'l Conduct r. 1.2 cmt. 6.

The commentary to Rule 1.9(a) anticipates the use of engagement letters that outline both the scope of representation and limitations on confidentiality at the time the former client engaged counsel. *See id.* r. 1.9 cmt. 2 (describing a lawyer's involvement in a "matter" as dependent "on the facts of a particular situation or transaction" and the "degree" of engagement). For example, a common representation agreement could provide for the sharing of confidential information among the co-parties represented by the same attorney but keep the information confidential as to third-parties. Likewise, a former client's concurrent representation by another attorney also informs as to the degree of the contested counsel's involvement and the confidences normally shared by a client in that situation. Thus, under the rule, the emphasis is not on the traditional notions of the formation of an attorney–client relationship, but on the scope of that relationship, when ascertaining the reasonable expectation of confidentiality under the circumstances. *See Allegaert v. Perot*, 565 F.2d 246, 250 (2d Cir. 1977) (Disqualification is not warranted unless "the attorney was in a position where he *could* have received information which his former client might reasonably have assumed the attorney would withhold from his present client.").

Here the trial court erred by trying to determine whether Forbes actually shared confidential information with Bush that Bush did not share with the other parties to the common representation agreement. Instead, the trial court should apply the objective test of whether a client in Forbes's position would normally have shared confidential information given the terms of the engagement letter and the type of disclosure that usually occurs within that common representation arrangement. Further, the trial court failed to consider the normal implications of simultaneous and ongoing representation of Forbes by other counsel. On remand, the trial court should objectively consider what confidential

factual information "would normally have been obtained" within the scope of the past representation. N.C. St. B. Rev. R. Prof'l Conduct r. 1.9 cmt. 3.

If the trial court determines that confidential information would normally have been shared within the scope of the past representation, it must then consider whether that information is material to the present action by deciding if the two matters are "substantially related." A former client must objectively demonstrate "a substantial risk that [confidential] information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." *Id.* Through an objective, fact-intensive inquiry, the trial court is best suited to determine whether such a substantial risk exists. *See id.* (considering "the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services"); *see also* Restatement (Third) of The Law Governing Lawyers § 132A cmt. d(iii) (Am. Law Inst. 2017) ("The substantial-relationship test . . . focus[es] upon the *general features* of the matters involved and inferences as to the likelihood that confidences were imparted by the former client that could be used to adverse effect in the subsequent representation." (emphasis added)).

In assessing whether two matters are "substantially related," the trial court should consider, *inter alia*, the following illuminative factors: (1) the initial engagement letter, including the scope of the representation and any limitations on confidentiality; (2) the factual background leading to the past representation, including common representation of others and any concurrent representation of the former client; (3) the amount of time spent with the attorney; (4) the subject matter of the two representations; and (5) all of the facts and circumstances of the current litigation, particularly as compared with those of the past representation. A former client's subjective perception or conclusory allegations that he shared confidential information during the past representation should not be considered. *See*, *e.g.*, *Silver Chrysler Plymouth*, *Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 756-57 (2d Cir. 1975).

Here the trial court erred by concluding that the matters appeared to be "substantially related" based on Forbes's conclusory belief that he had shared confidential information with Bush "directly related to the claims . . . against Defendants in this case." Thus, the trial court improperly determined disqualification in reliance on the former client's subjective judgment, which Rule 1.9(a) prohibits, rather than objectively comparing the facts and circumstances of both representations.

In its final rationale, the trial court mistakenly applied the now replaced "appearance of impropriety" test as a consideration in favor of disqualification. Unlike its predecessor, the Model Code of Professional Responsibility, the Rules of Professional Conduct do not recognize "appearance of impropriety" as a basis for disqualification, having deleted any reference to this standard in the 2002 revisions.[7] The tendency of the old test to lean towards a subjective, rather than objective, analysis rendered it "no longer helpful."[8] As a result, the "appearance of impropriety" test is no longer an appropriate legal standard for determining whether to disqualify counsel.

In sum, the trial court applied the incorrect standard under Rule 1.9(a) in disqualifying defendants' counsel. In making its determination upon remand, the trial court must objectively assess the facts surrounding the motion to disqualify counsel without relying on the former client's subjective perception of his prior representation. The trial court should avoid the outmoded "appearance of impropriety" test. We reverse the trial court's decision and remand this case to that court for application of the correct legal test.

REVERSED AND REMANDED.

Justice ERVIN did not participate in the consideration or decision of this case.

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7. The Model Rules of Professional Conduct, of which Rule 1.9 is a part, replaced the ABA Code of Professional Responsibility, which dated back to canons first promulgated in 1908. *See* Monroe H. Freedman, *The Kutak Model Rules v. the American Lawyer's Code of Conduct*, 26 Vill. L. Rev. 1165, 1165 (1981). Under the ABA Code, parties generally moved for disqualification under Canon 4, "A Lawyer Should Preserve the Confidences and Secrets of a Client," and Canon 9, "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." Model Code of Prof'l Responsibility Canons 4, 9 (Am. Bar Ass'n 1980). By 1986 North Carolina had adopted the Model Rules of Professional Conduct as its governing standard.

8. *See A Legislative History* 242 (Art Garwin ed., 2013) (noting that the Ethics 2000 Commission Reporter's Explanation of Proposed Changes included the statement that comment 5, referencing the appearance of impropriety standard, was "deleted as no longer helpful to the analysis of questions arising under this Rule").

ACTS RETIREMENT-LIFE COMMUNITIES, INC.	)	
v.	)	From Polk County
TOWN OF COLUMBUS, NORTH CAROLINA	)	

No. 334PA16

ORDER

The Court, on its own motion, orders that the parties submit supplemental briefs concerning the following issue:

Did the trial court err in finding that the Town acted arbitrarily and discriminatorily on the grounds that the findings of fact, entered by the trial court, when applied to North Carolina law show that the Town's actions were lawful?

Defendant's supplemental brief shall be filed no later than thirty days after the date of this order, plaintiff's supplemental brief shall be filed no later than thirty days following defendant's filing, and defendant's supplemental reply brief shall be filed no later fifteen days following plaintiff's filing.

By order of the Court, this the 7th day of December, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 8th day of December, 2017.

CHRISTIE S. CAMERON ROEDER
Clerk,
Supreme Court of North Carolina

s/M.C. Hackney
Assistant Clerk,
Supreme Court of North Carolina

CHELSEA DOOLITTLE	)	
	)	
v.	)	From Catawba County
	)	
ROBERT M. GEORGE, IN HIS INDIVIDUAL CAPACITY AS AN OFFICER OF THE HICKORY POLICE DEPARTMENT; VIDAL A. SIPE, IN HIS INDIVIDUAL CAPACITY AS AN OFFICER OF THE HICKORY POLICE DEPARTMENT; FRANK C. PAIN, IN HIS INDIVIDUAL CAPACITY AS AN OFFICER OF THE HICKORY POLICE DEPARTMENT; AND THE CITY OF HICKORY, A NORTH CAROLINA MUNICIPALITY	)	

No. 195P17

ORDER

The following order was entered:

Defendant's Motion to Amend or Supplement Motion to File Confidential Material Under Seal, filed on 2 August 2017, is allowed in part, in the Supreme Court, as to all documents appended to plaintiff's Response in Opposition to Defendant-Petitioner's Petition for Writ of Certiorari, Petition for Writ of Supersedeas and Application for Temporary Stay, filed on 23 June 2017; all documents appended to defendant's Motion for Leave to Amend or Supplement Petition for Writ of Certiorari, Petition for Writ of Supersedeas and Motion for Temporary Stay, filed on 30 June 2017; all documents appended to defendant's Motion for Leave to File a Reply to Plaintiff's Response to George's Petition for Writ of Certiorari, Writ of Supersedeas and Motion for Temporary Stay, filed on 30 June 2017; all documents appended to defendant's Reply to Plaintiff's Response to Petition for Writ of Certiorari, Petition for Writ of Supersedeas and Motion for Temporary Stay, filed on 27 July 2017; all documents appended to defendant's Motion to File Confidential Material Under Seal, filed on 27 July 2017; and all documents appended to defendant's Motion to Amend or Supplement Motion to File Confidential Material Under Seal, filed on 2 August 2017.

Defendant's motion is, in all other respects, denied.

By order of the Court in Conference, this the 7th day of December, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 8th day of December, 2017.

CHRISTIE SPEIR CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

NORTH CAROLINA STATE BOARD OF EDUCATION	)	
v.	)	From Wake County
THE STATE OF NORTH CAROLINA AND THE NORTH CAROLINA RULES REVIEW COMMISSION	)	

No. 110PA16-2

ORDER

This Court will hear oral arguments in this case during the February 2018 calendar. On its own motion, this Court sets the following briefing schedule: The Appellant's brief will be due on 22 December 2017. The Appellees' brief will be due on 16 January 2018. Should Appellant wish to file a reply brief, the reply brief will be due on 22 January 2018.

By order of the Court in Conference, this 15th day of December, 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of December, 2017.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

NORTH CAROLINA STATE BOARD OF EDUCATION	)	
v.	)	From Wake County
THE STATE OF NORTH CAROLINA AND MARK JOHNSON, IN HIS OFFICIAL CAPACITY	)	

No. 333PA17

ORDER

This Court will hear oral arguments in this case during the February 2018 calendar. On its own motion, this Court sets the following briefing schedule: The Appellant's brief will be due on 29 December 2017. The Appellees' brief will be due on 16 January 2018. Should Appellant wish to file a reply brief, the reply brief will be due on 22 January 2018.

By order of the Court in Conference, this 15th day of December, 2017.

s/Morgan, J.
For the Court

MARTIN, C.J., recused.

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of December, 2017.

CHRISTIE S. CAMERON ROEDER
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Surry County
	)	
WALTER COLUMBUS SIMMONS	)	

No. 292P17

ORDER

Upon consideration of the Petition for Discretionary Review filed by the State on the 15th day of September 2017, the Court allows the State's Petition for Discretionary Review for the limited purpose of remanding this case to the Court of Appeals for reconsideration in light of our decision in *State v. Sandra Meshell Brice*, ___ N.C. ___, 806 S.E.2d 32 (2017).

By order of the Court in conference, this the 7th day of December 2017.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 8th day of December 2017.

CHRISTIE SPEIR CAMERON ROEDER
Clerk of Supreme Court

s/M.C. Hackney
Assistant Clerk

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

7 DECEMBER 2017

091P14-4	State v. Salim Abdu Gould	1. Def's *Pro Se* Motion for Stay 2. Def's *Pro Se* Petition for *Writ of Supersedeas* 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied **11/16/2017** 2. 3.
109P17-2	In re Olander R. Bynum	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied
114P17	State v. Kevin Salvador Golphin	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Cumberland County	Dismissed without prejudice to Defendant's right to seek appropriate relief in the trial court **11/08/2017**
151P15-2	State v. Timothy Neal Prince	Def's PDR Under N.C.G.S. § 7A-31 (COA16-1275)	Denied
158P06-16	State v. Derrick D. Boger	Def's *Pro Se* Motion for Civil Complaint in Tort Action	Dismissed
168A17	In re Southeastern Eye Center	Defendant's (Douglas S. Harris) Motion to Consolidate Appeals	Denied **11/15/2017**
176P17	Andy Learon Crabtree and Carol Ann Crabtree v. Elesha M. Smith, d/b/a The Law Firm of Elesha M. Smith; Bank of America, N.A. f/k/a BAC Home Loans Servicing, LP; Rushmore Loan Management Services LLC; and U.S. Bank, N.A.	Plts' PDR Under N.C.G.S. § 7A-31 (COA16-864)	Denied
178P17	Karyn Wilson and Thomas Baumgardner, Individually, and Walter L. Hart, IV, Guardian Ad Litem for B.B., a Minor v. Ashley Women's Center, P.A., George Daniel Jacobs, M.D., and Nancy Kuney, CNM	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA16-1004) 2. Defendants' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

7 DECEMBER 2017

195P17	Chelsea Doolittle v. Robert M. George, in his Individual Capacity as an Officer of the Hickory Police Department; Vidal A. Sipe, in his Individual Capacity as an Officer of the Hickory Police Department; Frank C. Pain, in his Individual Capacity as an Officer of the Hickory Police Department; and The City of Hickory, a North Carolina Municipality	1. Def's (Robert M. George) Motion for Temporary Stay (COAP17-349) 2. Def's (Robert M. George) Petition for *Writ of Supersedeas* 3. Def's (Robert M. George) Petition for *Writ of Certiorari* to Review Order of COA 4. Def's (Robert M. George) Motion to Amend or Supplement Petition for *Writ of Certiorari*, Petition for *Writ of Supersedeas*, and Motion for Temporary Stay 5. Def's (Robert M. George) Motion for Leave to File Reply to Response to Petition for *Writ of Certiorari*, Petition for *Writ of Supersedeas*, and Motion for Temporary Stay 6. Def's (Robert M. George) Motion to File Confidential Material Under Seal 7. Def's (Robert M. George) Motion to Amend or Supplement Motion to File Confidential Material Under Seal	1. Allowed **06/16/2017** Dissolved **12/07/2017** 2. Denied 3. Denied 4. Allowed 5. Allowed **07/13/2017** 6. Dismissed as moot 7. Special Order
196P17	Maeghan Richmond v. Robert M. George, in his Individual Capacity as an Officer of the Hickory Police Department; Vidal A. Sipe, in his Individual Capacity as an Officer of the Hickory Police Department; Frank C. Pain, in his Individual Capacity as an Officer of the Hickory Police Department; and The City of Hickory, a North Carolina Municipality	1. Def's (Robert M. George) Motion for Temporary Stay (COAP17-350) 2. Def's (Robert M. George) Petition for *Writ of Supersedeas* 3. Def's (Robert M. George) Petition for *Writ of Certiorari* to Review Order of COA 4. Def's (Robert M. George) Motion for Leave to Amend or Supplement Petition for *Writ of Certiorari*, Petition for *Writ of Supersedeas*, and Motion for Temporary Stay 5. Def's (Robert M. George) Motion for Leave to File Reply to Response to Petition for *Writ of Certiorari*, Petition for *Writ of Supersedeas*, and Motion for Temporary Stay	1. Allowed **06/19/2017** Dissolved **12/07/2017** 2. Denied 3. Denied 4. Allowed 5. Allowed **07/28/17**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

7 DECEMBER 2017

200P17	Barry D. Edwards, XMC Films, Incorporated, Aegis Films, Inc., and David E. Anthony v. Clyde M. Foley, Ronald M. Foley, Lavonda S. Foley, Samuel L. Scott, CRS Trading Co. LLC, Brown Burton, Ronald Jed Meadows, and American Solar Kontrol, LLC	1. Defs' Motion for Temporary Stay (COA16-1060) 2. Defs' Petition for *Writ of Supersedeas* 3. Defs' PDR Under N.C.G.S. § 7A-31 4. Motion to Admit Bryan M. Knight *Pro Hac Vice*	1. Allowed **06/20/2017** Dissolved **12/07/2017** 2. Denied 3. Denied 4. Dismissed as moot
222A17	State v. Sam Babb Clonts, III	1. State's Motion for Temporary Stay (COA16-566) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent 4. State's PDR of Additional Issues	1. Allowed **07/07/2017** 2. Allowed 3. --- 4. Allowed
240P17-2	In re Bruce Bunting	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	1. Dismissed
250P17	State v. Justin Lee Perry	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA16-768)	Denied
252P17	State v. Sammy Lee Hensley, Sr.	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA16-689) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
254P09-2	David Reed Wilson v. Mark Carver, Supt. Of Caswell Correctional Center #4415	Petitioner's *Pro Se* Motion for PDR (COAP17-641)	Denied **11/06/2017**
259A17	In re Southeastern Eye Center	Defendant's (Douglas S. Harris) Motion to Consolidate Appeals	Denied **11/15/2017**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

7 DECEMBER 2017

268P17	Estate of Vaughn E. Russell, By and Through Its Administrator, Nancy E. Russell, and Nancy E. Russell, Individually v. Sondra Lynn Russell and Janice M. Russell	Plts' PDR Under N.C.G.S. § 7A-31 (COA17-21)	Denied
270P17	In the Matter of M.B., B.B., and J.B.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA16-1270)	Denied
282P17	Thomas Bentley, Employee v. Jonathan Piner Construction, Alleged Employer, Stonewood Insurance Company, Alleged Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA16-62-2)	Denied
290A17	State v. Marcus Marcel Smith	1. State's Motion for Temporary Stay (COA16-1229) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent 4. State's PDR as to Additional Issues 5. Def's Motion to Dismiss or Clarify the Scope of Notice of Appeal 6. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed 08/28/2017 2. Allowed 3. --- 4. Allowed 5. 6. Allowed
292P03-4	State v. Wali Farad Muhammad Bilal	Def's *Pro Se* Motion for PDR (COAP17-579)	Dismissed
292P17	State v. Walter Columbus Simmons	1. State's Motion for Temporary Stay (COA16-1065) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **08/29/2017** Dissolved **12/07/2017** 2. Denied 3. Special Order 4. Denied
294P17	State v. Nancy Benge Austin	Def's Petition for *Writ of Certiorari* to Review Order of COA (COAP17-508)	Allowed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

7 DECEMBER 2017

295P17	State v. Terry Jerome Wilson	1. State's Motion for Temporary Stay (COA16-1212) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/01/2017** 2. Allowed 3. Allowed
297P17	In the Matter of N.X.A. and In the Matter of B.R.S.A-D. and D.S.K.A-D.	Respondent-Mother and Respondent-Father's Joint PDR Under N.C.G.S. § 7A-31 (COA17-95)	Denied
305P17	State v. William Jesse Buchanan	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Decision of COA (COA16-697) 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* Petition for *Writ of Habeas Corpus*	1. 2. 3. Denied **12/07/2017**
307PA17	Soma Technology, Inc. v. Dalamagas, et al.	Joint Motion to Withdraw Appeals	Allowed **11/21/2017**
308A17	Soma Technology, Inc. v. Dalamagas, et al.	Joint Motion to Withdraw Appeals	Allowed **11/21/2017**
310A16	Worley, et al. v. Moore, et al.	Plts' Motion for Leave to Submit Supplemental Response	Allowed **Ervin, J., recused**
311P17	Angela Brown, Next of Kin of Donald L. Brown, Deceased Employee v. N.C. Department of Public Safety, Employer, Self-Insured (Corvel Corporation, Third-Party Administrator)	Plt's PDR Under N.C.G.S. § 7A-31 (COA16-740)	Denied

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

7 DECEMBER 2017

313P17	Arthur McArdle, Kimberly McArdle, Seldon Jones, Jacob McArdle, Hannah McArdle, Banning McArdle, and Frederick S. Barbour, as Guardian ad Litem for Sophie McArdle v. Mission Hospital, Inc. and Mission Health System, Inc.	1. Plts' PDR (COA16-554) 2. Plts' Motion to Amend PDR	1. Denied 2. Allowed
315P17	Judith Barbee and Thomas Barbee, Co-Administrators of the Estate of Lauren Barbee v. WHAP, P.A. and Lyndhurst Gynecologic Associates, P.A.	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA16-1154) 2. Plts' Motion to Withdraw PDR	1. --- 2. Allowed
324P17	Martin T. Slaughter v. Nicole B. Slaughter	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-1153) 2. Plt's Conditional PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Withdraw PDR	1. --- **11/14/2017** 2. Dismissed as moot **11/14/2017** 3. Allowed **11/14/2017**
327P17	Jeff Myres, Employee v. Strom Aviation, Inc., Employer; and United States Fire Insurance Company / Crum & Forster Insurance Company, Carrier	Plt's PDR Under N.C.G.S. § 7A-31(c) (COA16-558)	Denied
329P17	Cynthia Frank, Employee v. Charlotte Symphony, Employer, and Selective Insurance Company of America, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-211)	Denied

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

7 DECEMBER 2017

333P17	North Carolina State Board of Education v. The State of North Carolina, and Mark Johnson, in his Official Capacity	1. Plt's Motion for Temporary Stay (COAP17-687) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's PDR Prior to a Determination by the COA	1. Allowed **10/16/2017** 2. Allowed 3. Allowed **Martin, C.J., recused**
341P17	Mark Malecek v. Derek Williams	1. Notice of Appeal Based Upon a Constitutional Question Under N.C.G.S. § 7A-30(1) (COA16-830) 2. PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
342P17	State v. Daniel Richard McCoy	Def's PDR Under N.C.G.S. § 7A-31 (COA16-1099)	Denied
344P17	State v. Michael Lewis Williams	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP17-495) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
345P17-2	Eddricco Li'Shaun Brown v. State of N.C.	1. Petitioner's *Pro Se* Motion for Notice of Appeal 2. Petitioner's *Pro Se* Motion to Demand Default Judgment	1. Denied **11/06/2017** 2. Denied **11/06/2017**
346P17	State v. Leon Develda Caldwell	Def's *Pro Se* Motion for Appropriate Relief	Dismissed without prejudice
347P17	Jonathan James Newell v. N.C. Department of Public Safety Division of Adult Corrections	Petitioner 's *Pro Se* Motion for PDR (COAP17-721)	Dismissed
348P17	State v. Matthew Scott Krause	Def's P*ro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP17-677)	Dismissed

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

7 DECEMBER 2017

350A17	State of N.C. *ex rel.* Utilities Commission, et al. v. N.C. Waste Awareness & Reduction Network	1. Center for Biological Diversity, Food and Water Watch, Friends of the Earth, Greenpeace, Inc., and Institute for Local Self-Reliance's Motion for Leave to File Amicus Brief 2. Motion to Admit Anchun Jean Su *Pro Hac Vice* 3. Motion to Admit Howard M. Crystal *Pro Hac Vice*	1. Allowed **11/20/2017** 2. Allowed **11/20/2017** 3. Allowed **11/20/2017**
352P17	State v. Thomas W. McNeill	Def's *Pro Se* Motion for PDR (COAP17-629)	Dismissed
355P17	State v. Antione Cedric McKenith	Def's PDR Under N.C.G.S. § 7A-31 (COA17-81)	Denied
357P17	State v. Fredrick Canady	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Columbus County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
358A16	In re Southeastern Eye Center	Defendant's (Douglas S. Harris) Motion to Consolidate Appeals	Denied **11/15/2017**
360P17	State v. Kevin Christopher McReed	Def's PDR Under N.C.G.S. § 7A-31 (COA17-229)	Denied
361P17	Blue Ridge Healthcare Hospitals Inc. d/b/a Carolinas Healthcare System – Blue Ridge, Petitioner v. NC Department of Health and Human Services, Division of Health Service Regulation, Healthcare Planning and Certificate of Need Section, Respondent, and Caldwell Memorial Hospital, Inc. and SCSV, LLC, Respondent-Intervenors	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA17-137)	Denied

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

7 DECEMBER 2017

363A14-3	Sandhills Amusements, Inc., et al. v. Sheriff of Onslow County, et al.	1. Plts' Motion for Temporary Stay (COAP17-693) 2. Plts' Petition for *Writ of Supersedeas* 3. Plts' Petition for *Writ of Certiorari* to Review Order of COA	1. Denied 11/13/2017 2. 3. **Ervin, J., recused**
363P17	In the Matter of J.M. and J.M.	1. Respondent-Father's PDR Under N.C.G.S. § 7A-31 (COA17-275) 2. Petitioner and GAL's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed
364P17	State v. J. Guadalupe Garay Galindo	Def's *Pro Se* Motion for PDR (COAP17-590)	Dismissed
367P17	State v. Zachary John Rose	1. State's Motion for Temporary Stay (COA17-190) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **11/03/2017** Dissolved **11/27/2017** 2. Dismissed as moot **11/27/2017**
370A17	State v. Dyquaon Kenner Brawley	1. State's Motion for Temporary Stay (COA17-287) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **11/06/2017** 2. Allowed **11/28/2017** 3. ---
372P07-3	State v. Ricky Dean Johnson	1. Def's *Pro Se* Petition for W*rit of Certiorari* to Review Order of Superior Court, Cleveland County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot **Ervin, J., recused**

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

7 DECEMBER 2017

372P17	In the Matter of Kenneth Kelly Duvall v. State of N.C., et al.	1. Petitioner's *Pro Se* Motion for Default Judgment (COAP17-711) 2. Petitioner's *Pro Se* Motion for Injunctive Relief and *De Novo* Review and Answers to Constitutional Questions 3. Petitioner's *Pro Se* Motion to Appoint Counsel 4. Petitioner's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 11/07/2017 2. 3. 4.
373P17	Mike Causey, Commissioner of Insurance of North Carolina v. Cannon Surety, LLC, a North Carolina Limited Liability Company	1. Petitioner's Motion for Temporary Stay 2. Petitioner's Petition for *Writ of Supersedeas* 3. Petitioner's Notice of Appeal 4. Petitioner's Petition for Writ of Certiorari to Review Order of Business Court	1. Denied **11/07/2017** 2. Denied **11/07/2017** 3. Dismissed *ex mero motu* **11/07/2017** 4. Denied **11/07/2017**
379A17	State of N.C. v. Brandon Malone	1. State's Motion for Temporary Stay (COA16-1290) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **11/09/2017** 2.
386P17	Eric Jamal Whitley v. Donnie Harrison	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **11/17/2017**
387P17	In re Timothy D. Reels, Jr.	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **11/16/2017**
388P17	State v. Andwele Willie Eaves	1. Def's Motion for Temporary Stay (COA17-159) 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **11/16/2017** 2.
393P17	State v. Byron Jerome Parker	1. State's Motion for Temporary Stay (COA17-108) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/21/2017** 2. 3.
394P17	State v. Dontail Brinkley	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **11/21/2017** 2.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

7 DECEMBER 2017

398P15-2	Samuel Lee Gaskins v. Larry Dail, Superintendent	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **11/06/2017**
398P15-3	Samuel Lee Gaskins v. Larry Dail, Superintendent	Petitioner's *Pro Se* Motion to Reconsider Order Denying Petition for *Writ of Habeas Corpus*	Dismissed **11/17/2017**
403P17	Cameron Lee Hinton v. Donnie Harrison; Wake County Detention Center	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **11/28/2017**
404P17	Nancy Rogers, et al. v. Claudia Metcalf, et al.	1. Defs' *Pro Se* Motion for Temporary Stay 2. Defs' *Pro Se* Emergency Petition for *Writ of Certiorari* to Review Order of COA 3. Defs' *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Allowed **11/28/2017** Dissolved **12/07/2017** 2. Denied 3. Allowed
405P17	State v. J.C.	1. State's Motion for Temporary Stay (COA17-207-2) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31 4. State's Petition for *Writ of Certiorari* to Review Order of COA 5. Petitioner's Motion to Proceed Under a Pseudonym 6. Petitioner's Motion to Restrict Electronic Access, Place Case "Under Seal," and Redact Superior Court Case Numbers from All Published Materials	1. Allowed **11/27/2017** 2. 3. 4. 5. 6.
421P10-7	Robert Alan Lillie v. Mark Carver, Superintendent of Caswell Correctional Center	Petitioner's *Pro Se* Motion to Reconsider	Dismissed
514PA11-2	State v. Harry Sharod James	State's Motion to Amend Its Brief as Appellant by Striking a Portion of the Brief	Allowed

STEVEN HARRIS, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, RESPONDENT

No. 110A17

Filed 22 December 2017

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 798 S.E.2d 127 (2017), affirming a final decision dated 25 January 2016 issued by Administrative Law Judge Donald W. Overby in the Office of Administrative Hearings. Heard in the Supreme Court on 13 December 2017.

Law Offices of Michael C. Byrne, by Michael C. Byrne, for petitioner-appellee.

Joshua H. Stein, Attorney General, by Tamika L. Henderson, Assistant Attorney General, and Ryan Park, Deputy Solicitor General, for respondent-appellant.

Essex Richards, P.A., by Norris A. Adams, II, for North Carolina Fraternal Order of Police, and Blanchard, Miller, Lewis & Isley, P.A., by E. Hardy Lewis, for North Carolina State Employees Association, amici curiae.

The McGuinness Law Firm, by J. Michael McGuinness, and Milliken Law, by Megan A. Milliken, for North Carolina Police Benevolent Association and Southern States Police Benevolent Association, amici curiae.

PER CURIAM.

AFFIRMED.

IN RE G.T.

[370 N.C. 387 (2017)]

IN THE MATTER OF G.T.

No. 420A16

Filed 22 December 2017

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 791 S.E.2d 274 (2016), affirming an adjudication order entered on 3 February 2016, and reversing in part a dispositional order entered on 26 February 2016, both by Judge Ward D. Scott in District Court, Buncombe County. Heard in the Supreme Court on 11 December 2017.

Matthew J. Putnam for petitioner-appellant Buncombe County Department of Social Services.

Michael N. Tousey for appellant Guardian ad Litem.

Joyce L. Terres, Assistant Appellate Defender, for respondent-appellee mother.

PER CURIAM.

AFFIRMED.

STATE v. GODBEY

[370 N.C. 388 (2017)]

STATE OF NORTH CAROLINA
v.
RONNIE PAUL GODBEY

No. 443PA16

Filed 22 December 2017

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 792 S.E.2d 820 (2016), finding no error after appeal from a judgment entered on 8 December 2014 by Judge Christopher W. Bragg in Superior Court, Rowan County. Heard in the Supreme Court on 13 December 2017.

Joshua H. Stein, Attorney General, by Anita LeVeaux, Special Deputy Attorney General, and Sherri Horner Lawrence, Assistant Attorney General, for the State.

Glenn Gerding, Appellate Defender, by James R. Grant, Assistant Appellate Defender, for defendant-appellant.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE v. WILSON

[370 N.C. 389 (2017)]

STATE OF NORTH CAROLINA
v.
JOSHUA RYAN WILSON

No. 466A16

Filed 22 December 2017

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 793 S.E.2d 737 (2016), affirming a judgment entered on 24 September 2015 by Judge Michael J. O'Foghludha in Superior Court, Alamance County. Heard in the Supreme Court on 7 November 2017.

Joshua H. Stein, Attorney General, by Marie Hartwell Evitt, Assistant Attorney General, and Derrick C. Mertz, Special Deputy Attorney General, for the State.

Leslie Rawls for defendant-appellant.

PER CURIAM.

AFFIRMED.

WHEELER v. CENT. CAROLINA SCHOLASTIC SPORTS, INC..

[370 N.C. 390 (2017)]

STEPHEN VICTOR WHEELER
v.
CENTRAL CAROLINA SCHOLASTIC SPORTS, INC. D/B/A CENTRAL CAROLINA SCHOLASTIC BASEBALL SUMMER LEAGUE

No. 150A17

Filed 22 December 2017

Appeal pursuant to N.C.G.S. § 7A-30(2) from the unpublished decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 798 S.E.2d 438 (2017), affirming an order granting summary judgment entered on 22 April 2016 by Judge Claire V. Hill in Superior Court, Cumberland County. Heard in the Supreme Court on 11 December 2017.

Jerome P. Trehy, Jr. for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Melody J. Jolly, for defendant-appellee.

PER CURIAM.

AFFIRMED.

DISPOSITION OF PETITIONS FOR DISCRETIONARY REVIEW UNDER G.S. 7A-31

22 DECEMBER 2017

110A17	Steven Harris v. North Carolina Department of Public Safety	Petitioner's Motion to Dismiss Appeal	Dismissed as moot

COOPER v. BERGER

[370 N.C. 392 (2018)]

ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH CAROLINA
v.
PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; AND THE STATE OF NORTH CAROLINA

No. 52PA17-2

Filed 26 January 2018

1. Constitutional Law—North Carolina—session law creating Bipartisan State Board of Elections and Ethics Enforcement—challenge by Governor—subject matter jurisdiction

Where the legislature created the Bipartisan State Board of Elections and Ethics Enforcement following the election of Roy A. Cooper III as Governor, the three-judge trial court panel erred by dismissing the Governor's complaint for lack of subject matter jurisdiction. This case involved an issue of constitutional interpretation—whether the statutory provisions governing the manner in which the Bipartisan State Board was constituted and required to operate pursuant to Session Law 2017-6 impermissibly encroached upon the governor's executive authority to see that the laws are faithfully executed—rather than a nonjusticiable political question, and a decision to the contrary would sharply limit the ability of executive branch officials to advance separation of powers claims.

2. Constitutional Law—North Carolina—session law creating Bipartisan State Board of Elections and Ethics Enforcement—challenge by Governor—standing

Where the legislature created the Bipartisan State Board of Elections and Ethics Enforcement following the election of Roy A. Cooper III as Governor, the three-judge trial court panel erred by dismissing the Governor's complaint for lack of standing, to the extent that it did so. Apart from the legislative leaders' contention that the Governor's claim was a nonjusticiable political question, which the Supreme Court rejected, the legislative leadership did not appear to contend explicitly that the Governor lacked the necessary personal stake in the outcome of the controversy.

3. Constitutional Law—North Carolina—session law creating Bipartisan State Board of Elections and Ethics Enforcement—challenge by Governor—separation of powers—structure and operation of Board

Where the legislature created the Bipartisan State Board of Elections and Ethics Enforcement following the election of Roy A. Cooper III as Governor, and the Governor challenged the law as unconstitutionally infringing on his executive powers in violation of separation of powers, the Supreme Court held that the manner in which the membership of the Bipartisan State Board was structured and operated under Session Law 2017-6 impermissibly, facially, and beyond a reasonable doubt interfered with the Governor's ability to ensure that the laws are faithfully executed as required by Article III, Section 5(4) of the North Carolina Constitution. The state's Constitution does not permit the General Assembly to structure an executive branch commission such that the Governor is unable, within a reasonable period of time, to take care that the laws are faithfully executed because he is required to appoint half of the commission members from a list of nominees consisting of individuals who are likely not supportive of his policy preferences while the Governor also is given limited supervisory control over the agency and circumscribed removal authority over commission members.

4. Constitutional Law—North Carolina—session law creating Bipartisan State Board of Elections and Ethics Enforcement—challenge by Governor—selection of Executive Director

Where the legislature created the Bipartisan State Board of Elections and Ethics Enforcement following the election of Roy A. Cooper III as Governor, and the Governor challenged the law as unconstitutionally infringing on his executive powers in violation of separation of powers, the Supreme Court, after holding unconstitutional the provisions of the law concerning the composition of the Bipartisan State Board, declined to reach the issue of whether the provisions governing the selection of the Executive Director constituted a separate violation of Article III, Section 5(4) of the North Carolina Constitution.

5. Constitutional Law—North Carolina—session law creating Bipartisan State Board of Elections and Ethics Enforcement—challenge by Governor—chair and restructuring of county boards

Where the legislature created the Bipartisan State Board of Elections and Ethics Enforcement following the election of Roy A. Cooper III as Governor, the Supreme Court declined to express any opinion on the Governor's argument challenging the provisions of Session Law 2017-6 requiring that the office of the chair of the Bipartisan State Board be rotated between the state's two largest

political parties and the provisions restructuring the county boards of election.

6. Constitutional Law—North Carolina—session law creating Bipartisan State Board of Elections and Ethics Enforcement—challenge by Governor—temporary restraining order—moot

Where the legislature created the Bipartisan State Board of Elections and Ethics Enforcement following the election of Roy A. Cooper III as Governor, the Supreme Court dismissed as moot the legislative leadership's appeal from the temporary restraining order entered by the three-judge panel in the trial court following the filing of the Governor's complaint.

Chief Justice MARTIN dissenting.

Justice JACKSON joins in this dissenting opinion.

Justice NEWBY dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31, prior to a determination by the Court of Appeals, of orders entered on 28 April 2017 and 1 June 2017 in the Superior Court, Wake County, by a three-judge panel appointed by the Chief Justice pursuant to N.C.G.S. § 1-267.1. Heard in the Supreme Court on 28 August 2017. Following oral argument, on 1 September 2017, the Court ordered that this case be remanded to the panel for the entry of a supplemental order. After the entry of the supplemental order, the Court, on 2 November 2017, ordered supplemental briefing. Determined without further oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Daniel F.E. Smith, Jim W. Phillips, Jr., and Eric M. David, for plaintiff-appellant/appellee.

Nelson Mullins Riley & Scarborough LLP, by D. Martin Warf and Noah H. Huffstetler, III, for legislator defendant-appellants/appellees.

Joshua H. Stein, Attorney General, by Alexander McC. Peters, Senior Deputy Attorney General, for defendant-appellee State of North Carolina.

Poyner Spruill LLP, by Andrew H. Erteschik, for Brennan Center for Justice at N.Y.U. School of Law and Democracy North Carolina, amici curiae.

Robinson, Bradshaw & Hinson, P.A., by John R. Wester, J. Dickson Phillips, III, Adam K. Doerr, and Kevin Crandall, for James B. Hunt, Jr., and Burley B. Mitchell, Jr., amici curiae.

ERVIN, Justice.

On 8 November 2016, plaintiff Roy A. Cooper, III, was elected Governor of the State of North Carolina for a four-year term office commencing on 1 January 2017. On 16 December, 2016, the General Assembly enacted Senate Bill 4 and House Bill 17, which abolished the existing State Board of Elections and the existing State Ethics Commission; created a new Bipartisan State Board of Elections and Ethics Enforcement; and appointed the existing members of the State Ethics Commission to serve as the members of the Bipartisan State Board. The legislation in question was signed into law by former Governor Patrick L. McCrory on 16 December 2016. On 17 March 2017, a three-judge panel of the Superior Court, Wake County, convened pursuant to N.C.G.S. § 1-267.1(b1), determined that the legislation in question violated the separation-of-powers provisions of the North Carolina Constitution by unconstitutionally impinging upon the Governor's ability to faithfully execute the laws. *Cooper v. Berger*, No. 16 CVS 15636, 2017 WL 1433245 (N.C. Super. Ct. Wake County, Mar. 17, 2017).

On 25 April 2017, Chapter 6 of the 2017 North Carolina Session Laws became law notwithstanding the Governor's veto. *See* Act of Apr. 11, 2017, ch. 6, 2017-2 N.C. Adv. Legis. Serv. 21 (LexisNexis).[1] Session Law 2017-6 was captioned

> AN ACT TO REPEAL G.S. 126-5(D)(2C), AS ENACTED BY S.L. 2016-126; TO REPEAL PART I OF S.L. 2016-125; AND TO CONSOLIDATE THE FUNCTIONS OF ELECTIONS, CAMPAIGN FINANCE, LOBBYING, AND ETHICS UNDER

1. Session Law 2017-6 required the Revisor of Statutes to recodify substantial portions of the existing statutory provisions governing elections, campaign finance, lobbying, and ethics into a new Chapter 163A. Although the necessary recodification has now been completed, the Court will cite to the statutory provisions not directly enacted by virtue of Session Law 2017-6 as they existed prior to the recodification in this opinion.

ONE QUASI-JUDICIAL AND REGULATORY AGENCY BY CREATING THE NORTH CAROLINA BIPARTISAN STATE BOARD OF ELECTIONS AND ETHICS ENFORCEMENT.

The newly-enacted legislation provided, in pertinent part, that:

Article 1.

Bipartisan State Board of Elections and Ethics Enforcement.

§163A-1. Bipartisan State Board of Elections and Ethics Enforcement established.

There is established the Bipartisan State Board of Elections and Ethics Enforcement, referred to as the State Board in this Chapter.

§ 163A-2. Membership.

(a) The State Board shall consist of eight individuals registered to vote in North Carolina, appointed by the Governor, four of whom shall be of the political party with the highest number of registered affiliates and four of whom shall be of the political party with the second highest number of registered affiliates, as reflected by the latest registration statistics published by the State Board. The Governor shall appoint four members each from a list of six nominees submitted by the State party chair of the two political parties with the highest number of registered affiliates, as reflected by the latest registration statistics published by the State Board.

. . . .

(c) Members shall be removed by the Governor from the State Board only for misfeasance, malfeasance, or nonfeasance. Violation of G.S. § 163A-3(d) shall be considered nonfeasance.

. . . .

(f) At the first meeting in May, the State Board shall organize by electing one of its members chair and one of its members vice-chair, each to serve a two-year term as such. In 2017 and every four years thereafter, the chair shall be a member of the political party with the highest number of registered affiliates, . . . and the vice-chair a

member of the political party with the second highest number of registered affiliates. In 2019 and every year four years thereafter, the chair shall be a member of the political party with the second highest number of registered affiliates, as reflected by the latest registration statistics published by the State Board, and the vice-chair a member of the political party with the highest number of registered affiliates.

. . . .

§ 163A-3. Meetings; quorum; majority.

. . . .

(c) Unless otherwise specified in this Chapter, an affirmative vote of at least five members of the State Board shall be required for all actions by the State Board.

. . . .

§ 163A-5. Independent agency, staff, and offices.

(a) The State Board shall be and remain an independent regulatory and quasi-judicial agency and shall not be placed within any principal administrative department. The State Board shall exercise its statutory powers, duties, functions, and authority and shall have all powers and duties conferred upon the heads of principal departments under G.S. 143B-10.

. . . .

§ 163A-6. Executive Director of the State Board.

(a) There is hereby created the position of Executive Director of the State Board, who shall perform all duties imposed by statute and such duties as may be assigned by the State Board.

(b) The State Board shall appoint an Executive Director for a term of two years with compensation to be determined by the Office of State Human Resources. The Executive Director shall serve beginning May 15 after the first meeting held after new appointments to the State Board are made, unless removed for cause, until a successor is appointed. In the event of a vacancy, the vacancy shall be filled for the remainder of the term.

(c) The Executive Director shall be responsible for staffing, administration, and execution of the State Board's decisions and orders and shall perform such other responsibilities as may be assigned by the State Board.

(d)The Executive Director shall be the chief State elections official.

. . . .

§ 163-30. County boards of elections; appointments; terms of office; qualifications; vacancies; oath of office; instructional meetings.

In every county of the State there shall be a county board of elections, to consist of four persons of good moral character who are registered voters in the county in which they are to act. Two of the members of the county board of elections shall be of the political party with the highest number of registered affiliates, and two shall be of the political party with the second highest number of registered affiliates, as reflected by the latest registration statistics published by the State Board. In 2017, members of county boards of elections shall be appointed by the State Board . . . . In 2019, members of county boards of elections shall be appointed by the State Board on the last Tuesday in June, and every two years thereafter, and their terms of office shall continue for two years from the specified date of appointment and until their successors are appointed and qualified.

. . . .

The State chair of each political party shall have the right to recommend to the State Board three registered voters in each county for appointment to the board of elections for that county. If such recommendations are received by the Board 15 or more days before the last Tuesday in June 2017 and each two years thereafter, it shall be the duty of the State Board to appoint the county boards from the names thus recommended. . . .

. . . .

At the first meeting in July annually, the county boards shall organize by electing one of its members chair and

one of its members vice-chair, each to serve a one-year term as such. In the odd-numbered year, the chair shall be a member of the political party with the highest number of registered affiliates, as reflected by the latest registration statistics published by the State Board, and the vice-chair a member of the political party with the second highest number of registered affiliates. In the even-numbered year, the chair shall be a member of the political party with the second highest number of registered affiliates, as reflected by the latest registration statistics published by the State Board, and the vice-chair a member of the political party with the highest number of registered affiliates.

. . . .

§ 163-31. Meetings of county boards of elections; quorum; majority; minutes.

. . . Three members shall constitute a quorum for the transaction of board business. Except where required by law to act unanimously, a majority vote for action of the board shall require three of the four members.

. . . .

SECTION 9. Notwithstanding G.S. 163A-2, as enacted by Section 4 of this act, the chairs of the two political parties shall submit a list of names to the Governor . . . , and the Governor shall make appointments from those lists . . . . The State chairs of the two political parties shall not nominate, and the Governor shall not appoint, any individual who has served two or more full consecutive terms on the State Board of Elections or State Ethics Commission, as of April 30, 2017.

SECTION 10. Notwithstanding G.S. 163A-2(f) and (g), as enacted by Section 4 of this act, the Governor shall appoint a member of the State Board to serve as chair, a member to serve as vice-chair, and a member to serve as secretary of the State Board until its first meeting in May 2019, at which time the State Board shall select its chair and vice-chair in accordance with G.S. 163A-2(f) and select a secretary in accordance with G.S. 163A-2(g).

. . . .

> **Section 17.** Notwithstanding G.S. 163A-6, the Bipartisan State Board of Elections and Ethics Enforcement shall not appoint an Executive Director until May 2019. Until such time as the Bipartisan State Board of Elections and Ethics Enforcement appoints an Executive Director in accordance with G.S. 163A-6, as enacted by this act, the Executive Director of the State Board of Elections under G.S. 163-26, as of December 31, 2016, shall be the Executive Director.

Id., secs. 4, 7(h)-(i), 9, 10, 17, at 23-34.

On 26 April 2017, the Governor filed a complaint, a motion for a temporary restraining order, and a motion for a preliminary injunction challenging the constitutional validity of Sections 3 through 22[2] of Session Law 2017-6 and seeking to preclude its implementation. On 27 April 2017, the Chief Justice of the Supreme Court of North Carolina assigned a three-judge panel of the Superior Court, Wake County, to hear and decide this case as required by N.C.G.S. § 1-267.1(b1). On 28 April 2017, defendants Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives, filed a response in opposition to the Governor's motion for temporary restraining order. On the same date, the panel, by a divided vote, entered an order temporarily enjoining the enforcement of Sections 3 through 22 of Session Law 2017-6 "pending expiration of this Order or further Order of this Court."

On 23 May 2017, the Governor and the legislative leadership filed summary judgment motions.[3] In addition, the legislative leadership filed a motion seeking to have the Governor's complaint dismissed pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1), on the grounds that the claims asserted by the Governor "constitute non-justiciable political questions" and that the Governor "lacks standing" and an answer in which they denied the material allegations of the Governor's complaint and asserted a number of affirmative defenses, including the political question doctrine, and the State of North Carolina filed an answer requesting the panel to "grant

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2. Sections 1 and 2 of Session Law 2017-6 repealed Part I of Session Law 2016-125 and N.C.G.S. § 126-5(d)(2c) as enacted by Session Law 2016-126. S.L. 2017-6.

3. The parties agreed to an extension of the temporary restraining order pending a decision on the merits as part of a consent scheduling order that the panel entered on 10 May 2017.

such relief as may be just and proper." On 1 June 2017, the panel entered an order dismissing the Governor's complaint pursuant to N.C.G.S. § 1A-1, Rule 12(b)(1). On 6 June 2017, the Governor noted an appeal to the Court of Appeals from the panel's order. On 15 June 2017, the legislative leadership noted an appeal to the Court of Appeals from the temporary restraining order. On 19 July, 20 July, and 24 July 2017, respectively, this Court entered orders granting the Governor's petition for discretionary review prior to a decision by the Court of Appeals, allowing the legislative leadership to file an appellants' brief, prohibiting the parties "from taking further action regarding the unimplemented portions" of the challenged legislation, establishing an expedited briefing schedule, and setting this case for oral argument on 28 August 2017.

In his initial brief, the Governor argued that, while the General Assembly has the authority to enact laws, citing Article II, Sections 1 and 20 of the North Carolina Constitution (vesting "[t]he legislative power" in the General Assembly), its authority is subject to the constraints set out in Article I, Section 6 (providing that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other"). According to the Governor, the panel's decision to dismiss his complaint for lack of subject matter jurisdiction "ignor[es] separation of powers as a cornerstone of State government." In addition, the Governor asserted that he had standing to "protect the constitutional rights granted to his office," citing N.C. Const. art. I, § 6; *id.* art. II, §§ 1, 5; *State ex rel. McCrory v. Berger*, 368 N.C. 633, 645, 781 S.E.2d 248, 256 (2016) (noting that, since the adoption of the 1868 Constitution, the Governor has had the duty, pursuant to Article III, Section 5(4) of the North Carolina Constitution, to faithfully execute the laws); *Mangum v. Raleigh Board of Adjustment*, 362 N.C. 640, 642, 669 S.E.2d 279, 281-82 (2008) (explaining that "the North Carolina Constitution confers standing on those who suffer harm"); *Bacon v. Lee*, 353 N.C. 696, 718, 549 S.E.2d 840, 855 (observing that "Article III, Section 5 of the State Constitution enumerates the express duties of the Governor"), *cert. denied*, 533 U.S. 975, 122 S. Ct. 22, 150 L. Ed. 2d 804 (2001). The Governor denied that this case involves a nonjusticiable political question in light of the judicial branch's duty "to identify where the line should be drawn . . . between the Executive Branch and the Legislature," quoting *News & Observer Publishing Co. v. Easley*, 182 N.C. App. 14, 15-16, 641 S.E.2d 698, 700, *disc. rev. denied*, 361 N.C. 429, 648 S.E.2d 508 (2007). The Governor contended that, contrary to the arguments advanced by the legislative leadership, the presumption of constitutionality does not insulate Session Law 2017-6 from judicial scrutiny, citing *Moore v. Knightdale Board of Elections*, 331 N.C. 1, 4,

413 S.E.2d 541, 543 (1992) (stating that "[t]he presumption of constitutionality is not, however, and should not be, conclusive"). Finally, the Governor contended that the challenged portions of Session Law 2017-6 should be invalidated because they deprive him of the ability to exercise "enough 'control over the views and priorities of the officers' that implement 'executive policy' to allow the Governor to fulfill his constitutional duty of faithful execution," quoting *McCrory*, 368 N.C. at 647, 781 S.E.2d at 257.

The legislative leadership argued, on the other hand, that this case involves a nonjusticiable political question and that the Governor lacks standing to challenge the constitutionality of Session Law 2017-6. According to the legislative leadership, "the commitment of the power to alter the functions and duties of state agencies is reserved for the Legislature," with the manner in which the General Assembly has chosen to exercise that authority constituting a "political question that this Court has no authority to review." In addition, the legislative leadership contended that the Governor lacks standing to challenge the constitutionality of Session Law 2017-6 because the alleged constitutional injury upon which the Governor relies did not result from the enactment of the challenged legislation "given the similar or identical provisions in prior law," citing N.C.G.S. § 163-19 and section 4(c) of Session Law 2017-6. In view of the fact that the panel did not reach the merits of the Governor's claim, the legislative leadership urged this Court to refrain from addressing the constitutionality of the challenged legislation even if it concluded that this case was justiciable and that the Governor had standing to challenge the constitutionality of Session Law 2017-6. In the event that the Court elected to reach the merits of the Governor's constitutional claim, the legislative leadership asserts that the challenged legislation represents nothing more than the proper exercise of the General Assembly's constitutionally-derived legislative authority.

On 1 September 2017, "without determining that we lack the authority to reach the merits of plaintiff's claims," the Court entered an order concluding that "the proper administration of justice would be best served in the event that we allowed the panel, in the first instance, to address the merits of [the Governor's] claims before undertaking to address them ourselves." As a result, the Court certified this case "to the panel with instructions . . . to enter a new order . . . that (a) explains the basis for its earlier determination that it lacked jurisdiction to reach the merits of the claims advanced in [the Governor's] complaint and (b) addresses the issues that [the Governor] has raised on the merits."

On 31 October 2017, the panel entered an order determining that it lacked jurisdiction to reach the merits of the Governor's claims on the grounds that "[t]he functions, powers, and duties of an agency encompass how a particular agency might work, its structure, and what role it may play in enforcement of the laws"; "the power to alter the functions and duties of state agencies is reserved to the Legislature through its law-making ability and the Governor through executive order subject to review by the Legislature"; and that "[t]he merger of the Board of Elections and Ethics Commission into the Bipartisan Board . . . is a political question and therefore a nonjusticiable issue." In compliance with our order requesting it to address the merits of the Governor's claims, the panel found that:

> 1. The General Assembly has the authority and power to create and modify the duties of state agencies. *See*, *e.g.*, *Adams v. N. Carolina Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 696-97, 249 S.E.2d 402, 410 (1978).
>
> . . . .
>
> 5. Plaintiff has produced no authority that a commission or board with an even number of members is unconstitutional as a matter of law. Plaintiff has also produced no authority that "deadlock" on a particular issue constitutes a separation of powers violation.
>
> 6. The requirement that the Governor must make his appointments from lists provided by the state party chairs does not constrain his execution of the laws or otherwise violate separation of powers, as the Governor (and not the General Assembly) has a choice among the names on the lists and is making the decision about who will ultimately serve. . . . Session Law 2017-[6]—N.C. Gen. Stat. § 163-19—also requires that the Governor appoint members to the Board of Elections from lists provided by the party chairs. This requirement was first added by Session Law 1985-62 after the election of Governor James Martin. Other statutory changes to the Board of Elections (including the extension of the term of the Executive Director, see S.L. 1973-1409, § 2; S.L. 1985-62), may have coincided with a change in the political party of the Governor but have not resulted in constitutional challenges.
>
> . . . .

8. The Executive Director of the Bipartisan Board is to be, beginning in May 2019, chosen by the Bipartisan Board. Until that time, the current Executive Director of the Board of Elections, whose term is extended by Session Law 2017-6, will serve as the Executive Director of the Bipartisan Board. Such a statutory extension of a term of office has been found to be constitutional. . . .

9. The chair of the Bipartisan Board will initially be chosen by the Governor and will, thereafter, be chosen by the Bipartisan Board. . . .

10. The Governor also has the ability to remove any or all members from the Bipartisan Board for misfeasance, malfeasance, or nonfeasance. The General Assembly has no ability to remove members.

11. The Governor has adequate supervision over the Bipartisan Board, given the Bipartisan Board's role in and impact on state government as the oversight authority for ethics, elections, and lobbying. Additionally, Session Law 2017-6 expressly states that the Bipartisan Board must comply with the duties under N.C. Gen. Stat. § 143B-10, which includes reporting duties to the Governor. The General Assembly does not retain the ability to supervise the Bipartisan Board.

12. Session Law 2017-6 reserves no ongoing control to the General Assembly, and therefore, the General Assembly neither exercises power that the constitution vests exclusively in the executive branch nor prevents the Governor from performing his constitutional duties. Were the Governor given the degree of control he seeks over with the Board of Elections or Bipartisan Board in this case, neither Board could continue to function as "an independent regulatory and quasi-judicial agency" as the Board of Elections under prior law, N.C. Gen. Stat. § 163-28, and the Bipartisan Board would under Session Law 2017-6 (enacting N.C. Gen. Stat. § 163A-5(a)).

13. On a facial challenge, this Court cannot consider hypothetical situations that *could* sink the statute; to the contrary, Plaintiff must "establish that no set of circumstances exists under which the [a]ct would be valid."

> *Bryant*, 359 N.C at 564, 614 S.E.2d 486 (2005) (quotations omitted). . . .
>
> 14. There is evidence that supports the Bipartisan Board being able to function in politically divided situations. . . .
>
> 15. There are also numerous other boards and commissions tasked with some administrative functions that are made up of an even number of members such that tie votes and, therefore, deadlock, are hypothetical possibilities. . . .

After conceding that "circumstances could arise where a deadlock or stalemate so stifles the work of the Bipartisan Board that [the Governor] would have standing to raise a challenge that this statute is unconstitutional, not on its face but as applied to that particular situation," the panel held that Session Law 2017-6 is not unconstitutional on its face.

In the supplemental briefs that the Court requested following the filing of the panel's order, the Governor argued that "the judicial branch has subject matter jurisdiction to resolve separation of powers disputes," citing *McCrory*, 368 N.C. at 638, 781 S.E.2d at 25, *In re Alamance County Court Facilities*, 329 N.C. 84, 99, 405 S.E.2d 125, 132 (1991), and *State ex rel. Wallace v. Bone*, 304 N.C. 591, 608, 286 S.E.2d 79, 88 (1982), and that he has standing to advance the claim asserted in this complaint because the "North Carolina Constitution confers standing on the Governor to challenge statutes that cause him constitutional harm," citing Article I, Section 18 of the North Carolina Constitution and *Mangum*, 362 N.C. at 642, 669 S.E.2d at 281-82. In addressing the merits of his challenge to Session Law 2017-6, the Governor contends that the General Assembly's action in appointing the Executive Director of the Bipartisan State Board represented an unconstitutional exercise of control over an executive branch agency, with decisions authorizing legislative extensions of existing terms of office being inapplicable to a proper constitutional analysis given that those cases involved pre-existing municipal offices in which an incumbent's term was extended in lieu of holding a new election, citing *Penny v. Salmon*, 217 N.C. 276, 277, 7 S.E.2d 559, 560 (1940), and *Crump v. Snead*, 134 N.C. App. 353, 354, 517 S.E.2d 384, 385, *disc. rev. denied*, 351 N.C. 101, 541 S.E.2d 143 (1999), while the office of Executive Director of the Bipartisan State Board did not exist prior to the enactment of the challenged legislation, citing section 4(c) of Session Law 2017-6 (creating "the position of Executive Director of the State Board"), and given that the challenged legislation abolished the office

of Executive Director of the State Board of Elections, citing subsections 7(e) and (f) of Session Law 2017-6 (repealing N.C.G.S. §§ 163-26). Finally, the Governor contends that Session Law 2017-6 contravenes the separation-of-powers principles set out in *McCrory*, which require a reviewing court to focus upon the extent to which the Governor has a sufficient degree of control over executive branch agencies. According to the Governor, *McCrory* requires that "the Governor must have 'enough control' over executive branch entities and officials that possess 'final executive authority' in order to perform his constitutional duty to ensure that the laws are faithfully executed," quoting *McCrory*, 368 N.C. at 646, 781 S.E.2d at 256, with the requisite degree of control being exercised by means of appointment, supervision, and removal, citing *McCrory*, 368 N.C. at 646, 781 S.E.2d at 256. Although the General Assembly may require the appointment of statutory officers from lists and may require that appointees satisfy additional qualifications, the provisions of the challenged legislation "deprive[ ] the Governor of the ability to appoint a majority of members of the [Bipartisan] State Board who share his views and priorities."

On the other hand, the legislative leadership argues that the panel correctly decided that it lacked jurisdiction over the subject matter at issue in this case because the North Carolina Constitution provides the Governor with the authority to "make such changes in the allocation of offices and agencies and in the allocation of those functions, powers, and duties as he considers necessary for efficient administration," subject to later legislative review, quoting Article III, Section 5(10) of the North Carolina Constitution, thereby eliminating any need for the judicial branch to "interject itself into a balance struck in the text of the Constitution specifically dealing with the organization and structure of a state agency." For that reason, "[t]he question raised in this case by the Governor goes to the structure and function of the agency, which is textually committed to a balance struck in the text of the Constitution."

As far as the merits are concerned, the legislative leadership contends that *McCrory* does not necessitate the invalidation of Session Law 2017-6 because the Bipartisan State Board is structured as an independent agency. According to the legislative leadership, "the quasi-judicial nature of a commission can support its independence from being under the thumb of the executive," citing *Morrison v. Olson*, 487 U.S. 654, 687-88, 108 S. Ct. 2597, 2617, 101 L. Ed. 2d 569, 603 (1988). In addition, unlike the situation at issue here, the General Assembly appointed more members to the executive bodies at issue in *McCrory* than the Governor, citing *McCrory*, 368 N.C. at 637-38, 781 S.E.2d at 250-51.

Finally, the legislative leadership asserts that the Executive Director of the Bipartisan State Board is, on an ongoing basis, to be appointed by the members of the Bipartisan State Board and that the sole authority to remove the Executive Director is vested in the members of the Bipartisan State Board, citing section 4(c) of Session Law 2017-6. The legislative leadership further argues that the provisions of Session Law 2017-6 designating the Executive Director of the Bipartisan State Board represent nothing more than the extension of a pre-existing term of office and that the Governor has mischaracterized the role of the Executive Director, whose authority is limited to "staffing, administration, and execution of the State Board's decisions and orders," quoting section 4(c) of Session Law 2017-6.

[1] "[O]ne of the fundamental principles on which state government is constructed," John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 50 (2d ed. 2013), is that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other," N.C. Const. art. I, § 6. The legislative power is "vested in the General Assembly," N.C Const. art. II, § 1, which "enact[s] laws, within constitutional limits, to protect or promote the health, morals, order, safety, and general welfare of society," *State v. Ballance*, 229 N.C. 764, 769, 51 S.E.2d 731, 734 (1949) (citations omitted); *see also* N.C. Const. art. II, § 20. "The executive power of the State shall be vested in the Governor," N.C. Const. art. III, § 1, who "faithfully executes, or gives effect to, these laws," *McCrory*, 368 N.C. at 635, 781 S.E.2d at 250; *see also* N.C. Const. art. III, § 5(4).[4] Finally, "[t]he judicial power of the State, shall . . . be vested in a Court for the Trial of Impeachments and in a General Court of Justice," N.C. Const. art. IV, § 1, which "interprets the laws and, through its power of judicial review, determines whether they comply with the constitution," *McCrory*, 368 N.C. at 635, 781 S.E.2d at 250; *see also* N.C. Const. art. IV, § 1. *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 6-7 (1787).

"The political question doctrine controls, essentially, when a question becomes 'not justiciable . . . because of the separation of powers provided by the Constitution.' " *Bacon*, 353 N.C. at 717, 549 S.E.2d at 854 (alteration in original) (quoting *Powell v. McCormack*, 395 U.S. 486, 517, 89 S. Ct. 1944, 1961, 23 L. Ed. 2d 491, 514 (1969)). "The . . . doctrine

4. As was the case in *McCrory*, 368 N.C. at 646 n. 5, 781 S.E.2d at 256 n. 5, "[o]ur opinion takes no position on how the separation of powers clause applies to those executive departments that are headed by the independently elected members of the Council of State."

excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the" legislative or executive branches of government. *Id.* at 717, 549 S.E.2d at 854 (alteration in original) (quoting *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230, 106 S. Ct. 2860, 2866, 92 L. Ed. 2d 166, 178 (1986)). "In determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." *Baker v. Carr*, 369 U.S. 186, 210, 82 S. Ct. 691, 706, 7 L. Ed. 2d 663, 682 (1962) (brackets in original) (quoting *Coleman v. Miller*, 307 U.S. 433, 454-55, 59 S. Ct. 972, 982, 83 L. Ed. 1385, 1397 (1939)).

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

Id. at 211, 82 S. Ct. at 706, 7 L. Ed. 2d at 682. In other words, the Court necessarily has to undertake a separation of powers analysis in order to determine whether the political question doctrine precludes judicial resolution of a particular dispute.

The distinction between cases that do and do not involve nonjusticiable political questions can be seen by comparing our decision in *Bacon* with the Court of Appeals' decision in *News & Observer Publishing Co. v. Easley*. In *Bacon*, which involved a challenge to "the constitutionality of the Governor's exercise of his clemency power under Article III, Section 5(6) of the Constitution of North Carolina," 353 N.C. at 698, 549 S.E.2d at 843, this Court stated that "a question may be held nonjusticiable under this doctrine if it involves 'a textually demonstrable constitutional commitment of the issue to a coordinate political department,' " *id.* at 717, 549 S.E.2d at 854 (quoting *Baker*, 369 U.S. at 217, 82 S. Ct. at 710, 7 L. Ed. 2d at 686). As a result of the fact that "Article III, Section 5(6) of the State Constitution expressly commits the substance of the clemency power to the sole discretion of the Governor," we concluded that, "beyond the minimal safeguards applied to state clemency procedures," "judicial review of the exercise of clemency power would unreasonably disrupt a core power of the executive." *Id.* at 717, 549 S.E.2d at 854. On the other hand, in *News & Observer Publishing Co.*, which

also dealt with clemency-related issues, the Court of Appeals concluded that "the question before the Court is whether the [*News & Observer*] is entitled, under the Public Records Law, to certain clemency records within the possession of the Governor," 182 N.C. App. at 19, 641 S.E.2d at 702; determined that "[t]he answer to that question turns not on a political question, but on the meaning of our constitution's proviso that the Governor's power is subject to legislation 'relative to the manner of applying for pardons,' " *id.* at 19, 641 S.E.2d at 702 (quoting N.C. Const. art. III, § 5(6)); and noted that "[t]he principle that questions of constitutional and statutory interpretation are within the subject matter jurisdiction of the judiciary is just as well established and fundamental to the operation of our government as the doctrine of separation of powers," *id.* at 19, 641 S.E.2d at 702 (citations omitted). As a result, in order to resolve the justiciability issue, we must decide whether the Governor is seeking to have the judicial branch interfere with an issue committed to the sole discretion of the General Assembly or whether the Governor is seeking to have the Court undertake the usual role performed by a judicial body, which is to ascertain the meaning of an applicable legal principle, such as that embodied in N.C. Const. art. III, § 5(4).

As the briefs that he has submitted for our consideration clearly reflect, the Governor has not challenged the General Assembly's decision to merge the State Board of Elections and the Ethics Commission into the Bipartisan State Board, which is, as he appears to concede, a decision committed to the sole discretion of the General Assembly. *See* N.C. Const. art. III, § 5(10) (providing that "[t]he General Assembly shall prescribe the functions, powers, and duties of the administrative departments and agencies of the State and may alter them from time to time"). Instead, the Governor has alleged in his complaint that the enactment of Session Law 2017-6 "curtail[ed], in significant ways[, his] executive powers." More specifically, the Governor has alleged that "Session Law 2017-6 violate[s] the separation of powers by preventing the Governor from performing his core function under the North Carolina Constitution to 'take care that the laws be faithfully executed,' " quoting Article III, Section 5(4) of the North Carolina Constitution. As a result, the Governor is not challenging the General Assembly's decision to "prescribe the functions, powers, and duties of the administrative departments and agencies of the State" by merging the State Board of Elections and the Ethics Commission into the Bipartisan State Board and prescribing what the Bipartisan State Board is required or permitted to do; instead, he is challenging the extent, if any, to which the statutory provisions governing the manner in which the Bipartisan State Board is constituted and required to operate pursuant to Session Law 2017-6

impermissibly encroach upon his constitutionally established executive authority to see that the laws are faithfully executed.

As this Court explained in *McCrory*, "the separation of powers clause requires that, as the three branches of government carry out their duties, one branch will not prevent another branch from performing its core functions." 368 N.C. at 636, 781 S.E.2d at 250 (citing *Hart v. State*, 368 N.C. 122, 126-27, 774 S.E.2d 281, 285 (2015)). In that case, this Court considered former Governor McCrory's "challenge [to the constitutionality of] legislation that authorize[d] the General Assembly to appoint a majority of the voting members of three administrative commissions" on the grounds "that, by giving itself the power to appoint commission members, the General Assembly ha[d] usurped Governor McCrory's constitutional appointment power and interfered with his ability to take care that the laws are faithfully executed," *id.* at 636, 781 S.E.2d at 250, and noted that, in order to decide the issues before it in that case, the Court was required to "construe[ ] and appl[y] . . . provisions of the Constitution of North Carolina," *id.* at 638-39, 781 S.E.2d at 252 (citations omitted). Instead of holding that Governor McCrory's challenge to the validity of the legislation in question involved a nonjusticiable political question, we addressed Governor McCrory's claim on the merits.[5]

Our implicit decision that Governor McCrory's claim was justiciable is fully consistent with the literal language contained in Article III, Section 5(10) of the North Carolina Constitution, which refers to "the functions, powers, and duties of the administrative departments and agencies of the State," or, in other words, to what the agencies in question are supposed to do, rather than the extent to which the Governor has sufficient control over those departments and agencies to ensure "that the laws be faithfully executed," N.C. Const. art. III, § 5(4). Alternatively, even if one does not accept this understanding of the scope of the General Assembly's authority under Article III, Section 5(10), we continue to have the authority to decide this case because the General Assembly's authority pursuant to Article III, Section 5(10) is necessarily constrained by the limits placed upon that authority by other constitutional provisions. *See Buckley v. Valeo*, 424 U.S. 1, 132, 96 S. Ct. 612, 688, 46 L. Ed. 2d 659, 752 (1976) (noting that "Congress has plenary authority in all areas in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction") (citation omitted). For this reason,

5. The political question doctrine was not invoked by any party to *McCrory* or explicitly discussed in our opinion.

the Governor's authority to appoint constitutional officers pursuant to Article III, Section 5(8) is subject to the constitutional provisions limiting dual office holding, N.C. Const. art. VI, § 9, and separation of powers, *State ex rel. Wallace*, 304 N.C. at 608, 286 S.E.2d at 888 (holding that the appointment of sitting legislators to membership on administrative commissions constitutes a separation-of-powers violation); the General Assembly's exclusive authority to classify property for taxation-related purposes does not allow more favorable tax classification treatment for one religious organization as compared to another in light of the constitutional guarantees of religious liberty and equal protection, *see* N.C. Const. art. 1, §§ 13 and 19; *Heritage Village Church & Missionary Fellowship, Inc., v. State*, 299 N.C. 399, 406 n. 1, 263 S.E.2d 726, 730 n. 1 (1980); and the General Assembly's exclusive authority to enact criminal statutes, N.C. Const. art. II, § 1 (providing that the legislative power of the State is to be exercised by the General Assembly), does not authorize the enactment of ex post facto laws in violation of Article I, Section 16. As a result, under either interpretation of the relevant constitutional language, the authority granted to the General Assembly pursuant to Article III, Section 5(10)[6] is subject to other constitutional limitations, including the explicit textual limitation contained in Article III, Section 5(4).[7]

In this case, like *McCrory*, the Governor has alleged that the General Assembly "usurped [his] constitutional . . . power and interfered with

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6. The same analysis applies to Article III, Section 11 of the North Carolina Constitution (providing that, "[n]ot later than July 1, 1975, all administrative departments, agencies, and offices of the State and their respective functions, powers, and duties shall be allocated by law among and within not more than 25 principal administrative departments so as to group them as far as practicable according to major purposes"; "[r]egulatory, quasi-judicial, and temporary agencies may, but need not, be allocated within a principal department."

7. Although the legislative leadership has also suggested that the Governor is precluded from seeking relief from the judicial branch for justiciability and exhaustion-related reasons by virtue of the fact that he is entitled, under Article III, Section 5(10) of the North Carolina Constitution, to "make such changes in the allocation of offices and agencies and in the allocation of those functions, powers, and duties as he considers necessary for efficient administration," we do not find this argument persuasive given that the constitutional provision in question deals with the "functions, powers, and duties" of "the administrative departments and agencies of the State" rather than with the extent to which the Governor has the ability to control their operations in order to "take care that the laws be faithfully executed" pursuant to Article III, Section 5(4) of the North Carolina Constitution, and given that such changes become ineffective in the event that they are, prior to adjournment of the relevant legislative session "sine die," "specifically disapproved of by resolution of either house of the General Assembly or specifically modified by joint resolution of both house of the General Assembly."

his ability to take care that the laws are faithfully executed," *id.* at 636, 781 S.E.2d at 250, requiring us, consistent with *McCrory*, to "construe[ ] and appl[y] . . . provisions of the Constitution of North Carolina," *id.* at 638, 781 S.E.2d at 252. In other words, unlike *Bacon*, this case involves a conflict between two competing constitutional provisions. For that reason, this case, like *McCrory*, involves an issue of constitutional interpretation, which this Court has a duty to decide utilizing the manageable judicial standard enunciated in that decision, rather than a nonjusticiable political question arising from nothing more than a policy dispute. *See* N.C. Const. art. IV, § 1. A decision to reach a contrary result would necessarily compel the conclusion that both *McCrory* and *Wallace* were wrongly decided and sharply limit, if not eviscerate, the ability of executive branch officials to advance separation-of-powers claims. As a result, the panel erred by dismissing the Governor's complaint for lack of subject matter jurisdiction.[8]

[2] In order to have standing to maintain this case, the Governor was required to allege that he had suffered an injury as a result of the enactment of Session Law 2017-6 or, in other words, that he had "a personal stake in the outcome of the controversy." *Mangum*, 362 N.C. at 642, 669 S.E.2d at 282 (quoting *Stanley v. Dep't of Conservation & Dev.*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973)) (citing N.C. Const. art. I, § 18). This Court held in *McCrory* that the Governor had standing to challenge the legislation at issue in that case on the grounds that it "interfered with his ability to take care that the laws are faithfully executed." 368 N.C. at 636, 781 S.E.2d at 250. Similarly, as is evidenced by the allegations set out in his complaint, the Governor has clearly asserted the existence of a "personal stake in the outcome of the controversy" in this case. *Mangum*, 362 N.C. at 642, 669 S.E.2d at 282. Simply put, if a sitting Governor lacks standing to maintain a separation-of-powers claim predicated on the theory that legislation impermissibly interferes with the authority constitutionally committed to the person holding that office, we have difficulty ascertaining who would ever have standing to assert such a claim. Apart from their contention that the claim advanced in the Governor's complaint is a nonjusticiable political question, which we have already rejected, the legislative leadership does not appear to explicitly contend

8. The result that we have reached with respect to the political question issue does not amount to a determination that Article III, Section 5(4) of the North Carolina Constitution trumps Article III, Section 5(10) of the North Carolina Constitution. Instead, we believe that these constitutional provisions address different issues and can be harmonized with each other so that each of them is, as should be the case, given independent meaning.

that the Governor lacks the necessary personal stake in the outcome of this controversy to deprive him of standing.[9] As a result, we hold that the panel erred by dismissing Governor Cooper's complaint for lack of standing to the extent that it did so.

[3] Finally, we must address the merits of the Governor's claim that Session Law 2017-6 "unconstitutionally infringe[s] on the Governor's executive powers in violation of separation of powers."[10] "We review constitutional questions de novo." *McCrory*, 368 N.C. at 639, 781 S.E.2d at 252 (citing *Piedmont Triad Reg'l Water Auth. v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001)). "In exercising de novo review, we presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond a reasonable doubt." *Id.* at 639, 781 S.E.2d at 252 (first citing *Hart*, 368 N.C. at 131, 774 S.E.2d at 287-88; then citing *Baker v. Martin*, 330 N.C. 331, 334-35, 410 S.E.2d 887, 889 (1991)). In order to "determine whether the violation is plain and clear, we look to the text of the constitution, the historical context in which the people of North Carolina adopted the applicable constitutional provision, and our precedents." *Id.* at 639, 781 S.E.2d at 252 (citations omitted). A facial

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9. The legislative leadership does assert that the Governor lacks standing to maintain the present action because his alleged injuries did not result from the enactment of Session Law 2017-6. As we understand this argument, the legislative leadership contends that the injury of which the Governor complains was worked by prior legislative enactments rather than by the enactment of Session Law 2017-6. In spite of the fact that certain aspects of the manner in which the Bipartisan State Board is to be selected were reflected in prior statutory provisions, the record clearly shows that the composition of the Bipartisan State Board and the manner in which the members of the Bipartisan State Board and the Executive Director are selected, which is the focus of the Governor's separation of powers claim, resulted from the enactment of Session Law 2017-6 and represented a substantial change from prior law. Thus, we believe that the Governor is, in fact, seeking relief from an alleged injury to his constitutional executive authority stemming from the enactment of Session Law 2017-6 and that effective relief for that injury can be provided in the event that the Governor's constitutional claim proves successful on the merits.

10. In their initial brief, the legislative leadership urged us to refrain from reaching the merits in the event that we rejected their justiciability and standing contentions on the grounds that this Court is an appellate court and that the trial court had not had an opportunity to consider and address the merits of the Governor's challenge to the constitutionality of Session Law 2017-6. In view of our agreement with the legislative leadership that, in virtually all circumstances, this Court benefits from reviewing trial court decisions rather than exercising our supervisory authority in what amounts to a vacuum, we afforded the panel an opportunity to make a determination on the merits in our certification order. Having had the benefit of what is, in any realistic sense, a decision by the panel with respect to the merits of the Governor's claim, we believe that we are now in a position to evaluate the substantive validity of the Governor's challenge to Session Law 2017-6.

challenge to the constitutionality of legislation enacted by the General Assembly, which is the type of challenge asserted in the Governor's complaint, "is the most difficult challenge to mount successfully." *Hart*, 368 N.C. at 131, 774 S.E.2d at 288 (citing *Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009)).

As we have already noted, the North Carolina Constitution, unlike the United States Constitution, contains an explicit separation-of-powers provision. *See* N.C. Const. art. I, § 6 (stating that "[t]he legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other"). For that and other reasons, "the separation of powers doctrine is well established under North Carolina law." *Bacon*, 353 N.C. at 716, 549 S.E.2d at 854 (citing, *inter alia*, *State ex rel. Wallace*, 304 N.C. at 595-601, 286 S.E.2d at 81-84 (stating at 304 N.C. at 595, 286 S.E.2d at 81, that "each of our constitutions has explicitly embraced the doctrine of separation of powers")). As we explained in *McCrory*, separation-of-powers violations can occur "when one branch exercises power that the constitution vests exclusively in another branch" or "when the actions of one branch prevent another branch from performing its constitutional duties." *McCrory*, 368 N.C. at 645, 781 S.E.2d at 256.

This Court has held that Article III, Section 5(4) of the North Carolina Constitution requires "the Governor [to] have enough control over" commissions or boards that "are primarily administrative or executive in character" "to perform his [or her] constitutional duty," *id.* at 645-46, 781 S.E.2d at 256, with the sufficiency of the Governor's "degree of control" "depend[ing] on his [or her] ability to appoint the commissioners, to supervise their day-to-day activities and to remove them from office," *id.* at 646, 781 S.E.2d at 256. In view of the fact that "each statutory scheme" is different, "[w]e cannot adopt a categorical rule that would resolve every separation of powers challenge" and "must resolve each challenge by carefully examining its specific factual and legal context." *Id.* at 646-47, 781 S.E.2d at 257. In holding that the legislation at issue in *McCrory* violated Article III, Section 5(4) of the North Carolina Constitution, we noted that the General Assembly had "appoint[ed] executive officers that the Governor ha[d] little power to remove" and left "the Governor with little control over the views and priorities of the officers that the General Assembly appoint[ed]." *Id.* at 647, 781 S.E.2d at 257.

The test adopted in *McCrory* is functional, rather than formulaic, in nature. Although we did not explicitly define "control" for separation-of-powers purposes in *McCrory*, we have no doubt that the relevant

constitutional provision, instead of simply contemplating that the Governor will have the ability to preclude others from forcing him or her to execute the laws in a manner to which he or she objects, also contemplates that the Governor will have the ability to affirmatively implement the policy decisions that executive branch agencies subject to his or her control are allowed, through delegation from the General Assembly, to make as well. In the absence of such an understanding, the power of an executive branch agency to adopt rules and regulations could be rendered completely nugatory without any separation-of-powers violation having occurred.

The Bipartisan State Board established by Session Law 2017-6, which has responsibility for the enforcement of laws governing elections, campaign finance, lobbying, and ethics, clearly performs primarily executive, rather than legislative or judicial, functions.[11] *See id.* at 646, 781 S.E.2d at 256 (referring to "the final executive authority" that the three commissions at issue in that case "possess[ed]"). The Bipartisan State Board consists of eight members appointed by the Governor, four of whom must be members of the political party with the highest number of registered affiliates selected from a list of nominees provided by the chair of the party in question and four of whom must be members of the political party with the second highest number of registered affiliates selected from a list of nominees provided by the chair of the party in question. Ch. 6, sec. 4(c), 2017-2 N.C. Adv. Legis. Serv. at 23 (enacting N.C.G.S. § 163A-2 (2017)). In addition, Session Law 2017-6, like the

11. The basic functions, powers, and duties that the Bipartisan State Board is required to perform are, of course, outlined in statutory provisions enacted by the General Assembly. The General Assembly did not, however, make all of the policy-related decisions needed to effectively administer the election, campaign finance, lobbying, and ethics laws. Instead, consistent with much modern legislation, the General Assembly has delegated to the members of the Bipartisan State Board the authority to make numerous discretionary decisions, including, but not limited to, the extent to which particular administrative rules and regulations should be adopted, N.C.G.S. § 163-22(a) and N.C.G.S. § 163-22.2; the extent to which jurisdiction should be asserted over election-related protests pending before county boards of elections, N.C.G.S. § 163-182.12; and the number and location of the early voting sites to be established in each county and the number of hours during which early voting will be allowed at each site, N.C.G.S. § 163-227.2. As a result, the General Assembly has, in the exercise of its authority to delegate the making of interstitial policy decisions to administrative agencies, given decision making responsibilities to the executive branch by way of the Bipartisan State Board. We refer to the ability of the executive branch to make these discretionary determinations as the effectuation of "the Governor's policy preferences" throughout the remainder of this opinion. The use of this expression should not be understood as suggesting that the Bipartisan State Board has the authority to make any policy decision that conflicts with or is not authorized by the General Assembly, subject to applicable constitutional limitations.

legislation governing the agencies at issue in *McCrory*, precludes the Governor from removing members of the Bipartisan State Board in the absence of "misfeasance, malfeasance, or nonfeasance," *id.*, at 24 (enacting N.C.G.S. § 163A-2(c) (2017)); *see McCrory*, 368 N.C. at 646, 781 S.E.2d at 257 (stating that "the challenged legislation sharply constrains the Governor's power to remove members of any of the three commissions, allowing him to do so only for cause") and limits the ability of persons who share the Governor's policy preferences to supervise the day-to-day activities of the Bipartisan State Board, at least in the short term, by ensuring that no one could be appointed to the position of Executive Director other than the General Assembly's appointee until May 2019. As was the case in *McCrory*, in which we determined that the General Assembly had exerted excessive control over certain executive agencies by depriving the Governor of "control over the views and priorities" of a majority of the members of the commissions at issue in that litigation, 368 N.C. at 647, 781 S.E.2d at 257, we conclude that the relevant provisions of Session Law 2017-6, when considered as a unified whole, "leave[ ] the Governor with little control over the views and priorities" of the Bipartisan State Board, *id.* at 647, 781 S.E.2d at 257, by requiring that a sufficient number of its members to block the implementation of the Governor's policy preferences be selected from a list of nominees chosen by the leader of the political party other than the one to which the Governor belongs,[12] limiting the extent to which individuals supportive of the Governor's policy preferences have the ability to supervise the activities of the Bipartisan State Board, and significantly constraining the Governor's ability to remove members of the Bipartisan State Board.

In seeking to persuade us to reach a different result, the legislative leadership has advanced a number of arguments, each of which we

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12. We are, of course, unable to conclude with absolute certainty that persons chosen by the chair of the opposing political party will invariably and in all instances act to thwart the Governor's policy preferences at every turn. However, we do not believe that the applicable standard of review, including the presumption of constitutionality, requires us to turn a blind eye to the functions appropriately performed by the leader of an opposition party in our system of government or to force the Governor to be subject to the uncertainty that will necessarily arise from a determination that the showing of an actual interference with the Governor's executive authority is a necessary prerequisite to his or her ability to challenge legislation as violative of Article III, Section 5(4) of the North Carolina Constitution. Utilizing similar logic, the Court held in *McCrory* that the Governor lacked sufficient control over the administrative commissions at issue in that case based upon the fact that a majority of appointments had been made by the members of the General Assembly. 368 N.C. at 647, 781 S.E.2d at 248. As a result, our decision in this case is fully consistent with the applicable standard of review.

have carefully considered. Among other things, the legislative leadership asserts that the General Assembly has not retained ongoing supervision or control over the Bipartisan State Board given that none of its members are either legislators, as was the case in *Wallace*, or legislative appointees, as was the case in *McCrory*. This argument rests upon an overly narrow reading of *McCrory*, which focuses upon the practical ability of the Governor to ensure that the laws are faithfully executed rather than upon (1) the exact manner in which his or her ability to do so is impermissibly limited or (2) whether the impermissible interference stems from (a) direct legislative supervision or control or from (b) the operation of some other statutory provision. Put another way, the separation-of-powers violations noted in *Wallace* and *McCrory* do not constitute the only ways in which the Governor's obligation to "faithfully execute the laws" can be the subject of impermissible interference. Instead, as *McCrory* clearly indicates, the relevant issue in a separation-of-powers dispute is whether, based upon a case-by-case analysis of the extent to which the Governor is entitled to appoint, supervise, and remove the relevant executive officials, the challenged legislation impermissibly interferes with the Governor's ability to execute the laws in any manner.

The General Assembly does, of course, have the authority pursuant to Article III, Section 5(10) of the North Carolina Constitution to specify the number of members of an executive branch commission. Moreover, the General Assembly clearly has the authority to establish qualifications for commission membership, to make certain persons ex officio members of the commission, and to mandate that differing policy preferences be reflected in the commission's membership.[13] Similarly, the General Assembly has the undoubted authority to prescribe the commission's functions, powers and duties and to determine the substance of the laws and policies that the commission is called upon to execute. Finally, the General Assembly has the authority to provide the commission with a reasonable degree of independence from short-term political interference[14] and to foster the making of independent, non-partisan decisions.

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13. Our holding in this case does not hinge upon the fact that the General Assembly has required that half of the members of the Bipartisan State Board be members of a political party other than that to which the Governor belongs; instead, our decision rests upon the totality of the limitations imposed upon the Governor's appointment, supervisory, and removal authority set out in Session Law 2017-6.

14. The Court noted in *McCrory* that the General Assembly "insulate[d] the Coal Ash Management Commission from executive branch control even more by requiring the commission to exercise its powers and duties 'independently,' without the 'supervision, direction, or control' of the Division of Emergency Management or the Department of Public

All of these determinations are policy-related decisions committed to the General Assembly rather than to this Court. The General Assembly cannot, however, consistent with the textual command contained in Article III, Section 5(4) of the North Carolina Constitution, structure an executive branch commission in such a manner that the Governor is unable, within a reasonable period of time, to "take care that the laws be faithfully executed" because he or she is required to appoint half of the commission members from a list of nominees consisting of individuals who are, in all likelihood, not supportive of, if not openly opposed to, his or her policy preferences while having limited supervisory control over the agency and circumscribed removal authority over commission members. An agency structured in that manner "leaves the Governor with little control over the views and priorities of the [majority of] officers" and prevents the Governor from having "the final say on how to execute the laws." *McCrory*, 368 N.C. at 647, 781 S.E.2d at 257. As a result, the manner in which the membership of the Bipartisan State Board is structured and operates under Session Law 2017-6 impermissibly, facially, and beyond a reasonable doubt interferes with the Governor's ability to ensure that the laws are faithfully executed as required by Article III, Section 5(4) of the North Carolina Constitution. *Id.*

[4] In addition to challenging the validity of the provisions of Session Law 2017-6 governing the composition of the Bipartisan State Board, the Governor has also challenged the statutory provisions "creat[ing] the position of Executive Director of the [Bipartisan] State Board" and making the Executive Director, who is designated as the "chief State elections official," "responsible for staffing, administration, and execution of the State Board's decisions and orders" and for performing "such other responsibilities as may be assigned by the State Board." Ch. 6, sec. 4(c), 2017-2 N.C. Adv. Legis. Serv. at 26 (enacting N.C.G.S § 163A-6 (a), (c), (d) (2017)). Although the General Assembly appointed the individual then serving as the Executive Director of the State Board of Elections to be the Executive Director of the Bipartisan State Board for a term of office lasting until at least May 2019, *see id.*, sec. 17, at 34, the Bipartisan State Board is entitled to appoint an Executive Director by a majority vote after that point, N.C.G.S. § 163A-6 (2017). As a result, the relevant provisions of Session Law 2017-6 ensure that the Governor will not have

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Safety." 368 N.C. at 646, 781 S.E.2d at 257. Needless to say, we did not hold in *McCrory*, and do not hold now, that the entire concept of an "independent" agency is totally foreign to North Carolina constitutional law. Instead, the degree of independence with which an agency is required to operate is simply a factor that must be considered in making the required separation-of-powers determination.

any control over the identity of the Executive Director of the Bipartisan State Board until May 2019 and, perhaps, even after that time, given the manner in which the General Assembly has structured the membership of the Bipartisan State Board in Session Law 2017-6, *id.* § 163A-2.

Although the legislative leadership argues that, rather than appointing the Executive Director of the Bipartisan State Board, the General Assembly simply extended the term of the Executive Director of the State Board of Elections, we do not find that argument persuasive. As an initial matter, given that Session Law 2017-6 abolished the State Board of Elections, the position of Executive Director of that body no longer exists. Instead, Session Law 2017-6 expressly "create[s] the position of Executive Director of the [Bipartisan] State Board," *id.* § 163-6(a), clearly indicating that the position of Executive Director of the Bipartisan State Board is a new office rather than the continuation of an existing one. In addition, given the General Assembly's decision to combine the functions previously performed by the State Board of Elections and the Ethics Commission into the functions to be performed by a single agency, the duties assigned to the Executive Director of the Bipartisan State Board are necessarily more extensive than the duties assigned to the Executive Director of the State Board of Elections. *See* Ch. 6, sec. 4(c), at 26 (enacting N.C.G.S. § 163A-1 (2017)). As a result, we cannot agree that the General Assembly's decision to designate the Executive Director of the State Board of Elections as the Executive Director of the Bipartisan State Board constitutes nothing more than the exercise of the General Assembly's authority to extend the term of an existing officeholder in order to achieve some valid public policy goal.

As the Bipartisan State Board is structured in Session Law 2017-6, the General Assembly's decision to appoint the Executive Director of the Bipartisan State Board and to preclude the Bipartisan State Board from either selecting a new Executive Director prior to May 2019 or removing the Executive Director in the absence of "cause," N.C.G.S. § 163A-6(b), could impermissibly constrain the Governor's ability to ensure that the laws are faithfully executed. *See McCrory*, 368 N.C. at 645-46, 781 S.E.2d at 256-57. On the other hand, in the event that the membership of the Bipartisan State Board is structured in such a manner as to pass constitutional muster under Article III, Section 5(4) of the North Carolina Constitution and the Board is given adequate control over the manner in which the duties assigned to the Executive Director are performed, the Bipartisan State Board's ability to supervise and control the actions of the Executive Director might suffice to give the Governor adequate control over the Executive Director's activities, which appear to be

primarily administrative in nature,[15] for separation-of-powers purposes. For that reason, an interim appointment to the position of Executive Director of the Bipartisan State Board made by the General Assembly for a limited term might not constitute a separation-of-powers violation in the event that the Governor otherwise has sufficient control over the Bipartisan State Board. For that reason, given our determination that, in light of the totality of the circumstances, the manner in which the members of the Bipartisan State Board must be selected pursuant to Session Law 2017-6 is constitutionally invalid, we need not reach the issue of whether the provisions governing the selection of the Executive Director constitute a separate violation of Article III, Section 5(4) of the North Carolina Constitution at this time and decline to do so.

[5] Finally, the Governor has questioned the validity of the provisions of Session Law 2017-6 requiring that the office of the chair of the Bipartisan State Board be rotated between the state's two largest political parties and the provisions of Session Law 2017-6 restructuring the county boards of elections. Among other things, the Governor contends that the restructuring of the county boards of elections worked by Session Law 2017-6 "interferes with the executive function by creating deadlocked structures" and argues that the manner in which the county boards of elections are structured, coupled with the similar provisions governing the structure of the Bipartisan State Board, are likely to have the effect

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15. In seeking to persuade us to hold that the provisions of Session Law 2017-6 governing the appointment of the Executive Director, standing alone, work a separation-of-powers violation, the Governor has pointed to a number of statutory provisions assigning various responsibilities to the Executive Director and argued that his lack of control over the manner in which the Executive Director carries out these responsibilities impermissibly impairs his ability to ensure that the laws are faithfully executed. A number of these statutory provisions, including those portions of N.C.G.S. § 163-23 requiring the Executive Director to notify candidates and treasurers of the dates by which certain reports must be filed, that required reports had not been filed in a timely manner, and that certain complaints had been filed, and the provision of N.C.G.S. § 163-278.24 requiring the Executive Director to examine each report to determine if it complies with the relevant legal requirements, strike us as primarily ministerial, rather than discretionary, in nature. Although other statutory provisions do, as the Governor suggests, appear to authorize the Executive Director to take action that is discretionary in nature, *see, eg.*, N.C.G.S. § 163-271 (authorizing the Executive Director to take action in the event that certain emergencies affecting the holding of an election have occurred); N.C.G.S. § 163-132.4 (authorizing the Executive Director to promulgate directives to county boards of election); and N.C.G.S. § 163-278.23 (authorizing the Executive Director to issue written advisory opinions concerning campaign finance issues upon which candidates and treasurers are entitled to rely), the scope of the Executive Director's authority to engage in these actions may well be limited by other statutory provisions, including, for example, N.C.G.S. § 163A-6(c), which makes the Executive Director "responsible for staffing, administration, and execution of the [Bipartisan] State Board's decisions and orders" and "perform[ing] such other responsibilities as may be assigned by the [Bipartisan] State Board."

of thwarting the implementation of any particular Governor's election law-related policy preferences given that both boards will have a sufficient number of members who are unlikely to share the Governor's policy views to preclude the implementation of his or her preferred method of executing the elections laws. Although we agree that the provisions of Session Law 2016-7 governing the selection of the chair of the Bipartisan State Board and the manner in which the county boards of elections are structured have the effect of compounding the separation-of-powers violation which we have identified earlier in this opinion, we further note that the Governor has not argued before this Court that either of these sets of provisions, taken in isolation, work an independent separation-of-powers violation. In light of the manner in which the Governor has argued these issues before this Court and our decision to invalidate the provisions of Session Law 2017-6 relating to the composition of the Bipartisan State Board, we express no opinion concerning the extent, if any, to which an independent separation-of-powers challenge relating to provisions of Session Law 2017-6 governing the rotation of the office of chair of the Bipartisan State Board among the two largest political parties or the provisions of Session Law 2017-6 governing the composition of the county boards of elections would have merit.

[6] As we have already noted, the General Assembly noted an appeal from the temporary restraining order that the panel entered following the filing of the Governor's complaint. However, given that this temporary restraining order was dissolved relatively shortly after its entry, any decision that we might make with respect to its validity "cannot have any practical effect on the existing controversy." *Roberts v. Madison Cty Realtors Ass'n*, 344 N.C. 394, 398-399, 474 S.E.2d 783, 787 (1996). Moreover, since we conclude that the issues that had to be addressed during the proceedings leading to the entry of the challenged temporary restraining order are unlikely to recur, we do not believe that the legislative leadership's challenge to the entry of the temporary restraining order is "capable of repetition, yet evading review." *See Shell Island Homeowners Ass'n v. Tomlinson*, 134 N.C. App. 286, 292, 517 S.E.2d 401, 405 (1999) (stating that "[a]n otherwise moot claim falls within this exception where '(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again' " (quoting *Ballard v. Weast*, 121 N.C. App. 391, 394, 465 S.E.2d 565, 568 (alterations in the original), *appeal dismissed and disc. rev. denied*, 343 N.C. 304, 471 S.E.2d 66 (1996))). Similarly, given that the temporary restraining order has been dissolved and that we have decided the Governor's constitutional claim on the

merits, we are not persuaded that a decision to address the legislative leadership's challenge to the temporary restraining order would, at this point, serve the "public interest." *Cape Fear River Watch v. N.C. Envtl. Mgmt. Comm'n*, 368 N.C. 92, 100, 772 S.E.2d 445, 450 (2015) (declining to reach the merits of an obviously significant issue relating to the regulatory treatment of coal ash lagoons because any decision to do so would not "have any practical impact"). For all of these reasons, the legislative leadership's appeal from the temporary restraining order is dismissed as moot.

Thus, we hold that the panel erred by dismissing the Governor's complaint. Simply put, the claim asserted in the Governor's complaint does not raise a nonjusticiable political question, and the Governor clearly has standing to assert the claim that he has presented for consideration by the judicial branch. In addition, for the reasons set forth in more detail above, the provisions of Session Law 2017-6 concerning the membership of and appointments to the Bipartisan State Board, taken in context with the other provisions of that legislation, impermissibly interfere with the Governor's ability to faithfully execute the laws in violation of Article III, Section 5(4) of the North Carolina Constitution. Finally, the legislative leadership's appeal from the 28 April 2017 temporary restraining order is moot and does not come within the proper scope of either of the exceptions to the mootness doctrine upon which the legislative leadership relies. As a result, (1) the panel's 1 June 2017 order is reversed, with this case being remanded to the panel for further proceedings not inconsistent with this opinion, including the entry of a final judgment on the merits, and (2) the legislative leadership's appeal from the 28 April 2017 temporary restraining order is dismissed as moot.

ORDER ENTERED ON 1 JUNE 2017 REVERSED AND REMANDED; APPEAL FROM ORDER ENTERED ON 28 APRIL 2017 DISMISSED AS MOOT.

Chief Justice MARTIN dissenting.

The majority opinion imposes a constitutional requirement that the Governor be able to appoint a majority of the members of the Bipartisan State Board of Elections and Ethics Enforcement from his own political party. In so doing, the majority deviates from our holding in *State ex rel. McCrory v. Berger*, 368 N.C. 633, 781 S.E.2d 248 (2016). Because the majority opinion impermissibly constrains the General Assembly's constitutional authority to determine the structure of state administrative bodies, I respectfully dissent.

We must resolve every separation of powers challenge "by carefully examining its specific factual and legal context." *Id.* at 646-47, 781 S.E.2d at 257. The type of separation of powers violation that the Governor alleges here occurs "when the actions of one branch prevent another branch from performing its constitutional duties." *Id.* at 645, 781 S.E.2d at 256 (citing *Bacon v. Lee*, 353 N.C. 696, 715, 549 S.E.2d 840, 853, *cert. denied*, 533 U.S. 975, 122 S. Ct. 22 (2001)). When this type of violation is alleged, we must determine whether the Governor has "enough control" over administrative bodies that have final executive authority to be able to perform his constitutional duties. *Id.* at 646, 781 S.E.2d at 256. *McCrory* set forth a functional analysis to be applied in this context, one that focuses not on the precise mechanism by which the Governor's power is allegedly interfered with but instead on the extent to which the challenged legislation limits the Governor's ability to perform a core executive duty. *See id.* at 645-47, 781 S.E.2d at 256-57.

To determine whether the Governor had "enough control" under the circumstances of *McCrory,* we noted several aspects of that case that were relevant to our analysis. There, each commission created by the challenged legislation—specifically, the Coal Ash Management Commission, the Mining Commission, and the Oil and Gas Commission—"ha[d] final authority over executive branch decisions." *Id.* at 645, 781 S.E.2d at 256. The General Assembly appointed a majority of the voting members of each of the three commissions. *See id.* at 646, 781 S.E.2d at 256. And the challenged legislation allowed the Governor to remove commission members only for cause. *Id.* at 646, 781 S.E.2d at 257. By having majority control over commissions with final executive authority, the General Assembly prevented the Governor from performing his constitutional duty to take care that the laws be faithfully executed, and the General Assembly retained too much control over that power through its legislative appointments. *Id.* at 647, 781 S.E.2d at 257 (citing *Bacon*, 353 N.C. at 717-18, 549 S.E.2d at 854; and *State ex rel. Wallace v. Bone*, 304 N.C. 591, 608, 286 S.E.2d 79, 88 (1982)); *see also* N.C. Const. art. III, § 5(4) ("The Governor shall take care that the laws be faithfully executed.").

McCrory therefore clarified that the Governor must have "enough control" over a body with final executive authority, such as by an appropriate combination of appointment and removal powers, to ensure that the laws are faithfully executed. Contrary to what the majority suggests, however, *McCrory* did not mandate that the Governor be able to appoint a *majority* of voting members who share his views and priorities to every executive branch board or commission. Nor did it say that the Governor himself had to have "the final say on how to execute the

laws." *Cf. McCrory*, 368 N.C. at 647, 781 S.E.2d at 257 (referring to "a *commission* that has the final say on how to execute the laws" (emphasis added)). As the majority says, *McCrory* did essentially hold that legislation is unconstitutional when it "leaves the Governor with little control over the views and priorities of the [majority of] officers" on an executive branch board or commission, at least when (as in *McCrory*) only one other appointing authority is selecting that entire majority. *See id.* at 647, 781 S.E.2d at 257. But that is just another way of saying that, in that circumstance, the Governor may not be left with a *minority* of appointees.

In this case, even if having to appoint half of the members of the Bipartisan State Board from a list provided by the chair of the opposition party is tantamount to those members being appointed by someone else, that still leaves the Governor with the ability to appoint *half* of the members from his own party—not a minority. The majority purports to simply apply *McCrory* but, like a funhouse mirror, distorts it instead.

As the three-judge panel recognized, Session Law 2017-6 gives the Governor enough control over the Board to avoid violating the separation of powers clause. "Enough control" does not mean unlimited or unbridled control. It does not necessarily mean majority control, either. It simply means that the Governor must not be compelled to enforce laws while having little or no control over how that enforcement occurs. *See id.* at 647, 781 S.E.2d at 257. Here, the Board requires an affirmative vote of five of its members to take any action, Act of Apr. 11, 2017, ch. 6, sec. 4(c), 2017-2 N.C. Adv. Legis. Serv. 21, 25 (LexisNexis) (codified at N.C.G.S. § 163A-3(c) (2017)), and the Governor has enough control over the Board because he appoints half of its members from his own political party, *see id.* at 23 (codified at N.C.G.S. § 163A-2(a) (2017)). This means that the Board may not take any action without at least one vote of a member appointed by the Governor from his own party. At least one of those appointees, in other words, will cast the deciding vote when the Board is otherwise divided along party lines. Conversely, the four appointees from the Governor's party can veto any action that the opposition-party members of the Board otherwise want to take.[1]

1. To the extent that the Governor argues that the structure of the Bipartisan State Board makes it likely to deadlock rather than reach a five-vote consensus, this argument is speculative and therefore not appropriate for consideration on a facial challenge. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-50, 128 S. Ct. 1184, 1190 (2008) ("In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases."); *accord Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009).

Additionally, the Governor has the exclusive power to remove members of the Bipartisan State Board for misfeasance, malfeasance, or nonfeasance. *See id.* at 24 (codified at N.C.G.S. § 163A-2(c) (2017)). Although this is the same amount of removal power that the Governor had in *McCrory*, *see* 368 N.C. at 637-38, 781 S.E.2d at 251, and although it is limited to for-cause instances, this removal power is robust enough to address any concerns peculiar to this Board—namely, that Board members could violate the public trust by using their official positions for obviously malicious or purely partisan purposes. *See Malfeasance*, *Black's Law Dictionary* (10th ed. 2014) ("A wrongful, unlawful, or dishonest act; esp., wrongdoing or misconduct by a public official . . . ."). Giving the Governor the power to remove members *without* cause, moreover, would leave the Board open to political coercion. *Cf. Wiener v. United States*, 357 U.S. 349, 353, 355-56, 78 S. Ct. 1275, 1278, 1279 (1958) (reasoning that the War Claims Commission's need for insulation from political coercion weighed in favor of the President being able to remove Commission members only for cause).[2]

Let's not lose sight of the Board's purpose, which is to administer elections and adjudicate ethics complaints. The structure and makeup of the Board requires members to cooperate in a bipartisan way before taking any official action and encourages neutrality and fairness.[3] But,

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2. The majority also argues that, by selecting the most recent Executive Director of the prior State Board of Elections to be an interim Executive Director of the Bipartisan State Board until May 2019, Session Law 2017-6 "limits the ability of persons who share the Governor's policy preferences to supervise the day-to-day activities of the Bipartisan State Board." But the Executive Director does not supervise the Bipartisan State Board; in fact, the opposite is true. *See* Act of Apr. 11, 2017, ch. 6, sec. 4(c), 2017-2 N.C. Adv. Legis. Serv. 21, 26 (LexisNexis) (codified at N.C.G.S. § 163A-6(c) (2017)) (noting that the Executive Director is responsible for "staffing, administration, and execution *of the [Bipartisan] State Board's decisions and orders*," and also "perform[s] such other responsibilities *as may be assigned by the [Bipartisan] State Board*" (emphases added)). The majority seems to recognize this very fact when it concedes that the "Executive Director's activities . . . appear to be primarily administrative in nature."

3. Preserving confidence in the political neutrality and operational independence in the administration of elections is essential. *See Purcell v. Gonzalez*, 549 U.S. 1, 4, 127 S. Ct. 5, 7 (2006) (per curiam) ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy."); cf. Christopher S. Elmendorf, *Election Commissions and Electoral Reform: An Overview*, 5 Election L.J. 425, 425 (2006) (describing the recent interest in creating "politically insulated bodies to administer elections" to avoid partisan favoritism during those elections); Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 Wash. & Lee L. Rev. 937, 978-89 (2005) (describing recent electoral controversies in the United States and advocating for nonpartisan election administration). The "specific factual . . . context" of *McCrory*—which involved complex areas of

strangely, the majority opinion constitutionalizes a *partisan* makeup of the Bipartisan State Board, which threatens to inject political gamesmanship into the implementation of our election and ethics laws and undermines the neutrality inherent in an evenly divided bipartisan composition.

Indeed, in light of today's holding, the Federal Election Commission—which is the closest federal analogue to the Bipartisan State Board—would be unconstitutional under North Carolina law. The FEC is composed of six voting members, no more than three of whom may be from the same political party, and the voting members are appointed by the President and confirmed by the Senate. *See* 52 U.S.C. § 30106(a) (Supp. III 2015). Does the majority really believe that our state constitution prohibits neutral, bipartisan election boards?

It is beyond question that the courts should have "neither FORCE nor WILL but merely judgment." *United States v. Hatter*, 532 U.S. 557, 568, 121 S. Ct. 1782, 1791 (2001) (quoting *The Federalist* No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). "Our constitutionally assigned role is limited to a determination of whether the legislation is plainly and clearly prohibited by the constitution." *Hart v. State*, 368 N.C. 122, 127, 774 S.E.2d 281, 285 (2015); *see also Baker v. Martin*, 330 N.C. 331, 334, 410 S.E.2d 887, 889 (1991) (explaining that legislation will not be invalidated unless it is unconstitutional "beyond reasonable doubt" (quoting *Gardner v. City of Reidsville*, 269 N.C. 581, 595, 153 S.E.2d 139, 150 (1967))); *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989) ("[This Court] will not lightly assume that an act of the legislature violates the . . . Constitution . . . ."). By contrast, the General Assembly acts as the "arm of the electorate," *McCrory*, 368 N.C. at 639, 781 S.E.2d at 252 (quoting *Pope v. Easley*, 354 N.C. 544, 546, 556 S.E.2d 265, 267 (2001) (per curiam)), and is constitutionally empowered to organize the departments and agencies of our state government, *see* N.C. Const. art. II, § 1; *id.* art. III, § 5(10); *see also Wallace*, 304 N.C. at 595-96, 286 S.E.2d at 82. The General Assembly could, of course, choose to give the Governor the ability to appoint a majority of appointees, without any constraints, to any given executive branch board or commission. But doing so is the prerogative of the General Assembly, not of the courts. *See In re Alamance Cty. Ct. Facils.*, 329 N.C. 84, 95, 405 S.E.2d 125, 130 (1991) ("The courts have absolutely no authority to

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state environmental regulation—called for a substantial degree of executive oversight and policy discretion. *McCrory*, 368 N.C. at 646-47, 781 S.E.2d at 257. But the specific factual context of this case—which involves administration of election and ethics laws—calls for neutrality and independence.

control or supervise the power vested by the Constitution in the General Assembly as a coordinate branch of the government." (quoting *Person v. Bd. of State Tax Comm'rs*, 184 N.C. 499, 503, 115 S.E. 336, 339 (1922))).

I would hold that, by giving the Governor appointment and removal power over Bipartisan State Board members, and by allowing the Governor to appoint half of those members from his own political party, the General Assembly has satisfied the requirements established by our constitution. *See Hart*, 368 N.C. at 126, 774 S.E.2d at 284 ("If constitutional requirements are met, the wisdom of the legislation is a question for the General Assembly."); *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891 (1961) ("The wisdom and expediency of a statute is for the legislative department, when acting entirely within constitutional limits."). The majority instead constitutionalizes a requirement that the Governor be able to appoint a majority of Bipartisan State Board members from his own political party—to a board responsible for administering our state's election and ethics laws, no less.[4] By doing so, this Court has encroached on the General Assembly's constitutional authority and placed the courts in the position of micromanaging the organization and reorganization of state government. Our decision in *McCrory* does not compel this result, and the prudential exercise of our limited role counsels against it. "Just as the legislative and executive branches of government are expected to operate within their constitutionally defined spheres, so must the courts." *Hart*, 368 N.C. at 126, 774 S.E.2d at 285.[5] I therefore respectfully dissent.

Justice JACKSON joins in this dissenting opinion.

Justice NEWBY dissenting.

This case presents the question of whether the General Assembly has the authority to create an independent, bipartisan board to administer the laws of elections, ethics, lobbying, and campaign finance. Because the state constitution expressly commits this specific power to the legislative branch, this Court lacks the authority to intervene;

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4. As the three-judge panel warned, giving the Governor the degree of control that he seeks will prevent the board from functioning like the former State Board of Elections did—as "an independent regulatory and quasi-judicial agency."

5. I share Justice Newby's concerns about the breadth of the majority opinion and its implications for judicial encroachment on the role of the General Assembly under "our tripartite system of government." *Bacon*, 353 N.C. at 712, 549 S.E.2d at 851. I see these concerns as properly addressed in the context of analyzing the merits of the case.

the issue presents a nonjusticiable political question. In exercising judicial power under these circumstances, this Court violates the very separation-of-powers principle it claims to protect. The Court strips the General Assembly of its historic, constitutionally prescribed authority to make the laws and creates a novel and sweeping constitutional power in the office of Governor—the authority to implement personal policy preferences. In doing so, the Court ignores the carefully crafted, express constitutional roles of the political branches and boldly inserts the judiciary into the political, legislative process. If the Court should reach the merits, I would agree with the analysis of Chief Justice Martin's dissent; however, because the trial court correctly held that this case presents a nonjusticiable political question, I dissent separately.

Under the state constitution, the General Assembly considers various policy alternatives, and those measures enacted become the laws. The Governor may influence the lawmaking process and can even veto a measure. Nevertheless, once the General Assembly passes a law, the constitution requires the Governor to "faithfully" execute "the laws." "The laws" are not the Governor's policy preferences, but are those measures enacted by the General Assembly.

I.

The idea of the judiciary preventing the legislature, through which the people act, from exercising its power is the most serious of judicial considerations. *State ex rel. McCrory v. Berger*, 368 N.C. 633, 650, 781 S.E.2d 248, 259 (2016) (Newby, J., concurring in part and dissenting in part). As the agent of the people's sovereign power, *State ex rel. Ewart v. Jones*, 116 N.C. 570, 570, 21 S.E. 787, 787 (1895), the General Assembly has the presumptive power to act, *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989) ("[G]reat deference will be paid to acts of the legislature—the agent of the people for enacting laws."). Possessing plenary power, the General Assembly is only limited by the express terms of the constitution. *McIntyre v. Clarkson*, 254 N.C. 510, 515, 119 S.E.2d 888, 891-92 (1961).

When this Court strikes down an act of the General Assembly, it prevents an act of the people themselves. *Baker v. Martin*, 330 N.C. 331, 336-37, 410 S.E.2d 887, 890 (1991); *see also McIntyre*, 254 N.C. at 515, 119 S.E.2d at 891 ("The courts will not disturb an act of the law-making body unless it runs counter to a constitutional limitation or prohibition.").[1] A

1. *See, e.g.*, *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 189, 581 S.E.2d 415, 429 (2003) ("By seeking to curb unlawful discrimination by regulating covered

constitutional limitation upon the General Assembly must be expressed in the constitutional text. *Preston*, 325 N.C. at 448-49, 385 S.E.2d at 478 ("All power which is not expressly limited by the people in our State Constitution remains with the people, and an act of the people through their representatives in the legislature is valid unless prohibited by that Constitution." (citations omitted)). Thus, a claim that a law is unconstitutional must surmount the high bar imposed by the presumption of constitutionality and meet the highest quantum of proof, a showing that the statute is unconstitutional beyond a reasonable doubt. *Baker*, 330 N.C. at 334-37, 410 S.E.2d at 889-90.

II.

Since 1776 our constitutions have recognized that all political power resides in the people, N.C. Const. art. I, § 2; N.C. Const. of 1868, art. I, § 2; N.C. Const. of 1776, Declaration of Rights § I, and is exercised through their elected officials in the General Assembly, N.C. Const. art. II, § 1; N.C. Const. of 1868, art. II, § 1; N.C. Const. of 1776, § I. *See Jones*, 116 N.C. at 570, 21 S.E. at 787; *see also* John V. Orth & Paul Martin Newby, *The North Carolina State Constitution* 95 (2d ed. 2013) [hereinafter *State Constitution*] ("The legislative power is vested in the General Assembly, so called because all the people are present there in the persons of their representatives."). The structure of the bicameral legislative branch itself diffuses its power, *see McCrory*, 368 N.C. at 653, 781 S.E.2d at 261, and the people themselves limit legislative power by express constitutional prohibitions, *see Baker*, 330 N.C. at 338-39, 410 S.E.2d at 891-92.

Accountable to the people, N.C. Const. art. II, §§ 3, 5, through the most frequent elections, *id.* art. II, §§ 2, 4, "[t]he legislative branch of government is without question 'the policy-making agency of our government . . . . The General Assembly is the 'policy-making agency' because it

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employers, the enabling legislation and the Ordinance have the practical effect of regulating labor, as forbidden by Article II, Section 24."); *State v. Elam*, 302 N.C. 157, 160, 273 S.E.2d 661, 664 (1981) (noting that the General Assembly "was without authority to enact G.S. 15A-1446(d)(6) [affecting appellate rules]," as doing so violated Article IV, Section 13(2), providing that "[t]he Supreme Court shall have exclusive authority to make rules of practice and procedure for the Appellate Division" (second alteration in original) (quoting N.C. Const. art. IV, § 13(2))); *Sir Walter Lodge, No. 411, I.O.O.F. v. Swain*, 217 N.C. 632, 637-38, 9 S.E.2d 365, 368-69 (1940) (General Assembly exceeded its power under Article V, Section 5 to grant tax exemptions for property held for certain purposes.); *Bayard v. Singleton*, 1 N.C. (Mart.) 5, 6-7 (1787) (Statute directing that suits brought by claimants of property confiscated during the American Revolution should be dismissed exceeded General Assembly's lawmaking power, as it denied the right to trial by jury guaranteed under Section IX of the Declaration of Rights in the North Carolina Constitution of 1776.).

is a far more appropriate forum than the courts for implementing policy-based changes to our laws," *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004) (quoting *McMichael v. Proctor*, 243 N.C. 479, 483, 91 S.E.2d 231, 234 (1956)). *See also McCrory*, 368 N.C. at 653, 781 S.E.2d at 261 ("The diversity within the [legislative] branch . . . ensures healthy review and significant debate of each proposed statute, the enactment of which frequently reaches final form through compromise.").

Article III vests primary executive power with the Governor. N.C. Const. art. III, § 1. Though each of our state constitutions has placed executive power in the Governor generally, *id.* art. III, § 1; N.C. Const. of 1868, art. III, §§ 1, 4; N.C. Const. of 1776, § XIX, the constitutional powers of the executive have always been divided among various officials, N.C. Const. art. III, §§ 7(1)-(2), 8, with the Governor acting as chief executive, *id.* art. III, §§ 1, 5, within a multimember executive branch. *See McCrory*, 368 N.C. at 655-57, 781 S.E.2d at 262-63.

Unlike the General Assembly, the Governor historically has only those powers expressly granted by the constitution. *E.g.*, N.C. Const. art. III, § 5 (outlining the "Duties of Governor"); N.C. Const. of 1868, art. III, § 6 ("to grant reprieves, commutations and pardons"); *id.*, art. III, § 9 ("to convene the General Assembly in extra session"); N.C. Const. of 1776, § XIX (including the "Power to draw for and apply such Sums of Money as shall be voted by the General Assembly" and to exercise clemency, "the Power of granting Pardons and Reprieves"). Among the express constitutional duties of the Governor is to "take care that the laws be faithfully executed." N.C. Const. art. III, § 5(4). This provision does not create an independent, policymaking power in the Governor; it simply requires the Governor to enforce "the laws" as passed by the General Assembly. *See Winslow v. Morton*, 118 N.C. 486, 489-90, 24 S.E. 417, 418 (1896) (acknowledging that, when the constitution authorizes the General Assembly to legislate, the Governor, "as the constituted head of the executive department," is charged "with the duty of seeing that the statute is carried into effect"). Nowhere does the text of the constitution grant the Governor the authority to implement personal policy choices.

While Article III generally outlines executive authority, it nonetheless specifies numerous occasions when the legislature shares in the various responsibilities.[2] Only recently have the people, by constitutional

2. *See* N.C. Const. art. III, § 5(2) (Governor recommends to the General Assembly "such measures as he shall deem expedient."); *id.* art. III, § 5(3) (Governor prepares and recommends comprehensive budget to General Assembly for enactment and, after enactment, Governor shall effect the necessary economies to prevent deficits.); *id.* art. III, § 5(6) (Governor may grant clemency "subject to regulations prescribed by law relative to

amendment, allowed the Governor to participate in lawmaking through the power of gubernatorial veto. *See* Act of Mar. 8, 1995, ch. 5, secs. 3, 4, 1995 N.C. Sess. Laws 6, 8 (establishing referendum to amend the constitution to provide gubernatorial veto to take effect 1 January 1997). Nonetheless, a three-fifths vote in each legislative chamber can override a veto. N.C. Const. art. II, § 22(1). As illustrated by the gubernatorial veto provision, the constitutional text indicates the balance struck between the executive and legislative branches, granting the legislature the ultimate lawmaking authority. Only the people, by constitutional amendment, can change that power balance. *McCrory*, 368 N.C. at 654, 781 S.E.2d at 262.

This Court's decision in *Winslow v. Morton* illustrates how the aforementioned constitutional powers of the legislative and executive branches apply without conflict. In *Winslow* this Court reviewed the historic and express gubernatorial role of commander-in-chief of the militia. 118 N.C. at 488, 24 S.E. at 417. In comparing that role to the federal Executive, the Court noted that Congress, under the Federal Constitution, may provide by law for "raising, equipping and maintaining armies and navies" and "may make rules for the government of the land and naval forces." *Id.* at 489, 24 S.E. at 418 (citation omitted). "When Congress asserts its authority . . . within the purveiw [sic] of its powers the President is deprived of the supreme power of military head of the Government" and instead "incurs the obligation as Chief Executive to see that the laws made by the legislative branch of the government are faithfully executed." *Id.* at 489, 24 S.E. at 418 (citation omitted). In the same way,

> the Constitution of North Carolina (Art. XII, sec. 2) having authorized the Legislature "to provide for the organization, arming, equipping and discipline of the militia," where it passes an act in pursuance of this section, it imposes *pro tanto* a limit upon the incidental authority of the Governor, as commander in chief and charges him, as the constituted head of the executive department (Article III, section 1), with the duty of seeing that the statute is carried into effect.

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the manner of applying for pardons."); *id.* art. III, § 5(7) (Governor may convene General Assembly in extra session.); id. art. III, § 5(8) ("Governor shall nominate and by and with the advice and consent of a majority of the Senators appoint all officers whose appointments are not otherwise provided for."); *id.* art. III, § 6 (Lieutenant Governor "shall perform such additional duties as the General Assembly or the Governor may assign to him."); *id.* art. III, § 7(2) ("[R]espective duties [of the Council of State] shall be prescribed by law.").

Id. at 489-90, 24 S.E. at 418 (citing N.C. Const. of 1868, art. III, § 1, and quoting *id.*, art. XII, § 2).

Synthesizing the executive's constitutional role as commander-in-chief with the legislature's lawmaking power, the Court concluded that the Governor could in his discretion "dismiss officers of the militia when his powers and duties are not defined by any legislative act." *Id.* at 490, 24 S.E. at 418 ("The power to dismiss being conferred by the constitutional provision and affirmed by statute, it is clear that the Governor may still lawfully exercise it, unless the Legislature, by virtue of its authority to organize and discipline the militia, has either expressly or by implication repealed the statute."). Once the General Assembly limited the Governor's powers and duties by statute, however, he was constitutionally required to execute the laws as enacted. *Winslow* further illustrates the general principle that the specific and express allocations of authority between the branches as established by the text must be construed harmoniously.

III.

"The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other." N.C. Const. art. I, § 6. The separation-of-powers clause is located within the Declaration of Rights of Article I, an expressive yet nonexhaustive list of protections afforded to citizens against government intrusion, along with "the ideological premises that underlie the structure of government." *State Constitution* 46. The placement of the clause there suggests that keeping each branch within its described spheres protects the people by limiting overall governmental power. The clause does not establish the various powers but simply states the powers of the branches are "separate and distinct." N.C. Const. art. I, § 6. The constitutional text develops the nature of those powers. *State Constitution* 46 ("Basic principles, such as popular sovereignty and separation of powers, are first set out in general terms, to be given specific application in later articles.").

Thus, the separation-of-powers clause "is to be considered as a general statement of a broad, albeit fundamental, constitutional principle," *State v. Furmage*, 250 N.C. 616, 627, 109 S.E.2d 563, 571 (1959), and must be considered with the related, more specific provisions of the constitution that outline the practical workings for governance,[3] *see*

3. *Compare Piedmont Publ'g Co. v. City of Winston-Salem*, 334 N.C. 595, 598, 434 S.E.2d 176, 177-78 (1993) ("One canon of construction is that when one statute deals with a particular subject matter in detail, and another statute deals with the same subject matter in general and comprehensive terms, the more specific statute will be construed as

N.C. Const. art. II (providing the framework for legislative power); *id.* art. III (providing the framework for executive power); *id.* art. IV (providing the framework for judicial power). "Nowhere was it stated that the three powers or branches had to be equal. In fact, although the balance occasionally shifted, the preponderant power has always rested with the legislature." *State Constitution* 50.

Given that "a constitution cannot violate itself," *Leandro v. State*, 346 N.C. 336, 352, 488 S.E.2d 249, 258 (1997), a branch's exercise of its express authority by definition comports with separation of powers. A violation of separation of powers only occurs when one branch of government exercises, or prevents the exercise of, a power reserved for another branch of government. *McCrory*, 368 N.C. at 660, 781 S.E.2d at 265.[4] Understanding the prescribed powers of each branch, as divided between the branches historically and by the text itself, is the basis for stability, accountability, and cooperation within state government. *See State v. Emery*, 224 N.C. 581, 584, 31 S.E.2d 858, 861 (1944) ("[Constitutions] should receive a consistent and uniform construction . . . even though circumstances may have so changed as to render a different construction desirable.").

IV.

When confronted with an alleged separation-of-powers violation, a court must first determine if the conflict is nonjusticiable under the political question doctrine. Under this doctrine, courts will refuse to

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controlling."), *with Preston*, 325 N.C. at 449, 385 S.E.2d at 478 ("Issues concerning the proper construction of the Constitution of North Carolina 'are in the main governed by the same general principles which control in ascertaining the meaning of all written instruments.' " (quoting *Perry v. Stancil*, 237 N.C. 442, 444, 75 S.E.2d 512, 514 (1953))).

4. A coordinate branch may not encroach upon or exercise a power that the text of the state constitution expressly allocates to another branch. *See, e.g.*, *Bacon v. Lee*, 353 N.C. 696, 704, 549 S.E.2d 840, 846-47 (2001) (recognizing that any substantive review of the Governor's express constitutional authority to grant clemency would have resulted in an attempt by the judiciary to exercise a power reserved for the executive branch, thus violating separation of powers); *Elam*, 302 N.C. at 160, 273 S.E.2d at 664 (preventing the General Assembly from making rules for the state's appellate courts because those powers were reserved for the Supreme Court by express provision in Article IV, Section 13(2) of the state constitution); *Person v. Bd. of State Tax Comm'rs*, 184 N.C. 499, 502-04, 115 S.E. 336, 339-40 (1922) (concluding that, for the judicial branch to compel the collection of taxes on stockholder income when no statute requires such a tax would interfere with the General Assembly's constitutional power of taxation); *State v. Holden*, 64 N.C. 829, 830 (1870) (The power to "declare a County . . . in a state of insurrection, and call out the militia" "is a discretionary power, vested in the Governor by the Constitution . . . and cannot be controlled by the Judiciary, but the Governor alone is responsible to the people for its proper exercise.").

resolve a dispute of "purely political character" or when "[judicial] determination would involve an encroachment upon the executive or legislative powers." *Political Questions*, *Black's Law Dictionary* (6th ed. 1990). Federal guidance provides that, "as essentially a function of the separation of powers," *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 710, 7 L. Ed. 2d 663, 686 (1962), a court should not review questions better suited for the political branches. The same separation-of-powers principles limit this Court's review.

> The political question doctrine controls, essentially, when a question becomes "not justiciable . . . because of the separation of powers provided by the Constitution." *Powell v. McCormack*, 395 U.S. 486, 517, 23 L. Ed. 2d 491, 514 (1969). "The . . . doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill-suited to make such decisions . . . ." *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230, 92 L. Ed. 2d 166, 178 (1986). "It is well established that the . . . courts will not adjudicate political questions." *Powell*, 395 U.S. at 518, 23 L. Ed. 2d at 515. A question may be held non-justiciable under this doctrine if it involves "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Baker v. Carr*, 369 U.S. 186, 217, 7 L. Ed. 2d 663, 686 (1962).

Bacon v. Lee, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (2001) (ellipses in original).

As explained by the Supreme Court of the United States, under the political question doctrine, a court should refuse to become embroiled in a separation-of-powers dispute if any one of the following is true: (1) there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department;" (2) the matter involves "a lack of judicially discoverable and manageable standards for resolving it;" (3) the matter is impossible to "decid[e] without an initial policy determination of a kind clearly for nonjudicial discretion;" or (4) a court cannot possibly undertake an "independent resolution without expressing lack of the respect due coordinate branches of government." *Baker*, 369 U.S. at 217, 82 S. Ct. at 710, 7 L. Ed. 2d at 686. The presence of any one of these factors cautions against judicial entanglement. Judicial review

of a political question itself violates separation of powers because the Court asserts a power it does not have to prevent the exercise of a specific power held by a political branch.

V.

Against the backdrop of the General Assembly's plenary legislative power,[5] Article III provides the General Assembly specific authority to create and structure administrative entities. The constitution likewise gives the Governor specific guidelines by which he may influence the allocation of administrative functions, powers, and duties. Nonetheless, the text reserves the final authority for the legislative branch:

> (10) Administrative reorganization. The General Assembly shall prescribe the functions, powers, and duties of the administrative departments and agencies of the State and may alter them from time to time, but the Governor may make such changes in the allocation of offices and agencies and in the allocation of those functions, powers, and duties as he considers necessary for efficient administration. If those changes affect existing law, they shall be set forth in executive orders, which shall be submitted to the General Assembly not later than the sixtieth calendar day of its session, and shall become effective and shall have the force of law upon adjournment sine die of the session, unless specifically disapproved by resolution of either house of the General Assembly or specifically modified by joint resolution of both houses of the General Assembly.

N.C. Const. art. III, § 5(10). By the plain language, the General Assembly has the express authority to "prescribe the functions, powers, and duties of the administrative departments and agencies of the State and may alter them from time to time." *Id.*; *see also McCrory*, 368 N.C. at 664, 781 S.E.2d at 268 (noting "the General Assembly's significant express

5. The General Assembly possesses the plenary power to make law. Were the constitution silent as to which branch can by law reorganize administrative agencies, the legislative branch retains the authority to do so. *See McIntyre*, 254 N.C. at 515, 119 S.E.2d at 891 ("[A] State Constitution is in no matter a grant of power. All power which is not limited by the Constitution inheres in the people, and an act of a State legislature is legal when the Constitution contains no prohibition against it." (quoting *Lassiter v. Northampton Cty. Bd. of Elections*, 248 N.C. 102, 112, 102 S.E.2d 853, 861 (1958), *aff'd*, 360 U.S. 45, 79 S. Ct. 985, 3 L. Ed. 2d 1072 (1959))).

constitutional authority to assign executive duties to the constitutional executive officers and organize executive departments").[6]

Elsewhere in the same Article, the text again acknowledges the General Assembly's authority over administrative agencies:

> [A]ll administrative departments, agencies, and offices of the State and their respective functions, powers, and duties shall be allocated by law among and within not more than 25 principal administrative departments so as to group them as far as practicable according to major purposes. Regulatory, quasi-judicial, and temporary agencies may, but need not, be allocated within a principal department.

N.C. Const. art. III, § 11. It is the General Assembly that statutorily assigns the "respective functions, powers, and duties" of "all administrative departments, agencies, and offices." *Id.* Moreover, the text specifically acknowledges the validity of "[r]egulatory, quasi-judicial, and temporary agencies" independent of any principal department of the executive branch. *Id.*

By executive order, the Governor may also "make such changes . . . as he considers necessary for efficient administration." *Id.* art. III, § 5(10). When the Governor makes changes, he submits them to the General Assembly, and they become effective "unless specifically disapproved by resolution of either house . . . or specifically modified by joint resolution." *Id.* Much like the gubernatorial veto, the General Assembly retains the prerogative to statutorily override these changes, to reorganize the structure and functions of the executive branch, and to alter the branch's supervisory structure. *Id.* art. III, §§ 5(10), 11.

The framers of our current constitution understood the text of Article III, Sections 5(10) and 11 as simply incorporating the historic legislative authority to create and reorganize administrative divisions by statute:

> The General Assembly will not be deprived of any of its present authority over the structure and organization of state government. It retains the power to make changes

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6. The majority correctly notes that in *McCrory* the General Assembly did not argue that the Governor's challenge constituted a nonjusticiable political question. *But see McCrory*, 368 N.C. at 661, 781 S.E.2d at 266 (analogizing clemency review as "an explicit constitutional power" of the Governor, thus presenting "a nonjusticiable, political question," with the General Assembly's designated, "constitutional power to assign itself the authority to fill statutory positions" (citing *Bacon*, 353 N.C. at 716-17, 549 S.E.2d at 854)).

> on its own initiative, it can disapprove any change initiated by the Governor, and it can alter any reorganization plan which it has allowed to take effect and then finds to be working unsatisfactorily.

N.C. State Constitution Study Comm'n, *Report of the North Carolina State Constitution Study Commission* 131-32 (1968) [hereinafter *Report*].[7] Though the General Assembly may arrange an administrative structure or assign a particular power, function, or duty to an administrative office at present, the constitution provides that the legislature may arrange differently or assign elsewhere in the future. *Id.* Inherently, these decisions involve political and policy decisions.

As demonstrated here, the text of Article III, Sections 5(10) and 11 specifically assigns to the General Assembly authority over the administrative divisions it legislatively creates,[8] including the power to alter those same administrative divisions, to structure them as bipartisan, and to make them independent by housing them outside of the executive branch. N.C. Const. art. III, §§ 5(10), 11. The text of Article III, Section 5(10) likewise specifically affords the Governor a role for making changes by executive order, but subjects those changes to legislative approval. *Id.* art. III, § 5(10).

Significantly, there is nothing in the constitutional text of Article III, Sections 5(10) or 11 which limits the power of the General Assembly

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7. Before the state constitution incorporated the specific text of Article III, section 5(10), the North Carolina State Constitution Study Commission reviewed our constitution, drafted and proposed amendments to our current constitution, and transmitted a special report to the Governor and General Assembly. *See Report* at i-ii.

8. Relevant here, the constitution specifically recognizes that the General Assembly's policymaking authority includes passing laws related to and regulating elections. *See* N.C. Const. art. VI, § 2(2) ("The General Assembly may reduce the time of residence for persons voting in presidential elections."); *id.* art. VI, § 2(3) ("No person adjudged guilty of a felony against this State or the United States . . . shall be permitted to vote unless that person shall be first restored to the rights of citizenship in the manner prescribed by law."); *id.* art. VI, § 3 ("Every person offering to vote shall be at the time legally registered as a voter as herein prescribed and in the manner provided by law. The General Assembly shall enact general laws governing the registration of voters."); *id.* art. VI, § 5 ("A contested election for any office established by Article III of this Constitution shall be determined by joint ballot of both houses of the General Assembly in the manner prescribed by law."); *id.* art. VI, § 8 (recognizing the General Assembly's right to prescribe laws restoring rights of citizenship); *id.* art. VI, § 9 ("No person shall hold concurrently any two or more appointive offices or places of trust or profit, or any combination of elective and appointive offices or places of trust or profit, except as the General Assembly shall provide by general law."). The constitution recognizes no similar role for the Governor.

to create an independent, bipartisan board. Likewise, there is no constitutional text that grants the Governor the power to assert personal policy preferences, much less the power to override a policy decision of the General Assembly. Neither Section 5(4) of Article III nor any other constitutional provision gives the Governor an authority that in any way conflicts with the General Assembly's assigned power in Sections 5(10) and 11. Section 5(4) does not limit the power of the General Assembly in any manner; it simply requires the Governor to execute the laws as enacted by the General Assembly. Section 5(4) says nothing about the Governor's role in reorganization and clearly is not an "explicit textual limitation" on the General Assembly's power. The constitutional provisions of Article III do not conflict. The General Assembly makes the laws, and the Governor implements them. As conceded by the majority, when "the Governor is seeking to have the judicial branch interfere with an issue committed to the sole discretion of the General Assembly," the matter is nonjusticiable. The trial court correctly observed:

> g. The text of the Constitution makes clear that the power to alter the functions and duties of state agencies is reserved to the Legislature through its law-making ability and to the Governor through executive order subject to review by the Legislature.
>
> h. This Court cannot interject itself into the balance struck in the text of a Constitution specifically dealing with the organization and structure of a state agency. The [challenge here] is a political question and therefore a nonjusticiable issue, and this Court lacks authority to review it.

VI.

Moreover, not only does this case present a political question because the constitution textually commits the type of government reorganization here to the General Assembly, *see Baker*, 369 U.S. at 217, 82 S. Ct. at 710, 7 L. Ed. 2d at 686, this lawsuit likewise requires an "initial policy determination of a kind clearly for nonjudicial discretion," *id.* at 217, 82 S. Ct. at 710, 7 L. Ed. 2d at 686.

Here the General Assembly enacted Session Law 2017-6, creating the bipartisan board, "an independent regulatory and quasi-judicial agency [that] shall not be placed within any principal administrative department." Act of Apr. 11, 2017, ch. 6, sec. 4(c), 2017-2 N.C. Adv. Legis. Serv. 21, 25 (LexisNexis) (codified at N.C.G.S. § 163A-5(a) (2017)). In its enactment, the General Assembly found, among other policy reasons,

> that bipartisan cooperation with election administration and ethics enforcement lends confidence to citizens in the integrity of their government; and . . . it [is] beneficial and conducive to consistency to establish one quasi judicial and regulatory body with oversight authority for ethics, elections, and lobbying; and . . . it [is] imperative to ensure protections of free speech rights and increase public confidence in the decisions to restrict free speech; and . . . voices from all major political parties should be heard in decisions relating to First Amendment rights of free speech . . . .

Ch. 6, 2017-2 N.C. Adv. Legis. Serv. at 21. As evident from the stated purpose, the decision to place elections, lobbying, ethics, and campaign finance within a bipartisan, independent agency, at its heart, is a policy one, seeking to insulate these areas from political influence and creating the structure for achieving this end. Such a decision is precisely the type of "initial policy determination" assigned to the legislative branch. *See Beaufort Cty. Bd. of Educ. v. Beaufort Cty. Bd. of Comm'rs*, 363 N.C. 500, 512, 681 S.E.2d 278, 286 (2009) (Newby, J., concurring) (concluding that political considerations "should be left to a body like the General Assembly, which is in the best position to consider the full range of evidence and balance the competing objectives").

While the Governor attacks the independent and bipartisan nature of the consolidated board, a judicial resolution would require an initial policy determination this Court cannot make[9] and judicially discoverable and manageable standards that do not exist. By inserting itself into this controversy, the Court expresses a "lack of the respect due" the General Assembly's express constitutional lawmaking authority. This case presents a nonjusticiable political question because it satisfies not just one, which would be sufficient, but all four of the cited *Baker* criteria.

VII.

The majority's novel analysis creates two significant problems in our jurisprudence, forecasting perilous consequences for years to come. The majority's approach eliminates the political question doctrine and inserts the judiciary into every separation-of-powers dispute between

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9. As the majority concedes, "the General Assembly has the authority to provide the [board] with a reasonable degree of independence from short-term political interference and to foster the making of independent, non-partisan decisions. All of these determinations are policy-related decisions committed to the General Assembly rather than to this Court."

the political branches. Most concerning, the Court's decision judicially amends our constitution to grant the Governor a constitutional power to enact personal policy preferences, even elevating those preferences over the duly enacted laws when they conflict. While the majority correctly states the traditional rule for nonjusticiability as outlined in *Bacon* and *Baker*, it then crafts an exception to nonjusticiability that completely swallows the rule: Matters are justiciable any time a party seeks to have the Court "ascertain the meaning of an applicable legal principle, such as [a constitutional provision]."

Under the majority's new test, every separation-of-powers dispute is justiciable. Without exception, a party to a constitutional lawsuit asks the Court to "ascertain the meaning of [the] applicable legal principle." Swept up in this broad reach is *Bacon*, in which this Court held a challenge to a governor's textual clemency power was a nonjusticiable political question. *Bacon*, 353 N.C. at 716-17, 721-22, 549 S.E.2d at 854, 857. The plaintiff there sought the "meaning" of the applicable legal principle, Article III, Section 5(6). *See id.* at 701-04, 711, 549 S.E.2d at 844-47, 851 (asking whether a governor, who as Attorney General defended against the plaintiff's appeal, could consider the plaintiff's clemency request under Article III, Section 5(6)). Under the majority's new test, however, this Court wrongly decided *Bacon*. Such an approach to separation-of-powers claims unavoidably sounds the death knell of nonjusticiability. Any claim by a governor under Article I, Section 6 and Article III, Section 5(4) against the legislative branch will be justiciable.

The majority vainly searches to support this inventive approach with a Court of Appeals decision. In *News & Observer Publishing Co. v. Easley*, the *News & Observer* filed a public records request for clemency records, arguing the Public Records Law was a "regulation[ ] prescribed by law relative to the manner of applying for pardons" as envisioned by Article III, Section 5(6). *News & Observer Publ'g Co. v. Easley*, 82 N.C. App. 14, 22-23, 641 S.E.2d 698, 704-05 (2007) (quoting N.C. Const. art. III, § 5(6)). In essence, the dispute was not a question regarding a constitutional power textually committed to one branch. It involved the straightforward application of a constitutional provision to a statute. The Court of Appeals simply decided the Public Records Law was not a regulation "relative to the manner of applying for pardons." *Id.* at 23, 641 S.E.2d at 704.

Seeming to question its own analysis, the majority maintains that

> even if one does not accept this understanding of the scope of the General Assembly's authority under Article

> III, Section 5(10), we continue to have the authority to decide this case because the General Assembly's authority pursuant to Article III, Section 5(10) is necessarily constrained by the limits placed upon that authority by other constitutional provisions.

While the majority cites examples of express limitations that applied in other cases, it does not identify any such constitutional provision that expressly "limits" the General Assembly's authority under Article III, Sections 5(10) and 11.

The majority concedes that the constitution in Article III, Sections 5(10) and 11 textually assign to the General Assembly the authority to create the bipartisan board. It further admits that if the constitution assigns a specific power to a branch, a challenge to that power is nonjusticiable. Missing an actual "explicit textual limitation," the majority manufactures one to create a conflict in the text by judicially rewriting Article III, Section 5(4) to say, "The Governor shall take care that the Governor's personal policy preferences be faithfully executed." It thereby judicially creates a constitutional authority of the Governor to enforce personal policy preferences superior to the General Assembly's historic constitutional authority to make the laws. The majority then holds that, beyond a reasonable doubt, the General Assembly violated separation of powers in creating this bipartisan board because the board's structure prevents the Governor from exercising this newly-minted constitutional authority. Under this holding, the Governor no longer must seek to influence policy by participating in the constitutionally specified procedures of executive orders and the veto, both of which the General Assembly can override. The Governor prevails simply by complaining to the judicial branch that any legislation interferes with the implementation of personal policy preferences.

VIII.

Prominent jurists have warned that courts undermine their legitimacy when they take sides in policy questions assigned to the political branches:

> The Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court's complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.

Baker, 369 U.S. at 267, 82 S. Ct. at 737-38, 7 L. Ed. 2d at 714-15 (Frankfurter, J., dissenting). With today's sweeping opinion, the majority effectively eliminates the political question doctrine, embroiling the Court in separation-of-powers disputes for years to come. In reaching this decision, the majority creates a new and superior constitutional power in the Governor to enforce personal policy preferences, elevating those policy preferences over the constitutionally enacted laws. The General Assembly has the express, as well as the plenary, authority to create a bipartisan, independent board as it did here. Because the General Assembly acted within its express constitutional power, plaintiff's challenge presents a nonjusticiable political question. The only separation of powers violation in this case is this Court's encroachment on the express constitutional power of the General Assembly. Accordingly, I dissent.

AMENDMENTS TO THE RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW IN THE STATE OF NORTH CAROLINA

The following amendments to the Rules Governing Admission to the Practice of Law proposed by the North Carolina Board of Law Examiners were duly approved by the Council of the North Carolina State Bar at its quarterly meeting on July 28, 2017.

BE IT RESOLVED by the Council of the North Carolina State Bar that amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina be approved as follows (additions are underlined, deletions are interlined):

Rules Governing Admission to the Practice of Law

Section .0100 – Organization

~~.0101 Website~~
~~The Board of Law Examiners of the State of North Carolina shall maintain a public website that shall publish the location of its offices, its mailing address, office hours, telephone number, fax number, e-mail address and such other information as the Board may direct.~~

~~.0102 Purpose~~
~~The Board of Law Examiners of the State of North Carolina was created for the purpose of examining applicants and providing rules and regulations for admission to the bar, including the issuance of licenses therefor.~~

~~.0103 Membership~~
~~The Board of Law Examiners of the State of North Carolina consists of eleven members of the N.C. Bar elected by the council of the North Carolina State Bar. One member of said Board is elected by the Board to serve as chairman for such period as the Board may determine. The Board also employs an executive director to enable the Board to perform its duties promptly and properly. The executive director, in addition to performing the administrative functions of the positions, may act as attorney for the Board.~~

~~Section .0200 - General Provisions~~

~~.0201 Compliance~~
~~No person shall be admitted to the practice of law in North Carolina unless that person has complied with these rules and the laws of the state.~~

~~.0202~~ **.0101 Definitions**
For purposes of this Chapter, the following shall apply:

(1) "Chapter" or "Rules" refers to the "Rules Governing Admission to the Practice of Law in the State of North Carolina."

(2) "Board" refers to the "Board of Law Examiners of the State of North Carolina." A majority of the members of the Board shall constitute a quorum, and the action of a majority of a quorum, present and voting, shall constitute the action of the Board.

(3) "Executive Director" refers to the "Executive Director of the Board of Law Examiners of the State of North Carolina."

(4) "Filing" or "filed" shall mean received in the office of the Board of Law Examiners. Except that applications placed in the United States mail properly addressed to the Board of Law Examiners and bearing sufficient first class postage and postmarked by the United States Postal Service or date-stamped by any recognized delivery service on or before a deadline date will be considered as having been timely filed if all required fees are included in the mailing. Mailings which are postmarked after a deadline or which, if postmarked on or before a deadline ~~and,~~ do not include required fees or which include a check in payment of required fees which is ~~not honored due to~~ dishonored because of insufficient funds will not be considered as ~~timely~~ filed. Applications which are not properly signed and notarized; or which do not include the properly executed Authorization and Release forms; or which are illegible; or ~~which~~ with incomplete answers to the questions are not complete will not be considered filed and will be returned.

(5) Any reference to a "state" shall mean one of the United States, and any reference to a "territory" shall mean a United States territory.

(6) "Panel" means one or more members of the Board specially designated to conduct hearings provided for in these Rules.

.0102 Website
The Board shall maintain a public website that shall publish the location of its offices, its mailing address, office hours, telephone number, fax number, e-mail address and such other information as the Board may direct.

.0103 Purpose
~~The Board was created for the purpose of examining applicants and providing rules and regulations for admission to the bar, including the issuance of licenses therefor.~~

.0104 Membership
The Board consists of eleven members of the North Carolina State Bar elected by the council of the North Carolina State Bar. One member of the Board is elected by the Board to serve as its Chair for such period as the Board may determine. The Board also employs an Executive Director to enable the Board to perform its duties promptly and properly. The Executive Director, in addition to performing the administrative functions of the position, may act as the Board's attorney.

Section .0200 - General Provisions
.0201 Compliance
No person shall be admitted to the practice of law in North Carolina unless that person has complied with these Rules.

~~.0203~~ **.0202 Applicants**
For ~~the purpose of these rules~~ purposes of this Chapter, applicants are classified ~~either~~ as "general applicants," ~~or as~~ "comity applicants, "military spouse comity applicants," or "transfer applicants." To be classified as a "general applicant" and certified as such for admission to practice law, an applicant must satisfy the requirements of Rule .0501 of this Chapter. To be classified as a "comity applicant" and certified as such for admission to practice law, ~~a person shall~~ an applicant must satisfy the requirements of Rule .0502 of this Chapter. To be classified as a "military spouse comity applicant" and certified as such for admission to practice law, an applicant must satisfy the requirements of Rule .0503 of this Chapter. To be classified as a "transfer applicant" and certified as such for admission to practice law, an applicant must satisfy the requirements of Rule .0504 of this Chapter.

~~.0204~~ **.0203 List**
As soon as possible after each ~~filing~~ late-filing deadline for general applications, the Executive Director shall prepare ~~and maintain~~ a list of general applicants for the ensuing examination~~,~~ and all comity, military spouse comity, and transfer applicants whose applications are then pending, for publication in the *North Carolina State Bar Journal.*

~~.0205~~ **.0204 Hearings**
Every applicant may be required to appear before the Board to be examined about any matters pertaining to the applicant's moral character and general fitness, educational background or any other matters set out in Section .0500 of this Chapter.

~~.0206~~ **.0205 Nonpayment of Fees**
~~Failure to pay the~~ No application will be deemed to have been filed until the applicant has paid the fees required by these rules ~~shall cause the~~

~~application not to be deemed filed~~. If the check payable for the application fee is not honored upon presentment for any reason other than error of the bank, the application will be deemed not ~~timely~~ to have been filed and will have to be refiled. All such checks ~~payable to the Board for any fees which are not honored upon presentment~~ shall be returned to the applicant, who shall pay to the Board in cash, cashier's check, certified check or money order any fees payable to the Board including a fee for processing that check.

Section .0300 - Effective Date

These Revised Rules shall apply to all applications for admission to practice law in North Carolina submitted on or after June 30, 2018.

Section .0400 - Applications of General Applicants
.0401 How to Apply
Applications for admission must be made upon forms supplied by the Board and must be complete in every detail. Every supporting document required by the application form must be submitted with each application. The application form may be obtained by submitting a written request to the Board or by accessing the application via the Board's website: www.ncble.org.

.0402 Application Form
(1) The Application for Admission to Take the North Carolina Bar Examination ~~form~~ requires an applicant to supply full and complete information relating to the applicant's background, including family history, past and current residences, education, military service, past and present employment, credit status, involvement in disciplinary, civil or criminal proceedings, substance abuse, current mental and emotional impairment, and bar admission and discipline history. Applicants must list references and submit as part of the application:

- Certificates of Moral Character from four (4) individuals who know the applicant;
- A recent photograph;
- Two (2) sets of clear fingerprints;
- Two executed informational Authorization and Release forms;
- A birth certificate;
- Transcripts from the applicant's undergraduate and graduate schools;
- A copy of all applications for admission to the practice of law that the applicant has filed with any state, territory, or the District of Columbia;

- A certificate from the proper court or agency of every jurisdiction in which the applicant is or has been licensed, that the applicant is in good standing, or the applicant must otherwise satisfy the Board that the applicant falls within the exception provided in Rule .0501(7)(b), and is not under pending charge of misconduct;

- Copies of any legal proceedings in which the applicant has been a party.

The application must be filed in duplicate. The duplicate may be a photocopy of the original.

(2) An applicant who ~~has~~ aptly filed a complete Application for Admission to Take the North Carolina Bar Examination for ~~a particular~~ the February or July bar examination may, after failing or withdrawing from that particular examination, file a Supplemental Application ~~on forms supplied by the board, along,~~ with the applicable fee, for the next subsequent bar examination. ~~An applicant who has filed~~, on forms supplied by the Board, and may continue to file a Supplemental Application ~~as provided by this rule immediately preceding the filing deadline specified in Rule .0403 of this chapter may file a subsequent Supplemental Application along,~~ with the applicable ~~fees for the next~~ fee, for each subsequent examination. ~~The~~ until successful. Each Supplemental Application ~~will~~ must update ~~the~~ any information previously submitted to the Board by the applicant. ~~Said SUPPLEMENTAL APPLICATION~~ Each Supplemental Application must be filed by the deadline set out in Rule .0403 of this Chapter. An applicant who withdraws from or fails any particular administration of the bar examination and does not file a Supplemental Application for the next bar examination will be required to file a new general application before taking the written examination again.

.0403 Filing Deadlines

(1) Applications shall be filed ~~and received by~~ with the Executive Director at the offices of the Board on or before the first Tuesday in January immediately preceding the date of the July written bar examination and on or before the first Tuesday in October immediately preceding the date of the February written bar examination.

(2) Upon payment of a late filing fee of $250 (in addition to all other fees required by these rules), an applicant may file a late application with the Board on or before the first Tuesday in March immediately preceding the July written bar examination and on or before the first Tuesday in November immediately preceding the February written bar examination.

(3) Applicants who fail to timely file their application will not be allowed to take the Bar Examination designated on the application.

(4) ~~Any applicant who has aptly filed a General Application for the February or July written bar examination may make application to take the next immediately following bar examination by filing~~ General Applicants may file a Supplemental Application with the Executive Director of the Board at the offices ~~of the Board~~ on or before the following dates:

(a) If the applicant aptly filed a General Application ~~for the~~ , or a previous Supplemental Application, for the February bar examination, the Supplemental Application for the following July bar examination must be filed on or before the first Tuesday in May immediately preceding the July examination; and

(b) If the applicant aptly filed a General Application, or a previous Supplemental Application, for the July bar examination, the Supplemental Application for the following February bar examination must be filed on or before the first Tuesday in October immediately preceding the February examination.

.0404 Fees for General Applicants
~~Every application by an applicant who:~~

~~(1) is not a licensed attorney in any other jurisdiction shall be accompanied by a fee of $700.00.~~

~~(2) is or has been a licensed attorney in any other jurisdiction shall be accompanied by a fee of $1,500.00.~~

~~(3) is filing to take the North Carolina Bar Examination using a Supplemental Application shall be accompanied by a fee of $400.00.~~

~~(4)~~ (1) The application specified in .0402 (1) shall be accompanied by a fee of $850.00, if the applicant is not, and has not been, a licensed attorney in any other jurisdiction, or by a fee of $1,650.00, if the applicant is or has been a licensed attorney in any other jurisdiction; provided that if the applicant is filing after the deadline set out in Rule .0403(1), but before the deadline set forth in Rule .0403(2), the application shall also be accompanied by a late fee of $250.00 ~~in addition to all other fees required by these rules~~.

(2) A Supplemental Application shall be accompanied by a fee of $400.00.

.0405 Refund of Fees
Except as herein provided, no part of the fee required by Rule .0404(1)~~,~~ or (2)~~, or (3)~~ of this Chapter shall be refunded to the applicant unless the applicant shall file with the Executive Director a written request to withdraw as an applicant, not later than the 15th day of June preceding the July written bar examination and not later than the 15th day of January preceding the February written bar examination, in which event not more than one-half of the applicable fee may be refunded to the applicant at the discretion of the Board. No portion of any late fee will be refunded.

However, when an application for admission by examination is received from an applicant who, in the opinion of the Executive Director after consultation with the Board Chair, is not eligible for consideration under the Rules, the applicant shall be so advised by written notice. Upon receipt of such notice, the applicant may elect in writing to withdraw the application; and, provided the written election is received by the Board within twenty (20) days from the date of the Board's written notice to the applicant, receive a refund of all fees paid.

Section .0500 - Requirements for Applicants

.0501 Requirements for General Applicants
As a prerequisite to being licensed by the Board to practice law in the State of North Carolina, a general applicant shall:

(1) possess the qualifications of character and general fitness requisite for an attorney and counselor-at-law, and be of good moral character and entitled to the high regard and confidence of the public and have satisfied the requirements of Section .0600 of this Chapter ~~both~~ at the time the license is issued ~~and at the time of standing and passing a written bar examination as prescribed in Section .0900 of this Chapter~~;

(2) possess the legal educational qualifications as prescribed in Section .0700 of this Chapter;

(3) be ~~of the age of~~ at least eighteen (18) years of age;

(4) have filed formal application as a general applicant in accordance with Section .0400 of this Chapter;

(5) ~~stand and~~ pass ~~a~~ the written bar examination ~~as~~ prescribed in Section .0900 of this Chapter~~;~~, provided that an applicant who has failed to achieve licensure for any reason within three years after the date of the written bar examination in which the applicant received a passing score will be required to take and pass the examination again before being admitted as a general applicant;

(6) have ~~stood~~ taken and passed the Multistate Professional Responsibility Examination ~~approved by the Board~~ within the twenty-four (24) month period next preceding the beginning day of the written bar examination which applicant passes as prescribed ~~by Section .0900 of this Chapter which the applicant applies to take~~ above, or shall take and pass the Multistate Professional Responsibility Examination within the twelve (12) month period thereafter; the time limits are tolled for a period not exceeding four (4) years for any applicant who is a ~~servicemember~~ service member as defined in the ~~Servicemembers~~ Service Members Civil Relief Act, 50 U.S.C. Appx. § 511, while engaged in active service as defined in 10 U.S.C. § 101, and who provides a letter or other communication from the ~~servicemember's~~ service member's commanding officer stating that the ~~servicemember's~~ service member's current military duty prevents attendance for the examination, stating that military leave is not authorized for the ~~servicemember~~ service member at the time of the letter, and stating when the ~~servicemember~~ service member would be authorized military leave to take the examination.

(7) if the applicant is or has been a licensed attorney ~~then, that the applicant~~ be in good standing ~~in every jurisdiction within~~ each state, territory of the United Sates, or the District of Columbia, in which the applicant is or has been licensed to practice law and not under any charges of misconduct while the application is pending before the Board.

(a) For purposes of this rule, an applicant is "in good standing" in a jurisdiction if:

(i) the applicant is an active member of the bar of the jurisdiction and the jurisdiction issues a certificate attesting to the applicant's good standing therein; or

(ii) the applicant was formerly a member of the jurisdiction and the jurisdiction certifies the applicant was in good standing at the time that the applicant ceased to be a member; and

(b) if the jurisdiction in which the applicant is inactive or was formerly a member will not certify the applicant's good standing solely because of the non-payment of dues, the Board, in its discretion, may waive such certification from that jurisdiction.

(8) have successfully completed the State Specific Component, consisting of the course in North Carolina law prescribed by the Board.

.0502 Requirements for Comity Applicants

The Board in its discretion shall determine whether ~~attorneys~~ an attorney duly licensed to practice law in any state, or territory of the United States, or the District of Columbia, may be licensed to practice

law in the State of North Carolina without written examination, other than the Multistate Professional Responsibility Examination; provided that such attorney's jurisdiction of licensure qualifies as a jurisdiction in comity with North Carolina, in that the conditions required by ~~the~~ such state, or territory of the United States or the District of Columbia, for North Carolina attorneys to be licensed to practice law in that jurisdiction without written examination are not considered by the Board to be unduly or materially greater than the conditions required by the State of North Carolina for licensure to practice law without written examination in this State. A list of "approved jurisdictions," as determined by the Board pursuant to this rule, shall be available upon request.

Any attorney at law duly admitted to practice in another state, or territory of the United States, or the District of Columbia, upon written application may, in the discretion of the Board, be licensed to practice law in the State of North Carolina without written examination provided each such applicant shall:

(1) File with the Executive Director, upon such forms as may be supplied by the Board, a typed application in duplicate which will be considered by the Board after at least six (6) months from the date of filing~~; the~~. Such application ~~requires~~ shall require:

(a) That an applicant supply full and complete information in regard to his background, including family, past residences, education, military, employment, credit status, whether he has been a party to any disciplinary or legal proceedings, whether currently mentally or emotionally impaired, references, and the nature of the applicant's practice of law~~, and familiarity with the code of Professional Responsibility as promulgated by the North Carolina State Bar~~.

(b) That the applicant furnishes the following documentation:

(i) Certificates of Moral Character from four (4) individuals who know the applicant;

(ii) A recent photograph;

(iii) Two (2) sets of clear fingerprints;

(iv) A certification of the Court of Last Resort from the jurisdiction from which the applicant is applying; that:

- the applicant is currently licensed in the jurisdiction;

- the date of the applicant's licensure in the jurisdiction;

- the applicant was of good moral character when licensed by the jurisdiction;

and

- the jurisdiction allows North Carolina attorneys to be admitted without examination;

(v) Transcripts from the applicant's undergraduate and graduate schools;

(vi) A copy of all applications for admission to the practice of law that the applicant has filed with any state, territory, or the District of Columbia;

(vii) A certificate of admission to the bar of any state, territory, or the District of Columbia;

(viii) A certificate from the proper court of every jurisdiction in which the applicant is licensed ~~therein~~ that he is in good standing, or that the applicant otherwise satisfy the Board that the applicant falls within the exception provided in Rule .0501(7)(b), and not under pending charges of misconduct;

(2) Pay to the Board with each typewritten application, a fee of $2,000.00, no part of which may be refunded to:

(a) an applicant whose application is denied; or (b) an applicant who withdraws, unless the ~~withdrawing~~ applicant has filed with the Board a written request to withdraw, in which event, the Board in its discretion may refund no more than one-half of the fee to the withdrawing applicant. However, when an application for admission by comity is received from an applicant who, in the opinion of the Executive Director after consideration with the Board Chair, is not eligible for consideration under the Rules, the applicant shall be so advised by written notice. Upon receipt of such notice, the applicant may elect in writing to withdraw the application, and, provided the written election is received by the Board within twenty (20) days from the date of the Board's written notice to the applicant, receive a refund of all fees paid.

(3) Prove to the satisfaction of the Board that the applicant is duly licensed to practice law in one or more jurisdictions ~~relied upon by the applicant for admission to practice law in North Carolina, that each jurisdiction relied upon by the applicant has been or should be approved by the Board, pursuant to this rule, for admission to practice law in North Carolina, and~~ which are on the list of "approved jurisdictions," or should be on such list, as a comity jurisdiction within the language of the first paragraph of this Rule .0502; that the applicant has been, for at least four out of the ~~last~~ six years~~,~~ immediately preceding the filing of this application with the Executive Director, actively and substantially engaged

in the ~~full-time~~ practice of law pursuant to the license to practice law from one or more jurisdictions relied upon by the applicant; and that the applicant has read the Rules of Professional Conduct promulgated by the North Carolina State Bar. Practice of law for the purposes of this rule when conducted pursuant to a license granted by another jurisdiction shall include the following activities, if performed in a jurisdiction in which the applicant is admitted to practice law, or if performed in a jurisdiction that permits such activity by a licensed attorney not admitted to practice in that jurisdiction:

(a) The practice of law as defined by G.S. 84-2.1; or

(b) Activities which would constitute the practice of law if done for the general public; or

(c) Legal service as house counsel for a person or other entity engaged in business; or

(d) Judicial service, service as a judicial law clerk, or other legal service in a court of record or other legal service with any local or state government or with the federal government; or

(e) Legal ~~Service~~ service with the United States, a state or federal territory, or any local governmental bodies or agencies, including military service; or

(f) A full time faculty member in a law school approved by the Council of the North Carolina State Bar.

For purposes of this rule, the active practice of law shall not include (a) work that, as undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which any person receiving the unauthorized service was located, or (b) the practice of law in any additional jurisdiction, pursuant to a license to practice law in that additional jurisdiction, and that additional jurisdiction is not an "approved jurisdiction" as determined by the Board pursuant to this rule.

(4) Be in good standing in ~~every jurisdiction within~~ each State, territory of the United States, or the District of Columbia~~,~~ in which the applicant is or has been licensed to practice law and not under any charges of misconduct while the application is pending before the Board.

(a) For purposes of this rule, an applicant is "in good standing" in a jurisdiction if:

(i) the applicant is an active member of the bar of the jurisdiction and the jurisdiction issues a certificate attesting to the applicant's good standing therein; or

(ii) the applicant was formerly a member of the bar of the jurisdiction and the jurisdiction certifies the applicant was in good standing at the time that the applicant ceased to be a member; and

(b) if the jurisdiction in which the applicant is inactive or was formerly a member will not certify the applicant's good standing solely because of the non-payment of dues, the Board, in its discretion, may waive such certification from that jurisdiction; however, the applicant must not only be in good standing, but also must be an active member of each jurisdiction upon which the applicant relies for admission by comity.

(5) Be of good moral character and have satisfied the requirements of Section .0600 of this Chapter;

(6) Meet the educational requirements of Section .0700 of this Chapter as hereinafter set out if first licensed to practice law after August, 1971;

(7) Not have taken and failed the written North Carolina Bar Examination within five (5) years prior to the date of filing the applicant's comity application;

(8) Have ~~stood and~~ passed the Multistate Professional Responsibility Examination ~~approved by the Board~~.

.0503 Requirements for Military Spouse Comity Applicants

A Military Spouse Comity Applicant, upon written application may, in the discretion of the Board, be granted a license to practice law in the State of North Carolina without written examination provided that:

(1) The Applicant fulfills all of the requirements of Rule .0502, except that:

(a) in lieu of the requirements of paragraph (3) of Rule .0502, a Military Spouse Comity Applicant shall certify that said applicant has read the Rules of Professional Conduct promulgated by the North Carolina State Bar and shall prove to the satisfaction of the Board that the Military Spouse Comity Applicant is duly licensed to practice law in a state, or territory of the United States, or the District of Columbia, and that the Military Spouse Comity Applicant has been for at least four out of the last eight years immediately preceding the filing of this application with the Executive Director, actively and substantially engaged in the ~~full-time~~ practice of law. Practice of law for the purposes of this rule shall be defined as it would be defined for any other comity applicant; and

(b) Paragraph (4) of Rule .0502 shall not apply to a Military Spouse Comity Applicant.

(2) Military Spouse Comity Applicant ~~defined~~ Defined. A Military Spouse Comity Applicant is any person who is

(a) An attorney at law duly admitted to practice in another state or territory of the United States, or the District of Columbia; and

(b) Identified by the Department of Defense (or, for the ~~coast~~ Coast Guard when it is not operating as a service in the Navy, by the Department of Homeland Security) as the spouse of a ~~servicemember~~ service member of the United States Uniformed Services; and

(c) Is residing, or intends within the next six months, to be residing, in North Carolina due to the ~~servicemember's~~ service member's military orders for a permanent change of station to the State of North Carolina.

(3) Procedure. In addition to the documentation required by paragraph (1) of Rule .0502, a Military Spouse Comity Applicant must file with the Board the following:

(a) A copy of the ~~servicemember's~~ service member's military orders reflecting a permanent change of station to a military installation in North Carolina; and

(b) A military identification card which lists the Military Spouse Applicant as the spouse of the ~~servicemember~~ service member.

(4) Fee. A Military Spouse Comity Applicant shall pay a fee of $1,500.00 in lieu of the fee required in paragraph (2) of Rule .0502. This fee shall be non-refundable.

.0504 Requirements for Transfer Applicants

As a prerequisite to being licensed by the Board to practice law in the State of North Carolina, a transfer applicant shall:

(1) possess the qualifications of character and general fitness requisite for an attorney and counselor-at-law, and be of good moral character and entitled to the high regard and confidence of the public and have satisfied the requirements of Section .0600 of this Chapter;

(2) possess the legal educational qualifications as prescribed in Section .0700 of this Chapter;

(3) be at least eighteen (18) years of age;

(4) have filed with the Executive Director, upon such forms as may be supplied by the Board, a typed application in duplicate, containing the same information and documentation required of general applicants under Rule .0402(1);

(5) have paid with the application an application fee of $1,500.00, if the applicant is licensed in any other jurisdiction, or $1,275.00 if the applicant is not licensed in any other jurisdiction, no part of which may be refunded to an applicant whose application is denied or to an applicant who withdraws, unless the withdrawing applicant filed with the Board a written request to withdraw, in which event, the Board in its discretion may refund no more than one-half of the fee to the withdrawing applicant. However, when an application for admission by transfer is received from an applicant who, in the opinion of the Executive Director, after consultation with the Board Chair, is not eligible for consideration under the Rules, the applicant shall be so advised by written notice. Upon receipt of such notice, the applicant may elect in writing to withdraw the application, and, provided the written election is received by the Board within twenty (20) days from the date of the Board's written notice to the applicant, receive a refund of all fees paid.

(6) have, within the three-year period preceding the filing date of the application, taken the Uniform Bar Examination and achieved a scaled score on such exam that is equal to or greater than the passing score established by the Board for the UBE as of the administration of the exam immediately preceding the filing date;

(7) have passed the Multistate Professional Responsibility Examination.

(8) if the applicant is or has been a licensed attorney, be in good standing in each state, territory of the United Sates, or the District of Columbia, in which the applicant is or has been licensed to practice law and not under any charges of misconduct while the application is pending before the Board.

(a) For purposes of this rule, an applicant is "in good standing" in a jurisdiction if:

(i) the applicant is an active member of the bar of the jurisdiction and the jurisdiction issues a certificate attesting to the applicant's good standing therein; or

(ii) the applicant was formerly a member of the jurisdiction and the jurisdiction certifies the applicant was in good standing at the time that the applicant ceased to be a member; and

(b) if the jurisdiction in which the applicant is inactive or was formerly a member will not certify the applicant's good standing solely because of the non-payment of dues, the Board, in its discretion, may waive such certification from that jurisdiction; and

(9) have successfully completed the State-Specific Component, consisting of the course in North Carolina law prescribed by the Board.

Section .0600 - Moral Character and General Fitness

.0601 Burden of Proof
Every applicant shall have the burden of proving that the applicant possesses the qualifications of character and general fitness requisite for an attorney and counselor-at-law and is possessed of good moral character and is entitled to the high regard and confidence of the public.

.0602 Permanent Record
All information furnished to the Board by an applicant shall be deemed material, and all such information shall be and become a permanent record of the Board.

.0603 Failure to Disclose
No one shall be licensed to practice law ~~by examination or comity or be allowed to take the bar examination~~ in this state:

(1) who fails to disclose fully to the Board, whether requested to do so or not, the facts relating to any disciplinary proceedings or charges as to the applicant's professional conduct, whether same have been terminated or not, in this or any other state, or any federal court or other jurisdiction, or

(2) who fails to disclose fully to the Board, whether requested to do so or not, any and all facts relating to any civil or criminal proceedings, charges or investigations involving the applicant~~,~~ (unless expunged under applicable state law), whether the same have been terminated or not in this or any other state or in any of the federal courts or other jurisdictions.

.0604 Bar Candidate Committee
Every applicant shall appear before a bar candidate committee, appointed by the ~~Chairman of the~~ Board Chair, in the judicial district in which the applicant resides, or in such other judicial districts as the Board in its sole discretion may designate to the applicant, to be examined about any matter pertaining to the applicant's moral character and general fitness to practice law. An applicant who has appeared before a hearing Panel may, in the Board's discretion, be excused from making a

subsequent appearance before a bar candidate committee. The Board Chair may delegate to the Executive Director the authority to exercise such discretion. The applicant shall give such information as may be required on such forms provided by the Board. A bar candidate committee may require the applicant to make more than one appearance before the committee and to furnish to the committee ~~the~~ such information and documents as it may reasonably require pertaining to the moral character and general fitness of the applicant to be licensed to practice law in North Carolina. Each applicant will be advised when to appear before the bar candidate committee. There can be no changes once the initial assignment is made.

.0605 Denial; Re-Application
No new application or petition for reconsideration of a previous application from an applicant who has either been denied permission to take the bar examination or has been denied a license to practice law on the grounds set forth in Section .0600 shall be considered by the Board within a period of three (3) years next after the date of such denial unless, for good cause shown, permission for re-application or petition for a reconsideration is granted by the Board.

Section .0700 - Educational Requirements

.0701 General Education
Each applicant must have satisfactorily completed the academic work required for admission to a law school approved by the Council of the North Carolina State Bar.

.0702 Legal Education
Every applicant applying for admission to practice law in the State of North Carolina, before being granted a license to practice law, shall prove to the satisfaction of the Board that said applicant has graduated from a law school approved by the Council of The North Carolina State Bar or that said applicant will graduate within thirty (30) days after the date of the written bar examination from a law school approved by the Council of the North Carolina State Bar. There shall be filed with the Executive Director a certificate of the dean, or other proper official of said law school, certifying the date of the applicant's graduation. A list of the approved law schools is available in the office of the Executive Director.

Section .0800 - Protest

.0801 Nature of Protest
Any person may protest the application of any applicant to be admitted to the practice of law ~~either by examination or by comity~~.

.0802 Format
A protest shall be made in writing, signed by the person making the protest and bearing the person's home and business address, and shall be filed with the Executive Director

(a) if a general applicant, before the date the applicant is scheduled to be examined; or

(b) if a comity, military spouse comity, or transfer applicant, before the date of the applicant's final appearance before a Panel.

.0803 Notification; Right to Withdraw
The Executive Director shall notify immediately the applicant of the protest and of the charges therein made; and the applicant thereupon may file with the Executive Director a written withdrawal as a candidate for admission.

.0804 Hearing
In case the applicant does not withdraw as a candidate for admission to the practice of law, the person or persons making the protest and the applicant in question shall appear before a Panel or the Board at a time and place to be designated by the Board Chair. If the applicant is an applicant for admission by examination and a hearing on the protest is not held before the written examination, the applicant may take the written examination.

.0805 Refusal to License
Nothing herein contained shall prevent the Board on its own motion from refusing to issue a license to practice law until the Board has been fully satisfied as to the moral character and general fitness of the applicant as provided by Section .0600 of this Chapter.

Section .0900 - Examinations

.0901 Written Examination
Two written bar examinations shall be held each year for ~~those applying to be admitted to the practice of law in North Carolina~~ general applicants.

.0902 Dates
The written bar examinations shall be held in ~~the City of Raleigh,~~ Wake County or adjoining counties in the months of February and July on ~~such~~ the dates ~~as the Board may set from year to year~~ prescribed by the National Conference of Bar Examiners.

.0903 Subject Matter
~~The examination may deal with the following subjects: Business Association (including agency, corporations, and partnerships), Civil~~

~~Procedure, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Family Law, Legal Ethics, Real Property, Secured Transactions including The Uniform Commercial Code, Taxation, Torts, Trusts, Wills, Decedents' Estates and Equity.~~

The examination shall be the Uniform Bar Examination (UBE) prepared by the National Conference of Bar Examiners and comprising six (6) Multistate Essay Examination (MEE) questions, two (2) Multistate Performance Test (MPT) items, and the Multistate Bar Examination (MBE). Applicants may be tested on any subject matter listed by the National Conference of Bar Examiners as areas of law to be tested on the UBE. Questions will be unlabeled and not necessarily limited to one subject matter.

.0904 Grading and Scoring.
Grading of the MEE and MPT answers shall be strictly anonymous. The MEE and MPT raw scores shall be combined and converted to the MBE scale to calculate written scaled scores according to the method used by the National Conference of Bar Examiners for jurisdictions that administer the UBE.

~~.0904~~ **.0905 Passing Score**
The Board shall determine ~~what shall constitute~~ the passing ~~of an examination~~ UBE score for admission in North Carolina. The UBE passing score shall only be increased on one year's public notice.

Section .1000 - Review of Written Bar Examination

.1001 Review
~~An applicant for admission by~~ After release of the results of the written bar examination, a general applicant who has failed the written examination may, in the Board's offices, ~~examine~~ review the MEE questions and MPT items on the written examination and the applicant's answers ~~to the essay portion of the examination and such other~~ thereto, along with selected answers ~~as~~ by other applicants which the Board determines ~~will be of assistance to the applicant.~~ may be useful to unsuccessful applicants.

~~.1002 Fees~~
The Board will also furnish an unsuccessful applicant ~~a copy of the applicant's essay examination at a cost to be determined by the Executive Director, not to exceed an amount determined by~~ hard copies of any or all of these materials, upon payment of the reasonable cost of such copies, as determined by the Board. No copies of the ~~Board's grading guide will be made or furnished to the applicant.~~ MEE or MPT grading materials prepared by the National Conference of Bar Examiners will

be shown or provided to the applicant unless authorized by the National Conference of Bar Examiners.

~~.1003~~ .1002 Multistate Bar Examination

There is no provision for review of the Multistate Bar Examination. Applicants may, however, request the National Conference of Bar Examiners to hand score their MBE answers.

~~.1004~~ .1003 Release of Scores

(1) ~~Upon written request, the~~ The Board will not release ~~to an unsuccessful applicant the applicant's~~ UBE scores ~~on~~ to the ~~bar examination~~ public.

(2) The Board will inform each applicant in writing of the applicant's scaled score on the UBE. Scores will be shared with the applicant's law school only with the applicant's consent.

(3) Upon written request of an unsuccessful applicant, the Board will furnish the following information about the applicant's score to the applicant: the applicant's raw scores on the MEE questions and MPT items; the applicant's scaled combined MEE and MPT score; the applicant's scaled MBE score; and the applicant's scaled UBE score.

~~(2)~~(4) Upon written request of an applicant, the Board will furnish the Multistate Bar Examination score of said applicant to another jurisdiction's board of bar examiners~~,~~ or like organization that administers the admission of attorneys ~~into~~ for that jurisdiction.

~~.1005~~ .1004 Board Representative

The Executive Director ~~of the Board~~ serves as the Board's representative ~~of the Board during this~~ for purposes of any review of the written bar examination by an unsuccessful applicant. The ~~Secretary~~ Executive Director is not authorized to discuss any specific questions and answers on the bar examination.

.1005 Re-Grading

Examination answers cannot be re-graded once UBE scores have been released.

Section .1100 - Reserved for Future Use

Section .1200 - Board Hearings

.1201 Nature of Hearings

(1) All general applicants may be required to appear before the Board or a hearing Panel at a hearing to answer inquiry about any matter under

these rules. In the event a hearing for an applicant for admission by examination is not held before the written examination, the applicant shall be permitted to take the written examination.

(2) Each comity, military spouse comity, or transfer applicant shall appear before the Board or Panel to satisfy the Board that he or she has met all the requirements of Rule .0502, Rule .0503 or Rule .0504.

.1202 Notice of Hearing
The ~~Chairman~~ Board Chair will schedule the hearings before the Board or Panel, and such hearings will be scheduled by the issuance of a notice of hearing mailed to the applicant or the applicant's attorney within a reasonable time before the date of the hearing.

.1203 Conduct of Hearings
(1) All hearings shall be heard by the Board except that the ~~Chairman~~ Board Chair may designate two or more members or Emeritus Members (as ~~that term is defined by the Policy of the North Carolina~~ recommended by the Board and approved by the State Bar Council ~~creating Emeritus Members to~~) to serve as a Panel to conduct the hearings.

(2) The Panel will make a determination as to the applicant's eligibility for admission to practice law in North Carolina. The Panel may grant the application, deny the application, or refer it to the Board for a de novo hearing. The applicant will be notified in writing of the Panel's determination. In the event of an adverse determination by the Panel, the applicant may request a hearing de novo before the Board by giving written notice to the Executive Director at the offices of the Board within ten (10) days following receipt of the hearing Panel's determination. Failure to file such notice in the manner and within the time stated shall operate as a waiver of the right of the applicant to request a hearing de novo before the Board.

(3) The Board or a Panel may require an applicant to make more than one appearance before the Board or a hearing Panel, to furnish information and documents as it may reasonably require, and to submit to reasonable physical or mental examinations, pertaining to the moral character or general fitness of the applicant to be licensed to practice law in North Carolina.

(4) The Board or a Panel of the Board may allow an applicant to take the bar examination while the Board or a Panel makes a final determination that the applicant possesses the qualifications and general fitness requisite for an attorney and counselor at law, is possessed of good moral character, and is entitled to the confidence of the public.

.1204 Continuances~~; Motions for Such~~
Continuances will be granted to a party only in compelling circumstances, especially when one such disposition has been previously requested by and granted to that party. Motions for continuances should be made to the Executive Director and will be granted or denied by the Board Chair or by a Panel designated for the applicant's hearing.

.1205 Subpoenas
(1) The Board Chair, or the Board Chair's designee, shall have the power to subpoena and to summon and examine witnesses under oath and to compel their attendance and the production of books, papers and other documents and writings deemed by it to be necessary or material to the hearing as set forth in G.S. 84-24.

(2) The Executive Director is delegated the power to issue subpoenas in the Board's name.

.1206 ~~Depositions and Discovery~~ Evidence That May Be Received By the Board
(1) ~~A~~ In addition to live testimony, a deposition may be used in evidence when taken in compliance with the N.C. Rules of Civil Procedure, G.S. 1A-1.

(2) A Panel or the Board may consider sworn affidavits as evidence in a hearing. The Board will take under consideration sworn affidavits presented to the Board by persons desiring to protest an applicant's admission to the North Carolina Bar.

(3) The Board may receive other evidence in its discretion.

.1207 Reopening of a Case
After a final decision has been reached by the Board in any matter, a party may petition the Board to reopen or reconsider a case. Petitions will not be granted except when petitioner can show that the reasons for reopening or reconsidering the case are to introduce newly discovered evidence which was not presented at the initial hearing because of some justifiable, excusable or unavoidable circumstances and that fairness and justice require reopening or reconsidering the case. The Petition must be made within a reasonable time and not more than ninety days after the decision of the Board has been entered.

Section .1300 - Licenses

~~.1302 Licenses for General Applicants~~ .1301 Issuance
Upon compliance with the rules of the Board, and all orders of the Board, the Executive Director, upon order of the Board, shall issue a license to

practice law in North Carolina to each applicant as may be designated by the Board in the form and manner as may be prescribed by the Board, and at such times as prescribed by the Board.

Section .1400 - Judicial Review

.1401 Appeals
An applicant may appeal from an adverse ruling or determination by the Board as to the applicant's eligibility for admission to practice law in North Carolina. Such appeal shall lie to the Superior Court of Wake County.

.1402 Notice of Appeal
Notice of Appeal shall be provided, in writing, within twenty (20) days after notice of such ruling or determination. This Notice shall contain written exceptions to the ruling or determination and shall be filed with the Superior Court for Wake County, North Carolina. A filed copy of said Notice shall be given to the Executive Director. Failure to file such notice of appeal in the manner and within the time stated shall operate as a waiver of the right to appeal and shall result in the decision of the Board becoming final.

.1403 Record to be Filed
Within sixty (60) days after receipt of the notice of appeal, and after the applicant has paid the cost of preparing the record, the Executive Director shall prepare, certify, and file with the Clerk of the Superior Court of Wake County the record of the case, comprising~~;~~:

(1) the application and supporting documents or papers filed by the applicant with the Board;

(2) a complete transcription of the testimony ~~when~~ taken at ~~the~~ any hearing;

(3) copies of all pertinent documents and other written evidence introduced at the hearing;

(4) a copy of the decision of the Board; and

(5) a copy of the notice of appeal containing the exceptions filed to the decision. With the permission of the court, the record may be shortened by stipulation of all parties to the review proceedings. Any party unreasonably refusing to stipulate to limit the record may be taxed by the court for such additional costs as may be occasioned by the refusal. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

.1404 Proceedings on Review in Wake County Superior Court
~~Such~~ The appeal shall ~~lie to the Superior Court of Wake County and shall~~ be heard by the presiding judge or resident judge, without a jury, who may hear oral arguments and receive written briefs, but no evidence not offered at the hearing shall be taken, except that in cases of alleged omissions or errors in the record, testimony thereon may be taken by the court. The findings of fact by the Board, when supported by competent evidence, shall be conclusive and binding upon the court. The court may affirm, reverse, or remand the case for further proceedings. If the court reverses or remands for further proceedings the decision of the Board, the judge shall set out in writing, which writing shall become a part of the record, the reasons for such reversal or remand.

.1405 ~~North Carolina Supreme Court~~ Further Appeal
Any party to the review proceeding, including the Board, may appeal to the Supreme Court from the decision of the Superior Court. No appeal bond shall be required of the Board.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina were duly approved by the Council of the North Carolina State Bar at a regularly called meeting on July 28, 2017.

Given over my hand and the Seal of the North Carolina State Bar, this the 21st day of August, 2017.

s/ L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina as approved by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 8th day of November, 2017.

s/Mark Martin
Mark D. Martin Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules Governing Admission to the Practice of Law in the State of North Carolina be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 8th day of November, 2017.

s/Morgan, J.
For the Court

The Order establishing the Chief Justice's Commission on Professionalism, as amended on 12 January 2016, is further amended to read as follows:

THE CHIEF JUSTICE'S COMMISSION ON PROFESSIONALISM

IN THE SUPREME COURT OF NORTH CAROLINA BY ORDER OF THE COURT

In recognition of the need for the emphasis upon and encouragement of professionalism in the practice of law, the Court hereby creates THE CHIEF JUSTICE'S COMMISSION ON PROFESSIONALISM.

The membership of the Commission shall be as follows:

The Commission's chair will be the Chief Justice or his or her designee. The chair will appoint the Commission's other members. The Commission's members will reflect the profession's four main constituents: practicing lawyers, judges, law school faculty, and the public. The chair will appoint from the constituents as follows:

1. Judges:

   (a) two judges chosen from those who serve actively or have served on the trial benches of the courts of North Carolina or the United States, and

   (b) an appellate court judge chosen from the Supreme Court of North Carolina, the North Carolina Court of Appeals, or the United States Court of Appeals.

2. Law School Faculty: two law school faculty members who are full-time faculty members from accredited North Carolina law schools, chosen on recommendations of the deans thereof.

3. Practicing Lawyers: eight practicing lawyers giving due and appropriate regard for diversity of representation and taking into account such factors as the chair shall deem just.

4. Public Members: Three non-lawyer citizens active in public affairs.

With the exception of the chairman, the members of the Commission shall serve for a term of three years provided, however, in the discretion of the chair, the initial appointments may be for a term of less than three years so as to accomplish staggered terms for the membership of the Commission.

PROFESSIONALISM

BY THIS ORDER, the Court issues to the Commission the following charge: The Commission's primary charge shall be to enhance professionalism among North Carolina's lawyers. In carrying out its charge, the Commission shall provide ongoing attention and assistance to the task of ensuring that the practice of law remains a high calling, enlisted in the service of clients and in the public good.

The Commission's major responsibilities should include:

1. to consider and encourage efforts by lawyers and judges to improve the administration of justice;

2. to examine ways of making the system of justice more accessible to the public;

3. to monitor and coordinate North Carolina's professionalism efforts in such institutional settings as the bar, the courts, the law schools, and law firms;

4. to monitor professionalism efforts in jurisdictions outside North Carolina;

5. to conduct a study and issue a report on the present state of lawyer professionalism within North Carolina;

6. to plan and conduct Convocations on Professionalism;

7. to provide guidance and support to the Board of Continuing Legal Education and to the various CLE providers accredited by the Board, in the implementation and execution of a CLE professionalism requirement of not less than one hour per year;

8. to implement a professionalism component in bridge-the-gap programs for new lawyers;

9. to make recommendations to the Supreme Court, the State Bar, the voluntary bars, and the Board of Continuing Legal Education concerning additional means by which professionalism can be enhanced among North Carolina lawyers;

10. to receive and administer grants and to make such expenditures therefrom as the Commission shall deem prudent in the discharge of its responsibilities.

Provided, however, the Commission shall have no authority to impose discipline upon any members of the North Carolina State Bar or to

amend, suspend, or modify the rules and regulations of the North Carolina State Bar including the Revised Rules of Professional Conduct.

By order of the Court in Conference, this the 21st day of November, 2017.

s/Morgan, J.
Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of November, 2017.

Christie Speir Cameron Roeder
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

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