371 N.C.—No. 3 Pages 345-485

NORTH CAROLINA STATE BAR; ADMINISTRATIVE COMMITTEE; CONTINUING LEGAL EDUCATION; LEGAL SPECIALIZATION; CERTIFICATION OF PARALEGALS; ADMISSION TO THE PRACTICE OF LAW

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

NOVEMBER 29, 2018

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

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OF
NORTH CAROLINA

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SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 17 AUGUST 2018 AND 21 SEPTEMBER 2018

ORDERS

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

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CRIMINAL LAW

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to retain possession, for a certain use—Where defendant was convicted of keeping or maintaining a car which is used for the keeping or selling of a controlled substance in violation of N.C.G.S. § 90-108(a)(7) and where he argued on appeal that the trial court erred by denying his motion to dismiss, the Supreme Court held that, when viewed in the light most favorable to the State, it could reasonably be inferred from the evidence at trial that defendant had "kept" the Cadillac he was driving. The word "keep" in the relevant portion of subsection 90-108(a)(7) refers to possessing something for at least a short period of time—or intending to retain possession of something in the future—for a certain use. During the hour and a half of surveillance, officers saw defendant arrive at a hotel in a Cadillac, stay in a hotel room for a while, and then leave in the Cadillac. He was the only person they saw using the Cadillac, and there was a service receipt in the Cadillac bearing defendant's name and dated two and a half months before defendant's arrest. A reasonable jury thus could conclude that defendant had possessed the Cadillac for about two and a half months, at the very least. **State v. Rogers, 397.**

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INDICTMENT AND INFORMATION

Indictment and Information—habitual felon—conviction of lesser-included offense—Where the habitual felon indictment returned against defendant alleged that defendant had committed the offenses of robbery with a dangerous weapon and had been convicted of common law robbery, the Supreme Court held that the habitual felon indictment was not fatally defective. The indictment contained all of the information required by N.C.G.S. § 14-7.3 and gave defendant adequate notice of the charge against him. Further, common law robbery is a lesser-included offense of robbery with a dangerous weapon, and an indictment for an offense includes all the lesser degrees of the same crime. **State v. Langley, 389.**

JUVENILES

Juveniles—custodial interrogation—waiver of juvenile rights—The trial court did not err by concluding that juvenile defendant knowingly, willingly, and understandingly waived his juvenile rights pursuant to N.C.G.S. § 7B-2101 before making certain incriminating statements. Evidence in the record tended to show that the detective advised defendant of his juvenile rights in spoken English, written Spanish, and written English; defendant initialed each of the rights on the juvenile rights waiver form and signed it; defendant answered affirmatively that he understood his rights; and defendant understood what the detective was saying. While the

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
March 12, 13, 14, 15
April 16, 17, 18
May 14, 15, 16, 17
August 27, 28, 29, 30
October 1, 2, 3, 4
November 6, 7, 8
December 3, 4, 5, 6

BOONE FORD, INC. v. IME SCHEDULER, INC.

[371 N.C. 345 (2018)]

BOONE FORD, INC. D/B/A BOONE FORD LINCOLN MERCURY, INC.
A DELAWARE CORPORATION
v.
IME SCHEDULER, INC., A NEW YORK CORPORATION
AND
CASH FOR CRASH, LLC, A NEW JERSEY LIMITED LIABILITY COMPANY
v.
BOONE FORD, INC. D/B/A BOONE FORD LINCOLN MERCURY, INC.
A DELAWARE CORPORATION

No. 162A17

Filed 17 August 2018

Trials—consolidation of cases—by judge who did not preside over trial—error corrected by presiding judge

Where two cases were consolidated before trial by one superior court judge and then tried by another superior court judge, the Supreme Court held that the first judge erred in consolidating the cases because he was not scheduled to preside over the consolidated trial, but the judge who presided at trial effectively corrected that error, leaving the trial and judgment untainted. The Supreme Court reaffirmed the rule from *Oxendine v. Catawba County Department of Social Services*, 303 N.C. 699 (1981)—that "the discretionary ruling of one superior court judge to consolidate claims for trial may not be forced upon another superior court judge who is to preside at that trial"—but clarified that the judge who presides at a consolidated trial can effectively correct the procedural error that an earlier judge makes under *Oxendine*.

Justice NEWBY concurring in the result only.

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. ___, 800 S.E.2d 94 (2017), vacating an order granting a motion to consolidate entered on 21 April 2015 by Judge Jeff Hunt in Superior Court, Watauga County. Heard in the Supreme Court on 13 March 2018.

Reeves DiVenere Wright, by Anné C. Wright, for appellant Boone Ford, Inc.

Miller & Johnson, PLLC, by Nathan A. Miller, for defendant-appellee IME Scheduler, Inc. and plaintiff-appellee Cash for Crash, LLC.

MARTIN, Chief Justice.

This appeal concerns two cases that were consolidated before trial by one superior court judge and then tried by another superior court judge. We hold that the first judge erred in consolidating these cases because he was not scheduled to preside over the consolidated trial, but that the judge who presided at trial effectively corrected that error, leaving the trial and judgment untainted. We therefore reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for additional proceedings.

In February 2014, appellant Boone Ford, Inc. filed a complaint against appellee IME Scheduler, Inc. In its complaint, Boone Ford set forth five claims for relief relating to IME Scheduler's contemplated purchase of a Ford Raptor truck from Boone Ford. That purchase never occurred. In its answer, IME Scheduler asserted five counterclaims against Boone Ford arising out of the same failed transaction. That September, co-appellee Cash for Crash, LLC filed its own complaint against Boone Ford, alleging conversion and other torts based on an accidental wire transfer of $206,569 that, according to Cash for Crash's complaint, Boone Ford refused to return for three months. It is undisputed that IME Scheduler and Cash for Crash were both owned by the same man, Mikhail Heifitz, when the events at issue in both lawsuits took place. In its answer to Cash for Crash's complaint, Boone Ford moved to consolidate the two cases.

The superior court held a hearing on Boone Ford's motion to consolidate in April 2015, with Judge Jeff Hunt presiding. During the hearing, Judge Hunt said that he did not know who would preside at trial. There is no evidence in the record that Judge Hunt expected to be, or was scheduled to be, the presiding judge at trial. Judge Hunt granted the motion the day after the hearing.

Judge William H. Coward was ultimately assigned to preside at trial. In January 2016, he approved a pretrial order setting out various stipulations of the parties. He presided over the consolidated trial in February 2016. The record contains no indication that any party moved to sever the consolidated cases or asked Judge Coward to reconsider whether the cases should have been consolidated. The jury returned a verdict in Boone Ford's favor, and Judge Coward issued a judgment that awarded Boone Ford $70,000 in damages plus interest and costs.

IME Scheduler and Cash for Crash appealed that judgment to the Court of Appeals, arguing, among other things, that the cases had

been improperly consolidated. In a split decision, the Court of Appeals agreed with that argument, vacated Judge Hunt's consolidation order, and remanded the newly unconsolidated cases to superior court. *Boone Ford, Inc. v. IME Scheduler, Inc.*, ___ N.C. App. ___, ___, 800 S.E.2d 94, 98 (2017). Relying on our decision in *Oxendine v. Catawba County Department of Social Services*, the Court of Appeals reasoned that, because there was no indication that Judge Hunt would preside over these cases at trial, he lacked the authority to consolidate them. *Id.* at ___, 800 S.E.2d at 96-97 (citing and quoting *Oxendine*, 303 N.C. 699, 703-04, 281 S.E.2d 370, 373 (1981)). Based on this rationale, the Court of Appeals vacated the consolidation order. *Id.* at ___, 800 S.E.2d at 97-98. Judge Dillon dissented. *See generally id.* at ___, 800 S.E.2d at 98-99 (Dillon, J., dissenting). He agreed with the majority that Judge Hunt's order consolidating the cases was not binding on Judge Coward. *Id.* at ___, 800 S.E.2d at 98. But he noted that IME Scheduler and Cash for Crash "*never* made any motion asking Judge Coward to sever the matter." *Id.* at ___, 800 S.E.2d at 99. In Judge Dillon's view, this omission should have precluded IME Scheduler and Cash for Crash from objecting to the consolidation later simply because the jury returned a verdict unfavorable to them. *Id.* at ___, 800 S.E.2d at 98-99. Boone Ford appealed to this Court based on Judge Dillon's dissenting opinion.

In *Oxendine*, Judge Forrest A. Ferrell—the judge who was presiding over pretrial matters in the superior court action in that case—granted a motion to consolidate two actions even though "[t]here was no indication that he was scheduled to preside" at the trial of the consolidated cases. 303 N.C. at 704, 281 S.E.2d at 373. Adopting a rule first articulated by the Court of Appeals in *Pickard v. Burlington Belt Corp.*, this Court stated that "a consolidation cannot be imposed upon the judge presiding at the trial by the preliminary Order of another trial judge." *Id.* at 703, 281 S.E.2d at 373 (quoting *Pickard v. Burlington Belt Corp.*, 2 N.C. App. 97, 103, 162 S.E.2d 601, 604-05 (1968)). Applying this procedural rule from *Pickard*, this Court held that Judge Ferrell's entry of a consolidation order was "procedurally in error" and vacated that order. *Id.* at 703-04, 281 S.E.2d at 373. Thus, under *Oxendine*, a judge who is not scheduled to preside at the consolidated trial cannot consolidate two or more cases for trial. *Id.* "Whether cases should be consolidated for trial is to be determined in the exercise of his sound discretion *by the judge who will preside during the trial* . . . ." *Id.* at 703, 281 S.E.2d at 373 (emphasis added) (quoting *Pickard*, 2 N.C. App. at 103, 162 S.E.2d at 604-05).

Here, Judge Hunt stood in the same position that Judge Ferrell did in *Oxendine*. There was no indication in this case, either at the

consolidation hearing or at any other time, that Judge Hunt was scheduled to preside over the consolidated trial. As we have already said, Judge Hunt noted at the consolidation hearing that he did not know who would preside at trial. Like Judge Ferrell in *Oxendine*, then, Judge Hunt made a procedural error in issuing the consolidation order in question.

This does not end our analysis, however, because Judge Coward had the authority to make his own determination on consolidation. Under *Oxendine*, Judge Hunt's consolidation order could not bind Judge Coward. *Id.* at 704, 281 S.E.2d at 373. And although the record does not indicate that any party raised the question of consolidation before Judge Coward at any time, that does not change our analysis. Requiring Judge Coward to wait for a party to raise the issue of consolidation before acting on it, after all, would prevent him from severing the cases unless a party moved to sever. This requirement *would* allow Judge Hunt's order to bind Judge Coward in this instance, because no party moved before Judge Coward to sever the cases. That, in turn, would impose a restriction on the *Oxendine* rule that does not exist. Judge Coward therefore must have been free to sever the cases sua sponte for any reason he deemed appropriate.

Because we presume that judges know the law, *see Sanders v. Ellington*, 77 N.C. 255, 256 (1877); *accord Lambrix v. Singletary*, 520 U.S. 518, 532 n.4, 117 S. Ct. 1517, 1527 n.4 (1997), we presume that Judge Coward knew that he had the authority under *Oxendine* to sever the cases sua sponte. But he still signed a pretrial order that left the cases consolidated and ultimately presided over a consolidated trial. So Judge Coward implicitly made his own determination—a determination that the cases should be consolidated for trial. When he did so, his determination on consolidation replaced Judge Hunt's determination as the operative one in these proceedings. By substituting a procedurally sound determination in place of a procedurally unsound one, Judge Coward corrected the procedural error that Judge Hunt's consolidation order had injected into this case.

It is worth emphasizing the dramatically different postures in which this case and *Oxendine* came before our Court. The plaintiffs in *Oxendine* filed an interlocutory appeal less than a week after the entry of the consolidation order. *See* 303 N.C. at 701-02, 281 S.E.2d at 372. In other words, when *Oxendine* reached our appellate courts, no trial had occurred, and no judge had been assigned to preside at trial. As a result, no judge presiding at trial had the chance to correct the error that Judge Ferrell had made. Only the appellate courts could correct it, and this Court did so. *See id.* at 704, 281 S.E.2d at 373. In this case,

by contrast, Judge Coward was assigned to preside at, and did in fact preside at, the consolidated trial. He had already corrected the procedural error in question by the time the trial here took place, which left no error for the appellate courts to address. Because the appeal in this case was filed much later in this case's proceedings than the appeal in *Oxendine* was filed in that case's proceedings, and because in this case the second judge corrected the error that arose on the first judge's watch, this case is both factually and legally distinguishable from *Oxendine*.

The *Oxendine* rule—that is, the rule that "the discretionary ruling of one superior court judge to consolidate claims for trial may not be forced upon another superior court judge who is to preside at that trial," *id.* at 704, 281 S.E.2d at 373—was undoubtedly designed with the constitutionally mandated rotation of superior court judges in mind. *See* N.C. Const. art. IV, § 11 ("The principle of rotating Superior Court Judges among the various districts of a division is a salutary one and shall be observed."). *Oxendine*'s rule helps keep judges who will be rotating away from a district from unduly interfering with trials that will almost certainly be held in front of other judges. Because of what we hold today, a litigant who thinks that consolidation was improper under *Oxendine* may not wait until a consolidated trial is over and then object to consolidation just because the litigant does not like the outcome of the consolidated trial. Under today's decision, though, the authority to consolidate cases for trial remains in the hands of the judge who will preside at trial. That is *Oxendine*'s rule; it is sound; and we reaffirm it.

The *holding* of *Oxendine*, however, is on somewhat shakier ground. *Oxendine* could have held that Judge Ferrell's consolidation order could not bind any later-in-time judge but that the order was still valid until a later-in-time judge made a different determination. Instead, *Oxendine* held that it was improper for Judge Ferrell even to issue the consolidation order in the first place. *See* 303 N.C. at 703-04, 281 S.E.2d at 373. This holding does not necessarily follow from *Oxendine*'s rule, and its application may be impractical in some cases.[1]

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1. Notably, the *Superior Court Judges' Benchbook* cites *Oxendine* for the proposition that "[i]t is within the discretion of the judge presiding at trial whether to consolidate for trial actions that involve common questions of law and fact," but does not explicitly state that a judge not scheduled to preside at trial may not issue a consolidation order. Michael Crowell, *North Carolina Superior Court Judges' Benchbook*, *General: One Trial Judge Overruling Another* 5 (School of Gov't, Univ. of N.C. at Chapel Hill, Jan. 2015), https://benchbook.sog.unc.edu/judicial-administration-and-general-matters/one-trial-judge-overruling-another. The *Benchbook* thus summarizes *Oxendine*'s rule but not its holding.

In fact, *Oxendine*'s holding—that the judge who is assigned to hear preliminary matters but not scheduled to preside at trial cannot even *issue* an order consolidating related cases—cannot be easily harmonized with modern-day best practices for litigation. Because of the rotation process used to assign superior court judges, the judge hearing preliminary motions is often not the judge scheduled to preside at trial. Under *Oxendine*, it is therefore difficult to consolidate cases early in the litigation process absent a stipulation by the parties, even if consolidation is clearly justified on the merits. And waiting to consolidate until the eve of trial results in additional last-minute work for both judges and lawyers. Lawyers usually prefer to prepare cases as they will be tried, and Boone Ford correctly suggests in its brief that even work as prosaic as the preparation of trial notebooks and exhibits might be disrupted if cases are consolidated right before trial. In the meantime, lawyers and litigants may also waste time and effort on duplicative discovery matters. With all of that in mind, Judge Hunt's early consolidation order, although procedurally improper, made good practical sense.

The concurring opinion tries to resolve this tension by arguing that Judge Hunt did not commit error in this case at all. But *Oxendine*'s holding simply cannot be squared with a conclusion that no error occurred here. Both here and in *Oxendine*, a judge not scheduled to preside at trial consolidated two cases for trial, and *Oxendine* declared that the consolidation in that case was "procedurally in error," 303 N.C. at 703, 281 S.E.2d at 373, precisely because "[t]here was no indication that [the judge in question] was scheduled to preside at . . . trial," *id.* at 704, 281 S.E.2d at 373. The concurrence says nothing to distinguish the consolidation order in this case from the one in *Oxendine*, presumably because the two orders are not distinguishable. The meaningful difference between the two cases arose only when Judge Coward was assigned to preside at trial. At that point in time, Judge Coward could and did correct an error that had been made. But it is logically impossible that he retroactively caused no error to have been made at all. We have only two options: either declare Judge Hunt's order "procedurally in error" or overrule *Oxendine* outright. We cannot leave *Oxendine* in place while also declaring that no error occurred here.

And *Oxendine* has been good law for nearly four decades. We should not casually disturb our longstanding precedent, and we do not need to disturb it today to decide this case. It is enough to say that the judge who presides at a consolidated trial can effectively correct the procedural error that an earlier judge makes under *Oxendine*. We hold that Judge Coward's implicit determination that the cases in

question should be consolidated for trial replaced Judge Hunt's determination on consolidation and corrected the procedural error that Judge Hunt had made. We therefore reverse the decision of the Court of Appeals and remand this case to the Court of Appeals to consider other issues that its decision did not reach.

REVERSED AND REMANDED.

Justice NEWBY concurring in the result only.

Parties need to know the structure of the trial as early as possible to plan for the presentation of witnesses and evidence, to organize exhibits, and to conduct trial preparation generally. Rule 42 of the North Carolina Rules of Civil Procedure contemplates a pretrial procedure to consolidate matters for trial. This case illuminates the tension arising under our Rules of Civil Procedure as we adapt them to a system of rotating superior court judges. It appears this early notification of consolidation happened here. I agree with the majority that Judge Hunt's consolidation order had no binding effect on Judge Coward because Judge Hunt was not scheduled to preside over the trial. Any party objecting to the consolidation could have presented the matter afresh to the judge presiding at trial. Judge Coward, having the authority to make the final decision on consolidation, could have divided the cases for trial, but he did not. By ultimately trying the cases together, the presiding judge implicitly ratified the consolidation decision, leaving the trial and judgment untainted. Thus, Judge Hunt's initial decision to consolidate was a proper pretrial order, acquiesced to by the parties and ultimately ratified by the presiding judge at trial. Accordingly, I do not believe Judge Hunt committed "error." My concern is that, by labeling a preliminary pretrial consolidation order "error," the majority opinion will squelch the entry of these useful orders contemplated by Rule 42. Therefore, I concur in the result only.

Rule 42(a) of the North Carolina Rules of Civil Procedure governs the consolidation of claims in state court and authorizes the trial court to consolidate pending actions involving a common question of law or fact:

> [T]he judge may order a joint hearing or trial of any or all the matters in issue in the actions; he may order all the actions consolidated; and he may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

N.C.G.S. § 1A-1, Rule 42(a) (2017). In allocating this authority, the plain text of Rule 42 makes no distinction as to the judge who presides over the pretrial matters or trial. *Id.* (stating that "[w]hen actions involving a common question of law or fact are pending in both the superior and the district court of the same county, *a* judge of the superior court in which the action is pending may order all the actions consolidated" (emphasis added)). Rule 42 does not expressly prohibit the judge presiding over pretrial matters from entering a preliminary order of consolidation.[1]

We have often said that "one superior court judge ordinarily may not overrule a prior judgment of another superior court judge in the same case on the same issue." *State v. Duvall*, 304 N.C. 557, 561, 284 S.E.2d 495, 498 (1981) (quoting *State v. Duvall*, 50 N.C. App. 684, 691, 275 S.E.2d 842, 850 (1981), *rev'd on other grounds*, *Duvall*, 304 N.C. 557, 284 S.E.2d 495). "This rule does not apply, however, to *interlocutory* orders given during the progress of an action which affect the procedure and conduct of the trial." *State v. Stokes*, 308 N.C. 634, 642, 304 S.E.2d 184, 189 (1983) (citations omitted). "An interlocutory order or judgment does not determine the issues in the cause but directs further proceedings preliminary to the final decree." *Id.* at 642, 304 S.E.2d at 190 (citations omitted). "Such order or judgment is subject to change during the pendency of the action to meet the exigencies of the case." *Id.* at 642, 304 S.E.2d at 190 (citations omitted).

This case illustrates the challenge arising under our Rules of Civil Procedure as we apply them to a system of rotating superior court judges. *See* N.C. Const. art. IV, § 11 ("The principle of rotating Superior Court Judges among the various districts of a division is a salutary one and shall be observed."). Relevant here, we have held that a pretrial ruling made by a superior court judge who is not scheduled to preside over the trial that consolidates claims for trial does not bind the superior court judge who actually tries the case. "[T]he discretionary ruling of one superior court judge to consolidate claims for trial may not be forced upon another superior court judge who is to preside at that trial." *Oxendine v. Catawba Cty. Dep't of Soc. Servs.*, 303 N.C. 699, 704, 281 S.E.2d 370, 373 (1981); *see also Stokes*, 308 N.C. at 642, 304 S.E.2d at 189-90. In my view, the rule in *Oxendine*, read in this manner, squares with our current Rules of Civil Procedure and does not preclude the

1. Clearly, the judge presiding over pretrial matters can consolidate those matters for discovery and other pretrial purposes as needed.

judge who considers pretrial matters from making a non-binding, preliminary order.[2]

Here, since Judge Hunt was not scheduled to preside over the consolidated trial, his procedural consolidation order had no binding effect on Judge Coward. As the majority notes, trial court judges are presumed to know the law. *Sanders v. Ellington*, 77 N.C. 255, 256 (1877); *accord Lambrix v. Singletary*, 520 U.S. 518, 532 n.4, 117 S. Ct. 1517, 1527 n.4, 137 L. E. 2d 771, 789 n.4 (1997). We presume that Judge Coward knew he had the authority to sever the cases *ex mero motu*. *See Stokes*, 308 N.C. at 642, 304 S.E.2d at 189-90; *see also* N.C.G.S. § 1A-1, Rule 42(b)(1) (2017) ("The court may in furtherance of convenience or to avoid prejudice . . . order a separate trial of any claim . . . ."). No party contested the consolidation in the pretrial order. Judge Coward signed a pretrial order that left the cases consolidated and presided over a consolidated trial, thus implicitly ratifying Judge Hunt's preliminary order with his own determination on consolidation.

The rule in *Oxendine*, that the authority to consolidate cases for trial ultimately remains in the hands of the judge who will preside at the trial, does not preclude a trial judge from making a non-binding, preliminary determination that consolidation is warranted in the pretrial stages. This interpretation harmonizes the rule in *Oxendine* with our North Carolina Rules of Civil Procedure, which expressly contemplate these pretrial matters and allocate the authority to the presiding judge to consolidate without reservation. Nonetheless, parties need as much notice as possible if matters are to be consolidated for trial. Thus, a preliminary ruling on consolidation in the pretrial stages benefits the trial process and thereby serves the ends of justice. Accordingly, I believe no error was committed by the process used here.

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2. While this Court decided *Oxendine* after our adoption of the Rules of Civil Procedure, it relied on a pre-Rules case. *See Oxendine*, 303 N.C. at 703, 281 S.E.2d at 373 (citing *Pickard v. Burlington Belt Corp.*, 2 N.C. App. 97, 103, 162 S.E.2d 601, 604-05 (1965)). Furthermore, the trial judge in *Oxendine* issued his order "out of term and out of session." *Oxendine*, 303 N.C. at 704, 281 S.E.2d at 373. Orders that are issued out of term and out of session are improper unless both parties consent. *See State v. Saults*, 299 N.C. 319, 325, 261 S.E.2d 839, 842 (1980) (citing *Baker v. Varser*, 239 N.C. 180, 79 S.E.2d 757 (1954)). The opinion in *Oxendine* does not specify the impact of this error. Nonetheless, as indicated herein, I believe its essential holding, that the judge presiding at trial makes the ultimate determination regarding consolidation, can be harmonized with what occurred here without finding error.

MARJORIE C. LOCKLEAR
v.
MATTHEW S. CUMMINGS, M.D., SOUTHEASTERN REGIONAL MEDICAL CENTER, DUKE UNIVERSITY HEALTH SYSTEM, AND DUKE UNIVERSITY AFFILIATED PHYSICIANS, INC.

No. 202A17

Filed 17 August 2018

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. ___, 801 S.E.2d 346 (2017), reversing an order entered on 2 February 2016 and affirming an order entered on 4 February 2016, both by Judge James Gregory Bell in Superior Court, Robeson County. Heard in the Supreme Court on 14 March 2018.

Law Offices of Walter L. Hart, IV, by Walter L. Hart, IV; and Fulmer Law Firm, L.L.C., by H. Asby Fulmer, III, pro hac vice, for plaintiff-appellee.

Cranfill Sumner & Hartzog LLP, by Katherine Hilkey-Boyatt, David D. Ward, and Matthew R. Gambale, for defendant-appellants Matthew S. Cummings, M.D., Duke University Health System, and Duke University Affiliated Physicians, Inc.

PER CURIAM.

This matter is before the Court based upon a dissent at the Court of Appeals. *Locklear v. Cummings*, ___ N.C. App. ___, 801 S.E.2d 346 (2017). The dissent concluded that plaintiff pled "a claim of medical malpractice by a healthcare provider in her complaint, not a claim of ordinary negligence as asserted by the majority." *Id.* at ___, 801 S.E.2d at 352 (Berger, J., concurring in part and dissenting in part). We agree that the majority at the Court of Appeals erred when it converted plaintiff's claim of medical malpractice into a claim of ordinary negligence. *See Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005) (per curiam) ("It is not the role of the appellate courts . . . to create an appeal for an appellant."). We therefore reverse the decision of the Court of Appeals on that ground and remand this case to that court to address whether the trial court erred in dismissing plaintiff's complaint. *See Vaughan v. Mashburn*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (Aug. 17, 2018) (42PA17) (concluding "that a plaintiff in a medical malpractice action may file an amended complaint under Rule 15(a)" by leave of

court "to cure a defect in a Rule 9(j) certification when the expert review and certification occurred before the filing of the original complaint"); *Thigpen v. Ngo*, 355 N.C. 198, 204, 558 S.E.2d 162, 166 (2002) ("[P]ermitting amendment of a complaint to add the expert certification where the expert review occurred after the suit was filed would conflict directly with the clear intent of the legislature.").

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA
v.
MARIAN OLIVIA CURTIS

No. 441PA16

Filed 17 August 2018

Statutes of Limitations and Repose—misdemeanor—citation for DWI—tolling

A citation issued to defendant for driving while impaired tolled the statute of limitations for misdemeanors. The citation was a constitutionally and statutorily proper criminal pleading that conveyed jurisdiction to the district court to try defendant. The General Assembly did not intend the illogical result that an otherwise valid criminal pleading that vests jurisdiction in the trial court would not also toll the statute of limitations.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 794 S.E.2d 561 (2016), affirming an order signed on 9 February 2016 by Judge Michael Duncan in Superior Court, Caldwell County. Heard in the Supreme Court on 6 November 2017.

Joshua H. Stein, *Attorney General*, *by Christopher W. Brooks*, *Special Deputy Attorney General*, *for the State-appellant.*

Wilson, *Lackey & Rohr*, *P.C.*, *by Timothy J. Rohr*, *for defendant-appellee.*

JACKSON, Justice.

In this case we consider whether the two-year statute of limitations in N.C.G.S. § 15-1 bars the State from prosecuting defendant Marian Olivia Curtis for the misdemeanor offense of driving while impaired (DWI) when the State did not charge defendant by indictment or presentment and did not commence prosecution within that period. Because we conclude that other valid criminal pleadings listed in N.C.G.S. § 15A-921, including the citation issued to defendant in this case, toll the section 15-1 statute of limitations, we reverse the decision of the Court of Appeals affirming the superior court's order affirming the district court's order of dismissal and we remand this case for further proceedings.

On 1 August 2012, defendant was cited for DWI. Defendant was also charged with driving left of center and possession of a Schedule II controlled substance. A magistrate's order was issued on 9 August 2012. On 21 April 2015, defendant filed with the District Court, Caldwell County her Objection to Trial on Citation and Motion for Statement of Charges and Motion to Dismiss. In her motion defendant argued that, because she was filing a pretrial objection pursuant to N.C.G.S. § 15A-922(c) to trial on a citation, the State typically would be required by the statute to file a statement of charges; however, because section 15-1 establishes a two-year statute of limitations for misdemeanors, defendant contended that her charges must be dismissed instead. That same day, the district court issued a Preliminary Indication that "defendant was never charged via indictment, presentment, or warrant," that "[t]he statute of limitations ha[d] not been tolled," and that "[i]t has been more than two years since the alleged date of [the] offense." Consequently, the district court determined that the statute of limitations in section 15-1 barred further prosecution of defendant and thus dismissed the charges.

On 29 April 2015, the State appealed the district court's Preliminary Indication to Superior Court, Caldwell County and moved for an order denying defendant's motion to dismiss on the basis that the magistrate's order served to toll the section 15-1 statute of limitations. The superior court issued an order on 1 October 2015 affirming the district court's Preliminary Indication, granting defendant's motion to dismiss, and remanding the case to the district court for entry of a final order dismissing the DWI charge. The district court entered the final order of dismissal on 15 October 2015, and on appeal to superior court, that final order was affirmed in an order signed on 9 February 2016. The State appealed the superior court's decision to the Court of Appeals.

Having determined that the procedural and legal issues in this case were identical to those before it in *State v. Turner*, ___ N.C. App. ___, 793 S.E.2d 287 (2016), the Court of Appeals adopted its reasoning in

Turner and held that the district court had not erred in granting defendant's motion to dismiss. *State v. Curtis*, ___ N.C. App. ___, 794 S.E.2d 561, 2016 WL 7100635, at *1 (2016) (unpublished). Therefore, we look to *Turner*, which is also before this Court on appeal, for the reasoning of the Court of Appeals.[1]

The facts in *Turner* are substantially similar to those in this case. On 7 August 2012, the defendant, Christopher Glenn Turner, received a citation for driving while impaired, was arrested and brought before a magistrate who issued a magistrate's order, and was never charged by indictment, presentment, or warrant. *Turner*, ___ N.C. App. at ___, 793 S.E.2d at 288. On 26 November 2014, the defendant moved to dismiss the charges on grounds that the statute of limitations in section 15-1 had expired. *Id.* at ___, 793 S.E.2d at 288. As in this case, the charge ultimately was dismissed and the State appealed that decision to the Court of Appeals. *Id.* at ___, 793 S.E.2d at 288. The Court of Appeals reasoned that section 15-1 creates a two-year statute of limitations for the misdemeanors listed therein because it provides that "[t]he crimes of deceit and malicious mischief, and the crime of petit larceny where the value of the property does not exceed five dollars ($5.00), and all misdemeanors except malicious misdemeanors, shall be presented or found by the grand jury within two years after the commission of the same." *Id.* at ___, 793 S.E.2d at 289 (emphasis omitted) (quoting N.C.G.S. § 15-1 (2015)). Because the Court of Appeals determined that this statutory language was both explicit and clear, the court concluded that it "must give [the statute] its plain and definite meaning," and was "without power to interpolate, or superimpose, provisions and limitations not contained therein." *Id.* at ___, 793 S.E.2d at 290 (quoting *State v. Williams*, 218 N.C. App. 450, 451, 725 S.E.2d 7, 8-9 (2012)). The Court of Appeals also relied on this Court's determination regarding section 15-1 in *State v. Hedden* that "[t]here is no saving clause in this statute as to the effect of preliminary warrants before a justice of the peace or other committing magistrate, and in our opinion on the facts of this record the law must be construed and applied as written." *Id.* at ___, 793 S.E.2d at 289 (quoting *Hedden*, 187 N.C. 803, 805, 123 S.E. 65, 65 (1924) (footnote omitted)). Consequently, the Court of Appeals held that "the State had two years to either commence the prosecution of its case, or to issue a warrant, indictment, or presentment which would toll the

1. We allowed discretionary review of the decision of the Court of Appeals in *Turner* on 16 March 2017. For the reasons stated in our opinion here, we have filed a per curiam opinion reversing and remanding the decision of the Court of Appeals in *Turner*. *See State v. Turner*, ___ N.C. ___, ___ S.E.2d ___ (Aug. 17, 2018) (No. 440PA16).

statute of limitations," and affirmed dismissal of the DWI charge against the defendant because the State failed to pursue either course within that period. *Id.* at ___, 793 S.E.2d at 290.

On 16 March 2017, we allowed the State's petition for discretionary review of the decision of the Court of Appeals in this case. Before this Court, the State argues that any criminal pleading that establishes jurisdiction in the district court should toll the two-year statute of limitations in section 15-1 and therefore, that the Court of Appeals erred in holding that the State was barred from prosecuting this action due to expiration of the statute of limitations. We agree.

The issue before us is one of statutory interpretation. "The primary goal of statutory construction is to effectuate the purpose of the legislature in enacting the statute." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 574, 573 S.E.2d 118, 121 (2002) (citations omitted). "The legislative purpose of a statute is first ascertained by examining the statute's plain language." *Id.* at 574, 573 S.E.2d at 121 (quoting *Correll v. Div. of Soc. Servs.*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992)). We "give the statute its plain meaning" when the statutory language is clear, but when the meaning of the statute is ambiguous or unclear, we "must interpret the statute to give effect to the legislative intent." *Frye Reg'l Med. Ctr., Inc. v. Hunt*, 350 N.C. 39, 45, 510 S.E.2d 159, 163 (1999) (citing *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136-37 (1990)). Moreover, when "a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded." *Id.* at 45, 510 S.E.2d at 163 (quoting *Mazda Motors of Am., Inc. v. Sw. Motors, Inc.*, 296 N.C. 357, 361, 250 S.E.2d 250, 253 (1979)).

Before its 1971 revision, our state constitution established that "[n]o person shall be put to answer any criminal charge, except as hereinafter allowed, but by indictment, presentment, or impeachment." N.C. Const. of 1868, art. I, § 12. From 1943 until 2017, section 15-1 stated that "all misdemeanors except malicious misdemeanors, shall be presented or found by the grand jury within two years after the commission of the same, and not afterwards." N.C.G.S. § 15-1 (2015).[2] In *State v. Hundley*

2. While our decision in this case was pending, the General Assembly amended section 15-1 to provide that "all misdemeanors except malicious misdemeanors, shall be charged within two years after the commission of the same, and not afterwards." Act of Oct. 5, 2017, ch. 212, sec. 5.3, 2017 N.C. Sess. Laws 1565, 1579 (codified at N.C.G.S. § 15-1 (2017)).

we recognized that this statute specifically "refers to criminal prosecutions based on grand jury action." 272 N.C. 491, 493, 158 S.E.2d 582, 583 (1968). That view was based, at least in part, on our earlier decision in *State v. Underwood*. *See id.* at 493, 158 S.E.2d at 583 (citing *Underwood*, 244 N.C. 68, 70, 92 S.E.2d 461, 463 (1956)).

In *Underwood* a defendant moved to quash a warrant for driving while under the influence when, after appealing to the superior court from his conviction in the Recorder's Court of Harnett County based upon that warrant, the superior court did not hear his case and the State did not obtain a bill of indictment or presentment within two years of the commission of the crime charged. 244 N.C. at 69, 92 S.E.2d at 461-62. In considering whether the statute of limitations in section 15-1 entitled the defendant to such relief, we necessarily addressed our previous decision on this topic in *State v. Hedden*, which defendant points to in support of her motion to dismiss here. *See id.* at 70, 92 S.E.2d at 463. In *Hedden* we had considered whether the statute of limitations that was the predecessor to section 15-1 could be tolled by a magistrate's warrant.[3] 187 N.C. at 804-05, 123 S.E. at 65-66. We determined:

> There is no saving clause in this statute as to the effect of preliminary warrants before a justice of the peace or other committing magistrate, and in our opinion on the facts of this record the law must be construed and applied as written. There must be a presentment or indictment within two years from the time of the offense committed and not afterwards.

Id. at 805, 123 S.E. at 65. In *Underwood*, though, we distinguished *Hedden* on the basis that the committing magistrate who issued the warrant "did not have final jurisdiction of the offense charged but bound the defendant over to the Superior Court. Consequently, the defendant could not have been tried in the Superior Court on the original warrant,

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3. Similar to the version of section 15-1 in effect during the events giving rise to this case, section 4512 of the Consolidated Statutes provided:

> All misdemeanors, and petit larceny where the value of the property does not exceed five dollars, except the offenses of perjury, forgery, malicious mischief, and other malicious misdemeanors, deceit, and the offense of being accessory after the fact, now made a misdemeanor, shall be presented or found by the grand jury within two years after the commission of the same, and not afterwards.

1 N.C. Cons. Stat. § 4512 (1919).

but only upon a bill of indictment." *Underwood*, 244 N.C. at 70, 92 S.E.2d at 463.[4] We determined that section 15-1 directed only that "[i]n criminal cases *where an indictment or presentment is required*, the date on which the indictment or presentment has been brought or found by the grand jury marks the beginning of the criminal proceeding and arrests the statute of limitations." *Id.* at 70, 92 S.E.2d at 463 (emphasis added) (citing N.C.G.S. § 15-1). We then held that:

> [I]n all misdemeanor cases, where there has been a conviction in an inferior court that had final jurisdiction of the offense charged, upon appeal to the Superior Court the accused may be tried upon the original warrant and that the statute of limitations is tolled from the date of the issuance of the warrant.

Id. at 70, 92 S.E.2d at 462.

Defendant argues here that our holding in *Underwood* should be read to carve out a single exception to the plain language of section 15-1 to allow warrants to toll the statute of limitations. Defendant's attempt to distinguish *Underwood* from the present case elevates form over substance and is unpersuasive. Although our holding in *Underwood* addressed the specific factual circumstances of that case, the critical distinction we drew was more generally between crimes that require grand jury action to convey jurisdiction to the trial court and crimes that do not. *See Underwood*, 244 N.C. at 70, 92 S.E.2d at 463. For the latter, it would be absurd to require the State to charge a defendant by indictment or presentment in order to toll the statute of limitations when the State has already obtained an otherwise valid criminal pleading that conveys jurisdiction by satisfying the requirements of N.C.G.S. § 15A-924(a). *See State v. Brice*, 370 N.C. 244, 249, 806 S.E.2d 32, 36 (2017) (explaining that a criminal pleading is constitutionally sufficient and conveys jurisdiction to the trial court when the pleading "clearly [ ] apprise[s] the defendant . . . of the conduct which is the subject of the accusation" (quoting N.C.G.S. § 15A-924(a)(5) (2015))).

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4. In other words, because of the locality-specific structure and jurisdiction of the inferior courts at the times that *Underwood* and *Hedden* were decided, the defendant in *Underwood* could be tried to final judgment, convicted, and sentenced based upon the warrant in that case, but the defendant in *Hedden* could only be held based upon the warrant at issue pending further action by a grand jury. Therefore, the *Underwood* warrant had the effect of tolling the statute of limitations and the *Hedden* preliminary warrant did not.

Since our decision in *Underwood*, the structure of the General Court of Justice as well as the allocation of subject-matter jurisdiction and the types of pleadings that may convey jurisdiction over criminal actions all have undergone substantive changes. The extensive amendments to Article IV of the 1868 constitution that were ratified in 1962 created the District Courts as a division of the new General Court of Justice, *see* N.C. Const. of 1868, art. IV, §§ 1-2, 8 (1962), and granted to the General Assembly the power to "by general law uniformly applicable in every local court district of the State, prescribe the jurisdiction and powers of the District Courts," *id.* art. IV, § 10(3). In a provision that has remained unaltered since its enactment, the General Assembly subsequently directed that "the district court has exclusive, original jurisdiction for the trial of criminal actions, including municipal ordinance violations, below the grade of felony, and the same are hereby declared to be petty misdemeanors." *Compare* N.C.G.S. § 7A-272(a) (Supp. 1965), *with id.* § 7A-272(a) (2017). Following these changes in the structure and allocation of jurisdiction in the General Court of Justice, the text of the provision formerly denominated as Article I, Section 12 of the 1868 constitution was changed in the 1971 constitution to state that "[e]xcept in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment." N.C. Const. art. I, § 22. As such, the General Statutes have directed since 1975 that "[t]he citation, criminal summons, warrant for arrest, or magistrate's order serves as the pleading of the State for a misdemeanor prosecuted in the district court, unless the prosecutor files a statement of charges, or there is objection to trial on a citation." *Compare* N.C.G.S. § 15A-922(a) (1975), *with id.* § 15A-922(a) (2017).

Defendant argues that the expansion of the scope of criminal pleadings for misdemeanor offenses contemplated in Article I, Section 22 does not mean that the scope of pleadings capable of tolling the two-year statute of limitations has also expanded. If the General Assembly desired that effect, defendant contends that section 15-1 would provide for it explicitly. Here defendant again draws an overly technical distinction—one that fails to contemplate the purpose of the two-year statute of limitations in light of development of our State's laws governing criminal procedure.

We have recognized that the purpose of a statute of limitations such as section 15-1 is to "provide predictable, legislatively enacted limits on prosecutorial delay," thereby serving as "the primary guarantee against bringing overly stale criminal charges." *State v. Goldman*, 311 N.C. 338, 343, 317 S.E.2d 361, 364 (1984) (quoting *United States v. Lovasco*, 431

U.S. 783, 789, 97 S. Ct. 2044, 2048 (1977)). Because a criminal citation may now serve as the State's charging document for misdemeanors, *see* N.C.G.S. § 15A-922(a); *see also id.* § 20-138.1(c)-(d) (2017) (stating that "[i]mpaired driving as defined in this section is a misdemeanor," and "[i]n any prosecution for impaired driving, the pleading is sufficient if it states the time and place of the alleged offense in the usual form and charges that the defendant drove a vehicle on a highway or public vehicular area while subject to an impairing substance"), the purpose of the statute of limitations was satisfied by issuance of the citation to defendant.

Here defendant received a citation for driving while subject to an impairing substance. That citation was a constitutionally and statutorily proper criminal pleading that conveyed jurisdiction to the district court to try defendant for the misdemeanor crime charged. In light of our decision in *Underwood*, the changes to criminal procedure and to our court system since the enactment of section 15-1, as well as our understanding of the general purpose of a criminal statute of limitations, we hold that the citation issued to defendant tolled the statute of limitations here. We cannot conclude that the General Assembly intended the illogical result that an otherwise valid criminal pleading that vests jurisdiction in the trial court would not also toll the statute of limitations. Accordingly, we reverse the decision of the Court of Appeals and remand this case to that court for remand to the Superior Court, Caldwell County, with instructions to vacate the 9 February 2016 Order Affirming District Court Order and for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

STATE OF NORTH CAROLINA
v.
TERRENCE LOWELL HYMAN

No. 245A08-2

Filed 17 August 2018

1. Criminal Law—appropriate relief—inability to raise in prior proceedings

The defendant in a first-degree murder prosecution was not in a position to adequately raise his ineffective assistance of counsel claim in prior direct appeals, and his motion for appropriate relief was not subject to the procedural bar created by N.C.G.S. § 15A-1419(a)(3).

2. Criminal Law—appropriate relief—adequate representation—motion denied

The trial court's decision to deny defendant's motion for appropriate relief was supported by the evidence where the claim for ineffective assistance of counsel rested on an alleged conversation between a witness and defendant's trial counsel concerning a probation violation proceeding prior to this trial, which raised the possibility of a conflict of interest. The trial court found that the alleged conversation never happened.

Appeal pursuant to N.C.G.S. § 7A-30(2) and on writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 797 S.E.2d 308 (2017), reversing an order denying defendant's motion for appropriate relief signed on 12 May 2015 by Judge Cy A. Grant, Sr., and entered in Superior Court, Bertie County. Heard in the Supreme Court on 5 February 2018.

Joshua H. Stein, *Attorney General*, *by Mary Carla Babb and Nicholaos G. Vlahos*, *Assistant Attorneys General*, *for the State-appellant.*

Glenn Gerding, *Appellate Defender*, *by Nicholas C. Woomer-Deters*, *Assistant Appellate Defender*, *for defendant-appellee.*

ERVIN, Justice.

The question before us in this case is whether the record supports the trial court's decision to deny defendant's motion for appropriate relief. After carefully considering the record in light of the applicable law, we hold that, while the claim asserted in defendant's motion for appropriate relief is not subject to the procedural bar established by N.C.G.S. § 15A-1419(a)(3), the trial court did not err by denying defendant's motion for appropriate relief for the reasons stated by the Court of Appeals. As a result, we affirm the decision of the Court of Appeals, in part; reverse that decision, in part; and remand this case to the Court of Appeals for consideration of defendant's remaining challenges to the trial court's order denying his motion for appropriate relief.

At approximately 10:00 p.m. on 5 May 2001, Earnest Bennett arrived at the L and Q nightclub with his friends Shelton Lamont Gilliam, Tyrone Knight, and Alton Bennett. As the night progressed and early morning arrived, a man confronted Mr. Bennett, leading to an argument between the two men that escalated into an altercation after a "crew of people" approached Mr. Bennett and began to hit him with "bottles, chairs and basically everything that they could find."

Derrick Speller testified for the State at defendant's trial that, after the altercation had been in progress for approximately fifteen minutes, he observed defendant Terrence Lowell Hyman enter the nightclub with a firearm and shoot it at Mr. Bennett. At that point, Mr. Speller observed Mr. Bennett "clench his side and run for the door." As Mr. Bennett reached the nightclub door, defendant shot him again in the small of his back. According to Mr. Speller, Mr. Bennett and defendant exited the nightclub once defendant had shot Mr. Bennett a second time. Outside the nightclub, Mr. Speller saw defendant "kneeling down over" Mr. Bennett, who was on the ground, and shoot Mr. Bennett a third time.[1] Mr. Bennett died as a result of the gunshot wounds that he sustained on this occasion.

On the other hand, Demetrius Pugh testified on defendant's behalf that he observed Demetrius Jordan shoot Mr. Bennett multiple times inside and outside of the nightclub. According to Demetrius Pugh, Mr. Jordan had a .38 caliber handgun inside the nightclub and procured a nine millimeter handgun from his van after leaving the nightclub's interior.[2] In addition, Lloyd Pugh testified on defendant's behalf that he heard two gunshots inside the nightclub. Although Lloyd Pugh could not

1. Robert Wilson, another witness for the State, also identified defendant as the individual who shot Mr. Bennett.

2. Mr. Speller admitted that Mr. Jordan fired a nine millimeter handgun into the air outside the nightclub.

see who had fired these shots, he knew that defendant had not fired them because he could see defendant, who was leaving the nightclub at that time, and observed that he did not have a firearm on his person when the shots were fired. As Lloyd Pugh attempted to bring the fight inside the nightclub under control, he heard additional gunshots outside. Simultaneously, Lloyd Pugh observed defendant reentering the nightclub without a firearm in his possession.

On 30 July 2001, the Bertie County grand jury returned a bill of indictment charging defendant with first-degree murder. The charges against defendant came on for trial before the trial court and a jury at the 25 August 2003 criminal session of Superior Court, Bertie County.

During the trial, Mr. Speller testified on direct examination that defendant's trial counsel, Teresa Smallwood, had spoken with him before the trial and asked for his help with the case.[3] In the course of a cross-examination conducted by Ms. Smallwood, Mr. Speller testified that he had sought assistance from Ms. Smallwood's law firm with respect to a probation violation proceeding at some point prior to the time that this case came on for trial. In addition, Mr. Speller testified that:

> Q.: At some point in time during that conversation it came up that you had been at the L and Q, do you remember that?
>
> A.: No
>
> . . . .
>
> Q.: Do you remember when you told the members of the jury this earlier that I wanted you to help me, it was because you told me a story on that particular occasion as to what you say happened; isn't that correct?
>
> A.: No, it's not.
>
> . . . .
>
> Q.: You sat in my office and you told me across the desk from me that you had seen Demetrius Jordan . . . . shoot a weapon; isn't that correct?

3. Defendant's other trial counsel, W. Hackney High, stated during a bench conference that he had not known that Mr. Speller and Ms. Smallwood had conversed prior to trial until that fact emerged during Mr. Speller's testimony.

A.: No, it's not.

Q.: And you told me that the reason you didn't want to come forward is because you had been hustling for Turnell Lee and Demetrius Jorden and them dudes was lethal. Do you recall saying that?

A.: No, I did not.

Q.: They would off you in a minute. You don't remember that?

A.: No.

Q.: I didn't either. Until I went back and got the notes. Then in the course of the conversation when you and I were talking, you said that you would help in any way you could; isn't that correct?

A.: No, it's not.

. . . .

Q.: Well earlier you told the members of the jury that I said I needed you to help?

. . . .

A.: Not in the conversation that you're referring to.

. . . .

Q.: Do you recall that at the point in time when we were talking about what it was you knew about the L and Q, do you recall telling me that Turnell Lee and Demetrius Jordan were after you to go and tell the police something that you knew wasn't true?

A.: No, we never had that conversation.

. . . .

When I spoke to you about that case, that was when you sent Tyrone Watson to say that you wanted to talk to me, Turnell and a few other people. I went to your office and seen—and talked to you and Tanza [Ruffin][4] in the parking lot at your office. You all was leaving. I told you

4. At the time of defendant's trial, Ms. Ruffin was Ms. Smallwood's law partner.

at that time I couldn't help you on this case, that I would harm him more than I could help him if I was brought on the stand to testify. That's the only conversation that you and I ever had about this case.

Q.: Derrick, that's the second time we talked about this; isn't that correct?

. . . .

Didn't I represent you in '01?

A.: No, Tanza [Ruffin] represented me.

. . . .

Q.: And I ultimately represented you in that case; isn't that correct?

. . . .

Before the judge, you and I stood before the judge on that case?

A.: Yes, we stood before the judge.

Q.: And it was in the occurrence of that that you talked about all these things as to why you never came forward; isn't that correct?

A.: No, it is not.

At one point in her cross-examination of Mr. Speller, Ms. Smallwood attempted to question Mr. Speller using a one-page document that had Mr. Speller's name at the top and writing on the right-hand side, but was precluded from doing so by the trial court.

On 12 September 2003, the jury returned a verdict convicting defendant of first-degree murder. On 16 September 2003, the jury returned a verdict determining that no aggravating circumstances existed and that defendant should be sentenced to a term of life imprisonment without the possibility of parole. Based upon the jury's verdicts, the trial court entered a judgment sentencing defendant to a term of life imprisonment without parole.

In seeking relief from the trial court's judgment before the Court of Appeals, defendant argued that the trial court had erred by failing "to conduct a hearing when the trial court became aware of a potential conflict of interest on the part of" Ms. Smallwood arising from the fact

"that [Ms.] Smallwood had previously represented [Mr.] Speller in an unrelated case." *State v. Hyman*, 172 N.C. App. 173, 616 S.E.2d 28, 2005 WL 1804345, at *4 (2005) (unpublished) (*Hyman I*). After determining that it could not "find from the face of the record that defendant's attorney's prior representation of [Mr.] Speller affected her representation of defendant," *id.* at *6, the Court of Appeals remanded this case to the Superior Court, Bertie County, "for an evidentiary hearing 'to determine if the actual conflict adversely affected [the attorney's] performance,' " *id.* (alteration in original) (quoting *State v. James*, 111 N.C. App. 785, 791, 433 S.E.2d 755, 759 (1993)).

An evidentiary hearing was conducted before the trial court on remand on 3 October 2005 and 2 November 2005. At the remand hearing, Ms. Smallwood testified that the information that she used during her cross-examination of Mr. Speller stemmed from a meeting that she had had with Mr. Speller, during which she had taken notes. According to available court records, Ms. Smallwood appeared on Mr. Speller's behalf at a probation revocation hearing on 26 September 2002, although Ms. Ruffin was listed as Mr. Speller's attorney of record in that case.[5] On 28 November 2005, the trial court entered an order concluding that Ms. Smallwood's "representation of [defendant] was not adversely affected by her previous representation of [Mr.] Speller." On appeal to the Court of Appeals from the trial court's remand order, defendant argued that "[Ms.] Smallwood's actual conflict of interest adversely affected her representation of him." *State v. Hyman*, 182 N.C. App. 529, 642 S.E.2d 548, 2007 WL 968753, at *2 (2007) (unpublished) (*Hyman II*). The Court of Appeals rejected defendant's challenge to the trial court's remand order on the grounds that defendant had not challenged any of the trial court's findings of fact, rendering them conclusive for purposes of appellate review, *id.* at *4, and that "[d]efendant [had] failed to show [that] the trial court [had] erred when it concluded that [Ms.] Smallwood's representation of him was not adversely affected by her previous representation of [Mr.] Speller," *id.* at *5. As a result, the Court of Appeals affirmed the trial court's remand order. *Id.* at *6.

On 8 May 2008, defendant filed a petition seeking the issuance of a writ of habeas corpus with the United States District Court for the Eastern District of North Carolina. On 31 May 2008, defendant filed a petition seeking the issuance of a writ of certiorari by this Court authorizing

5. Ms. Smallwood had been appointed to represent defendant in this case on 14 May 2001.

review of the Court of Appeals' decisions in *Hyman I* and *Hyman II* and the trial court's remand order. This Court denied defendant's certiorari petition on 22 December 2008. On 31 March 2010, United States District Judge Terrence W. Boyle entered an order opining that "[Ms.] Smallwood's actual conflict of interest adversely affected her performance" and issuing the requested writ of habeas corpus. The State noted an appeal to the United States Court of Appeals for the Fourth Circuit from the District Court's order. On 21 July 2011, the Fourth Circuit released an opinion staying further federal appellate proceedings in order "to provide the North Carolina courts with an opportunity to weigh in on the procedural and substantive issues." *Hyman v. Keller*, No. 10-6652, 2011 WL 3489092, at *11 (4th Cir. Aug. 10, 2011) (per curiam).

On 15 July 2013, defendant filed a motion for appropriate relief in Superior Court, Bertie County, in which he asserted, among other things, that his "constitutional right to effective, conflict-free trial counsel [had been] violated." Defendant argued that "[Ms.] Smallwood was a critical defense witness because she could have testified concerning a prior statement by [Mr.] Speller, a key State's witness, that both impeached his testimony and tended to exculpate [defendant]" and requested that an evidentiary hearing be held at which he could "present evidence, which has never been considered by any court, that establishes a prima facie claim that his right to effective, conflict-free counsel was violated." On 16 July 2013, the trial court entered an order granting defendant's request that an evidentiary hearing be held.

On 3 June 2014, the trial court held an evidentiary hearing for the purpose of considering the issues raised by defendant's motion for appropriate relief. On 12 May 2015, the trial court signed an order denying defendant's motion for appropriate relief. In its order, the trial court found as a fact that:

> 11. At the MAR evidentiary hearing held June 3, 2014, Defendant introduced as evidence a page out of a legal notepad which contained handwritten notes, the contents of which were as follows:
>
> 11/20/01
> Derrick Speller
> saw the whole thing
> Demet had a .380 and a 9 mm.
> He shot the guy and then ran out the back door
> Somebody else shot at the guy with a chrome looking small gun but "I don't know who it was."

> "I heard Demetrius shot him again outside but I don't know for sure."
> "I think it was a 9 mm he (Demet) had outside.
> --Never gave a statement to police because he hustled for Demet and Turnell and them [n*******] are lethal.
> can you shoot me a couple of dollars

The handwritten notes had an exhibit stamp on them reading "Defendant's Exhibit 1." This is an indication that at trial Ms. Smallwood placed the exhibit stamp on the notes, marking them as Defendant's Exhibit 1, when she attempted to show the notes to Speller, but the undersigned would not allow her to do so. . . .

. . . .

13. Former NCPLS attorney Ravi Manne testified at the MAR evidentiary hearing that he . . . . located Defendant's MAR Exhibit 1 among Ms. Smallwood's files on Defendant's case.

. . . .

17. At the MAR evidentiary hearing, Defendant introduced an October 9, 2003 letter Ms. Smallwood sent the Office of Indigent Defense Services ("IDS"), which appeared with other documents admitted into evidence collectively as Defendant's MAR Exhibit 30. . . . Attached to the letter was an "Attorney Time Sheet," detailing in eight pages Ms. Smallwood's daily hours in Defendant's case. The first entry on the time sheet is for May 14, 2001, at which time Ms. Smallwood noted that she reviewed her appointment notice and talked to Defendant's family. There is no entry on the time sheet for November 20, 2001, the date listed on the handwritten notes purportedly from the conversation Ms. Smallwood had with Speller admitted at the MAR evidentiary hearing as Defendant's MAR Exhibit 1.

. . . .

19. At the MAR evidentiary hearing, W. Hackney High testified that he was appointed, along with Ms. Smallwood, to represent Defendant at trial. According to Mr. High, Ms. Smallwood was first-chair counsel, and

he was second-chair counsel. In preparing for trial, Mr. High and Ms. Smallwood reviewed the State's witness list and together determined which attorney would cross-examine which witness, depending on several factors including whether either attorney knew the witness. Mr. High and Ms. Smallwood had decided prior to trial that Mr. High would cross-examine Speller. A witness list Ms. Smallwood and Mr. High prepared from information conveyed to them by the State was admitted into evidence at the MAR evidentiary hearing as Defendant's MAR Exhibit 21. The list contained a notation indicating that "Hack," meaning Mr. High, was to cross-examine Speller.

20. According to Mr. High's MAR evidentiary hearing testimony, prior to trial he and Ms. Smallwood did not have a substantive conversation about Speller. Mr. High testified that he had some indication what Speller would testify to, but did not recall knowing specifically what he was going to say. Mr. High further testified that he was not aware of any conversation between Speller and Ms. Smallwood or any notes regarding a conversation between the two before trial. Mr. High testified that if he had the notes Ms. Smallwood would subsequently claim she had at trial, he would have provided them to his co[-] counsel. Moreover, Mr. High noted that if he had known about the notes when preparing for trial, he would have told Ms. Smallwood that she needed to cross-examine Speller, or they would have approached his cross-examination differently.

21. According to Mr. High's MAR evidentiary hearing testimony, when Speller's name was called at trial, Ms. Smallwood leaned over to Mr. High and said, "[D]on't worry about this one, I've got it." When Mr. High inquired as to why, Ms. Smallwood told him that he had spoken with Speller about the case and to let her handle it.

22. At the MAR evidentiary hearing, Mr. High testified that after District Attorney Asbell concluded her direct examination of Speller at trial, Ms. Smallwood left the courtroom during the recess and returned with some papers. Ms. Smallwood told Mr. High that she had talked to Speller prior to trial and that she had some notes she was going to use to cross-examine him. This was the first

time Mr. High heard of the notes. Mr. High testified that with Speller's cross-examination, Ms. Smallwood tried to establish that the events on the night in question were different than how Speller testified to them on direct examination. According to Mr. High, Ms. Smallwood had a piece of paper in her hand when she was cross-examining Speller. Mr. High testified that the decision to have Ms. Smallwood, rather than himself, cross-examine Speller was a strategic decision based on her having prior knowledge concerning the witness that Mr. High did not have.

23. . . . . Mr. High recalled that the [trial court] would not admit the notes because Speller had denied that the conversation which Ms. Smallwood was referring to during the cross-examination ever took place.

24. At the MAR evidentiary hearing, Mr. High could not positively identify Defendant's MAR Exhibit 1 as the piece of paper Ms. Smallwood had with her when she came back into the courtroom after the recess.

. . . .

27. At the MAR evidentiary hearing, Ms. Ruffin stated that she was aware that Speller had testified at defendant's trial and that his trial testimony was not helpful to Defendant's case. However, she was under the impression that Speller had information which would be helpful. Ms. Ruffin remembered being in the parking lot when Speller was speaking with Ms. Smallwood and that he indicated he could be helpful to the case, but she could not remember exactly what he said. Ms. Ruffin also remembered Ms. Smallwood telling her that Speller claimed that he was there the night of the murder, that he saw everything, and that he sought her out and indicated to her that he could help. Ms. Ruffin testified that Ms. Smallwood may have had a conversation with Speller other than the one in the parking lot.

28. At the MAR evidentiary hearing, Ms. Ruffin identified the handwriting on Defendant's MAR Exhibit 1 as that of Ms. Smallwood.

29. . . . . Ms. Ruffin testified that just because Defendant's MAR Exhibit 2 was found in a box of

Defendant's case files did not mean they were related to Defendant; rather, they could have simply been notes taken on a notepad used in Defendant's case that were never torn out.

. . . .

31. Defendant called neither Ms. Smallwood nor Speller as a witness at the MAR evidentiary hearing.

32. Defendant presented no credible evidence that the conversation which Ms. Smallwood claimed she had with Speller ever took place.

33. Defendant presented no credible evidence that Defendant's MAR Exhibit 1 contained, as he purported, notes taken contemporaneously with any conversation between Ms. Smallwood and Speller.

34. Defendant presented no credible evidence that the purposed conversation between Ms. Smallwood and Speller took place on the date appearing on Defendant's MAR Exhibit 1, i.e., November 20, 2001.

35. Given the evidence presented at the MAR evidentiary hearing, the Court cannot definitely find based only upon Defendant's MAR Exhibit 1 and Ms. Smallwood's cross-examination of Speller at Defendant's trial that Ms. Smallwood wrote the notes admitted as Defendant's MAR Exhibit 1 contemporaneously with any conversation she had with Speller; that the purported conversation took place on the date appearing on the exhibit, i.e., November 20, 2001; or that the conversation ever took place. The undersigned acknowledged that Ms. Ruffin did testify as to how she remembered, based upon Speller's attitude in the parking lot and from talking to Ms. Smallwood, that Speller would be helpful to the case. However, other evidence indicated that the conversation purportedly memorialized in Defendant's MAR Exhibit 1 never took place. First, Ms. Smallwood did not inform her co-counsel Mr. High of her conversation with Speller, despite the fact that she and Mr. High had decided that he would be the attorney cross-examining Speller. In fact, Mr. High did not learn about the purported conversation until Speller testified at trial several days after the trial began. Secondly,

> despite keeping detailed notes of the time she spent working on Defendant's case, the time sheet Ms. Smallwood submitted to IDS for fee payment approval did not contain an entry for November 20, 2001, the date on Defendant's MAR Exhibit 1.
>
> 36. At trial, Ms. Smallwood attempted to show Speller what she identified as her notes from their conversation. The undersigned finds upon a review of the trial transcript that he would not allow Ms. Smallwood to do so because Speller had denied that the conversation which Ms. Smallwood was referring to during the cross-examination ever took place.

Based upon these findings of fact, the trial court concluded, in pertinent part, that defendant's ineffective assistance of counsel claim stemming from "Ms. Smallwood's failure to withdraw and testify" concerning her alleged prior conversation with Mr. Speller was "procedurally barred because [d]efendant was in a position to adequately raise it in *Hyman I*, but failed to do so." In the alternative, the trial court concluded that defendant's ineffective assistance of counsel claim lacked merit given that he "can demonstrate neither deficient performance nor prejudice in regard to trial counsel's failure to withdraw from representing [d]efendant and to testify as a witness regarding a prior conversation she had with Speller in which he made remarks inconsistent with his direct trial testimony," citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 692 (1984). More specifically, the trial court concluded that it could not find that Ms. Smallwood's performance had been deficient because the trial court could not find, based upon the evidence contained in the transcript of defendant's trial and the evidence presented at the evidentiary hearing, that Ms. Smallwood's notes were written contemporaneously with any alleged conversation that Ms. Smallwood had with Mr. Speller, that the alleged conversation between Ms. Smallwood and Mr. Speller took place on 20 November 2001, or that the alleged conversation between Ms. Smallwood and Mr. Speller ever actually occurred. Finally, the trial court concluded that "[d]efendant can demonstrate neither deficient performance nor prejudice even assuming that the conversation which Ms. Smallwood claimed [that] she had with [Mr.] Speller took place" "because Ms. Smallwood would not have been allowed to testify to the substance of the conversation [that] she allegedly had with [Mr.] Speller had she withdrawn and testified at trial" or "introduced her notes of the conversation" "because [Mr.] Speller categorically denied having had the alleged conversation with

Ms. Smallwood." In light of that fact, "any testimony by Ms. Smallwood would have been limited to impeaching only [Mr.] Speller's denial that any conversation took place, and would not have included the substance of the alleged conversation." For that reason, the trial court determined that "the absence of Ms. Smallwood's limited testimony did not prejudice [d]efendant, particularly in light of her effective cross-examination of [Mr.] Speller" and the fact that "other evidence established defendant, not Demetrius Jordan, was the shooter."

In seeking relief from the trial court's order before the Court of Appeals, defendant argued that the trial court had erroneously relied upon the ineffective assistance of counsel test enunciated in *Strickland* and should, instead, have relied upon the test enunciated in *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980). According to defendant, "the test for determining ineffective assistance of counsel based on an attorney's conflict of interest is whether 'an actual conflict of interest adversely affected his lawyer's performance,' " quoting *Sullivan*, 446 U.S. at 350, 100 S. Ct. at 1719, 64 L. Ed. 2d at 348. Defendant contended that the record developed at the evidentiary hearing demonstrated that Ms. Smallwood had been subject to an actual conflict of interest at the time that she represented defendant. In the alternative, defendant argued that, even if the trial court had properly relied upon the *Strickland*, rather than the *Cuyler*, test, the trial court's order should still be overturned because Ms. Smallwood's failure to withdraw from her representation of defendant in order to testify concerning her conversation with Mr. Speller constituted ineffective assistance of counsel, citing *Strickland*, 466 U.S. at 687, 694, 104 S. Ct. at 2064, 2068, 80 L. Ed. 2d at 693, 698. In support of this contention, defendant argued that Finding of Fact Nos. 32, 33, 34, and 35 lacked sufficient evidentiary support in light of the overwhelming and unrebutted evidence tending to show that the alleged conversation between Ms. Smallwood and Mr. Speller actually took place. In addition, defendant contends that Ms. Smallwood's testimony concerning Mr. Speller's statements would have been admissible given that "[e]xtrinsic evidence is admissible to prove a witness's prior inconsistent statement, where the inconsistency goes to a material issue," citing *State v. Green*, 296 N.C. 183, 192-93, 250 S.E.2d 197, 203 (1978). Finally, defendant argued that, to the extent that defendant was procedurally barred from raising the ineffective assistance of counsel claim asserted in his motion for appropriate relief because he could have asserted it in *Hyman I*, his failure to do so should be excused because he had received ineffective assistance from his appellate counsel.

The State, on the other hand, argued that the trial court had correctly concluded that defendant's ineffective assistance of trial counsel claim was procedurally barred given that, even though defendant was in a position to adequately raise the claim in question on direct appeal, he had failed to do so and had opted, instead, to argue "that the trial court [had] erred in failing to conduct a hearing when it became aware of a conflict of interest." In addition, the trial court correctly rejected defendant's ineffective assistance of counsel claim on the merits given the existence of sufficient record evidence to support the trial court's determination that the alleged conversation between Ms. Smallwood and Mr. Speller never took place and given that the trial court had correctly determined that, even if the conversation in question had occurred, Ms. Smallwood would not have been allowed to testify to the substance of the alleged conversation before the jury.

After summarizing the procedural history of the case, the Court of Appeals rejected the State's contention that defendant's ineffective assistance of counsel claim was procedurally barred on the grounds that, "[w]hile perhaps unartfully, defendant adequately raised the exculpatory witness claim when he was first in a position to do so" by arguing in *Hyman I* that "[d]efense counsel Smallwood had a conflict of interest in that she was in possession of information which could be used to impeach Derrick Speller, one of the State's most crucial witnesses," and that, "[a]lthough she chose to remain as counsel and used the information she acquired in her representation of Speller to impeach his testimony, rather than withdrawing as counsel and testifying as a witness, it is not at all clear that this was the correct decision." *State v. Hyman*, ___ N.C. App. ___, ___, 797 S.E.2d 308, 317 (2017) (*Hyman III*). Secondly, the Court of Appeals held that, the trial court's findings to the contrary notwithstanding, defendant had proved by a preponderance of the evidence that "[Ms.] Smallwood was privy to a conversation in which [Mr.] Speller identified the shooter as someone other than defendant" and that the presentation of evidence concerning this conversation "would have been both relevant and material had it been offered at trial." *Id.* at ___, 797 S.E.2d at 318 (citing N.C.G.S. § 15A-1420(c)(5) (2015)). For that reason, the Court of Appeals held that the trial court's findings of fact to the effect that the alleged conversation between Ms. Smallwood and Mr. Speller never took place "were not germane to the adjudication of defendant's exculpatory witness claim" and did not, for that reason, "support its conclusion that defendant's claim is meritless for lack of evidentiary support." *Id.* at ___, 797 S.E.2d at 318.

After making these preliminary determinations, the Court of Appeals proceeded to consider the merits of defendant's ineffective assistance of counsel claim. As an initial matter, the Court of Appeals determined, in reliance upon this Court's decision in *State v. Phillips*, 365 N.C. 103, 711 S.E.2d 122 (2011), *cert. denied*, 565 U.S. 1204, 132 S. Ct. 1541, 182 L. Ed. 2d 176 (2012), that "*Strickland* provides an adequate framework to review defendant's exculpatory witness claim." *Id.* at ___, 797 S.E.2d at 320 (citing *Phillips*, 365 N.C. at 121-22, 711 S.E.2d at 137); *see also id.* at ___, 797 S.E.2d at 319-20 (quoting *Phillips*, 365 N.C. at 121-22, 711 S.E.2d at 137 (explaining that "[t]he purpose of our *Holloway* and *Sullivan* exceptions from the ordinary requirements of *Strickland* . . . is . . . to apply needed prophylaxis in situations where *Strickland* itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel" (first ellipsis in original) (quoting *Mickens v. Taylor*, 535 U.S. 162, 176, 122 S. Ct. 1237, 1246, 152 L. Ed. 2d 291, 307 (2002)), and that, "[b]ecause the facts do not make it impractical to determine whether defendant suffered prejudice, we conclude that *Strickland*'s framework is adequate to analyze defendant's issue")). According to the Court of Appeals, since "the facts of this case do not 'make it impractical to determine whether defendant suffered prejudice,' " *id.* at ___, 797 S.E.2d at 320 (quoting *Phillips*, 365 N.C. at 122, 711 S.E.2d at 137), the *Strickland* framework is adequate "to evaluate defendant's exculpatory witness claim," *id.* at ___, 797 S.E.2d at 320.

In addition, the Court of Appeals held that, contrary to the result reached by the trial court, Ms. "Smallwood's testimony, had it been offered, would have been admissible to impeach [Mr.] Speller by showing that he had previously identified [Mr.] Jordan as the shooter," which "was a material issue in defendant's murder trial." *Id.* at ___, 797 S.E.2d at 320; *see State v. Stokes*, 357 N.C. 220, 226, 581 S.E.2d 51, 55 (2003) (stating that, "when a witness is confronted with prior statements that are inconsistent with the witness' testimony, the witness' answers are final as to collateral matters, but where the inconsistencies are material to the issue at hand in the trial, the witness' testimony may be contradicted by other testimony"). In addition, even if testimony concerning the statements that Mr. Speller allegedly made to Ms. Smallwood concerned a collateral matter, her "testimony would have also been admissible to show [Mr.] Speller's bias or interest in the trial." *Id.* at ___, 797 S.E.2d at 320; *see Green*, 296 N.C. at 193, 250 S.E.2d at 203 (stating that, if the cross-examination relates to a collateral matter, "but tends to show bias, motive, or interest of the witness, the [examiner] must first confront the witness with the 'prior statement so that he may have an opportunity to admit, deny or explain it.' ").

The Court of Appeals further concluded that, "[w]hile the admissibility of [Ms.] Smallwood's testimony does not in and of itself establish deficient performance, the circumstances surrounding her decision to remain as counsel leads us to that conclusion." *Id.* at ___, 797 S.E.2d at 321. More specifically, the Court of Appeals noted that "[Ms.] Smallwood was the only witness to [Mr.] Speller's prior inconsistent statement" and determined that, "after her ineffective cross-examination, she became a necessary witness at trial with a duty to withdraw." *Id.* at ___, 797 S.E.2d at 321 (citation omitted). In addition, the Court of Appeals concluded that defendant was prejudiced by Ms. Smallwood's failure to withdraw as one of defendant's trial counsel and testify as a witness on defendant's behalf because "she could have testified that [Mr.] Speller, one of only two key witnesses for the State, had previously told her that it was [Mr.] Jordan—not defendant—who shot [Mr.] Bennett," *id.* at ___, 797 S.E.2d at 321; because "[s]he could have attacked [Mr.] Speller's credibility through his prior inconsistent statement and evidence of his interest in the trial," *id.* at ___, 797 S.E.2d at 321; and because "[Ms.] Smallwood's testimony could have rehabilitated her own credibility as an advocate at trial." *Id.* at ___, 797 S.E.2d at 322.

In a dissenting opinion, Judge Dillon concluded that the trial court had properly denied defendant's motion for appropriate relief on the grounds that the ineffective assistance of counsel claim that defendant had asserted in his motion for appropriate relief was procedurally barred. *Id.* at ___, 797 S.E.2d at 323 (Dillon, J., dissenting). More specifically, Judge Dillon asserted that defendant's brief before the Court of Appeals in *Hyman I* "*failed* to make an exculpatory witness claim" and, even if the brief "*did* raise an exculpatory witness claim, [d]efendant is still procedurally barred because he failed to raise it through a petition for rehearing to [the Court of Appeals] following the issuance of our prior opinion, which ostensibly ignored his claim." *Id.* at ___, 797 S.E.2d at 323 (citing N.C. R. App. P. 31 (providing that a party may file a petition for rehearing arguing "the points of fact or law that, in the opinion of the petitioner, the [Court of Appeals] overlooked or misapprehended" "contain[ing] such argument in support of the petition as petitioner desires to present" (first alteration in *Hyman III*))). According to Judge Dillon, "[d]efendant has failed to establish that, 'more likely than not, but for the error, no reasonable fact finder would have found the defendant guilty of the underlying offense,' " *id.* at ___, 797 S.E.2d at 323 (quoting N.C.G.S. § 15A-1419(e)(1) (2015)), given his failure to "present evidence to show exactly what Ms. Smallwood would have said had she taken the stand," *id.* at ___, 797 S.E.2d at 323. In Judge Dillon's opinion, defendant did not establish that there was a reasonable probability that a different

result would have occurred had Ms. Smallwood withdrawn as counsel and attempted to testify as a witness or had defendant's appellate counsel sought rehearing with respect to his exculpatory witness claim. *Id.* at ___, 797 S.E.2d at 323. Judge Dillon believed that, in order to establish the necessary prejudice, defendant would have had "to show exactly what the substance of Ms. Smallwood's testimony would have been," *id.* at ___, 797 S.E.2d at 323, and failed to do so at the hearing held for the purpose of considering the issues raised by defendant's motion for appropriate relief, *id.* at ___, 797 S.E.2d at 323-24. Finally, Judge Dillon concluded that the copy of Ms. Smallwood's notes of her alleged conversation with Mr. Speller was not admissible to show the contents of Ms. Smallwood's testimony had she withdrawn from her representation of defendant in order to testify. *Id.* at ___, 797 S.E.2d at 324. This Court undertook review of the Court of Appeals' decision in light of Judge Dillon's dissenting opinion and our decision to allow the State's petition seeking the issuance of a writ of certiorari authorizing review of issues in addition to those addressed in Judge Dillon's dissent.

In seeking to persuade us to reverse the Court of Appeals' decision, the State argues that, in order to establish that his ineffective assistance of counsel claim had merit, defendant had to establish that the conversation that allegedly occurred between Ms. Smallwood and Mr. Speller actually took place and the content of the testimony that Ms. Smallwood would have given had she withdrawn from her representation of defendant and testified. According to the State, the trial court's finding that defendant "presented no credible evidence that the conversation which Ms. Smallwood claimed she had with [Mr.] Speller ever took place" had adequate evidentiary support. In view of the fact that the record contains no evidence concerning the substance of Ms. Smallwood's potential testimony, the State claims that a reviewing court lacks the ability to determine whether Ms. Smallwood's testimony would have been admissible or affected the jury's deliberations at trial.

The State contends that defendant failed to show either deficient performance or prejudice as required by *Strickland*. According to the State, defendant did not establish any deficient performance on Ms. Smallwood's part given his failure to "present any evidence as to what Ms. Smallwood would have testified to had she withdrawn and taken the stand" or to present any "credible evidence establishing [that] Ms. Smallwood's conversation with [Mr.] Speller ever took place." In the State's view, even if Ms. Smallwood had withdrawn as one of defendant's trial counsel and testified, she "could not have testified to the content of her notes," citing *State v. Moore*, 275 N.C. 198, 213-14, 166

S.E.2d 652, 662-63 (1969) (determining that extrinsic evidence of a witness's prior inconsistent statement, which constituted double hearsay, was not admissible to impeach that witness after the witness denied making the statement). Similarly, the State argued that defendant was not prejudiced by Ms. Smallwood's failure to withdraw as one of his trial counsel and to testify on his behalf even if she was entitled to testify to the entirety of her conversation with Mr. Speller as reflected in the notes admitted into evidence at the hearing held with respect to defendant's motion for appropriate relief given that, even though the questions that Ms. Smallwood posed to Mr. Speller on cross-examination were not evidence, the posing of those questions necessarily created the impression that Mr. Speller had made statements to Ms. Smallwood that were inconsistent with Mr. Speller's trial testimony. In addition, the State contends that, even if Ms. Smallwood had withdrawn and testified, there is no way to know what impact her testimony would have had upon the jury. The State contends that the record contained ample support for the jury's decision to convict defendant, including testimony from additional witnesses aside from Mr. Speller and evidence casting doubt upon the credibility of the witnesses upon whose testimony defendant relied.

Finally, the State contends that the trial court correctly determined that the ineffective assistance of counsel claim asserted in defendant's motion for appropriate relief was procedurally barred. After acknowledging that defendant had listed a claim like the one upon which he now relies in the record on appeal submitted for consideration by the Court of Appeals in *Hyman I*, the State points out that defendant did not argue the merits of this claim in his brief and had argued, instead, that the trial court had erred by failing to conduct a hearing upon learning that Ms. Smallwood had previously represented Mr. Speller. Moreover, the State contends that defendant failed to establish any justification for a decision to excuse the procedural bar to which defendant's claim was subject.

In seeking to persuade us to uphold the Court of Appeals' decision, defendant contends that the extent to which the alleged conversation between Mr. Speller and Ms. Smallwood actually occurred is irrelevant to the validity of defendant's ineffective assistance of counsel claim given that the jury, rather than the trial court, bore ultimate responsibility for determining the credibility of Ms. Smallwood's testimony, citing *State v. Scott*, 323 N.C. 350, 353, 372 S.E.2d 572, 575 (1988) (explaining that "[t]he credibility of the witnesses and the weight to be given their testimony is exclusively a matter for the jury"). In addition, defendant contends that, even if the extent to which the conversation between Mr.

Speller and Ms. Smallwood actually occurred is relevant to the issues that are before the Court in this case, the substance of that conversation was established in the record developed at trial and at the hearing held for the purpose of considering defendant's motion for appropriate relief. According to defendant, Ms. Smallwood's testimony at the remand hearing established that she could have testified about the prior inconsistent statements that Ms. Speller made to her had she withdrawn from her representation of defendant for the purpose of testifying on defendant's behalf. More specifically, defendant notes that Ms. Smallwood testified at the remand hearing that she took contemporaneous notes of her conversation with Mr. Speller and described the substance of the information contained in those notes, which were found in Ms. Smallwood's file concerning defendant's case and admitted into evidence at the hearing held for the purpose of considering the issues raised by defendant's motion for appropriate relief. In addition, defendant notes that the questions that Ms. Smallwood posed to Mr. Speller on cross-examination at trial consisted of a "nearly verbatim" recitation of the information contained in the notes admitted into evidence at the hearing held in connection with defendant's motion for appropriate relief and that Ms. Ruffin testified to her understanding that Mr. Speller had stated during a conversation between Ms. Smallwood and Mr. Speller that he could be helpful to defendant's defense. Although Ms. Smallwood's time sheet did not indicate that she had spent any time working on defendant's case on 20 November 2001, her time sheet did indicate that Ms. Smallwood spent time working on defendant's case on 30 November 2001, a fact that suggests that a recordkeeping error might have occurred.

Defendant maintains that, in view of the fact that Ms. Smallwood was the only witness to Mr. Speller's prior inconsistent statements concerning the identity of the individual that murdered Mr. Bennett and the fact that Mr. Speller's prior inconsistent statements concerned facts that were material to the issue of defendant's guilt, Ms. Smallwood's failure to withdraw from her representation of defendant and to testify on his behalf constituted deficient performance. Ms. Smallwood's testimony concerning her conversation with Mr. Speller would not have amounted to an attempt "to prove the truth of the matter asserted," quoting N.C.G.S. § 8C-1, Rule 701. Instead, Ms. Smallwood's testimony concerning her conversation with Mr. Speller, which included an account of the shooting for which defendant was on trial, would have been admissible to impeach Mr. Speller's testimony concerning a material issue of fact. In defendant's view, the fact that this case was a close one that hinged upon the credibility of the State's witnesses demonstrates that Ms.

Smallwood's failure to withdraw from her representation of defendant and to testify concerning her conversation with Mr. Speller prejudiced defendant's chances for a more favorable outcome at trial.

Finally, defendant argues that the claim that he had asserted in his motion for appropriate relief was not procedurally barred. According to defendant, a fair reading of the argument that he advanced before the Court of Appeals in *Hyman I* demonstrates that the claim asserted in his motion for appropriate relief was adequately presented for the Court of Appeals' consideration. The brief that defendant submitted to the Court of Appeals in *Hyman I* summarized several conflict of interest cases, described Ms. Smallwood's conflict of interest as involving her "possession of information which could be used to impeach" Mr. Speller, and stated that, "[w]here an actual conflict exists which adversely affects counsel's performance, a new trial is necessary."

According to well-established North Carolina law, appellate courts review trial court orders deciding motions for appropriate relief "to determine 'whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.' " *State v. Frogge*, 359 N.C. 228, 240, 607 S.E.2d 627, 634 (2005) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)). "[T]he trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (quoting *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000), *cert. denied*, 531 U.S. 1165, 121 S. Ct. 1126, 148 L. Ed. 2d 992 (2001)). "If no exceptions are taken to findings of fact [made in a ruling on a motion for appropriate relief], such findings are presumed to be supported by competent evidence and are binding on appeal." *State v. Mbacke*, 365 N.C. 403, 406, 721 S.E.2d 218, 220 (alteration in original) (quoting *State v. Baker*, 312 N.C. 34, 37, 320 S.E.2d 670, 673 (1984)), *cert. denied*, 568 U.S. 864, 133 S. Ct. 224, 184 L. Ed. 2d 116 (2012). Conclusions of law, on the other hand, are fully reviewable. *State v. Bush*, 307 N.C. 152, 168, 297 S.E.2d 563, 573 (1982) (citation omitted).

[1] As an initial matter, we must address the validity of the State's contention that the claim asserted in defendant's motion for appropriate relief is procedurally barred pursuant to N.C.G.S. § 15A-1419(a)(3), which provides that a claim asserted in a motion for appropriate relief must be denied if, "[u]pon a previous appeal, the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so." N.C.G.S. § 15A-1419(a)(3) (2017). As we

have previously indicated, N.C.G.S. § 15A-1419(a)(3) "is not a general rule that any claim not brought on direct appeal is forfeited on state collateral review" and requires the reviewing court, instead, "to determine whether the particular claim at issue could have been brought on direct review." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 525 (2001) (quoting *McCarver v. Lee*, 221 F.3d 583, 589 (4th Cir. 2000), *cert. denied*, 531 U.S. 1089, 121 S. Ct. 809, 148 L. Ed. 2d 694 (2001)), *cert. denied*, 535 U.S. 1114, 122 S. Ct. 2332, 153 L. Ed. 2d 162 (2002). "[Ineffective assistance of counsel] claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as . . . an evidentiary hearing." *Id.* at 166, 557 S.E.2d at 524 (citations omitted). Although, "to avoid procedural default under N.C.G.S. § 15A-1419(a)(3), defendants should necessarily raise those [ineffective assistance of counsel] claims on direct appeal that are apparent from the record," "defendants likely will not be in a position to adequately develop many [ineffective assistance of counsel] claims on direct appeal." *Id.* at 167, 557 S.E.2d at 525 (citing *McCarver*, 221 F.3d at 589-90). As a result, in order to be subject to the procedural default specified in N.C.G.S. § 15A-1419(a)(3), the direct appeal record must have contained sufficient information to permit the reviewing court to make all the factual and legal determinations necessary to allow a proper resolution of the claim in question.

A careful review of the record demonstrates that defendant was not in a position to adequately raise the ineffective assistance of counsel claim asserted in his motion for appropriate relief on direct appeal.[6] "A

6. Although the Court of Appeals held that defendant did, in fact, adequately assert his ineffective assistance of counsel claim on direct appeal in *Hyman I*, we do not find that argument persuasive. The mere fact that defendant stated that Ms. Smallwood labored under a conflict of interest at defendant's trial by virtue of the fact that she allegedly possessed information that could be used to impeach Mr. Speller and pointed out that "it [was] not at all clear" that Ms. Smallwood's decision "to remain as counsel and use[ ] the information [that] she acquired in her representation of [Mr.] Speller to impeach his testimony, rather than withdrawing as counsel and testifying as a witness," "was the correct decision" cannot be understood as the assertion of an explicit claim that Ms. Smallwood's failure to withdraw from her representation of defendant and to take the stand as a witness in his behalf constituted ineffective assistance of counsel given the well-established legal principle that "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066-67, 80 L. Ed. 2d at 696 (citation omitted). As a result, while we agree with the Court of Appeals that the ineffective assistance of counsel claim that defendant raised in his motion for appropriate relief is not procedurally barred by N.C.G.S. § 15A-1419(a)(3), we reach that result for a different reason than that found persuasive by the Court of Appeals.

convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial[.]

Id. at 687, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. As a result, in order to successfully challenge the trial court's judgment on the basis of the ineffective assistance of counsel claim asserted in his motion for appropriate relief, defendant would have had to establish that Ms. Smallwood was in a position to provide favorable testimony on defendant's behalf, that her failure to withdraw from her representation of defendant in order to testify on his behalf constituted deficient performance, and that, had Ms. Smallwood acted as defendant contends that she should have acted, there is a reasonable probability that defendant would have been found not guilty of the first-degree murder of Mr. Bennett.

The record developed at trial did not contain any information affirmatively tending to show that the alleged conversation between Ms. Smallwood and Mr. Speller actually occurred or whether Ms. Smallwood had a strategic or tactical reason for failing to withdraw from her representation of defendant and testify before the jury concerning the statements that Mr. Speller allegedly made to her. Although the trial court ultimately found that Ms. Smallwood and Mr. Speller never had the conversation upon which defendant's ineffective assistance of counsel claim relies, the fact that the trial court ultimately rejected this aspect of defendant's claim should not cause us to overlook the fact that defendant had no hope of making a viable showing to the contrary based upon the evidentiary record developed at trial, which consisted of nothing more than Mr. Speller's denial that the alleged conversation had ever occurred. Similarly, while defendant made no effort to elicit testimony from Ms. Smallwood concerning the extent, if any, to which she had a strategic or tactical reason for refraining from withdrawing from her representation of defendant and testifying on his behalf, the extent to which her acts or omissions had such a strategic or tactical motivation was a relevant issue about which the trial record is completely silent. Finally, the record presented for consideration by the Court of Appeals

in *Hyman I* is devoid of any affirmative evidence concerning the nature of the statements that Mr. Speller allegedly made to Ms. Smallwood or the content of the testimony that Ms. Smallwood would have given had she withdrawn from her representation of defendant and testified on defendant's behalf. Although the trial transcript does contain the questions that Ms. Smallwood posed to Mr. Speller on cross-examination at defendant's trial and although these questions do track the contents of the notes that defendant introduced into evidence at the hearing held for the purpose of considering defendant's motion for appropriate relief, the fact that Ms. Smallwood posed certain questions to Mr. Speller on cross-examination does not constitute the existence of evidence sufficient to support a finding of fact concerning the contents of the testimony that Ms. Smallwood would have been able to deliver had she withdrawn from her representation of defendant and testified on his behalf. As a result, we hold that defendant was not, in fact, in a position to adequately raise his ineffective assistance of counsel claim on direct appeal in *Hyman I* and is not, for that reason, subject to the procedural bar created by N.C.G.S. § 15A-1419(a)(3) with respect to the ineffective assistance of counsel claim that is before us in this case.[7]

[2] In view of our determination that defendant's ineffective assistance of counsel claim is not procedurally barred pursuant to N.C.G.S. § 15A-1419(a)(3), we must next address the merits of defendant's ineffective assistance of counsel claim. At the beginning of our analysis of this issue, we must acknowledge that the trial court determined that defendant failed to establish that the conversation between Ms. Smallwood and Mr. Speller, upon which defendant's ineffective assistance of counsel

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7. The dissenting judge in the Court of Appeals determined that defendant was procedurally barred from raising the ineffective assistance of counsel claim set out in his motion for appropriate relief claim because, even if defendant had raised that claim before the Court of Appeals, as the majority held that he had, defendant "is still procedurally barred because he failed to raise it through a petition for rehearing to this Court following the issuance of our prior opinion, which ostensibly ignored his claim," citing N.C. R. App. P. 31 (authorizing a party to "file a petition for rehearing after an opinion to argue 'the points of fact or law that, in the opinion of the petitioner, the [Court of Appeals] overlooked or misapprehended' "). *Hyman III*, ___ N.C. App. at ___, 797 S.E.2d at 323. As a result of the fact that rehearing petitions pursuant to N.C. Rule of Appellate Procedure 31 are only available in civil cases, defendant had no right to seek rehearing of the Court of Appeals' decision in *Hyman I* or *Hyman II* and cannot be held to have been subject to a procedural bar for failing to file an unauthorized rehearing petition. Moreover, nothing in N.C.G.S. § 15A-1419(a)(3) provides any support for a determination that a failure to seek rehearing following an appellate decision works any sort of procedural bar. As a result, the fact that defendant did not file any sort of rehearing petition with the Court of Appeals following its decisions in *Hyman I* and *Hyman II* has no bearing on the proper resolution of the procedural default issue that is before us in this case.

claim rests, actually occurred. More specifically, the trial court found as a fact that defendant presented no credible evidence during the hearing held for the purpose of considering defendant's motion for appropriate relief that "Ms. Smallwood wrote the notes admitted as Defendant's MAR Exhibit 1 contemporaneously with any conversation she had with Speller; that the purported conversation took place on the date appearing on the exhibit, i.e., November 20, 2001; or that the conversation ever took place."

"A defendant who seeks relief by motion for appropriate relief must show the existence of the asserted grounds for relief," N.C.G.S. § 15A-1420(c)(6) (2017), with "the moving party ha[ving] the burden of proving by a preponderance of the evidence every fact essential to support the motion," *id.* § 15A-1420(c)(5) (2017). As a result, in order to sustain the ineffective assistance of counsel claim asserted in his motion for appropriate relief, defendant was required to persuade the trial court, by a preponderance of the evidence, of the nature and extent of the testimony that Ms. Smallwood would have provided had she withdrawn from her representation as defendant's trial counsel and testified on defendant's behalf.

As the record clearly reflects, the trial court found that the alleged conversation between Ms. Smallwood and Mr. Speller upon which defendant's ineffective assistance of counsel claim rests never occurred. Although defendant contends that the trial court's findings to this effect lack adequate evidentiary support, we believe that the record contains adequate evidentiary support[8] for the trial court's findings. We note, as an initial matter, that, while defendant introduced a document consisting of notes written in Ms. Smallwood's handwriting dated 20 November 2001, neither Ms. Smallwood nor anyone else ever testified that a

8. The record does, of course, contain ample evidence from which a contrary finding could have been made, including, but not limited to, the content of the questions that Ms. Smallwood posed to Mr. Speller on cross-examination, the content of the notes found in Ms. Smallwood's file concerning defendant's case, the resemblance of the notes that Ms. Smallwood utilized during her cross-examination of Mr. Speller at trial to the document found in Ms. Smallwood's file, and Ms. Smallwood's testimony at the remand hearing held as a result of the Court of Appeals' decision in *Hyman I*. However, the fact that such evidence exists has little to no bearing on the issue that is actually before us, which is whether the findings of fact that the trial court actually did make had sufficient evidentiary support. Although the members of this Court might have found the facts differently than the trial court did, the trial judge, rather than an appellate court, is responsible for resolving factual disputes in the record given the trial judge's superior opportunity to make such determinations.

conversation of the nature allegedly memorialized in these notes actually occurred. Although Ms. Ruffin was able to verify that Mr. Speller and Ms. Smallwood had a conversation[9] and that Ms. Smallwood believed that Mr. Speller would be helpful to defendant's defense, Ms. Ruffin acknowledged that she did not hear Mr. Speller make the statements recounted in the notes that defendant introduced during the proceedings before the trial court. As a related matter, the fact that the notes in question were found in Ms. Smallwood's trial files, while suggestive of a conversation, does not, without more, tend to establish that a conversation of the type upon which defendant's ineffective assistance of counsel claim hinges ever actually occurred. On the other hand, the fact that Ms. Smallwood and Mr. High had decided before trial that Mr. High would assume responsibility for cross-examining Mr. Speller, the fact that one of the criteria that Ms. Smallwood and Mr. High utilized in determining which of them would cross-examine each of the State's witnesses was the extent to which either Ms. Smallwood or Mr. High knew the witness, and the fact that Ms. Smallwood had not told Mr. High that she had had a conversation with Mr. Speller at any point prior to the time that Mr. Speller took the witness stand at defendant's trial raises questions about the validity of defendant's claim that the alleged conversation between Ms. Smallwood and Mr. Speller ever actually occurred. The trial court's finding that the alleged conversation did not, in fact, take place is also supported by the fact that the time records that Ms. Smallwood submitted to Indigent Defense Services at the time that she sought payment for the services that she provided during the course of her representation of defendant contained no indication that she did any work on defendant's behalf on the date shown on the notes that Ms. Smallwood allegedly made during her conversation with Mr. Speller. Finally, Mr. Speller adamantly insisted during his trial testimony that he never made any statement to Ms. Smallwood consistent with the information contained in the handwritten notes found in Ms. Smallwood's file relating to defendant's case. As a result, for all of these reasons, we conclude that the record contains sufficient evidence to support the trial court's findings of fact to the effect that the alleged conversation between Ms. Smallwood and Mr. Speller never occurred.

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9. The conversation that Ms. Ruffin described in her testimony before the trial court, which allegedly took place in the parking lot outside the law office that she and Ms. Smallwood utilized, appears to be a different conversation than the one which allegedly took place in Ms. Smallwood's office, during which Mr. Speller allegedly told Ms. Smallwood that Mr. Bennett was killed by Mr. Jordan, rather than defendant.

Although the Court of Appeals was correct in pointing out that defendant "was not required to 'definitely' prove that [Ms.] Smallwood transcribed the handwritten notes contemporaneously with any conversation she had with [Mr.] Speller, that the purported conversation took place on 20 November 2001, or that the conversation ever took place," ___ N.C. App. at ___, 797 S.E.2d at 318 (majority), we do believe that the viability of defendant's ineffective assistance of counsel claim hinges upon the extent to which Ms. Smallwood was in a position to properly testify that Mr. Speller made the statements attributed to him in the notes that were admitted into evidence at the hearing held in connection with defendant's motion for appropriate relief. In the event that the conversation between Ms. Smallwood and Mr. Speller never happened, Ms. Smallwood could not have properly contradicted Mr. Speller's trial testimony from the witness stand because any testimony that she might have given to that effect would have been perjured. Similarly, in the event that the notes upon which defendant relies for the purpose of showing the contents of the testimony that Ms. Smallwood would have been able to deliver had she withdrawn from her representation of defendant and testified on his behalf did not reflect an actual conversation between Ms. Smallwood and Mr. Speller, they cannot serve as a basis for showing the contents of the testimony that she would have been able to provide had she acted in accordance with the theory that underlies the ineffective assistance of counsel claim asserted in defendant's motion for appropriate relief. Although we agree with defendant's contention that the mere fact that Ms. Smallwood and Mr. Speller disagree about the extent to which Mr. Speller made certain statements to Ms. Smallwood concerning the events that happened at the time of Mr. Bennett's death does not, without more, suffice to preclude the allowance of defendant's motion for appropriate relief, the complete absence of any testimony from Ms. Smallwood or some other witness to the effect that the conversation in question did occur and describing the contents of the conversation that occurred at that time, coupled with the existence of ample evidentiary support for the trial court's determination, based upon its observations during the original trial and subsequent hearings, that the alleged conversation never took place, suffices to support the trial court's decision to deny defendant's motion for appropriate relief. As a result, for all of these reasons, we affirm the Court of Appeals' decision that defendant's ineffective assistance of counsel claim is not procedurally barred pursuant to N.C.G.S. § 15A-1419(a)(3), reverse the Court of Appeals' decision to overturn the trial court's order denying defendant's motion for appropriate relief, and remand this case to the Court of Appeals for

consideration of remaining challenges to the trial court's order denying defendant's motion for appropriate relief.

AFFIRMED, IN PART; REVERSED, IN PART; AND REMANDED.

STATE OF NORTH CAROLINA
v.
WILLIE JAMES LANGLEY

No. 221PA17

Filed 17 August 2018

Indictment and Information—habitual felon—conviction of lesser-included offense

Where the habitual felon indictment returned against defendant alleged that defendant had committed the offenses of robbery with a dangerous weapon and had been convicted of common law robbery, the Supreme Court held that the habitual felon indictment was not fatally defective. The indictment contained all of the information required by N.C.G.S. § 14-7.3 and gave defendant adequate notice of the charge against him. Further, common law robbery is a lesser-included offense of robbery with a dangerous weapon, and an indictment for an offense includes all the lesser degrees of the same crime.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 803 S.E.2d 166 (2017), finding no error in part and vacating in part judgments entered on 28 January 2015 by Judge W. Russell Duke, Jr., in Superior Court, Pitt County, and remanding for resentencing. Heard in the Supreme Court on 16 April 2018.

Joshua H. Stein, Attorney General, by Kimberly N. Callahan, Assistant Attorney General, for the State-appellant.

John Keating Wiles for defendant-appellee.

ERVIN, Justice.

The issue before us in this case is whether an habitual felon indictment returned against defendant was fatally defective. After carefully considering the record in light of the applicable law, we hold that the habitual felon indictment at issue in this case was not fatally defective. For that reason, we reverse the Court of Appeals' decision to the contrary and remand this case to the Court of Appeals for consideration of defendant's remaining challenge to the trial court's judgments.

At approximately 10:30 p.m. on 24 September 2014, Jesse Atkinson, Jr., drove his father, Jesse Atkinson, Sr., and a friend named Kion in Kion's Honda Civic to Vance Street in Greenville for the purpose of buying marijuana. Upon reaching Vance Street, Mr. Atkinson, Jr., pulled up against the curb, at which point Kion exited the car, leaving Mr. Atkinson, Jr., in the front seat and Mr. Atkinson, Sr., in the back seat. After sitting in the car for about five to ten minutes, Mr. Atkinson, Jr., and Mr. Atkinson, Sr., observed a dark blue Nissan Sentra drive past the Honda, stop at a nearby corner, make a U-turn, and pull up beside the Honda facing in the opposite direction. Davron Lovick drove the dark blue Nissan Sentra, with defendant Willie James Langley occupying the front passenger seat.

As the Nissan Sentra neared the Honda, defendant jumped across Mr. Lovick and started shooting at Mr. Atkinson, Jr., and Mr. Atkinson, Sr., with either an AK47 or SKS rifle. After the shooting began, Mr. Atkinson, Jr., drove away while the Nissan continued to chase the Honda and defendant continued to fire at the fleeing vehicle. Defendant fired at least eight shots at the Honda, with Mr. Atkinson, Sr., sustaining gunshot wounds to his right calf and left thigh.

On 29 September 2014, the Pitt County grand jury returned bills of indictment charging defendant with assaulting Mr. Atkinson, Jr., with a deadly weapon with the intent to kill; assaulting Mr. Atkinson, Sr., with a deadly weapon with the intent to kill inflicting serious injury; two counts of attempted first-degree murder; possession of a firearm by a felon; discharging a weapon into an occupied vehicle; and having attained habitual felon status. The indictment charging that defendant had attained habitual felon status alleged, in pertinent part, that

> on or about the date of offense shown and in the County named above the defendant named is an habitual felon in that on or about September 11, 2006, the defendant did commit the felony of Felony Larceny, in violation of North Carolina General Statute 14-72(a), and that on or about February 15, 2007, the defendant was convicted of the felony of Felony Larceny in the Superior Court of Pitt County,

> North Carolina; and that on or about October 08, 2009, the defendant did commit the felony of Robbery with a Dangerous Weapon, in violation of North Carolina General Statute 14-87, and that on or about September 21, 2010, the defendant was convicted of the felony of Common Law Robbery in the Superior Court of Pitt County, North Carolina; and that on or about August 24, 2011, the defendant did commit the felony of Robbery with a Dangerous Weapon, in violation of North Carolina General Statute 14-87.1, and that on or about May 5, 2014, the defendant was convicted of the felony of Common Law Robbery in the Superior Court of Pitt County, North Carolina, against the form of the statute . . . and against the peace and dignity of the State.

The charges against defendant came on for trial before the trial court and a jury at the 26 January 2015 criminal session of the Superior Court, Pitt County. On 28 January 2015, the jury returned verdicts finding defendant guilty as charged. Based upon the jury's verdicts, the trial court consolidated defendant's convictions for two counts of attempted first-degree murder, assault with a deadly weapon with the intent to kill, and assault with a deadly weapon with the intent to kill inflicting serious injury for judgment and sentenced defendant to a term of 238 to 298 months imprisonment; sentenced defendant to a consecutive term of 110 to 144 months imprisonment based upon his conviction for possession of a firearm by a felon; and sentenced defendant to a consecutive term of 110 to 144 months imprisonment based upon his conviction for discharging a weapon into an occupied vehicle. 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, among other things,[1] that the habitual felon indictment that had been returned against him was facially defective. According to defendant, "with respect to the second and third previous felony convictions alleged in the habitual felon indictment returned against [defendant], the previous offenses that he allegedly *committed* differed from the offenses of conviction." In defendant's view, the fact

1. In addition to the issue discussed in the text of this opinion, defendant contended that the trial court had erred by denying his motion for a mistrial and instructing the jury in such a manner as to constructively amend the habitual felon indictment. The Court of Appeals held that the trial court had not abused its discretion in denying defendant's mistrial motion and did not reach the issue of whether the trial court had constructively amended the habitual felon indictment in its instructions to the jury.

that the offense that defendant allegedly committed differed from the offense that defendant was allegedly convicted of having committed demonstrated that the habitual felon indictment failed to comply with the pleading requirements set out in N.C.G.S. 14-7.3 as construed in *State v. Cheek*, 339 N.C. 725, 729-30, 453 S.E.2d 862, 865 (1995). The State, on the other hand, argued that the habitual felon indictment returned against defendant did, in fact, comply with the requirements set out in N.C.G.S. § 14-7.3 and sufficed to support the trial court's decision to sentence defendant as an habitual felon.

In its opinion, the Court of Appeals "order[ed] that the judgment regarding the habitual felon conviction be vacated and the case be remanded for resentencing on the underlying felonies without the habitual felon enhancement" on the grounds that "the trial court proceeded on a facially deficient habitual felon indictment." *State v. Langley*, ___ N.C. App. ___, ___, 803 S.E.2d 166, 167 (2017). In support of this determination, the Court of Appeals explained that, "for a habitual felon indictment to fully comport with statutory requirements there must be two dates listed for each prior felony conviction put forth in the habitual felon indictment—both the date the defendant committed the felony and the date the defendant was convicted of *that same felony* in the habitual felon indictment." *Id.* at ___, 803 S.E.2d at 171 (first citing N.C.G.S. § 14-7.3; then citing *Cheek*, 339 N.C. at 729-30, 453 S.E.2d at 865). More specifically, the Court of Appeals noted that, "[o]n its face, the indictment did not provide the offense date for Conviction 2 or Conviction 3. Instead, for both of these convictions, the indictment alleged offense dates for robberies with a dangerous weapon, and then gave conviction dates for two counts of common law robbery." *Id.* at ___, 803 S.E.2d at 171. According to the Court of Appeals, "[i]t would be an impermissible inference to read into the indictment that common law robbery took place on 8 October 2009 or 24 August 2011 because that is not what the grand jury found when it returned its bill of indictment." *Id.* at ___, 803 S.E.2d at 167. This Court granted the State's request for discretionary review of the Court of Appeals' decision with respect to the validity of defendant's habitual felon indictment on 1 November 2017.

In seeking to persuade us to reverse the Court of Appeals' decision, the State argues that the Court of Appeals erroneously engrafted an additional requirement onto the statutory provisions governing the contents of an habitual felon indictment given that the applicable statutory language requires that the offense that the defendant allegedly committed be identical to the offense that the defendant was allegedly convicted of committing. The State contends that the insertion of this requirement

into N.C.G.S. § 14-7.3 conflicts with this Court's consistent refusal to "engraft additional unnecessary burdens upon the due administration of justice," quoting *State v. Freeman*, 314 N.C. 432, 436, 333 S.E.2d 743, 746 (1985). According to the State, N.C.G.S. § 14-7.3 simply does not require that an habitual felon indictment identify the nature of the prior offense aside from alleging that it was a felony. In the State's view, the habitual felon indictment returned against defendant in this case adequately alleged that defendant had attained habitual felon status by alleging that defendant had committed and had been convicted of three prior felony offenses, specifying the date upon which each felony offense had been committed, asserting that the offenses in question were committed against the State of North Carolina, listing the date upon which each conviction occurred, and identifying the court in which defendant was convicted on each occasion, with the name of the prior felony being mere surplusage unnecessary to the existence of a facially valid indictment.

Defendant, on the other hand, asserts that the mere fact that an individual has been convicted of three prior felony offenses does not suffice to establish that the individual in question is an habitual felon given that the felonies necessary to establish the existence of that status cannot overlap. For example, defendant notes that the second felony must have been "committed after the conviction of or plea of guilty to the first felony" and that the third felony must have been "committed after the conviction of or plea of guilty to the second felony," quoting N.C.G.S. § 14-7.1. In light of that fact, a valid habitual felon indictment must allege "both the date the defendant committed the felony and the date the defendant was convicted of *that same felony* in the habitual felon indictment," quoting *Langley*, ___ N.C. App. at ___, 803 S.E.2d at 171. In other words, in order for an habitual felon indictment to show that the prior felony convictions upon which the State relies do not impermissibly overlap, the dates upon which those felonies were committed and the dates upon which defendant was convicted of committing those felonies must be set out in that indictment. In defendant's view, the habitual felon indictment returned against him in this case is fatally defective because it did not provide conviction dates for the second and third of the three felony offenses that defendant allegedly committed, making it impossible to know whether defendant's second and third common law robbery convictions impermissibly overlapped given that the indictment did not indicate when those two common law robbery offenses were committed, and because the indictment did not provide offense dates for the second and third offenses for which defendant was allegedly convicted, making it impossible to know whether defendant's second

and third robbery with a dangerous weapon offenses did not impermissibly overlap given that the indictment did not indicate when defendant was convicted of committing those offenses.

"A valid . . . indictment is an essential of jurisdiction." *State v. McBane*, 276 N.C. 60, 65, 170 S.E.2d 913, 916 (1969) (quoting *State v. Morgan*, 226 N.C. 414, 415, 36 S.E.2d 166, 167 (1946)). "The . . . indictment must charge all the essential elements of the alleged criminal offense," *id.* at 65, 170 S.E.2d at 916 (citing *Morgan*, 226 N.C. 414, 38 S.E.2d 166), "in a plain, intelligible, and explicit manner," *id.* at 65, 170 S.E.2d at 916 (quoting N.C.G.S. § 15-153 (1969)).[2] "The purpose of an indictment 'is (1) to give the defendant notice of the charge against him to the end that he may prepare his defense . . . [and] (2) to enable the court to know what judgment to pronounce in case of conviction.' " *State v. Russell*, 282 N.C. 240, 243-44, 192 S.E.2d 294, 296 (1972) (quoting *State v. Burton*, 243 N.C. 277, 278, 90 S.E.2d 390, 391 (1955)). "[I]t is not the function of an indictment to bind the hands of the State with technical rules of pleading; rather, its purposes are to identify clearly the crime being charged. . . ." *State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981). For that reason, indictment drafting is "no longer bound by the 'ancient strict pleading requirements of the common law.' " *State v. Williams*, 368 N.C. 620, 623, 781 S.E.2d 268, 271 (2016) (quoting *Freeman*, 314 N.C. at 436, 333 S.E.2d at 746).

The content of a valid indictment alleging that a defendant has attained habitual felon status is specified in N.C.G.S. 14-7.3, which provides that the indictment "shall be separate from the indictment charging [that person] with the principal felony" and "must set forth the date that the prior felony offenses were committed, the name of the state or other sovereign against whom said felony offenses were committed, the dates that pleas of guilty were entered to or convictions returned in said felony offenses, and the identity of the court wherein said pleas or convictions took place." N.C.G.S. § 14-7.3 (2017). In view of the fact that the ultimate question before us in this case is whether N.C.G.S. § 14-7.3 requires that an indictment charging that the defendant has attained habitual felon status must allege that the defendant committed the same felony offense for which he was ultimately convicted, we are required to interpret the relevant statutory provision to see if it embodies a requirement of the type for which defendant contends.

2. The relevant statutory language has not changed since *McBane* was decided.

"Legislative intent controls the meaning of a statute." *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016) (quoting *Brown v. Flowe*, 349 N.C. 520, 522, 507 S.E.2d 894, 895 (1998)). "The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, 'the spirit of the act and what the act seeks to accomplish.' " *Id.* at 258, 794 S.E.2d at 792 (quoting *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001)). "Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *State v. Hooper*, 358 N.C. 122, 125, 591 S.E.2d 514, 516 (2004) (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990)). "[I]t 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) (citations omitted).

The language of the relevant statutory provision is clear, unambiguous, and requires no construction. N.C.G.S. § 14-7.3 states that an habitual felon indictment must set forth (1) "the date that prior felony offenses were committed," (2) "the name of the state or other sovereign against whom said felony offenses were committed," (3) "the dates that pleas of guilty were entered to or convictions returned in said felony offenses," and (4) "the identity of the court wherein said pleas or convictions took place." N.C.G.S. § 14-7.3; *accord Cheek*, 339 N.C. at 729-30, 453 S.E.2d at 865 (explaining that an "habitual felon indictment fully comports with the requirements of N.C.G.S. § 14-7.3 by setting forth the three prior felony convictions relied on by the State, the dates these offenses were committed, the name of the state against whom they were committed, the dates defendant's guilty pleas for these offenses were entered, and the identity of the court wherein these convictions took place"). The indictment at issue in this case alleged that the three prior felony offenses upon which the State relied in attempting to establish that defendant had attained habitual felon status were committed on 11 September 2006, 8 October 2009, and 24 August 2011; that the offenses that led to defendant's felony convictions were committed against the State of North Carolina; that defendant was convicted of committing these offenses, the identity of which was specified in the body of the habitual felon indictment, on 15 February 2007, 21 September 2010, and 5 May 2014; and that each of these convictions occurred in the Superior Court, Pitt County. As a result, the habitual felon indictment returned against defendant in this case contains all of the information required by N.C.G.S. § 14-7.3 and provides defendant with adequate notice of the

bases for the State's contention that defendant had attained habitual felon status.

In addition, we note that the habitual felon indictment returned against defendant in this case alleged that defendant had committed the offenses of robbery with a dangerous weapon and had been convicted of the lesser included offenses of common law robbery. "[I]t is well settled that an indictment for an offense includes all the lesser degrees of the same crime," *State v. Baker*, 369 N.C. 586, 595, 799 S.E.2d 816, 822 (2017) (quoting *State v. Roy*, 233 N.C. 558, 559, 64 S.E.2d 840, 841 (1951)), so that, "[w]hen a defendant is indicted for a criminal offense, he may be convicted of the charged offense or a lesser included offense when the greater offense charged in the bill of indictment contains all of the essential elements of the lesser," *State v. Thomas*, 325 N.C. 583, 591, 386 S.E.2d 555, 559 (1989) (quoting *State v. Weaver*, 306 N.C. 629, 633, 295 S.E.2d 375, 377 (1982), *abrogated on other grounds by State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993)). As a result, when defendant allegedly committed the offense of robbery with a dangerous weapon on 8 October 2009 and 24 August 2011, he also committed the lesser included offense of common law robbery. Thus, the Court of Appeals' statement that "[i]t would be an impermissible inference to read into the indictment that common law robbery took place on 8 October 2009 or 24 August 2011 because that is not what the grand jury found when it returned its bill of indictment," *Langley*, ___ N.C. App. at ___, 803 S.E.2d at 171, to the contrary notwithstanding, the habitual felon indictment returned against defendant in this case did effectively allege that defendant had both committed and been convicted of common law robbery.

As a result, for all of these reasons, we hold that the habitual felon indictment returned against defendant in this case was not fatally defective, reverse the Court of Appeals' decision, and remand this case to the Court of Appeals consideration of defendant's remaining challenge to the trial court's judgments.

REVERSED AND REMANDED.

STATE v. ROGERS

[371 N.C. 397 (2018)]

STATE OF NORTH CAROLINA
v.
ANTWARN LEE ROGERS

No. 63A17

Filed 17 August 2018

1. Drugs—keeping or maintaining a car used for the keeping or selling of a controlled substance—keeping a car—possession for a short period, or intent to retain possession, for a certain use

Where defendant was convicted of keeping or maintaining a car which is used for the keeping or selling of a controlled substance in violation of N.C.G.S. § 90-108(a)(7) and where he argued on appeal that the trial court erred by denying his motion to dismiss, the Supreme Court held that, when viewed in the light most favorable to the State, it could reasonably be inferred from the evidence at trial that defendant had "kept" the Cadillac he was driving. The word "keep" in the relevant portion of subsection 90-108(a)(7) refers to possessing something for at least a short period of time—or intending to retain possession of something in the future—for a certain use. During the hour and a half of surveillance, officers saw defendant arrive at a hotel in a Cadillac, stay in a hotel room for a while, and then leave in the Cadillac. He was the only person they saw using the Cadillac, and there was a service receipt in the Cadillac bearing defendant's name and dated two and a half months before defendant's arrest. A reasonable jury thus could conclude that defendant had possessed the Cadillac for about two and a half months, at the very least.

2. Drugs—keeping or maintaining a car used for the keeping or selling of a controlled substance—keeping a controlled substance—storing rather than merely transporting

Where defendant was convicted of keeping or maintaining a car which is used for the keeping or selling of a controlled substance in violation of N.C.G.S. § 90-108(a)(7) and where he argued on appeal that the trial court erred by denying his motion to dismiss, the Supreme Court held that, when viewed in the light most favorable to the State, it could reasonably be inferred from the evidence at trial that defendant was using the Cadillac he was driving to "keep" crack cocaine. The word "keeping" in the relevant portion of subsection 90-108(a)(7) refers to the storing of illegal drugs. The cocaine was

hidden in the gas compartment of the car, and the circumstances were such that a reasonable jury could conclude that defendant was storing rather than merely transporting the drugs in the car.

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. ___, 796 S.E.2d 91 (2017), finding no error in part and reversing and remanding in part judgments entered on 13 August 2015 by Judge W. Allen Cobb Jr. in Superior Court, New Hanover County. Heard in the Supreme Court on 12 March 2018.

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

Glenn Gerding, *Appellate Defender*, *by Wyatt Orsbon*, *Assistant Appellate Defender*, *for defendant-appellee.*

MARTIN, Chief Justice.

During a drug investigation, law enforcement officers pulled defendant over and discovered two bags of crack cocaine hidden behind the gas-cap door of the car that he was driving. After the trial court denied defendant's motion to dismiss, defendant was convicted of, among other things, keeping or maintaining a vehicle which is used for the keeping or selling of controlled substances. We hold that it can reasonably be inferred from the evidence at trial, when viewed in the light most favorable to the State, that defendant had kept the car that he was driving, and that he was using that car to store crack cocaine when he was arrested. We therefore conclude that the trial court correctly denied defendant's motion to dismiss as to the charge of keeping or maintaining a vehicle which is used for the keeping or selling of controlled substances.

Detective Evan Luther of the New Hanover County Sheriff's Office Vice and Narcotics Unit became familiar with defendant over the course of a months-long drug investigation. On 8 August 2013, while that investigation was ongoing, Detective Luther obtained information implicating defendant in drug activity that, according to Detective Luther's trial testimony, "needed to be acted upon that day." Detective Luther also learned that defendant would be driving a particular white Cadillac and staying in Room 129 of a specific Econo Lodge hotel. After obtaining this information, Detective Luther began the process of getting a search warrant for the hotel room and the Cadillac. While he was doing so, he told assisting officers that defendant was "wanted on outstanding warrants"

and that, as a result, officers could initiate contact with defendant at any time.

As part of Detective Luther's investigation, Lieutenant Leslie Wyatt of the New Hanover County Sheriff's Office went to set up surveillance at the hotel where defendant was expected to be. When Lieutenant Wyatt got there, he spotted a Cadillac matching the description that Detective Luther had given him. Lieutenant Wyatt briefly went to a nearby gas station, and when he got back, the Cadillac was gone. About ten minutes after Lieutenant Wyatt had set up stationary surveillance on the hotel, the Cadillac returned and parked in front of Room 129. Defendant, who was the only person in the car, got out and went into that room. He stayed there for about forty-five minutes but then left the room and drove away in the Cadillac. At least one officer stayed behind to conduct surveillance on the hotel room.

Other officers followed defendant as he drove to an apartment complex, turned around, left the complex, and continued driving. This behavior was "[i]ndicative of someone seeing if they're being followed," according to Lieutenant Wyatt's trial testimony, so the officers pulled defendant over. Defendant was alone in the car, and the officers arrested him based on his outstanding warrants. While defendant was in custody, his cell phone continuously received calls and text messages. A contact named "Surf City Lick" called a number of times and sent several text messages, and a contact named "Mexican Friend Lick" also called a number of times. The word "lick," Detective Luther testified, is a slang term for someone who purchases drugs. Detective Luther also testified that the contents of some of the text messages, which the arresting officers could see on the screen of the phone, could be consistent with a customer's asking if a drug delivery was forthcoming.

The officers who arrested defendant took defendant and the Cadillac back to the hotel. Detective Luther arrived at the hotel shortly thereafter with a signed warrant to search the Cadillac and Room 129 of the hotel. Collectively, the officers at the hotel had conducted surveillance for about an hour and a half before they executed the search warrant. When officers searched the Cadillac, they found two purple plastic bags hidden in the small space behind the door covering the gas cap. Both bags contained crack cocaine. As in many cars, the gas-cap compartment of the Cadillac was accessible only by operating a switch inside the car. When the officers searched inside the car, they found a marijuana cigarette, $243 in cash hidden inside a boot, and a service receipt dated 29 May 2013 with defendant's name printed on it.

Meanwhile, the officers who searched the hotel room found two purple plastic bags containing a much larger amount of crack cocaine hidden behind the toilet paper holder in the bathroom. The purple bags in the hotel room were the same type of bags as those found in the gas-cap compartment of the Cadillac. Officers also found a number of small Ziploc bags in the hotel room—bags that, according to Detective Luther, drug dealers commonly use to package drugs into smaller amounts for sale. Finally, officers found a digital scale disguised to look like an MP3 player in the hotel room. Investigating officers determined that the car was registered to someone other than defendant, that the hotel room was checked out under someone else's name, and that defendant did not leave personal luggage inside the hotel room. These practices, Detective Luther testified, are consistent with drug sale activity.

Defendant was indicted for possession with intent to manufacture, sell, and/or deliver cocaine; manufacture of cocaine; possession of cocaine; keeping or maintaining a vehicle which is used for the keeping or selling of a controlled substance; possession of drug paraphernalia; possession of up to one-half ounce of marijuana; and having attained the status of a habitual felon. The State declined to proceed on the manufacture-of-cocaine charge. At the close of the State's evidence, defendant moved to dismiss all of the remaining charges against him. The trial court granted the motion as to the possession-of-cocaine charge, but denied the motion as to all other remaining charges. The jury found defendant guilty of all of these charges.

Defendant appealed to the Court of Appeals, arguing, among other things, that the trial court erred in denying his motion to dismiss the charge of keeping or maintaining a vehicle which is used for the keeping or selling of a controlled substance. In an opinion that split on this issue, the Court of Appeals reversed that conviction. The majority held that there was insufficient evidence that defendant kept or maintained the Cadillac, and also held that "there was insufficient evidence that defendant used [the Cadillac] on any prior occasion for the purpose of keeping or selling a controlled substance." *State v. Rogers*, ___ N.C. App. ___, ___, ___, 796 S.E.2d 91, 96, 97 (2017) (emphasis omitted). The judge who dissented on this issue determined that the evidence, taken together, was sufficient to show that defendant kept or maintained the Cadillac over a period of time for the purpose of keeping cocaine. *Id.* at ___, 796 S.E.2d at 101-02 (Stroud, J., concurring in part and dissenting in part). The State gave notice of appeal based on the partially dissenting opinion.

[1] Defendant was convicted of keeping or maintaining a car which is used for the keeping or selling of a controlled substance in violation

of N.C.G.S. § 90-108(a)(7). That provision says, in pertinent part, that "[i]t shall be unlawful for any person . . . [t]o knowingly keep or maintain any . . . vehicle . . . which is used for the keeping or selling of [controlled substances] in violation of this Article." N.C.G.S. § 90-108(a)(7) (2017). To prove a defendant guilty under this portion of subsection 90-108(a)(7), the State must prove that the defendant "(1) knowingly (2) ke[pt] or maintain[ed] (3) a vehicle (4) which [wa]s used for the keeping or selling (5) of controlled substances." *State v. Mitchell*, 336 N.C. 22, 31, 442 S.E.2d 24, 29 (1994). For a criminal prosecution to survive a motion to dismiss, the State must present "substantial evidence of all the material elements of the offense charged and [substantial evidence] that the defendant was the perpetrator of the offense." *State v. Campbell*, 368 N.C. 83, 87, 772 S.E.2d 440, 444 (2015) (quoting *State v. Myrick*, 306 N.C. 110, 113-14, 291 S.E.2d 577, 579 (1982)). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (quoting *State v. Turnage*, 362 N.C. 491, 493, 666 S.E.2d 753, 755 (2008)). "[W]e must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citing *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992)). "Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then 'it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty.' " *Id.* at 75-76, 430 S.E.2d at 919 (alteration in original) (emphasis omitted) (quoting *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978)).

In this case, officers conducted surveillance for approximately an hour and a half on the day that defendant was arrested. During that time, they did not see any person other than defendant driving or occupying the Cadillac. A subsequent search of the Cadillac revealed two bags of crack cocaine stored in the gas-cap compartment. Thus, the only issues before us are whether there was substantial evidence to show that defendant "ke[pt] or maintain[ed]" the Cadillac and, if so, whether there was substantial evidence that the Cadillac was "used for the keeping . . . of" controlled substances.[1]

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1. A defendant may be convicted of violating subsection 90-108(a)(7) if he keeps or maintains a vehicle which is used for "the keeping *or* selling of" drugs. (Emphasis added.) The Court of Appeals majority failed to analyze whether substantial evidence supported the theory that the Cadillac that defendant was driving was used for the *selling* of drugs—even though the State made that argument on appeal. Because the Court of Appeals

"In the construction of any statute, . . . words must be given their common and ordinary meaning, nothing else appearing." *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202-03 (1974). To quote the beginning of subsection 90-108(a)(7) at greater length than we did above, that subsection makes it "unlawful for any person" to "keep or maintain any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever" for certain purposes or uses. The meaning of the term "keep," as it is used in referring to a person who "keep[s]" a vehicle, building, or other place, is clear from the context in which it appears. When you "keep" a "shop," for instance—that is, when you are a shopkeeper—you have possession of the shop for a designated purpose or use (usually to sell goods). You generally will have possessed that shop for at least a short period of time, but in some instances, you may be said to be "keep[ing]" a shop even when you have just opened it, if the circumstances indicate that you intend to retain the shop for continued use in the future. *Cf. The New Oxford American Dictionary* 952 (3d ed. 2010) (defining "keep" as "have or retain possession of" or "retain or reserve for use in the future"). This possession must have occurred for at least a short period of time, or the circumstances must indicate an intent to retain that property in the future (and in many cases, both may be evident). Thus, the word "keep," in the "keep or maintain" language of subsection 90-108(a)(7), refers to possessing something for at least a short period of time—or intending to retain possession of something in the future—for a certain use.

In this case, officers conducted surveillance for about an hour and a half before searching the Cadillac and defendant's hotel room. During their surveillance, the officers saw defendant arrive at the hotel in the Cadillac, stay in his room awhile, and then leave in the Cadillac. Defendant, moreover, was the only person that the officers saw using the car. And let's not forget an additional, very important piece of evidence: the service receipt found inside the Cadillac bearing defendant's name—a receipt that bore a date from about two and a half months before defendant's arrest. Viewing this evidence in the light most favorable to the State, and drawing all reasonable inferences from it, we hold that a reasonable jury could conclude that defendant had possessed the

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majority did not conduct this analysis, *see Rogers*, ___ N.C. App. at ___, 796 S.E.2d at 94-98, the opinion that dissented on this issue did not do so either, *see id.* at ___, 796 S.E.2d at 100-02 (Stroud, J., concurring in part and dissenting in part). The State, moreover, did not petition this Court to consider any issues beyond the scope of that partially dissenting opinion. We therefore limit our analysis to whether there was substantial evidence that defendant used the Cadillac to *keep* drugs. *See* N.C. R. App. P. 16(b).

car for about two and a half months, at the very least.[2] The State therefore presented sufficient evidence that defendant "ke[pt]" the Cadillac.

[2] We thus turn to the other issue before us: whether the State presented sufficient evidence that defendant used the Cadillac "for the keeping . . . of" illegal drugs. N.C.G.S. § 90-108(a)(7). Ordinarily, "words used in one place in [a] statute have the same meaning in every other place in the statute." *Campbell v. First Baptist Church of Durham*, 298 N.C. 476, 483, 259 S.E.2d 558, 563 (1979) (first citing *Helvering v. Stockholms Enskilda Bank*, 293 U.S. 84, 55 S. Ct. 50 (1934); and then citing *Wells v. Hous. Auth.*, 213 N.C. 744, 197 S.E. 693 (1938)). But there are exceptions to that rule, and this is one. By making it a crime to "keep" a car "which is used for the keeping" of controlled substances, subsection 90-108(a)(7) uses the word "keep" and its variant "keeping" to mean different things. We have already noted that in the first instance, the word "keep" refers to possessing something for at least a short period of time, or to possessing something currently and intending to retain possession of it in the future, for some designated purpose or use. In the second instance, however, the word "keeping" is used to refer to *keeping drugs in* (in this case) *a car*. When someone "keep[s]" an object in his car, that word does not refer to possessing something for a designated use; it refers to *storing* that object in his car. That is the "common and ordinary meaning" of the word "keeping" in this context. *See In re Clayton-Marcus*, 286 N.C. at 219, 210 S.E.2d at 202. There is no reason to interpret the use of the word "keeping" in subsection 90-108(a)(7) differently, and, in fact, no other interpretation would make sense. So when subsection 90-108(a)(7) speaks of "the keeping . . . of" drugs, it is referring to the storing of drugs.

In this case, the State presented substantial evidence that defendant was using the Cadillac to store crack cocaine. Officers found the cocaine hidden in, of all places, the gas-cap compartment. At no point did the officers see anyone other than defendant use the Cadillac or access its gas-cap compartment, nor did the officers see defendant himself access the gas-cap compartment at any point during their observation period. So a jury could reasonably infer that the bags of cocaine had been placed

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2. Possessing a car for two and a half months is sufficient to show that an individual "ke[pt]" a car under subsection 90-108(a)(7). But we do not mean to imply that possession for that long is necessary to satisfy that element. "[K]eep[ing]" a car for a much shorter period of time may suffice—we need not, and do not, take any position on that to decide this case. And, of course, as we have already suggested, the State may also be able to prove that a defendant has "ke[pt]" a car by proving that the defendant possessed a car, and that he intended to continue possessing it in the future, when he was arrested.

there before the Cadillac was under stationary surveillance—indeed, that seems to be the only plausible inference. And defendant's actions—arriving at the hotel, staying there for about forty-five minutes while the drugs evidently stayed hidden in the gas-cap compartment, and leaving in the Cadillac again—seem to indicate that defendant was not using the car only to transport drugs from one place to another.[3] Plus, a defendant who wants to store contraband will, all other things equal, want to store it in a hidden place, which is exactly what putting the cocaine in the gas-cap compartment would accomplish. Finally, putting the drugs in a place that is somewhat hard to access—and that is not inside the passenger compartment of the car at all—likewise suggests storage rather than mere transportation. So, when viewing this evidence in the light most favorable to the State and drawing all reasonable inferences from it, the evidence indicates that defendant was using the Cadillac to store cocaine within it.

In addition, the evidence suggesting that defendant was involved in selling drugs also permits us to draw a reasonable inference that defendant was using the Cadillac to store cocaine. Officers found $243 in cash hidden inside a boot kept in the car, and the continuous stream of calls and messages to defendant's phone when defendant was in custody suggested that he was about to conduct a drug sale. The cocaine found inside the gas-cap compartment of the Cadillac, moreover, was stored in purple plastic bags of the same color, type, and size as the bags of cocaine that officers found in defendant's hotel room. And when officers searched the hotel room, they also found a number of smaller Ziploc bags and a digital scale that was disguised to look like something else. These circumstances, when viewed in the light most favorable to the State, indicate that defendant used the hotel room to split up large amounts of crack cocaine into smaller portions that he would then store inside the Cadillac until they were sold.

This Court has discussed subsection 90-108(a)(7) on only one prior occasion, in *State v. Mitchell*, 336 N.C. 22, 442 S.E.2d 24 (1994). In that case, the defendant entered a convenience store with two bags of marijuana in his shirt pocket. *Id.* at 26, 442 S.E.2d at 26. The store clerk, an off-duty police officer, asked about the bags, which the defendant admitted contained marijuana, and the defendant gave them to her. *Id.*

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3. Of course, if a defendant used a car to transport illegal drugs to, for instance, a drug sale, that fact might well be evidence that he was "us[ing]" the car "for the . . . *selling of*" controlled substances. *See* N.C.G.S. § 90-108(a)(7) (emphasis added). But, as we have already said, we are not addressing the "selling" element of subsection 90-108(a)(7) due to the limited scope of this appeal.

The store clerk then called the police, at which time the defendant left the store. *Id.* The next day, the defendant was arrested for possession of marijuana. *Id.* Police found a marijuana cigarette inside the defendant's car, and when the police searched the defendant's house, they found additional evidence: a scale with some cocaine residue, as well as small plastic bags, two marijuana cigarettes, and rolling papers. *Id.*

The main dispute in *Mitchell* was whether the State presented substantial evidence that the defendant's car "was used for keeping or selling marijuana." *Id.* at 32, 442 S.E.2d at 29. *Mitchell* held, and we reaffirm today, that subsection 90-108(a)(7) does not "create a separate crime simply because the controlled substance was temporarily in a vehicle." *Id.* at 33, 442 S.E.2d at 30. In other words, merely possessing or transporting drugs inside a car—because, for instance, they are in an occupant's pocket or they are being taken from one place to another—is not enough to justify a conviction under the "keeping" element of subsection 90-108(a)(7).[4] *See id.* at 32-33 & n.1, 442 S.E.2d at 30 & n.1. Rather, courts must determine whether the defendant was using a car for the *keeping* of drugs—which, again, means the *storing* of drugs—and courts must focus their inquiry "on the *use*, not the contents, of the vehicle." *See id.* at 34, 442 S.E.2d at 30.

In *Mitchell*, the State's evidence from the night that the defendant went to the convenience store was sufficient to raise an inference that the defendant temporarily possessed marijuana in his car, but nothing more. *Id.* at 33, 442 S.E.2d at 30. And although the State's evidence also indicated that police found a single marijuana cigarette in the defendant's car the next day, *see id.*, that alone does not indicate that the car was being used to *store* the cigarette; people often leave cigarettes or other small moveable things in their cars but then take them out soon thereafter. This Court correctly reasoned that the sum of this evidence was insufficient to raise a reasonable inference that the defendant was using the car to "keep[ ]" marijuana, which is what subsection 90-108(a)(7) prohibits. *See id.* Our analysis today is therefore consistent with the holding of *Mitchell*.

Even though *Mitchell* reached the correct result, however, part of its reasoning was inconsistent with the text of subsection 90-108(a)(7). Specifically, *Mitchell* interpreted "the keeping . . . of [drugs]" to mean

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4. As we have already suggested in footnote 3, though, evidence that a defendant has transported or possessed drugs inside a car may, in conjunction with additional evidence, be enough to satisfy the "*selling*" element of subsection 90-108(a)(7). (Emphasis added.)

"not just possession, but possession that occurs over a duration of time." *Id.* at 32, 442 S.E.2d at 30. But the statutory text does not require that drugs be kept for "a duration of time." As we have seen, the linchpin of the inquiry into whether a defendant was using a vehicle, building, or other place "for the keeping . . . of" drugs is whether the defendant was using that vehicle, building, or other place for the storing of drugs. So, for instance, when the evidence indicates that a defendant has possessed a car for at least a short period of time, but that he had just begun storing drugs inside his car at the time of his arrest, that defendant has still violated subsection 90-108(a)(7)—even if, arguably, he has not stored the drugs for any appreciable "duration of time." The critical question is *whether* a defendant's car is used to store drugs, not *how long* the defendant's car has been used to store drugs for. As a result, we reject any notion that subsection 90-108(a)(7) requires that a car kept or maintained by a defendant be used to store drugs for a certain minimum period of time—or that evidence of drugs must be found in the vehicle, building, or other place on more than one occasion—for a defendant to have violated subsection 90-108(a)(7). But again, merely having drugs in a car (or other place) is not enough to justify a conviction under subsection 90-108(a)(7). The evidence and all reasonable inferences drawn from the evidence must indicate, based "on the totality of the circumstances," *id.* at 34, 442 S.E.2d at 30, that the drugs are also being stored there. To the extent that *Mitchell*'s "duration of time" requirement conflicts with the text of subsection 90-108(a)(7), therefore, this aspect of *Mitchell* is disavowed.

In sum, viewing the evidence in this case in the light most favorable to the State and drawing all reasonable inferences from that evidence, a reasonable jury could find that defendant kept the Cadillac in question and that defendant used that Cadillac to store crack cocaine. The trial court correctly denied defendant's motion to dismiss the charge of keeping or maintaining a vehicle which is used for the keeping or selling of controlled substances. We therefore reverse the decision of the Court of Appeals as to the issue before us. The remaining issues that the Court of Appeals addressed are not before us, and we leave its decision as to those issues undisturbed.

REVERSED.

STATE OF NORTH CAROLINA
v.
FELIX RICARDO SALDIERNA

No. 271PA15-2

Filed 17 August 2018

Juveniles—custodial interrogation—waiver of juvenile rights

The trial court did not err by concluding that juvenile defendant knowingly, willingly, and understandingly waived his juvenile rights pursuant to N.C.G.S. § 7B-2101 before making certain incriminating statements. Evidence in the record tended to show that the detective advised defendant of his juvenile rights in spoken English, written Spanish, and written English; defendant initialed each of the rights on the juvenile rights waiver form and signed it; defendant answered affirmatively that he understood his rights; and defendant understood what the detective was saying. While the record did contain evidence that would have supported a different conclusion, the evidence supported the trial court's conclusion that defendant waived his juvenile rights.

Justice BEASLEY dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 803 S.E.2d 33 (2017), reversing an order denying defendant's motion to suppress entered on 20 February 2014 by Judge Forrest Donald Bridges, vacating a judgment entered on 4 June 2014 by Judge Jesse B. Caldwell, both in Superior Court, Mecklenburg County, and remanding the case for further proceedings after the Supreme Court of North Carolina remanded the Court of Appeals' prior decision in this case, *State v. Saldierna*, 242 N.C. App. 347, 775 S.E.2d 326 (2015). Heard in the Supreme Court on 14 May 2018 in session in the Old Burke County Courthouse in the City of Morganton pursuant to N.C.G.S. § 7A-10(a).

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

Goodman Carr, *PLLC*, *by W. Rob Heroy*, *for defendant-appellee.*

ERVIN, Justice.

The issue before the Court in this case is whether the trial court's order denying defendant's suppression motion contained sufficient findings of fact to support its conclusion that defendant knowingly and voluntarily waived his juvenile rights pursuant to N.C.G.S. § 7B-2101 before making certain incriminating statements. After careful consideration of defendant's challenge to the denial of his suppression motion in light of the record and the applicable law, we hold that the trial court's order contained sufficient findings to support this conclusion and reverse the decision of the Court of Appeals to the contrary.

From 26 November 2012 to 3 January 2013, defendant Felix Ricardo Saldierna and seven other individuals were involved in a series of breakings and enterings that occurred in the Charlotte area. After coming home from work on 17 December 2012, Cheryl Brewer[1] discovered that someone had entered her residence through a broken window, scrawled "Merry Chritmas" [sic] across a wall, and stolen a 32-inch television and a lock box. On 18 December, a 42-inch television, an Xbox game system, and jewelry were stolen from the residence of William Nunez. Another individual suspected in the commission of these crimes told investigating officers that defendant had been involved in the underlying break-ins. In January 2013, warrants for arrest charging defendant with felonious breaking or entering and conspiracy to commit breaking or entering were issued. Based upon the issuance of these warrants for arrest, defendant was taken into custody at his home in Fort Mill, South Carolina.

After having been placed under arrest, defendant was transported to the York County Justice Center, where he was interviewed by Detective Aimee Kelly of the Charlotte-Mecklenburg Police Department. At the beginning of this interview, Detective Kelly informed defendant that she was required to inform him of his rights. Defendant responded to Detective Kelly's statement by telling her that "my English is good, but like when you say something like that much it's kind of confusing." After stating that he was sixteen years old, defendant informed Detective Kelly that he was taking courses intended for both freshman and sophomore high school students. When Detective Kelly asked defendant if he could read, defendant responded in the affirmative before adding that he could read English "kind of, a little bit," and that he could read Spanish. At that point, Detective Kelly told defendant that she would provide him with

1. The name of the victim set out in the text of this opinion is derived from the factual basis statement provided by the prosecutor at the time that defendant entered his negotiated guilty plea. The indictment returned against defendant in the relevant cases named the alleged victim as Cheryl Drew.

a copy of a juvenile rights waiver form in both English and Spanish so that he would be able to read along with her while she informed him of his rights. At the conclusion of this portion of their discussion, Detective Kelly and defendant had the following exchange:

> [Kelly]: You understand I'm a police officer, right?
>
> [Defendant]: Yes ma[']am[.]
>
> [Kelly]: Ok, and that I would like to talk to you about this. And this officer has also explained to me and I understand that I have the right to remain silent, that means that I don't have to say anything or answer any questions. Should be right there number 1 right on there. Do you understand that?
>
> [Defendant]: [unintelligible] questions?
>
> [Kelly]: Yes, that is your right? So do you understand that? If you understand that, put your initials right there showing that you understand that. On this sheet. On this one. You can put it on both. Anything I say can be used against me. Do you understand that?
>
> [Defendant]: Yes ma[']am.
>
> [Kelly]: I have the right to have a parent[,] guardian or custodian here with me now during questioning. Parent means my mother, father, stepmother, or stepfather. Guardian means the person responsible for taking care of me. Custodian means the person in charge of me where I am living. Do you understand that? Do you want to read that?
>
> [Defendant]: Yeah.
>
> [Kelly]: Do you understand that?
>
> [Defendant]: [no response]
>
> [Kelly]: I have the right to talk to a lawyer and to have a lawyer here with me now to advise and help during questioning. Do you understand that?
>
> [Defendant]: [unintelligible]
>
> [Kelly]: If I want to have a lawyer with me during questioning one will be provided to me at no cost before any questioning. Do you understand that?
>
> [Defendant]: Yes ma[']am.

[Kelly]: Ok. Now I want to talk to you about some stuff that's happened in Charlotte. And um, I will tell you this. There's been some friends of yours that have already been questioned about these items and these issues. And they've been locked up. And that's what I want to talk to you about. Do you want to help me out and to help me understand what's been going on with some of these cases and talk to me about this now here?

[Defendant]: Uh

[Kelly]: Are you willing to talk to me is what I'm asking.

[Defendant]: Yes ma[']am.

[Kelly]: Ok. So I am 14 years or more. Let me see that pen. And I understand my rights as they've been explained by [D]etective Kelly. I do wish to answer questions now without a lawyer, parent, guardian or custodian here with me? My decision to answer questions now is made freely and is my own choice. No one has threatened me in any way or has promised me any special treatment because I have decided to answer questions now. I am signing my name below. Do you understand this? Initial, sign, date and time.

[Kelly]: It is 1/9/13. It is 12:10PM.

[Defendant]: Um, Can I call my mom?

[Kelly]: Call your mom now?

[Defendant]: She's on her um. I think she is on her lunch now.

[Kelly]: You want to call her now before we talk?

[Kelly] [to other officers]: He wants to call his mom.

. . . .

[Other Officer]: [S]tep back outside and we'll let you call your mom outside. . . .

. . . .

9:50: [Defendant] [can be heard on phone. Call is not intelligible.]

. . . .

> [Kelly]: 12:20: Alright Felix, so, let's talk about this thing going on. Like I said a lot of your friends have been locked up and everybody's talking. They're telling me about what's going on and what you've been up to. I'm not saying you're the ringleader of this here thing and some kind of mastermind right but I think you've gone along with these guys and gotten yourself into a little bit of trouble here. This is not something that's going to end your life. You know what I'm saying. This is not a huge deal. I know you guys were going into houses when nobody was home. You weren't looking to hurt anybody or anything like that. I just want to hear your side of the story. We can start off. I'm going to ask you questions I know the answer to. A lot of these questions are to tell if you're being truthful to me.

At that point, Detective Kelly interviewed defendant for approximately fifty-four minutes concerning the extent of his involvement in the commission of the crimes that Detective Kelly was investigating. During the course of the ensuing interrogation, defendant confessed to having been involved in the break-ins that had occurred at the residences of Ms. Brewer and Mr. Nunez.

On 22 January 2013, the Mecklenburg County grand jury returned bills of indictment charging defendant with two counts of conspiracy to commit felonious breaking, entering, and larceny and two counts of felonious breaking or entering. On 9 October 2013, defendant filed a motion seeking to have his confession and all of the evidence that the State had obtained as a result of the statements that defendant made to Detective Kelly suppressed on the grounds that his confession had been obtained as the result of violations of N.C.G.S. § 7B-2101 and his federal constitutional right not to be deprived of liberty without due process of law. According to defendant, "[b]y asking to speak to his mother prior to questioning, [d]efendant invoked his rights under N.C.G.S. § 7B-2101." In addition, defendant alleged that, in light of his "indicat[ion] that he was not ready to be questioned without her," "[t]he interview should have ceased at that moment and not continued until [d]efendant's mother was present, or should have simply ceased."

On 31 January 2014, defendant's suppression motion came on for hearing before Judge Forrest Donald Bridges in the Superior Court, Mecklenburg County. At the suppression hearing, Detective Kelly testified that, while defendant "spoke English clearly and understood what [she] was saying," "[he] said he wasn't very good at reading English." Although Detective Kelly acknowledged that defendant might have

claimed to have had "some issues understanding English," she stated that defendant "seemed to very clearly understand what [she] was asking him" and that she had had no trouble understanding defendant at any point during the interview. Detective Kelly "found [defendant's English] to be fine" and believed "that he understood [his juvenile] rights." According to Detective Kelly, defendant followed along and initialed the relevant portions of the juvenile rights waiver form while she read his juvenile rights to him.

In addition, Detective Kelly asserted at the suppression hearing that defendant "never said he wanted his mother [at the interview]." On the other hand, Detective Kelly did not ask defendant "whether or not he was ready to proceed" after he requested to be allowed to speak with his mother. In fact, defendant had signed the juvenile rights waiver form before asking the investigating officers to give him an opportunity to call his mother. Detective Kelly had an "understanding" that defendant had called his mother "to let her know where he was and that he was arrested."

On 20 February 2014, the trial court entered an order denying defendant's suppression motion in which the court found as a fact:

> 1. That Defendant was in custody.
>
> 2. That Defendant was advised of his juvenile rights pursuant to North Carolina General Statute § 7B-2101.
>
> 3. That Detective Kelly of the Charlotte-Mecklenburg Police Department advised Defendant of his juvenile rights.
>
> 4. That Defendant was advised of his juvenile rights in three manners. Defendant was advised of his juvenile rights in spoken English, in written English, and in written Spanish.
>
> 5. That Defendant indicated that he understood his juvenile rights as given to him by Detective Kelly.
>
> 6. That Defendant indicated he understood his rights after being given and reviewing a form enumerating those rights in Spanish.
>
> 7. That Defendant indicated that he understood that he had the right to remain silent. Defendant understood that to mean that he did not have to say anything or answer any questions. Defendant initialed next to this right at number 1

on the English rights form provided to him by Detective Kelly to signify his understanding.

8. That Defendant indicated he understood that anything he said could be used against him. Defendant initialed next to this right at number 2 on the English rights form provided to him by Detective Kelly to signify his understanding.

9. That Defendant indicated he understood that he had the right to have a parent, guardian, or custodian there with him during questioning. Defendant understood the word parent meant his mother, father, stepmother, or stepfather. Defendant understood the word guardian meant the person responsible for taking care of him. Defendant understood the word custodian meant the person in charge of him where he was living. Defendant initialed next to this right at number 3 on the English rights form provided to him by Detective Kelly to signify his understanding.

10. That Defendant indicated he understood that he had the right to have a lawyer and that he had the right to have a lawyer there with him at the time to advise and help him during questioning. Defendant initialed next to this right at number 4 on the English rights form provided to him by Detective Kelly to signify his understanding.

11. That Defendant indicated he understood that if he wanted a lawyer there with him during questioning, a lawyer would be provided to him at no cost prior to questioning. Defendant initialed next to this right at number 5 on the English rights form provided to him by Detective Kelly to signify his understanding.

12. That Defendant initialed a space below the enumerated rights on the English rights form that stated the following: "I am 14 years old or more and I understand my rights as explained by Detective Kelly. I DO wi[s]h to answer questions now, WITHOUT a lawyer, parent, guardian, or custodian here with me. My decision to answer questions now is made freely and is my own choice. No one has threatened me in any way or promised me special treatment. Because I have decided to answer questions now, I am signing my name below."

13. That Defendant's signature appears on the English rights form below the initialed portions of the form. Defendant's signature appears next to the date, 1-9-13, and the time, 12:10. Detective Kelly signed her name as a witness below Defendant's signature.

14. That after being informed of his rights, informing Detective Kelly he wished to waive those rights, and signing the rights form, Defendant communicated to Detective Kelly that he wished to contact his mother by phone. Defendant was given permission to do so.

15. That Defendant attempted to call his mother, but was unable to speak to her.

16. That Defendant indicated that his mother was on her lunch break at the time he tried to contact her.

17. That Defendant did not at that time or any other time indicate that he changed his mind regarding his desire to speak to Detective Kelly. That Defendant did not at that time or any other time indicate that he revoked his waiver.

18. That Defendant only asked to speak to his mother.

19. That Defendant did not make his interview conditional on having his mother present or conditional on speaking to his mother.

20. That Defendant did not ask to have his mother present at the interview site.

21. That, upon review of the totality of the circumstances, the Court finds that Defendant's request to speak to his mother was at best an ambiguous request to speak to his mother.

22. That at no time did Defendant make an unambiguous request to have his mother present during questioning.

23. That Defendant never indicated that his mother was on the way or could be present during questioning.

24. That Defendant made no request for a delay of questioning.

Based upon these findings of fact, the trial court concluded as a matter of law:

1. That the State carried its burden by a preponderance of the evidence that Defendant knowingly, willingly, and understandingly waived his juvenile rights.

2. That the interview process in this case was consistent with the interrogation procedures as set forth in North Carolina General Statute § 7B-2101.

3. That none of Defendant's State or Federal rights were violated during the interview conducted of Defendant.

4. That statements made by Defendant were not gathered as a result of any State or Federal rights violation.

In light of these findings and conclusions, the trial court denied defendant's suppression motion.

On 4 June 2014, defendant entered a negotiated plea of guilty to two counts of felonious breaking or entering and two counts of conspiracy to commit breaking or entering while reserving the right to seek appellate review of the denial of his suppression motion.[2] Based upon defendant's plea, Judge Caldwell consolidated defendant's convictions for judgment and entered a judgment sentencing defendant to a term of six to seventeen months imprisonment, with this sentence being suspended and defendant placed on supervised probation for a period of thirty-six months on the condition that defendant serve a forty-five day active sentence, for which he received forty-five days' credit for time spent in pretrial confinement; pay the costs; comply with the usual terms and conditions of probation; and have no contact with the victim.[3] Defendant noted an appeal from Judge Caldwell's judgment to the Court of Appeals.

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2. The plea agreement between defendant and the State provided that, in return for defendant's guilty pleas, the State would voluntarily dismiss one additional count of felonious breaking or entering, one count of conspiracy to break or enter, and three counts of felonious larceny and that defendant would receive a sentence of six to seventeen months imprisonment, with this sentence to be suspended and with defendant to be on supervised probation for a period of thirty-six months, with the terms and conditions of defendant's probation including a requirement that he serve a forty-five day split sentence, subject to credit for time served in pretrial confinement, and that he be subject to intensive probation for a period of one year.

3. The final page of Judge Caldwell's judgment was omitted from the record on appeal. Having obtained a copy of that page from the office of the Clerk of Superior Court, Mecklenburg County, we have added it to the record on appeal upon our own motion pursuant to N.C.R. App. P. 9(b)(5)b.

In seeking relief from the Court of Appeals, defendant argued that his request to call his mother during his conversation with Detective Kelly had constituted "an unambiguous invocation of his right to have a parent present during a custodial interrogation" and that, in the alternative, even if his request for the presence of his mother had been ambiguous, "[Detective] Kelly was required to make further inquiries to clarify whether he actually meant that he was invoking his right to end the interrogation until his mother was present." *State v. Saldierna*, 242 N.C. App. 347, 353, 775 S.E.2d 326, 330 (2015) (*Saldierna I*). In addition, defendant contended that the trial court had failed to "appropriately consider his juvenile status in determining that his waiver of rights was knowing and voluntary." *Id.* at 354, 775 S.E.2d at 331.

In holding that the trial court had erred by denying defendant's suppression motion, the Court of Appeals determined "that[, while] the findings of fact regarding the ambiguous nature of [defendant's] statement, 'Can I call my mom[,]' are supported by competent evidence," the "ambiguous [nature of that] statement required [Detective] Kelly to clarify whether [defendant] was invoking his right to have a parent present during the interview." *Id.* at 360, 775 S.E.2d at 334. As a result, the Court of Appeals held "that the trial court erred in concluding that [Detective] Kelly complied with the provisions of section 7B-2101" and "reverse[d] the trial court's order, vacate[d] the judgments entered upon [defendant's] guilty pleas, and remand[ed] to the trial court with instructions to grant the motion to suppress." *Id.* at 360, 775 S.E.2d at 334. This Court granted the State's petition seeking discretionary review of the Court of Appeals' decision, reversed that decision, and remanded this case to the Court of Appeals for consideration of defendant's remaining challenge to the trial court's suppression order. *State v. Saldierna*, 369 N.C. 401, 409, 794 S.E.2d 474, 479 (2016).[4]

In overturning the Court of Appeals' decision in *Saldierna I*, this Court concluded that defendant's statement, "Um, [c]an I call my mom?", did not constitute "a clear and unambiguous invocation of his right to have his parent or guardian present during questioning." *Id.* at 408, 794 S.E.2d at 479 (citing *Davis v. United States*, 512 U.S. 452, 459, 114 S. Ct.

4. Justice Beasley dissented from the Court's decision to reverse the Court of Appeals based upon her belief that the record established that defendant had unambiguously invoked his right to the presence of a parent and that investigating officers had an obligation to obtain clarification of any ambiguous statement that defendant may have made regarding the extent to which he desired the presence of a parent prior to being interrogated by Detective Kelly. *Saldierna*, 369 N.C. at 409, 794 S.E.2d at 479-80 (Beasley, J., dissenting).

2350, 2355, 129 L. Ed. 2d 362, 371 (1994) (holding that invocation of the right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney")). "Although defendant asked to call his mother, he never gave any indication that he wanted to have her present for his interrogation, nor did he condition his interview on first speaking with her." *Id.* at 408, 794 S.E.2d at 479. As a result, we determined that the Court of Appeals had erred by holding that the ambiguous nature of defendant's request to be allowed to call his mother required Detective Kelly to make further inquiry into the extent to which defendant intended to invoke his right to have his mother present before any custodial interrogation could commence. *Id.* at 409, 794 S.E.2d at 479.

On remand before the Court of Appeals, defendant argued that the trial court had erred by denying his suppression motion on the grounds that his confession had been obtained as the result of a violation of both his statutory and constitutional rights as a juvenile. According to defendant, the United States Supreme Court held in *J.D.B. v. North Carolina* "that reviewing courts must take into account the juvenile's age and maturity when determining the admissibility of a confession, and not to evaluate the confession as if the juvenile were an adult," citing *J.D.B.*, 564 U.S. 261, 272, 131 S. Ct. 2394, 2403, 180 L. Ed. 2d 310, 323-24 (2011). Defendant argued "that the *Davis* test should not be applied to the context of a juvenile interrogation" because "*Davis* involved an adult," because "the [United States] Supreme Court did not announce that the rule applied equally to juvenile confessions," and because "the [United States] Supreme Court has made clear . . . that juvenile confessions should be evaluated differently than adult confessions," citing, *inter alia*, *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 257 (1967), and *J.D.B.*, 564 U.S. 261, 131 S. Ct. 2394, 180 L. Ed. 2d 310.

In addition, defendant argued that, in light of the totality-of-the-circumstances approach outlined in *J.D.B.*, the trial court had erred by failing to consider that defendant "was in custody and outnumbered by three law enforcement officers"; had "stated to the detective plainly, '[c]an I call my mom now?' "; was sixteen years old and had only completed the eighth grade as of the date of the interrogation; "indicated to [Detective Kelly] that his native language was Spanish, that he could not write in English, and he may have stated he had difficulty understanding" Detective Kelly; provided "unclear" responses to questions that Detective Kelly posed during the interrogation; and expressed a desire to call his mother. According to defendant, an analysis of the totality of the circumstances surrounding defendant's interrogation established

that the trial court had erred by finding that defendant had knowingly and voluntarily waived his statutory and constitutional rights.

The State, on the other hand, argued before the Court of Appeals that defendant had knowingly, willingly, and understandingly waived his juvenile rights when he was advised of those rights in spoken English, written English, and written Spanish; had acknowledged that he understood those rights; and had expressed, both verbally and in writing, his willingness to waive those rights. "[A]s [ ] evidence of his understanding and intention to proceed with the interview," the State pointed to the fact that defendant had "signed each paragraph of the Rights Waiver Form" and had gone "on to answer Detective Kelly's questions for nearly an hour without ever once indicating . . . . he did not understand the rights read to him or that he was at all unclear about the choice he made to answer questions." Although "age is to be considered by the trial judge," the State asserted that defendant's juvenile status and grade level did not preclude him from understanding and waiving his juvenile rights. Moreover, the State claimed that "[t]here is no evidence of mistreatment or coercion" during the interrogation. In spite of the fact that it involved the interrogation of an adult rather than a juvenile, the State contended that the United States Supreme Court's decision in *Davis* remains applicable in determining whether defendant had validly waived his juvenile rights. Finally, the State argued that defendant's reliance upon *J.D.B.* was misplaced given that *J.D.B.* involved the issue of a juvenile's age as "relevant to the determination of whether the child was considered to have been 'in custody' for *Miranda* purposes" and given that the United States Supreme Court had stated in *J.D.B.* that "a child's age will [not] be determinative, or even a significant factor in every case," quoting *J.D.B.*, 564 U.S. at 277, 131 S. Ct. at 2406, 180 L. Ed. 2d at 326.

In holding that the trial court had erred by denying defendant's suppression motion, the Court of Appeals concluded on remand that defendant did not "knowingly, willingly, and understandingly waive[ ] his rights under section 7B-2101 of the North Carolina General Statutes and under the constitutions of North Carolina and the United States." *State v. Saldierna*, ___ N.C. App. ___, ___, 803 S.E.2d 33, 35 (2017) (*Saldierna II*). In reaching this conclusion, the Court of Appeals explained that, "[w]hether a waiver is knowingly and intelligently made depends on the specific facts and circumstances of each case, including the background, experience, and conduct of the accused." *Id.* at ___, 803 S.E.2d at 36 (quoting *State v. Simpson*, 314 N.C. 359, 367, 334 S.E.2d 53, 59 (1985)). According to the Court of Appeals, "[t]he totality of the circumstances *must be carefully scrutinized* when determining if a youthful

defendant has legitimately waived his *Miranda* rights," *id.* at ___, 803 S.E.2d at 40 (quoting *State v. Reid*, 335 N.C. 647, 663, 440 S.E.2d 776, 785 (1994) (emphasis added)), given that juveniles possess "unique vulnerabilities," in that "(1) they are less likely than adults to understand their rights; and (2) they are distinctly susceptible to police interrogation techniques," *id.* at ___, 803 S.E.2d at 42 (emphasis omitted) (quoting Cara A. Gardner, *Failing to Serve and Protect: A Proposal for an Amendment to a Juvenile's Right to a Parent, Guardian, or Custodian During a Police Interrogation After* State v. Oglesby, 86 N.C. L. Rev. 1685, 1698 (2008)).

The Court of Appeals stated that, "despite the trial court's many findings of fact that defendant 'indicated he understood' Detective Kelly's questions and statements regarding his rights, the evidence as recorded contemporaneously during the questioning and as noted in testimony from the hearing, does not support those findings." *Id.* at ___, 803 S.E.2d at 41. In addition, the Court of Appeals stated that "the findings do not reflect the scrutiny that a trial court is required to give in juvenile cases." *Id.* at ___, 803 S.E.2d at 41. Among other things, the Court of Appeals noted that "no response [was] recorded that [defendant] 'understood' " that Detective Kelly had asked defendant to initial, sign, and date the English version of the juvenile rights waiver form. *Id.* at ___, 803 S.E.2d at 41. For that reason, the Court of Appeals held that the finding of fact " '[t]hat [d]efendant was advised of his juvenile rights . . . in written Spanish,' is not supported by competent *documentary* evidence in the record" and that "the evidence does not support the trial court's ultimate conclusion that defendant executed a valid waiver." *Id.* at ___, 803 S.E.2d at 41 (alterations in original). As a result, the Court of Appeals determined that "the totality of the circumstances set forth in this record ultimately do not fully support the trial court's conclusions of law, namely, '[t]hat the State carried its burden by a preponderance of the evidence that [d]efendant knowingly, willingly, and understandingly waived his juvenile rights.' " *Id.* at ___, 803 S.E.2d at 43 (alterations in original). This Court granted the State's petition for discretionary review of the Court of Appeals' remand decision in *Saldierna II* on 1 November 2017.

In seeking to persuade us to reverse the Court of Appeals' decision, the State claims that the Court of Appeals failed to properly apply the applicable standard of appellate review. According to the State, the Court of Appeals should have focused upon determining "whether the unchallenged findings of fact supported the trial court's conclusion of law that defendant knowingly and voluntarily waived his juvenile rights." The State further contends that, even if the trial court's findings

had been challenged by defendant as lacking in sufficient evidentiary support, they would nevertheless be "conclusive on appeal" because they were "supported by competent evidence, even if the evidence is conflicting," quoting *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994), *cert. denied*, 513 U.S. 1096, 115 S. Ct. 764, 130 L. Ed. 2d 661 (1995). In the State's view, the audio recording of defendant's interview with Detective Kelly "demonstrates that defendant had the ability to understand Detective Kelly as she read him his juvenile rights." In addition, the State notes that, in instances in which defendant failed to provide an audible response to Detective Kelly's inquiries concerning the extent to which defendant understood specific juvenile rights, defendant placed his initials by the relevant paragraph on the juvenile rights waiver form. Finally, the State asserts that Detective Kelly's suppression hearing testimony sufficed to support the trial court's findings to the effect that defendant understood Detective Kelly as she read his juvenile rights to him.

Defendant, on the other hand, contends that the State failed to meet its burden of demonstrating that he knowingly, willingly, and understandingly waived his statutory and constitutional rights. According to defendant, this Court should consider defendant's youth, his request to call his mother, the number of officers present during the interrogation, and the misleading statements made to defendant by investigating officers in determining that the trial court had erred by denying defendant's suppression motion. In spite of the fact that defendant had initialed the juvenile rights waiver form, defendant argues that the fact that his responses to Detective Kelly's questions regarding the extent to which he understood his rights were unclear indicates that he had not understood the questions that Detective Kelly had posed to him. In addition, defendant notes that the trial court failed to make any findings of fact concerning defendant's "experience, education, background, . . . intelligence," and "capacity to understand the warnings given [to] him" as required by the totality-of-the-circumstances analysis enunciated in *Fare v. Michael C.*, quoting *Fare*, 442 U.S. 707, 725, 99 S. Ct. 2560, 2571, 61 L. Ed. 2d 197, 212 (1979). In light of these deficiencies in the trial court's findings of fact and the fact that, in the Court of Appeals' view, the relevant findings were actually mixed findings of fact and conclusions of law, defendant contends that the Court of Appeals appropriately examined the evidence anew, citing, *inter alia*, *Olivetti Corp. v. Ames Business Systems, Inc.*, 319 N.C. 534, 548, 356 S.E.2d 578, 586-87 (1987), and had not committed any error of law in the course of overturning the trial court's suppression order.

"The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citation omitted). The trial court's findings of fact "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *Eason*, 336 N.C. at 745, 445 S.E.2d at 926. "The conclusions of law made by the trial court from such findings, however, are fully reviewable on appeal." *State v. McCollum*, 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993) (citation omitted), *cert. denied*, 512 U.S. 1254, 114 S. Ct. 2784, 129 L. Ed. 2d 895 (1994), *post-conviction relief granted*, *State v. McCollum*, No. 83 CRS 15506-07, 2014 WL 4345428 (N.C. Super. Ct. Robeson County Sept. 2, 2014) (order vacating defendant's convictions and the trial court's judgment, and mandating defendant's immediate release from custody). "[A]n appellate court accords great deference to the trial court . . . because it is entrusted with the duty to hear testimony, weigh and resolve any conflicts in the evidence, find the facts, and, then based upon those findings, render a legal decision, in the first instance, as to whether or not a constitutional violation of some kind has occurred." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619-20 (1982).

N.C.G.S. § 7B-2101(a) states that

> (a) [a]ny juvenile in custody must be advised prior to questioning:
>
> (1) That the juvenile has a right to remain silent;
>
> (2) That any statement the juvenile does make can be and may be used against the juvenile;
>
> (3) That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and
>
> (4) That the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.

N.C.G.S. § 7B-2101(a) (2015).[5] The relevant statutory language is clearly intended to codify the rights afforded to a juvenile subjected to custodial

5. At the time that the interrogation at issue in this case occurred, N.C.G.S. § 7B-2101(b) provided that, "[w]hen the juvenile is less than 14 years of age, no in-custody

interrogation pursuant to *Miranda* in addition to affording a juvenile the State statutory right to have a parent, guardian, or custodian present during the interrogation process. *See Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706-07 (1966) (holding that, "[p]rior to any questioning, [a] person [subjected to custodial interrogation] must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed," although "[t]he defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently"). "If the juvenile indicates in any manner and at any stage of questioning pursuant to this section that the juvenile does not wish to be questioned further, the officer shall cease questioning." N.C.G.S. § 7B-2101(c). "Before admitting into evidence any statement resulting from custodial interrogation, the court shall find that the juvenile knowingly, willingly, and understandingly waived the juvenile's rights." *Id.* § 7B-2101(d) (2017). The State "bears the burden of demonstrating that the waiver was knowingly and intelligently made, and an express written waiver, while strong proof of the validity of the waiver, is not inevitably sufficient to establish a valid waiver." *Simpson*, 314 N.C. at 367, 334 S.E.2d at 59 (citations omitted); *see also State v. Thibodeaux*, 341 N.C. 53, 58, 459 S.E.2d 501, 505 (1995) (explaining that "[t]he State has the burden of showing by a preponderance of the evidence that the defendant made a knowing and intelligent waiver of his rights and that his statement was voluntary"). "Whether a waiver is knowingly and intelligently made depends on the specific facts and circumstances of each case, including the background, experience, and conduct of the accused." *Simpson*, 314 N.C. at 367, 334 S.E.2d at 59 (citations omitted). As a result, "the court [is required to look] at the totality of the circumstances surrounding the statement" in order to determine whether the State has adequately established that a waiver was knowingly and intelligently made. *Thibodeaux*, 341 N.C. at 58, 459 S.E.2d at 505.

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admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney." For offenses committed on or after 1 December 2015, the General Assembly amended N.C.G.S. § 7B-2101(b) by raising the age at which the presence of the juvenile's parent, guardian, custodian, or attorney is required from less than fourteen to less than sixteen. Act of May 26, 2015, ch. 58, secs. 1.1, 4. 2015 N.C. Sess. Laws 126, 126, 130. However, given that defendant was sixteen years old at the time of the interrogation at issue in this case, neither version of N.C.G.S. § 7B-2101(b) would have barred the admission of defendant's incriminating statements concerning his involvement in the unlawful break-ins at the residence of Ms. Brewer and Mr. Nunez.

"This totality-of-the-circumstances approach is adequate to determine whether there was been a waiver even where interrogation of juveniles is involved." *Fare*, 442 U.S. at 725, 99 S. Ct. at 2572, 61 L. Ed. 2d at 212. "The totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation," including "evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his . . . rights, and the consequences of waiving those rights." *Id.* at 725, 99 S. Ct. at 2572, 61 L. Ed. 2d at 212 (citing *North Carolina v. Butler*, 441 U.S. 369, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979)). In applying the totality-of-the-circumstances test in cases involving the custodial interrogation of juveniles, we have noted that "the record must be carefully scrutinized, with particular attention to both the characteristics of the accused and the details of the interrogation." *State v. Fincher*, 309 N.C. 1, 19, 305 S.E.2d 685, 697 (1983) (quoting *State v. Spence*, 36 N.C. App. 627, 629, 244 S.E.2d 442, 443, *disc. rev. denied*, 295 N.C. 556, 248 S.E.2d 734 (1978)). However, a defendant's juvenile status "does not compel a determination that he did not knowingly and intelligently waive his *Miranda* rights." *Id.* at 19, 305 S.E.2d at 696-97 (citation omitted). Instead, the juvenile's age is a factor to consider along with "the characteristics of the accused and the details of the interrogation." *Id.* at 19, 305 S.E.2d at 697 (quoting *Spence*, 309 N.C. at 629, 244 S.E.2d at 443).

A careful review of the record satisfies us that the trial court's findings of fact have adequate evidentiary support and that those findings support the trial court's conclusion that defendant knowingly and voluntarily waived his juvenile rights. In reaching a contrary conclusion, the Court of Appeals failed to focus upon the sufficiency of the evidence to support the findings of fact that the trial court actually made and to give proper deference to those findings. *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619-20. Although the Court of Appeals concluded that "the evidence does not support the trial court's findings of fact . . . that defendant 'understood' Detective Kelly's questions and statements regarding his rights," *Saldierna II*, ___ N.C. App. at ___, 803 S.E.2d at 41, the record contains ample support for the trial court's determination that defendant understood his juvenile rights, with this determination resting upon the existence of evidence tending to show that Detective Kelly advised defendant of his juvenile rights in spoken English, written Spanish, and written English;[6] that defendant initialed each of the rights enumerated

6. In spite of the fact that the record does not contain the Spanish language version of the juvenile rights waiver form, the trial court's determination that defendant was

on the juvenile rights waiver form that Detective Kelly reviewed with him and signed the juvenile rights waiver form in such a manner as to indicate that he had decided to waive his juvenile rights and to speak with Detective Kelly without the presence of a parent, guardian, custodian, or attorney; that defendant answered affirmatively when questioned about the extent to which he understood his rights; and that defendant "understood what [Detective Kelly] was saying." As a result, we hold that the Court of Appeals erred in determining that the record did not support the trial court's findings to the effect that defendant understood his juvenile rights.

Admittedly, the record does contain evidence that would have supported a different determination concerning the issue of whether defendant understood the juvenile rights that were available to him. For example, the record does reflect that some of defendant's responses to Detective Kelly's inquiries concerning the extent to which he understood certain of his rights were "unintelligible" and that English was not defendant's primary language. However, given the evidence recited above, including Detective Kelly's suppression hearing testimony that defendant "seemed to very clearly understand what [she] was asking him" and that his English was "fine," the record concerning the extent to which defendant was able to understand the English language in general and Detective Kelly's questions in particular was, at most, in conflict. According to well-established North Carolina law, resolution of such evidentiary conflicts is a matter for the trial court, which has the opportunity to see and hear the witnesses, rather than an appellate court, which is necessarily limited to consideration of a cold record even in cases involving audio recordings and videographic evidence.

In addition, the trial court's findings support its conclusion of law that "[d]efendant knowingly, willingly, and understandingly waived his juvenile rights." Among other things, the record contains defendant's express written waiver of his juvenile rights which, while not determinative, is "strong proof of the validity of the waiver." *Simpson*, 314 N.C. at 367, 334 S.E.2d at 59. In addition to the express written waiver, the record contains evidence tending to show, and the trial court found, that defendant was advised of his rights in both written English and Spanish and in spoken English. Moreover, the transcript of defendant's interview with Detective Kelly indicates that, in all but two instances, defendant verbally affirmed that he understood his rights and that he was willing to

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informed of his juvenile rights in written form using the Spanish language is amply supported by Detective Kelly's suppression hearing testimony.

answer Detective Kelly's questions. Aside from the fact that defendant's suggestion that the inaudibility of certain of defendant's responses demonstrated that he did not understand his rights conflicts with Detective Kelly's suppression hearing testimony to the contrary and the fact that the record contains no evidence tending to show that defendant ever expressed a lack of willingness to speak with Detective Kelly, sought to invoke his rights, or was unable to adequately communicate with the investigating officers, this aspect of defendant's argument represents, in essence, an attempt to persuade us to reweigh the evidence and reach a different result with respect to a factual issue other than that deemed appropriate by the trial court. Similarly, the Court of Appeals' determinations that defendant's request to call his mother "shows enough uncertainty, enough anxiety on [defendant's] behalf, so as to call into question whether, under all the circumstances present in this case, the waiver was (unequivocally) valid" and that defendant's "last ditch effort to call his mother (for help), after his prior attempt to call her had been unsuccessful,[7] was a strong indication that he did not want to waive his rights at all," *Saldierna II*, ___ N.C. App. at ___, 803 S.E.2d at 42, are inconsistent with the trial court's findings of fact concerning the circumstances surrounding defendant's attempt to call his mother, which we have already found to have adequate record support. Finally, the record contains no allegations of coercive police conduct or the use of improper interrogation techniques.[8] As a result, we hold that the trial court did not err by concluding that defendant had knowingly, willingly, and understandingly waived his juvenile rights and that the Court of Appeals' decision to the contrary should be reversed.[9]

REVERSED.

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7. A number of statements that were made by investigating officers during Detective Kelly's interview with defendant suggest that defendant had made an earlier, unsuccessful attempt to reach his mother before the phone call reflected in the interview transcript.

8. Both defendant and the Court of Appeals appear to assert that Detective Kelly's statement to defendant that "[t]his is not something that's going to end your life" and "is not a huge deal" constituted a deceptive statement that should be weighed in favor of a finding that defendant had not voluntarily waived his juvenile rights. We are acutely aware that the incurrence of a felony conviction can have significant, and lasting, effects upon a juvenile's prospects. However, we are not persuaded that the statement in question constitutes official misconduct sufficient to compel a conclusion that defendant's will was overborne at the time that he decided to waive his juvenile rights and speak with Detective Kelly and believe that it simply reflects Detective Kelly's opinion that defendant was not suspected of having committed other, more serious criminal offenses.

9. A considerable amount of defendant's argument to this Court focuses upon policy, rather than legal or evidentiary, considerations. Although defendant points to a substantial

Justice BEASLEY dissenting.

In *Saldierna I*, I dissented because defendant's statement, "Um, [c]an I call my mom?", was an unambiguous invocation of his right to have a parent present during questioning. *See State v. Saldierna* (*Saldierna I*), 369 N.C. 401, 409, 794 S.E.2d 474, 479 (2016) (Beasley, J., dissenting). Upon this unambiguous invocation, law enforcement should have immediately ceased questioning and not resumed until defendant's mother was present or he reinitiated the conversation. *See id.* at 412, 794 S.E.2d at 481 (citing *Edwards v. Arizona*, 451 U.S. 477, 484-85, 68 L. Ed. 2d 378, 386 (1981)). Defendant did not knowingly, intelligently, and voluntarily waive his right to have his mother present—rather, he unambiguously invoked that right. Thus, for the reasons stated in my dissent to *Saldierna I*, I respectfully dissent.

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body of research that suggests that juveniles are unable to understand the language typically used in informing them of their rights, the approach that defendant advocates in reliance upon this information lacks support in the precedent of the United States Supreme Court or of this Court. On the contrary, as we have already noted, the United States Supreme Court has explicitly held that the totality-of-the-circumstances test for determining the validity of waivers of a defendant's *Miranda* rights is equally applicable to adults and juveniles, see *Fare*, 442 U.S. at 725, 99 S. Ct. at 2572, 61 L. Ed. 2d at 212, with a juvenile's age being a relevant, but not determinative, factor in the required analysis. Nothing in the record that has been presented for our consideration tends to show that the trial court failed to properly incorporate evidence concerning defendant's age or his linguistic and educational status into the required totality-of-the-circumstances evaluation.

STATE v. TURNER

[371 N.C. 427 (2018)]

STATE OF NORTH CAROLINA
v.
CHRISTOPHER GLENN TURNER

No. 440PA16

Filed 17 August 2018

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 793 S.E.2d 287 (2016), affirming an order entered on 15 January 2016 by Judge Michael Duncan in Superior Court, Caldwell County. Heard in the Supreme Court on 6 November 2017.

Joshua H. Stein, *Attorney General*, *by Christopher W. Brooks*, *Special Deputy Attorney General*, *for the State-appellant.*

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

PER CURIAM.

For the reasons stated in *State v. Curtis*, ___ N.C. ___, ___ S.E.2d ___ (Aug. 17, 2018) (No. 441PA16), we reverse the decision of the Court of Appeals and remand this case to that court for remand to the Superior Court, Caldwell County, with instructions to vacate the 15 January 2016 Order Affirming District Court Order and for further proceedings not inconsistent with our opinion in *Curtis*.

REVERSED AND REMANDED.

MARIA VAUGHAN
v.
LINDSAY MASHBURN, M.D. AND LAKESHORE WOMEN'S SPECIALISTS, PC

No. 42PA17

Filed 17 August 2018

Medical Malpractice—pleadings—Rule 9(j)—amendment—relation back

A plaintiff in a medical malpractice action may file an amended complaint under Rule 15(a) of the N.C. Rules of Civil Procedure to cure a defect in a Rule 9(j) certification when the expert review and certification occurred before the filing of the original complaint. Further, such an amended complaint may relate back under Rule 15(c). In this case, plaintiff's amended complaint corrected a technical pleading error and made clear that the expert review required by Rule 9(j) occurred before the filing of the original complaint. The trial court's denial of plaintiff's motion to amend as being futile was based on a misapprehension of the law.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 795 S.E.2d 781 (2016), affirming an order entered on 27 August 2015 by Judge Stanley L. Allen in Superior Court, Iredell County. Heard in the Supreme Court on 13 December 2017.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Patricia P. Shields and Joshua D. Neighbors; Shapiro, Appleton & Duffan, P.C., by Kevin M. Duffan and Richard N. Shapiro; and Collum & Perry, PLLC, by Travis E. Collum, for plaintiff-appellant.

Parker Poe Adams & Bernstein LLP, by Chip Holmes and Bradley K. Overcash, for defendant-appellees.

Law Office of D. Hardison Wood, by D. Hardison Wood; and Knott & Boyle PLLC, by W. Ellis Boyle, for North Carolina Advocates for Justice, amicus curiae.

Roberts & Stevens, P.A., by Phillip T. Jackson and Eric P. Edgerton, for North Carolina Association of Defense Attorneys, amicus curiae.

HUDSON, Justice.

Here we are asked to decide whether a medical malpractice plaintiff may amend a timely filed complaint to cure a defective Rule 9(j) certification after the statute of limitations has run, when the expert review required by Rule 9(j) occurred before the filing of the original complaint. The Court of Appeals concluded that Rule 9(j) does not permit a plaintiff to amend in these circumstances and affirmed the trial court's dismissal of plaintiff's medical malpractice complaint. *Vaughan v. Mashburn*, ___ N.C. App. ___, 795 S.E.2d 781 (2016). Because we conclude that the procedures plaintiff followed here are consistent with the letter and spirit of Rule 9(j), we reverse the decision of the Court of Appeals and remand to the trial court for further proceedings.

Background

On 3 May 2012, plaintiff underwent a laparoscopic hysterectomy at Lake Norman Regional Medical Center in Mooresville, North Carolina. The operation was performed by defendant Lindsay Mashburn, M.D., a physician who practices in the area of obstetrics and gynecology and who is an employee of defendant Lakeshore Women's Specialists, PC. Plaintiff alleges that during this surgery defendant Mashburn "inappropriately inflicted an injury and surgical wound to the Plaintiff's right ureter" resulting in "severe bodily injuries and other damages."

In October 2014, plaintiff's original counsel contacted Nathan Hirsch, M.D., a specialist in obstetrics and gynecology who had performed approximately one hundred laparoscopic hysterectomies, and provided Dr. Hirsch all of plaintiff's medical records pertaining to defendants' alleged negligence. After reviewing these records, Dr. Hirsch informed plaintiff's counsel on 31 October 2014 that in his opinion, the care and treatment rendered to plaintiff by defendants during and following the 3 May 2012 operation violated the applicable standard of care and that he was willing to testify to this effect.

Plaintiff filed a medical malpractice complaint against defendants on 20 April 2015 within the time afforded by the applicable statute of limitations, which expired on 3 May 2015.[1] In accordance with the special pleading requirements of section (j) ("Medical malpractice") of Rule 9 ("Pleading special matters") of the North Carolina Rules of Civil Procedure, plaintiff alleged in the complaint:

1. Pursuant to N.C.G.S. §§ 1-15(c) and 1-52, medical malpractice actions must be brought within three years of the last allegedly negligent act of the physician.

> Plaintiff avers that the medical care received by [plaintiff] complained of herein has been reviewed by persons who are reasonably expected to qualify as expert witnesses under Rule 702 of the North Carolina Rules of Evidence and who are willing to testify that the medical care provided did not comply with the applicable standard of care.

In making this assertion, however, plaintiff inadvertently used the certification language of a prior version of Rule 9(j), which stated:

> (j) Medical malpractice. — Any complaint alleging medical malpractice by a health care provider as defined in G.S. 90-21.11 in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:
>
> (1) The pleading specifically asserts that *the medical care has been reviewed* by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care[.]

N.C.G.S. § 1A-1, Rule 9 (2009) (emphasis added). In 2011 the legislature amended Rule 9(j), and the rule now provides, in pertinent part:

> (j) Medical malpractice. — Any complaint alleging medical malpractice by a health care provider pursuant to G.S. 90-21.11(2)a. in failing to comply with the applicable standard of care under G.S. 90-21.12 shall be dismissed unless:
>
> (1) The pleading specifically asserts that the medical care *and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry* have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care[.]

Id., Rule 9 (2017) (emphasis added); *see also* Act of June 13, 2011, ch. 400, sec. 3, 2011 N.C. Sess. Laws 1712, 1713. Thus, plaintiff's Rule 9(j) certification omitted an assertion that "all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry" had been reviewed as required by the applicable rule.

On 10 June 2015, defendant Mashburn filed a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, asserting that the complaint failed "to state a claim upon which relief can be granted." Two days later, defendants filed an answer, which incorporated by reference defendant Mashburn's motion to dismiss. On 30 June 2015, plaintiff filed a motion for leave to file an amended complaint under Rule 15(a) of the North Carolina Rules of Civil Procedure to "add[ ] a single sentence to paragraph 21 of Plaintiff's original Complaint that accurately reflects the events that occurred prior to the filing of Plaintiff's original Complaint," specifically that "all medical records pertaining to the alleged negligence that are available to Plaintiff after reasonable inquiry have been reviewed before the filing of this Complaint," as required by Rule 9(j). In support of her motion for leave to file an amended complaint, plaintiff submitted to the trial court an affidavit of her original trial counsel, an affidavit of Dr. Hirsch, and her responses to defendants' Rule 9(j) interrogatories—all indicating that Dr. Hirsch reviewed plaintiff's medical care and related medical records before the filing of plaintiff's original complaint.

Following a hearing on 10 August 2015, the trial court entered an order on 27 August granting defendants' motion to dismiss, denying plaintiff's motion for leave to file an amended complaint, and dismissing plaintiff's complaint with prejudice. In its order the trial court stated:

> 1. Plaintiff's Original Complaint, filed on April 20, 2015, did not comply with Rule 9(j) of the North Carolina Rules of Civil Procedure, as amended effective October 1, 2011, in that the pleading did not specifically assert that the Plaintiff's medical expert reviewed **all** medical records pertaining to the alleged negligence that are available to the Plaintiff after reasonable inquiry.
>
> 2. Plaintiff's Motion for Leave to File an Amended Complaint, filed on June 30, 2015, is denied as being futile because the proposed amendment to Plaintiff's Original Complaint does not relate back to the filing date of Plaintiff's Original Complaint, and the statute of limitations ran on May 3, 2015.

Plaintiff appealed from the trial court's order to the Court of Appeals.

At the Court of Appeals plaintiff argued that the trial court's ruling was erroneous and that under this Court's decision in *Thigpen v. Ngo*, 355 N.C. 198, 558 S.E.2d 162 (2002), a plaintiff may amend a defective

Rule 9(j) certification and receive the benefit of relation back under Rule 15(c) so long as there is evidence "the review occurred before the filing of the original complaint." The Court of Appeals disagreed, noting that *Thigpen* was inapposite because the Court in that case did not address the issue of relation back under Rule 15(c). *Vaughan*, ___ N.C. App. at ___, 795 S.E.2d at 784-85. Relying instead on its own precedent in *Alston v. Hueske*, 244 N.C. App. 546, 781 S.E.2d 305 (2016), and *Fintchre v. Duke University*, 241 N.C. App. 232, 773 S.E.2d 318 (2015), the Court of Appeals determined that it was "again compelled by precedent to reach 'a harsh and pointless outcome' as a result of 'a highly technical failure' by [plaintiff's] trial counsel—the dismissal of a non-frivolous medical malpractice claim and the 'den[ial of] any opportunity to prove her claims before a finder of fact.' " *Id.* at ___, 795 S.E.2d at 788 (quoting *Fintchre*, 241 N.C. App. at 246, 773 S.E.2d at 327 (Stephens, J., concurring)). The court held that "where a medical malpractice 'plaintiff did not file the complaint with the *proper* Rule 9(j) certification *before the running of the statute of limitation*, the complaint cannot have been deemed to have commenced within the statute.' " *Id.* at ___, 795 S.E.2d at 788 (quoting *Alston*, 244 N.C. App. at 554, 781 S.E.2d at 311 (emphases added)). Accordingly, the Court of Appeals affirmed the ruling of the trial court. *Id.* at ___, 795 S.E.2d at 788-89.

Plaintiff filed a petition for discretionary review, which this Court allowed on 16 March 2017.

Analysis

Plaintiff argues that she should be permitted to amend her medical malpractice complaint under Rule 15(a) to correct a purely technical pleading error when doing so would enable the plaintiff to truthfully allege compliance with Rule 9(j) before both the filing of the initial complaint and the expiration of the statute of limitations. Further, plaintiff contends that such an amendment can relate back under Rule 15(c) so as to survive a motion to dismiss pursuant to Rule 9(j) and the applicable statute of limitations. We agree.

The outcome of this case hinges on the interaction between N.C.G.S. § 1A-1, Rule 9(j), as set forth above, and N.C.G.S. § 1A-1, Rule 15, which governs amendments to pleadings. "Statutes dealing with the same subject matter must be construed *in pari materia* and harmonized, if possible, to give effect to each." *Bd. of Adjust. v. Town of Swansboro*, 334 N.C. 421, 427, 432 S.E.2d 310, 313 (1993) (citing *Jackson v. Guilford Cty. Bd. of Adjust.*, 275 N.C. 155, 167, 166 S.E.2d 78, 86 (1969)).

Rule 15 provides, in pertinent part:

> (a) Amendments. — A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within 30 days after service of the amended pleading, unless the court otherwise orders.
>
> . . . .
>
> (c) Relation back of amendments. — A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

N.C.G.S. § 1A-1, Rule 15 (2017). "A motion to amend is addressed to the discretion of the trial court." *Henry v. Deen*, 310 N.C. 75, 82, 310 S.E.2d 326, 331 (1984). When the trial court's ruling is based on a misapprehension of law, the order will be vacated and the case remanded to the trial court for further proceedings. *See Concerned Citizens of Brunswick Cty. Taxpayers Ass'n v. State ex rel. Rhodes*, 329 N.C. 37, 54-55, 404 S.E.2d 677, 688 (1991) ("When the order or judgment appealed from was entered under a misapprehension of the applicable law, the judgment, including the findings of fact and conclusions of law on which the judgment was based, will be vacated and the case remanded for further proceedings." (citing *Davis v. Davis*, 269 N.C. 120, 127, 152 S.E.2d 306, 312 (1967))). While "[a] judge's decision in this matter will not be reversed on appeal absent a showing of abuse of discretion[,] . . . amendments should be freely allowed unless some material prejudice to the other party is demonstrated." *Mauney v. Morris*, 316 N.C. 67, 72, 340 S.E.2d 397, 400 (1986) (first citing *Henry*, 310 N.C. at 82, 310 S.E.2d at 331; then citing *Mangum v. Surles*, 281 N.C. 91, 98-99, 187 S.E.2d 697, 702 (1972)); *see also id.* at 72, 340 S.E.2d at 400 ("The burden is upon the opposing party to establish that that party would be prejudiced by

the amendment." (first citing *Roberts v. Reynolds Mem'l Park*, 281 N.C. 48, 58-59, 187 S.E.2d 721, 727 (1972); then citing *Vernon v. Crist*, 291 N.C. 646, 654, 231 S.E.2d 591, 596 (1977))).

This "liberal amendment process" under Rule 15 "complements the concept of notice pleading embodied in Rule 8," 1 G. Gray Wilson, *North Carolina Civil Procedure* § 15-1, at 15-2 to 15-3 (3d ed. 2007) [hereinafter Wilson, Civil Procedure], and reflects the legislature's intent "that decisions be had on the merits and not avoided on the basis of mere technicalities," *Mangum*, 281 N.C. at 99, 187 S.E.2d at 702 (citation omitted); *see also Roberts*, 281 N.C. at 56, 187 S.E.2d at 725 ("The new Rules achieve their purpose of insuring a speedy trial on the merits of a case by providing for and encouraging liberal amendments to conform pleadings and evidence under Rule 15(a), by pretrial order under Rule 16, during and after reception of evidence under Rule 15(b), and after entry of judgment under Rules 15(b), 59 and 60."). "There is no more liberal canon in the rules than that leave to amend 'shall be freely given when justice so requires.' " Wilson, *Civil Procedure* § 15-3, at 15-5.

In addressing the applicability of Rule 15 in the context of a medical malpractice complaint, we must also consider the legislative intent behind Rule 9(j). *See Brown v. Kindred Nursing Ctrs. E., L.L.C.*, 364 N.C. 76, 80, 692 S.E.2d 87, 89 (2010) (concluding that in addressing "the extent to which Rule 9(j) allows a party to amend a deficient medical malpractice complaint[,] . . . the specific policy objectives embodied in Rule 9(j) must be considered").

"Rule 9(j) serves as a gatekeeper, enacted by the legislature, to prevent frivolous malpractice claims by requiring expert review *before* filing of the action." *Moore v. Proper*, 366 N.C. 25, 31, 726 S.E.2d 812, 817 (2012) (citing *Thigpen*, 355 N.C. at 203-04, 558 S.E.2d at 166); *see also* Minutes of N.C. House Select Comm. on Tort Reform, *Hearing on H. 636 & H. 730*, 1995 Reg. Sess. (Apr. 19, 1995) [hereinafter *Hearing*] (comments by Rep. Charles B. Neely, Jr.) (explaining that "[t]he bill attempts to weed out law suits which are not meritorious *before they are filed*" (emphasis added)). As the caption of the 1995 legislation states, *see* Act of June 20, 1995, ch. 309, 1995 N.C. Sess. Laws 611, 611 ("An Act to Prevent Frivolous Medical Malpractice Actions by Requiring that Expert Witnesses in Medical Malpractice Cases Have Appropriate Qualifications to Testify on the Standard of Care at Issue and to Require Expert Witness Review as a Condition of Filing a Medical Malpractice Action"), the rule seeks to accomplish its purpose in two ways:

> First, the legislature mandated that an expert witness must review the conduct at issue and be willing to testify

> at trial that it amounts to malpractice before a lawsuit may be filed. Second, the legislature limited the pool of appropriate experts to those who spend most of their time in the profession teaching or practicing.

Moore, 366 N.C. at 37, 726 S.E.2d at 820 (Newby, J., concurring in part and concurring in the result) (citing ch. 309, secs. 1, 2, 1995 N.C. Sess. Laws at 611-13). Thus, the rule averts frivolous actions by precluding any filing in the first place by a plaintiff who is unable to procure an expert who both meets the appropriate qualifications and, after reviewing the medical care and available records, is willing to testify that the medical care at issue fell below the standard of care.

The Court of Appeals correctly noted that this Court has not addressed, in *Thigpen* or in any other case, the precise issue raised here involving the interplay between Rule 15 and Rule 9(j). We find our previous decisions, particularly *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 528 S.E.2d 568 (2000), instructive in resolving the question presented here.

In *Brisson* the plaintiffs' claims stemmed from injuries allegedly sustained during an abdominal hysterectomy performed on the female plaintiff on 27 July 1994. 351 N.C. at 591-92, 528 S.E.2d at 569. The plaintiffs filed a timely medical malpractice action on 3 June 1997 but failed to include a Rule 9(j) expert certification in their complaint. *Id.* at 591-92, 528 S.E.2d at 569. On the basis of this defect, the defendants moved to dismiss the plaintiffs' complaint. *Id.* at 591-92, 528 S.E.2d at 569. The plaintiffs then filed a motion to amend their complaint, along with an attached affidavit of their counsel, asserting that "a physician has reviewed the subject medical care, but it was inadvertently omitted from the pleading." *Id.* at 592, 528 S.E.2d at 569-70. The plaintiffs also filed a motion in the alternative to voluntarily dismiss their complaint without prejudice under Rule 41(a)(1) of the North Carolina Rules of Civil Procedure. *Id.* at 592, 528 S.E.2d at 570. After the trial court denied the plaintiffs' motion to amend but reserved ruling on the defendants' motion to dismiss, the plaintiffs voluntarily dismissed their claims against defendants under Rule 41(a)(1) on 6 October 1997. *Id.* at 592, 528 S.E.2d at 570.

Similar to Rule 15(c)'s "relation back" provision, Rule 41(a)(1) includes a one-year "saving provision" for voluntary dismissals, providing that "[i]f an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within

one year after such dismissal." N.C.G.S. § 1A-1, Rule 41(a)(1) (2017). Thus, "a plaintiff may 'dismiss an action that originally was filed within the statute of limitations and then refile the action after the statute of limitations ordinarily would have expired.' " *Brisson*, 351 N.C. at 594, 528 S.E.2d at 571 (quoting *Clark v. Visiting Health Prof'ls, Inc.*, 136 N.C. App. 505, 508, 524 S.E.2d 605, 607, *disc. rev. denied*, 351 N.C. 640, 543 S.E.2d 867 (2000)).

Accordingly, within one year of their voluntary dismissal, the plaintiffs filed a new complaint on 9 October 1997 that included the Rule 9(j) certification. *Id.* at 592, 528 S.E.2d at 570. The defendants filed an answer and moved for judgment on the pleadings, asserting that the plaintiffs' claims were barred by the statutes of limitations and repose. *Id.* at 592, 528 S.E.2d at 570. The trial court entered an order granting the defendants' motion for judgment on the pleadings, ruling that the plaintiffs' original 3 June 1997 complaint "d[id] not extend the statute of limitations in this case because it d[id] not comply with Rule 9(j)" and that the subsequent 9 October 1997 complaint was barred by the statute of limitations. *Id.* at 592, 528 S.E.2d at 570. After the Court of Appeals reversed the trial court's ruling, this Court granted the defendants' petition for discretionary review. *Id.* at 593, 528 S.E.2d at 570.

We first noted that the plaintiffs' voluntary dismissal under Rule 41(a)(1) rendered the plaintiffs' motion to amend "neither dispositive nor relevant to the outcome of this case" and that the sole issue was whether the voluntary dismissal under Rule 41(a)(1) "effectively extended the statute of limitations by allowing plaintiffs to refile their complaint against defendants within one year, even though the original complaint lacked a Rule 9(j) certification." *Id.* at 593, 528 S.E.2d at 570. In resolving this issue, we rejected the defendants' contention that the plaintiffs' failure to comply with Rule 9(j) in their first complaint rendered the one-year "saving provision" of Rule 41(a)(1) inapplicable. *Id.* at 594, 528 S.E.2d at 571. Regarding the interplay between Rule 41(a)(1) and Rule 9(j), we concluded:

> This Court has repeatedly stated that "[s]tatutes dealing with the same subject matter must be construed *in pari materia* and harmonized, if possible, to give effect to each." *Board of Adjust. v. Town of Swansboro*, 334 N.C. 421, 427, 432 S.E.2d 310, 313 (1993). On these facts, we must look to our Rules of Civil Procedure and construe Rule 9(j) along with Rule 41. Although Rule 9(j) clearly requires a complainant of a medical malpractice action to attach to the complaint specific verifications regarding

> an expert witness, the rule does not expressly preclude such complainant's right to utilize a Rule 41(a)(1) voluntary dismissal. Had the legislature intended to prohibit plaintiffs in medical malpractice actions from taking voluntary dismissals where their complaint did not include a Rule 9(j) certification, then it could have made such intention explicit. In this case, the plain language of Rule 9(j) does not give rise to an interpretation depriving plaintiffs of the one-year extension pursuant to their Rule 41(a)(1) voluntary dismissal merely because they failed to attach a Rule 9(j) certification to the original complaint. "[T]he absence of any express intent and the strained interpretation necessary to reach the result urged upon us by [defendants] indicate that such was not [the legislature's] intent." *Sheffield v. Consolidated Foods Corp.*, 302 N.C. 403, 425, 276 S.E.2d 422, 436 (1981).

Id. at 595, 528 S.E.2d at 571. Accordingly, we determined that the plaintiffs' voluntary dismissal of their original 3 June 1997 complaint—though it lacked a proper Rule 9(j) expert certification—extended for one year the statute of limitations pursuant to Rule 41(a)(1) and rendered the plaintiffs' subsequent 9 October 1997 complaint timely filed. *Id.* at 597, 528 S.E.2d at 573. In closing, we noted that our decision

> merely harmonizes the provisions of Rules 9(j) and 41(a). A frivolous malpractice claim with no expert witness pursuant to Rule 9(j) still meets the ultimate fate of dismissal. Likewise, a meritorious complaint will not be summarily dismissed without benefit of Rule 41(a)(1), simply because of an error by plaintiffs' attorney in failing to attach the required certificate to the complaint pursuant to Rule 9(j).

Id. at 598, 528 S.E.2d at 573. Regarding the additional issue of whether "an amended complaint which fails to allege that review of the medical care in a medical malpractice action took place before the filing of the original complaint satisf[ies] the requirements of Rule 9(j)," we concluded that discretionary review was improvidently allowed. *Id.* at 597, 528 S.E.2d at 573. That issue subsequently arose in *Thigpen*.

In *Thigpen* the alleged medical malpractice occurred in June 1996. 355 N.C. at 199, 558 S.E.2d at 163. Rule 9(j) allows a plaintiff, before expiration of the statute of limitations, to file "a motion to extend the statute of limitations for a period not to exceed 120 days to file a complaint in a medical malpractice action in order to comply with this Rule."

N.C.G.S. § 1A-1, Rule 9(j). In accordance with this provision, on 8 June 1999, before the expiration of the three-year statute of limitations, the plaintiff filed a motion to extend the statute of limitations for 120 days in order to file a complaint. *Thigpen*, 355 N.C. at 199, 558 S.E.2d at 163. The trial court granted the plaintiff's motion and entered an order extending the statute of limitations through 6 October 1999. *Id.* at 199, 558 S.E.2d at 164.

On the final day of the extended deadline, the plaintiff filed her medical malpractice complaint but failed to include the Rule 9(j) expert certification. *Id.* at 200, 558 S.E.2d at 164. On 12 October 1999, six days after the extended statute of limitations had expired, the plaintiff filed an amended complaint "including a certification that the 'medical care has been reviewed' by someone who would qualify as an expert." *Id.* at 200, 558 S.E.2d at 164. The defendants then filed motions to dismiss on the basis that the plaintiff's amended complaint was not filed before expiration of the extended statute of limitations. *Id.* at 200, 558 S.E.2d at 164. The trial court granted the defendants' motions and dismissed with prejudice the plaintiff's complaint, finding that "Plaintiff's original Complaint did not contain a certification that the care rendered by Defendants had been reviewed by an expert witness reasonably expected to testify that the care rendered to Plaintiff did not comply with the applicable standard of care as required by Rule 9(j)." *Id.* at 200, 558 S.E.2d at 164. After a split decision of the Court of Appeals, in which the majority reversed the trial court, the defendants appealed to this Court. *Id.* at 198-99, 200, 558 S.E.2d at 163-64.

As an initial matter, we determined that "the interplay between Rule 9(j) and Rule 15" was "neither dispositive nor relevant to th[e] case" and further, that *Brisson* was factually distinguishable and therefore inapposite. *Id.* at 200-01, 558 S.E.2d at 164. We then noted that

> [t]he General Assembly added subsection (j) of Rule 9 in 1995 pursuant to chapter 309 of House Bill 730, entitled, "An Act to Prevent Frivolous Medical Malpractice Actions by Requiring that Expert Witnesses in Medical Malpractice Cases Have Appropriate Qualifications to Testify on the Standard of Care at Issue and to Require Expert Witness Review as a Condition of Filing a Medical Malpractice Action." Act of June 20, 1995, ch. 309, 1995 N.C. Sess. Laws 611. The legislature specifically drafted Rule 9(j) to govern the initiation of medical malpractice actions and to require physician review as a condition for filing the action. The legislature's intent was to provide

> a more specialized and stringent procedure for plaintiffs in medical malpractice claims through Rule 9(j)'s requirement of expert certification prior to the filing of a complaint. Accordingly, permitting amendment of a complaint to add the expert certification where the expert review occurred after the suit was filed would conflict directly with the clear intent of the legislature.

Id. at 203-04, 558 S.E.2d at 166. Because the plaintiff's original complaint failed to comply with Rule 9(j), we concluded that the trial court correctly dismissed the complaint.

Next, we addressed an issue for which we granted discretionary review (and for which we concluded discretionary review had been improvidently allowed in *Brisson*)—whether "an amended complaint which fails to allege that review of the medical care in a medical malpractice action took place before the filing of the original complaint satisfies the requirements of Rule 9(j)." *Id.* at 204, 558 S.E.2d at 166. Consistent with our prior discussion of legislative intent, we held that it does not. *Id.* at 204, 558 S.E.2d at 166. Specifically, we determined that

> [t]o survive dismissal, the pleading must "specifically assert[ ] that the medical care *has been reviewed*." N.C.G.S. § 1A-1, Rule 9(j), para. 1(1), (2) (emphasis added). Significantly, the rule refers to this mandate twice (in subsections (1) and (2)), and in both instances uses the past tense. *Id.* In light of the plain language of the rule, the title of the act, and the legislative intent previously discussed, it appears review must occur *before* filing to withstand dismissal. Here, in her amended complaint, plaintiff simply alleged that "[p]laintiff's medical care *has been reviewed* by a person who is reasonably expected to qualify as an expert witness." (Emphasis added.) There is no evidence in the record that plaintiff alleged the review occurred before the filing of the original complaint. Specifically, there was no affirmative affidavit or date showing that the review took place before the statute of limitations expired. Allowing a plaintiff to file a medical malpractice complaint and to then wait until after the filing to have the allegations reviewed by an expert would pervert the purpose of Rule 9(j).

Id. at 204, 558 S.E.2d at 166-67. Thus, *Thigpen* emphasizes that because expert review is a condition of initiating a medical malpractice action in the first place, the review must occur before the filing of an original

complaint.[2] Because the plaintiff's proposed amended complaint still failed to comply with Rule 9(j), it was unnecessary to address whether the amended complaint—had it been in compliance—could have received the benefit of relating back to the filing date of the original complaint under Rule 15(c). Accordingly, we concluded that discretionary review was improvidently allowed regarding the issue of "whether a plaintiff who files a complaint without expert certification pursuant to Rule 9(j) can cure that defect after the applicable statute of limitations expires by amending the complaint as a matter of right and having that amendment relate back to the date of the original complaint." *Id.* at 204-05, 558 S.E.2d at 167.

That latter issue is similar in significant respect to the one raised here, though the proposed amended complaint in *Thigpen* was attempted as "a matter of course," whereas plaintiff here sought to amend "by leave of court," which, as previously noted, "shall be freely given when justice so requires." N.C.G.S. § 1A-1, Rule 15(a). With that "liberal canon" in mind, we now conclude that much of the rationale behind our decision in *Brisson* is similarly applicable here and, in conjunction with the legislative intent behind Rules 15 and 9(j), leads to a result that is consistent with *Thigpen* and was forecast in part by our discussion in that case. *See, e.g.*, *Thigpen*, 355 N.C. at 204, 558 S.E.2d at 166 ("[P]ermitting amendment of a complaint to add the expert certification where the expert review occurred after the suit was filed would conflict directly with the clear intent of the legislature. . . . There is no evidence in the record that plaintiff alleged the review occurred before the filing of the original complaint. Specifically, there was no affirmative affidavit or date showing that the review took place before the statute of limitations expired.").

Our conclusion in *Brisson* that "the plain language of Rule 9(j) does not give rise to an interpretation depriving plaintiffs of the one-year extension pursuant to their Rule 41(a)(1) voluntary dismissal merely because they failed to attach a Rule 9(j) certification to the original complaint," 351 N.C. at 595, 528 S.E.2d at 571, has similar application here.

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2. We again emphasized the necessity of the expert review occurring before filing in *Brown*, in which the plaintiff filed his complaint first and then attempted to utilize Rule 9(j)'s 120-day extension in order to conduct the expert review. *See Brown*, 364 N.C. at 80, 692 S.E.2d at 90 ("[P]laintiff's sole reason for requesting an extension of the statute of limitations is inconsistent with the General Assembly's purpose behind enacting Rule 9(j). Here, plaintiff did not move for a 120-day extension to locate a certifying expert before filing his complaint. Rather, plaintiff alleged malpractice first and then sought to secure a certifying expert. This is the exact course of conduct the legislature sought to avoid in enacting Rule 9(j).").

Just as Rule 9(j) "does not expressly preclude such complainant's right to utilize a Rule 41(a)(1) voluntary dismissal," *id.* at 595, 528 S.E.2d at 571, Rule 9(j) does not preclude plaintiff's right to utilize a Rule 15(a) amended complaint or her right to have the amended complaint relate back to the date of the original filing under Rule 15(c). As we noted in *Brisson*, "[h]ad the legislature intended to prohibit plaintiffs in medical malpractice actions from" filing an amended complaint and receiving the benefit of relation back under Rule 15(c), "then it could have made such intention explicit." *Id.* at 595, 528 S.E.2d at 571. Further, "[t]he absence of any express intent and the strained interpretation necessary to reach the result urged upon us by [defendants] indicate that such was not [the legislature's] intent." *Id.* at 595, 528 S.E.2d at 571 (quoting *Sheffield*, 302 N.C. at 425, 276 S.E.2d at 436). Moreover, we find persuasive that when the legislature amended Rule 9(j) in 2001, Act of May 17, 2001, ch. 121, sec. 1, 2001 N.C. Sess. Laws 232, 232-33, and again in 2011, more than a decade after *Brisson*, ch. 400, sec. 3, 2011 N.C. Sess. Laws at 1713, it did not include any amendments rejecting that decision. *See Brown*, 364 N.C. at 83, 692 S.E.2d at 91-92 (" 'The legislature's inactivity in the face of the Court's repeated pronouncements' on an issue 'can only be interpreted as acquiescence by, and implicit approval from, that body.' " (quoting *Rowan Cty. Bd. of Educ. v. U.S. Gypsum Co.*, 332 N.C. 1, 9, 418 S.E.2d 648, 654 (1992))). Similar to *Brisson*, we reject defendants' contention here that the defect in plaintiff's Rule 9(j) certification in her original, timely filed complaint failed to "toll" the statute of limitations, thereby depriving plaintiff of relation back under Rule 15(c). Accordingly, we conclude that a plaintiff in a medical malpractice action may file an amended complaint under Rule 15(a) to cure a defect in a Rule 9(j) certification when the expert review and certification occurred before the filing of the original complaint. Further, such an amended complaint may relate back under Rule 15(c).

We again emphasize that in a medical malpractice action the expert review required by Rule 9(j) must occur before the filing of the original complaint. This pre-filing expert review achieves the goal of "weed[ing] out law suits which are not meritorious before they are filed." *Hearing* (comments by Rep. Neely). But when a plaintiff prior to filing *has* procured an expert who meets the appropriate qualifications and, after reviewing the medical care and available records, is willing to testify that the medical care at issue fell below the standard of care, dismissing an amended complaint would not prevent frivolous lawsuits. Further, dismissal under these circumstances would contravene the principle "that decisions be had on the merits and not avoided on the basis of mere technicalities." *Mangum*, 281 N.C. at 99, 187 S.E.2d at 702. As in

Brisson, our decision "merely harmonizes" the provisions of Rule 9(j) and Rule 15. 351 N.C. at 598, 528 S.E.2d at 573. "A frivolous malpractice claim with no expert witness pursuant to Rule 9(j) still meets the ultimate fate of dismissal. Likewise, a meritorious complaint will not be summarily dismissed without benefit of Rule [15], simply because of an error by [plaintiff's] attorney in failing to attach the required certificate to the complaint pursuant to Rule 9(j)." *Id.* at 598, 528 S.E.2d at 573.

Here plaintiff alleged in her 20 April 2015 complaint that the expert review of the "medical care" had occurred as required by Rule 9(j) but failed to assert that "all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry" had been included in that review. After the statute of limitations expired on 3 May 2015, plaintiff filed a motion to amend by leave of court in order to correct her defective Rule 9(j) certification and assert that "all medical records pertaining to the alleged negligence that are available to Plaintiff after reasonable inquiry" had been reviewed before the filing of the original complaint. In support of her motion for leave to file an amended complaint, plaintiff submitted to the trial court an affidavit of her original trial counsel, an affidavit of her medical expert, Dr. Hirsch, and her responses to defendants' Rule 9(j) interrogatories—all indicating that Dr. Hirsch reviewed plaintiff's medical care and related medical records before the filing of plaintiff's original complaint. Defendants do not contend that anything in the record indicates that the expert review did not take place before the filing of the original complaint. Because plaintiff's amended complaint corrected a technical pleading error and made clear that the expert review required by Rule 9(j) occurred before the filing of the original complaint, the amended complaint complied with Rule 9(j) and may properly relate back to the date of the original complaint under Rule 15(c). Accordingly, the trial court's denial of plaintiff's motion to amend as being futile was based on a misapprehension of law. The decision of the Court of Appeals to the contrary is reversed, and this case is remanded for further proceedings.

As a final matter, this Court allowed discretionary review of the issue of whether "the trial court abuse[d] its discretion in denying [plaintiff's] motion to amend when [plaintiff] filed a motion to amend within 120 days of the expiration of the statute of limitations, and verified by affidavits that her proposed Rule 9(j) certification factors all had occurred inside the statute of limitations." As to this issue, we hold that discretionary review was improvidently allowed.

REVERSED AND REMANDED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART.

STATE v. CLEGG

[371 N.C. 443 (2018)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Wake County
	)	
CHRISTOPHER A. CLEGG	)	

No. 101P15-3

ORDER

This case is before the Court upon defendant's request for further review of the Court of Appeals' unanimous, unpublished decision holding that "defendant's *Batson* challenge was properly denied" by the trial court. *State v. Clegg*, No. COA-17-76, 2017 WL 3863494, at *6 (N.C. Ct. App. Sept. 5 2017). On its own motion, the Court orders that this case be remanded to the trial court for reconsideration of defendant's *Batson* challenge based upon the existing record and the entry of a new order addressing the merits of defendant's *Batson* challenge in light of the United States Supreme Court decision in *Foster v. Chatman*, __ U.S. __, 136 S. Ct. 1737, 195 L. Ed. 1 (2016), which was decided after the trial court's decision in this case. After the entry of the order on remand, the trial court should certify that order to this Court, which retains jurisdiction and will undertake any necessary additional proceedings at that time.

By order of the Court in conference, this the 14th day of August, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of August, 2018.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

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

STATE v. J.C.

[371 N.C. 444 (2018)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Onslow County
	)	
J.C.	)	

No. 405P17

ORDER

The State's petition for discretionary review is decided as follows:

The State's request for discretionary review with respect to the following issue is allowed:

> Whether the Court of Appeals erred in dismissing the State's appeal as of right from the trial court's expunction order granting petitioner his requested relief.

Except as otherwise allowed, the State's petition for discretionary review is denied.

By order of the Court in conference, this the 14th day of August, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 15th day of August, 2018.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

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

STATE v. RYAN

[371 N.C. 445 (2018)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Gaston County
	)	
MICHAEL PATRICK RYAN	)	

No. 366A10

ORDER

This case is before the Court upon the State's request for further review of the trial court's order dated 3 February 2017. On its own motion, this Court allows review of this matter and directs the parties to brief whether the trial court erred in granting defendant's Motion for Appropriate Relief and ordering a new trial.

By order of the Court, this the 14th day of August, 2018.

s/Morgan, J.
For the Court

Ervin, J., recused

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 17th day of August, 2018.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

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

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

14 AUGUST 2018

001P18	Christian G. Plasman, in his individual capacity and derivatively for the benefit of, on behalf of and right of nominal party Bolier & Company, LLC v. Decca Furniture (USA), Inc., Decca Contract Furniture, LLC, Richard Herbst, Wai Theng Tin, Tsang G. Hung, Decca Furniture, Ltd., Decca Hospitality Furnishings, LLC, Dongguan Decca Furniture Co. Ltd., Darren Hudgins, Decca Home, LLC, and Elan By Decca, LLC, and Bolier & Company, LLC, nominal defendant v. Christian J. Plasman a/k/a Barrett Plasman, third-party defendant	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA17-358) 2. Plt's Petition for *Writ of Certiorari* to Review Decision of COA (COA17-358) 3. Plt's Motion to Certify for Discretionary Review and Consolidate for Consideration COA16-777, COA16-1156, COA17-358 4. Plt's PDR Under N.C.G.S. § 7A-31 (COA17-151)	1. Denied 2. Denied 3. Dismissed as moot 4. Denied
002P18	Jennifer L. Wilson v. SunTrust Bank; SunTrust Mortgage Inc.; Deutsche Bank Trust Company Americas; The Law Firm of Hutchens, Senter & Britton, P.A. n/k/a Hutchens, Senter, Kellam & Pettit, P.A.; Substitute Trustee Services, Inc.; and Does/Janes 1-10 Inclusive	1. Plt's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA17-482) 2. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
017P18-2	State v. Joseph Burton Mial	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Guilford County 2. Def's *Pro Se* Motion for PDR	1. Dismissed 2. Dismissed

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

14 AUGUST 2018

031A18	Andrea Kirby Crowell v. William Worrell Crowell	1. Plt's Notice of Appeal Based Upon a Dissent (COA17-164) 2. Plt's PDR as to Additional Issues 3. Plt's Motion for Temporary Stay 4. Plt's Petition for *Writ of Supersedeas*	1. --- 2. 3. Allowed **06/28/2018** 4. Allowed **06/28/2018**
033P18	State v. Nicholas Anthony Borsello	Def's PDR Under N.C.G.S. § 7A-31 (COA17-40)	Denied
036P18	Walton North Carolina, LLC and Walton NC Concord, L.P. v. The City of Concord, North Carolina	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA17-822) 2. Plts' Motion to Amend PDR	1. Denied 2. Allowed
038P18	Krista Ragsdale, Guardian Ad Litem for Alec Seeburger v. Dr. John M. Whitley and Cumberland County Hospital System, Inc., d/b/a Cape Fear Valley Health System	Defs' PDR Under N.C.G.S. § 7A-31 (COA17-860)	Denied
039P18	Russell F. Walker v. Knats Creek Nursery, Inc.	1. Plt's *Pro Se* Motion for PDR (COAP18-21) 2. Def's Motion to Deny PDR	1. Denied **05/09/2018** 2. Dismissed as moot
039P18-2	Russell F. Walker v. Knats Creek Nursery, Inc.	1. Plt's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP18-21, 17-1192) 2. Plt's *Pro Se* Motion to Proceed as an Indigent 3. Def's Motion for Sanctions 4. Def's Motion for "Gatekeeper" Order	1. Denied 2. Allowed 3. Denied 4. Denied
041P17-2	Arthur O. Armstrong v. North Carolina, et al.	Plt's *Pro Se* Motion for Leave to File a *Writ of Mandamus*	Denied
044P18	Brenda Lemus Rodriguez v. Liliana Silverio Lemus	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-1285) 2. Def's Petition in the Alternative for *Writ of Certiorar*i to Review Decision of COA	1. Denied 2. Dismissed as moot

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

14 AUGUST 2018

050P18	Karen Cecchettini v. Thomas Cecchettini	Def's PDR Under N.C.G.S. § 7A-31 (COA17-556)	Denied
051P18	North Carolina Farm Bureau Insurance Company, Inc. and North Carolina Insurance Underwriting Association v. Ronnie D. Lilley, Sr.	Def's PDR Under N.C.G.S. § 7A-31 (COA16-998)	Denied
065A17-2	State v. Jeffrey Robert Parisi	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **06/25/2018** 2.
067P18	State v. Jonathan Eugene Dixon	1. State's Motion for Temporary Stay (COA17-962) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **03/07/2018** Dissolved **08/14/2018** 2. Denied 3. Denied **Ervin, J., recused**
073P18	Erin Keena v. Cedar Street Investments, LLC, d/b/a Draught, a Domestic for Profit, LLC, and John Doe Employee and/or Agent, jointly and severally, directly and vicariously	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-852)	Denied
075P17-4	Ocwen Loan Servicing v. Margaret Ann Reaves	1. Def's *Pro Se* Motion for Notice of Appeal 2. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Wake County	1. Dismissed *ex mero motu* 2. Denied
080P18-3	Darron J. Jones v. Mr. Cranford	Plt's *Pro Se* Motion to File Amended Complaint	Dismissed as moot
094P18	USA Trouser, S.A. de C.V. v. James A. Williams; Navigators Insurance Company; and Navigators Management Company, Inc.	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-918)	Denied

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

14 AUGUST 2018

097P18	Phyllis V. Parsons v. Donald Joe Parsons, Jr., Individually, and as Administrator of the Estate of Donald Joe Parsons	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-278)	Denied
101P15-3	State v. Christopher Anthony Clegg	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-76) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Special Order 3. Allowed
106A18	State v. Scott Alton Hill	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-758) 2. State's Motion to Dismiss Appeal	1. --- 2. Allowed
107P17-2	State v. Teon Jamell Williams	Def's *Pro Se* Motion to Dismiss and/ or Squash, Set Aside, Vacate the Indictments for Habitual Felon and Resentence, or Consolidate, or Run Concurrent	Dismissed
109P17-5	In re Olander R. Bynum	Petitioner's *Pro Se* Motion for *En Banc* Consideration of Application for *Writ of Mandamus*	Dismissed
109P18	Theodore Creed v. William E. Creed, Nationwide Property & Casualty Insurance Company, Inc., Essentia Insurance Company, and Owners Insurance Company	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-456)	Denied
110P18	State v. Devon Shamark Crooms	Def's PDR Under N.C.G.S. § 7A-31 (COA17-317)	Denied
112P18	James H. McCall, IV and Shannon McCall v. Ronald Lee Million, Jr. and Marissa Hayler Million	1. Defs' Notice of Appeal Based Upon a Constitutional Question (COA17-403) 2. Defs' PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
113P18	State v. Billy Ray Allen	Def's PDR Under N.C.G.S. § 7A-31 (COA17-661)	Denied

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116P18	State v. Nicholas Nacoleon Harding	1. Def's Motion for Temporary Stay (COA17-448) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/11/2018** Dissolved **08/14/2018** 2. Denied 3. Denied
117P18	Regency Lake Owners' Association, Inc., and Charles Huffman v. Regency Lake, LLC, Courtland Properties, Inc., and Joseph MacMinn	Plts' PDR Under N.C.G.S. § 7A-31 (COA17-1117)	Denied
121P18	In the Matter of A.R., D.G., T.G.	Respondent Mother's PDR Under N.C.G.S. § 7A-31 (COA17-1212)	Denied
127P18	William M. Byron and Dana T. Byron v. Synco Properties, Inc., a North Carolina Corporation, and City of Charlotte, a North Carolina Body Politic and Corporate	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA17-318) 2. Defs' Motion to Dismiss PDR	1. Denied 2. Dismissed as moot
128A18	Azure Dolphin, LLC, et al. v. Barton, et al.	Counsel for Plaintiff-Appellant's Motion to Withdraw as Appellate Counsel	Allowed **08/15/2018**
130A03-2	State v. Quintel Martinez Augustine (DEATH)	1. NAACP Legal Defense and Educational Fund, Inc.'s Motion to Admit Jin Lee Hee *Pro Hac Vice* 2. NAACP Legal Defense and Educational Fund, Inc.'s Motion to Admit W. Kerrel Murray *Pro Hac Vice* 3. NAACP Legal Defense and Educational Fund, Inc.'s Motion to Not Require the Payment of Additional *Pro Hac Vice* Fees	1. Allowed **07/18/2018** 2. Allowed **07/18/2018** 3. Denied **07/18/2018** **Ervin, J., recused**

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130A03-2	State v. Quintel Martinez Augustine (DEATH)	1. Former State and Federal Prosecutors' Motion to Admit Paul F. Khoury *Pro Hac Vice* 2. Former State and Federal Prosecutors' Motion to Admit Robert L. Walker *Pro Hac Vice* 3. Former State and Federal Prosecutors' Motion to Admit Madeline J. Cohen *Pro Hac Vice* 4. Former State and Federal Prosecutors' Motion to Not Require the Payment of Additional *Pro Hac Vice* Fees	1. Allowed **07/20/2018** 2. Allowed **07/20/2018** 3. Allowed **07/20/2018** 4. Denied **07/20/2018** **Ervin, J., recused**
131P16-9	State v. Somchoi Noonsob	Def's *Pro Se* Motion for Verified Complaint	Denied **06/27/2018**
132P14-2	State v. Melvin Bibian Warner	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Cabarrus County 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
134A18	Regency Centers Acquisition, LLC v. Crescent Acquisitions, LLC	Plt's Motion to Hold Case in Advance of Settlement	Allowed **08/10/2018**
135P18	State v. Albert Uriah Mathis	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA17-128) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
136A18	Donald Sullivan v. Robert Wayne Pugh and Karen Lloyd Pugh, His Legal Wife ——— TOG Properties, LLC v. Karen Pugh	1. Plt's (Donald Sullivan) *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA17-450) 2. Plt's (TOG Properties, LLC) Motion to Dismiss Appeal	1. --- 2. Allowed
137A18	Cassandra Swaringen Christian v. Department of Health and Human Services	1. Petitioner's Notice of Appeal Based Upon a Constitutional Question (COA17-605) 2. Respondent's Motion to Dismiss Appeal	1. --- 2. Allowed

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138P18	Betty Jo O'Neal v. Jeffrey Hunter Fox and Lisa Polley Fox	1. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-754) 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed
148P18	State v. Robert O'Neal Dick	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-1251) 2. Def's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
149P18	Angela Meshell Bluitt v. Wake Forest University Baptist Medical Center, Wake Forest University, North Carolina Baptist Hospital, and Evan Rubery, MD	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-1170)	Denied
150P03-2	State v. Larry Chavis	1. Def's *Pro Se* Motion for Notice of Appeal (COAP18-195) 2. Def's *Pro Se* Motion for PDR 3. Def's *Pro Se* Petition in the Alternative for *Writ of Certiorari* to Review Order of COA	1. Dismissed 2. Dismissed 3. Dismissed
152P18	State v. Maurice Alexander Robinson	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-839) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
154P18	State v. Kenneth Wayne Ryckeley	Def's PDR Under N.C.G.S. § 7A-31 (COA17-200)	Denied
157P18	State v. Kim Sydnor	Def's *Pro Se* Motion to Have COA Enforce Its Order (COA17-48)	Dismissed
158P18	In re Robert Lee Styles, Jr.	Petitioner's *Pro Se* Motion for PDR (COAP18-93)	Dismissed
159P18	State v. Timothy Brown	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-944)	Denied
161A18	State v. Mollie Elizabeth B. McDaniel	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **06/01/2018** 2. Allowed **06/25/2018** 3. ---

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162P18	State v. Ronnie Lee Ford	1. Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COA17-817) 2. Def's *Pro Se* Motion for *En Banc* Review 3. Def's *Pro Se* Motion for Discretionary Review Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed 3. Dismissed
163P18	State v. Brundon Moore	Def's *Pro Se* Petition for *Writ of Mandamus*	Dismissed
167P18	State v. Tristan Philip Hines	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-1141)	Denied
168P18	State v. Rachel McAlister	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-282)	Denied
171P18	State v. Ray Muhammad	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-166) 2. Defendant's Motion for Temporary Stay	1. Denied 2. Dismissed **07/20/2018** **Morgan, J., recused**
172P18	State v. Dominic Rashaun Stroud	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-762) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed **Ervin, J., recused**
173P18	State v. Donte Parker	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1067)	Denied
174P18	State v. Robert Harold Johnson	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Watauga 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
175P18	Neil Allen Simcox v. General Court of Justice District Court Division State of North Carolina County of Cabarrus	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **06/13/2018**

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178P18	Elizabeth E. LeTendre v. Currituck County, North Carolina	1. Plt's Motion for Temporary Stay (COA17-1108) 2. Plt's Petition for *Writ of Supersedeas* 3. Plt's Notice of Appeal Based Upon a Constitutional Question 4. Plt's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/19/2018** 2. 3. 4.
179P18	State v. Frank Gladney, III	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-831)	Denied
181P18	State v. Toni Turnage	1. Def's Motion for Temporary Stay (COA17-803) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/20/2018** 2. 3.
182A15-4	Adam Jarmal Hodge v. State of North Carolina	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied
183P18	State v. Samantha Rae Xiong	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-1185) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed **Ervin, J., recused**
187P18	State v. Edward Smith, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA17-925)	Denied
188P18	Banyan GW, LLC v. Wayne Preparatory Academy Charter School, Inc. and its Board of Directors; Sharon Thompson, Chair of the Board of Directors; and John Ankeney, and Lucius J. Stanley, as members of the Board of Directors, and Vertex III, LLC	1. Def's (Wayne Preparatory Academy Charter School, Inc.) Motion for Temporary Stay (COA18-378) 2. Def's (Wayne Preparatory Academy Charter School, Inc.) Petition for *Writ of Supersedeas*	1. Denied **06/25/2018** 2. Denied **06/25/2018**
189P18	State v. Kurt Allen Corey	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **06/22/2018** 2.

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191P18	State v. Jesse Dean Hoppes	Def's *Pro Se* Motion for Petition for *En Banc* Rehearing (COA17-861)	Dismissed **Ervin, J., recused**
193P18	State v. Joshua Bolen	Def's *Pro Se* Motion for Appropriate Relief (COAP18-238)	Denied **06/25/2018**
193P18-2	State v. Joshua Bolen	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **07/10/2018**
194A16-2	State v. Michael Antonio Bullock	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA15-731-2) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal 4. State's Conditional PDR Under N.C.G.S. § 7A-31	1. --- 2. Denied 3. Allowed 4. Dismissed as moot
194P18	State v. Jesse James Lenoir	1. State's Motion for Temporary Stay (COA17-943) 2. State's Petition for *Writ of Supersedeas* 3. State's Motion to Dissolve Stay and Withdraw Petition for *Writ of Supersedeas*	1. Allowed **06/25/2018** 2. --- 3. Allowed **07/06/2018**
195P18	Jabar Hope v. Marion Correctional Institution	Plt's *Pro Se* Motion for Appeal	Dismissed
196P18	State v. Ricky Staten	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Halifax 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
198P18	State v. Curtis L. Tyson	1. Def's *Pro Se* Motion for Appropriate Relief 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

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200P18	George Reynold Evans v. State of North Carolina and Alan Adam, ADA 13A Judicial District and Prosecutorial District	1. Petitioner's *Pro Se* Motion of Appeal for Discretionary Review (COAP18-359) 2. Petitioner's *Pro Se* Petition for *Writ of Mandamus* 3. Petitioner's *Pro Se* Motion of Appeal for Discretionary Review 4. Petitioner's *Pro Se* Motion of *Writ of Mandamus* as Alternative of the *Writ of Habeas Corpus*	1. Denied **07/12/2018** 2. Denied **07/12/2018** 3. Denied **07/12/2018** 4. Denied **07/12/2018**
207P18	Trustee Services of Carolina, Benjamin Barco, Brock and Scott v. Chilove-Chery Saimplice	1. Def's *Pro Se* Petition for *Writ of Supersedeas* 2. Def's *Pro Se* Motion for Notice of Appeal	1. Denied 2. Dismissed
208A17	State v. Justin Deandre Bass	1. State's Motion for Temporary Stay (COA16-421) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent 4. Def's Motion to Dismiss State's Notice of Appeal for Mootness	1. Allowed **06/23/2017** 2. Allowed **06/23/2017** 3. --- 4.
210P18	James E. Price v. Magistrate Donald Paschall and Magistrate Willis James E. Price v. Magistrate D.C. Robinson	1. Plt's *Pro Se* PDR (COA17-1146) 2. Plt's *Pro Se* Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA 3. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Denied 3. Allowed
213P18	State v. Montey Andrea Murray	Def's PDR Under N.C.G.S. § 7A-31 (COA17-769)	Denied
216P18	Jermaine M. Jones v. District Attorney Britt, Secretary of State, Director of Prison, Treasurer, and Governor Roy Cooper	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied **07/12/2018**
223P18	State v. Jimmy Lee Forte, Jr.	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **07/18/2018** 2.

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227P14-2	State v. Max Tracy Earls	Def's *Pro Se* Motion for Review of a Constitutional Question (COAP18-455)	Dismissed
227P18	State v. Carl Ray Poore, Jr.	1. State's Motion for Temporary Stay (COA17-1387) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/23/2018** 2. 3.
237P18	State v. Aaron Ross Taylor	1. Def's Motion for Temporary Stay 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **08/02/2018** 2.
238A18	In the Matter of T.T.E.	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas*	1. Allowed **08/02/2018** 2.
239A18	State v. Neil Wayne Hoyle	1. State's Motion for Temporary Stay (COA17-1324) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **08/03/2018** 2.
241P18	Bradley Lynn Mauney v. State of North Carolina	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **08/06/2018**
242P18	Johnnie Rowe v. State of North Carolina	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Denied **08/07/2018**
249P11-7	State v. Bobby Ray Grady	1. Def's *Pro Se* Motion for *Writ of Supersedeas* (COAP17-914) 2. Def's *Pro Se* Motion for the Production of Documents	1. Dismissed 2. Dismissed
266A94-2	State v. Eric Johnson	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Vance 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

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266P17	State v. Jawanz Bacon	1. State's Motion for Temporary Stay (COA16-1268) 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 **08/04/2017** Dissolved **08/14/2018** 2. Denied 3. Denied 4. Dismissed as moot
274P15-3	State v. Robert K. Stewart	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Moore County 2. Def's *Pro Se* Motion to Dismiss All Charges 3. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 4. Def's *Pro Se* Motion to Appoint Counsel	1. Denied **06/12/2018** 2. Dismissed **06/12/2018** 3. Allowed **06/12/2018** 4. Dismissed **06/12/2018**
274P15-4	State v. Robert K. Stewart	1. Def's *Pro Se* Motion for Reconsideration 2. Def's *Pro Se* Motion for Hearing *En Banc*	1. Dismissed 2. Dismissed
309P15-5	State v. Reginald Underwood Fullard	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Forsyth 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
316P98-3	State v. Billy Ray Artis	Def's *Pro Se* Motion for Relief	Dismissed **Ervin, J., recused**
327P02-10	State v. Guy Tobias LeGrande	Def's *Pro Se* Motion for Discretionary Review	Dismissed **Ervin, J., recused**

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331P17	State v. Amia Smith Ervin	1. State's Motion for Temporary Stay (COA17-324)	1. Allowed **10/05/2017** Dissolved **08/14/2018**
		2. State's Petition for *Writ of Supersedeas*	2. Denied
		3. State's PDR Under N.C.G.S. § 7A-31	3. Denied
		4. Def's Conditional PDR Under N.C.G.S. § 7A-31	4. Dismissed as moot
335A17	Pine v. Wal-Mart Associates, Inc. #1552, et al.	1. Plt's Motion to Substitute New Brief with Corrected Brief	1. Allowed **08/03/2018**
		2. Plt's Motion to Deem Brief Timely Filed	2. Allowed **08/03/2018**
341P12-6	State v. Donald Durrant Farrow	Def's *Pro Se* Petition for *Writ of Mandamus*	Denied **07/02/2018**
366A10	State v. Michael Patrick Ryan	1. Def's Motion to Dismiss Appeal	1. Special Order
		2. Def's Motion to Deny Petition for *Certiorari*	2. Special Order
		3. Def's Motion to Expedite	3. Special Order
		4. State's Motion to Strike Reply to Response to Motion to Dismiss Appeal	4. Special Order
			Ervin, J., recused
394P17	State v. Dontail Brinkley	1. State's Motion for Temporary Stay (COA16-572)	1. Allowed **11/21/2017** Dissolved **08/14/2018**
		2. State's Petition for *Writ of Supersedeas*	2. Denied
		3. State's PDR Under N.C.G.S. § 7A-31	3. Denied

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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. Allowed 3. Special Order 4. Denied 5. Hold 6. Hold
406P17-3	State v. Daniel Luna	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, New Hanover 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
411A94-6	State v. Marcus Reymond Robinson (DEATH)	1. NAACP Legal Defense and Educational Fund, Inc.'s Motion to Admit Jin Hee Lee *Pro Hac Vice* 2. NAACP Legal Defense and Educational Fund, Inc.'s Motion to Admit W. Kerrel Murray *Pro Hac Vice*	1. Allowed **07/18/2018** 2. Allowed **07/18/2018**
411A94-6	State v. Marcus Reymond Robinson (DEATH)	1. Former State and Federal Prosecutors' Motion to Admit Paul F. Khoury *Pro Hac Vice* 2. Former State and Federal Prosecutors' Motion to Admit Robert L. Walker *Pro Hac Vice* 3. Former State and Federal Prosecutors' Motion to Admit Madeline J. Cohen *Pro Hac Vice*	1. Allowed **07/20/2018** 2. Allowed **07/20/2018** 3. Allowed **07/20/2018**
421PA17	State v. Juan Foronte McPhaul	Motion to Admit Sharon Katz and Matthew R. Brock *Pro Hac Vice*	Allowed **08/02/2018**
422P07-2	State v. Keith Douglas Robinson	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Durham County	Denied **07/12/2018**

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433A17	Eugene K. Ehmann, N. William Shiffli, Jr., and Thad A. Throneburg v. Medflow, Inc.; Greg E. Lindberg; Eli Global, LLC; Eli Research, LLC; Eli Equity, LLC; SNA Capital, LLC; Southland National Holdings, LLC; Southland National Insurance Corporation; DJRTC, LLC; and Medflow Holdings, LLC	1. Plts' Petition for *Writ of Certiorari* to Review Order of Business Court, Mecklenburg County 2. Defs' Motion for Extension of Time to Respond to Petition for *Writ of Certiorari* 3. Defs' Motion to Dismiss Appeal	1. Denied 2. Allowed **02/12/2018** 3. Allowed **Jackson, J., recused**
438P13-2	State v. Derrick Thomas Bailey	1. Def's *Pro Se* Motion for Notice of Appeal (COAP17-317) 2. Def's *Pro Se* Motion for PDR	1. Dismissed 2. Dismissed **Ervin, J., recused**
441A98-4	State v. Tilmon Charles Golphin (DEATH)	1. NAACP Legal Defense and Educational Fund, Inc.'s Motion to Admit Jin Hee Lee *Pro Hac Vice* 2. NAACP Legal Defense and Educational Fund, Inc.'s Motion to Admit W. Kerrel Murray *Pro Hac Vice* 3. NAACP Legal Defense and Educational Fund, Inc.'s Motion to Not Require the Payment of Additional *Pro Hac Vice* Fees	1. Allowed **07/18/2018** 2. Allowed **07/18/2018** 3. Denied **07/18/2018** **Beasley, J., recused**
441A98-4	State v. Tilmon Charles Golphin (DEATH)	1. Former State and Federal Prosecutors' Motion to Admit Paul F. Khoury *Pro Hac Vice* 2. Former State and Federal Prosecutors' Motion to Admit Robert L. Walker *Pro Hac Vice* 3. Former State and Federal Prosecutors' Motion to Admit Madeline J. Cohen *Pro Hac Vice* 4. Former State and Federal Prosecutors' Motion to Not Require the Payment of Additional *Pro Hac Vice* Fees	1. Allowed **07/20/2018** 2. Allowed **07/20/2018** 3. Allowed **07/20/2018** 4. Denied **07/20/2018** **Beasley, J., recused**

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499P04-2	André M. Spates v. State of North Carolina, Judge Charles H. Henry	Petitioner's *Pro Se* Petition for *Writ of Mandamus*	Denied **07/27/2018**
519P99-2	State v. Larry Leggett	Def's *Pro Se* Motion for PDR Under N.C.G.S. § 7A-31 (COAP18-367)	Dismissed
526A13-2	State v. Timothy Glenn Mills	1. State's Motion for Temporary Stay (COA17-747) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent 4. Def's Motion to Dismiss State's Appeal 5. State's Amended Notice of Appeal Based Upon a Dissent	1. Allowed **05/30/2018** 2. Allowed **05/30/2018** 3. --- 4. Denied 5. ---
532P08-3	State v. Frank Durand Tomlin	1. Def's Motion for Temporary Stay (COA17-351) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31 4. Def's Petition for *Writ of Certiorari* to Review Decision of COA	1. Allowed **07/11/2018** 2. 3. 4.
536P00-8	Terrance L. James v. State of North Carolina	1. Petitioner's *Pro Se* Motion for Averment of Jurisdiction 2. Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus* 3. Petitioner's *Pro Se* Petition for *Writ of Mandamus* 4. Petitioner's *Pro Se* Petition for *Writ of Prohibition*	1. Dismissed **06/15/2018** 2. Denied **06/15/2018** 3. Denied **06/15/2018** 4. Denied **06/15/2018**
548A00-2	State v. Christina Shea Walters (DEATH)	1. NAACP Legal Defense and Educational Fund, Inc.'s Motion to Admit Jin Hee Lee *Pro Hac Vice* 2. NAACP Legal Defense and Educational Fund, Inc.'s Motion to Admit W. Kerrel Murray *Pro Hac Vice* 3. NAACP Legal Defense and Educational Fund, Inc.'s Motion to Not Require the Payment of Additional *Pro Hac Vice* Fees	1. Allowed **07/18/2018** 2. Allowed **07/18/2018** 3. Denied **07/18/2018**

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548A00-2	State v. Christina Shea Walters (DEATH)	1. Former State and Federal Prosecutors' Motion to Admit Paul F. Khoury *Pro Hac Vice*	1. Allowed **07/20/2018**
		2. Former State and Federal Prosecutors' Motion to Admit Robert L. Walker *Pro Hac Vice*	2. Allowed **07/20/2018**
		3. Former State and Federal Prosecutors' Motion to Admit Madeline J. Cohen *Pro Hac Vice*	3. Allowed **07/20/2018**
		4. Former State and Federal Prosecutors' Motion to Not Require the Payment of Additional *Pro Hac Vice* Fees	4. Denied **07/20/2018**
579P01-5	State v. Antorio Maurice Smarr	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Gaston County	1. Dismissed
		2. Def's *Pro Se* Motion to Appoint Counsel	2. Dismissed as moot

ADAMS CREEK ASSOCIATES
v.
MELVIN DAVIS AND LICURTIS REELS

No. 3A08-4

Filed 21 September 2018

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. ___, 810 S.E.2d 6 (2018), affirming an order denying motions in the cause entered on 13 June 2016 by Judge Benjamin G. Alford in Superior Court, Carteret County. Heard in the Supreme Court on 29 August 2018.

Armstrong Law Firm, P.A., by L. Lamar Armstrong, Jr. and L. Lamar Armstrong, III, for plaintiff-appellee.

Hairston Lane, P.A., by James E. Hairston, Jr., for defendant-appellants.

Tin Fulton Walker & Owen, PLLC, by William G. Simpson, Jr.; and Goldsmith Resolutions, by Frank Goldsmith, for North Carolina Advocates for Justice, amicus curiae.

PER CURIAM.

The decision of the Court of Appeals is vacated, and this case is remanded to the Court of Appeals for further remand to the trial court for findings of fact concerning defendants' ability to comply with the removal of the structures as a condition of the 2011 Contempt Order. In the trial court, defendants also are without prejudice to advance claims not briefed or previously raised but discussed at oral arguments before this Court.

VACATED AND REMANDED.

STATE v. AUSTIN

[371 N.C. 465 (2018)]

STATE OF NORTH CAROLINA
v.
NANCY BENGE AUSTIN

No. 294PA17

Filed 21 September 2018

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an unpublished order of the Court of Appeals dated 4 August 2017 denying defendant's petitions for writ of mandamus or writ of certiorari to review an order entered on 14 November 2016 by Judge Bryan Collins in Superior Court, Caldwell County. Heard in the Supreme Court on 27 August 2018.

Joshua H. Stein, Attorney General, by Joseph L. Hyde, Assistant Attorney General, for the State.

Glenn Gerding, Appellate Defender, by Daniel Shatz, Assistant Appellate Defender, for defendant-appellant.

PER CURIAM.

CERTIORARI IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA
v.
JERMEL TORON KRIDER

No. 68A18

Filed 21 September 2018

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. ___, 810 S.E.2d 828 (2018), vacating a judgment entered on 3 October 2016 by Judge Mark E. Klass in Superior Court, Iredell County. Heard in the Supreme Court on 30 August 2018.

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

Glenn Gerding, *Appellate Defender*, *by Emily Holmes Davis*, *Assistant Appellate Defender*, *for defendant-appellee.*

PER CURIAM.

As to the issue of whether the evidence in this case could support a determination that defendant violated N.C.G.S. § 15A-1343(b)(3a), we hold that the State failed to carry its burden of presenting sufficient evidence to support the trial court's decision to revoke defendant's probation based upon a finding that defendant willfully absconded probation. Accordingly, we affirm the decision of the Court of Appeals; however, we disavow the portion of the opinion analyzing the pertinence of the fact that defendant's probationary term expired prior to the date of the probation violation hearing and holding "that the trial court lacked jurisdiction to revoke defendant's probation after his case expired." *State v. Krider*, ___ N.C. App. ___, ___, 810 S.E.2d 828, 833 (2018).

MODIFIED and AFFIRMED.

STATE v. MCPHAUL

[371 N.C. 467 (2018)]

STATE OF NORTH CAROLINA
v.
JUAN FORONTE McPHAUL

No. 421PA17

Filed 21 September 2018

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 808 S.E.2d 294 (2017), finding no prejudicial error in part and vacating in part judgments entered on 2 October 2015 by Judge James M. Webb in Superior Court, Hoke County. On 9 May 2018, the Supreme Court allowed the State's conditional petition for discretionary review as to additional issues. Heard in the Supreme Court on 28 August 2018.

Joshua H. Stein, Attorney General, by William P. Hart, Jr., Assistant Attorney General, for the State-appellant/appellee.

Glenn Gerding, Appellate Defender, by Amanda S. Zimmer, Assistant Appellate Defender, for defendant-appellant/appellee.

Rayburn Cooper & Durham, P.A., by James B. Gatehouse; and Davis Polk & Wardwell LLP, by Sharon Katz, pro hac vice, and Matthew R. Brock, pro hac vice, for Professor Brandon L. Garrett and twenty-five other named scholars representing the fields of law, forensic science, medicine, and statistics, amici curiae.

PER CURIAM.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE OF NORTH CAROLINA
v.
JOHN H. SAYRE

No. 330A17

Filed 21 September 2018

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. ___, 803 S.E.2d 699 (2017), affirming an order entered on 2 May 2016 by Judge Eric C. Morgan in Superior Court, Forsyth County. Heard in the Supreme Court on 27 August 2018.

Joshua H. Stein, *Attorney General*, *by Kimberly N. Callahan*, *Assistant Attorney General*, *for the State.*

Glenn Gerding, *Appellate Defender*, *by Nicholas C. Woomer-Deters*, *Assistant Appellate Defender*, *for defendant-appellant.*

PER CURIAM.

AFFIRMED.

STATE v. SMITH

[371 N.C. 469 (2018)]

STATE OF NORTH CAROLINA
v.
MARCUS MARCEL SMITH

No. 290A17

Filed 21 September 2018

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. ___, 804 S.E.2d 235 (2017), reversing an order denying defendant's motion to suppress entered on 9 May 2016 by Judge John O. Craig III in Superior Court, Forsyth County. On 7 December 2017, the Supreme Court allowed petitions for discretionary review of additional issues filed by both the State and defendant. Heard in the Supreme Court on 29 August 2018.

Joshua H. Stein, Attorney General, by Teresa M. Postell, Assistant Attorney General, for the State-appellant/appellee.

Jason Christopher Yoder for defendant-appellant/appellee.

PER CURIAM.

For the reasons stated in the dissenting opinion, we reverse the decision of the Court of Appeals. With respect to the additional issues raised by the parties' petitions for discretionary review, we conclude that discretionary review was improvidently allowed. Therefore, the decision of the Court of Appeals as to these matters remains undisturbed.

REVERSED IN PART; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE v. STIMPSON

[371 N.C. 470 (2018)]

STATE OF NORTH CAROLINA
v.
ANTONIO LAMAR STIMPSON

No. 408A17

Filed 21 September 2018

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. ___, 807 S.E.2d 603 (2017), finding no error after appeal from judgments entered on 28 April 2016 by Judge Susan E. Bray in Superior Court, Guilford County. Heard in the Supreme Court on 28 August 2018.

Joshua H. Stein, Attorney General, by Wes Saunders, Assistant Attorney General, for the State.

Drew Nelson for defendant-appellant.

PER CURIAM.

AFFIRMED.

STATE v. BUCHANAN

[371 N.C. 471 (2018)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Yancey County
	)	
WILLIAM JESSE BUCHANAN	)	

No. 305P17

SPECIAL ORDER

Upon consideration of the petition filed by Defendant on 14 August 2017 in this matter for a writ of certiorari to review the decision of the North Carolina Court of Appeals, the following order is entered and is hereby certified to the North Carolina Court of Appeals:

Allowed for the limited purpose of vacating that portion of the opinion of the Court of Appeals entered 6 June 2017 discussing jury instructions, the single taking rule, and double jeopardy; and remanding to the Court of Appeals with instructions to address the issue presented by defendant on appeal, to wit:

> Did the trial court commit plain error by failing to instruct the jury that it could not convict Mr. Buchanan of obtaining property by false pretense and attempting to obtain property by false pretense because such a verdict would violate the "single taking rule?"

That portion of the opinion discussing sufficiency of the evidence remains undisturbed.

Defendant's remaining motions are dismissed.

By order of the Court in Conference, this the 20th day of September, 2018.

s/Morgan, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 25th day of September, 2018.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

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

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

20 SEPTEMBER 2018

031A18	Andrea Kirby Crowell v. William Worrell Crowell	1. Plt's Notice of Appeal Based Upon a Dissent (COA17-164) 2. Plt's PDR as to Additional Issues 3. Plt's Motion for Temporary Stay 4. Plt's Petition for *Writ of Supersedeas* 5. Def's Motion to Dismiss Appeal	1. — 2. Allowed as to Issues I and II only 3. Allowed **06/28/2018** 4. Allowed **06/28/2018** 5. Denied
032P18	Little River, LLC, Petitioner v. Lee County, North Carolina, Respondent, and Carolina Trace Association, Inc., South Landing Property Owners Association, Inc., Village at the Trace Property Owners Association, Sedgemoor Property Owners Association, Escalante Carolina Trace, LLC., Sandra Ward, Terry Ward, Laura Riddle, Bobby Riddle, Jr., Daniel Stanley, Kay Coles, Fred Berman, C. David Turner, John Beck, Lyona Beck, Gerald Merritt, Kermit Keeter, Louane Keeter, Alfred Rushatz, Sharwynne Blatterman, Barry Markowitz, Miriam Markowitz, Terri Dussault, and Homer Todd Spoffard, Neighbor-Respondents	1. Respondent's (Lee County) PDR Under N.C.G.S. § 7A-31 (COA17-461) 2. Petitioner's 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

20 SEPTEMBER 2018

038P10-4	John Fletcher Church v. Jean Marie Decker (formerly Church)	1. Plt's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA17-1119, 17-1120) 2. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 3. Plt's *Pro Se* Motion to Amend Petition	1. Dismissed *ex mero motu* 2. Denied 3. Allowed **Ervin, J., recused**
055P02-14	State v. Henry Ford Adkins	Def's *Pro Se* Motion for PDR(COAP18-582)	Denied
055A18	State v. James Howard Terrell, Jr.	1. State's Motion for Temporary Stay (COA17-268) 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 Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **02/23/2018** 2. Allowed 3. --- 4. Allowed as to Issues I and III only 5. Dismissed as moot
060A18	David Hampton and Wife, Mary D. Hampton v. Cumberland County	1. Petitioners' Notice of Appeal Based Upon a Dissent (COA16-704) 2. Petitioners' Notice of Appeal Based Upon a Constitutional Question 3. Petitioners' Petition for *Writ of Certiorari* to Review Decision of COA	1. Dismissed *ex mero motu* 2. Dismissed *ex mero motu* 3. Allowed
065A17-2	State v. Jeffrey Robert Parisi	1. Def's Motion for Temporary Stay (COA17-1221) 2. Def's Petition for *Writ of Supersedeas* 3. Def's Notice of Appeal Based Upon a Dissent	1. Allowed **06/25/2018** 2. Allowed 3. ---
065P18	State v. Noui Phachoumphone	Def's PDR Under N.C.G.S. § 7A-31 (COA17-247)	Allowed

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

20 SEPTEMBER 2018

091P14-5	State v. Salim Abdu Gould	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COA18-425) 2. Def's *Pro Se* Motion to Proceed *In Forma Pauperis* 3. Def's *Pro Se* Motion for Writ of Immediate Appeal 4. Def's *Pro Se* Motion *In Limine* 5. Def's *Pro Se* Motion for Temporary Stay 6. Def's *Pro Se* Petition for *Writ of Supersedeas*	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed **09/17/2018** 6. Dismissed **09/17/2018**
101P18	Glen Lewis Ring, Wanda Joyce Ring, William Thomas Ring, and Pamela Ann Ring v. Moore County, Camp Easter Management, LLC, and Bob Koontz	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA16-1034) 2. Plts' Petition for *Writ of Certiorari* to Review Decision of COA	1. Dismissed 2. Denied
102P13-4	State v. Charles Anthony Ball	Def's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COAP18-358)	Dismissed
108P18	Willard Briggs, Employee v. Debbie's Staffing, Inc., Employer, N.C. Ins. Guar. Ass'n, Carrier; Employment Plus, Employer, N.C. Ins. Guar. Ass'n; and Permatech, Inc., Employer, Cincinnati Ins. Co., Carrier	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA17-778) 2. Defs' (Permatech, Inc. and Cincinnati Ins. Co.) Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
111P18	State v. Isaac Tyrone Jackson, Jr.	1. Def's PDR Under N.C.G.S. § 7A-31 (COA16-1141) 2. Def's Petition in the Alternative for *Writ of Certiorari* to Review Decision of COA 3. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Dismissed 2. Denied 3. Dismissed as moot

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

20 SEPTEMBER 2018

122P18	Zloop, Inc. v. Parker Poe Adams & Bernstein, LLP, Alba-Justina Secrist a/k/a AJ Secrist and R. Douglas Harmon	1. Plt's Verified Motion for Leave to File Amended Notice of Appeal 2. Plt's Petition for *Writ of Certiorari* to Review Decision of N.C. Business Court 3. Def's Motion for Extension of Time to Respond to Petition for *Writ of Certiorari*	1. Dismissed as moot 2. Allowed 3. Allowed **05/21/2018**
126A18	State v. Mardi Jean Ditenhafer	1. State's Notice of Appeal Based Upon a Dissent (COA16-965) 2. State's PDR as to Additional Issues	1. — 2. Allowed
127P13-2	State v. Jarrod W. Willis	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* 3. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot **Ervin, J., recused**
131P16-10	State v. Somchai Noonsab	Def's *Pro Se* Motion for Constitutional Questions	Dismissed
145PA17-2	In the Matter of A.P.	1. Guardian ad Litem's Motion for Temporary Stay (COA16-1010-2) 2. Guardian ad Litem's Petition for *Writ of Supersedeas* 3. Guardian ad Litem's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/12/2018** 2. 3.
153P18	State v. Corey Alexander Thomas	Def's PDR Under N.C.G.S. § 7A-31 (COA17-520)	Denied
155P17-3	State v. Joe Robert Reynolds	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Surry County	Dismissed
156P18	Danny Hopper, Employee v. Lakeside Mills, Inc., Employer Penn Millers Insurance Company, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-706)	Denied

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

20 SEPTEMBER 2018

160P18	State v. James Harold Courtney, III	1. State's Motion for Temporary Stay (COA17-1095) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Constitutional Question 4. State's PDR Under N.C.G.S. § 7A-31 5. Def's Motion to Dismiss Appeal	1. Allowed 06/01/2018 2. Allowed 3. --- 4. Allowed 5. Allowed
170P18	Claudia Holcombe; Tom Pelton; Dos Aves, LLC, a North Carolina Limited Liability Company; and Robert Martin and wife, Naomi Martin v. Oak Island Aircraft Housing, LLC, a North Carolina Limited Liability Company; 717, NC, LLC, a North Carolina Limited Liability Company; Brian Keesee; John M. Martin; Kevin W. Stephenson; Oak Island Aircraft Management, Inc., a Former North Carolina Corporation and/or Past and/or Present Business Trade Name; Dick J. Thompson; and Robert Weinbach	1. Defs' (717, NC, LLC; Brian Keesee; and Dick J. Thompson) Notice of Appeal Based Upon a Constitutional Question (COA17-1081) 2. Defs' (717, NC, LLC; Brian Keesee; and Dick J. Thompson) PDR Under N.C.G.S. § 7A-31 3. Def's (Kevin W. Stephenson) Motion to Dismiss Appeal 4. Plts' (Claudia Holcombe; Tom Pelton; and Dos Aves, LLC) Motion to Dismiss Appeal 5. Plts' (Claudia Holcombe; Tom Pelton; and Dos Aves, LLC) Motion for Sanctions	1. Dismissed *ex mero motu* 2. Denied 3. Dismissed as moot 4. Dismissed as moot 5. Denied
177P18	Anthony Douglas Pryor, Sr., Employee v. Express Services, Employer, Sedgwick CMS, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-1060)	Denied
180P18	Michelle Kish v. Frye Regional Medical Center, Employer, Self-insured (Sedgwick Claims Management Services, Inc., Third-Party Administrator)	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-1314)	Denied

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

20 SEPTEMBER 2018

182P18	State v. Kindrick Jarod Payne	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-650) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed
186P18	Evelyn Talley v. Pride Mobility Products Corporation, Quality Home Healthcare, Inc., William S. Cameron and Barbara B. Cameron	Plt's PDR Under N.C.G.S. § 7A-31 (COA17-896)	Denied
189P18	State v. Kurt Allen Corey	1. State's Motion for Temporary Stay (COA17-1031) 2. State's Petition for *Writ of Supersedeas* 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/22/2018** 2. Allowed 3. Allowed
190P18	State v. Lee-Jamil Ke'Ruan Miller	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1049)	*Ex mero motu*, treated as PWC and denied
192P18	Russell Walker v. Hoke County, Fifth Third Bank, Inc., and Tyton NC Biofuels, LLC	1. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-341) 2. Plt's *Pro Se* Motion to Proceed *In Forma Pauperis*	1. Denied 2. Allowed
201PA12-5	Dickson, et al. v. Rucho, et al.	Plts' Motion to Dismiss Appeal	Denied
201P18	State v. James Leon Rucker, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA17-809)	Denied
203P18	State v. Dexter Leon Surratt	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-1285) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal 4. State's Motion to Deem Response to PDR Timely Filed	1. — 2. Denied 3. Allowed 4. Allowed
205P18	State v. Alquan De'Shawn Hill	Def's PDR Under N.C.G.S. § 7A-31 (COA17-993)	Denied

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

20 SEPTEMBER 2018

206A18	State v. Galen Lee Smith	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-1116) 2. State's Motion to Dismiss Appeal 3. Def's Motion to Amend Notice of Appeal	1. — 2. Allowed 3. Allowed
208P18	State v. Kevin Jonathan Mitchell	Def's PDR Under N.C.G.S. § 7A-31 (COA17-212)	Denied
209P18	State v. Laris Sutton	Def's PDR Under N.C.G.S. § 7A-31 (COA17-35)	Denied
212P18	City of Hickory v. Willie James Grimes, National Casualty Company, Travelers Indemnity Company, North Carolina Insurance Guaranty Association, Argonaut Great Central Insurance Company, Twin City Fire Insurance Company, and TIG Insurance Company	Def's (Argonaut Great Central Insurance Company) PDR Under N.C.G.S. § 7A-31 (COA17-441)	Denied
215P18	State v. James Charles	Def's PDR Under N.C.G.S. § 7A-31 (COA17-937)	Denied
217P18	State v. Edwin Christopher Lawing	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-231) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
221P18	State v. Michael Eugene Bowden	1. Def's *Pro Se* Motion for Notice of Appeal (COAP18-394) 2. Def's *Pro Se* Motion for PDR	1. Dismissed 2. Dismissed **Hudson, J., recused** **Jackson, J., recused**
224P18	State v. Damien Markese Pruitt	Def's PDR Under N.C.G.S. § 7A-31 (COA17-883)	Denied

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

20 SEPTEMBER 2018

225P18	State v. Brandon Marquis Cozart	1. Def's *Pro Se* Notice of Appeal Based Upon a Constitutional Question (COA17-535) 2. Def's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied
233P18	State v. Kion Tyearl Dail	PDR Under N.C.G.S. § 7A-31 (COA17-294)	Denied
234P18	State v. Gambit C. Shreve	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA 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
237P18	State v. Aaron Ross Taylor	1. Def's Motion for Temporary Stay (COA17-730) 2. Def's Petition for *Writ of Supersedeas* 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/02/2018** Dissolved **09/20/2018** 2. Denied 3. Denied
238A18	In the Matter of T.T.E.	1. State's Motion for Temporary Stay 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **08/02/2018** 2. Allowed **09/04/2018** 3. ---
243P18	State v. Ronald Lin Murray	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Carteret 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
248A18	Sykes, et al. v. Blue Cross and Blue Shield of N.C., et al.	Joint Motion to Stay All Briefing	Dismissed as moot

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

20 SEPTEMBER 2018

251P18	Susan Sykes d/b/a Advanced Chiropractic and Health Center; Dawn Patrick; Troy Lynn; Lifeworks on Lake Norman, PLLC; Brent Bost; and Bost Chiropractic Clinic, PA v. Health Network Solutions, Inc. f/k/a Chiropractic Network of the Carolinas, Inc.; Michael Binder; Steven Binder, Robert Stroud, Jr.; Larry Grosman; Matthew Schmid; Ralph Ransone; Jeffrey K. Baldwin; Ira Rubin; Richard Armstrong; Brad Batchelor; John Smith; Rick Jackson; and Mark Hooper	Defs' PDR Prior to a Determination of COA	Allowed
253P18	State v. Webster Waller	Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of COA (COAP18-201)	Dismissed
256P18	Nathaniel R. Webb v. Donnie Harrison; Wake County Jail; Attorney General for North Carolina	Petitioner's *Pro Se* Petition for *Writ of Habeas Corpus*	Dismissed **08/20/2018**
257P18	State v. Sydney Shakur Mercer	1. State's Motion for Temporary Stay (COA17-1279) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **08/21/2018** 2.
261P18	NC NAACP v. Moore, et al.	Plt's Petition for *Writ of Supersedeas*	Denied **09/04/2018**
264P18	In the Matter of B.O.A.	1. Petitioner's Motion for Temporary Stay (COA18-7) 2. Petitioner's Petition for *Writ of Supersedeas* 3. Petitioner's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/23/2018** 2. 3.

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

20 SEPTEMBER 2018

265P18	State v. Shenondoah Perry and Earl Lamont Powell	1. State's Motion for Temporary Stay (COA17-714) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **08/22/2018** 2.
266P18	State v. Charles Antonio Means	Def's *Pro Se* Petition for *Writ of Habeas Corpus*	Dismissed **08/23/2018**
268P18	State v. Marvin Louis Miller, Jr.	1. State's Motion for Temporary Stay (COA17-1215) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **08/23/2018** 2.
269P18	Rebecca Anne Edwards, Plaintiff v. The Bipartisan State Board of Elections and Ethics Enforcement; Kim Westbrook Strach, in her Official Capacity as Executive Director of the Bipartisan State Board of Elections and Ethics Enforcement, and the State of North Carolina, Defendants and Philip E. Berger, in his Official Capacity as President Pro Tempore of the Senate; and Timothy K. Moore, in his Official Capacity as Speaker of the House, Intervenors	1. Plt's PDR Prior to a Determination of COA (COAP18-587) 2. Intervenors' (Berger and Moore) Conditional PDR	1. Dismissed as moot 2. Dismissed as moot **Jackson, J., recused** **Ervin, J., recused**
270A18	State v. Thomas Earl Griffin	1. State's Motion for Temporary Stay (COA17-386) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **08/24/2018** 2.
271A18	State *ex rel.* Utilities Commission v. Attorney General	Joint Motion to Hold Case in Abeyance	Allowed **09/12/2018**

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

20 SEPTEMBER 2018

272P18	Christopher J. Anglin v. Philip E. Berger, in his Official Capacity as President Pro Tempore of the North Carolina State Senate; Timothy K. Moore, in his Official Capacity as Speaker of the North Carolina House of Representatives, the State of North Carolina; the North Carolina Bipartisan State Board of Elections and Ethics Enforcement; and Kimberly W. Strach, in her Official Capacity as Executive Director of the North Carolina Bipartisan State Board of Elections and Ethics Enforcement	1. Plt's PDR Prior to Determination of COA (COAP18-586) 2. Defs' (Berger and Moore) Conditional PDR	1. Dismissed as moot 2. Dismissed as moot **Jackson, J., recused**
273P18	State v. Gregory Charles Baskins	1. State's Motion for Temporary Stay (COA17-1327) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **08/27/2018** 2.
274A18	State v. Duval Lamont Bowman	1. State's Motion for Temporary Stay (COA17-657) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **08/27/2018** 2.
275P18	State v. Theola Antonio Saunders	1. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Bertie County 2. Def's *Pro Se* Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
277P18	State v. Gabriel Adrian Ferrari	1. Def's *Pro Se* Motion for Notice of Appeal (COA98-724) 2. Def's *Pro Se* Motion for Certiorari	1. Dismissed 2. Dismissed
280P18	State v. Nashone L. Wiggins	Def's *Pro Se* Motion for Appropriate Relief	Denied **08/30/2018**

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

20 SEPTEMBER 2018

282P18	State v. Christopher Jamme Whitfield and State v. Corey Levi Banner	1. State's Motion for Temporary Stay (COA17-184) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **08/31/2018** 2.
288P18	State v. Edward M. Alonzo	1. Def's Application for Temporary Stay (COA17-1186) 2. Def's Petition for *Writ of Supersedeas*	1. Allowed **09/07/2018** 2.
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 **12/07/2017** 3. — 4. Allowed **12/07/2017** 5. Dismissed as moot 6. Allowed **12/07/2017**
295P18	State v. Charles Ward Ayers	1. State's Motion for Temporary Stay (COA17-725) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **09/12/2018** 2.
301A18	State v. Aaron Kenard Westbrook	1. State's Motion for Temporary Stay (COA18-32) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **09/13/2018** 2. Allowed **09/13/2018** 3. —
302A18	State v. Michelle Smith White	1. State's Motion for Temporary Stay (COA18-39) 2. State's Petition for *Writ of Supersedeas* 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **09/13/2018** 2. Allowed **09/13/2018** 3. —

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

20 SEPTEMBER 2018

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* 4. Def's *Pro Se* Petition for *Writ of Certiorari* to Review Order of Superior Court, Yancey County 5. Def's *Pro Se* Supplemental Petition for *Writ of Certiorari* to Review Order of Superior Court, Yancey County 6. Def's *Pro Se* Supplemental Petition for *Writ of Certiorari* to Review Order of Superior Court, Yancey County 7. Def's Supplemental Petition for *Writ of Certiorari*	1. Special Order 2. Special Order 3. Denied **12/27/2017** 4. Special Order 5. Special Order 6. Special Order 7. Special Order
305P18	State v. Fred Dravis	1. State's Motion for Temporary Stay (COA18-76) 2. State's Petition for *Writ of Supersedeas*	1. Allowed **09/13/2018** 2.
309P18	State v. Douglas W. Standard	1. Def's *Pro Se* Motion for Trial by Jury 2. Def's *Pro Se* Motion for Change of Venue 3. Def's *Pro Se* Motion to Stay the Judgment	1. Denied **09/20/2018** 2. Denied **09/20/2018** 3. Denied **09/20/2018**
330A17	State v. John H. Sayre	State's Motion to Take Judicial Notice of Court Records	Dismissed as moot
341P12-7	State v. Donald Durrant Farrow	Def's *Pro Se* Motion to Amend Petition for *Writ of Mandamus*	Dismissed as moot **Ervin, J., recused**
368P12-5	Sherif A. Philips, M.D. v. Pitt County Memorial Hospital, Inc., Paul Bolin, M.D. and Ralph Whatley, M.D., Sanjay Patel, M.D. and Cynthia Brown, M.D.	1. Plt's *Pro Se* Notice of Appeal Based Upon a Constitutional Question 2. Plt's *Pro Se* PDR Under N.C.G.S. § 7A-31	1. Dismissed 2. Dismissed

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

20 SEPTEMBER 2018

376P17	Jennifer Cleland Green v. Stanley Boyd Green	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA16-1102) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
379P12-2	James and Lara Barnhill v. Richard W. Farrell and The Farrell Law Group, PC	Defs' *Pro Se* PDR Under N.C.G.S. § 7A-31 (COA17-402)	Denied
390P12-2	State v. Todd Joseph Martin	1. Def's Petition for *Writ of Certiorari* to Review Order of Superior Court, Carteret County 2. Def's Motion for Appendices to Petition for *Writ of Certiorari* to be Filed Under Seal	1. Dismissed 2. Dismissed as moot
405PA17	State v. J.C.	State's Motion to Deem Brief Timely Filed	Allowed **09/20/2018**
433A17	Eugene K. Ehmann, N. William Shiffli, Jr., and Thad A. Throneburg v. Medflow, Inc.; Greg E. Lindberg; Eli Global, LLC; Eli Research, LLC; Eli Equity, LLC; SNA Capital, LLC; Southland National Holdings, LLC; Southland National Insurance Corporation; DJRTC, LLC; and Medflow Holdings, LLC	Defs' Motion for Monetary Damages Caused by Frivolous Appeal	Denied **Jackson, J., recused**
449P11-20	Charles Everette Hinton v. State of North Carolina, et al.	1. Plt's *Pro Se* Motion for Class Action Third-Party Claim 2. Plt's *Pro Se* Motion for Demand for Trial by Jury 3. Plt's *Pro Se* Motion for Inquiry into Restraints on Liberty and Privileges of the *Writ of Habeas Corpus* 4. Plt's *Pro Se* Motion to Intervene in Class Action Third-Party Claim	1. Denied **09/11/2018** 2. Denied **09/11/2018** 3. Denied **09/11/2018** 4. Denied **09/11/2018**

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ADMINISTRATION OF THE STATE BAR

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 27, 2018.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning its organization, as particularly set forth in 27 N.C.A.C. 1A, Section .0400, be amended by adding the following new provisions in lieu of the former rule.

27 N.C.A.C. 1A, Section .0400, Organization of the North Carolina State Bar

.0406 Vacancies and Succession [NEW RULE]

(a) Succession Upon Mid-term Vacancy in Office. Officer vacancies shall be filled as follows:

(1) A vacancy in the office of president shall be filled by the president-elect, who shall serve as president for the unexpired term and for the next term.

(2) A vacancy in the office of president-elect shall be filled by the vice-president, who shall serve as president-elect for the unexpired term. At the end of the unexpired term, the office of president-elect will become vacant and the council shall elect a president-elect in accordance with Rule .0404 of this subchapter. A former vice-president who served an unexpired term as president-elect pursuant to this subsection will be eligible to stand for election as president-elect.

(3) The council shall elect a person to fill the unexpired term created by any vacancy in the office of vice-president or secretary. The election shall occur at a special meeting of the council or at the next regularly scheduled meeting of the council.

(4) If there is a vacancy in the office of president or president-elect and there is no available successor under these provisions, the council shall elect a person to fill the unexpired term created by such vacancy. The election shall occur at a special meeting of the council or at the next regularly scheduled meeting of the council.

(b) Temporary Inability to Preside at Meetings. If the president is absent or is otherwise unable to preside at any meeting of the North

Carolina State Bar or the council, the president-elect shall preside. If the president-elect is absent or is otherwise unable to preside, then the vice-president shall preside. If none of the president, president-elect, or vice-president are present and able to preside, then the council shall elect a member to preside during the meeting.

(c) Temporary Inability to Perform Duties. If the president is absent or is otherwise temporarily unable to perform the duties of office, the president-elect shall perform those duties until the president returns or becomes able to resume the duties. If the president-elect is absent or is otherwise temporarily unable to perform the duties of the president, then the council shall select one of its members to perform those duties for the period of the president's absence or inability.

(d) Temporary Inability of Secretary to Perform Duties. If the secretary is absent or is otherwise temporarily unable to perform the duties of office, the assistant director and director for management, finance, and communications shall perform those duties until the secretary returns or becomes able to resume the duties. If the assistant director and director for management, finance, and communications is absent or is otherwise unable to perform those duties, the counsel of the State Bar shall perform those duties until the secretary returns or becomes able to resume the duties. If neither the assistant director and director for management, finance, and communications nor the counsel are able to perform those duties, then the president may select a member of the State Bar staff to perform those duties for the period of the secretary's absence or inability.

~~(a) If the office of president becomes vacant for any reason, including resignation, death, disqualification, or permanent inability, the president-elect shall become president for the unexpired term and the next term. If the office of the president-elect becomes vacant because the president-elect must assume the presidency under the foregoing provision of this section, then the vice-president shall become the president-elect for the unexpired term and at the end of the unexpired term to which the vice-president ascended the office will become vacant and an election held in accordance with Rule .0304 of this subchapter; if the office of president-elect becomes vacant for any other reason, the vice-president shall become the president-elect for the unexpired term following which said officer shall assume the presidency as if elected president-elect. If the office of vice-president or secretary becomes vacant for any reason, including resignation, death, disqualification, or permanent inability, or if the office of president or president-elect becomes vacant without an available successor under these provisions then the office will be filled by election by the council at a special meeting of the council with such~~

~~notice as required by Rule .0602 of this subchapter or at the next regularly scheduled meeting of the council.~~

~~(b) If the president is absent or unable to preside at any meeting of the North Carolina State Bar or the council, the president-elect shall preside, or if the president-elect is unavailable, then the vice-president shall preside. If none are available, then the council shall elect a member to preside during the meeting.~~

~~(c) If the president is absent from the state or for any reason is temporarily unable to perform the duties of office, the president-elect shall assume those duties until the president returns or becomes able to resume the duties. If the president-elect is unable to perform the duties, then the council may select one of its members to assume the duties for the period of inability.~~

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 and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 27, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 12th day of September, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted 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 20th day of September, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

NORTH CAROLINA STATE BAR

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of September, 2018.

s/Morgan, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ADMINISTRATION OF THE STATE BAR

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 27, 2018.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning its organization, as particularly set forth in 27 N.C.A.C. 1A, Section .1400, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .1400, Rulemaking Procedures

.1401 Publication for Comment

(a) As a condition precedent to adoption, a proposed rule or amendment to a rule must be published for comment as provided in subsection (c).

(b) A proposed rule or amendment to a rule must be presented to the Executive Committee and the council prior to publication for comment, and specifically approved for publication by both.

(c) A proposed rule or amendment to a rule must be published for comment in an official printed or digital publication of the North Carolina State Bar that is mailed or emailed to the membership at least 30 days in advance of its final consideration by the council. The publication of any such proposal must be accompanied by a prominent statement inviting all interested parties to submit comment to the North Carolina State Bar at a specified postal or e-mail address prior to the next meeting of the Executive Committee, the date of which shall be set forth.

NORTH CAROLINA STATE BAR

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 and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 27, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 10th day of September, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted 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 20th day of September, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of September, 2018.

s/Morgan, J.
For the Court

NORTH CAROLINA STATE BAR

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ADMINISTRATION OF THE STATE BAR

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 27, 2018.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning its organization, as particularly set forth in 27 N.C.A.C. 1A, Section .1400, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1A, Section .1400, Rulemaking Procedures

.1403 Action by the Council and Review by the North Carolina Supreme Court

(a) Whenever the Executive Committee recommends adoption of any proposed rule or amendment to a rule in accordance with the procedure set forth in Rule .1402 above, the council at its next regular business meeting shall consider the proposal, the Executive Committee's recommendation, and any comment received from interested parties, and:

(1) decide whether to adopt the proposed rule or amendment, subject to the approval of the North Carolina Supreme Court as described in G.S. 84-21;

(2) reject the proposed rule or amendment; or

(3) refer the matter back to the Executive Committee for reconsideration.

(b) Any proposed rule or amendment to a rule adopted by the council shall be transmitted by the secretary to the North Carolina Supreme Court for its review on a schedule approved by the Court, but in no event later than 120 days following the council's adoption of the proposed rule or amendment.

(c) ~~No~~ A proposed rule or amendment to a rule adopted by the council shall take effect ~~unless and until~~ when it is ~~approved by order~~ entered upon the minutes of the North Carolina Supreme Court.

(d) ...

NORTH CAROLINA STATE BAR

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 and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 27, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 10th day of September, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted 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 20th day of September, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of September, 2018.

s/Morgan, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING THE ADMINISTRATIVE COMMITTEE

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 20, 2018.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning the Administrative Committee, as particularly set forth in 27 N.C.A.C. 1D, Section .0900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee

.0902 Reinstatement from Inactive Status

(a) Eligibility to Apply for Reinstatement...

(c) Requirements for Reinstatement

(1) Completion of Petition ...

(2) CLE Requirements ~~for Calendar Year~~ Before Inactive
Unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter or is subject to the requirements in paragraph (c)(5) of this rule, the member must satisfy the minimum continuing legal education requirements, as set forth in Rule .1518 of this subchapter, for the calendar year ~~immediately preceding the calendar year~~ in which the member was transferred to inactive status (the "subject year") if such transfer occurred on or after July 1 of the subject year, including any deficit from a prior calendar year that was carried forward and recorded in the member's CLE record for the subject year.

(3) Character and Fitness to Practice ....

(d) Service of Reinstatement Petition ...

.0904 Reinstatement from Suspension

(a) Compliance Within 30 Days of Service of Suspension Order...

(d) Requirements for Reinstatement

(1) Completion of Petition...

(2) CLE Requirements ~~for Calendar Years~~ Before Suspended Unless the member was exempt from such requirements pursuant to Rule .1517 of this subchapter or is subject to the requirements in paragraph (d)(4) of this rule, the member must satisfy the minimum continuing legal education (CLE) requirements, as set forth in Rule .1518 of this subchapter, for the calendar year ~~immediately preceding the year~~ in which the member was suspended (the "subject year") if such transfer occurred on or after July 1 of the subject year, including any deficit from a prior year that was carried forward and recorded in the member's CLE record for the subject year. The member shall also sign and file any delinquent CLE annual report form.

(3) Additional CLE requirements….

(e) Procedure for Review of Reinstatement Petition ...

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 and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 20, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 10th day of September, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted 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 20th day of September, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

ADMINISTRATIVE COMMITTEE

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of September, 2018.

s/Morgan, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 20, 2018.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning continuing legal education, as particularly set forth in 27 N.C.A.C. 1D, Section .1500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1500, Rules Governing the Administration of the Continuing Legal Education Program

.1501 Scope, Purpose and Definitions

(a) ...

(c) Definitions:

(1) ...

(17) "Technology training" shall mean a program, or a segment of a program, devoted to education on information technology (IT) or cybersecurity (see N.C. Gen. Stat. §143B-1320(a)(11), or successor statutory provision, for a definition of "information technology"), including education on an information technology product, device, platform, application, or other tool, process, or methodology. To be eligible for CLE accreditation as a technology training program, the program must satisfy the accreditation standards in Rule .1519 of this subchapter: specifically, the primary objective of the program must be to increase the participant's professional competence and proficiency as a lawyer. Such programs include, but are not limited to, education on the following: a) an IT tool, process, or methodology designed to perform tasks that are specific or uniquely suited to the practice of law; b) using a generic IT tool process or methodology to increase the efficiency of performing tasks necessary to the practice of law; c) the investigation, collection, and introduction of social media evidence; d) e-discovery; e) electronic filing of legal documents; f) digital forensics for legal investigation or litigation; and g) practice management software. See Rule .1602 of this subchapter for additional information on accreditation of technology training programs.

(18) ~~(17)~~ ...

.1518 Continuing Legal Education Program

(a) Annual Requirement. Each active member subject to these rules shall complete 12 hours of approved continuing legal education during each calendar year beginning January 1, 1988, as provided by these rules and the regulations adopted thereunder.

Of the 12 hours:

(1) at least 2 hours shall be devoted to the areas of professional responsibility or professionalism or any combination thereof; ~~and~~

(2) at least 1 hour shall be devoted to technology training as defined in Rule .1501(c)(17) of this subchapter and further explained in Rule .1602(e) of this subchapter; and

(3) ~~(2)~~ effective January 1, 2002, at least once every three calendar years, each member shall complete an hour of continuing legal education instruction on substance abuse and debilitating mental conditions as defined in Rule .1602 (a). This hour shall be credited to the annual 12-hour requirement but shall be in addition to the annual professional responsibility/professionalism requirement. To satisfy the requirement, a member must attend an accredited program on substance abuse and debilitating mental conditions that is at least one hour long.

(b) Carryover ...

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 and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 20, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 10th day of September, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted 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 20th day of September, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of September, 2018.

s/Morgan, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 20, 2018.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning continuing legal education, as particularly set forth in 27 N.C.A.C. 1D, Section .1500, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1500, Rules Governing the Administration of the Continuing Legal Education Program

.1522 Annual Report and Compliance Period

CONTINUING LEGAL EDUCATION

(a) Annual Written Report. Commencing in 1989, each active member of the North Carolina State Bar shall provide an annual written report to the North Carolina State Bar in such form as the board shall prescribe by regulation concerning compliance with the continuing legal education program for the preceding year or declaring an exemption under Rule .1517 of this subchapter. The annual report form shall be corrected, if necessary, signed by the member, and promptly returned to the State Bar via mail or online filing. Upon receipt via mail or online filing of a signed annual report form, appropriate adjustments shall be made to the member's continuing legal education record with the State Bar...

(b) Compliance Period ...

(c) Report. Prior to January 31 of each year, the prescribed report form concerning compliance with the continuing legal education program for the preceding year shall be available on the State Bar's CLE website and a notice of its posting shall be mailed or emailed to all active members of the North Carolina State Bar.

(d) Late Filing Penalty ...

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 and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 20, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 10th day of September, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted 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 20th day of September, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of September, 2018.

s/Morgan, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CONTINUING LEGAL EDUCATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 20, 2018.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning continuing legal education, as particularly set forth in 27 N.C.A.C. 1D, Section .1600, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .1600, Regulations Governing the Administration of the Continuing Legal Education Program

.1602 Course Content Requirements

(a) ...

(c) Law Practice Management ~~Courses~~ Programs - A CLE accredited ~~course~~ program on law practice management must satisfy the accreditation standards set forth in Rule .1519 of this subchapter with the primary objective of increasing the participant's professional competence and proficiency as a lawyer. The subject matter presented in an accredited ~~course~~ program on law practice management shall bear a direct relationship to either substantive legal issues in managing a law practice or a lawyer's professional responsibilities, including avoidance of conflicts of interest, protecting confidential client information, supervising

subordinate lawyers and nonlawyers, fee arrangements, managing a trust account, ethical legal advertising, and malpractice avoidance. The following are illustrative, non-exclusive examples of subject matter that may earn CLE credit: employment law relating to lawyers and law practice; business law relating to the formation and operation of a law firm; calendars, dockets and tickler systems; conflict screening and avoidance systems; law office disaster planning; handling of client files; communicating with clients; and trust accounting. If appropriate, a law practice management ~~course~~ program may qualify for professional responsibility (ethics) CLE credit. The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit: marketing; networking/rainmaking; client cultivation; increasing productivity; developing a business plan; improving the profitability of a law practice; selling a law practice; and purchasing office equipment (including computer and accounting systems).

(d) Skills and Training ~~Courses~~ Programs - A ~~course~~ program that teaches a skill specific to the practice of law may be accredited for CLE if it satisfies the accreditation standards set forth in Rule .1519 of this subchapter with the primary objective of increasing the participant's professional competence and proficiency as a lawyer. The following are illustrative, non-exclusive examples of subject matter that may earn CLE credit: legal writing; oral argument; courtroom presentation; and legal research. A ~~course~~ program that provides general instruction in non-legal skills shall NOT be accredited. The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit: learning to use software for an application that is not specific to the practice of law (e.g. word processing); learning to use office equipment (except as permitted by paragraph (e) of this rule); public speaking; speed reading; efficiency training; personal money management or investing; career building; marketing; and general office management techniques.

(e) Technology Training ~~Courses~~ Programs – ~~A course on a specific information technology product, device, platform, application, or other technology solution (IT solution) may be accredited for CLE if the course satisfies the accreditation standards in Rule .1519 of this subchapter; specifically, the primary objective of the course must be to increase the participant's professional competence and proficiency as a lawyer. The following are illustrative, non-exclusive examples of courses that may earn CLE credit: electronic discovery software for litigation; document automation/assembly software; document management software; practice management software; digital forensics for litigation; and digital security.~~ A ~~course~~ program on the selection of an ~~IT solution~~ information technology (IT) product, device, platform, application, web-based

technology, or other technology tool, process, or methodology, or the use of an IT ~~solution~~ tool, process, or methodology to enhance a lawyer's proficiency as a lawyer or to improve law office management may be accredited as technology training if the requirements of paragraphs (c) and (d) of this rule are satisfied. A ~~course~~ program that provides general instruction on an IT ~~solution~~ tool, process, or methodology but does not include instruction on the practical application of the IT ~~solution~~ tool, process, or methodology to the practice of law shall not be accredited. The following are illustrative, non-exclusive examples of subject matter that will NOT receive CLE credit: generic education on how to use a tablet computer, laptop computer, or smart phone; training courses on Microsoft Office, Excel, Access, Word, Adobe, etc., programs; and instruction in the use of a particular desktop or mobile operating system. No credit will be given to a ~~course~~ program that is sponsored by a manufacturer, distributor, broker, or merchandiser of ~~the~~ an IT ~~solution~~ tool, process, or methodology unless the course is solely about using the IT ~~solution~~ tool, process, or methodology to perform tasks necessary or uniquely suited to the practice of law and information about purchase arrangements is not included in the accredited segment of the program. A sponsor may not accept compensation from a manufacturer, distributor, broker, or merchandiser of an IT ~~solution~~ tool, process, or methodology in return for presenting a CLE program about ~~the~~ an IT ~~solution~~ tool, process, or methodology. ~~Presenters may include representatives of a manufacturer, distributor, broker, or merchandiser of the IT solution but they may not be the only presenters at the course and they may not determine the content of the course.~~

(f) ...

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 and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 20, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 10th day of September, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted 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 20th day of September, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of September, 2018.

s/Morgan, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING LEGAL SPECIALIZATION

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 27, 2018.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning legal specialization, as particularly set forth in 27 N.C.A.C. 1D, Section .2900, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1D, Section .2900, Certification Standards for the Elder Law Specialty

.2905 Standards for Certification as a Specialist in Elder Law

Each applicant for certification as a specialist in elder law shall meet the minimum standards set forth in Rule .1720 of this subchapter. In addition, each applicant shall meet the following standards for certification in elder law:

(a) Licensure and Practice...

(c) Substantial Involvement Experience Requirements - In addition to the showing required by Rule .2905(b), an applicant shall show substantial involvement in elder law by providing information regarding the applicant's participation, during the five years immediately preceding the date of the application, in at least sixty (60) elder law matters in the categories set forth in Rule .2905(c)(3) below...

(3) Experience Categories:

(A) health and personal care planning including giving advice regarding, and preparing, advance medical directives (medical powers of attorney, living wills, and health care declarations) and counseling older persons, attorneys-in-fact, and families about medical and life-sustaining choices, and related personal life choices.

(B) pre-mortem legal planning including giving advice and preparing documents regarding wills, trusts, durable general or financial powers of attorney, real estate, gifting, and the financial and tax implications of any proposed action.

(C) fiduciary representation including seeking the appointment of, giving advice to, representing, or serving as executor, personal representative, attorney-in-fact, trustee, guardian, conservator, representative payee, or other formal or informal fiduciary.

(D) legal capacity counseling including advising how capacity is determined and the level of capacity required for various legal activities, and representing those who are or may be the subject of guardianship/conservatorship proceedings or other protective arrangements.

(E) public benefits advice including planning for and assisting in obtaining Medicaid, supplemental security income, and veterans benefits.

(F) special needs counseling, including the planning, drafting, and administration of special/supplemental needs trusts, housing, employment, education, and related issues.

(G) advice on insurance matters including analyzing and explaining the types of insurance available, such as health, life, long term care, home care, COBRA, medigap, long term disability, dread disease, and burial/funeral policies.

(H) resident rights advocacy including advising patients and residents of hospitals, nursing facilities, continuing care retirement communities, assisted living facilities, adult care facilities, and those cared for in their homes of their rights and appropriate remedies in matters such as admission, transfer and discharge policies, quality of care, and related issues.

(I) housing counseling including reviewing the options available and the financing of those options such as: mortgage alternatives, renovation loan programs, life care contracts, and home equity conversion.

(J) employment and retirement advice including pensions, retiree health benefits, unemployment benefits, and other benefits.

(K) counseling with regard to age and/or disability discrimination in employment and housing.

(L) litigation and administrative advocacy in connection with any of the above matters, including will contests, contested capacity issues, elder abuse (including financial or consumer fraud), fiduciary administration, public benefits, nursing home torts, and discrimination.

(d) Continuing Legal Education - An applicant must earn forty-five (45) hours of accredited continuing legal education (CLE) ~~credits~~ in elder law ~~and related fields, as specified in this rule~~, during the three full calendar years preceding application and the year of application, with not less than nine (9) credits earned in any of the three calendar years. ~~Of the 45 CLE credits, at least ten (10) credits must be earned attending elder law–specific CLE programs.~~ Elder law CLE is any accredited program on a subject identified in the experience categories described in subparagraph (c)(3) of this rule. ~~Related fields shall include the following: estate planning and administration, trust law, health and long-term care planning, public benefits, veterans' benefits, surrogate decision-making, older persons' legal capacity, social security disability, Medicaid/Medicare claims, special needs planning, and taxation. No more than twenty (20) credits may be earned in the related fields of estate taxation or estate administration.~~

(e) Peer Review - ...

.2906 Standards for Continued Certification as a Specialist in Elder Law

The period of certification is five years. Prior to the expiration of the certification period, a certified specialist who desires continued certification must apply for continued certification within the time limit described in Rule .2906(d) below. No examination will be required for continued certification. However, each applicant for continued certification as a specialist shall comply with the specific requirements set forth below in addition to any general standards required by the board of all applicants for continued certification.

(a) Substantial Involvement - ...

(b) Continuing Legal Education - The specialist must earn seventy-five (75) hours of accredited continuing legal education (CLE) credits in elder law ~~or related fields~~ during the five calendar years preceding application, with not less than ten (10) credits earned in any calendar year. Elder law CLE is any accredited program on a subject identified in the experience categories described in Rule .2905(c)(3) of this subchapter. ~~Related fields shall include the following: estate planning and administration, trust law, health and long term care planning, public benefits, surrogate decision-making, older persons' legal capacity, social security disability, Medicaid/Medicare claims and taxation. No more than forty (40) credits may be earned in the related fields of estate taxation or estate administration.~~

(c) Peer Review - ….

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 and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 27, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 10th day of September, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted 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 20th day of September, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of September, 2018.

s/Morgan, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CERTIFICATION OF PARALEGALS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 20, 2018.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning certification of paralegals, as particularly set forth in 27 N.C.A.C. 1G, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1G, Section .0100, The Plan for Certification of Paralegals

.0118 Certification Committee

(a) The board shall establish a separate certification committee. The certification committee shall be composed of seven members appointed by the board~~, one of whom shall be designated annually by the chairperson of the board as chairperson of the certification committee~~. At least two members of the committee shall be lawyers, licensed and currently in good standing to practice law in this state, and two members of the committee shall be certified paralegals. The remaining members of the committee shall be either lawyers, licensed and currently in good standing to practice law in this state, or certified paralegals. The paralegals appointed to the inaugural committee shall be exempt from the certification requirement during their initial term but each such member shall be eligible, during the shorter of such initial term or the alternative qualification period, for certification by the board upon the board's determination that the committee member meets the requirements for certification in Rule .0119(b).

(b) The chair of the Board of Paralegal Certification shall appoint one member of the committee to serve for a one-year term as chair of the committee and one member of the committee to serve for a one-year term as vice chair of the committee. The chair and vice chair may be reappointed to multiple terms in these positions.

~~(b)~~ (c) Members shall hold office for three years, except those members initially appointed who shall serve as hereinafter designated...

~~(c)~~ (d) ...

CERTIFICATION OF PARALEGALS

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 and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly scheduled meeting on April 20, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 10th day of September, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted 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 20th day of September, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of September, 2018.

s/Morgan, J.
For the Court

AMENDMENTS TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR CONCERNING CERTIFICATION OF PARALEGALS

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on April 20, 2018.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar concerning Certification of Paralegals, as particularly set forth in 27 N.C.A.C. 1G, Section .0100, be amended as follows (additions are underlined, deletions are interlined):

27 N.C.A.C. 1G, Section .0100, The Plan for Certification of Paralegals

.0122 Right to Review and Appeal to Council

(a) Lapsed Certification ...

~~(c) Failure of Written Examination. Within 30 days of the mailing of the notice from the board's executive director that an individual has failed the written examination, the individual may review his or her examination upon the condition that the individual will not take the examination again until such time as the entire content of the examination has been replaced. Review of the examination shall be at the office of the board at a time designated by the executive director. The individual shall be allowed not more than three hours for such review and shall not remove the examination from the board's office or make photocopies of any part of the examination.~~

> ~~(1) Request for Review by the Board. Within 30 days of individual's review of his or her examination, the individual may request review by the board pursuant to the procedures set forth in paragraph (c) of this rule. The request should set out in detail the area or areas which, in the opinion of the individual, have been incorrectly graded. Supporting information may be filed to substantiate the individual's claim.~~

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

and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on April 20, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 12th day of September, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted 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 20th day of September, 2018.

s/Mark Martin
Mark D. Martin, Chief Justice

On this date, the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

s/Morgan, J.
For the Court

AMENDMENT TO THE RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

The following amendment to the Rules Governing Admission to the Practice of Law was duly approved by the Council of the North Carolina State Bar at its quarterly meeting on April 20, 2018.

BE IT RESOLVED by the Council of the North Carolina State Bar that the amendment to Section .0500 of the Rules Governing Admission to the Practice of Law proposed by the North Carolina Board of Law Examiners be approved as follows (additions are underlined, deletions are interlined):

Section .0500 Requirements for Applicants

.0501 Rules Governing Admission to the Practice of Law in North Carolina

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 at the time the license is issued;

(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 formal application as a general applicant in accordance with Section .0400 of this Chapter;

(5) pass the written bar examination 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 taken and passed the Multistate Professional Responsibility Examination within the twenty-four (24) month period next preceding the beginning day of the written bar examination which applicant passes as prescribed 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 service member as defined in the 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 service member's commanding officer stating that the service member's current military duty prevents attendance for the examination, stating that military leave is not authorized for the service member at the time of the letter, and stating when the service member would be authorized military leave to take the examination.

(7) 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 ending 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~~.~~, within the twenty-four (24) month period next preceding the beginning day of the written bar examination which applicant passes as prescribed above, or 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 service member as defined in the 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 service member's commanding officer stating that the service member's current military duty prevents the service member from completing the State-Specific Component within the 24 month period next preceding the beginning day of the written bar examination which applicant passes as prescribed above, or within the 12 month period thereafter.

ADMISSION TO THE PRACTICE OF LAW

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules Governing Admission to the Practice of Law was duly approved by the Council of the North Carolina State Bar on April 20, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 12th day of September, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendment to the Rules Governing Admission to the Practice of Law as approved by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 20th day of September, 2018.

s/Mark Martin
Mark D. Martin Chief Justice

On this date, the foregoing amendment to the Rules Governing Admission to the Practice of Law was entered upon the minutes of the Supreme Court. The amendment shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of September, 2018.

s/Morgan, J.
For the Court

AMENDMENT TO THE RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

The following amendments to the Rules Governing Admission to the Practice of Law were duly approved by the Council of the North Carolina State Bar at its quarterly meeting on July 27, 2018.

BE IT RESOLVED by the Council of the North Carolina State Bar that the amendment to Section .0600 of the Rules Governing Admission to the Practice of Law proposed by the North Carolina Board of Law Examiners be approved as follows (additions are underlined, deletions are interlined):

Section .0600 Moral Character and General Fitness

.0604 – Bar Candidate Committee

Every General Applicant and Transfer A~~a~~pplicant shall appear before a bar candidate committee, appointed by 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.

NORTH CAROLINA
WAKE COUNTY

I, L. Thomas Lunsford, II, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules Governing Admission to the Practice of Law was duly approved by the Council of the North Carolina State Bar on July 27, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 11th day of September, 2018.

s/L. Thomas Lunsford, II
L. Thomas Lunsford, II, Secretary

After examining the foregoing amendment to the Rules Governing Admission to the Practice of Law as approved by the Council of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 20th day of September, 2018.

s/Mark Martin
Mark D. Martin Chief Justice

On this date, the foregoing amendment to the Rules Governing Admission to the Practice of Law was entered upon the minutes of the Supreme Court. The amendment shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of September, 2018.

s/Morgan, J.
For the Court

AMENDMENTS TO THE RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

The following amendments to the Rules Governing Admission to the Practice of Law were duly approved by the Council of the North Carolina State Bar at its quarterly meeting on July 27, 2018.

BE IT RESOLVED by the Council of the North Carolina State Bar that the amendments to Section .1200 of the Rules Governing Admission to the Practice of Law proposed by the North Carolina Board of Law Examiners be approved as follows (additions are underlined, deletions are interlined):

.1201 Nature of Hearings

(1) Any 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~~ All comity~~,~~ and military spouse comity~~, or transfer~~ applicants shall appear before the Board or a Panel, either in person or by electronic means as directed by the Board, to satisfy the Board that he or she has met all the requirements of Rule .0502~~,~~ or Rule .0503 ~~or Rule.0504~~.

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 were duly approved by the Council of the North Carolina State Bar on July 27, 2018.

Given over my hand and the Seal of the North Carolina State Bar, this the 11th day of September, 2018.

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 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 20th day of September, 2018.

s/Mark Martin
Mark D. Martin Chief Justice

On this date, the foregoing amendments to the Rules Governing Admission to the Practice of Law were entered upon the minutes of the Supreme Court. The amendments shall be published in the forthcoming volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 20th day of September, 2018.

s/Morgan, J.
For the Court

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