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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

OCTOBER 19, 2026

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OF
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SUPREME COURT OF NORTH CAROLINA

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FILED 14 AUGUST 2026 (FIRST HALF)

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Joinder—Rule 19—failure to join—subject matter jurisdiction not implicated—In a matter involving the question of whether Civil Procedure Rule 19 requires a revocable trust to be joined in an equitable distribution matter, the Supreme Court reiterated that any failure to join a necessary party pursuant to Rule

19 does not result in a lack of subject matter jurisdiction over the proceeding. While a Rule 19 challenge may be deemed waived—unlike a challenge to subject matter jurisdiction—the appellate court declined to deem the joinder issue waived in this instance despite defendant's failure to raise it at his first opportunity, in order to identify the property subject to distribution. **Face v. Face, 1.**

CONSTITUTIONAL LAW

Effective assistance of counsel—admission of defendant's guilt without consent—Harbison per se prejudice rule—narrowed—In a prosecution on charges including second-degree murder and felony hit and run, brought after defendant walked away from the fatal collision of his vehicle with a motorcycle carrying a married couple—where defendant had admitted that he was driving the vehicle and that people were killed in the crash, and he pled guilty to driving while license revoked—defendant did not receive ineffective assistance when his counsel conceded his guilt to the lesser-included offenses of misdemeanor death by vehicle and misdemeanor hit and run without defendant's consent. The expansive per se rule established in *State v. Harbison*, 315 N.C. 175 (1985)—that a per se violation of the Sixth Amendment is established in every case where counsel admits his client's guilt without the defendant's consent—was narrowed in light of the holding of *Florida v. Nixon*, 543 U.S. 175 (2004): that prejudice is presumed only where counsel entirely fails to function as a defendant's advocate, a criterion which can be, but is not always, met by unconsented-to concessions of guilt. Here, because defense counsel did not admit any elements of the charges for which defendant was convicted that defendant had not already conceded, defendant could not demonstrate prejudice. **State v. Farook, 84.**

North Carolina—colorable Corum claim—student assaulted by teacher—right to sound basic education—sufficiency of facts—In a civil action brought by a student against a teacher and the county school district arising from the teacher's physical assault of the student in a classroom, the trial court erred by granting the school board's Civil Procedure Rule 12(b)(6) motion to dismiss the student's constitutional claim, which she raised directly under the North Carolina Constitution pursuant to *Corum v. Univ. of N.C.*, 330 N.C. 761 (1992). The student alleged sufficient facts to support a colorable constitutional claim that the Board's actions after she was assaulted—including by first suspending her, and then by transferring her to another school without her input or consent—constituted deliberate indifference to the conduct of others that infringed on her right to a sound basic education and, further, the student lacked another adequate state law remedy. Therefore, the decision of the Court of Appeals upholding the trial court's order was reversed, and the matter was remanded for further proceedings. **K.H. v. Dixon, 13.**

DISCOVERY

Deposition—request for production of documents—timeliness of objections—misstatement of law—abuse of discretion—In a suit against two automotive companies (defendants), in which plaintiff, as administratrix of her son's estate, asserted that the faulty design of her son's vehicle contributed to his death by a post-collision fire, the trial court committed an error of law when it held that defendants failed to timely object to plaintiff's request for production of documents prior to a scheduled deposition. Defendants' separate objections—filed ten days and seven days, respectively, prior to the deposition—were made within the deadlines

DISCOVERY—Continued

set forth in Civil Procedure Rule 30(b)(5) (requiring that objections be served at least seven days prior to the taking of a deposition) and, despite plaintiff's request that objections be made earlier, one party cannot unilaterally impose tighter deadlines than those provided in the Rules of Civil Procedure. The trial court's misstatement of the deadline caused prejudicial harm because the court improperly waived defendants' objections to both the Rule 30(b)(5) notice and to plaintiff's other Rule 34 requests; therefore, the error constituted an abuse of discretion. The opinion of the Court of Appeals upholding this aspect of the trial court's order was reversed, and the matter was remanded with instructions to vacate the discovery order and for further proceedings. **Sessoms v. Toyota Motor Sales, U.S.A., Inc., 39.**

Deposition—scope of topics—preservation of objections—protective order not required—legal error—In a suit against two automotive companies (defendants), in which plaintiff, as administratrix of her son's estate, asserted that the faulty design of her son's vehicle contributed to his death by a post-collision fire, the trial court erred by holding that defendants' objections to the scope of deposition topics were waived or overruled for failure to seek a protective order to limit the scope of Civil Procedure Rule 30(b)(6) deposition topics. Pursuant to the Rules of Civil Procedure, defendants here preserved their objections to the deposition topics by serving them directly on plaintiff in advance of the deposition and were not required to seek a protective order. The decision of the Court of Appeals upholding this aspect of the trial court's order was reversed, and the matter was remanded with instructions to vacate the discovery order and for further proceedings. **Sessoms v. Toyota Motor Sales, U.S.A., Inc., 39.**

DIVORCE

Equitable distribution—personal goodwill—distinguished from enterprise goodwill—separate property—prospective—In an equitable distribution proceeding where the parties agreed on the division of all assets except the law firm started by plaintiff after the parties wed but before they separated (and where plaintiff was a sole practitioner), the Supreme Court for the first time distinguished enterprise goodwill from personal goodwill for equitable distribution purposes. Enterprise goodwill is marketable and stays with a professional practice, while personal goodwill is tied to, and thus goes with, the practitioner; accordingly, personal goodwill cannot qualify as marital property pursuant to N.C.G.S. § 50-20(a) because the statute assumes that all such property can be distributed. In addition, the Court emphasized that, because personal goodwill is prospective and concerns only future earnings, a trial court may still classify the income generated by a professional practice, even one with a sole practitioner, as marital property on the same basis as other "real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties" under N.C.G.S. § 50-20(b)(1b). **Sneed v. Johnston, 70.**

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Keeping or maintaining a vehicle for keeping or selling controlled substances—keeping versus selling—sufficiency of evidence—In a prosecution for keeping or maintaining a vehicle for keeping or selling controlled substances (N.C.G.S. § 90-108(a)(7)), the State failed to offer substantial evidence that defendant kept or maintained his vehicle for the keeping of controlled substances, an offense which applies to using a vehicle for the storage of illegal drugs. While a

DRUGS—Continued

defendant does not need to store drugs in a vehicle for any minimum time period, it is not sufficient for him to merely have drugs in a vehicle, since a keeping or maintaining a vehicle charge is distinct from a possession of controlled substances charge. Here, the totality of the circumstances failed to demonstrate storage: the drugs and drug paraphernalia at issue were in a bookbag—entirely self-contained and meant to facilitate transportation into and out of the vehicle—in the passenger compartment of the vehicle. However, the matter was remanded to the Court of Appeals for consideration of whether the State met its burden to prove that defendant used his vehicle to sell (rather than keep) controlled substances. **State v. Garmon, 116.**

INDICTMENT AND INFORMATION

Habitual felon indictment—filed prior to commission of principal felony and filing of indictment—not untimely—The Court of Appeals erred in allowing defendant's motion for appropriate relief, in which he argued that his habitual felon indictment was untimely because it was filed prior to the commission of the principal felony and, thus, prior to the filing of the indictment for the principal felony; the plain language of the Habitual Felon Act (specifically, N.C.G.S. § 14-7.3) did not prohibit this practice. A habitual felon indictment need only include: (1) the dates of the prior felony offenses; (2) the state of the prior felonies; (3) the dates on which defendant pled guilty to, or was convicted of, the prior felonies; and (4) the court where the convictions occurred—all requirements which relate to and depend on the prior felonies, not the principal felony. **State v. Garmon, 116.**

SEXUAL OFFENDERS

Sex offender registration—successive petitions to terminate—issue preclusion—tier level—law of the case—In a criminal case where defendant—who pleaded guilty to two counts of sexual activity by a substitute parent—filed three successive petitions for removal from the sex offender registry, the Court of Appeals properly affirmed the trial court's order denying his third petition on the ground that he was a Tier II offender under the Sex Offender Registration and Notification Act (SORNA) and, therefore, was ineligible to seek removal before the applicable twenty-five-year waiting period. Successive petitions to terminate sex offender registration are part of the same underlying case; therefore, they are subject to the law of the case doctrine, meaning that any ruling made as to one petition concerning a legal question—such as a defendant's tier status under SORNA—is binding on subsequent petitions. Consequently, because the trial court had already held in a prior order—denying defendant's second petition—that defendant had committed a Tier II offense, and because defendant failed to appeal that ruling, defendant was precluded from challenging his tier designation on appeal from the subsequent order denying his third petition. **State v. Lingerfelt, 157.**

TRUSTS

Revocable—all settlors named as parties in equitable distribution proceeding—Rule 19 joinder not required—In an issue of first impression, the Supreme Court held that Civil Procedure Rule 19 does not compel the joinder of a revocable trust to an equitable distribution (ED) proceeding when all of the trust's settlors are named parties in the ED proceeding because settlors retain complete, exclusive control over a revocable trust's property for life and, therefore, a judgment against settlors pertaining to property held in a revocable trust will effectively bind the revocable trust without interfering with the rights of anyone else. **Face v. Face, 1.**

SCHEDULE FOR HEARING APPEALS DURING 2026

NORTH CAROLINA SUPREME COURT

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

February 10, 11, 12, 17, 18, 19
April 14, 15, 16, 21, 22, 23
September 8, 9, 10, 15, 16, 17
November 10, 12, 17, 18, 19

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

KATHLEEN K. FACE
v.
S. ALLEN FACE

No. 333PA24

Filed 14 August 2026

1. Civil Procedure—joinder—Rule 19—failure to join—subject matter jurisdiction not implicated

In a matter involving the question of whether Civil Procedure Rule 19 requires a revocable trust to be joined in an equitable distribution matter, the Supreme Court reiterated that any failure to join a necessary party pursuant to Rule 19 does not result in a lack of subject matter jurisdiction over the proceeding. While a Rule 19 challenge may be deemed waived—unlike a challenge to subject matter jurisdiction—the appellate court declined to deem the joinder issue waived in this instance despite defendant's failure to raise it at his first opportunity, in order to identify the property subject to distribution.

2. Trusts—revocable—all settlors named as parties in equitable distribution proceeding—Rule 19 joinder not required

In an issue of first impression, the Supreme Court held that Civil Procedure Rule 19 does not compel the joinder of a revocable trust to an equitable distribution (ED) proceeding when all of the trust's settlors are named parties in the ED proceeding because settlors retain complete, exclusive control over a revocable trust's property for life and, therefore, a judgment against settlors pertaining to

property held in a revocable trust will effectively bind the revocable trust without interfering with the rights of anyone else.

Justice BERGER dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31(c) of a unanimous decision of the Court of Appeals, 296 N.C. App. 306 (2024), affirming the trial court's indicative ruling entered on 6 September 2023, affirming the alimony judgment and order entered on 11 January 2022, and reversing in part the equitable distribution order entered on 28 December 2021 by Judge J. Calvin Chandler in District Court, Brunswick County, and remanding the case for correction of a clerical error in the equitable distribution order. Heard in the Supreme Court on 18 February 2026.

Ward and Smith, P.A., by Christopher S. Edwards, John M. Martin, J. Albert Clyburn, and Alex C. Dale, for plaintiff-appellee.

Jonathan McGirt for defendant-appellant.

BARRINGER, Justice.

This case presents a question of first impression for this Court: whether under Rule 19 a revocable trust must be joined to an equitable distribution proceeding where all settlors of the trust are named parties to the proceeding. The answer is no. A judgment against the settlors concerning property held in a revocable trust will effectively bind the revocable trust without interfering with anyone else's rights. Thus, Rule 19 principles do not compel joinder of the revocable trust. We therefore modify and affirm the judgment of the Court of Appeals.

I. Background

Plaintiff Kathleen Face and defendant Allen Face married on 11 May 2007. The parties separated on 17 July 2014 and ultimately divorced on 9 November 2015.

During their marriage, plaintiff and defendant conveyed three properties into the S. Allen Face, III and Kathleen K. Face Revocable Trust Dated September 15, 2011 (the Revocable Trust). The three properties held in the Revocable Trust included: (1) 316 Sea Star Circle, (2) 1009 Lismore Way, and (3) 311 Cottage Lane. The Revocable Trust instrument designated both plaintiff and defendant as co-trustees, sole beneficiaries, and settlors.

The Revocable Trust's written terms provided that plaintiff and defendant, as settlors of the Revocable Trust, retained the absolute right to "change the beneficiaries, their respective shares and the plan of distribution; amend [the Revocable] Trust in any other respect; or[ ] revoke [the Revocable] Trust in its entirety or any provision therein," so long as the right was exercised "by instruments signed by both [Settlors] and delivered to the Trustee." After their separation, the parties sold 316 Sea Star Circle and 311 Cottage Lane to third parties; 1009 Lismore Way remained in the Revocable Trust.

Also, after their separation, each of the parties asserted claims for equitable distribution. In a signed pretrial order, plaintiff and defendant stipulated their agreement to several facts and issues. Notably, the pretrial order "stipulated that all parties ha[d] been correctly designated and there [was] no question as to misjoinder or nonjoinder of parties." The pretrial order further stipulated that the three properties were marital property, that the proceeds from 316 Sea Star Circle and 311 Cottage Lane would be divided between the parties, and that plaintiff would take title to 1009 Lismore Way. The trial court then entered its Equitable Distribution Order, distributing the three properties as the parties had stipulated. Defendant appealed the Equitable Distribution Order.

During the pendency of that appeal, defendant filed a Motion to Set Aside Orders Pursuant to N.C. R. Civ. P. 60(b) (Rule 60 Motion). In the Rule 60 Motion, defendant argued "that the trial court did not have subject matter jurisdiction to adjudicate the ownership of the properties at 316 Sea Star Circle, 1009 Lismore Way, and/or 311 Cottage Lane," because the Revocable Trust was a "necessary party" under Rule 19 of the North Carolina Rules of Civil Procedure.

The trial court rejected defendant's Rule 60 Motion by entering an Indicative Ruling Denying Defendant's Motion to Set Aside Orders Pursuant to N.C. R. Civ. P. 60(b) (Indicative Ruling). Defendant filed a petition for writ of certiorari at the Court of Appeals, seeking review of the Indicative Ruling. The court allowed defendant's petition.

The Court of Appeals reviewed both the Equitable Distribution Order and the Indicative Ruling.[1] The court affirmed the Equitable Distribution Order in substantial part, reversing it only as to the trial

1. The Court of Appeals also reviewed and affirmed an Alimony Judgment and Order (Alimony Order) entered by the trial court and appealed by defendant. *Face v. Face*, 296 N.C. App. 306, 323–24 (2024). The Alimony Order has no bearing on the issues presented here.

court's "double-counting" of previously distributed marital property. *Face v. Face*, 296 N.C. App. 306, 322 (2024). Determining that the double-counting was a mere "clerical error," the Court of Appeals remanded the case to the trial court for correction. *Id.*

As for the Indicative Ruling, the Court of Appeals fully affirmed it. *Id.* at 318. The court reasoned that when plaintiff and defendant—the Revocable Trust's settlors—stipulated that the three properties were marital property, they effectively revoked the Revocable Trust. *Id.* Being revoked, the Revocable Trust "was not a necessary party to the equitable distribution proceeding." *Id.*

Defendant filed a petition for discretionary review with this Court. We allowed review, but only as to the issues related to necessary joinder of the Revocable Trust. *Face v. Face*, 388 N.C. 517 (2025) (order).

II. Standard of Review

"[T]he standard of review of a trial court's denial of a Rule 60(b) motion is abuse of discretion." *Davis v. Davis*, 360 N.C. 518, 523 (2006). However, when a trial court's determination necessarily turns on a question of law, that determination is reviewed de novo. "Interpreting the Rules of Civil Procedure is a matter of statutory interpretation and thus a question of law reviewed de novo." *Jay v. Jay*, 389 N.C. 61, 65 (2026).

As for matters where the trial court sits without a jury, "the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Cherry Cmty. Org. v. Sellars*, 381 N.C. 239, 251–52 (2022) (quoting *Shepard v. Bonita Vista Props., L.P.*, 191 N.C. App. 614, 616 (2008), *aff'd per curiam*, 363 N.C. 252 (2009)).

III. Analysis

A. Subject Matter Jurisdiction and North Carolina Rule of Civil Procedure 19

[1] Rule 19 requires the joinder of necessary parties to an action. The rule provides that "those who are united in interest must be joined as plaintiffs or defendants." N.C.G.S. § 1A-1, Rule 19(a) (2025).

The Court of Appeals characterized a court's failure to join a necessary party as an issue concerning its "subject matter jurisdiction." *Face*, 296 N.C. App. at 317. Before this Court, plaintiff contests that characterization. Plaintiff explains that necessary joinder relates to "the power to administer complete relief between the parties," whereas subject matter jurisdiction "refers to a court's power to hear and resolve a claim" based

on the complaint's allegations. We agree with plaintiff and hold that the failure to join a necessary party pursuant to Rule 19 is not an issue of subject matter jurisdiction.

Our holding is not novel. In fact, the Court of Appeals itself has held as much. *See Stancil v. Bruce Stancil Refrig., Inc.*, 81 N.C. App. 567, 573 (1986) ("[A] failure to join a necessary party does not result in a lack of jurisdiction over the subject matter of the proceeding."). To be sure, subject matter jurisdiction is conferred by our constitution and General Assembly. N.C. Const. art. IV, § 12; *McLaughlin v. Martin*, 92 N.C. App. 368, 370 (1988) ("[S]ubject matter jurisdiction is . . . granted by . . . the General Assembly.").

By enacting § 7A-244 of the General Statutes of North Carolina, the General Assembly granted district courts exclusive subject matter jurisdiction over equitable distribution actions. N.C.G.S. § 7A-244 (2025). Jurisdiction is not lost simply because a trial court may later struggle to provide complete relief without joining a third party. *See Nation Ford Baptist Church Inc. v. Davis*, 382 N.C. 115, 127 (2022) ("[A] court must only assure itself that *any* of the plaintiff's claims can possibly be adjudicated and that *any* form of relief can possibly be granted—if so, the court has jurisdiction to proceed on those claims.").

Even our rules of civil procedure recognize this point. Rule 12 permits parties to move to dismiss a claim or complaint on the basis of a "[f]ailure to join a necessary party" and, separately, on the basis of a "[l]ack of jurisdiction over the subject matter." N.C.G.S. § 1A-1, Rule 12(b)(1), (7) (2025). If the failure to join a necessary party deprived a trial court of subject matter jurisdiction, then it would be wholly unnecessary for Rule 12 to separately list the two bases. Clearly, then, our rules of civil procedure compel the conclusion that the failure to join a necessary party does not result in a lack of jurisdiction over the subject matter of the proceeding. For these reasons, the trial court here possessed jurisdiction over the parties' equitable distribution claims.

Characterizing this issue as distinct from subject matter jurisdiction is significant, because unlike most issues, "subject matter jurisdiction is not waivable and can be raised at any time," even on appeal. *In re K.J.L.*, 363 N.C. 343, 346 (2009). Yet, despite being distinct from subject matter jurisdiction, courts have nevertheless been hesitant to deem Rule 19 challenges waived.

Over a century ago, we explained that "[t]his Court has sometimes upon its own motion ordered a new trial and remanded a cause when it appeared that a necessary party was missing from the case . . . and that

manifest justice required a new trial." *Vaughan & Barnes v. Davenport*, 159 N.C. 369, 371 (1912).[2] Our hesitation to deem a necessary party argument waived has been reaffirmed time and again in our caselaw, *see Edmondson v. Henderson*, 246 N.C. 634, 637 (1957); *Town of Morganton v. Hutton & Bourbonnais Co.*, 247 N.C. 666, 668 (1958), although not invariably, *see Lanier v. Pullman Co.*, 180 N.C. 406, 410 (1920) (" 'If the defendant deemed the trustee a necessary party,' . . . 'he should have demurred, and his failure to do so was a waiver.' " (quoting *Watkins v. Kaolin Mfg. Co.*, 131 N.C. 536, 538 (1902))).

In this case, we find it prudent to review defendant's Rule 19 argument despite his failure to raise the argument at his first opportunity to do so. Fundamentally, for an equitable distribution proceeding to function properly, it is essential to accurately identify the title and interest of the property subject to distribution. Accordingly, we decline to deem it waived in this instance.

B. The Revocable Trust and North Carolina Rule of Civil Procedure 19

[2] The Court of Appeals held that the Revocable Trust had been revoked by the pretrial stipulations. However, we do not address the effect of these pretrial stipulations on the existence of the Revocable Trust. Instead, we resolve this case through the application of a straightforward, categorical rule: when all settlors of a revocable trust are named parties to an equitable distribution proceeding, Rule 19 does not require joinder of the revocable trust.

Defendant's principal argument on appeal is that such a rule would conflict with "[t]he leading case on this issue"—*Upchurch v. Upchurch*, 122 N.C. App. 172 (1996). *Upchurch* held that "when a third party holds legal title to property which is claimed to be marital property, that third

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2. Federal courts take a similar approach as well. The Supreme Court of the United States, in applying the federal Rule 19, directed that "[w]hen necessary . . . a court of appeals should, on its own initiative, take steps to protect the absent party, who of course had no opportunity to plead and prove his interest below." *Provident Tradesmens Bank & Tr. Co. v. Patterson*, 390 U.S. 102, 111 (1968). The federal courts of appeals have taken this statement to mean that their courts may raise Rule 19 issues on their own and may do so for the first time on appeal. *See, e.g.*, *NLRB v. Doug Neal Mgmt. Co.*, 620 F.2d 1133, 1139 (6th Cir. 1980); *see also Enter. Mgmt. Consultants, Inc. v. U.S. ex rel. Hodel*, 883 F.2d 890, 892–93 (10th Cir. 1989) (collecting cases).

We acknowledge, however, that under North Carolina law, there is no mandatory requirement for an appellate court to correct a necessary joinder defect on its own motion before ruling on the merits. *M.E. v. T.J.*, 380 N.C. 539, 564 (2022).

party is a necessary party to the equitable distribution proceeding, with their participation limited to the issue of ownership of that property." *Id.* at 176. The *Upchurch* court then reversed the trial court's equitable distribution order and remanded the case for the trial court to consider whether a constructive or resulting trust—either of which being an *irrevocable* trust—held legal title to the distributed property. *Id.* at 176–77. If so, the *Upchurch* court directed the trial court to join the trust under Rule 19. *Id.* However, *Upchurch* concerned an irrevocable trust, not a revocable trust. Under Rule 19 principles, the *Upchurch* rule is ill-suited in this case.[3]

As previously stated, Rule 19 provides that "those who are united in interest must be joined as plaintiffs or defendants." N.C.G.S. § 1A-1, Rule 19(a). A person united in interest with a party is a "necessary party to the action"—that is, a party "so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally . . . without his presence." *Strickland v. Hughes*, 273 N.C. 481, 485 (1968). "A sound criterion" for discerning whether a party's interest is sufficiently vital to an action is found in the following definition: "Necessary parties are those persons who have rights which must be ascertained and settled before the rights of the parties to the suit can be determined." *Equitable Life Assurance Soc'y of the U.S. v. Basnight*, 234 N.C. 347, 352 (1951).

Rule 19 is designed to join interested parties to an action so that a court may issue a judgment completely, thus finally determining a claim. Critically, a party not joined to an action is not bound by the trial court's judgment in that action. Thus, Rule 19 joins interested parties to provide "complete administration" of their rights. *W.F. Kornegay & Co. v. Farmers & Merchs. Steamboat Co.*, 107 N.C. 115, 118 (1890).

Rule 19's necessary party rule harkens back to the "father of systematic equity"—Lord Nottingham, the Lord Keeper and Lord Chancellor of England from 1673 to 1682. Geoffrey C. Hazard Jr., *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 Colum. L. Rev. 1254, 1256 (1961) (extraneity omitted). Not long after the establishment of our courts, North Carolina adopted the rule, citing to the Court of Chancery. *See*, *e.g.*, *Marshall v. Lovelass*, 1 N.C. (Cam. & Nor.) 412,

3. To the extent the Court of Appeals held otherwise in *Wenninger v. Wenninger*, 293 N.C. App. 791 (2024), it is overruled. From this Court's close review, the legally significant distinction between a revocable trust and irrevocable trust was never briefed by the parties in *Wenninger*.

428–29 (1801); *see also Southal v. Shields*, 81 N.C. 28, 30 (1879) ("We understand the rule and practice of courts of equity under our former system and equally so under our present system of courts, to be, . . . the duty of the [c]ourt, to require that all proper parties be before the [c]ourt . . . ."). Thus, Rule 19 is firmly rooted in equity.

Equity is "practical" and "seeks to reach and do complete justice where courts of law, through the inflexibility of their rules[,] . . . are incompetent to do so." *Moore v. Moore*, 297 N.C. 14, 16 (1979) (quoting *Zebulon v. Dawson*, 216 N.C. 520, 522 (1939)). Our necessary party rule has embraced these pragmatic roots. Decades before this Court had even been established, then-Judge Hall, sitting in court of conference, recognized that while "[i]t is regularly true that all persons interested should be made parties by name," there are certainly exceptions to this "good general rule." *Marshall*, 1 N.C. (Cam. & Nor.) at 428. Practical considerations of joining a necessary party shape these exceptions. For example, this Court refused to require joinder of a person concerned in interest with the suit where that person had "moved away and not since [been] heard of for many years." *See Ingram v. Lanier*, 2 N.C. (1 Hayw.) 221, 221 (1795) (per curiam). Accordingly, while Rule 19 generally requires that all necessary parties be joined in an action, equity demands that the courts also engage in practical inquiries.

With these principles in mind, we turn now to whether Rule 19 compels joinder of the Revocable Trust to the equitable distribution proceeding. To resolve this question, it is important to engage in a practical inquiry; that is, what is the legal relationship between a settlor and a revocable trust?

A settlor retains complete, exclusive control over a revocable trust's property for life. North Carolina's Uniform Trust Code provides that the "rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed *exclusively* to, the settlor [of the revocable trust]." N.C.G.S. § 36C-6-603(a) (2025) (emphasis added). Moreover, "[i]f a trustee is a settlor, the trustee's actions are presumed to be taken *at the direction of* the settlor." *Id.* (emphasis added).

The settlor's control of a revocable trust is absolute. Even trustees must comply with the settlor's commands. "[T]he settlor of a revocable trust has, *at all times*, the power to direct or consent to the actions of the trustee whether or not the power is conferred upon the settlor by the terms of the trust." *Id.* § 36C-8-808 (2025) (emphasis added). The settlor's power to direct the actions of the trustee extends to directions that are "not authorized by or [are] contrary to the terms of the trust."

Id. § 36C-8-808(1). Thus, under North Carolina law, a revocable trust is owned and controlled exclusively by its settlor.

This complete, exclusive control over the trust blurs the distinction between property belonging to the revocable trust and property belonging to its settlor. Under both federal and state revenue law, a revocable trust's income is taxed to its settlor—even if the revenue is paid to someone else. *Corliss v. Bowers*, 281 U.S. 376, 378 (1930); N.C.G.S. § 105-160.5 (2025). The reason being that actual command over a trust (i.e., power of revocation) is akin to ownership. As such, a revocable trust's income must be reported and filed on its settlor's tax return. Unlike limited liability companies or irrevocable trusts, for instance, no separate tax identification number is assigned to a revocable trust. *See* 26 U.S.C. §§ 641(a), 6012(a)(4); 26 C.F.R. § 301.6109-1(a)(2). Thus, tax law makes clear that a revocable trust's property is not separate and distinct from its settlor's.

The same can be said for bankruptcy law. Federal courts characterize property held in a revocable trust as indistinguishable from the individual settlor's property for purposes of estate inclusion. 11 U.S.C. § 541(a)(1); *see also* Alan B. Clements, *Revocable Trusts in Motion: Designing Governance for Authority Transitions*, 53 Est. Plan. 01, 16 (2026), Westlaw 53 ESTPLN 01, at *23 (stating the same).[4] Thus, bankruptcy law, too, discerns no meaningful distinction between property held in a revocable trust and property held individually by its settlor.

In essence, with respect to claims against property, there is little distinction between property held in a revocable trust and property held individually by the settlors. When settlors are named parties to a judgment, they are bound by it. Trust law provides settlors complete, exclusive control over a revocable trust. Therefore, a judgment against the settlors concerning property held in a revocable trust will effectively bind the revocable trust without interfering with anyone else's rights.

Our dissenting colleague takes issue with our decision to address this joinder issue rather than focus on the effect of the pretrial stipulations. In so doing, the dissent asserts that we have "turn[ed] a blind eye to the revocation issue." However, the dissent loses sight of what

4. As we do here, bankruptcy law also recognizes an important legal distinction between a revocable trust and an irrevocable trust: A debtor's property that is not subject to the power of revocation for the debtor's own benefit is excluded from the debtor's estate. 11 U.S.C. § 541(b)(1).

this case is ultimately about. Critically, this is a case about joinder, not revocation.

Once parties are joined, and thus bound by a judgment, (or in this case, an equitable distribution order) they must then take additional steps to carry out the judgment. Just as a trial court may order parties to a proceeding to transfer real property pursuant to N.C.G.S. § 50-20(g), so too may it order settlors to distribute the corpus of a revocable trust in accordance with N.C.G.S. § 36C-6-602(c) (2025). Accordingly, the dissent's fixation on statutory compliance misconstrues the question before us. We are in no way holding, as the dissent contends, that "a trust may be revoked without satisfying any mechanism for revocation in § 36C-6-602(c)." Rather, we merely hold that Rule 19 does not compel *joining* a revocable trust when all settlors are named parties to the proceeding. The judgment's execution may still be effectuated in compliance with our statutory mandates.

For the reasons stated herein, we embrace Rule 19's pragmatic roots and hold that a revocable trust need not be joined in an equitable distribution proceeding when its settlors are named parties.

IV. Conclusion

Our practical Rule 19 inquiry confirms that complete justice may be done without joining a revocable trust where all its settlors are named parties to an equitable distribution proceeding. For these reasons, we modify and affirm the Court of Appeals' judgment in accordance with this opinion.

MODIFIED AND AFFIRMED.

Justice BERGER dissenting.

Our General Statutes describe the particular means by which a settlor may revoke or amend a revocable trust. *See* N.C.G.S. § 36C-6-602(b), (c) (2025). But today the majority effectively authors a statutory amendment. According to the majority, so long as "all settlors of a revocable trust are named parties to an equitable distribution proceeding," a trust may be revoked without satisfying any mechanism for revocation in subsection 36C-6-602(c). The majority admits this "blurs the distinction between property belonging to the revocable trust and property belonging to its settlor." Further, according to the majority, Rule 19 does not require the trust itself to be joined as a separate party so long as all the

settlors are named parties to a proceeding. Although not admitted by the majority, this brings uncertainty to settled rules of civil procedure. I respectfully dissent.

The statutorily prescribed mechanisms by which a settlor may revoke a revocable trust are precise and limited. *See* N.C.G.S. § 36C-6-602(c). Specifically, revocation or amendment can occur:

> (1) By substantial compliance with a method provided in the terms of the trust; or
>
> (2) If the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by:
>
> a. A later will or codicil . . . ; or
>
> b. By oral statement to the trustee if the trust was created orally; or
>
> c. Any other written method delivered to the trustee manifesting clear and convincing evidence of the settlor's intent.

Id.

In this case, the terms of the Trust provided that the settlors may amend or revoke the Trust "by instruments signed by both [settlors] and delivered to the Trustee." The Court of Appeals below concluded that "the pretrial order effectively revoked the Trust." *Face v. Face*, 296 N.C. App. 306, 318 (2024). The Court of Appeals reasoned that "[d]efendant's assent to the pre-trial order manifested 'clear and convincing evidence of the settlor's intent' for the property in the Trust to be distributed between the parties as marital property." *Id.* According to the Court of Appeals,

> the Trust was revocable by either party, and all of the property and proceeds in the Trust were stipulated as marital assets. The parties agreed that the property was titled to them individually and retained complete control over the properties in the Trust. Defendant's assent to the pre-trial order manifested "clear and convincing evidence of the settlor's intent" for the property in the Trust to be distributed between the parties as marital property.

Id.

At least the panel below attempted to ground its decision in statutory text. But the majority here, rather than grappling with the revocation issue, declines to "address the effect" of the pretrial stipulations and instead announces a new rule: "when all settlors of a revocable trust are named parties to an equitable distribution proceeding, Rule 19 does not require joinder of the revocable trust." In answering the joinder question, the majority turns a blind eye to the revocation issue. And despite the attempt to limit application of their new rule, clever lawyers will begin piercing trusts through procedural maneuvering.

Both the panel below and the majority here fail to properly apply the statute. Under the plain text of subsection 36C-6-602(c), the Trust in this case could only be revoked by (1) "substantial compliance" with the method provided in the terms of the Trust or, because that method was not "expressly made exclusive," (2) by "[a]ny other written method delivered to the trustee manifesting clear and convincing evidence of the settlor's intent." N.C.G.S. § 36C-6-602(c). Neither option was satisfied.

The Trust contemplated "instruments signed by both [settlors] and delivered to the Trustee." There is no contention that either party attempted this method for revocation. Instead, the Court of Appeals below relied on the latter option, holding that the pretrial stipulations sufficed as "clear and convincing evidence" of intent to revoke. *Face*, 296 N.C. App. at 318. Both the panel below and the majority here assert that the parties stipulated that the Trust property was marital property. *See id.* But to the contrary, the pretrial stipulation order explicitly stated that "[t]he classification of the property [attached in the exhibit] as either marital, divisible[,] or separate" is one of four "contested issues to be tried by the court." Further, the exhibit "reflects the parties' contentions as to the content, value[,] and proposed distribution of the marital estate." Such ambiguous language is hardly "clear and convincing evidence" of intent to revoke the Trust under subsection 36C-6-602(c) and instead allows trusts to be revoked by inference or accident.

In addition, the majority's new rule creates an additional concern. Rule 19 states that "those who are united in interest must be joined as plaintiffs or defendants." N.C.G.S. § 1A-1, Rule 19(a) (2025). Under the rule announced today, so long as "all settlors of a revocable trust are named parties to an equitable distribution proceeding, Rule 19 does not require joinder of the revocable trust." Purporting to ground its decision in equity and pragmatism, the majority asserts that "a judgment against the settlors concerning property held in a revocable trust will effectively bind the revocable trust without interfering with anyone else's rights." (emphasis omitted).

Thus, I cannot agree that "there is little distinction between property held in a revocable trust and property held individually by the settlors." And lawyers who practice in the trusts and estates field may disagree, too. Although revocable, a revocable trust still exists as a separate and distinct legal entity, the majority today erases any distinction.

K.H., A MINOR, BY AND THROUGH HER GUARDIAN AD LITEM, JOHN HARTMAN
v.
DANIELLE L. DIXON, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY, AND ALAMANCE-BURLINGTON BOARD OF EDUCATION

No. 290A24

Filed 14 August 2026

1. Appeal and Error—interlocutory order—constitutional Corum claim—substantial right—risk of inconsistent verdicts

In a civil action brought by a student against a teacher and the county school district arising from the teacher's physical assault of the student in a classroom, although the trial court's order granting the school board's Civil Procedure Rule 12(b)(6) motion to dismiss the student's constitutional claim was interlocutory, the Supreme Court had subject matter jurisdiction to review the matter. Not only did the student sufficiently allege a *Corum* claim that her rights under the North Carolina Constitution to a sound basic education were infringed—based on the school board's decision to first suspend her, and then to transfer her to another school without her input or consent—but, further, the trial court's dismissal of the student's constitutional claim against the board—while allowing her separate tort claims against the teacher to go forward—created a risk of inconsistent verdicts and, therefore, affected a substantial right.

2. Constitutional Law—North Carolina—colorable Corum claim—student assaulted by teacher—right to sound basic education—sufficiency of facts

In a civil action brought by a student against a teacher and the county school district arising from the teacher's physical assault of the student in a classroom, the trial court erred by granting the school board's Civil Procedure Rule 12(b)(6) motion to dismiss the student's constitutional claim, which she raised directly under

the North Carolina Constitution pursuant to *Corum v. Univ. of N.C.*, 330 N.C. 761 (1992). The student alleged sufficient facts to support a colorable constitutional claim that the Board's actions after she was assaulted—including by first suspending her, and then by transferring her to another school without her input or consent—constituted deliberate indifference to the conduct of others that infringed on her right to a sound basic education and, further, the student lacked another adequate state law remedy. Therefore, the decision of the Court of Appeals upholding the trial court's order was reversed, and the matter was remanded for further proceedings.

Justice ALLEN concurring.

Chief Justice NEWBY and Justice BARRINGER join in this concurring opinion.

Justice DIETZ joins in this concurring opinion but does not join in the majority opinion.

Justice BERGER dissenting.

Justice DIETZ joins in Part I of this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) (2023) from the decision of a divided panel of the Court of Appeals, 296 N.C. App. 62 (2024), affirming an order entered on 17 April 2023 by Judge Michael L. Robinson in Superior Court, Alamance County. Heard in the Supreme Court on 17 September 2025.

Fox Rothschild LLP, by Matthew Nis Leerberg, Nathan W. Wilson, and Margaret McCall Reece, for plaintiff-appellant.

Tharrington Smith LLP, by David B. Noland and Joshua E. Renz, for defendant-appellee Alamance-Burlington Board of Education.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Elizabeth L. Troutman and William A. Robertson, for North Carolina School Boards Association, amicus curiae.

EARLS, Justice.

K.H. (Katherine)[1] was a student at a public middle school in the Alamance-Burlington School District in the fall of 2022. She alleges that one day that semester, her teacher violently attacked her in her classroom in front of other students, and that the Alamance-Burlington Board of Education (the Board) responded by first suspending Katherine, then revoking that suspension after news outlets covered the attack, and then transferring Katherine to an alternative school without her input.

In addition to suing her teacher, Ms. Danielle Dixon, for these alleged events, Katherine sued the Board for its allegedly inadequate hiring and supervision of Ms. Dixon and its response to Ms. Dixon's actions. In particular, Katherine brought a *Corum* claim directly under the North Carolina Constitution, asserting that the Board's conduct infringed on her constitutional right to the opportunity to access a sound basic education and that she lacked another adequate state law remedy. See *Corum v. Univ. of N.C.*, 330 N.C. 761, 782 (1992).

We agree with Katherine that her complaint against the Board states a colorable constitutional claim and that she lacks an adequate other state remedy for the Board's actions. *See Deminski ex rel. C.E.D. v. St. Bd. of Educ.*, 377 N.C. 406, 413 (2021) (summarizing the three *Corum* elements as applied to an individual constitutional claim under Article I, Section 15 and Article IX, Section 2 of our state constitution). Although the "fundamental right" to "equal access to participation in our public school system," *Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 618 (1980), does not generally hold school districts liable for the intentional torts of their teachers, it does make local authorities responsible for responding reasonably to such incidents once they occur. Failing to do so may constitute "deliberate[ ] indifferen[ce] to conduct that prevent[s schoolchildren] from accessing their constitutionally guaranteed right to a sound basic education." *Deminski*, 377 N.C. at 414. Katherine's allegations, if proved, would support the conclusion that the Board responded unreasonably to Ms. Dixon's assault when it suspended Katherine and then transferred her to a new school, and that its deliberate indifference to the situation impaired Katherine's academic performance and caused her to suffer negative educational consequences.

Because Katherine's complaint did state a *Corum* claim, the trial court erred by granting the Board's motion to dismiss this claim under Civil Procedure Rule 12(b)(6). We reverse the Court of Appeals' contrary decision and remand this action for further proceedings consistent with this opinion.

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1. A pseudonym to protect the minor's privacy and for ease of reading.

I. Background

A. The Assault and the Board's Response

Katherine's complaint alleged the following, which we assume to be true in reviewing the decision to grant the Board's Rule 12(b)(6) motion to dismiss. *E.g.*, *Jones v. J. Kim Hatcher Ins. Agencies*, 387 N.C. 489, 492 (2025).

In the fall of 2022, Katherine was a student at Broadview Middle School, a public school in the Alamance-Burlington School District. Danielle Dixon was one of Katherine's assigned teachers. Ms. Dixon's teaching license expired in 2015, and she was not licensed at the time she was assigned to be Katherine's teacher. On 2 November 2022, when Katherine "was attending school" and "attempted to walk into her assigned classroom to retrieve her bookbag," "[Ms. Dixon] blocked [Katherine's] path with her arm." Katherine was only "approximately three inches away and still moving forward" when Ms. Dixon put out her arm, and because of that "close proximity," Katherine "was unable to avoid any contact" and ran into Ms. Dixon's arm.

After that contact, Ms. Dixon "grabbed [Katherine] and pulled her inside of the classroom while closing the door." She then proceeded to violently beat Katherine. First, "[Ms. Dixon] grabbed [Katherine] by the hair and slammed [Katherine] into the door with enough force to break a broom that was located between [Katherine] and the wall and door area." Ms. Dixon then "forcefully slammed [Katherine] to the ground" by her hair. Ms. Dixon then continued to "slam[ ] [Katherine's] head into the ground" at least four more times while grasping the back of Katherine's head and hair. During the assault, students inside the classroom "began yelling" for Ms. Dixon to release Katherine and stop harming her. Upon hearing this "yelling and commotion," "two other teachers entered the room and called for help." Katherine "attempted to defend herself but was unable to because of [Ms.] Dixon's large size and age advantage."

The complaint also included still images that allegedly capture the unfolding assault, apparently taken by a student onlooker. The images similarly show a teacher figure pinning a student figure to the wall behind a classroom door, forcing the student to the floor, grasping the student's head and hair while the student's legs are splayed out, and appearing to yell at another teacher figure who approached her during the assault.

After the attack, Katherine experienced bruises, hair loss from where Ms. Dixon had grabbed her, and ongoing emotional distress. The superintendent for the Board, Dr. Dain Butler, initially suspended Katherine

for ten days. But when "video of the altercation was made available to local news outlets," the Board reversed that decision. Still, Katherine was not allowed to return to Broadview Middle School. Instead, she was transferred to Ray Street Academy, an alternative school, without her input or consent. This cumulative disruption, starting with the assault and followed by the suspension and transfer, meant that Katherine "was forced to change her schools," her "academic performance . . . was placed in peril," and she "suffered educational consequences."

B. The Complaint and Subsequent Proceedings

On 5 January 2023, Katherine, by and through her guardian ad litem, sued Ms. Dixon in her individual and official capacities, as well as the Board. Against both defendants, Katherine brought claims for damages for assault and battery, negligent infliction of emotional distress, intentional infliction of emotional distress, and violations of the North Carolina Constitution Article I, Section 15, and Article IX, Section 2. Against the Board specifically, she also brought a claim of negligent hiring, retention, and supervision of Ms. Dixon. Katherine alleged that, in addition to teaching without an active teacher's license and attacking Katherine, "[Ms.] Dixon had multiple issues within her classroom with other students and [faced] disciplinary actions by the Principal of Broadview Middle School," and that the Board failed to investigate whether Ms. Dixon "had the emotional capacity" and adequate training to teach minor children.

The Board moved to dismiss the complaint on 21 February 2023. As grounds to dismiss Katherine's tort claims under Civil Procedure Rules 12(b)(1) and 12(b)(2), the Board invoked sovereign immunity, arguing that those claims were barred because the Board had not waived its immunity up to the extent of its insurance coverage under N.C.G.S. § 115C-42. The Board also moved to dismiss Katherine's constitutional claim under Rule 12(b)(6) for failure to state a claim.

The trial court agreed and dismissed Katherine's tort claims against the Board because "the Complaint does not sufficiently demonstrate a basis for waiver of the Board's sovereign immunity as required under Rules 12(b)(1)–(2)." The trial court also granted the Board's motion to dismiss Katherine's constitutional claim under Rule 12(b)(6) because "the Complaint falls short of alleging facts giving rise to the type of claims contemplated in *Deminski*." Katherine's claims against Ms. Dixon in her individual capacity remained.

Katherine appealed, and the Court of Appeals affirmed. *K.H. v. Dixon*, 296 N.C. App. 62, 72 (2024). First, the Court of Appeals concluded that

it had jurisdiction to entertain Katherine's interlocutory appeal because "appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *Id.* at 64 (quoting *Kawai Am. Corp. v. Univ. of N.C. at Chapel Hill*, 152 N.C. App. 163, 165 (2002)). Katherine's appeal fell within this precedent, it reasoned, because the trial court dismissed her tort claims on grounds involving sovereign immunity and dismissed her constitutional claim for failure to state a claim. *Id.* at 65 (first citing *Hinson v. City of Greensboro*, 232 N.C. App. 204, 209 (2014); and then citing *Horne v. Town of Blowing Rock*, 223 N.C. App. 26, 29 (2012)).

As to the merits, the Court of Appeals agreed with the trial court that Katherine had not adequately pleaded a waiver of sovereign immunity under N.C.G.S. § 115C-42 and thus dismissal was appropriate. *Id.* at 65–67. The court also agreed that Katherine failed to allege facts to show that she "was subjected to *repeated* or *ongoing* issues with Dixon" and thus failed to state a claim for constitutional injury under *Deminski*. *Id.* at 71.

On this last point, Judge Murphy dissented. He would have held that Katherine's complaint, taken as a whole, adequately alleged that the Board "was deliberately indifferent to the hostile environment it created when it placed" an unqualified, unlicensed, and inadequately trained and supervised individual in a classroom and when it suspended Katherine after her teacher attacked her. *Id.* at 78–79 (Murphy, J., concurring in part and dissenting in part). The Board's actions, in his view, were sufficient to support allegations of an injury to Katherine's constitutional rights to a sound basic education in our public schools. And because he agreed that Katherine's common-law actions were barred by sovereign immunity, no other adequate state remedy exists for her injuries and her *Corum* claim should be allowed to proceed. *Id.* at 79.

Katherine appealed to this Court as of right based on Judge Murphy's dissent. N.C.G.S. § 7A-30 (2023) (repealed 2023).

II. Analysis

A. Jurisdiction

[1] First, this Court has subject matter jurisdiction to hear Katherine's constitutional claims against the Board. *See In re K.J.L.*, 363 N.C. 343, 346 (2009) ("[A] court's lack of subject matter jurisdiction is not waivable and can be raised at any time."). Subject matter jurisdiction is, fundamentally, "a court's 'power to pass on the merits of a case.' " *Askew v. City of Kinston*, 386 N.C. 286, 297 (2024) (quoting *Slattery v. Appy*

City, LLC, 385 N.C. 726, 729 (2024)). In part because "the state judiciary . . . has the responsibility to protect the state constitutional rights of the citizens," a court's authority to hear *Corum* claims specifically "flows from the 'authority granted to it by the Constitution.' " *Id.* at 298–99 (first quoting *Corum*, 330 N.C. at 783–84; and then quoting *Henderson County v. Smyth*, 216 N.C. 421, 423 (1939)). According to her pleadings, Katherine's claims against the Board arise directly under the North Carolina Constitution, specifically Article I, Section 15, and Article IX, Section 2, for harms the Board allegedly inflicted upon her personally. Her complaint thus activated the court's subject matter jurisdiction by alleging " 'infringement of a legal right' secured by the Constitution and [by] present[ing] a justiciable controversy." *Id.* at 299 (quoting *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 608 (2021)); *Deminski*, 377 N.C. at 414 (concluding that allegations of a "school's deliberate indifference to ongoing student harassment" stated a "colorable constitutional claim" under Article I, Section 15 of the North Carolina Constitution).

After this Court heard argument on the merits of the issues on appeal, we directed the parties to file supplemental briefing on whether the Court of Appeals had appellate jurisdiction over Katherine's appeal. *See K.H. v. Dixon*, 388 N.C. 513 (2025) (order). Although we have had multiple occasions to consider whether an interlocutory order granting a motion to dismiss on sovereign immunity grounds is immediately appealable, as the Court of Appeals has held, this Court has yet to resolve the merits of that issue. *E.g.*, *Farmer v. Troy Univ.*, 382 N.C. 366, 369 n.1 (2022) (declining, as in *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 328 (1982), to "decide whether a motion to dismiss on the basis of sovereign immunity is properly designated as a Rule 12(b)(1) motion or a 12(b)(2) motion," only the latter of which is immediately appealable under statute (quoting *Estate of Long v. Fowler*, 378 N.C. 138, 142 n.1 (2021))).

In their supplemental briefing, both Katherine and the Board contended that the Court of Appeals did have such jurisdiction. They argued that Court of Appeals precedent correctly holds that an interlocutory order granting a motion to dismiss based on governmental immunity is immediately appealable under the substantial rights doctrine, as is an order denying the same. *E.g.*, *Ballard v. Shelley*, 257 N.C. App. 561, 564 (2018); *Greene v. Barrick*, 198 N.C. App. 647, 649–50 (2009).

As an alternative to the substantial rights justification, Katherine further argued that sovereign immunity is a matter of personal jurisdiction, so adverse rulings on such grounds are immediately appealable under N.C.G.S. § 1-277(b) (2025) ("*Any* interested party has the right

of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant . . . .” (emphasis added)). Further, fairness considerations support applying a rule of mutual appealability because procedural rules “must be applied equally to all parties to a lawsuit,” she argued, quoting *Goins v. Puleo*, 350 N.C. 277, 281 (1999). Once the Court of Appeals had jurisdiction over the tort claims dismissed based on immunity defenses, Katherine reasoned, it had attendant jurisdictional authority to review dismissal of her *Corum* claim.

In addition, both Katherine and the Board argued that immediate appellate review was warranted because the posture of the claims before the trial court risked inconsistent verdicts on the same factual issues—namely, whether Ms. Dixon in fact assaulted Katherine and whether that assault caused Katherine emotional distress. *See*, *e.g.*, *Gardner v. Richmond County*, 386 N.C. 594, 595 (2024) (per curiam) (reversing the Court of Appeals for failing to apply the doctrine of inconsistent verdicts to allow an immediate appeal of the dismissal of claims by one plaintiff when claims by another plaintiff that raised the same issues were allowed to proceed); *Bernick v. Jurden*, 306 N.C. 435, 439 (1982) (holding that “the possibility of inconsistent verdicts in separate trials” from an order allowing summary judgment for some but not all defendants “affects the substantial right . . . to have one jury decide whether the conduct of one, some, all or none of the defendants caused his injuries”).

We agree with this basis for appellate jurisdiction—the posture of the claims below indicates a risk of inconsistent verdicts on the same factual issues. The risk of inconsistent verdicts doctrine arises when there is “a risk of two actual trials resulting in two different verdicts” on the same issues. *Foster v. Crandell*, 181 N.C. App. 152, 162–63, *disc. rev. denied*, 361 N.C. 567 (2007). That circumstance can occur where claims against multiple defendants involve identical legal issues and some but not all of those claims are dismissed before trial. *E.g.*, *Cook v. Bankers Life & Cas. Co.*, 329 N.C. 488, 491 (1991) (concluding that a risk of inconsistent verdicts existed where common issues of agency, waiver, estoppel, and the necessity of consent arose across distinct claims against two defendants and the trial court granted summary judgment in favor of one defendant but not the other). That risk can also arise where the factual issues underlying separate claims are substantially the same, and some of the claims will proceed while others will not. *E.g.*, *Green v. Duke Power Co.*, 305 N.C. 603, 608 (1982) (noting that undergoing a second trial affects a substantial right when there is

"the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue"); *SciGrip, Inc. v. Osae*, 373 N.C. 409, 433 n.9 (2020) (concluding that two breach of contract claims brought against two defendants posed a risk of inconsistent verdicts because factual issues in the conduct giving rise to both claims overlapped, and holding that the order granting summary judgment to the plaintiff on one claim but not the other was immediately appealable). In these cases, "the possibility of separate trials involving the same issues which could lead to inconsistent verdicts" affects a substantial right. *Hamby v. Profile Prods., L.L.C.*, 361 N.C. 630, 634 (2007); *see also Cook*, 329 N.C. at 491 ("[W]e hold that the order dismissing the case as to [one defendant but not the other] affected a substantial right of the plaintiff which she will lose if it is not corrected before a final judgment is entered.").

Here, even as the trial court dismissed all of Katherine's claims against the Board, Katherine's separate tort claims against Ms. Dixon remain. The record indicates that the trial court filed an entry of default against Ms. Dixon on 20 February 2023. That sort of Rule 55(a) entry of default "is only an interlocutory act looking toward subsequent entry of final judgment of default." *E.g.*, *Estate of Teel v. Darby*, 129 N.C. App. 604, 607 (1998) (citing *State Emps. Credit Union, Inc. v. Gentry*, 75 N.C. App. 260, 265 (1985)). An entry of default can be set aside prior to a final judgment of default upon "good cause shown" under Civil Procedure Rule 55(d). N.C.G.S. § 1A-1, Rule 55(d) (2025). Thus, on this record, were Katherine unable to obtain immediate appellate review of the order dismissing her claims against the Board, and were Ms. Dixon to successfully move to set aside the entry of default, it is still possible that Katherine would proceed to a first trial on the merits of her claims against Ms. Dixon. Further, if the dismissal of her claims against the Board was overturned on appellate review, she could face a second jury trial on the merits of the Board's conduct. Although Katherine's constitutional claims against the Board are distinct from her tort claims against Ms. Dixon, many of the same factual issues must be resolved in both—including the alleged events relating to the assault and the extent of harm to Katherine. That would risk exposing Katherine to inconsistent verdicts on the same factual issues. On this basis, the trial court's otherwise interlocutory order dismissing her claim against the Board but not against all defendants affects Katherine's substantial rights and grants her an immediate right of appeal. *See Gardner*, 386 N.C. at 595.[2]

2. Because we conclude that the risk of inconsistent verdicts supports Katherine's immediate right of appeal, we are satisfied of our own appellate jurisdiction and

B. Katherine's Claim under Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution

[2] Katherine alleges that the Board violated her constitutional right to equal access to a sound basic education in our public schools when it hired an unlicensed and unqualified teacher, failed to adequately train and supervise that teacher, and responded to the teacher's physical attack on Katherine in a classroom by suspending Katherine, reversing that decision when news outlets reported about the altercation, and then transferring her to an alternative school without her input.

We agree with Katherine that her allegations as to the Board's conduct after the alleged assault do state a colorable constitutional rights violation, the second element of her *Corum* claim. Because the other two elements are similarly met, the trial court wrongly dismissed Katherine's constitutional claim against the Board under Rule 12(b)(6).

1. Applicable Legal Principles

We review an order granting a motion to dismiss under Rule 12(b)(6) de novo. *Farmer*, 382 N.C. at 369. "On a Rule 12(b)(6) motion, well-pleaded allegations of fact in the complaint are treated as true," and "[f]actual inferences should be viewed in the light most favorable to the nonmoving party." *Cato Corp. v. Zurich Am. Ins. Co.*, 386 N.C. 667, 672 (2024) (cleaned up).

In *Corum v. University of North Carolina*, 330 N.C. 761 (1992), this Court "recognized a direct action under the State Constitution against state officials for violation of rights guaranteed by the Declaration of Rights." *Id.* at 783. Sovereign immunity is no defense to such claims. *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 338 (2009). In *Deminski*, we explained that an individual student could bring such

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subsequently do not reach the issue of whether Katherine also has the right to appeal based on her substantial rights in "orders raising issues of governmental or sovereign immunity," as the Court of Appeals put it. *See K.H. v. Dixon*, 296 N.C. App. 62, 65 (2024) (quoting *Hinson v. City of Greensboro*, 232 N.C. App. 204, 209 (2014)). After all, our review is cabined by another limitation on our appellate jurisdiction, namely that we obtained review of this matter through an appeal as of right based on a dissent at the Court of Appeals. *See* N.C.G.S. § 7A-30(2) (2023) (repealed 2023). In turn, the dissent did not dispute the majority's conclusion as to Katherine's right to immediate appeal, perhaps because the dissent was similarly bound by long-standing Court of Appeals precedent. *See K.H.*, 296 N.C. App. at 73 (Murphy, J., concurring in part and dissenting in part). Issues not "specifically set out as the basis for the dissent" are not preserved for this Court's appellate jurisdiction arising from an appeal based on that dissent. *See Cryan v. Nat'l Council of YMCAs of the U.S.*, 384 N.C. 569, 570 (2025). We leave this jurisdictional issue for future resolution.

Corum claims against local education authorities for deliberate indifference to the conduct of others that deprived that student of access to their constitutionally guaranteed education rights: "Notably, the right to a sound basic education rings hollow if the structural right exists but in a setting that is so intimidating and threatening to students that they lack a meaningful opportunity to learn." *Deminski*, 377 N.C. at 414. These types of *Corum* claims, we explained, require a claimant to meet three elements to "sufficiently allege[ ] a claim for relief under Article I, Section 15 and Article IX, Section 2": (1) that a state actor violated the student's right to access a sound basic education; (2) that the claim is colorable; and (3) that there is no other adequate remedy under state law, meaning that the claimant at least has "the opportunity to enter the courthouse doors and present his claim." *Id.* at 413–14 (cleaned up).

2. Application

The trial court ruled that Katherine's complaint fell short of articulating a claim under *Deminski*. But that determination rests on an overly narrow interpretation of our precedent and the constitutional right at stake.

The North Carolina Constitution vests in every schoolchild a right to the opportunity to access a sound basic education. *Leandro v. State*, 346 N.C. 336, 345, 347 (1997). This "fundamental right" is rooted in the text, structure, and history of our Constitution as well as our precedent. *See id.* at 348; *Sneed*, 299 N.C. at 618. Specifically, Article I, Section 15 places an affirmative duty on "the State to guard and maintain" the "right to the privilege of education." Article IX, Section 2 guarantees a uniform public school system "wherein equal opportunities shall be provided for all students." This mandatory language creates an obligation on the State to "take charge of the education of its citizens," *Lane v. Stanly*, 65 N.C. 153, 158 (1871), and reflects the framers' intent to constitutionally "establish and secure . . . a system of free popular education," *Collie v. Comm'rs of Franklin Cnty.*, 145 N.C. 170, 175 (1907) (cleaned up).

This constitutional requirement is not opportunity in name only. Reading the constitution as a whole, these two articles "combine" to guarantee schoolchildren the opportunity to access a quality education. *See Leandro*, 346 N.C. at 347. And these directives require the State and localities to provide "a safe environment where learning can take place," *Deminski*, 377 N.C. at 412–13, and where "considerations of procedural due process" apply, *Sneed*, 299 N.C. at 618. Local education agencies in particular have an important role to play in delivering on "the duty of the State to guard and maintain" the right to access a sound basic

education. N.C. Const. art. I, § 15. Because "[e]ducation is the cornerstone of a political fabric," especially for a government based on "popular suffrage," local authorities charged with "instruction of the children" occupy positions of great trust and authority essential to safeguarding constitutional education rights. *Smith v. Sch. Trs.*, 141 N.C. 143, 154–55 (1906).

Two of our precedents bear directly on Katherine's allegations. In *Deminski* we recognized that "a government entity with control over the school" could be liable to a student for its "deliberate[ ] indifferen[ce] to ongoing harassment that prevents [that] student from accessing his constitutionally guaranteed right to a sound basic education." 377 N.C. at 407. That was so even as the harassment was allegedly perpetrated only by fellow students, not any public employees. *Id.* at 407–09. There we noted that the harassment of the plaintiff students by fellow students was allegedly "severe and discriminatory," *id.* at 410, and "ongoing," and the school and local school board knew about it yet "failed to take adequate action," *id.* at 414. We relied in part on federal court interpretations of Title IX, which bars recipients of federal education funding from denying educational benefits or equal participation in an educational program to students based on sex. *See id.* (citing *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 644–47 (1999)). Under Title IX, "severe, pervasive, and objectively offensive" "student-on-student harassment" may "den[y] its victims the equal access to education that Title IX is designed to protect." *Davis*, 526 U.S. at 652.

The second relevant case is *Sneed v. Greensboro City Board of Education*, 299 N.C. 609 (1980). There we concluded that our state constitutional requirement of a general and uniform system of free public schools does not bar public schools from "charging [ ] modest, reasonable fees . . . to support the purchase of supplementary supplies and materials for use by or on behalf of students." *Id.* at 617 (emphasis omitted). The state constitution does, however, limit a public school's ability to charge such fees under threat of penalty to "a student who cannot pay required fees because of real economic hardship." *Id.* at 618. We concluded that, to survive constitutional scrutiny, mechanisms must exist so that "all students and their parents are given adequate and timely notice" of how they may be eligible to have such charges waived and "the simple procedures by which they may confidentially apply for" that waiver. *Id.* at 619. Such procedural safeguards were necessary to protect the fundamental right of "equal access to participation in our public school system," we reasoned, because otherwise students might inevitably feel they must forgo educational opportunities to avoid the

"stigma" of being singled out on the basis of their socioeconomic status or because they are unaware of possible relief. *Id.* at 618–19.

Taken together then, *Deminski* and *Sneed* underscore that local school authorities may not be deliberately indifferent to extreme, in-school conduct that deprives a student of the opportunity to access a sound basic education on equal terms. A governmental entity must respond reasonably, including with adequate procedural protections, to incidents of severe harassment or assault that would make schoolchildren more vulnerable to future harassment or deprive them of their opportunity to access a sound basic education. *See Doe v. Fairfax Cnty. Sch. Bd.*, 1 F.4th 257, 274 (4th Cir. 2021) ("[A] school may be held liable under Title IX if its response to a single incident of severe sexual harassment, or the lack thereof, was clearly unreasonable and thereby made the plaintiff more vulnerable to future harassment or further contributed to the deprivation of the plaintiff's access to educational opportunities."); *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 172–73, 175 (1st Cir. 2007) (recognizing that "a single instance of peer-on-peer harassment theoretically might form a basis for Title IX liability if that incident were vile enough and the institution's response, after learning of it, unreasonable enough to have the combined systemic effect of denying access to a scholastic program or activity," and noting that "an institutional response to harassment may be carried out so inartfully as to render it clearly unreasonable"), *rev'd on other grounds*, 555 U.S. 246 (2009); *Davis*, 526 U.S. at 648 (noting that deliberate indifference to acts of student-on-student harassment occurs where an institution's "response . . . or lack thereof is clearly unreasonable in light of the known circumstances").

Here Katherine's complaint does state a colorable claim under Article I, Section 15, and Article IX, Section 2. Assuming her allegations are true and taking factual inferences in her favor, Katherine's teacher violently assaulted her in a manner that required intervention by two other teachers and led to significant physical injury. Yet the Board and its administrators responded by *suspending Katherine* for ten days. They only reversed that suspension after news outlets learned details of the attack. Even still, the Board and administrators further responded by transferring Katherine to an alternative school without her input. The cumulative effect of these events impaired Katherine's ability to learn and jeopardized her academic performance. Effectively punishing a student when a teacher violently assaults her in the classroom is clearly unreasonable. Such deliberate indifference by the Board

states a colorable constitutional claim that the government actor denied Katherine equal access to a sound basic education.[3]

Because the second element of *Deminski* is met, we also address the final two elements to assess whether the trial court erred by dismissing Katherine's *Corum* claim. The first element, that defendant Alamance-Burlington Board of Education, is a state actor, is satisfied. *See Deminski*, 377 N.C. at 414. The third element is met, too: Katherine seeks monetary damages for her injuries. The Board successfully obtained dismissal of Katherine's tort claims against it based on sovereign immunity. An alternative remedy is not adequate when it is barred by sovereign immunity because "a plaintiff must have at least the opportunity to enter the courthouse doors and present his claim." *Craig*, 363 N.C. at 340. Additionally, Katherine's tort claims against Ms. Dixon would redress Katherine's alleged injuries only for the assault; however, they do not redress her alleged injury by the Board for its response to this assault and the "educational consequences" she "suffered" that violated

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3. To the extent that Katherine alleged a constitutional claim because Ms. Dixon's intentional torts "are imputed to Defendant Board pursuant to the doctrines of agency and/or *respondeat superior*," because Ms. Dixon lacked a valid teaching license at the time of the attack, or because the Board was on notice that Ms. Dixon was likely to violently assault a student because of unspecified earlier "issues within her classroom with other students and disciplinary actions by the Principal," the trial court correctly determined that these allegations alone are too vague and therefore insufficient to state a claim under Article I, Section 15 and Article IX, Section 2. As in other contexts, local school boards are not vicariously liable for the intentional torts of their employees, because "intentional tortious acts are rarely considered to be within the scope of an employee's employment." *Medlin v. Bass*, 327 N.C. 587, 594 (1990) (cleaned up). Moreover, the allegations do not establish a factual relationship between the earlier "issues" of which the Board and its administrators had notice and Ms. Dixon's eventual assault of Katherine. *Cf. Davis*, 526 U.S. at 652–53 (noting that Congress likely intended Title IX's private damages actions to apply to those incidents "serious enough to have the systematic effect of denying the victim equal access to an educational program or activity[,] . . . in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment").

The dissent raises the possibility that the Board may not have had a full understanding of what transpired when the Board initially decided to suspend Katherine. *See* dissent *infra* Part II. To be sure, the evidence may ultimately show that the Board acted reasonably. But a Rule 12(b)(6) motion asks specifically whether, taking the facts and factual inferences in the light most favorable to the nonmoving party, the complaint states a valid legal claim. *E.g.*, *Cato Corp. v. Zurich Am. Ins. Co.*, 386 N.C. 667, 672 (2024). We hold only that Katherine's allegations were sufficient to meet that standard.

This decision does not afford bellicose students a constitutional claim when they are appropriately disciplined for their own participation in a school fight. The facts alleged here are plainly more severe than a simple schoolyard tiff. Moreover, trial courts and defendants have plenty of tools at their disposal to quickly dispose of frivolous lawsuits.

her right to equal access to a sound basic education. *See Askew*, 386 N.C. at 294 ("*Corum* requires courts to disaggregate the rights violated, the constitutional harms alleged, and the appropriate remedy on the facts of the particular case." (cleaned up)). Without her *Corum* claim, Katherine lacks another remedy at law against the Board specifically for its conduct. Thus, Katherine's complaint satisfies all three elements of *Deminksi*.

III. Conclusion

Because Katherine's complaint states a colorable constitutional claim that a government actor failed to guard and maintain her right to access a sound basic education as a result of its deliberate indifference to a severe instance of misconduct, and because she lacks another adequate state law remedy, the trial court erred by dismissing her *Corum* claim against the Board on a Rule 12(b)(6) motion. Accordingly, the Court of Appeals erred by affirming the same. We reverse that portion of the decision below and remand this matter for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Justice ALLEN concurring.

The complaint alleges that a teacher brutally—and unjustifiably—assaulted plaintiff K.H. at school and that school officials in the Alamance-Burlington School System responded by suspending plaintiff and then moving her to an alternative school against her will. I agree with the majority that, if these allegations are true, the school district's reaction to the attack violated plaintiff's educational rights under the North Carolina Constitution.

In *Sneed v. Greensboro City Board of Education*, 299 N.C. 609 (1980), this Court recognized that Article I, Section 15 and Article IX, Section 2(1) of the state constitution combine to make "equal access to participation in our public school system . . . a fundamental right." *Sneed*, 299 N.C. at 618. If a student's right to access the public school system on equal terms with other students means anything, surely it means that a school district may not suspend and then involuntarily reassign an innocent student for being severely beaten by an out-of-control teacher.

I write separately to emphasize the narrowness of today's decision. Like the facts alleged in *Deminski v. State Board of Education*, 377

N.C. 406 (2021), the facts alleged by plaintiff are extreme. The plaintiff in *Deminski* alleged that her three children were targeted by other elementary school students, who severely bullied them and subjected them to graphic acts of sexual harassment over a period of several months. *Deminski*, 377 N.C. at 407–09. The plaintiff further alleged that "the bullying and harassment continued with no real change" even after: (1) one of the plaintiff's children informed a teacher of the harassment; (2) the plaintiff herself "repeatedly notified the teacher, assistant principal, and principal of the situation"; and (3) the defendant school board learned of the incidents. *Id.* at 409.

Because "the school's [alleged] deliberate indifference to ongoing student harassment created an environment in which [the *Deminski* plaintiff's children] could not learn," we held that the complaint asserted a colorable constitutional claim against the defendant school board. *Id.* at 414. In so ruling, we reasoned that "the right to a sound basic education [recognized in *Leandro v. State*, 346 N.C. 336 (1997),] rings hollow if the structural right exists but in a setting that is so intimidating and threatening to students that they lack a meaningful opportunity to learn." *Id.*

It seems reasonable to assume that most school officials would not react with almost total indifference to bullying and sexual harassment of the sort alleged in *Deminski*. Similarly, one would expect that school officials in general are highly unlikely to respond to a teacher's brutal and unprovoked assault on a student by punishing the student.

Given that this case involves such an improbable set of alleged facts, the majority's opinion should not be interpreted to expose ordinary student discipline decisions to *Deminski*-style challenges. As the majority points out, "[t]he facts alleged here are plainly more severe than a simple schoolyard tiff . . . ." Majority *supra* Section II.B.2 n.3. I would go further and say that they differ materially from situations in which, for example, two students accused of fighting blame each other for starting the fight. So long as school officials act in good faith and in accordance with procedural safeguards, they are not prohibited from disciplining students for misconduct merely because the students deny wrongdoing. To hold otherwise would deprive school officials of the disciplinary tools necessary to preserve a safe and orderly school environment. Because I do not understand today's decision to hamstring school officials in this way, I join the majority's opinion.

Chief Justice NEWBY and Justice BARRINGER join in this concurring opinion. Justice DIETZ concurs in this opinion but does not join the majority opinion.

Justice BERGER dissenting.

Plaintiff's complaint fails to allege a colorable constitutional violation, and with minimal analysis and no support from precedent, the majority's far-reaching opinion creates grounds for constitutional claims out of routine disciplinary actions taken by schools. The narrow "deliberate indifference" standard articulated in *Deminski*, which required a pattern of misconduct, is no more because the majority has abandoned restraint to reach an isolated incident of misconduct at the hands of a teacher.

But the merits should not be reached at all because the Court of Appeals did not have jurisdiction over plaintiff's interlocutory appeal. I respectfully dissent.

I. Jurisdiction

The burden of establishing appellate jurisdiction rests solely with the party seeking to appeal. N.C. R. App. P. 28(b)(4) ("An appellant's brief shall contain . . . [a] statement of the grounds for appellate review."); *see also Denney v. Wardson Constr., Inc.*, 264 N.C. App. 15, 17 (2019) ("[T]his Court will not construct arguments for or find support for appellant's right to appeal from an interlocutory order on our own initiative. That burden falls solely on the appellant. As a result, if the appellant's opening brief fails to explain why the challenged order affects a substantial right, we must dismiss the appeal for lack of appellate jurisdiction." (cleaned up)). Here, plaintiff relied on N.C.G.S. § 7A-27(b)(3)(a) and § 1-277 as the basis for appellate jurisdiction over the trial court's interlocutory order granting the Board's motion to dismiss. However, because it was doubtful that either provision established jurisdiction, we ordered supplemental briefing. Plaintiff continued to assert that jurisdiction exists pursuant to N.C.G.S. § 7A-27(b)(3)(a) and § 1-277.

But the majority nonetheless declines to decide the primary issue raised by the supplemental briefing, instead avoiding the obvious jurisdictional flaw to reach the merits. But jurisdictional rules cannot be ignored, even when judges are eager to make law.

"Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725 (1990). But an interlocutory order that "[a]ffects a substantial right" is immediately appealable. *See* N.C.G.S. § 7A-27(b)(3)(a) (2025). "[A]n interlocutory order affects a substantial right if the order deprives the appealing party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered." *Sharpe v. Worland*,

351 N.C. 159, 162 (1999) (cleaned up); *see also Byrd v. Avco Corp.*, 389 N.C. 32, 40 (2026). A "substantial right" is "one materially affecting those interests which a person is entitled to have preserved and protected by law." *Land v. Whitley*, 388 N.C. 296, 303 (2025) (cleaned up). "[T]he appellant has the burden of showing [the appellate court] that the order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits." *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380 (1994).

"[T]he denial of summary judgment on grounds of sovereign immunity is immediately appealable, though interlocutory, because it represents a substantial right[.]" *Craig ex rel. Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 338 (2009). The logic here is simple: when a governmental actor asserts sovereign immunity, "the entitlement is an *immunity from suit* . . . and it is effectively lost if a case is erroneously permitted to go to trial." *Id.* (cleaned up). Thus, the denial of a motion for summary judgment or a motion to dismiss based on immunity "unquestionably affects a substantial right" because, "if the governmental agency were forced to litigate the case to judgment before appealing the immunity ruling, it could deprive the government of *its* right not to have to appear in court and defend the case at all." *Ballard v. Shelley*, 257 N.C. App. 561, 564 (2018) (emphasis added). In other words, the government's right to immunity is "los[t] if the order is not reviewed before final judgment." *Byrd*, 389 N.C. at 40 (cleaned up).

But the issue here is not deprivation of the government's right to sovereign immunity. Instead, plaintiff is commandeering the government's substantial right to manufacture appellate jurisdiction. This doesn't make sense. When a trial court grants a motion to dismiss based on immunity, is the non-governmental actor deprived of a substantial right unique to him or her? Of course not. The non-governmental entity "is in the same position as any other litigant whose claim was dismissed for lack of jurisdiction." *Ballard*, 257 N.C. App. at 564. "One might assume, therefore, that an appeal from an order *granting* a motion to dismiss based on sovereign or governmental immunity would not automatically affect a substantial right, simply because the ruling involved immunity." *Id.* But the majority declines the opportunity to clarify or explain how a party that is not cloaked with immunity loses a sovereign-immunity-based substantial right asserted by the opposing party.

The Court of Appeals, without regard to which party is cloaked with immunity, has "repeatedly held that appeals *raising* issues of governmental or sovereign immunity affect a substantial right." *Kawai Am. Corp. v. Univ. of N.C. at Chapel Hill*, 152 N.C. App. 163, 165 (2002)

(cleaned up) (emphasis added). In other words, according to the Court of Appeals, so long as one party has a substantial right, either party can bootstrap an interlocutory appeal. The majority declines the opportunity to rectify this approach despite the fact that it is both atextual and unfair.

Subsection 1-277(b) as a jurisdictional basis is similarly unavailing. That provision states that "[a]ny interested party has the right of immediate appeal from an adverse ruling as to the jurisdiction of the court *over the person or property of the defendant* . . . ." N.C.G.S. § 1-277(b) (2025) (emphasis added). This subsection only "permits the immediate appeal of an order denying a motion made pursuant to Rule 12(b)(2) to dismiss for lack of jurisdiction over the person, [but it] does not apply to orders denying motions made pursuant to Rule 12(b)(1) to dismiss for lack of subject matter jurisdiction." *Teachy v. Coble Dairies, Inc.*, 306 N.C. 324, 327 (1982). In other words, subsection 1-277(b) can serve as grounds for plaintiff's appeal only if sovereign immunity is a matter of personal jurisdiction.

This Court has yet to answer that question, but it should. *See id.* at 327. In *Teachy*, we described the competing arguments.

> A viable argument may be propounded that the State, as a party, is claiming by the doctrine of sovereign immunity that the particular forum of the State courts has no jurisdiction over the State's person. On the other hand, the doctrine may be characterized as an objection that the State courts have no jurisdiction to hear the particular subject matter of tort claims against the State.

Id. (cleaned up).

The latter is the better characterization. First, sovereign immunity is offense-specific. Our courts clearly have jurisdiction over governmental actors in a variety of suits. *See, e.g.*, *Corum v. Univ. of N.C.*, 330 N.C. 761, 785–86 (1992) ("The doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights."); *Cedarbrook Residential Ctr., Inc. v. N.C. Dep't of Health and Hum. Servs.*, 383 N.C. 31, 45 (2022) ("[B]y enacting the State Tort Claims Act, the State partially waived its sovereign immunity by consenting to direct suits brought as a result of negligent acts committed by its employees in the course of their employment." (cleaned up)). Further, governmental actors may be sued in their individual as opposed to official capacities, indicating that

sovereign immunity is not a question of courts' all-or-nothing power over the government's "person"; rather, when sovereign immunity is raised, courts have no authority over the "subject matter" of that particular suit. *See Teachy*, 306 N.C. at 327; *see also Powelson v. United States*, 150 F.3d 1103, 1104 (9th Cir. 1998) ("[S]overeign immunity is not merely a defense to an action against the United States, but a jurisdictional bar." (quoting 16 *Moore's Federal Practice* § 105.21 (3rd ed. 1998))).

The majority avoids answering this question, asserting that "[i]ssues not 'specifically set out as the basis for the dissent' are not preserved for this Court's appellate jurisdiction arising from an appeal based on that dissent." (Quoting *Cryan v. Nat'l Council of YMCAs of the U.S.*, 384 N.C. 569, 570 (2025).) But this assertion misses the point entirely. "[O]ur appellate jurisdiction is derived from that previously acquired in the court from which the cause is removed[.]" *Gordon v. Sanderson*, 83 N.C. 1, 2 (1880). Accordingly, the issue at hand is whether the Court of Appeals had appellate jurisdiction in the first instance. "[W]hen the appeal is interlocutory[,] the appellant has the burden of showing in his brief to [the appellate court] that . . . the order appealed from deprives the appellant of a substantial right[.]" *Abe v. Westview Capital, L.C.*, 130 N.C. App. 332, 334–35 (1998) (cleaned up). The scope of the dissent below is irrelevant to this jurisdictional inquiry.

Further, although claiming that the issue is beyond the scope of this Court's review, the majority also devotes nearly six pages to attempting to explain the basis for appellate jurisdiction in this case. Ultimately, the majority concludes that "the posture of the claims below indicates a risk of inconsistent verdicts on the same factual issues" and affects a substantial right. Specifically, the majority holds that "many of the same factual issues . . . including the alleged events relating to the assault and the extent of harm to Katherine" would need to be resolved in both the present case and in a trial against Ms. Dixon, thus raising a risk of inconsistent verdicts.

But the events of the assault and plaintiff's injuries are largely uncontested. In its brief to this Court, the Board concedes that Ms. Dixon assaulted the student. Given that the Board has not argued these facts and that a video of the incident exists, it is unlikely that separate juries would reach inconsistent verdicts as to the "assault and the extent of harm to [plaintiff]."

Regardless, it is even less likely that a trial against Ms. Dixon will proceed. The trial court entered default judgment against Ms. Dixon over three years ago in February 2023. Neither party has claimed that

Ms. Dixon seeks to set aside this judgment. But the majority's conclusion rests on the mere possibility that, upon motion from Ms. Dixon, the trial court could set aside the default judgment "[f]or good cause shown" and "in accordance with Rule 60(b)." N.C.G.S. § 1A-1, Rule 55(d) (2025). Under Rule 60(b), the court may set aside judgment for:

> (1) Mistake, inadvertence, surprise, or excusable neglect;
>
> (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
>
> (4) The judgment is void;
>
> (5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) Any other reason justifying relief from the operation of the judgment.

N.C.G.S. § 1A-1, Rule 60(b) (2025). There is no indication that Ms. Dixon will be positioned to assert a successful motion to set aside the default judgment entered against her under any of the grounds outlined in Rule 60(b), and I am not persuaded that a risk of inconsistent verdicts supports interlocutory jurisdiction here. Regardless, plaintiff failed to raise this alternative basis for jurisdiction at the Court of Appeals, so the argument is waived. *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402 (2005) ("It is not the role of the appellate courts . . . to create an appeal for an appellant.").

Because there is no risk of inconsistent verdicts and neither subsection 7A-27(b)(3)(a) nor section 1-277 provides grounds for an interlocutory appeal when a motion to dismiss based on sovereign immunity is granted, plaintiff failed to demonstrate a basis for appellate jurisdiction and we should dismiss this appeal.

II. Plaintiff's *Corum* Claim

After the majority runs around the jurisdictional hurdle, it expands our precedent regarding *Corum* claims for violations of the right to a

sound basic education nearly beyond recognition by making a single incident of teacher misconduct grounds for a constitutional claim. To the extent there was some modicum of restraint in our *Corum* jurisprudence in this space, the governor has been taken off by the majority.

"Article I, Section 15 and Article IX, Section 2 of the North Carolina Constitution combine to guarantee every child of this state an opportunity to receive a sound basic education in our public schools." *Deminski v. State Bd. of Educ.*, 377 N.C. 406, 412 (2021) (quoting *Leandro v. State*, 346 N.C. 336, 347 (1997)). "[E]qual access to participation in our public school system is a fundamental right, guaranteed by our state[.]" *Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 618 (1980).

To assert a *Corum* claim in the educational context, a claimant must sufficiently allege (1) that a state actor violated the student's constitutional rights; (2) that the claim is colorable, meaning it presents facts sufficient to support an alleged violation of a right protected by the State Constitution; and (3) that there is no adequate state remedy. *Deminski*, 377 N.C. at 413–414. For purposes of this dissent, I do not dispute elements (1) and (3) are met.

Regarding element (2), the majority claims that *Deminski* and *Sneed* "bear directly" on plaintiff's claim. In *Deminski*, we "consider[ed] whether an individual may bring a claim under the North Carolina Constitution for a school board's deliberate indifference to continual student harassment." *Id.* at 407. There, "[o]ver a period of several months," three elementary school students were bullied and sexually harassed by other students. *Id.* Specifically, the complaint alleged physical and sexual harassment that included students "push[ing] [the plaintiff's] spine so that she was in pain and had trouble breathing and swallowing" and another student "pull[ing] down his pants in the hallway in [the plaintiff's] presence to expose his penis." *Id.* at 407–09. Crucially, the various forms of harassment occurred repeatedly "[t]hroughout the school day" and "on multiple occasions." *Id.* at 407–08. All three plaintiff-students were subjected to similar "sexual conduct, constant verbal interruptions laced with vulgarity, and physical violence." *Id.* at 409. Further, the teacher, assistant principal, and principal, were "repeatedly notified" and "repeatedly informed" about the incidents, yet "the bullying and harassment continued with no real change." *Id.* Ultimately the plaintiff-students transferred to a new school. *Id.*

This Court held that the plaintiff-students alleged a colorable constitutional claim "because the school's deliberate indifference to *ongoing* student harassment created an environment in which plaintiff-students

could not learn." *Id.* at 414 (emphasis added). "Deliberate indifference indicates that the government entity knew about the circumstances infringing plaintiff-students' constitutional right and failed to take adequate action to address those circumstances." *Id.* We reasoned that the State must "provide an opportunity to learn that is free from *continual* intimidation and harassment which prevent a student from learning." *Id.* at 412–13 (emphasis added).

Sneed should be similarly unavailing because, although also analyzing a *Corum* claim in the educational context, the facts there bear no resemblance to the case at hand. In *Sneed*, we held that public schools may collect "modest, reasonable fees for the purpose of enhancing the quality of their educational effort." *Sneed*, 299 N.C. at 610. We noted that schools must provide a waiver policy for students facing economic hardship in order to protect "equal access to participation in our public school[s]." *Id.* at 618.

The majority relies on *Deminski* and *Sneed* to conclude that "local school authorities may not be deliberately indifferent to extreme, in-school conduct that deprives a student of the opportunity to access a sound basic education on equal terms." Though neither case lends support for such a sweeping standard, the majority applies this standard to conclude that the Board "[e]ffectively punish[ed]" plaintiff by suspending her and then transferring her after the incident. According to the majority, the Board's actions were "clearly unreasonable" and amounted to "deliberate indifference."

But this case is not *Deminski*; at least it wasn't until today. There are at least three flaws with the majority's scant analysis of the allegations in plaintiff's complaint. First, the majority fails to explain how a singular incident of abuse at the hands of a teacher can amount to "deliberate indifference" by the school board. In stark contrast to the "continual" and "ongoing" harassment that took place "[o]ver a period of several months" in *Deminski*, 377 N.C. at 414, the majority concludes that an isolated incident is enough. The majority reaches this conclusion without any facts alleging that the Board was previously made aware of similar behavioral problems with Ms. Dixon or other incidents involving Ms. Dixon and plaintiff, specifically. In fact, in footnote 3, the majority concedes that plaintiff's allegations regarding Ms. Dixon's lack of licensure as well as the "unspecified earlier 'issues within her classroom' " are "too vague" to state a constitutional claim.

We also note that Ms. Dixon was hired just six weeks prior to the date of the assault. In the absence of specific allegations demonstrating

a nexus between Ms. Dixon's conduct during those six weeks and her assault on plaintiff, it is impossible to shoehorn the facts alleged here into the *Deminski* framework which emphasized indifference to "continual" and "ongoing" harassment.[1]

Second, the majority ignores that, at the time of the assault, plaintiff was attempting to enter a classroom she was not authorized to be in at that time.[2] Of course, Ms. Dixon's response to the student's misconduct was egregious. But the fact remains that plaintiff impermissibly entered the classroom and, in doing so, subjected herself to disciplinary action.

School boards have broad discretion to discipline. *See* N.C.G.S. § 115C-391.1 (2025); *id.* § 115C-390.7–390.8 (authority to impose short-term and long-term suspensions); *id.* § 115C-105.48 (authority to transfer students to alternative schools); *see also* Alamance-Burlington School System, *Student Code of Conduct* § 4300(b) (2021–22), available at https://core-docs.s3.amazonaws.com/documents/asset/uploaded_file/3260/sahs/2275048/21-22_EngCOC_book_complete.pdf (explaining that violations of the Code of Student Conduct may result in short-term suspensions and placement in an alternative learning program or school). While the majority labels the Board's suspension and transfer of plaintiff as "clearly unreasonable," the complaint did not allege that plaintiff was transferred only because of the incident with Ms. Dixon rather than her own conduct or risk of academic failure. We are not "required to accept . . . unwarranted deductions of fact[ ] or unreasonable inferences as true." *Est. of Vaughn v. Pike Elec., LLC.*, 230 N.C. App. 485, 493 (2013). But by making this inference, the majority lays the groundwork for every routine disciplinary action or transfer to give rise to a constitutional claim against the school board.

Additionally, it would be unreasonable to assume that the Board acted so egregiously. Instead, perhaps the Board was merely made aware that a physical altercation took place between plaintiff and Ms.

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1. The majority attempts to bolster its analysis with federal case law analyzing allegations of sex discrimination under Title IX. But federal precedent interpreting Title IX has no bearing on this state's constitutional provisions guaranteeing the right to a sound basic education, and allowing federal Title IX jurisprudence an entry into this area of our state's constitution is concerning.

2. The complaint alleges that, when the incident occurred, plaintiff was attempting to "retrieve her bookbag" from Ms. Dixon's classroom and "was unable to avoid any contact with Defendant Dixon . . . caus[ing] Minor Plaintiff to strike Defendant Dixon in her arm." Plaintiff's brief provides the additional context that plaintiff "forgot her bookbag" in Ms. Dixon's classroom and "went back inside to retrieve it."

Dixon when plaintiff attempted to enter Ms. Dixon's classroom without permission, which is exactly what happened. When presented in that light, the Board's initial decision to suspend plaintiff—a decision which was reneged once video of the incident was made available—does not seem so unreasonable. Either way, even accepting the facts of the complaint as true, we just do not know.

And even if the response was unreasonable, the Board was not deliberately indifferent. In fact, by transferring plaintiff out of the school where the abuse occurred, the Board demonstrated just the opposite. While reasonable minds might disagree on whether transferring plaintiff was the most appropriate option, the Board responded, just not in a way the majority likes. But our precedent instructs us to provide deference in these highly factual school discipline cases. *See King v. Beaufort Cnty. Bd. of Educ.*, 364 N.C. 368, 374 (2010) ("[T]he special context of public schools requires a more lenient approach to reviewing the decisions of school officials, and the professional judgments of school officials on school safety and student discipline issues are entitled to appropriate judicial deference." (cleaned up)). Deliberate indifference, per our precedent, is therefore reserved for those situations in which a school board has knowledge of an existing issue and, armed with that information, takes no action to alleviate continual harassment or abuse, as occurred in *Deminski*. At least it was until today.

Lastly, plaintiff's complaint fails entirely to allege a "deprivation" of the right to a sound basic education or when that deprivation might have occurred. As explained above, plaintiff cannot fit into the *Deminski* framework because the allegations do not show deliberate indifference to ongoing harassment. In addition, plaintiff cannot claim a deprivation simply because she was transferred to a new school. School boards have the statutory authority to transfer students to alternative programs. *See* N.C.G.S. § 115C-105.48. "[T]he mere fact that a student has had to engage in an alternative education program . . . is insufficient to establish a constitutional violation; instead, a plaintiff must show that the program itself was somehow inadequate to provide the opportunity for a sound basic education." *Davis v. Blanchard*, 175 F. Supp. 3d 581, 595 (M.D.N.C. 2016) (interpreting the right to a sound basic education protected by the North Carolina Constitution).

Glaringly, plaintiff's complaint lacks any allegation that the new school failed to provide her the opportunity to a sound basic education. Instead, plaintiff makes the vague claim that her "academic performance . . . was placed in peril" and that she "suffered educational consequences," but she provides no facts to support these assertions.

"[A] conclusory allegation . . . should not be sufficient, by itself, to withstand a Rule 12(b)(6) motion to dismiss." *Meyer v. Walls*, 347 N.C. 97, 114 (1997). But the majority's reasoning effectively requires courts to assume that the transfer alone deprived the plaintiff of the right to a sound basic education.

Finally, we note the foreseeable issues with the majority's sweeping standard that school authorities "may not be deliberately indifferent to extreme, in-school conduct that deprives a student of the opportunity to access a sound basic education on equal terms."[3] The majority fails to define "extreme, in-school conduct" or how we view "on equal terms." We are left wondering if a fist-fight on the middle-school playground which leads to suspension of both participants could give rise to a constitutional claim. How about a food fight in the cafeteria? Does merely transferring a student to another school equate to a denial of equal access? How so? Is the majority saying that school choice is a component of these equal access protections? If so, the majority should be explicit. And if not, the majority should explain how transferring the student to another school somehow denied her equal access to participate in the public schools.

The majority offers no limiting principle. But make no mistake, such a far-reaching declaration lays the groundwork for profiteering attorneys to assert constitutional violations for every grievance a child faces in school because principals and administrators may now be the guarantors of subjective educational equality. Good luck.

Justice DIETZ concurs in Part I of this opinion concerning jurisdiction based on governmental immunity.

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3. The concurrence "emphasize[s] the narrowness of today's decision," asserting that "this case involves . . . an improbable set of alleged facts." But the concurrence fails to engage with the new standard actually articulated by the majority which is inarguably wide-ranging. Disciplinary actions including suspensions and transfers are routinely employed by schools, and the majority makes no attempt to cabin its holding to the specific facts of this case because they can't.

SESSOMS v. TOYOTA MOTOR SALES, U.S.A., INC.

[390 N.C. 39 (2026)]

SHEILA MARTIN SESSOMS, ADMINISTRATRIX OF THE ESTATE OF MATTHEW GIBSON SESSOMS

v.

TOYOTA MOTOR SALES, U.S.A., INC., TOYOTA MOTOR CORPORATION, TOYOTA MOTOR NORTH AMERICA, INC., TOYOTA MOTOR ENGINEERING & MANUFACTURING NORTH AMERICA, INC., SUBARU OF AMERICA, INC., SUBARU CORPORATION, SUBARU CORPORATION, F/K/A FUJI HEAVY INDUSTRIES, LTD., NATIONAL CAR AND TRUCK SALES LLC, J.C. SOLES, JR., IN HIS INDIVIDUAL CAPACITY, JEREMY G. REGISTER, IN HIS INDIVIDUAL CAPACITY, AND BARRY W. GELEZINSKY, IN HIS INDIVIDUAL CAPACITY

No. 23PA25

Filed 14 August 2026

1. Discovery—deposition—request for production of documents—timeliness of objections—misstatement of law—abuse of discretion

In a suit against two automotive companies (defendants), in which plaintiff, as administratrix of her son's estate, asserted that the faulty design of her son's vehicle contributed to his death by a post-collision fire, the trial court committed an error of law when it held that defendants failed to timely object to plaintiff's request for production of documents prior to a scheduled deposition. Defendants' separate objections—filed ten days and seven days, respectively, prior to the deposition—were made within the deadlines set forth in Civil Procedure Rule 30(b)(5) (requiring that objections be served at least seven days prior to the taking of a deposition) and, despite plaintiff's request that objections be made earlier, one party cannot unilaterally impose tighter deadlines than those provided in the Rules of Civil Procedure. The trial court's misstatement of the deadline caused prejudicial harm because the court improperly waived defendants' objections to both the Rule 30(b)(5) notice and to plaintiff's other Rule 34 requests; therefore, the error constituted an abuse of discretion. The opinion of the Court of Appeals upholding this aspect of the trial court's order was reversed, and the matter was remanded with instructions to vacate the discovery order and for further proceedings.

2. Discovery—deposition—scope of topics—preservation of objections—protective order not required—legal error

In a suit against two automotive companies (defendants), in which plaintiff, as administratrix of her son's estate, asserted that the faulty design of her son's vehicle contributed to his death by a

post-collision fire, the trial court erred by holding that defendants' objections to the scope of deposition topics were waived or overruled for failure to seek a protective order to limit the scope of Civil Procedure Rule 30(b)(6) deposition topics. Pursuant to the Rules of Civil Procedure, defendants here preserved their objections to the deposition topics by serving them directly on plaintiff in advance of the deposition and were not required to seek a protective order. The decision of the Court of Appeals upholding this aspect of the trial court's order was reversed, and the matter was remanded with instructions to vacate the discovery order and for further proceedings.

Justice DIETZ concurring.

Chief Justice NEWBY joins in this concurring opinion.

Justice RIGGS dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 297 N.C. App. 395 (2024), affirming in part, reversing in part, vacating in part, and dismissing in part orders entered on 10 August 2023 and 1 December 2023 by Judge James Gregory Bell in Superior Court, Robeson County, and remanding for further proceedings. Heard in the Supreme Court on 15 April 2026.

Ward and Smith, P.A., by Alex C. Dale, Christopher S. Edwards, Joseph T. Knott III, and Mark S. Wigley, Abrams & Abrams, P.A., by Noah B. Abrams, and Musselwhite, Musselwhite, Branch & Grantham, P.A., by William Owen, for plaintiff-appellee.

Jennifer K. Van Zant, Jim W. Phillips, Jr., Andrew L. Rodenbough, Graham F. Whittington, Patrick J. Cleary, and Annie C. Warren for defendant-appellants.

Dowling PLLC, by Troy D. Shelton, for Chamber of Commerce of the United States of America and the North Carolina Chamber Legal Institute, amici curiae.

Roberts & Stevens, PA, by David Hawisher, for NCADA, amicus curiae.

Ellis & Winters LLP, by Scottie Forbes Lee and Jacob V. Stewart, for the Product Liability Advisory Council, Inc., amicus curiae.

EARLS, Justice.

The North Carolina Rules of Civil Procedure are intended to facilitate the "expeditious handling of factual information before trial so that the critical issues may be presented at trial unencumbered by unnecessary or specious issues." *Willis v. Duke Power Co.*, 291 N.C. 19, 34 (1976). To that end, "gamesmanship" is strongly disfavored. *See id.* Where a trial court order compels discovery consistent with these rules, and a party violates that order, the court has the discretion to impose appropriate sanctions. *E.g.*, *Dunhill Holdings, LLC v. Lindberg*, 282 N.C. App. 36, 56 (2022). Such penalties may include striking all or parts of a pleading, deeming certain acts as established for purposes of the action, or even holding the offending party in contempt of court. N.C.G.S. § 1A-1, Rule 37(b)(2) (2025). Appellate courts will not micromanage discovery matters that are entrusted to the sound discretion of the trial court, such as appropriate sanctions. *See Am. Tel. & Tel. Co. v. Griffin*, 39 N.C. App. 721, 727 (1979).

Here, we review a discovery order that ultimately gave rise to serious sanctions. Toyota Motor Sales, U.S.A., Inc. (Toyota) and Subaru Corporation (Subaru) are two defendants in a negligence, unfair and deceptive trade practices, and product liability suit brought by Ms. Sheila Sessoms. Ms. Sessoms represents the estate of her son, Matthew Gibson Sessoms, who was tragically killed while driving a vehicle designed, manufactured, sold, and distributed by Toyota and Subaru. After the trial court found that Toyota and Subaru were willfully failing to comply with their obligations under the Rules of Civil Procedure and with the trial court's earlier discovery order, the trial court sanctioned them by eliminating one of their defenses to the action and deeming two elements of Ms. Sessoms's product liability claim as established.

Below, the Court of Appeals vacated the sanctions order and reversed part of the discovery order. *See Sessoms v. Toyota Motor Sales, U.S.A., Inc.*, 297 N.C. App. 395, 399 (2024) (per curiam). The Court of Appeals held that the trial court erred by ordering Toyota and Subaru to translate documents they had already produced from the Japanese language into the English language, where defendants only ever possessed the documents in the Japanese language and would therefore have to create costly English translations to comply with the order. *Id.* We declined to allow review of this issue and it is not before us at this time.

On discretionary review of the remaining issues in the discovery order, we conclude that the trial court committed two other legal errors. First, the trial court erred by enforcing a fourteen-day deadline for objections to document requests in a deposition notice pursuant to Rule 30(b)(5). This Rule plainly states that such objections "must be served at least seven days prior to the taking of the deposition." N.C.G.S. § 1A-1, Rule 30(b)(5) (2025). Although parties can mutually agree to a different deadline, including in a discovery plan, and a court can order documents produced consistent with the Rules, a party seeking discovery may not unilaterally compel an adverse party to act in advance of the 30(b)(5) deadlines. Second, the trial court erred by waiving Toyota and Subaru's objections to the Rule 30(b)(6) deposition topics simply because they did not obtain a protective order prior to the respective depositions. We hold that a deponent who seeks to object to Rule 30(b)(6) deposition topics need not obtain a protective order to preserve those objections. Rather, the objections are preserved when the party from whom discovery is sought lodges them directly with the party seeking discovery, in advance of the deposition.

Because the trial court's discovery order contained two other legal errors, the Court of Appeals erred by affirming those parts of the order. We reverse that part of the Court of Appeals decision, remand this matter to the Court of Appeals with instructions to vacate the discovery order, and further remand the matter to the trial court for further proceedings consistent with this opinion.

I. Background

A. The Car Crash and Complaint

Ms. Sessoms's eighteen-year-old son Matthew was driving a 2013 Toyota Scion on 12 July 2021 in Columbus County when, around 11:30 a.m., a state-owned dump truck ran a stop sign and collided with the front of his vehicle. As the complaint alleges, the occupant compartment collapsed and effectively pinned Mr. Sessoms to the steering wheel while he was alive and conscious. Then, while he was trapped, his car caught fire near the engine compartment. Bystanders and emergency rescue services were unable to extinguish the growing flames and unsuccessfully tried for over an hour to rescue Mr. Sessoms from the burning car. The complaint alleged that "the firewall between the engine compartment and the occupant structure failed, and fire began spreading from the footwell of the driver's side of the vehicle to Mr. Sessoms's" person, causing severe pain and injury and eventually his death.

As the administratrix of Matthew's estate, Ms. Sessoms brought her first amended complaint on 10 January 2022 naming Toyota and Subaru, joint developers of the Scion, as defendants.[1] Her new complaint alleged (1) negligence, gross negligence, recklessness, and willful and wanton misconduct, specifically related to the vehicle design; (2) breach of express and implied warranties; and (3) Chapter 75 violations under North Carolina's Unfair and Deceptive Trade Practices Act.

B. Claims in Discovery

The claims proceeded to discovery. The parties entered a Hague service agreement on 23 February 2022 to extend deadlines for various discovery matters not at issue here. They also entered into a Stipulated Sharing Protective Order, which the trial court approved on 8 August 2022. No other discovery plan, such as one crafted pursuant to Rule 26(f), appears in the record.

Ms. Sessoms served interrogatories, requests for production of documents, and requests for admissions on Subaru and Toyota on 26 January 2022 and 28 January 2022, respectively. Ms. Sessoms's requests focused on certain components of the vehicle, including the A-pillar, roof rails, and occupant compartment structure, as well as its firewall, engine compartment, fuel tank, fuel supply system, fuel lines, and supplemental restraint system. She sought information about employees, contractors, and suppliers who participated in the distribution of the 2013 Scion, corporate contracts related to the Scion's development and design of those component parts by each corporate entity, incidents involving those component parts in a model year 2011 Scion to present including on any previous collisions, details of particular engineers assigned to this litigation, recall history and manual or product literature for the above mentioned components, details on the sale and distribution of the Scions, and any communications related to the accident. In broad strokes, these requests sought information about Toyota and Subaru's likely defenses, their respective roles in the Scion's manufacture and design, the process of design and manufacture for this vehicle model and subsequent Scions, communications related to defendants' own investigation into the crash, and any notice Toyota and Subaru had about the Scion's safety issues. Toyota and Subaru answered on 3 March 2022 and 25 April 2022, responded on 12 May 2022 and 27 June 2022, and submitted supplemental responses on 27 July 2022 and 12 January 2023, respectively.

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1. References in this opinion to "defendants" refer only to the two defendants subject to this appeal, Toyota and Subaru, and not the remaining defendants to the action.

In the spring of 2023, Ms. Sessoms noticed depositions of Toyota and Subaru as corporate entities pursuant to Rule 30(b)(6). Ms. Sessoms's 18 April 2023 notice to Toyota contained a request for document production pursuant to Rule 30(b)(5), as did Ms. Sessoms's 16 May 2023 notice to Subaru. On 22 May 2023, Toyota responded and objected to topics and document requests in the deposition notice. Subaru similarly responded and objected on 15 June 2023. Nonetheless, Toyota's designee Barry Hare was deposed on 1 June 2023 and Subaru's designee Tetsuya Nakase was deposed on 22 June 2023. Ms. Sessoms's counsel held both depositions open pending her forthcoming motion to compel.

C. The Discovery Order

Following both depositions, Ms. Sessoms moved the trial court on 6 July 2023 to compel discovery against Toyota and Subaru. Among many issues, she argued that defendants did not timely respond to the Rule 30(b)(5) document requests within the fourteen-day period contained in the request, so their objections should be "waived" and "stricken" by the trial court and the trial court should order those documents produced. Further, she argued that defendants' responses to the Rule 30(b)(6) deposition topics contained "improper unilateral limitations of the deposition topics" and other improper objections and that defendants had not obtained a protective order prior to the deposition. She asked that the trial court overrule those objections and compel the designees to be "prepared to testify as to the topics contained in Plaintiff's Rule 30(b)(6) Notices to the Subaru and Toyota Defendants" at the reconvened deposition. She also sought the production of additional documents, including English language translations of documents already produced in Japanese. Ms. Sessoms's motion confirmed that the parties tried to meet and confer, but that "[t]hese efforts were unavailing." Toyota and Subaru opposed the motion, arguing that their responses were complete, consistent with the Rules of Civil Procedure, and that Ms. Sessoms's requests were otherwise not sufficiently detailed for them to respond further. They pointed to correspondence from defense counsel to plaintiff's counsel offering to meet and requesting "additional, specific information regarding the additional documents you seek."

The trial court heard Ms. Sessoms's motion on 7 August 2023 with counsel for the parties present. On 10 August 2023, the court issued an order granting her motion to compel (the discovery order). The trial court held that Toyota and Subaru had not complied with the Rules of Civil Procedure and had not produced adequately prepared designees for the Rule 30(b)(6) depositions. The court ordered Toyota and Subaru to supplement their responses to certain interrogatories and requests

for production, including with new documents translated into the English language, and to make a log of responsive documents Toyota and Subaru were claiming were "not within their possession or control" or were otherwise privileged—in particular, documents which Subaru's designee specifically referenced during his Rule 30(b)(6) deposition but that were not produced. The trial court also ordered Toyota and Subaru to designate a witness prepared to testify as to all matters known or reasonably available to the respective defendants for the topics listed in Ms. Sessoms's Rule 30(b)(6) notice "without further objection" and that the depositions would reconvene locally, in Robeson County.

D. The Sanctions Order

On 11 September 2023, Toyota and Subaru submitted supplemental responses to plaintiff's first set of interrogatories, requests for production, and requests for admission. Counsel exchanged letters on 13 September and 18 September as to the scope of defendants' obligations under the discovery order, and specifically the nonproduction of certain documents in English and documents that representatives for Toyota and Subaru claimed could not be found. Counsel for Ms. Sessoms warned that she would file another motion to compel and for sanctions should the issues not be resolved.

On 19 September 2023, Ms. Sessoms moved for sanctions and made a second motion to compel. She argued that Toyota and Subaru's responses to her discovery requests were incomplete and contained improper objections and refusals to substantively answer, that other attempts to resolve the issues without judicial intervention were unsuccessful, and that she was "unable to effectively prosecute her claims without" the materials being withheld. She emphasized that nearly all of Subaru's documents were in the Japanese language and had not been translated according to the trial court's discovery order. Subaru and Toyota opposed the motion to compel and for sanctions on 25 October 2023, arguing that they had complied with the Rules of Civil Procedure and that to the extent there were "potentially responsive documents . . . no longer available," that was due to "the operation of routine, good-faith document retention policies."

The trial court heard Ms. Sessoms's new motion on 27 November 2023 with counsel present. On 1 December 2023, the trial court granted Ms. Sessoms's motion by written order (the sanctions order). The court reiterated the discovery order's conclusions that Toyota and Subaru had "willfully failed to comply with [their] obligations under Rule 30(b)(6)," and that neither had "served timely objections to the document requests

contained in the Rule 30(b)(6) notices." The court again observed that "[n]either [defendant] filed motions for protective orders to limit the scope of the deposition or the accompanying document requests prior to the taking of the Rule 30(b)(6) depositions."

The court further ruled that defendants' 10 September 2023 responses were past due, incomplete, and missing the required privilege log, and that a range of responsive documents that the discovery order compelled be produced were either not produced in English or not produced at all. The trial court further observed that Toyota and Subaru had not adequately explained why documents related to the Scion's development and design were not produced, notwithstanding the proffered document retention policy, because Toyota and Subaru "have not shown the [c]ourt that they, in fact, complied with their own policy." This failure, the trial court reasoned, suggested that relevant and discoverable documents were being "with[he]ld[ ]" or had even been "potential[ly] destr[oyed]."

Relying on what the court characterized as Toyota and Subaru's repeated and intentional noncompliance with the Rules of Civil Procedure and the discovery order, the trial court held that Toyota and Subaru's conduct merited sanctions under Rule 37(b). The trial court proceeded to sanction defendants by deeming certain facts as established against Toyota and Subaru. In brief, the established facts proved the elements of duty and breach in Ms. Sessoms's product liability claim in her favor, based on the defective design of the side structure, engine compartment, and firewall and the existence of a feasible alternative design. Moreover, the trial court struck Toyota and Subaru's defense that the Scion was designed in compliance with applicable government regulations and therefore was not defective. The court reiterated that Toyota and Subaru remained bound by the discovery order and instructed that the court would hold a status conference in sixty days to determine Toyota and Subaru's compliance with both orders and consider then "whether additional sanctions are just and appropriate."

E. The Appeal

Toyota and Subaru appealed both the discovery order and the sanctions order, relying on Court of Appeals precedent that a sanctions order affects a substantial right and should be appealed with the underlying discovery order. *See Benfield v. Benfield*, 89 N.C. App. 415, 418–19 (1988); *Feeassco, LLC v. Steel Network, Inc.*, 264 N.C. App. 327, 331–32 (2019); *Willis*, 291 N.C. at 30; *Baker v. Speedway Motorsports, Inc.*, 173 N.C. App. 254, 262 (2005). They also petitioned for writ of certiorari

in the alternative to ensure the Court of Appeals could fully review both orders, arguing that "[t]he [d]iscovery [o]rder involves issues and facts inextricably intertwined with those addressed in the [s]anctions [o]rder."

On review, the Court of Appeals dismissed Toyota and Subaru's appeal as to the location of the reconvened Rule 30(b)(6) deposition, reasoning that this issue did not raise a substantial right. *See Sessoms*, 297 N.C. App. at 398. Otherwise, the Court of Appeals retained the appeal and, to the extent that other issues in the appealed orders did not affect a substantial right, in its discretion granted certiorari. *Id.*

On the merits, the Court of Appeals concluded that "the trial court did not abuse its discretion [or] commit reversible error, or the Toyota Defendants have otherwise waived any argument by not timely objecting *except that* we conclude the trial court erred by requiring [Toyota and Subaru] to create new documents in English of documents already provided that are in the Japanese language." *Id.* The court followed "the greater weight of authority in the United States that a party producing documents is not required to create new documents consisting of English translations of documents already provided." *Id.* at 399. The court reversed that portion of the discovery order but otherwise affirmed that order. *Id.* As to the sanctions order, the Court of Appeals vacated and remanded for the trial court to reconsider whether, in the trial court's discretion, the same sanctions were merited and whether the sanctions to be imposed mooted any of the remaining discovery disputes. *Id.*

Toyota and Subaru petitioned this Court for discretionary review, which we allowed on 12 December 2025. We denied Ms. Sessoms's conditional petition for discretionary review of whether the Court of Appeals wrongly vacated the sanctions order on the English translation issue.

II. Discovery Issues

A. Standard of Review

The Rules of Civil Procedure are part of the General Statutes, so interpreting their meaning is a matter of statutory interpretation. *In re E.D.H.*, 381 N.C. 395, 398 (2022). Statutory interpretation questions are reviewed de novo. *Id.* Otherwise, "[t]he administration of these rules lies necessarily within the province of the trial courts," *Am. Tel. & Tel. Co.*, 39 N.C. App. at 727, and an appellate court reviews a trial court's discovery rulings for abuse of discretion, *e.g.*, *Fulmore v. Howell*, 189 N.C. App. 93, 94 (2008) (reviewing a trial court's order granting a motion

to compel for abuse of discretion); *Hartman v. Hartman*, 82 N.C. App. 167, 180 (1986) (reviewing a protective order under Rule 26(c) for abuse of discretion). An abuse of discretion may occur where the trial court commits an error of law by misinterpreting and misapplying the relevant legal standard, *Da Silva v. WakeMed*, 375 N.C. 1, 5 (2020), or where an appellant shows that the court's ruling was "manifestly unsupported by reason[ ] or could not be the product of a reasoned decision," *Fulmore*, 189 N.C. App. at 96 (quoting *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 601 (2005)).

Discovery orders not certified under Rule 54(b) are interlocutory and not immediately appealable unless they affect a substantial right. *E.g.*, *Baker*, 173 N.C. App. at 262. But a discovery order enforced by sanctions under Rule 37(b) may be appealable. *E.g.*, *Willis*, 291 N.C. at 29 ("Appeal from an adjudication of criminal contempt is a recognized means of obtaining immediate review to test discovery orders." (cleaned up)); *Feeassco, LLC*, 264 N.C. App. at 331–32 (noting that "a party may appeal from an [interlocutory] order imposing sanctions by striking its answer and entering judgment as to liability" and that "[t]he appeal tests the validity of both the discovery order and the sanctions imposed").

Here, Toyota and Subaru appealed both the discovery order and the sanctions order to the Court of Appeals, but our review is limited only to the discovery order. The Court of Appeals in its discretion allowed certiorari to review issues in the discovery order, even if they did not affect a substantial right. *Sessoms*, 297 N.C. App. at 398. The Court of Appeals also vacated the sanctions order, and we did not allow review of that decision. Thus the validity of the sanctions order is not before us and that order remains "null and void." *Alford v. Shaw*, 327 N.C. 526, 543 n.6 (1990). We also denied review of the Court of Appeals' decision that the Rules of Civil Procedure do not permit a court to order an adverse party to translate documents into the English language where those documents did not already exist in English, so that issue is not before us, either. Our review is thus limited to the remaining issues in the discovery order. *See* N.C. R. App. P. 16(a) ("Review by the Supreme Court is limited to consideration of the issues stated in . . . the petition for discretionary review . . . unless further limited by the Supreme Court . . . ."); *Cherry Cmty. Org. v. Sellars*, 381 N.C. 239, 256 (2022) (noting that, on discretionary review, "our review is limited to consideration of the issues stated in the petition for discretionary review and the response thereto and properly presented in the new briefs" (cleaned up)).

B. Rule 30(b)(5) Request for Production Deadlines

[1] Ms. Sessoms's Rule 30(b)(6) deposition notices to Toyota and Subaru also included a request that documents be produced pursuant to Rule 30(b)(5). That Rule permits a deposing party to include "a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition." N.C.G.S. § 1A-1, Rule 30(b)(5) (2025). In both notices, Ms. Sessoms requested that documents be produced fourteen days before the scheduled deposition.

Toyota and Subaru responded and objected not fourteen days prior to the scheduled deposition, as Ms. Sessoms requested, but rather ten days and seven days before the taking of the deposition, respectively.

In the discovery order, the trial court held that Toyota and Subaru's responses to these Rule 30(b)(5) document requests "did not comply with the North Carolina Rules of Civil Procedure" and ordered both defendants to produce documents within thirty days "without further objection." The sanctions order elaborated that, in the trial court's view, "[n]either [Toyota] [n]or [Subaru] served timely objections to the document requests contained in the Rule 30(b)(6) notices," and that the discovery order "overrul[ed Toyota and Subaru's] objections[ ] and order[ed] full and complete supplementation." The Court of Appeals affirmed this decision without particular reasoning. *Sessoms*, 297 N.C. App. at 398. This was legal error.

Rule 30(b)(5) states that notices made pursuant to that provision shall follow "the procedure of Rule 34, except as to the time for response." N.C.G.S. § 1A-1, Rule 30(b)(5). The provision separately provides the time for response: "[T]he notice and the request must be served at least 15 days earlier than would otherwise be required by Rule 30(b)(1), and any objections to such a request must be served at least seven days prior to the taking of the deposition." *Id.* The documents themselves are due "at the taking of the deposition." *Id.*

Here, no one disputes that Toyota and Subaru served their objections "at least seven days prior" to the deposition. *Id.* Thus the objections were served within the deadlines prescribed by the Rules of Civil Procedure and could not be waived as untimely on this basis. Although Ms. Sessoms requested the objections and responsive documents sooner than the timelines provided for in the Rules, one party may not unilaterally impose tighter deadlines on their adverse party than those prescribed by the Rules and expose the other party to sanctions on that basis. *See* N.C.G.S. § 1A-1, Rule 1 (2025) ("These rules shall govern

the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute."). The Rules do not forbid parties from negotiating and mutually agreeing to different deadlines, of course, but that is not what happened here.

Misstating a deadline is not necessarily a legal error giving rise to abuse of discretion. Trial courts and trial advocates are busy and mistakes happen. Oftentimes, such mistakes may be harmless. In general, orders to compel and orders for sanctions are intended to address "a violation of a substantive rule of discovery." *E.g.*, *Myers v. Myers*, 269 N.C. App. 237, 252 (2020). But here, it appears that the deadline mistake did have a prejudicial and significant effect. Namely the parties agree that Ms. Sessoms's Rule 30(b)(5) document requests largely restated her earlier requests for production. So waiving defendants' objections to the Rule 30(b)(5) requests effectively waived the other outstanding objections to all of Ms. Sessoms's previous requests for production under Rule 34. A misstatement of the deadline thus improperly waived both the objections to the Rule 30(b)(5) notice and to the other Rule 34 requests. Getting the deadline wrong was thus harmful under these circumstances. Such an error of law constitutes an abuse of discretion. *See Da Silva*, 375 N.C. at 5.

C. Objections to Rule 30(b)(6) Deposition Topics

[2] On 18 April and 16 May 2023, Ms. Sessoms served Toyota and Subaru respectively with a notice of deposition pursuant to Rule 30(b)(6). The parties subsequently disputed the appropriate scope of topics Ms. Sessoms identified in her notices as well as the preparedness of Toyota and Subaru's designees to testify to both the objected- and non-objected-to topics.

In particular, each Rule 30(b)(6) notice contained twenty-five topics Ms. Sessoms proposed to cover in the deposition. Those notices were served forty-four and thirty-seven days before Toyota and Subaru's depositions, respectively.

Toyota and Subaru ultimately objected to all twenty-five topics. Those objections were served at the same time as defendants' responses to the Rule 30(b)(5) document requests, ten days and seven days before the taking of the deposition, respectively. *See supra* Section II.B.

Their objections indicated that Toyota and Subaru refused to produce a witness capable of testifying to some topics. For example, they declined to produce a witness who could explain previous instances

when that designee has testified under oath. For other topics, though, defendants objected only in part and further indicated that a witness would be produced who could testify to part of the topic. For example, one of Ms. Sessoms's noticed topics asked that the corporate designee be prepared to testify to communications between Toyota and "any governmental agency related to any customer complaints, warranty claims, or legal claims related to the fuel supply system in other Toyota vehicles with the same or similar A-Pillar, roof rail, brake fluid reservoir, occupant compartment, firewall, engine compartment, fuel tank, fuel line, and/or components and/or any other components thereof." Toyota objected and stated it would produce a witness who would testify on these topics in part. Specifically, Toyota indicated it would produce a witness who would testify "generally about communications between Toyota and NHTSA [the National Highway Traffic Safety Administration] pertaining to recalls or NHTSA investigations, if any, involving the roof structure, occupant compartment structure, bulkhead between engine compartment and occupant compartment, doors and door frames, or fuel delivery system applicable to the 2013-2016MY U.S. bound Scion FR-S." Its witness would also testify as to certain notices received through Toyota's "Brand Engagement Center" about alleged defects in "2013-2016MY U.S. bound Scion FR-S" related to "the vehicle's roof structure, occupant compartment structure, bulkhead between engine compartment and occupant compartment, doors and door frames, or fuel delivery system." But Toyota objected to producing a witness who could provide the same information related to "other Toyota vehicles," alleging that this request was overly broad. Toyota also objected to its designee offering information about claims related to alleged defects with the Scion but that "have nothing to do with Plaintiff's claims in this case" where the driver was killed following a post-collision fire. It further objected to providing information about the names and addresses of other claimants on the grounds of the "right of privacy," citing a federal district court case from another jurisdiction. Subaru's objections followed similar patterns. For example, Subaru also objected to its designee discussing vehicle models outside the 2013 to 2016 U.S.-bound Scion FR-S.

Notwithstanding these objections, the depositions proceeded ten days later for Toyota and seven days later for Subaru. After the depositions, Ms. Sessoms challenged Toyota and Subaru's compliance with the Rules of Civil Procedure in her first motion to compel. She alleged specifically that Toyota and Subaru did not adequately educate their witnesses, that the witnesses reviewed materials not produced in discovery, and that Subaru and Toyota made improper objections and attempted to

"unilateral[ly] limit[ ] . . . the deposition topics." Ms. Sessoms noted that neither Subaru nor Toyota moved for a protective order prior to the taking of the Rule 30(b)(6) depositions. Ms. Sessoms also explained that her counsel had "attempted to meet and confer in good faith to receive substantive productions pursuant to the Notice," but that "[t]hese efforts were unavailing." Ms. Sessoms's emphasized in particular that during the deposition, Subaru's designee "expressly acknowledged—for the first time in the year-long litigation—that numerous computer files, tests, test results, standards, and other documents and materials exist, but were withheld from production[,] . . . includ[ing] tests and standards that [Subaru]'s designee testified about—for the first time—in answering leading questioning by counsel for Subaru and Toyota."

At the hearing on Ms. Sessoms's first motion to compel, her counsel argued that Subaru and Toyota should have either moved to quash the Rule 30(b)(6) motion or else moved for a protective order prior to the taking of the deposition so the trial court could rule on the appropriateness of the listed topics. Defendants could not, under the Rules, simply object and then produce a designee who would testify only as to defendants' chosen topics, she argued.

Although it is somewhat ambiguous from the trial court's order and the record exactly how this dispute was resolved, it appears the trial court at least in part accepted Ms. Sessoms's interpretation of the Rules and sanctioned Toyota and Subaru for failing to seek a protective order prior to the taking of the deposition. The discovery order compelled Toyota and Subaru to "designate the specific individuals who are prepared to testify as to all matters known or reasonably available to the respective Defendant for the topics listed in the respective Rule 30(b)(6) depositions, without further objection." The parties construed this order as overruling or waiving Toyota and Subaru's objections to deposition topics and requiring the corporate designees to be re-deposed accordingly. The sanctions order ultimately cited Toyota and Subaru's failure to "file[ ] motions for protective orders to limit the scope of the deposition or the accompanying document requests prior to the taking of the Rule 30(b)(6) depositions" and reiterated that the discovery order "overrul[ed] the subject Defendants' objections."

On appeal, the Court of Appeals affirmed the discovery order without analysis of this issue specifically. *Sessoms*, 297 N.C. App. at 398.

We hold that, to the extent the trial court waived or overruled Toyota and Subaru's objections to the Rule 30(b)(6) deposition topics because they failed to seek a protective order to limit the scope of Rule 30(b)(6)

deposition topics prior to the taking of the deposition, this was legal error. The Rules of Civil Procedure do not require a deponent to a Rule 30(b)(6) deposition notice to seek or obtain a protective order prior to the taking of a deposition to preserve their objections to the noticed topics. Objections are preserved by lodging them directly with the noticing party in advance of the scheduled deposition. The Court of Appeals likewise erred by affirming this part of the discovery order.

A Rule 30(b)(6) deposition is a distinctive type of deposition. *See* N.C.G.S. § 1A-1, Rule 30(b)(6) (2025). Unlike an ordinary deposition, where a party seeking discovery takes an oral examination of a specified person, *see id.* at Rule 30(b)(1), a deposition under Rule 30(b)(6) enables a party to depose a business, corporation, or organization itself, *id.* at Rule 30(b)(6). This provision articulates particular procedures that apply. In general, the deposing party notices the deposition as against the organization by name and identifies "with reasonable particularity the matters on which examination is requested." *Id.* Then, the deponent organization picks a witness or witnesses to testify on its behalf. "The persons so designated shall testify as to matters known or reasonably available to the organization." *Id.* As the comment explains, this provision was designed to "curb the 'bandying' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it," while mitigating the burden to "organizations which find that an unnecessarily large number of their officers and agents are being deposed by a party uncertain of who in the organization has knowledge." *Id.* at cmt. to 1975 Amendment.

By its plain language, Rule 30(b)(6) imposes "concomitant responsibilit[ies]" on both the deposing party and the deponent organization. *E.g.*, *Newman v. Borders, Inc.*, 257 F.R.D. 1, 3 (D.D.C. 2009) (noting that the deposing party must clearly identify the topics for the deposition and the organization must produce a witness "who can speak knowingly as to the topic" even if that person must be "educate[d]" so they can do so). The noticing party must be reasonably clear about the topics to be covered, and the deponent organization must adequately prepare its designees to speak to the identified topics. *Accord 8A Wright & Miller's Federal Practice and Procedure* § 2103 (3d ed. 2010) (noting that materially identical language in the federal rules creates "an implicit obligation to prepare the witness"). Rule 30(b)(6)'s structure thus implies parties may have to confer after receiving the notice and prior to the taking of the deposition to be aligned on the deposition's focus and to meet their mutual obligations. The existence of mutual obligations also signals that

one party may have concerns based on how they perceive the adverse party meeting (or not meeting) their own obligations—thus implicitly contemplating the prospect of objections.

Of course, even designees endeavoring to be adequately prepared may not exactly anticipate all questions that might be asked pursuant to "reasonably particular" topics. Topics are, by definition, not exact questions. *See*, *e.g.*, *Topic*, *Webster's Third New International Dictionary* 2410 (2002) (defining a topic as "[a] subject under discussion or consideration" or "a phrase summarizing what is to be presented in a discourse or a section of it"). Rule 30(b)(6)'s use of the word "topics" thus counsels against penalizing a deponent for failing to exactly anticipate and prepare for every single question asked, where the organizational deponent otherwise operated reasonably and in good faith to understand the topics, anticipate the questions, and educate its designee accordingly.

Ms. Sessoms argues that a protective order is required for a deponent organization to limit the scope of Rule 30(b)(6) deposition topics, pointing specifically to Rule 37(d). That provision mandates that a party must apply for a protective order where a party "fail[s] . . . to appear before the person who is to take the deposition, after being served with a proper notice." N.C.G.S. § 1A-1, Rule 37(d) (2025). But the comment to this Rule clarifies that it applies in cases of "total noncompliance." *See id.* at cmt. to 1975 Amendment. This provision prohibits a party from "remain[ing] completely silent even when he regards a notice to take his deposition . . . as improper and objectionable," and makes clear that, if a deponent "desires not to appear or not to respond, he must apply for a protective order." *Id.* The circumstances here are different—it was not that Toyota and Subaru refused to appear at all, but rather that they disputed the appropriate scope of the topics over which Ms. Sessoms sought to depose them in advance of the deposition and otherwise intended to, and did, sit for the noticed deposition.

Instead, Toyota and Subaru and several amici argue that the circumstances here, where a party from whom discovery is sought objects to Rule 30(b)(6) deposition topics including because they are overbroad or "not reasonably particular" or otherwise not discoverable, is most akin to a "failure to designate" under Rule 37(a)(2). Rule 37(a) instructs that a party seeking discovery may use a motion to compel where "a deponent fails to answer a question propounded or submitted under Rules 30 or 31[ ] or a corporation or other entity fails to make a designation." *Id.* at Rule 37(a). This is a sword, of sorts, for the party seeking discovery to put a dispute directly before the trial court.

We find this reasoning persuasive. Treating objections to Rule 30(b)(6) deposition topics as a "failure to designate" comports with the provision's ordinary meaning. *See Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 550 (2018) ("Usually, words of a statute will be given their natural, approved and recognized meaning." (quoting *Black v. Littlejohn*, 312 N.C. 626, 638 (1985))). An objection to a Rule 30(b)(6) discovery topic is effectively a refusal to produce a witness to testify to that topic, or a failure to make a designation for that topic. By contrast, it would be quite unusual to state that a witness "fail[ed] . . . to appear before the person who is to take the deposition, after being served with a proper notice," when the witness did in fact show up but objected in advance to testifying to certain noticed topics. *Compare* N.C.G.S. § 1A-1, Rule 37(a)(2) *with id.* at Rule 37(d).

Rule 37(a)(2)'s enforcement mechanism also supports that disputes over the scope of topics in a Rule 30(b)(6) deposition can be resolved on the motion of the party seeking discovery. Specifically, if the trial court denies the motion to compel for "failure to make a designation," the court is empowered to issue a protective order under Rule 26(c) as if the non-moving party had earlier obtained one. *See id.* at Rule 37(a)(2) ("If the court denies the motion [to compel] in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c)."). If the nonmoving party were always required to obtain a protective order in the first instance as Ms. Sessoms argues, this clause would seemingly serve little purpose. Its existence thus serves as another textual indication that a protective order is not necessarily required to preserve such objections. *See State v. Conley*, 374 N.C. 209, 215 (2020) ("It is presumed that the legislature did not intend any provision to be mere surplusage." (cleaned up)).

Our holding here should not be construed as limiting any party's ability to bring disputes over Rule 30(b)(6) deposition topics to the trial court's attention. A motion for a protective order under Rule 26(c) remains another mechanism to put a discovery dispute to a trial court. It is effectively a shield for a party or "person from whom discovery is sought," and it protects a range of interests, from "unreasonable annoyance, embarrassment, oppression, or undue burden or expense" to improper disclosure of "trade secret[s] or other confidential research, development, or commercial information." N.C.G.S. § 1A-1, Rule 26(c) (2025). Similar to Rule 37(a)(2), Rule 26(c) permits a trial court to "order that any party or person provide or permit discovery" when denying "in whole or in part" a motion for a protective order. *Id.* So disputes that could have been resolved through a motion to compel can similarly be raised by a person from whom discovery is sought should they choose

to do so. We hold simply that that a deponent who seeks to object to Rule 30(b)(6) deposition topics need not obtain a protective order prior to the taking of the deposition to preserve those objections.[2]

To be clear, though, in order for a party seeking discovery to have a meaningful opportunity to enforce their rights under Rule 37(a)(2), which includes certifying that the movant has attempted to meet and confer to resolve the dispute without judicial intervention, a deposing party must have sufficient notice of the Rule 30(b)(6) deponent's objections in advance of the deposition. We agree with federal court interpretations of the Federal Rules of Civil Procedure (interpreting analogous language before the 2020 rule change) that objections to Rule 30(b)(6) depositions must be made promptly to the deposing party after service of the notice. The objecting corporation "must give advance notice to the requesting party of those objections, so that the requesting party has the opportunity to reconsider its position, narrow the scope of the topic, or otherwise stand on its position and seek to compel additional answers." *Kartagener v. Carnival Corp.*, 380 F. Supp. 3d 1290, 1296 (S.D. Fla. 2019); *accord Wright & Miller* § 2103 (3d ed. Supp. 2026) (same); *see also* F. R. Civ. P. 30(b)(6) (directing parties to "confer in good faith about the matters for examination" following an amendment in 2020). A party objecting to deposition topics in a Rule 30(b)(6) notice preserves those objections by serving them directly on the deposing party in advance of the deposition. Raising objections to deposition topics for the first time during the taking of a deposition or on its eve would suggest a corporate entity has fallen short of its obligations to adequately prepare its designees as to the noticed topics.[3]

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2. Notably, too, both Rule 26(c) and Rule 37(d) provide for the possibility of attorney fee shifting for a successful movant. *See* N.C.G.S. § 1A-1, Rule 37(a)(4) (2025) ("If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust."); *id.* at Rule 26(c) ("The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion."). That possibility is limited by exceptions where the trial court finds the other party was "substantially justified" in opposing the motion "or that other circumstances make an award of expenses unjust." *See id.* at Rule 37(a)(4). These provisions should continue incentivizing parties to resolve disputes prior to a deposition when possible and without judicial intervention; and should disincentivize gamesmanship that would improperly shift the routine costs of discovery to parties acting reasonably and in good faith.

3. As with the Federal Rules of Civil Procedure, the North Carolina Rules of Civil Procedure do not state a particular deadline by which objections to Rule 30(b)(6)

Contrary to the trial court, then, we do not interpret the Rules of Civil Procedure to require a deposing party to preserve objections to Rule 30(b)(6) deposition topics by seeking a protective order. Here, Toyota and Subaru preserved their objections to the Rule 30(b)(6) topics by serving those directly on Ms. Sessoms in advance of the noticed deposition. Waiving or overruling their objections to those topics solely for failure to obtain a protective order prior to the taking of the deposition amounted to legal error.

* * *

In summary, the Court of Appeals held that the trial court's discovery order improperly compelled Toyota and Subaru to produce English language translations of documents the defendants' only ever possessed in the Japanese language. We now hold that the trial court improperly waived objections to Rule 30(b)(5) document requests and 30(b)(6) deposition topics based on a misapplication and misinterpretation of the Rules of Civil Procedure. In light of the central role of these holdings in the discovery order and subsequent proceedings, we vacate the trial court's order and remand for further proceedings consistent with this opinion. *See In re A.J.L.H.*, 384 N.C. 45, 57 (2023) (noting that, when a trial court rules improperly on a matter entrusted to its discretion, vacating the order is the appropriate remedy by a reviewing court).

D. Other Issues Raised

Toyota and Subaru brought two other challenges to the discovery order on appeal.[4] The first was that the trial court's order that Toyota and Subaru supplement their responses to Ms. Sessoms's requests for production of documents and interrogatories was impermissibly vague and gave defendants "no information to assess how their initial discovery responses were inadequate." The second was that the trial court's discovery order imposed "impossible" discovery tasks such as making a log of documents that "do not exist in the possession of [Toyota or Subaru]."

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deposition topics must be made to be preserved. Even so, parties can certainly agree to specified deadlines, or they may be imposed upon order of a court in a discovery plan. *See* N.C.G.S. § 1A-1, Rule 29 (2025) (entitled "Stipulations regarding discovery procedure"); *id.* at Rule 26(f) (entitled "Discovery meeting, discovery conference, discovery plan").

4. Toyota and Subaru also challenged the trial court's determination that defendants "had withheld, or otherwise failed to produce, and potentially destroyed responsive documents." This determination appears in the sanctions order, not the discovery order, however, and thus is not presented for our review. *See supra* Section I.E.

As to the order to supplement, we note that parties on both sides have advanced arguments to our Court that were not made to the trial court and that the trial court ought to consider in the first instance on remand. For example, Ms. Sessoms precisely explained her view that Toyota and Subaru over-produced design and testing files for the 2013 Scion model but produced no design or testing files indicating changes in the model between 2013 and 2014—evidence which goes to Ms. Sessoms's product liability theory of alternative feasible design. Oral Argument at 30:29, *Sessoms v. Toyota Motor Sales, U.S.A., Inc.*, No. 23PA25 (N.C. Aug. 14, 2026), www.youtube.com/watch?v=9l8c6IoL1Oc. She cites publicly available information indicating that the 2014 model had been upgraded to "improve occupant protection in small overlap frontal crashes" including with "a structural change adjacent to the left part of the firewall" where Mr. Sessoms's older Scion was hit and argues that subsequent design changes through 2016 are also probative. (Quoting Insurance Institute for Highway Safety, *2014 Scion FR-S*, https://www.iihs.org/ratings/vehicle/Scion/fr-s-2-door-hatchback/2014 (last visited Aug. 11, 2026).) For their part, Toyota and Subaru advance new arguments for why their proffered document retention policies explain the corporations' retention of some of the design files they produced but not others. In general, litigants may not raise and argue new issues for the first time in an appellate court. *See Weil v. Herring*, 207 N.C. 6, 10 (1934). Further, these are the type of fact-specific discovery issues that parties ought to try to resolve via meet and confer and, should those efforts prove unsuccessful, are appropriately resolved by the trial court in the first instance. *Cf. Am. Tel. & Tel. Co.*, 39 N.C. App. at 727 (noting that routine administration of discovery rules "lies necessarily within the province of the trial court").[5]

Finally, as to the trial court's order that Toyota and Subaru make a log of documents that both claim are no longer in their possession, we clarify only that we do not agree with defendants' position that the trial court has ordered them to complete an "impossible task." The record shows that Subaru's own designee referenced testing and design files that existed and were material to Ms. Sessoms's claims, including because defendants intended to rely on them in their defense to the action, but that were not produced in discovery. In leading questions by Subaru's own counsel, the designee acknowledged, for example,

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5. We note the complexity of the factual issues in this case could make it a good candidate for designation as "exceptional." *See generally* Gen. R. Prac. Super. and Dist. Cts. 2.1. Rule 2.1 rests the decision to designate a case "exceptional" in the discretion of the Chief Justice. *See id.*

that Subaru would have conducted testing for the Insurance Institute of Highway Safety "during . . . development" prior to sending the 2013 Scion to market and that similar submissions would have been made to European and Japanese regulators—yet copies of those tests and submissions were not produced.

Counsel for Subaru and Toyota later demurred, explaining to the trial court that, "[m]any of these documents that are being asked for are documents that are not available and not in the possession and control and custody of our client." The trial court's subsequent order to log those documents mirrored counsel's explanation from the hearing and required Toyota and Subaru to make a log of documents formerly in Toyota or Subaru's custody but that they now claimed were out of their "possession or control": "To the extent that Defendants claim that a document or set of documents is not within their possession or control, Defendants shall specifically identify the document(s), the custodian of the document(s), the efforts made to obtain the document(s), and, to the extent that any document was destroyed, the date of destruction and the identity of the individual(s) who authorized the destruction of any such document(s)." It would not be an abuse of discretion for the trial court to order Toyota and Subaru to particularly explain why documents their own witness said existed are now not in their "possession or control."

III. Conclusion

Because the trial court's discovery order contained two legal errors which together justify vacating the order, the Court of Appeals erred by affirming those parts of the order. We reverse that part of the Court of Appeals decision and remand this matter to the Court of Appeals with instructions to vacate the discovery order and further remand the matter to the trial court for additional proceedings consistent with this opinion.

REVERSED AND REMANDED.

Justice DIETZ concurring.

The U.S. Court of Appeals for the Sixth Circuit once observed that "when a party comes to us with nine grounds for reversing the district court, that usually means there are none." *Fifth Third Mortg. Co. v. Chi. Title Ins. Co.*, 692 F.3d 507, 509 (6th Cir. 2012). This adage proved true enough that I have quoted it over the years. *See Bodie v. Bodie*, 239 N.C. App. 281, 282 (2015).

But this case teaches that the opposite can also be true. When a party correctly points out error after error in a court order, at some point it may be time to throw the whole thing out.

That is what this Court does today. By vacating the discovery order, it is a nullity. *In re K.N.*, 381 N.C. 823, 830 (2022). But the genesis of these errors was not the trial court's order; it was the breadth of plaintiff's discovery and the parties' failure to adequately meet and confer on its scope as the rule envisions. *See* N.C.G.S. § 1A-1, Rules 26(b), 37(a)(2). "Although the rule should be construed liberally neither party should be allowed to roam at will in the closets of the other." *Willis v. Duke Power Co.*, 291 N.C. 19, 34 (1976). Instead, the process is designed for parties to winnow down these types of aggressive discovery requests to get at the truly relevant material, keeping in mind that "one party's need for information must be balanced against the likelihood of an undue burden imposed upon the other." *Id.*

As questions at oral argument indicated, the parties cannot even agree on when and how they met and conferred on these issues, much less what steps they took to work out the pending objections. That failure is how this case went adrift and correcting it will steer the case back on course. Thus, the next step for the parties is not to return to the trial court seeking another ruling on these pending motions. That would be skipping ahead.

In the spirit of the discovery process, the next step should be for the parties to genuinely meet and confer and work out a plan that resolves these disputes. *See* N.C.G.S. § 1A-1, Rule 26(f). If they cannot do so, they need to schedule a discovery conference with the trial court. *Id.* This is a complex product liability case that would be difficult for any trial judge to sort out in a single hearing on a motion to compel or motion for protective order. The comedy of errors in this case did not begin with the trial court's order; it began with the breakdown in the shared responsibilities at the heart of the discovery process. The parties need to address that issue before returning to the trial court for further motions practice.

Chief Justice NEWBY joins in this concurring opinion.

Justice RIGGS dissenting.

Ms. Sessoms has been seeking accountability for her son's death for over four years, and her day in court is as far away as ever. The traffic

collision that gave rise to this lawsuit occurred in 2021, and Ms. Sessoms, as the administratrix of her son's estate, promptly filed this action in 2022. And now, in 2026, this case remains mired in the discovery phase of litigation due, in part, to the extensive interlocutory proceedings endorsed by the Court of Appeals and now by this Court.[1] The grant of certiorari by the Court of Appeals did not comply with our caselaw and, in fact, directly conflicts with cases we release on this same day. The careful use of certiorari review is a critical part of appellate practice in this state, particularly in interlocutory discovery stages of litigation. I disagree with the majority's view that certain legal errors committed by the trial court were more than harmless, and thus, I respectfully dissent.

I. The Court of Appeals failed to apply *Cryan*, and this Court's endorsement of this interlocutory appeal will only exacerbate problems with the application of *Cryan* at the Court of Appeals.

While the appeal of the sanctions order is understandable,[2] the appeal of the discovery order and this Court's error correction efforts will cause more problems than they clarify. The orders are interlocutory, and it is well-settled law that "[a]s a general rule, interlocutory orders are not immediately appealable." *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 558 (2009) (citing *Davis v. Davis*, 360 N.C. 518, 524 (2006)). Interlocutory orders are only appealable when they affect a substantial right. N.C.G.S. § 7A-27(b)(3) (2025); *see also Veazey v. City of Durham*, 231 N.C. 357, 362 (1950). When interlocutory orders do not implicate a substantial right and are not immediately appealable, our appellate courts can only review those orders where review meets the exacting standard described in *Cryan v. National Council of Young Men's Christian Associations of United States*, 384 N.C. 569 (2023). Despite that well-established rule, the Court of Appeals—without legal analysis—granted certiorari to review the discovery order and the sanctions order, stating,

> To the extent that the Toyota Defendants do not have an immediate appeal of right to review of other issues

1. As in the majority, references in this dissent to "defendants" refers only to the two defendants subject to this appeal, Toyota and Subaru, and not the remaining defendants to the action.

2. A sanctions order is immediately appealable because it affects a substantial right. *Willis v. Duke Power*, 291 N.C. 19, 30 (1976). The same is not true of a discovery order, though. *Sharpe v. Worland*, 351 N.C. 159, 163 (1999) (stating that "[a]n order compelling discovery is generally not immediately appealable because it is interlocutory").

> concerning the Discovery Order and the Sanctions Order, in our discretion we grant *certiorari* in the aid of our jurisdiction. *See* N.C.G.S. § 7A-32(c).

Sessoms v. Toyota Motor Sales, U.S.A., Inc., 297 N.C. App. 395, 398 (2024).

A. *Cryan* Analysis

In providing no legal analysis, failing to *even cite* to our standard for granting certiorari, as announced in *Cryan*, the Court of Appeals erred. *See State v. Martinez*, No. 101PA25, slip op. at 8 (N.C. Aug. 14, 2026) ("While certiorari is a discretionary writ, we emphasize that *Cryan*'s two-part test must be satisfied. The failure to apply *Cryan* is an error of law that constitutes an abuse of discretion." (cleaned up)).

In the three years since the *Cryan* rule was announced, I agree with the Court's view in other cases issued today that the Court of Appeals still struggles to uniformly apply that precedent, necessitating this Court's intervention on multiple occasions. *See State v. Martinez*, No. 101PA25, slip op. at 7 n.1 (N.C. Aug. 14, 2026) (providing evidence of three different panels of the Court of Appeals applying three different standards for certiorari in published opinions issued on the same day in 2025); *State v. Gupton*, No. 444PA19, slip op. at 4 n.2 (N.C. Aug. 14, 2026) (noting the Court of Appeals' failure to apply *Cryan*). Our involvement here, in a case where the Court of Appeals already corrected the only harmful error committed by the trial court, will just exacerbate confusion about where certiorari review is appropriate.

Putting aside for the moment the failure of the Court of Appeals to apply the governing law, and looking at its application here, we must consider anew *Cryan*'s two-part test by assessing: "(1) the likelihood that the case has merit or that error was committed below and (2) whether there are extraordinary circumstances that justify issuing the writ." 384 N.C. at 570. If a party's petition satisfies *Cryan*, only then may the reviewing court, in its discretion, decide to grant or deny certiorari. *Womble v. Moncure Mill & Gin Co.*, 194 N.C. 577, 579 (1927) (stating that "[c]ertiorari is a discretionary writ" to which a moving party is not entitled as a matter of right). In my review, *Cryan*'s two-part test was not satisfied and therefore the Court of Appeals abused its discretion in granting certiorari here.[3] While I think there is little doubt that the trial

3. I do agree with the Court of Appeals' determination and corresponding analysis that the trial court did err by requiring defendants to create English translations of the Japanese documents provided in discovery. *See Sessoms*, 297 N.C. App. at 398.

court committed some errors in its discovery and sanctions orders, not all errors need to be corrected, particularly at an interlocutory stage. *See Dep't of Transp. v. Rowe*, 351 N.C. 172, 176 (1999) (stating that "[t]he appeals process is designed to eliminate the unnecessary delay and expense of repeated fragmentary appeals, and to present the whole case for determination in a single appeal from the final judgment") (internal citation omitted); *see also Perkins v. Endicott Johnson Corp.*, 128 F.2d 208, 212 (2d Cir. 1942) (noting that "only the seriously prejudicial defects [from interlocutory orders] will be dignified by appellate attention" because "many mistakes, apparently important at the time, will be seen to be trivial from the perspective of a final disposition of the case"). Our involvement now, reviewing the discovery order, certainly is not justified given that the sanctions order, which relied so heavily on the mistaken translation requirement, has been vacated.

Turning to *Cryan*'s second prong requiring a showing of extraordinary circumstances, the impact of allowing this interlocutory appeal of the discovery order not only defeats any chance defendants had of satisfying the second prong of *Cryan*, the circumstances here actually counsel *against* endorsing this invitation to piecemeal discovery appeals. This Court has stated that this prong "generally requires a showing of substantial harm, considerable waste of judicial resources, or 'wide-reaching issues of justice and liberty at stake.' " *Cryan*, 384 N.C. at 573 (quoting *Doe v. City of Charlotte*, 273 N.C. App. 10, 23 (2020)).

B. The Impact of Allowing this Interlocutory Appeal

The general rule that "interlocutory orders are not immediately appealable" exists for good reason. *Turner*, 363 N.C. at 558; *see* N.C.G.S. § 1A-1, Rule 54(b) (2025) (instructing that interlocutory orders "shall not . . . be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes"). The rationale for this general rule is widely understood:

> There is no more effective way to procrastinate the administration of justice than that of bringing cases to an appellate court piecemeal through the medium of successive appeals from intermediate orders. The rules regulating appeals from the Superior Court to the Supreme Court are designed to forestall the useless delay inseparable from unlimited fragmentary appeals, and to enable courts to perform their real function, i.e., to administer 'right and justice . . . without sale, denial, or delay.' N.C. Const. Art. I, Sec. 35.

Veazey, 231 N.C. at 363–64; *see also Cobbledick v. United States*, 309 U.S. 323, 325 (1940) ("To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause."). Beyond the clear delay in the administration of justice, appeals based on interlocutory orders can lead to other forms of harm, such as evidence loss or degradation, memories fading, increased costs of litigation for the parties, and the crowding of appellate calendars with litigation that ultimately wastes judicial resources.

Defendants invited us to provide more clarity on the rules of discovery. But they issued that invitation in a case where the parties did not even negotiate a standard Rule 26(f) discovery order, a key step in promoting collaboration between the parties and avoiding the need for judicial intervention in discovery disputes. *See* Oral Argument at 4:24, *Sessoms v. Toyota Motor Sales, U.S.A., Inc.*, No. 23PA25 (N.C. Aug. 14, 2026), www.youtube.com/watch?v=9l8c6IoL1Oc. Even assuming, arguendo, that some litigants might prefer to have more caselaw from this Court addressing discovery matters, we absolutely should not provide that guidance in a case where the parties cannot even agree on a Rule 26(f) discovery order. Our involvement now would dramatically disincentivize further collaboration on discovery matters and invite any party attempting to avoid final adjudication to seek clarity, warranted or not, on every possible discovery dispute.

The majority properly acknowledges that "the validity of the sanctions order is not before us and that order remains 'null and void' " and further acknowledges that "our review is thus limited to the remaining issues in the discovery order." But despite those acknowledgments, the majority fails to address why *this appeal*—an appeal now premised *only* on the discovery order and *not* the sanctions order—is worthy of this Court's attention notwithstanding our general rule that interlocutory orders, including orders compelling discovery, are "not immediately appealable." *Sharpe v. Worland*, 351 N.C. 159, 163 (1999); *see also Mack v. Moore*, 91 N.C. App. 478, 480 (1988) (holding that a discovery order was not immediately appealable due to lack of enforcement sanctions).

By signaling to future litigants that our courts will entertain more fragmented litigation, this Court's decision today (with the tolerance it signals for piecemeal discovery appeals) throws open wide the doors for more delays in the administration of justice, made in both good and bad faith, and the other harms associated with litigating interlocutory appeals. Dilatory tactics will become an even more pervasive norm than

they currently are, reminding us of the truth in the adage that justice delayed is justice denied.

C. The Advisory Nature of the Majority Opinion

The majority accurately frames that our review is limited to certain issues with the discovery order, but Ms. Sessoms is also correct that defendants "seek[ ] nothing more than an advisory opinion on a vacated sanctions order." We should not grant discretionary review or proceed with advisory opinions when it becomes clear that our ruling would be advisory in nature.

This Court has stated that "[t]he courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments . . . deal with theoretical problems, give advisory opinions . . . adjudicate academic matters, provide for contingencies which may hereafter arise, or give abstract opinions." *Little v. Wachovia Bank & Tr. Co.*, 252 N.C. 229, 243 (1960), *overruled on other grounds by Citizens Nat'l Bank v. Grandfather Home for Children, Inc.*, 280 N.C. 354 (1972); *see also Wise v. Harrington Grove Cmty. Ass'n*, 357 N.C. 396, 408 (2003) (stating that "[i]t is no part of the function of the courts to issue advisory opinions"). Where this Court has occasionally reviewed issues that, although not live, are likely to persist on remand, those decisions come almost entirely in the context of class certification cases. *See, e.g.*, *Empire Contractors, Inc. v. Town of Apex*, 388 N.C. 552, 560 (2025); *Jackson v. Home Depot U.S.A., Inc.*, 388 N.C. 109, 119 (2025); *Surgeon v. TKO Shelby, LLC*, 385 N.C. 772, 773 (2024).

Ms. Sessoms asserts that, because the sanctions order was vacated by the Court of Appeals, many of the questions defendants wanted resolved by this Court were focused on the crafting of the sanctions order on remand, thus, not "drawn into focus by these proceedings," given that only the discovery order is before us now. *See Wise*, 357 N.C. at 408. She is correct. For example, regarding spoliation, in defendants' section of their brief entitled "Trial courts should not sanction parties for alleged spoliation without record support," defendants relitigate the issue of whether their submitted affidavits of those with knowledge of the companies' document retention policies—i.e., efforts taken after the discovery order but before the sanctions order, which the trial court seemingly did not find sufficiently explanatory or credible—excused their noncompliance with the document log requirement. Thus, defendants sought to relitigate an issue for an entirely advisory opinion from this Court, giving defendants another bite at the apple when it comes to avoiding the consequences of their spoliation. To its credit, the majority

does not engage with defendants' arguments about the document retention policies and spoliation—properly so. But the fact that merits review in this matter invites those kinds of attempts only confirms why this Court previously employed a careful rule to avoid interlocutory, advisory opinions in discovery disputes because otherwise we will see endless acceptances of that invitation.

II. The legal errors identified by the majority do not require vacatur of the entire discovery order.

While I agree with the majority that there were some misinterpretations of the rules by the trial court, I disagree that those errors are ones so harmful as to require the discovery order to be vacated. It is also worth emphasizing the nature of interlocutory appeals and issues: discovery disputes can be appealed after trial, too. Defendants would not have been precluded from raising these errors after trial and arguing error and prejudice at the procedurally proper time. *Sharpe*, 351 N.C. at 164 ("[T]he general rule [is] that interlocutory discovery orders are not ordinarily appealable prior to entry of a final judgment.").

A. Defendants waived their objections by opening the door during the depositions, thus the identified errors were not harmful under the circumstances of this case.

The trial court did commit error with respect to the number of days defendants had to submit objections to the Rule 30(b)(5) requests for production and as to whether a deponent must obtain a protective order to preserve objections to Rule 30(b)(6) deposition topics. These errors, though, do not justify vacatur of the discovery order, particularly given the Court of Appeals' ruling on the translation issue and vacatur of the sanctions order. Thus, I respectfully dissent from the majority's conclusion that those errors by the trial court "together justify vacating the order" where the trial court overruled defendants' objections and ordered full and complete supplementation. I would instead hold that, based on the questions asked by defense counsel during the 30(b)(6) depositions and the testimony elicited from defendants' designee witnesses, defendants had, in effect, waived the protective order issue, at least insofar as it encompassed the objections they had to the Rule 30(b)(5) requests for production and the Rule 30(b)(6) deposition topics which covered the same subjects.[4] Thus, because these objections were

4. I do not think the testimony elicited in the 30(b)(6) depositions acted to waive objections to the timeframe in which defendants had to produce responsive documents, but I do not see that error as one significantly weighty enough to justify this interlocutory appeal.

waived, the trial court's ultimate conclusions about defendants' non-compliance with the discovery order are legally sound, and the errors identified by the majority do not require the discovery order to be vacated. *State v. Williams*, 361 N.C. 78, 80 (2006) ("To establish that a trial court's exercise of discretion is reversible error, a defendant must show harmful prejudice as well as clear abuse of discretion." (cleaned up)).

Consider Topic/Request No. 12—Ms. Sessoms requested "[a]ll safety standards, guidelines, procedures, policies, regulations, and rules related to the design, manufacture, production, advertising, distribution, sale, and supply of the 2013 Toyota Scion that is the subject of this litigation." Defendants responded with objections to Request No. 12 and referenced previously produced documents. Ultimately, defendants sought to narrow the scope of what the witness would be able to testify about and what the defendants would produce, with blanket language objecting that the request for production and deposition topic were "overly broad, unduly burdensome," and "ask[ ] for information that is not relevant and not reasonably calculated to lead to the discovery of admissible evidence." Notably, Ms. Sessoms stated in her first motion to compel that defendants did not produce any documents in response to the requests for production contained in the Notice of Deposition. During the deposition of Subaru's designee, the designee was questioned about various safety standards, leading to the following exchanges between Ms. Sessoms's counsel and defendants' designee:

> Q: . . . [Y]our lawyer had questioned you and you had answered regarding testing to Toyota specifications. Do you remember that?
>
> A. Yes.
>
> Q. Was testing to Toyota specifications performed for the—for this FR-S?
>
> A. Yes.
>
> Q. Please identify where on Exhibit 3 it was produced.
>
> . . . .
>
> A. I thought it was in here, but I'm sorry, it looks like it is not among the documents that were produced in this litigation.
>
> Q. Did you review that testing in preparation for your deposition today?

> A. I did not see it directly, but I do know that there is a slight differences—or difference between the Toyota crash evaluation standard and Subaru's crash evaluation standard.
>
> Q. Okay. Was Toyota's—can you please point out on Exhibit 3 where Toyota's crash evaluation standard was produced?
>
> A. I don't think it was among the documents that were produced.

This occurred multiple times during the Subaru deposition, where Ms. Sessoms's counsel asked for more information from the designee and with the designee elaborating and explaining that the relevant documents had not been produced.[5]

Likewise, this also occurred during the deposition of Toyota's designee. Regarding Topic/Request No. 15 pertaining to similar customer complaints and legal claims, Ms. Sessoms's counsel asked the designee about a similar lawsuit and the designee mentioned that a preliminary inspection was performed in that matter by a Toyota engineer. The designee further mentioned that the inspection report was "more than likely" still with Toyota, prompting Ms. Sessoms's counsel to ask defendant Toyota to supplement its production. Defendants' trend of failing to produce or supplement was consistent, even regarding Topic/Request Nos. 1 and 2, requesting information about the Sessoms incident and investigation. When asked by Ms. Sessoms's counsel how the designee prepared for the deposition, the designee mentioned that Toyota's counsel had provided some photographs to him to refresh his recollection and Ms. Sessoms's counsel noted that the referenced photographs were ones "that we don't have."

Thus, Ms. Sessoms's counsel's questions to the designees regarding testing and other topics and the designees' proffered answers effectively waived the objections to the scope of the deposition topics and requests for production. And because of that waiver, any determination of whether the trial court erred by concluding that the filing of a protective

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5. The transcripts further reflect that the Subaru designee also brought up relevant documents (that had not been produced) pertaining to Subaru's internal testing standards, Insurance Institute for Highway Safety (IIHHS) test standards, New Car Assessment Program (NCAP) test standards, and CATIA design files. This list is not exhaustive—it just illustrates that the door was not just cracked ajar once, inadvertently. The door was swung wide open, with obvious intent, and thus the waiver was broad.

order was necessary to preserve defendants' objections to the scope of the topics and document requests was not outcome determinative. Further, the manner in which defendants broadly waived their objections also signals the likely weakness[6] of their objections to the scope in the first place—a party may not disclaim relevance of access to documents or information in discovery and then refer to such non-disclosed documents or information to affirmatively make their case. *See* N.C.G.S. § 1A-1, Rule 26(b)(1) (2025) (stating that "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action"). Ultimately, then, because the objections were waived by conduct in the 30(b)(6) depositions, the trial court's errors pertaining to the deadline for objections or need for a protective order were not prejudicial and do not justify the discovery order being vacated.

B. Defendants did not comply with the trial court's discovery order or the Rules of Civil Procedure.

In opening the door to further testimony and discovery where defendants objected to the scope, and thereby waiving objections, the above exchanges also show that defendants did not comply with the trial court's discovery order or the Rules of Civil Procedure because defendants failed to produce requested documents and answer questions about designated topics, in both written discovery and in deposition.

The record before the trial court establishes that the trial court did not abuse its discretion in concluding that defendants did not meet their discovery obligations. The defendants failed to produce any documents in response to the Rule 30(b)(5) requests despite having relevant documents in their possession as evidenced by the designees' testimony. Additionally, as explained above, the designees referenced documents during the depositions that had not been produced thus far in discovery despite Ms. Sessoms's Rule 30(b)(5) requests for production clearly anticipating the documents mentioned by the designees. Finally, it is worth emphasizing the document retention policies that defendants

6. The concurrence decries the "breadth of plaintiff's discovery" as the cause for this Court's intervention, but this aside will only pour gasoline on the fire that will be future interlocutory discovery disputes. As an appellate court, it is not our job to issue advisory thoughts on the breadth of one party's discovery requests. To the extent the majority identified reversible error by the trial court, it did not presume that the plaintiff's requests were overbroad or put its finger on the scale to dictate how the trial court should proceed on remand. While I disagree with the vacatur, the majority appropriately refrains from such unhelpful commentary.

proffered to the trial court to explain why they had not produced the requested documents. Beyond finding the policies unpersuasive, the trial court actually found that defendants had failed to show that they even complied with their own policies and concluded that defendants had "with[held] or potential[ly] destr[oyed] relevant and discoverable documents," thereby prejudicing Ms. Sessoms. In summing up the defendants' actions and inactions in discovery, the trial court viewed its imposition of sanctions as "just and appropriate" especially when considering the defendants' conduct and their "sophistication."

Our discovery rules are focused "on expeditious handling of factual information before trial so that the critical issues may be presented at trial unencumbered by unnecessary or specious issues and so that evidence at trial may flow smoothly and objections and other interruptions be minimized." *Willis*, 291 N.C. at 34. In the face of the ample evidence establishing defendants' noncompliance with the trial court's discovery order and the Rules of Civil Procedure, our departure from our long-standing policy of not entertaining piecemeal interlocutory appeals, particularly on discovery issues, highlights the entire point. Because of defendants' noncompliance, Ms. Sessoms's day in court will now be years delayed. That is not justice.

JASON M. SNEED
v.
CHARITY A. JOHNSTON (SNEED)

No. 130PA24

Filed 14 August 2026

Divorce—equitable distribution—personal goodwill—distinguished from enterprise goodwill—separate property—prospective

In an equitable distribution proceeding where the parties agreed on the division of all assets except the law firm started by plaintiff after the parties wed but before they separated (and where plaintiff was a sole practitioner), the Supreme Court for the first time distinguished enterprise goodwill from personal goodwill for equitable distribution purposes. Enterprise goodwill is marketable and stays with a professional practice, while personal goodwill is tied to, and thus goes with, the practitioner; accordingly, personal goodwill cannot qualify as marital property pursuant to N.C.G.S.

§ 50-20(a) because the statute assumes that all such property can be distributed. In addition, the Court emphasized that, because personal goodwill is prospective and concerns only future earnings, a trial court may still classify the income generated by a professional practice, even one with a sole practitioner, as marital property on the same basis as other "real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties" under N.C.G.S. § 50-20(b)(1b).

On discretionary review pursuant to N.C.G.S. § 7A-31(c) (2023) of a unanimous decision of the Court of Appeals, 293 N.C. App. 650 (2024), affirming an order and judgment entered on 30 September 2022 by Judge Gary L. Henderson in District Court, Mecklenburg County. Heard in the Supreme Court on 11 September 2025.

Dowling PLLC, by Troy D. Shelton, and Miller Bowles Cushing, PLLC, by Nicholas L. Cushing, for plaintiff-appellant.

Connell & Gelb PLLC, by Michelle D. Connell, for defendant-appellee.

ALLEN, Justice.

When married couples divorce, the property at issue sometimes includes professional entities such as law firms. In many instances, a professional practice's most valuable asset is something called "goodwill," which has been defined as "the expectation of continued public patronage." *Poore v. Poore*, 75 N.C. App. 414, 420 (1985). Courts in other states have recognized that a professional practice's goodwill can consist of both enterprise goodwill and personal goodwill. Enterprise goodwill is marketable and stays with the practice. Personal goodwill is tied to—and thus goes with—the practitioner. Most courts that have distinguished between the enterprise and personal goodwill of professional practices have concluded that of the two, only enterprise goodwill can qualify as marital property. Consequently, they have held that personal goodwill cannot be distributed between the parties to marital dissolution proceedings.

In this divorce case, the trial court had to classify the goodwill of the law firm started by plaintiff Jason M. Sneed during his marriage to defendant Charity A. Johnston. Although the trial court distinguished between the law firm's enterprise goodwill and personal goodwill, it classified

both forms of goodwill as marital property and awarded defendant half the total value thereof. The Court of Appeals affirmed the trial court's order, while also asserting that "our courts have consistently declined" to divide goodwill into categories. *Sneed v. Johnston*, 293 N.C. App. 650, 659 (2024).

For the reasons explained below, today we join the ranks of those state appellate courts which have distinguished enterprise goodwill from personal goodwill and have held that the personal goodwill of a professional practice cannot be treated as marital property. Accordingly, we reverse the decision of the Court of Appeals to the extent that it holds otherwise and remand this case for entry of an equitable distribution order consistent with our decision.

I.

Plaintiff and defendant wed on 17 August 1996 and legally separated on 5 January 2015. They divorced on 8 March 2016.

The parties agreed on the division of all assets except Sneed, PLLC, the law firm started by plaintiff after the parties wed but before they separated. Plaintiff was the law firm's sole practitioner.

With the consent of the parties, the trial court appointed appraiser Greg Reagan to assess the law firm's value as of the date of the parties' separation. Although plaintiff initially supplied Reagan with requested financial records, he began ignoring Reagan's communications and did not pay his portion of Reagan's fee, which defendant then paid. Defendant eventually hired Reagan to perform a valuation of the law firm.

At trial, plaintiff testified that the value of Sneed, PLLC was either negative or nonexistent due to an outstanding line of credit. Reagan valued the law firm at $3,100,000 as of the date of separation. According to Reagan, ten percent of the law firm's goodwill value consisted of enterprise goodwill, while the remaining ninety percent consisted of personal goodwill tied to plaintiff.

The trial court adopted Reagan's valuation of the firm. It divided the goodwill value into $302,436 enterprise goodwill and $2,688,321 personal goodwill. The court ordered plaintiff to pay a distributive award to defendant of $1,550,000, half the firm's total purported value as of the date of separation. Plaintiff was to pay this amount in monthly installments of $8,611.11 over fifteen years.

On appeal, plaintiff challenged the trial court's equitable distribution order on multiple grounds. Most relevant for purposes of our

decision, he argued that the trial court erred by classifying Sneed, PLLC as entirely marital property. According to plaintiff, the trial court should have classified the firm's personal goodwill as plaintiff's own separate property and excluded it from equitable distribution. *See generally* N.C.G.S. § 50-20(b)(2) (2025) (defining "separate property" in the equitable distribution context).

The Court of Appeals affirmed the trial court's order, including its treatment of the law firm's goodwill. The appellate court noted the statutory presumption "that all property acquired after the date of marriage and before the date of separation is marital property[.]" *Sneed*, 293 N.C. App. at 659 (2024) (quoting N.C.G.S. § 50-20(b)(1) (2021)). Quoting *Poore v. Poore*, the Court of Appeals explained that "goodwill is an asset that must be valued and considered in determining the value of a professional practice for purposes of equitable distribution." *Id.* (quoting *Poore*, 75 N.C. App. at 420–21). The court further stated that "our courts have consistently declined to draw a distinction between personal and enterprise goodwill." *Id.*

Turning to the trial court's findings of fact regarding the law firm's value, the Court of Appeals concluded that the findings were "supported by competent evidence, including Reagan's report." *Id.* at 660. The Court of Appeals determined that "these [f]indings support the trial court's [c]onclusion that [d]efendant was entitled to a distributive award of $1,550,000 representing her share of Sneed, PLLC." *Id.* The Court of Appeals therefore affirmed the trial court's order and judgment. *Id.*

Pursuant to N.C.G.S. § 7A-31(c), plaintiff petitioned this Court to review the following issue: "In an equitable distribution proceeding, how should a court classify personal and enterprise goodwill in a business owned by a spouse?" We allowed plaintiff's petition.

II.

Equitable distribution is governed by N.C.G.S. § 50-20. The equitable distribution statute "requires the trial court to conduct a three-step process: (1) classify property as being marital, divisible, or separate property; (2) calculate the net value of the marital and divisible property; and (3) distribute equitably the marital and divisible property." *Smith v. Smith*, 387 N.C. 255, 258 (2025) (quoting *Brackney v. Brackney*, 199 N.C. App. 375, 381 (2009)). "A trial court's determination that specific property is to be characterized as marital, divisible, or separate property will not be disturbed on appeal if there is competent evidence to support the determination. Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *Id.* (cleaned up).

In contrast, a trial court's interpretation of N.C.G.S. § 50-20 is reviewed de novo. *See, e.g.*, *Miller v. Carolina Coast Emergency Physicians, LLC*, 382 N.C. 91, 104 (2022) (cleaned up) ("[W]hen the pertinent inquiry on appeal is based on a question of law—such as whether the trial court properly interpreted and applied the language of a statute—we conduct de novo review."). In conducting de novo review, an appellate court "considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Morris v. Rodeberg*, 385 N.C. 405, 409 (2023) (cleaned up).

III.

In his principal brief to this Court, plaintiff makes two main arguments. First, he contends that both the trial court and the Court of Appeals erred by classifying the personal goodwill of Sneed, PLLC as marital property. Second, he maintains that the trial court and the Court of Appeals likewise erred "by treating the firm's enterprise goodwill as marital property."

Goodwill is "the component of a professional practice which is the most controversial and difficult to value, and yet often the most valuable." *Poore*, 75 N.C. App. at 420. It is an intangible asset that has been commonly defined as "the expectation of continued public patronage." *Id.* (citation omitted); *see also Goodwill*, *Black's Law Dictionary* (12th ed. 2024) [hereinafter *Black's*] (defining "goodwill" as "[a] business's reputation, patronage, and other intangible assets that are considered when appraising the business"). "Goodwill exists as property merely as an incident to other property rights, and is not susceptible of being owned and disposed of separately from the property right to which it is incident." *Maola Ice Cream Co. of N.C. v. Maola Milk & Ice Cream Co.*, 238 N.C. 317, 321 (1953).

Personal goodwill and enterprise goodwill are two subcategories of goodwill. This Court has never authoritatively defined them in the equitable distribution context, though appellate courts in other states have done so. For example, the Supreme Court of South Carolina has defined the two terms as follows:

> Enterprise goodwill is that which exists independently of one's personal efforts and will outlast one's involvement with the business. Enterprise goodwill is based on the intangible, but generally marketable, existence in a business of established relations with employees, customers and suppliers. Enterprise goodwill attaches to a business entity and

> is associated separately from the reputation of the owners. The asset has a determinable value because the enterprise goodwill of an ongoing business will transfer upon sale of the business to a willing buyer.
>
> In contrast, personal goodwill is associated with individuals. It is that part of increased earning capacity that results from the reputation, knowledge and skills of individual people. The implied assumption is that if the individual were not there, the clients would go elsewhere. Accordingly, the goodwill of a service business, such as a professional practice, consists largely of personal goodwill.

Moore v. Moore, 779 S.E.2d 533, 543 (S.C. 2015) (cleaned up).

Defendant insists that plaintiff has not preserved his argument that enterprise goodwill cannot be marital property. According to defendant: "In his brief to the Court of Appeals, [plaintiff] never argues that the trial court erred in its classification, value, and/or distribution of *enterprise* goodwill, and therefore, 'the lower appellate court never addressed or otherwise "ruled on" the classification, value, and/or distribution of *enterprise* goodwill.' " Defendant cites *State v. Sturkie*, 325 N.C. 225 (1989) (per curiam), in which this Court concluded that it had improvidently allowed discretionary review of an issue not presented to the Court of Appeals. 325 N.C. at 226–27.

We agree with defendant that plaintiff has not preserved his argument that enterprise goodwill cannot be marital property. "Issues not presented and discussed in a party's brief [on appeal] are deemed abandoned." N.C. R. App. P. 28(a). In his principal brief to the Court of Appeals, plaintiff included a passing reference to "the issue of whether *any* law firm goodwill should be considered marital property." He failed to assert, however, that enterprise goodwill cannot be classified as marital property for equitable distribution purposes. Similarly, he did not ask the Court of Appeals to reverse the trial court's classification of his law firm's enterprise goodwill as marital property. We therefore conclude that discretionary review was improvidently allowed as to the proper classification of enterprise goodwill. Hence, the only issue left for us to resolve is whether the personal goodwill of a professional practice can qualify as marital property in an equitable distribution proceeding.

IV.

A.

The equitable distribution statute presumes "that all property acquired after the date of marriage and before the date of separation is marital property except property that is separate property." N.C.G.S. § 50-20(b)(1b) (2025). Unlike marital property, "[s]eparate property may not be distributed." *Crowell v. Crowell*, 372 N.C. 362, 368 (2019).

We disagree with the Court of Appeals' assertion that "our courts have consistently declined to draw a distinction between personal and enterprise goodwill" in equitable distribution cases. *Sneed*, 293 N.C. App. at 659. As far as we can tell, neither the Court of Appeals nor this Court has directly confronted the distinction in this context.

In *Poore*, the Court of Appeals had to decide for the first time "how to value a solely-owned professional association for purposes of equitable distribution." 75 N.C. App. at 419. It explained that "the task of a reviewing court on appeal is to determine whether the approach used by the trial court reasonably approximated the net value of the partnership interest." *Id.* Because "[t]here is no set rule for determining the value of the goodwill of a professional practice," the Court of Appeals stressed in *Poore* that "each case must be determined in light of its own particular facts." *Id.* at 421. Moreover, "[t]he determination of the existence and value of goodwill is a question of fact and not of law and should be made with the aid of expert testimony." *Id.* (cleaned up).

The Court of Appeals urged trial courts to exercise caution in valuing goodwill because "the individual practitioner will be forced to pay the ex-spouse tangible dollars for an intangible asset at a value concededly arrived at on the basis of some uncertain elements." *Id.* (cleaned up). The court offered a non-exclusive list of factors that can affect the value of goodwill: "the age, health, and professional reputation of the practitioner, the nature of the practice, the length of time the practice has been in existence, its past profits, its comparative professional success, and the value of its other assets." *Id.* The Court of Appeals described appraisal methods that have been used to value goodwill, one of which "is to determine the market value of the goodwill, [that is], the price that a willing buyer would pay to a willing seller for it." *Id.* To be legitimate, the court explained, any goodwill valuation method must "measure[ ] the present value of goodwill by taking into account past results, and not the postmarital efforts of the professional spouse." *Id.*

Nothing in *Poore* indicates that either party asked the Court of Appeals to distinguish between personal goodwill and enterprise

goodwill in that case. In fact, the terms "personal goodwill" and "enterprise goodwill" do not appear in the opinion.

The same is true of this Court's opinion in *McLean v. McLean*, 323 N.C. 543 (1988). There, the Court of Appeals vacated the trial court's findings regarding the valuation of the husband's law practice and remanded the case to the trial court for a new value determination. 323 N.C. at 544–45. The trial court had used the "return on investment" approach to arrive at the law firm's value, but the Court of Appeals concluded that "there was no evidence . . . to support the rate of return used by the [trial] court in making its calculations or to indicate that such a method would yield an accurate evaluation." *Id.* at 557 (quoting *McLean v. McLean*, 88 N.C. App. 285, 292 (1987)).

On appeal to this Court, the *McLean* defendant argued that the trial court also erred by admitting the expert testimony of a certified public accountant because the accountant failed to base his valuation of the firm on the factors listed in *Poore*. This Court disagreed, reasoning that the *Poore* factors "relate to the weight to be accorded such [expert testimony], not to its admissibility." *Id.* at 556.

We nonetheless affirmed the Court of Appeals' decision to vacate and remand. The trial court's judgment, we explained, "reflect[ed] no consideration of goodwill, other than [noting] that the [trial] court chose a return on investment approach in part 'because of the difficulty in arriving at a [goodwill] value.' " *Id.* at 558. While agreeing with *Poore* that goodwill should be valued, we "join[ed] the Court of Appeals in cautioning trial courts to value goodwill with great care" to avoid unfairness to practitioners. *Id.* (cleaned up). We further stated that "[t]he factors listed in *Poore* as relevant in valuing goodwill—age, health, reputation of the practitioner, nature of the practice, length of time in existence, profitability, and comparative professional success—are helpful, though not exclusive or absolute." *Id.*

Like the Court of Appeals in *Poore*, this Court in *McLean* neither addressed the distinction between personal goodwill and enterprise goodwill nor the potential impact of that distinction on equitable distribution. Thus, while informative, *McLean* is not dispositive here.

Finally, in *Sonek v. Sonek*, 105 N.C. App. 247 (1992), the Court of Appeals concluded that "a salaried employee of a professional association who has no ownership interest in the association cannot have personal goodwill for equitable distribution purposes." 105 N.C. App. at 249. In support of this holding, the court observed that "[t]he factors discussed in *Poore*, such as the past profits of the practice and the value of

its assets, are obviously inapplicable to a non-owner salaried employee since they presume the existence of an ownership interest." *Id.* at 250.

Although *Sonek* uses the term "personal goodwill," it does not expressly distinguish it from enterprise goodwill, nor does it address the proper treatment of personal goodwill in the equitable distribution of professional practices. Hence, *Sonek* does little to aid our analysis.

B.

Among appellate courts in other states, "[t]here is a split of authority on whether enterprise goodwill and/or personal goodwill in a professional practice may be characterized as marital property and thus equitably distributed." *May v. May*, 589 S.E.2d 536, 542 (W. Va. 2003). A few courts "have taken the position that neither personal nor enterprise goodwill in a professional practice constitutes marital property." *Id.* at 544; *see also*, *e.g.*, *Singley v. Singley*, 846 So. 2d 1004, 1011 (Miss. 2002) (concluding that goodwill "cannot be deemed a divisible marital asset in a divorce action"). Other state courts have made "no distinction between personal and enterprise goodwill" and have taken the position that a professional practice's goodwill can qualify as marital property. *May*, 589 S.E.2d at 543 (cleaned up); *see also*, *e.g.*, *Sommers v. Sommers*, 660 N.W.2d 586, 590 (N.D. 2003) ("We have indicated that the goodwill of a divorcing party's business interests may be considered in valuing the parties' marital property.").

Of those state courts that have considered the issue, however, most have concluded "that personal goodwill is not marital property, but that enterprise goodwill is marital property." *May*, 589 S.E.2d at 545; *see also*, *e.g.*, *Gaskill v. Robbins*, 282 S.W.3d 306, 315 (Ky. 2009) (classifying personal goodwill as nonmarital); *Howell v. Howell*, 523 S.E.2d 514, 520 (Va. Ct. App. 2000) (categorizing personal goodwill as "separate property in a divorce action"); *Butler v. Butler*, 663 A.2d 148, 155 (Pa. 1995) (holding enterprise goodwill to be the only type of goodwill that should be included when valuing a business for equitable distribution); *Thompson v. Thompson*, 576 So. 2d 267, 270 (Fla. 1991) (emphasizing that only the "business asset" of enterprise goodwill is divisible upon divorce); *Taylor v. Taylor*, 386 N.W.2d 851, 858–59 (Neb. 1986) (opining that, while personal goodwill "is not a marketable asset distinct from the individual," enterprise goodwill is "a business asset with value independent of the presence or reputation of a particular individual" and should therefore be characterized as marital property for distribution purposes).

Courts in the majority camp have explained their willingness to regard the enterprise goodwill of a professional practice as marital

property by observing that the value of enterprise goodwill can be quantified and that enterprise goodwill can continue to exist even if the practitioner abandons the practice. *Yoon v. Yoon*, 711 N.E.2d 1265, 1268–69 (Ind. 1999); *see also Thompson*, 576 So. 2d at 270 (explaining that, "to be a marital asset," goodwill "must exist separate and apart from the reputation or continued presence of the marital litigant"). In other words, enterprise goodwill "is in general transferrable to others and has a value to others." *Yoon*, 711 N.E.2d at 1269; *see also Moore*, 779 S.E.2d at 543 (stating that enterprise goodwill "has a determinable value because the enterprise goodwill of an ongoing business will transfer upon sale of the business to a willing buyer" (quoting *Wilson v. Wilson*, 706 S.E.2d 354, 361 (W. Va. 2010))).

Those same courts have reasoned that the personal goodwill of a professional practice "is not subject to equitable distribution." *May*, 589 S.E.2d at 547. Why? Because it "represents nothing more than [the] probable future earning capacity [of the practitioner]." *Taylor*, 386 N.W.2d at 858. As such, personal goodwill "is not a marketable asset distinct from the individual." *Id.*; *see also Yoon*, 711 N.E.2d at 1269 ("[A]ny value that attaches to a business as a result of . . . 'personal goodwill' represents nothing more than the future earning capacity of the individual and is not divisible."). Thus, "although relevant in determining alimony, [personal goodwill] is not a proper consideration in dividing marital property in a dissolution proceeding." *Taylor*, 386 N.W.2d at 858; *see also May*, 589 S.E.2d at 547 (holding that personal goodwill "is not a divisible asset" and "is more properly considered as the individual's earning capacity that may affect property division and alimony").

Some courts have also opined that treating personal goodwill as marital property risks imposing unfair financial burdens on practitioners. For one thing, a practitioner who is ordered to pay a share of personal goodwill in a marital dissolution proceeding cannot sell or otherwise liquidate that goodwill to satisfy the obligation. *See Taylor*, 386 N.W.2d at 858 ("There is a disturbing inequity in compelling a professional practitioner to pay a spouse a share of intangible assets at a judicially determined value that could not be realized by a sale or another method of liquidating value." (quoting *Holbrook v. Holbrook*, 309 N.W.2d 343, 355 (Wis. Ct. App. 1981))). For another, "[t]o assess a value on [personal goodwill] and to award a proportionate amount to the spouse is akin to making a lump sum alimony payment since it is based on future earnings of the paying spouse. If, in addition to this payment, alimony is awarded, there is, in effect, a double charge on the future income of the paying spouse." *Travis v. Travis*, 795 P.2d 96, 99 (Okla. 1990) (quoting *Beasley v. Beasley*, 518 A.2d 545, 553 (Pa. Super. Ct. 1986)).

C.

However persuasive the reasons that have led other courts to adopt the majority rule, we cannot simply follow their lead. The provisions of the equitable distribution statute must guide our decision.

In relevant part, the statute defines "[m]arital property" to include:

> All real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, . . . *except property determined to be separate property*. . . . It is presumed that all property acquired after the date of marriage and before the date of separation is marital property *except property that is separate property*. . . . [This] presumption may be rebutted by the greater weight of the evidence.

N.C.G.S. § 50-20(b)(1b) (2025) (emphases added).

The statute defines "[s]eparate property" to mean:

> All real and personal property acquired by a spouse before marriage or acquired by a spouse by devise, descent, or gift during the course of the marriage. . . . The increase in value of separate property and the income derived from separate property is considered separate property. All professional licenses and business licenses that would terminate on transfer are considered separate property.

Id. § 50-20(b)(2).

The personal goodwill of Sneed, PLLC does not fit neatly into the definition of separate property. Plaintiff founded the firm after marrying defendant, so its personal goodwill plainly does not qualify as property "acquired by a spouse *before* marriage." *Id.* (emphasis added). Similarly, the firm did not acquire personal goodwill during the marriage "by devise, descent, or gift." *Id.*; *see Devise*, *Black's* (defining "devise" as "[p]roperty disposed of in a will"); *Descent*, *Black's* (defining "descent" as "[t]he acquisition of real property by law, as by inheritance," or "the passing of intestate real property to heirs"); *Gift*, *Black's* (defining "gift" as property "voluntar[ily] transfer[red] . . . to another without compensation").

Plaintiff points to the final sentence in N.C.G.S. § 50-20(b)(2), which classifies nontransferable professional licenses, such as law licenses, as separate property. According to plaintiff, "[c]ourts [in states] with similar

laws have held that if professional licenses are separate property, then personal goodwill should also be classified as separate property." Plaintiff could have added that the equitable distribution statute requires our courts to treat the "increase in value of separate property and the income derived from separate property" as separate property. N.C.G.S. § 50-20(b)(2).

If accepted by this Court, this argument could call into question decisions by the Court of Appeals that address the proper classification of increases in the value of separate property. In those cases, some of which involve professional licenses, the court has distinguished between active and passive increases. *See*, *e.g.*, *Stewart v. Stewart*, 141 N.C. App. 236, 248 (2000). Whereas passive increases are unquestionably separate property, the Court of Appeals has held that increases attributable to the "financial or managerial contributions of one of the spouses to the separate property during the marriage" can be marital property under the equitable distribution statute. *Id.* (cleaned up). The logic of this passive/active distinction has been understood to apply to income derived from professional licenses. *See* Suzanne Reynolds, *Reynolds on North Carolina Family Law* § 6.26 (6th ed. 2020) [hereinafter *Reynolds*] (observing that "[o]nly the license itself and any passive increase in value or income is separate property").

No doubt much hard work went into developing the personal goodwill of Sneed, PLLC. In his briefs to this Court, however, plaintiff does not discuss—much less urge us to overturn—the Court of Appeals' case law on passive and active increases in the value of separate property. Consequently, we leave those precedents undisturbed.

Plaintiff further argues that "[p]ersonal goodwill, representing future earnings potential, cannot logically be 'acquired during the marriage' when it explicitly represents income to be earned after separation." This contention appears to us to miss the mark. Of course, plaintiff has not yet received *future* earnings; however, he undoubtedly acquired his future earnings *potential* during his marriage to defendant. It was during his marriage that he founded Sneed, PLLC and developed the reputation, knowledge, and skills that increased his earning capacity.

Nonetheless, we think it obvious that personal goodwill cannot qualify as marital property under the equitable distribution statute. The statute assumes that all such property possesses an attribute that personal goodwill unquestionably lacks: the capacity to be distributed. *See* N.C.G.S. § 50-20(a) (2025) (directing trial courts to "provide for an equitable distribution of the marital property . . . in accordance with this section"). Representing as it does a practitioner's future earning

potential, personal goodwill is tied to the individual practitioner. Indeed, some courts have gone so far as to deny that it is property at all. *See*, *e.g.*, *McKenna v. Pray*, 320 A.3d 415, 422 (Me. 2024) (cleaned up) ("As a general principle, the personal goodwill of a professional practice is not a species of property."). In purporting to distribute a professional practice's personal goodwill between the parties to an equitable distribution proceeding, a trial court is really granting one spouse a right to property—the other spouse's future earnings—that does not yet exist.

We therefore agree with most state appellate courts that have considered whether the personal goodwill of a professional practice can be marital property. Specifically, we hold that the personal goodwill of a professional practice does not qualify as marital property for equitable distribution purposes. To the extent that decisions of this Court or the Court of Appeals allow such goodwill to be classified as marital property, we disavow those decisions.

Defendant insists that classifying personal goodwill as separate property will result in "chaos" and "make property distribution financially crippling, if not impossible, for the parties and gut our equitable distribution law." According to defendant, if we hold that personal goodwill is necessarily separate property, "then all the income from a business which is derived from personal goodwill is also separate property." This means, defendant says, "that any income that is earned from a business during the marriage must be traced out to determine if the income came from personal goodwill (i.e., separate property) or enterprise goodwill (i.e., marital property)." Bank accounts, retirement accounts, marital residences, and other property funded by or purchased with "personal goodwill income" could be deemed separate property, defendant argues. The result? Defendant predicts that "[p]arties could never settle equitable distribution claims without involving an expert to trace the separate property which flowed from goodwill into all assets acquired during the marriage coverture."

Defendant paints a bleak picture, but she is wrong. The reason is simple: personal goodwill is always prospective. The term refers to what practitioners are expected to earn, not to what they have already earned. You cannot trace *past* earnings to personal goodwill because, by definition, personal goodwill concerns *future* earnings. Hence, our holding today does not prevent a trial court from classifying the income generated by a professional practice, even one with a sole practitioner, as marital property on the same basis as other "real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties." N.C.G.S. § 50-20(b)(1b).

Plaintiff further argues that classifying personal goodwill as marital property would violate the "inalienable" right of North Carolinians—recognized by our state constitution—to "the enjoyment of the fruits of their own labor." N.C. Const. art. I, § 1. Having ruled that the personal goodwill of plaintiff's law firm is not marital property, we need not reach the merits of this argument. In any event, it appears that plaintiff did not make this argument to the trial court, and so it is not properly before us. *See In re J.N.*, 381 N.C. 131, 133–34 (2022) ("[R]espondent['s] fail[ure] to assert his constitutional argument in the trial court . . . . waived the argument for appellate review.").

The trial court distinguished between the enterprise goodwill and personal goodwill of Sneed, PLLC but classified both as marital property. The Court of Appeals affirmed the classification, though it interpreted our precedents to reject distinctions between the enterprise and personal goodwill of professional practices. Based on what we have said above, we leave the trial court's treatment of the firm's enterprise goodwill intact but hold that both the trial court and the Court of Appeals erred in classifying the law firm's personal goodwill as marital property.

We emphasize that our decision is limited to equitable distribution proceedings. It should not be understood, for instance, to impair the right of a professional practitioner's spouse to alimony or to change the law regarding the consideration of earnings potential in alimony determinations. *See generally Reynolds*, § 5.16[c][5] (summarizing the case law on the circumstances in which a spouse's earning capacity may inform a trial court's alimony decision).

V.

Discretionary review was improvidently allowed as to the proper classification of enterprise goodwill. The decision of the Court of Appeals is reversed insofar as it affirms the trial court's classification of the personal goodwill of plaintiff's law firm as marital property. This case is remanded to the Court of Appeals for further remand to the trial court for entry of an equitable distribution order consistent with this opinion and for further proceedings not inconsistent therewith.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED IN PART; REVERSED IN PART AND REMANDED.

STATE OF NORTH CAROLINA
v.
KHALIL ABDUL FAROOK

No. 457PA20-2

Filed 14 August 2026

Constitutional Law—effective assistance of counsel—admission of defendant's guilt without consent—Harbison per se prejudice rule—narrowed

In a prosecution on charges including second-degree murder and felony hit and run, brought after defendant walked away from the fatal collision of his vehicle with a motorcycle carrying a married couple—where defendant had admitted that he was driving the vehicle and that people were killed in the crash, and he pled guilty to driving while license revoked—defendant did not receive ineffective assistance when his counsel conceded his guilt to the lesser-included offenses of misdemeanor death by vehicle and misdemeanor hit and run without defendant's consent. The expansive per se rule established in *State v. Harbison*, 315 N.C. 175 (1985)—that a per se violation of the Sixth Amendment is established in every case where counsel admits his client's guilt without the defendant's consent—was narrowed in light of the holding of *Florida v. Nixon*, 543 U.S. 175 (2004): that prejudice is presumed only where counsel entirely fails to function as a defendant's advocate, a criterion which can be, but is not always, met by unconsented-to concessions of guilt. Here, because defense counsel did not admit any elements of the charges for which defendant was convicted that defendant had not already conceded, defendant could not demonstrate prejudice.

Justice BERGER concurring.

Justice RIGGS dissenting.

Justice EARLS joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 297 N.C. App. 412, 910 S.E.2d 867 (2024), affirming in part and reversing in part judgments entered on 10 October 2018 by Judge Anna Mills Wagoner and an order entered on 9 March 2023 by Judge Michael D. Duncan in Superior Court, Rowan

County, and remanding in part for further proceedings. Heard in the Supreme Court on 4 November 2025.

Jeff Jackson, Attorney General, by John C. Congleton, Special Deputy Attorney General, for the State-appellant.

Sarah Holladay for defendant-appellee.

NEWBY, Chief Justice.

The issue in this case is whether the United States Supreme Court's decision in *Florida v. Nixon* generally requires the two-part test in *Strickland v. Washington* as the proper analysis for most Sixth Amendment ineffective assistance of counsel claims arising from an attorney's admission of his client's guilt to the jury without the client's knowing consent. This Court's precedent in *State v. Harbison* applied a per se prejudice rule based upon a narrow exception recognized by the Supreme Court in *United States v. Cronic* but erroneously expanded this narrow exception beyond the facts of *Harbison* to apply in all criminal cases involving an attorney's unconsented-to concession of a client's guilt. We take this opportunity to clarify that most IAC claims are governed by *Strickland* and that *Cronic*'s exception and per se prejudice rule applies only in those circumstances in which a defendant is entirely surprised by his counsel's concession of his guilt. Because the facts of defendant's case do not fall under the *Cronic* exception, we apply *Strickland* and conclude that defendant cannot show that he was prejudiced by counsel's allegedly deficient performance. Therefore, we reverse the decision of the Court of Appeals.

On 17 June 2012, defendant's vehicle crossed the center line and collided with a motorcycle carrying Tommy and Suzette Jones, who both died as a result of the collision. A witness saw defendant get out of his car and eventually walk away from the crash. Defendant turned himself in to law enforcement several days later.

Defendant was ultimately charged with driving while impaired, felony hit and run, obtaining the status of a violent habitual felon, and two counts of second-degree murder. Before trial, defendant pled guilty to driving while license revoked.

Prior to trial, defendant's counsel made admissions that:

> defendant was operating [the vehicle in question] on the date of the offense; [t]hat the vehicle he was

> driving on the date of the offense was involved in a crash with the motorcycle occupied by Tommy Jones and Suzette Jones, resulting in their deaths; [and t]hat at the time of the offense the defendant's drivers license was in a state of revocation as the result of a 1987 impaired driving revocation.

Defendant further stipulated that he was the driver and operator of the vehicle involved in the crash at the time of the crash and that at the time of the crash, defendant knew his license had been revoked for driving while impaired.

In a colloquy with the trial court, defendant affirmed that his counsel had defendant's permission to concede these elements of the offenses charged; that defendant understood the elements he was conceding; and that the State would not have to prove these elements beyond a reasonable doubt.

During the presentation of the State's evidence at trial, defendant further stipulated that blood evidence was found on the driver's side airbag of his vehicle and was properly processed by the State Crime Lab and that Crime Lab experts would testify that the DNA belonged to defendant. The trial court noted that defendant "sh[ook] his head, yes," as defense counsel discussed the stipulation.

Following the close of the State's evidence, defendant further stipulated that he was not at the scene of the collision when law enforcement arrived and that he did not return to the scene. The trial court conducted another colloquy with defendant, who reiterated his agreement to the pretrial stipulations and agreed that his counsel made the new stipulations with defendant's permission. Defendant further agreed that the State did not need to prove the new stipulations beyond a reasonable doubt and verified that he had no questions.

During closing arguments, defense counsel traced the admissions and stipulations defendant had made up to that point: that defendant was driving the vehicle at the time of the crash; that his license was revoked; that his vehicle was involved in a collision; that a person or persons were killed; and that defendant had pled guilty to driving while license revoked. Counsel then told the jury that it could find the defendant "[g]uilty of second-degree murder, guilty of involuntary manslaughter, guilty of misdemeanor death and not guilty." Defense counsel stated: "We've admitted several different things. We're admitting to certain things happening. The fact that he drove his vehicle and people died. We're not here to ask you to find him not guilty." Counsel told the jury

that "the most appropriate charge here – the most appropriate thing that you . . . could convict him of – we ask you to find him guilty of misdemeanor death by motor vehicle." Counsel continued: "I'm not – we're not, as a defense, not asking you to find him not guilty of anything. We're asking you to find the most appropriate, which is the lesser included in misdemeanor offenses of both of these crimes. Misdemeanor death, misdemeanor death and the misdemeanor version of hit-and-run."

The jury found defendant guilty of two counts of second-degree murder and one count of feloniously failing to remain at the scene of a crash resulting in serious injury or death. After trial, defendant pled no contest to the charge of attaining the status of a violent habitual felon. Defendant was sentenced to life without the possibility of parole on his violent habitual felon plea and each of the second-degree murder convictions, as well as twenty-nine to forty-four months of incarceration on the conviction for leaving the scene of a crash involving death or serious injury.

Defendant appealed, contending, among other things, that his counsel provided ineffective assistance (IAC) in conceding defendant's guilt to the misdemeanor charges without defendant's consent. *State v. Farook*, 297 N.C. App. 412, 414, 910 S.E.2d 867, 872–73 (2024). The Court of Appeals cited this Court's precedent in *State v. Harbison*, 315 N.C. 175, 178–79, 337 S.E.2d 504, 506 (1985), for the proposition that a defense counsel's admission of a defendant's guilt without the defendant's consent is per se violative of the Sixth Amendment's right to counsel. *Farook*, 297 N.C. App. at 450–51, 910 S.E.2d at 894–95. The Court of Appeals determined that defense counsel conceded defendant's guilt during closing argument by asking the jury to find the defendant guilty of the lesser included misdemeanor charges and stating that the defense was "not asking [the jury] to find [defendant] not guilty of anything." *Id.* at 451–52, 910 S.E.2d at 895. The court further determined that while defendant admitted and stipulated to certain elements of the offenses, the record did not clearly indicate whether defendant consented to the admission of his guilt to the offenses as a whole. *Id.* at 453–54, 910 S.E.2d at 895–96. The court also rejected the State's argument that defendant conceded guilt to the misdemeanor death by motor vehicle offense by conceding his guilt to each element of the underlying charge, opining that "even if a defendant knowingly and voluntarily consents to every element of a criminal offense, this does not necessarily indicate the defendant was aware that conceding these elements would amount to conceding guilt to the entire offense." *Id.* at 455, 910 S.E.2d at 897. The Court of Appeals remanded for an evidentiary hearing to determine

whether defendant knowingly consented to defense counsel's admission of defendant's guilt to the misdemeanor death by motor vehicle charge. *Id.* at 456, 910 S.E.2d at 897.

The State petitioned this Court for discretionary review, raising two questions: (1) whether the Court of Appeals' application of the per se prejudice standard conflicts with jurisprudence of this Court and (2) whether *Harbison*'s per se prejudice standard survived subsequent jurisprudence. On 27 June 2025, this Court allowed discretionary review.

"Whether a defendant was denied the effective assistance of counsel is a question of law that is reviewed de novo." *State v. Nunnally*, 929 S.E.2d 548, 554 (N.C. 2026) (quoting *State v. Clark*, 380 N.C. 204, 215, 868 S.E.2d 56, 64 (2022)).

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." U.S. Const. amend. VI. The United States Supreme Court, which is the final arbiter on questions of federal constitutional law, *see State v. Tirado*, 387 N.C. 104, 128–30, 911 S.E.2d 51, 69–71 (2025), has explained that "the right to counsel [guaranteed by the Sixth Amendment] is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 1449 n.14 (1970)). The right to effective assistance of counsel is a key safeguard for the right to a fair trial. *See id.* at 684–85, 104 S. Ct. at 2063. The United States Supreme Court has incorporated the Sixth Amendment right to counsel into the Due Process Clause of the Fourteenth Amendment, rendering it applicable to the States. *Gideon v. Wainwright*, 372 U.S. 335, 339–43, 83 S. Ct. 792, 794–96 (1963).

A criminal defendant may "claim that counsel's assistance was so defective as to require a reversal of a conviction or death sentence." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. It is the defendant's burden, however, to establish that he received IAC in violation of his Sixth Amendment rights. *United States v. Cronic*, 466 U.S. 648, 658, 104 S. Ct. 2039, 2046 (1984).

For a defendant to prevail on an IAC claim is no small feat. Generally, IAC claims are evaluated under the two-pronged test established in *Strickland*:

> 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, a trial whose result is reliable.

466 U.S. at 687, 104 S. Ct. at 2064. Under the "deficient performance" prong,

> a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Id. at 690, 104 S. Ct. at 2066. Under the "prejudice" prong,

> [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. . . . The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. at 691, 694, 104 S. Ct. at 2066, 2068. These are difficult hurdles for a defendant to clear. And "[u]nless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a

breakdown in the adversary process that renders the result unreliable." *Id.* at 687, 104 S. Ct. at 2064.

The United States Supreme Court, however, has eased defendants' burden in some narrow instances. Specifically, the Court has recognized that there are some "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at 658, 104 S. Ct. at 2046. In other words, in some rare instances, the prejudice prong is presumptively satisfied. *Cronic* provided several examples of such circumstances: when there is a "complete denial of counsel . . . at a critical stage of [the] trial"; when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"; and situations in which even competent counsel would be unable to provide effective assistance, such as when the appointment of counsel is unclear or occurs too close to the commencement of trial. *Id.* at 659–61, 104 S. Ct. at 2047–48.

In 1985, this Court diverged from this framework on certain Sixth Amendment IAC claims, holding that *Strickland* is modified when a defendant shows that his trial counsel conceded his guilt to the jury without the defendant's knowing and voluntary consent. In *State v. Harbison* the defendant proceeded at trial on a self-defense theory until his trial counsel, in closing argument, to the defendant's surprise told the jury that in counsel's opinion, the defendant should not be found innocent but should be found guilty of a lesser charge. *Harbison*, 315 N.C. at 177–78, 337 S.E.2d at 506. This Court determined that trial counsel had not provided effective assistance. *Id.* at 180–81, 337 S.E.2d at 507–08.

Harbison acknowledged *Strickland*, but we took for granted that trial counsel had performed deficiently and determined that trial counsel's concession of a defendant's guilt without the defendant's consent qualified for *Cronic*'s presumption of prejudice. *See id.* at 178–80, 337 S.E.2d at 506–07. We stated, "[W]hen counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed." *Id.* at 179–80, 337 S.E.2d at 507. The Court analogized a nonconsensual admission of a defendant's guilt to a guilty plea, reasoning that an admission of the defendant's guilt without his consent had the same "practical effect . . . as if counsel had entered a plea of guilty without the client's consent" because "[w]hen counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away." *Id.* at 180, 337 S.E.2d at 507. So, instead of subjecting the defendant's IAC claim to the usual rigors of the

Strickland analysis, this Court adopted a per se rule: "[I]neffective assistance of counsel, per se in violation of the Sixth Amendment, [is] established in *every* criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *Id.* at 180, 337 S.E.2d at 507–08 (emphasis added). Later, we expanded *Harbison*'s per se prejudice rule to include a defense counsel's implied concession of a client's guilt without the client's consent. *State v. McAllister*, 375 N.C. 455, 473, 475, 847 S.E.2d 711, 722, 723 (2020).

Harbison, like the present case, involved only questions of Sixth Amendment federal constitutional law.[1] 315 N.C. at 178–79, 337 S.E.2d at 506–07. The Supreme Court of the United States, not this Court, is the ultimate authority on such questions—including the test for determining when an attorney's conduct constitutes IAC in violation of the Sixth Amendment. Importantly to this dispute, the Supreme Court has undermined the expansive per se rule established in *Harbison*.

In *Florida v. Nixon*, 543 U.S. 175, 125 S. Ct. 551 (2004), the Supreme Court clarified that the proper analysis of IAC claims when a defendant asserts that his trial counsel conceded his guilt without his knowing, voluntary consent is the routine application of *Strickland*. In *Nixon* the defendant was charged with, among other things, first-degree murder after he tied his victim to a tree and set her on fire. *Id.* at 179–80, 125 S. Ct. at 556. The State's evidence against the defendant was "overwhelming." *Id.* at 180, 125 S. Ct. at 556. The defendant's counsel believed that "[the defendant's] guilt was not 'subject to any reasonable dispute.' " *Id.* at 180–81, 125 S. Ct. at 556.

The defendant's counsel therefore tried to arrange a plea deal for defendant that would have avoided the death penalty, but prosecutors refused. *Id.* at 180–81, 125 S. Ct. at 556–57. Faced with the prospect of

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1. In this case defendant's IAC claim is predicated entirely on his Sixth Amendment right to counsel. Like the Federal Constitution, the North Carolina Constitution also enshrines the right to counsel. In Article I, Section 23, the state constitution provides: "In all criminal prosecutions, every person charged with crime has the right . . . to have counsel for defense . . . ." N.C. Const. art. I, § 23. We have previously synchronized the state constitutional test for IAC claims with the federal test of *Strickland*. *See State v. Braswell*, 312 N.C. 553, 562–63, 324 S.E.2d 241, 248 (1985) ("[W]e expressly adopt the test set out in *Strickland* . . . as a uniform standard to be applied to measure ineffective assistance of counsel under the North Carolina Constitution."). We refused to apply a "less stringent rule," which we believed would "encourage convicted defendants to assert frivolous claims which would result in unwarranted trial of their counsels." *Id.* at 562, 324 S.E.2d at 248 (quoting *State v. Weaver*, 306 N.C. 629, 640, 295 S.E.2d 375, 381 (1982)). But, as noted above, defendant is proceeding only under the Sixth Amendment.

a capital trial, the defendant's counsel approached the defendant with a strategy: counsel would "concede guilt, thereby preserving his credibility in urging leniency during the penalty phase." *Id.* at 181, 125 S. Ct. at 557. The defendant's counsel deemed this strategy "to be 'the only way to save [the defendant's] life.' " *Id.* at 186, 125 S. Ct. at 559.

The defendant's counsel explained this strategy to the defendant several times, but the defendant was "generally unresponsive" and did not approve or reject the concession strategy. *Id.* at 181, 125 S. Ct. at 557. The defendant's counsel "eventually exercised his professional judgment to pursue the concession strategy" even though the defendant had not given permission to do so. *Id.* at 181–82, 125 S. Ct. at 557.

In the guilt phase of the trial, the defendant's counsel employed his concession strategy, conceding the defendant's guilt in the opening statement but arguing that "there are going to be reasons why you [(i.e., the jury)] should recommend that [defendant's] life be spared." *Id.* at 182–83, 125 S. Ct. at 557–58. During the State's case-in-chief, the defendant's counsel cross-examined witnesses and raised objections to the admission of certain evidence. *Id.* at 183, 125 S. Ct. at 558. He also contested several components of the jury instructions. *Id.* at 183, 125 S. Ct. at 558. In closing, the defendant's counsel again conceded the defendant's guilt but forecasted that he would be asking for leniency in sentencing. *Id.* at 183, 125 S. Ct. at 558. The jury convicted the defendant of all charges. *Id.* at 183, 125 S. Ct. at 558.

At the sentencing phase of the trial, the defendant's counsel introduced mitigating evidence, including evidence of low IQ, possible brain damage, mental illness, emotional instability, previous psychiatric care, "childhood emotional troubles," and "erratic behavior in the days preceding the murder." *Id.* at 183–84, 125 S. Ct. at 558. In closing argument, the defendant's counsel asked that the defendant's life be spared in light of the mitigating evidence. *Id.* at 184, 125 S. Ct. at 558.

The jury recommended the defendant be sentenced to death. *Id.* at 184, 125 S. Ct. at 558. The trial court imposed the death penalty but "commended [defense counsel's] performance during the trial, stating that 'the tactic employed . . . was an excellent analysis of [the] reality of his case.' " *Id.* at 184, 125 S. Ct. at 559.

The Florida Supreme Court ultimately concluded, however, that the defendant's counsel had provided ineffective assistance. *Id.* at 185–86, 125 S. Ct. at 559. In doing so, the Florida Supreme Court applied a rule virtually identical to *Harbison.* Because defense counsel had conceded the defendant's guilt without permission, the Florida Supreme Court

"appl[ied] . . . a presumption of deficient performance, as well as a presumption of prejudice." *Id.* at 178–79, 125 S. Ct. at 555. It reasoned that the concession "made without the defendant's express consent—however gruesome the crime and despite the strength of the evidence—automatically rank[ed] as prejudicial ineffective assistance of counsel necessitating a new trial." *Id.* at 178, 125 S. Ct. at 555. The Florida Supreme Court analogized the concession as "the 'functional equivalent of a guilty plea.' " *Id.* at 185, 125 S. Ct. at 559 (quoting *Nixon v. Singletary*, 758 So.2d 618, 624 (Fla. 2000) (per curiam)). After remanding for a hearing on the defendant's consent to the strategy, the Florida Supreme Court ultimately ordered a new trial. *Id.* at 185–86, 125 S. Ct. 559–60.

The Supreme Court of the United States issued the writ of certiorari and unanimously reversed the Florida Supreme Court's ruling.[2] *Id.* at 178–79, 125 S. Ct. at 555. It observed that "[t]he Florida court . . . did not hold . . . to the standard prescribed in *Strickland*" when it "first presumed deficient performance, then applied the presumption of prejudice" under *Cronic*. *Id.* at 189, 125 S. Ct. at 561. This stacking of presumptions absolved the defendant of his burden "to show that counsel's concession strategy was unreasonable." *Id.* at 189, 125 S. Ct. at 561–62. This was error, the Court explained, because "th[e] latter presumption [(i.e., the presumption of prejudice)] . . . is reserved for cases in which counsel fails meaningfully to oppose the prosecution's case." *Id.* at 179, 125 S. Ct. at 555. Stated positively, "[a] presumption of prejudice [was] not in order based solely on a defendant's failure to provide express consent to a tenable strategy counsel ha[d] adequately disclosed to and discussed with the defendant." *Id.* at 179, 125 S. Ct. at 555.

Instead, the United States Supreme Court clarified that *Strickland* governed the defendant's IAC claim:

> The Florida Supreme Court's erroneous equation of [the defendant's counsel's] concession strategy to a guilty plea led it to apply the wrong standard in determining whether counsel's performance ranked as ineffective assistance. The court first presumed deficient performance, then applied the presumption of prejudice that *United States v. Cronic*, 446 U.S. 648, 104 S. Ct. 2039 . . . (1984), reserved for situations in which counsel has entirely failed to function as

2. Chief Justice William Rehnquist was recused. *Nixon*, 543 U.S. at 193, 125 S. Ct. at 563.

> the client's advocate. The Florida court therefore did not hold [the defendant] to the standard prescribed in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 . . . (1984), which would have required [the defendant] to show that counsel's concession strategy was unreasonable. . . . [The Florida Supreme Court's] majority misunderstood *Cronic* and failed to attend to the realities of defending against a capital charge.
>
> *Cronic* recognized a narrow exception to *Strickland*'s holding that a defendant who asserts ineffective assistance of counsel must demonstrate not only that his attorney's performance was deficient, but also that the deficiency prejudiced the defense. *Cronic* instructed that a presumption of prejudice would be in order in "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." The Court elaborated: "[I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." [S]ee *Bell v. Cone*, 535 U.S. 685, 696–97, 122 S. Ct. 1843, 1851 (2002) (for *Cronic*'s presumed prejudice standard to apply, counsel's "failure must be complete"). We illustrated just how infrequently the "surrounding circumstances [will] justify a presumption of ineffectiveness" in *Cronic* itself.

Id. at 189–90, 125 S. Ct. at 561–62 (citations omitted) (quoting *Cronic*, 466 U.S. at 658–59, 104 S. Ct. at 2046–47).

The United States Supreme Court went on to opine that the defense counsel's concession strategy "d[id] not rank as a 'fail[ure] to function in any meaningful sense as the Government's adversary.' " *Id.* at 190, 125 S. Ct. at 562 (quoting *Cronic*, 466 U.S. at 666, 104 S. Ct. at 2051). It suggested, however, that "such a concession in a run-of-the-mine trial *might* present a closer question." *Id.* at 190, 125 S. Ct. at 562 (emphasis added).

In sum, the Supreme Court held that the state high court erred in mechanically subsuming every instance of a defense counsel's concession of a defendant's guilt without the defendant's consent within

Cronic's prejudice presumption. Instead, IAC claims predicated on defense counsel's concession of guilt without consent must go through the usual rigors of *Strickland*, unless the intentionally narrow *Cronic* exception applies. *See id.* at 192, 125 S. Ct. at 563.[3] Before remanding, the Court observed: "[I]f [the defendant's] counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain." *Id.* at 192, 125 S. Ct. at 563.

Several significant observations from *Nixon* bear on the continuing viability of *Harbison*.

First, the United States Supreme Court found a flaw in the Florida Supreme Court's reasoning which is also included in this Court's decision in *Harbison*. The United States Supreme Court rejected the notion that a concession of guilt without the defendant's permission during the trial is the "functional equivalent" of entering a guilty plea without permission. *Nixon*, 543 U.S. at 188, 125 S. Ct. at 560–61. Although there may be some surface level similarities, the Court explained that there are significant differences between the two that should be kept in mind when conducting IAC analyses.

With an unconsented-to admission of guilt, the defendant "retain[s] the rights accorded a defendant in a criminal trial"; namely, "[t]he State [is] obliged to present during the guilt phase competent admissible evidence establishing the essential elements of the crimes," and "the defense reserve[s] the right to cross-examine witnesses . . . and [can] endeavor . . . to exclude prejudicial evidence." *Id.* at 188, 125 S. Ct. at 561. Also, the defendant's right to appeal errors at trial is not hindered. *Id.* at 188, 125 S. Ct. at 561. These opportunities are not afforded to defendants who plead guilty. *See id.* at 187, 125 S. Ct. at 560. Indeed, a guilty plea "is 'itself a conviction,' " waiving the right to a trial by jury, the protection

3. Notably, since *Nixon*, the United States Supreme Court has clarified that if the defendant "adamantly object[s] to any admission of guilt" and his defense counsel concedes guilt anyway, Sixth Amendment IAC jurisprudence is not implicated; that is, the defendant's claim in that scenario is not evaluated under *Strickland-Cronic* framework. *McCoy v. Louisiana*, 584 U.S. 414, 417, 426, 138 S. Ct. 1500, 1505, 1510–11 (2018). Rather, such scenarios are treated as "[v]iolation[s] of [the] defendant's Sixth Amendment-secured autonomy" rights and "rank[ ] as error of the kind [the Supreme Court's] decisions have called 'structural'; when present, such an error is not subject to harmless-error review." *Id.* at 427, 138 S. Ct. at 1511. Instead, a new trial is automatically required as the corrective—regardless of prejudice. *Id.* at 428, 138 S. Ct. at 1511–12. The rule from *McCoy* is not implicated here, where there is no indication that defendant objected to counsel's admission of his guilt to the lesser included offenses.

against self-incrimination, the right to confront one's accusers, and the right to an unhindered appeal. *Id.* at 187–88, 125 S. Ct. at 560 (quoting *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 1711 (1969)).

The "erroneous equation" of concession strategies and guilty pleas led the Florida Supreme Court to incorrectly apply a presumption of prejudice to an IAC claim based on a counsel's concession of guilt during trial without the defendant's permission. *Id.* at 189, 125 S. Ct. at 561. This Court made the same erroneous equation in *Harbison* when we said that "[t]he practical effect [of employing a concession strategy] is the same as if counsel had entered a plea of guilty without the client's consent." 315 N.C. at 180, 337 S.E.2d at 507. And like the Florida Supreme Court, the erroneous equation led this Court to improperly presume prejudice in all cases in which defense counsel concedes guilt without the defendant's consent.

Second, in *Nixon* the United States Supreme Court clearly contemplated that *Strickland* is the general rule to be applied in most IAC cases—even those concerning concessions of guilt without the defendant's permission. Federal courts, including the United States District Court for the Middle District of North Carolina and the United States Court of Appeals for the Fourth Circuit, have discussed *Nixon* as reestablishing *Strickland* as the proper test for evaluating IAC claims arising from trial counsel's unconsented-to admission of a defendant's guilt. *McNeill v. Polk*, 476 F.3d 206, 217 (4th Cir. 2007) ("Under *Florida v. Nixon*, trial counsel's performance cannot be constitutionally deficient based solely on his failure to seek [the defendant's] consent before admitting guilt to the jury. Instead, [the defendant] must show that counsel's decision to admit guilt was objectively unreasonable under the *Strickland* standard." (citation omitted)); *Smith v. Stein*, 982 F.3d 229, 233 (4th Cir. 2020) (noting that "*Nixon* unanimously determined that such an admission was not automatically prejudicial ineffective assistance of counsel" in a discussion of the retroactive application of *McCoy*, 584 U.S. 414, 138 S. Ct. 1500 (2018), in a noncapital case); *Roberson v. Witherspoon*, No. 20CV306, 2021 WL 723533, at *6 (M.D.N.C. Feb. 24, 2021) ("[A]s the Fourth Circuit observed [in *Smith*], *Nixon* did not view counsel's concession of a client's guilt as structural error outside the ambit of harmlessness analysis, but rather, as an allegation regarding the ineffectiveness of counsel subject to the standards announced in *Strickland v. Washington*." (citation omitted)).[4]

4. This Court, as well as our Court of Appeals and our lower courts, have continued to apply *Harbison* following the Supreme Court's decision in *Nixon*. *See State*

Finally, this Court in *Harbison* also, like the Florida Supreme Court in *Nixon*, "applied the presumption of prejudice that *United States v. Cronic* reserved for situations in which counsel has entirely failed to function as the client's advocate." *Nixon*, 543 U.S. at 189, 125 S. Ct. at 561–62 (citation omitted). *Harbison*, however, turned what the United States Supreme Court intended to be "a narrow exception" in *Cronic* into a blanket per se rule applying to "*every* criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507–08 (emphasis added). This is at odds with *Nixon*'s clarification that the *Cronic* exception is "narrow" and applies "infrequently." *Nixon*, 543 U.S. at 190, 125 S. Ct. at 562. Indeed, the *Cronic* exception has a high threshold. For it to apply, defense counsel must "fail[ ] meaningfully to oppose the prosecution's case," "entirely fail[ ] to function as the client's advocate," "entirely fail[ ] to subject the prosecution's case to meaningful adversarial testing," or "fail[ ] to function in any meaningful sense as the Government's adversary." *Id.* at 179, 189, 190, 125 S. Ct. at 555, 561, 562. This "failure must be complete." *Id.* at 190, 125 S. Ct. at 562 (quoting *Bell v. Cone*, 535 U.S. at 696–97, 122 S. Ct. at 1851).

On the facts of *Harbison*, the defendant's counsel did precisely what *Cronic* forbade: failed to function as his client's advocate or to meaningfully test the State's case by "expressing his personal opinion that his client should not be found innocent but should be found guilty of manslaughter," despite the defendant's contention throughout trial that he acted in self-defense. *Harbison*, 315 N.C. at 177, 337 S.E.2d at 506. This Court held that "when counsel *to the surprise of his client* admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed." *Id.* at 180, 337 S.E.2d at 507 (emphasis added). Although this "surprise" concession fell within the "narrow exception" of *Cronic*, *Nixon*, 543 U.S. at 190, 125 S. Ct. at 562, *Harbison* went a step further and drew every instance of a counsel's unconsented-to concession of his client's guilt under the umbrella of *Cronic*: "ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in *every* criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the

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v. McAllister, 375 N.C. 455, 847 S.E.2d 711 (2020), *and State v. Maready*, 205 N.C. App. 1, 9–10, 695 S.E.2d 771, 777–78 (2010). However, state lower courts' treatment of *Nixon* is not precedential for this Court and paints only half of the picture, leaving unaddressed post-*Nixon* jurisprudence by federal district and appellate courts. Furthermore, the Supreme Court of the United States is the final arbiter of federal constitutional law, and this Court is required to bring our case law into compliance with its decision on this issue.

defendant's consent." *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507–08 (emphasis added). This broad, blanket rule cannot be maintained following *Nixon*; instead, *Harbison*'s per se prejudice rule may only apply where *Cronic* permits.

Because the United States Supreme Court is the final arbiter of federal law, we are compelled to follow that Court's guidance when considering IAC claims under the Sixth and Fourteenth Amendments. Therefore, IAC claims asserting that defense counsel conceded guilt without the defendant's knowing and voluntary permission are evaluated under both prongs of *Strickland*, unless the narrow exception recognized by *Cronic* applies.[5]

On its facts, this case does not appear to fall under the *Cronic* exception. Rather than entirely failing to oppose the State's case or to function as his client's advocate, counsel here employed a concession strategy to which defendant agreed, at least in part, as reflected by the pretrial *Harbison* admissions and the colloquies conducted by the trial court in which defendant agreed to various concessions. Because counsel discussed a strategy involving concessions with his client prior to trial and defendant was not wholly surprised by counsel's admission of his guilt, this case does not fall within the *Cronic* exception, and *Strickland* thus controls.

Applying *Strickland*, we must determine: (1) whether counsel performed deficiently by conceding defendant's guilt to the lesser included offenses of misdemeanor death by vehicle and misdemeanor hit and run without the defendant's consent, and (2) whether defendant was prejudiced by these concessions.

The Court of Appeals concluded that the record did not clearly show whether defendant knowingly consented to the admission of his guilt to the misdemeanor offenses, despite defendant's admissions and stipulations to several *elements* of the misdemeanor offenses. *Farook*, 297 N.C. App. at 455–56, 910 S.E.2d at 897. The court further opined that "even if a defendant knowingly and voluntarily consents to every element of a criminal offense, this does not necessarily indicate the defendant was aware that conceding these elements would amount to conceding guilt

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5. Infrequently, a defense counsel's concession of guilt without the defendant's knowing and voluntary permission may amount to a complete failure to function as the defendant's advocate. On those uncommon occasions, the "narrow" *Cronic* exception may be invoked, and the prejudice prong may be presumptively satisfied.

to the entire offense." *Id.* at 455, 910 S.E.2d at 897. The State contends that the Court of Appeals erred because, under *State v. McNeill*, "[w]here . . . a defendant stipulates to the elements of an offense, defense counsel may infer consent to admit defendant's guilt of that offense." 346 N.C. 233, 238, 485 S.E.2d 284, 287 (1997). The State argues that defendant "effectively stipulated to the elements of the offense[s] of misdemeanor hit and run" and misdemeanor death by motor vehicle and therefore "his consent to a concession can be inferred."

The elements of misdemeanor death by vehicle are established by statute: (1) unintentionally causing the death of another person, (2) while the defendant was engaged in violating any State law or local ordinance governing traffic or vehicles, and (3) the offense or violation proximately caused the death. N.C.G.S. § 20-141.4(a2) (2025). In written pretrial admissions, defendant admitted "pursuant to *State v. Harbison*" that he was driving at the time of the collision and "[t]hat the vehicle he was driving on the date of the offense was involved in a crash with the motorcycle occupied by [the victims], resulting in their deaths." Defendant further admitted "[t]hat at the time of the offense the defendant's drivers license was in a state of revocation as the result of a 1987 impaired driving revocation" and stipulated that he "knew his license was in the state of revocation for an implied consent offense, driving while impaired." However, in closing argument, defense counsel told the jury that the violation of motor vehicle law that caused the accident was driving left of center, not driving with defendant's license revoked: "You'll be given two main options on [violating state motor vehicle law]. That will be left of center or driving while license revoked. . . . [D]riving while license revoked isn't what caused the accident. Left of center is." The record does not reflect that defendant ever admitted or stipulated to driving left of center or that driving left of center caused the accident.

Section 20-166 of the North Carolina General Statutes provides that misdemeanor hit and run is a Class 1 misdemeanor.

> With regard to the charge of failure to stop immediately after a crash involving property damage in violation of N.C.[G.S.] § 20-166(c), the State must show (i) that [d]efendant was driving a vehicle, (ii) which was involved in a crash, (iii) that [d]efendant knew or reasonably should have known the car was in a crash, (iv) where property was damaged, (v) that [d]efendant failed to immediately stop at the scene of the crash, and (vi) that [d]efendant's failure to stop was intentional or willful.

State v. Braswell, 222 N.C. App. 176, 182, 729 S.E.2d 697, 702 (2012). As noted above, defendant admitted and stipulated before trial (1) that he was driving a vehicle at the time of the collision and (2) that the vehicle he was driving was involved in a crash with the victims' motorcycle. During trial, defendant stipulated that his blood and DNA were found on the airbag of defendant's vehicle, permitting an inference that defendant's vehicle was damaged and that defendant knew or reasonably should have known that the vehicle was in a crash. The trial court noted that as counsel and the trial court discussed this stipulation, defendant was "shaking his head, yes." Defendant also admitted during trial "that he was not at the scene when law enforcement was there, and did not return to the scene." The trial court questioned defendant regarding this admission, and defendant verbally confirmed that counsel made this admission with defendant's permission, that the State did not need to prove that element beyond a reasonable doubt, and that defendant did not have any questions. We will leave for another day the question of whether intentionality or willfulness of the failure to stop can be inferred from defendant's conduct.

Under *Harbison*'s blanket per se prejudice rule, defense counsel's concession of these elements may have been sufficient to demonstrate ineffective assistance or, as the Court of Appeals concluded, may have required remand to determine whether the concessions were made with defendant's consent. Nonetheless, under *Strickland*, a defendant alleging IAC must also show prejudice, which this defendant cannot do as a matter of law.

Assuming *arguendo* that defendant's counsel performed deficiently in making the concessions without defendant's knowing consent, the cold record demonstrates that defendant cannot show prejudice from these admissions. As noted above, prejudice requires a showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

The most obvious form of prejudice defendant could show is that, but for counsel's concession, defendant would not have been convicted of felony hit and run or second-degree murder; however, defense counsel did not concede defendant's guilt to these charges, and defendant was not convicted of the charges to which counsel conceded his guilt.[6]

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6. The Court of Appeals cites *State v. Matthews*, in which the defendant was convicted of first-degree murder but contended that his defense counsel provided ineffective

In fact, counsel's concession of defendant's guilt to the lesser included misdemeanor offenses did not admit any elements of the charges for which defendant was convicted that defendant had not otherwise conceded. The elements of felony hit and run are established by statute.

> The driver of any vehicle who knows or reasonably should know: (1) That the vehicle which he or she is operating is involved in a crash; and (2) That the crash has resulted in serious bodily injury, . . . or death to any person; shall immediately stop the driver's vehicle at the scene of the crash. The driver shall remain with the vehicle at the scene of the crash until a law-enforcement officer completes the investigation of the crash or authorizes the driver to leave and the vehicle to be removed . . . . A willful violation of this subsection shall be punished as a Class F felony.

N.C.G.S. § 20-166(a) (2025). The only elements shared by felony hit and run and the misdemeanor offense are: (1) that the defendant was driving a vehicle which was involved in a crash; (2) that the defendant knew or reasonably should have known that the vehicle was involved in a crash; and (3) that the defendant failed to stop at the scene. Defendant admitted prior to trial that the vehicle he was driving was involved in a collision that caused the victims' deaths. In a colloquy with the trial court during trial, defendant affirmed that his counsel had his permission to admit that he was not at the scene of the collision when law enforcement arrived and that he did not return to the scene of the collision when law enforcement arrived; that the State did not need to prove these elements beyond a reasonable doubt; and that defendant had no questions about this admission. Defendant's stipulation that his blood and DNA were on the airbag of his car permits an inference that defendant knew or reasonably should have known that his vehicle was involved in a crash. Therefore, counsel's allegedly impermissible concession of defendant's guilt to misdemeanor hit and run did not impact defendant's conviction for felony hit and run.

"Second-degree murder is an unlawful killing with malice, but without premeditation and deliberation. Intent to kill is not a necessary

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assistance by conceding his client's guilt to second-degree murder, a lesser included offense, without the defendant's consent. 358 N.C. 102, 109, 591 S.E.2d 535, 540–41 (2004). *Matthews* was decided solely on the issue of whether the defendant knew his counsel would concede his guilt to the lesser included offense, because under *Harbison*, prejudice was presumed. Because we now return ineffective assistance of counsel analysis to the ambit of *Strickland*, which requires a showing of prejudice, *Matthews* does not control.

element of second-degree murder, but there must be an intentional act sufficient to show malice." *State v. Brewer*, 328 N.C. 515, 522, 402 S.E.2d 380, 385 (1991) (citation omitted). In a similar second-degree murder case arising from a vehicle collision in which two people died, this Court concluded that "it was necessary for the State to prove only that defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind." *State v. Rich*, 351 N.C. 386, 395, 527 S.E.2d 299, 304 (2000). Here the trial court's instructions to the jury described six elements for second-degree murder by vehicle: (1) defendant was driving a vehicle; (2) on a highway or street within the State; (3) the vehicle was involved in a collision while defendant was driving; (4) defendant violated the motor vehicle laws of the State; (5) defendant acted unlawfully and with malice; and (6) the victims' deaths were proximately caused by the unlawful acts of the defendant done in a malicious manner. The overlapping elements between second-degree murder and misdemeanor death by vehicle include a violation of State motor vehicle or traffic laws that proximately caused the death of another. As noted above, defendant admitted prior to trial that he was driving when his vehicle was involved in a collision, that the victims died as a result of the collision, and that defendant's drivers license was revoked at the time of the collision. Counsel conceded in his closing statement that "driving while license revoked isn't what caused the accident. Left of center is." This separate admission was not an implication of counsel's concession of defendant's guilt to the lesser included offenses and was not separately challenged on appeal. Therefore, counsel's admission of defendant's guilt to misdemeanor death by motor vehicle did not implicate defendant's second-degree murder convictions.

Because we determine as a matter of law that defendant cannot show prejudice from counsel's concession of his guilt to the lesser included offenses, we reverse the decision of the Court of Appeals remanding the case for an evidentiary hearing on defendant's IAC claim. The remaining issues addressed by the Court of Appeals are not properly before this Court and its decision as to these issues remains undisturbed.

REVERSED.

Justice BERGER concurring in result only.

I concur in result only.

There are essentially three questions concerning unauthorized concessions under federal law. First, did the defendant expressly object to the concession and counsel proceeded anyway? This will usually be apparent from the record, and if there was such an objection, structural error has occurred and prejudice is not considered. *See McCoy v. Louisiana*, 584 U.S. 414 (2018). Next, federal courts ask did "counsel entirely fail[ ] to subject the prosecution's case to meaningful adversarial testing[?]" *United States v. Cronic*, 466 U.S. 648, 659 (1984). If so, federal courts apply a presumption of prejudice when conducting the traditional *Strickland* IAC test. *See id.*; *Florida v. Nixon*, 543 U.S. 175, 189–90 (2004). If neither of these circumstances are present, the question is whether counsel performed deficiently and to the prejudice of the defendant. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Nixon*, 543 U.S. at 191–92 (2004).

While the majority's efforts move analysis of concession issues in the right direction toward the federal framework, they don't actually get there because *Harbison* remains. If the Court is searching for clarity, we should simply state that North Carolina follows existing federal law in this sphere and overturn *Harbison* and *McAllister* to the extent they presume prejudice from uncontested concessions because they insert a separate question often unanswerable from the record: whether defendant knowingly consented in advance? *Harbison* created a remedy to answer this question: ex post evidentiary hearings on consent years after trial. Do these continue under the majority opinion even though such a remedy is not available under the federal model? Perhaps.

Harbison was grounded in federal law at the time, concluding there was a "per se violation of the Sixth Amendment." *Harbison*, 315 N.C. at 180. That decision cannot survive *Nixon* and *McCoy*. The majority all but acknowledges this in a footnote. But *Harbison* lingers.

When the record is silent as to affirmative consent or objection by a defendant to counsel's concession, *Nixon* holds that a presumption of prejudice is unwarranted. *Harbison* doesn't work in that space, and it doesn't fit within the circumstances of *McCoy* either. A defendant who objects on the record and has his or her Sixth Amendment right overridden by counsel is entitled to reversal without further inquiry. Leaving *Harbison* in place could lead a court to potentially take *McCoy* claims

out of a structural error posture and place them into an ineffective assistance of counsel/consent inquiry. That's not correct.

The better result here is to look to *McCoy* when there is an express objection and *Cronic* when the complete failure to act as counsel applies. Then simply apply *Strickland*'s two-part test to all other claims. Every defendant with a genuine constitutional claim would be fully protected, and those with *McCoy* claims would be even better protected than they are today. And there would be less potential for confusion for litigants and judges.

Justice RIGGS dissenting.

The majority today narrows an important case in North Carolina's criminal law jurisprudence effectively out of existence. *State v. Harbison*, 315 N.C. 175 (1985), has been on the books for forty-one years and has been consistently utilized by our courts for over twenty years since the United States Supreme Court published *Florida v. Nixon*, 543 U.S. 175 (2004). However, today's decision renders *Harbison* superfluous. The majority on this Court continues down its path of eradicating precedent from our books with which it philosophically or politically disagrees. This is the opposite of judicial restraint and caution, and the epitome of judicial activism. Therefore, I respectfully dissent.

The majority shines a particularly bright light on its activist intentions in two particular parts of its opinion. First, the majority impliedly overturns a very recent decision from this Court, *State v. McAllister*, 375 N.C. 455 (2020), issued when it had a different political composition. The majority's author dissented in that 2020 opinion, making some of the arguments in his dissent that he makes here today.[1]

1. In *McAllister*, the majority determined that statements in defense counsel's closing argument amounted to an implied admission of the defendant's guilt which, if made without the defendant's authorization, would constitute a per se violation of the defendant's right to effective assistance of counsel under *Harbison*. 375 N.C. at 475. The dissent argued that "[t]he majority's decision today limits defense counsel's ability to pursue this common strategy" of conceding in order to "enhance defense counsel's credibility" to the jury. *Id.* at 478 (Newby, J., dissenting). Like he did in his *McAllister* dissent, the author of today's majority again erroneously puts a counsel's strategy decisions ahead of a defendant's autonomy in violation of a defendant's Sixth Amendment right to counsel. *See McCoy v. Louisiana*, 584 U.S. 414, 422 (2018) ("Just as a defendant may steadfastly refuse to plead guilty in the face of overwhelming evidence against her, or reject the assistance of

Second, in a footnote that can only, at best, be described as dicta, but is more accurately reviewed as an inappropriate effort to deter future litigation, the majority notes (correctly) that defendant's ineffective assistance of counsel claim in this case is "predicated entirely on his Sixth Amendment right to counsel," not state constitutional grounds. *See* majority *supra* n.1. The majority then goes on to suggest that we would treat any future claims brought under Article I, Section 23 (our state constitutional right to counsel provision) in lockstep with the federal constitutional analysis. I disagree that either our state constitution or precedent requires reflexive lockstepping with *United States v. Cronic*, 466 U.S. 648 (1984), under Article I, Section 23. Our constitutional provision has a different history and role in the context of our entire state constitutional structure, so should be interpreted intentionally when the matter is properly presented, but dicta in our opinions carries absolutely no force of law. *Trs. of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs.*, 313 N.C. 230, 242 (1985) ("Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby.").

With this perspective in mind, I turn now to the proper reading of *Florida v. Nixon*, including its easy reconciliation with our long-standing precedent, and explain why this case would be more appropriately resolved with remand for an evidentiary hearing to determine whether *Harbison* applies.

A. Ineffective Assistance of Counsel

To establish a claim for ineffective assistance of counsel, a defendant must prove that his counsel's conduct fell below an objective standard of reasonableness. *State v. Braswell*, 312 N.C. 553, 561–62 (1985). To successfully carry that burden, the defendant must satisfy the two-part *Strickland* test by "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and "showing that the deficient performance prejudiced the defense" by depriving the defendant of a fair trial. *Braswell*, 312 N.C. at 562 (quoting *Strickland v. Washington*,

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legal counsel despite the defendant's own inexperience and lack of professional qualifications, so may she insist on maintaining her innocence at the guilt phase of a capital trial. These are not strategic choices about how best to *achieve* a client's objectives; they are choices about what the client's objectives in fact *are*."); *Harbison*, 315 N.C. at 180 ("This Court is cognizant of situations where the evidence is so overwhelming that a plea of guilty is the best trial strategy. However, the gravity of the consequences demands that the decision to plead guilty remain in the defendant's hands.").

466 U.S. 668, 687 (1984)). A defendant has established per se ineffective assistance of counsel, requiring a new trial, when "the harm is so likely and so apparent that the issue of prejudice need not be addressed." *Harbison*, 315 N.C. at 180; *see Strickland*, 466 U.S. at 692 ("In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice."); *Cronic*, 466 U.S. at 658 (observing that "[t]here are . . . circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified").

In *Harbison*, this Court announced that per se ineffective assistance of counsel occurs "when counsel to the surprise of his client admits his client's guilt . . . without first obtaining the client's consent." 315 N.C. at 180. This includes "when counsel concedes the defendant's guilt to the offense or a lesser included offense without the defendant's consent." *State v. Berry*, 356 N.C. 490, 512 (2002) (citing *Harbison*, 315 N.C. at 180). The defendant in *Harbison* shot two people, seriously injuring one victim and fatally wounding the other. 315 N.C. at 177. Throughout the trial, the defendant "steadfastly maintained that he acted in self-defense." *Id.* While defense counsel generally argued self-defense, during closing arguments counsel expressed to the jury: "I don't feel that [the defendant] should be found innocent. I think he should do some time to think about what he has done. I think you should find him guilty of manslaughter and not first degree." *Id.* at 178. This Court stated that "[w]hen counsel admits his client's guilt without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away." *Id.* at 180. Such a concession of guilt is a per se violation of a defendant's constitutional right to effective assistance of counsel. *Id.*

Just as general ineffective assistance of counsel claims are questions of law reviewed de novo, *State v. Clark*, 380 N.C. 204, 215 (2022), per se ineffective assistance of counsel claims are also reviewed de novo, *State v. Moore*, 286 N.C. App. 341, 345 (2022) (citing *Harbison*, 315 N.C. at 178–81); *see also State v. Wilson*, 236 N.C. App. 472, 475–78 (2014) (reviewing the defendant's per se ineffective assistance of counsel claim de novo).

The State asks this Court to disavow or limit *Harbison* and "reserve the application of *per se* presumptive prejudice to the rare case where the circumstances are such that actual prejudice is evident." The State asserts that cases decided after *Harbison*, particularly *Florida v. Nixon*, have raised the question of whether a per se prejudicial standard remains "properly extant." To the degree that the State asks us to

overrule or limit *Harbison*, and the majority accepts the State's invitation, both misunderstand *Nixon*. On the facts of that case, the United States Supreme Court's holding in *Nixon* was not intended to repudiate *Strickland* or significantly rework how ineffective assistance of counsel claims are established. *See Nixon*, 543 U.S. at 192.

In *Nixon*, the United States Supreme Court held that it is not per se ineffective assistance of counsel when, in a death penalty case, defense counsel concedes the defendant's guilt to an offense without the defendant's explicit consent where counsel's concession appears to be a part of trial strategy that has been discussed and disclosed to the defendant, who neither consents nor objects to the strategy. *Id.* at 179, 190–92.[2] As stated in *Nixon*,

> To summarize, *in a capital case*, counsel must consider in conjunction both the guilt and penalty phases in determining how best to proceed. When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and *the defendant is unresponsive*, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent. Instead, if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain.

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2. As framed by Justice Ginsburg in the introduction of the *Nixon* opinion:

> Defense counsel undoubtedly has a duty to discuss potential strategies with the defendant. But when a defendant, informed by counsel, neither consents nor objects to the course counsel describes as the most promising means to avert a sentence of death, counsel is not automatically barred from pursuing that course. The reasonableness of counsel's performance, after consultation with the defendant yields no response, must be judged in accord with the inquiry generally applicable to ineffective-assistance-of-counsel claims: Did counsel's representation "f[a]ll below an objective standard of reasonableness"?

Nixon, 543 U.S. at 178 (alteration in original) (citing and quoting *Strickland*, 466 U.S. at 688, 694). Defense counsel, Mr. Corin, concluded that the best strategy in the defendant's case was "to concede guilt, thereby preserving his credibility in urging leniency during the penalty phase." *Id.* at 181. Mr. Corin attempted to explain that strategy to the defendant at least three times, and the defendant "was generally unresponsive" and "never verbally approved or protested Corin's proposed strategy." *Id.*

Id. at 192 (emphases added). The *Nixon* Court continued, "[a]lthough such a concession *in a run-of-the-mine trial* might present a closer question, the gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus," and "[c]ounsel therefore may reasonably decide to focus on the trial's penalty phase." *Id.* at 190–91 (emphasis added).[3] Accordingly, *Nixon* adds a gloss to the ineffective assistance of counsel analysis in certain cases—perhaps most capital cases and cases in which a defendant refuses to engage with his or her counsel after being advised on strategy—but does not require significant disturbance of *Harbison*. Rather, *Nixon* contemplates a specific circumstance where the per se prejudicial standard should not be applied given that defense counsel's concession of defendant's guilt to the jury may not even be prejudicial, let alone per se prejudicial, and instead may be reasonable in a capital case where the defendant is non-communicative with counsel.[4] *Nixon* does not require this Court to dramatically change our existing jurisprudence.

At most, *Nixon* suggests that per se ineffective assistance of counsel claims may not exist in a simple binary based on whether an attorney has verbal consent. *See*, *e.g.*, *State v. Al-Bayyinah*, 359 N.C. 741, 757 (2005) ("The United States Supreme Court has found that whether or not a defendant expressly consented to counsel's argument was not dispositive in finding ineffective assistance." (citing *Nixon*, 543 U.S. at 192)). On one hand, in a capital case like *Nixon*, an unconsented-to concession of guilt may, under certain conditions, not squarely track the rationale for applying a per se prejudicial standard to counsel's actions and may instead constitute a reasonable trial strategy even without the defendant's verbal consent. *See Nixon*, 543 U.S. at 178–79. If those conditions are met, counsel's actions would not be a per se violation of the defendant's Sixth Amendment rights, and the customary test under *Strickland* would apply. *See id.* at 179 ("A presumption of prejudice is

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3. "*Harbison* applies only to the guilt/innocence phase of a trial" and not the sentencing phase. *State v. Walls*, 342 N.C. 1, 57 (1995); *see also State v. Al-Bayyinah*, 359 N.C. 741, 757 (2005) (stating that "the rule in *State v. Harbison* precluding defense counsel from admitting a defendant's guilt to the jury without the defendant's consent does not apply to sentencing proceedings" (citation omitted)).

4. It is worth acknowledging that the United States Supreme Court granted certiorari specifically "to resolve an important question of constitutional law, *i.e.*, whether counsel's failure to obtain the defendant's express consent to a strategy of conceding guilt *in a capital trial* automatically renders counsel's performance deficient." *Nixon*, 543 U.S. at 186 (emphasis added).

not in order based solely on a defendant's failure to provide express consent to a tenable strategy counsel has adequately disclosed to and discussed with the defendant."). On the other hand, an unconsented-to concession by counsel may constitute per se ineffective assistance of counsel under *Harbison* if it totally surprises the defendant. Such surprise would still be presumptively prejudicial to the defendant's right to a fair trial.

But *Nixon* was not the end of the story: in *McCoy v. Louisiana*, 584 U.S. 414 (2018), the United States Supreme Court provided further guidance on another, albeit distinguishable, case involving defense counsel's concession of a defendant's guilt. Like in *Nixon*, defense counsel in *McCoy* was operating under circumstances in which the evidence against the defendant was overwhelming and defense counsel advised the defendant that he intended to concede defendant's guilt at the guilt phase to avoid a death sentence in the penalty phase. *McCoy*, 584 U.S. at 418–21. But, unlike in *Nixon*, the defendant in *McCoy* "intransigent[ly] and unambiguous[ly]" objected to defense counsel's strategy to concede. *Id.* at 420. The Supreme Court held that "[t]he trial court's allowance of [defense counsel]'s admission of McCoy's guilt despite McCoy's insistent objections was incompatible with the Sixth Amendment" and remanded the matter for a new trial. *Id.* at 428. The Fourth Circuit later reconciled the cases:

> In short, *McCoy* and *Nixon* leave us with a reasonably straightforward rule. If defense counsel assesses conceding guilt to a jury as the wisest path, he has two obligations: He must consult with his client, and, if the client engages, he may not "steer the ship the other way." *McCoy*, 584 U.S. at 424, 138 S.Ct. 1500. If the lawyer violates these rules and thus "usurp[s] control of an issue within [the defendant's] sole prerogative," the remedy is a new trial, regardless of whether prejudice can be demonstrated. *Id.* at 426-27, 138 S.Ct. 1500.

United States v. Hashimi, 110 F.4th 621, 629 (4th Cir. 2024) (alterations in original). Thus, *McCoy* affirms that "[v]iolation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural,' " and, in that circumstance, the defendant must be "accorded a new trial without any need first to show prejudice." 584 U.S. at 427–28. Importantly, the *McCoy* Court did not apply *Strickland* and reasoned that it did not need to "[b]ecause a client's autonomy, not counsel's competence [was] in issue." *Id.* at 426. To be sure, neither

Nixon nor *McCoy* are on all fours with this case, but those cases represent the United States Supreme Court's jurisprudence since this Court decided *Harbison*.

Returning to the State's and majority's assertion that *Nixon* should shift our jurisprudence, the key circumstances that made a presumption of prejudice inappropriate in *Nixon* are not present here. Crucially, this is not a capital case. The record lacks any indication that counsel discussed using concessions as a trial strategy with Mr. Farook or that, if the concessions were a trial strategy, the strategy was reasonable even without Mr. Farook's consent.[5] Furthermore, while the defendant's unresponsiveness was important to *Nixon*'s holding, the record does not suggest that Mr. Farook was unresponsive. Lastly, the United States Supreme Court affirmed the potential for structural error requiring no showing of prejudice when the defense counsel undermines a defendant's autonomy to choose defense objectives. *See McCoy*, 584 U.S. at 427–28. Thus, any gloss that *Nixon* may add to evaluating ineffective assistance of counsel claims in North Carolina does not fundamentally change our approach here, and *Harbison* remains good law.

Before returning to *Harbison*, it is worth examining how other federal and state courts have dealt with alleged per se ineffective assistance of counsel claims after *Nixon*. While some federal district and appellate courts apply *Nixon* to non-capital proceedings, a vast majority recognize, as we should, that the capital nature of the case (and the human life at stake) is significant. *See, e.g.*, *Stenson v. Lambert*, 504 F.3d 873, 891 (9th Cir. 2007) (emphasizing that *Nixon* instructs that explicit consent to conceding guilt is not needed "where the evidence of guilt is overwhelming and the attorney is attempting to avoid the death penalty"); *Holder v. United States*, 721 F.3d 979, 988 (8th Cir. 2013) (acknowledging that "[t]he Court [in *Nixon*] recognized that capital cases involve specialized circumstances"); *Lockett v. Trammell*, 711 F.3d 1218, 1249 (10th Cir.

5. Our lower courts have considered how *Nixon* impacts the validity of *Harbison* and have continued to apply *Harbison*. *See, e.g.*, *State v Maready*, 205 N.C. App. 1, 9–10 (2010) (considering *Nixon* and deciding not to apply it as "[t]he case before us is not a death penalty case, and the United States Supreme Court has not addressed the specific Sixth Amendment issue presented in the 'run-of-the-mine' case before us"); *State v. Taylor*, No. COA17-1284, slip op. at 7 n.4 (N.C. Ct. App. Dec. 18, 2018) (unpublished) (rejecting the State's argument that *Harbison* was no longer good law in light of *Nixon*). *But see State v. Legrand*, No. COA06–153, slip op. at 6–10 (N.C. Ct. App. Dec. 19, 2006) (unpublished) (incorporating *Nixon* into its analysis of the defendant's ineffective assistance of counsel claim).

2013) (emphasizing *Nixon*'s rationale that "the gravity of the potential sentence in a capital trial . . . vitally affect[s] counsel's strategic calculus" (alterations in original) (quoting *Nixon*, 543 U.S. at 190–91)); *Darden v. United States*, 708 F.3d 1225, 1229 (11th Cir. 2013) ("Thus, under *Nixon*, *Cronic* does not apply when defense counsel strategically concedes guilt *in a capital case* in order to more credibly advance defendant's case for leniency during the penalty phase." (emphasis added)); *United States v. Roof*, 10 F.4th 314, 351 (4th Cir. 2021) (per curiam) (summarizing *Nixon*'s holding to provide that "counsel could concede commission of the crime at the guilt phase of a capital case in order to preserve credibility for the defense during the penalty phase, and that counsel could do so even though the defendant 'never verbally approved or protested [the] proposed strategy' " (alteration in original) (quoting *Nixon*, 543 U.S. at 181)); *United States v. Basham*, 789 F.3d 358, 387 (4th Cir. 2015) (highlighting *Nixon*'s holding as one applicable "[i]n the context of a capital case"); *Goodwin v. Johnson*, 632 F.3d 301, 310 (6th Cir. 2011) (characterizing *Nixon*'s holding as providing that "trial counsel's decision to concede guilt in the guilt phase of a capital trial [was] not necessarily deficient"); *Mitts v. Bagley*, 620 F.3d 650, 662 (6th Cir. 2010) (noting that *Nixon* involved a defense attorney's concession of guilt in the context of a capital trial), *rev'd per curiam on other grounds sub nom.*, *Bobby v. Mitts*, 563 U.S. 395 (2011); *Thomas v. Payne*, 960 F.3d 465, 477 (8th Cir. 2020) (noting *Nixon*'s holding as providing that it is not a presumptively-prejudicial error for counsel to concede his client's guilt during the trial's penalty phase "to persuade the trier that his client's life should be spared" when the defendant is unresponsive to trial strategy (quoting *Nixon*, 543 U.S. at 191)); *United States v. Felicianosoto*, 934 F.3d 783, 786–87 (8th Cir. 2019) (summarizing *Nixon* as standing for the proposition that it is not automatically ineffective assistance of counsel when defense counsel concedes his client's guilt as a strategy "*to avert a sentence of death*" when the client is unresponsive to the disclosed strategy (emphasis added) (quoting *Nixon*, 543 U.S. at 178)); *Bergerud v. Falk*, No. 14-CV-02728-MSK, 2015 WL 5770946, at *11 (D. Colo. Oct. 2, 2015) ("The Court finds that *Florida* [*v. Nixon*] did not announce a rule of law applicable in non-death penalty cases.").[6]

6. The majority relies in part on *Smith v. Stein*, 982 F.3d 229 (4th Cir. 2020) and *Roberson v. Witherspoon*, No. 20CV306, 2021 WL 723533 (M.D.N.C. Feb. 24, 2021), as support that the Fourth Circuit and the Middle District of North Carolina have utilized *Nixon* in non-capital contexts. However, both *Smith* and *Roberson* arguably only touch on *Nixon* in part rather than embrace it in full. *See Smith*, 982 F.3d at 233–35 (discussing *Nixon* in the context of whether *McCoy* was retroactively

In short, while federal courts undoubtedly vary as to how broadly to interpret *Nixon*'s holding, the overwhelming majority of federal cases understand *Nixon* as fact-bound. Thus, because *Nixon* and *Harbison* can co-exist and *Nixon* does not undermine *Harbison*, we should exercise judicial restraint and decline to overturn a foundational case that has been continuously applied in the over two decades since *Nixon* and that shapes huge swaths of criminal practice throughout our state.

B. Prior to today's opinion, remand would have been appropriate because further fact finding is needed to fully assess Mr. Farook's *Harbison* error claim.

Now turning back to the *Harbison* inquiry that should have shaped this Court's analysis, the majority concludes that "[ineffective assistance of counsel] claims asserting that defense counsel conceded guilt without the defendant's knowing and voluntary permission are evaluated under both prongs of *Strickland*, unless the narrow exception recognized by *Cronic* applies." However, in applying the standard enunciated by *Harbison*, when defense counsel's statements to the jury cannot logically be interpreted as anything other than an implied concession of guilt to a charged offense, we have stated that *Harbison* error exists unless the defendant has previously consented to such a trial strategy. *McAllister*, 375 N.C. at 475–76 (emphasizing that "a finding of *Harbison* error based on an implied concession of guilt should be a rare occurrence"). Before any admissions of guilt by defense counsel, the trial court must be satisfied that the defendant gave knowing and informed consent to the concession and that the defendant was aware of the potential consequences of his decision. *See, e.g.*, *State v. Matthews*, 358 N.C. 102, 109 (2004) (requiring that, to show consent, "the facts must show, at a minimum, that defendant *knew* his counsel were going to make such a concession"); *State v. Thompson*, 359 N.C. 77, 120 (2004) (concluding no per se violation occurred where the "defendant's on-the-record consent to his counsel's argument complied with the requirements of *Harbison*"); *State v. McDowell*, 329 N.C. 363, 385–87 (1991) (concluding that the defendant properly consented under *Harbison* where the trial court informed the defendant his authorization was required, the trial

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applicable on collateral review); *Roberson*, 2021 WL 723533, at *11 (finding *Nixon* distinguishable as petitioner did not contend that trial counsel ever expressly conceded petitioner's guilt). Moreover, both cases are distinguishable from Mr. Farook's case: in *Smith* the record was more complete in that it reflected that defense counsel informed the defendant of the concession strategy; in *Roberson* there was no express concession of defendant's guilt. *See Smith*, 982 F.3d at 231; *Roberson*, 2021 WL 723533, at *11.

court was told counsel and defendant discussed the concessions, and the defendant was instructed to stop counsel if any concession went beyond the scope of his authorization).

Statements made by defense counsel "must be viewed in context to determine whether the statement was, in fact, a concession of defendant's guilt of a crime." *State v. Mills*, 205 N.C. App. 577, 587 (2010) (citing *State v. Hinson*, 341 N.C. 66, 78 (1995)). *Compare Matthews*, 358 N.C. at 106, 109 (holding that defense counsel committed *Harbison* error where, without advising the defendant, counsel stated to the jury, "When you look at the evidence . . . you're going to find that he's guilty of second-degree murder" (alteration in original)), *with State v. Fisher*, 318 N.C. 512, 532–33 (1986) (concluding there was no *Harbison* error when counsel conceded that the defendant had acted with malice but also "told the jury that they could find the defendant not guilty"), *and State v. Greene*, 332 N.C. 565, 571–72 (1992) (concluding there was no *Harbison* error where counsel argued that the defendant was not guilty, but, if the jury were to find the defendant guilty of any charges, it should be for involuntary manslaughter).

Despite the damage done to *Harbison* today, I reiterate that *Harbison* never held that counsel per se violates a defendant's right to effective assistance of counsel whenever the record is silent on whether the defendant explicitly or impliedly consented to concessions and whether defendant understood the consequences of providing consent. Trial courts should, of course, continue to conduct routine and thorough *Harbison* inquiries any time defense counsel seeks to concede elements or guilt of a crime so that we rarely confront a silent record. But whether a defendant consented to a concession of guilt and understood the consequences of such a concession is a factual question.

Defense counsel, Mr. Sease, explicitly conceded Mr. Farook's guilt to misdemeanor death by motor vehicle.[7] While Mr. Sease hinted to the

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7. Defendant's appellate counsel also argued that defendant's trial counsel improperly conceded Mr. Farook's guilt to misdemeanor hit-and-run, and the majority addresses the hit-and-run charge. However, the Court of Appeals failed to analyze that argument and focused its holding solely on trial counsel's concession of Mr. Farook's guilt to misdemeanor death by motor vehicle. *See State v. Farook*, 297 N.C. App. 412, 454–56 (2024) (remanding for an evidentiary hearing to ascertain consent to concede "guilt to the misdemeanor death by motor vehicle charge"). As the Court of Appeals did not analyze trial counsel's alleged concession of guilt to misdemeanor hit-and-run, it was premature for this Court to review that issue. Thus, I would hold that Mr. Farook's ineffective assistance of counsel claim as it relates to trial counsel's alleged concession of Mr. Farook's guilt to misdemeanor hit-and-run remains an outstanding question.

concession in his opening statement, saying, "This is really a case of calling something that happened—calling something one thing when it's really something else," Mr. Sease was explicit in his closing argument. Mr. Sease told the jury outright that "[w]e're not here to ask you to find him not guilty," and stated that "we're . . . not asking you to find him not guilty of anything. We're asking you to find the most appropriate, which is the lesser included in misdemeanor offenses of both of these crimes. Misdemeanor death [by motor vehicle] . . . and the misdemeanor version of hit-and-run."

Because Mr. Sease clearly conceded Mr. Farook's guilt to the complete crime of misdemeanor death by motor vehicle, our focus under *Harbison* should have been whether Mr. Farook consented to that concession. Because further factfinding is necessary to determine whether Mr. Farook knowingly consented to the concession before counsel made it, I would have remanded this case to the Court of Appeals for further remand to the trial court for an evidentiary hearing on that issue.

The record here reflects the piecemeal admission of certain facts and scattered *Harbison* inquiries—standing alone, this sequencing increases the likelihood that Mr. Farook, and any defendant in a similar position, would not have understood the consequences of what he agreed to admit. And more to the point, the admissions here did not cover every element of the crimes.[8]

A person commits the offense of misdemeanor death by motor vehicle if the following elements are satisfied:

> (1) The person unintentionally causes the death of another person,

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8. It is abundantly clear that a valid defense strategy can involve admitting elements of a crime without admitting ultimate guilt.

> A criminal defense attorney may concede that a defendant has engaged in bad behavior without admitting that the defendant has committed one of the crimes charged. Indeed, it may be in the defendant's best interests for his attorney to do so. Admitting to the jury that a defendant has behaved poorly can enhance defense counsel's credibility and help the jury better understand what is really at issue in a case.

McAllister, 375 N.C. at 478 (Newby, J., dissenting). Here, Mr. Farook and his counsel agreed to stipulate to certain facts. Without a more developed record, we cannot meaningfully determine whether Mr. Farook consented to conceding the full crime rather than mere "bad behavior."

> (2) The person was engaged in the violation of any State law or local ordinance applying to the operation or use of a vehicle or to the regulation of traffic, other than impaired driving . . . , and
>
> (3) The commission of the offense in subdivision (2) of this subsection is the proximate cause of the death.

N.C.G.S. § 20-141.4(a2) (2025). My review of the record does not support that Mr. Farook conceded every element.

Mr. Farook explicitly stipulated to certain facts which were memorialized in the Harbison Admissions order, including: (1) "That the defendant was operating a gold Saturn vehicle on the date of the offense;" (2) "That the vehicle he was driving on the date of the offense was involved in a crash with the motorcycle occupied by Tommy Jones and Suzette Jones, resulting in their deaths;" and (3) "That at the time of the offense the defendant's driver[']s license was in a state of revocation as a result of a 1987 impaired driving revocation." In addition, the trial court engaged in colloquies with Mr. Farook about those concessions and confirmed that the concessions were with his permission, that he was admitting the concessions without the State having to prove those elements beyond a reasonable doubt, and that he was doing so of his own free will. Later in the trial, Mr. Sease also agreed to stipulate to the fact that Mr. Farook's blood and DNA were found on his driver's-side airbag. Finally, Mr. Sease stipulated to the court that Mr. Farook was not at the scene of the crash when police arrived and that he did not return to the scene. And Mr. Farook consented to the new stipulations when the court conducted another colloquy. Notably, sixteen days separate the first and the last *Harbison* colloquies.

Even assuming arguendo that defense counsel conceded every element via the written stipulations, opening statement, closing argument, and limited *Harbison* inquiries do not establish that Mr. Farook consented to concede proximate cause or ultimate guilt to misdemeanor death by motor vehicle. Nor do those inquiries establish that he understood the consequences of those concessions. Although the record clearly documents that Mr. Farook and his counsel agreed to make certain concessions, they do not rise to the level of stipulating to the elements or to the complete offense of misdemeanor death by motor vehicle. At no point did the trial court engage in a colloquy with Mr. Farook in which he consented to his counsel's concession of guilt to the commission of the complete crime of the misdemeanor death by motor vehicle offense.

* * *

In sum, I would affirm the Court of Appeals' holding that the record was insufficient to conclude that Mr. Sease had consent to concede Mr. Farook's guilt to the offense of misdemeanor death by motor vehicle. And I would further affirm the Court of Appeals' remand of Mr. Farook's ineffective assistance of counsel claim to the trial court for an evidentiary hearing for the purpose of determining whether Mr. Farook knowingly consented in advance to his attorney's admission of guilt.

Justice EARLS joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
CHARLES LEON GARMON

No. 329A24

Filed 14 August 2026

1. Indictment and Information—habitual felon indictment—filed prior to commission of principal felony and filing of indictment—not untimely

The Court of Appeals erred in allowing defendant's motion for appropriate relief, in which he argued that his habitual felon indictment was untimely because it was filed prior to the commission of the principal felony and, thus, prior to the filing of the indictment for the principal felony; the plain language of the Habitual Felon Act (specifically, N.C.G.S. § 14-7.3) did not prohibit this practice. A habitual felon indictment need only include: (1) the dates of the prior felony offenses; (2) the state of the prior felonies; (3) the dates on which defendant pled guilty to, or was convicted of, the prior felonies; and (4) the court where the convictions occurred—all requirements which relate to and depend on the prior felonies, not the principal felony.

2. Drugs—keeping or maintaining a vehicle for keeping or selling controlled substances—keeping versus selling—sufficiency of evidence

In a prosecution for keeping or maintaining a vehicle for keeping or selling controlled substances (N.C.G.S. § 90-108(a)(7)), the State failed to offer substantial evidence that defendant kept or

maintained his vehicle for the keeping of controlled substances, an offense which applies to using a vehicle for the storage of illegal drugs. While a defendant does not need to store drugs in a vehicle for any minimum time period, it is not sufficient for him to merely have drugs in a vehicle, since a keeping or maintaining a vehicle charge is distinct from a possession of controlled substances charge. Here, the totality of the circumstances failed to demonstrate storage: the drugs and drug paraphernalia at issue were in a bookbag—entirely self-contained and meant to facilitate transportation into and out of the vehicle—in the passenger compartment of the vehicle. However, the matter was remanded to the Court of Appeals for consideration of whether the State met its burden to prove that defendant used his vehicle to sell (rather than keep) controlled substances.

Chief Justice NEWBY concurring in part and dissenting in part.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 296 N.C. App. 725 (2024), finding no error in part and vacating in part judgments entered on 4 August 2022 by Judge Keith O. Gregory in Superior Court, Union County, and remanding the case for resentencing. On 21 March 2025, the Supreme Court allowed the State's petition for discretionary review. Heard in the Supreme Court on 4 November 2025.

Jeff Jackson, *Attorney General*, *by Zachary K. Dunn*, *Special Deputy Attorney General*, *for the State-appellant.*

Jarvis John Edgerton IV for defendant-appellee.

RIGGS, Justice.

During a traffic stop, officers found, *inter alia*, a bookbag with drug paraphernalia and trafficking weights of controlled substances in Charles Garmon's vehicle. On 14 January 2021, Mr. Garmon was indicted for various crimes, including keeping or maintaining a vehicle for the purpose of keeping or selling controlled substances ("keeping or maintaining a vehicle charge"). Exactly one year prior, Mr. Garmon had been indicted for attaining habitual felon status, stemming from three felony convictions in 2001, 2009, and 2013. Mr. Garmon moved to dismiss the keeping or maintaining a vehicle charge, but the trial court denied his

motion, and he was convicted of trafficking in opioids by possession, trafficking in opioids by transportation, possessing drug paraphernalia, and keeping or maintaining a vehicle for the keeping or selling of controlled substances. He then pleaded guilty to attaining habitual felon status.

On appeal, Mr. Garmon filed a motion for appropriate relief, claiming that his habitual felon indictment was untimely because it was filed before he committed the principal felonies at issue here. The Court of Appeals, bound by precedent, granted his motion for appropriate relief. *State v. Garmon*, 296 N.C. App. 725, 726 (2024). Mr. Garmon also challenged the trial court's denial of his motion to dismiss the keeping or maintaining a vehicle charge. The Court of Appeals' majority held that the trial court did not err by denying his motion to dismiss. *Id.* at 734. Judge Hampson dissented, claiming that the State failed to meet its burden on whether Mr. Garmon used the vehicle for the purpose of keeping controlled substances. *Id.* at 739 (Hampson, J., dissenting).

We hold that the Court of Appeals erred by granting Mr. Garmon's motion for appropriate relief. The plain language of the Habitual Felon Act does not prohibit the filing of habitual felon indictments before the principal felony indictment, so Mr. Garmon's habitual felon indictment was not improper. We also hold that the State did not present more than a scintilla of evidence that Mr. Garmon used the vehicle to keep controlled substances, but we remand for further proceedings to determine whether he used the vehicle to sell controlled substances. Therefore, we reverse in part the Court of Appeals' judgment and remand the case.

I. Factual and Procedural Background

On 12 October 2020, after receiving information from a confidential informant, officers conducted an interdiction operation to search for a small, silver car with body damage. An officer identified Mr. Garmon's small, silver Hyundai car with body damage, recognized Mr. Garmon, and initiated a traffic stop because he knew Mr. Garmon did not have a valid driver's license. When Mr. Garmon admitted that he did not have a license, the officer asked Mr. Garmon to step out of the vehicle and conducted a *Terry* frisk. The officer did not find any weapons but detained Mr. Garmon while he ran a search of the vehicle's registration[1] and another officer conducted a K9 search of the vehicle.

1. The officer who stopped Mr. Garmon testified that he could not recall whether Mr. Garmon was registered as the owner of the vehicle.

During the K9 search, a police dog circled the exterior of Mr. Garmon's vehicle and alerted at the lowered driver's side window. The handling officer searched Mr. Garmon's car and found a black bookbag in the front passenger floorboard area containing a digital scale, plastic bags (including some with the corners cut), a bag with a leafy green substance, a bag with a crystallized substance, a bag with a white powdery substance, pills, a marijuana grinder, and eye drops. The officer also found a handgun under the passenger seat, ammunition in the car, and a folded, brown piece of paper with a white powdery substance in the center console cup holders. While the bookbag did not contain any identifying information, several items in the car had Mr. Garmon's name on them, including a Social Security card, Bank of America letter, package, and hotel receipt from the day of the search. While officers conducted the K9 search, Mr. Garmon stated, "I got to make money somehow. That's all I know how to do. I know it ain't right, but I just do it for my kids."

Mr. Garmon was indicted for attaining habitual felon status on 14 January 2020, several months before the traffic stop. The three felonies supporting his habitual felon indictment occurred on 23 June 2000, 21 November 2007, and 25 March 2012. He was convicted of the three felonies in 2001, 2009, and 2013.

One year later, on 14 January 2021, Mr. Garmon was indicted for trafficking in opioids by possession in violation of N.C.G.S. § 90-95(h), trafficking in opioids by transportation in violation of N.C.G.S. § 90-95(h), possession of drug paraphernalia in violation of N.C.G.S. § 90-113.22, and maintaining a vehicle that was used for keeping or selling a controlled substance in violation of N.C.G.S. § 90-108(a)(7).[2] Mr. Garmon's trial began on 1 August 2022.

At trial, an expert witness from the State Crime Lab testified that the pills in the bookbag contained fentanyl and heroin and that the powder contained fentanyl. The crystal substance from the bookbag and the powder on the brown piece of paper were not tested because the crime lab did not test beyond the "highest charge," and the other substances had already reached trafficking weight. Mr. Garmon moved to dismiss the keeping or maintaining a vehicle charge, but the trial court denied his motion.

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2. Mr. Garmon was also indicted for possession of a firearm by a felon, possession of methamphetamine, and possession with intent to sell or deliver (PWISD) oxycodone on 14 January 2021. The State voluntarily dismissed the possession of methamphetamine and PWISD oxycodone charges, and the jury found Mr. Garmon not guilty of possession of a firearm by a felon.

The jury found Mr. Garmon guilty of trafficking in opioids by possession, trafficking in opioids by transportation, possession of drug paraphernalia, and keeping or maintaining a vehicle for the keeping or selling of controlled substances. At sentencing, Mr. Garmon pleaded guilty to attaining habitual felon status. The trial court sentenced him to seventy to ninety-three months for the trafficking in opioids by possession, trafficking in opioids by transportation, and possession of drug paraphernalia charges, and forty-four to sixty-five months for the keeping or maintaining a vehicle charge, to run consecutively. Mr. Garmon entered a written notice of appeal on 11 August 2022. He also filed a motion for appropriate relief in the Court of Appeals on 9 February 2024, claiming that the trial court did not have subject matter jurisdiction to enter his guilty plea to attaining habitual felon status because his habitual felon indictment predated the traffic stop and the resulting charges. *See Garmon*, 296 N.C. App. at 732–33.

The Court of Appeals held that the trial court did not err by denying Mr. Garmon's motion to dismiss the keeping or maintaining a vehicle charge but held that it was "bound by precedent" to grant Mr. Garmon's motion for appropriate relief. *Id.* at 726. The Court of Appeals thus vacated and remanded to the trial court for resentencing. *Id.* at 733–35. Judge Hampson dissented and would have held that the trial court erred in denying Mr. Garmon's motion to dismiss because the State failed to meet its burden that Mr. Garmon used the vehicle for the keeping of drugs. *Id.* at 739 (Hampson, J., dissenting). He would have reversed Mr. Garmon's conviction on the keeping or maintaining a vehicle charge. *Id.* Mr. Garmon filed a notice of appeal based on Judge Hampson's dissent on 7 January 2025. The State filed a petition for discretionary review, which we allowed on 21 March 2025.

II. Standard of Review

This Court reviews the denial of a motion to dismiss de novo and "must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Calderon*, 388 N.C. 700, 706 (2025) (quoting *State v. Barnes*, 334 N.C. 67, 75 (1993)). When deciding a motion to dismiss, " 'the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator.' Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Mann*, 355 N.C. 294, 301 (2002) (citation omitted) (quoting *State v. Call*, 349 N.C. 382, 417 (1998)). "If there is more than a scintilla of competent evidence to support the allegations in the warrant or indictment, it is the court's duty to submit the case to

the jury." *State v. Horner*, 248 N.C. 342, 344–45 (1958); *see also State v. Powell*, 299 N.C. 95, 99 (1980).

The sufficiency of an indictment is also reviewed de novo. *State v. Applewhite*, 386 N.C. 431, 434 (2024); *State v. Stewart*, 386 N.C. 237, 240 (2024).

III. Analysis

Mr. Garmon challenged his habitual felon indictment as untimely and claimed that the trial court erred by denying his motion to dismiss. The Court of Appeals granted Mr. Garmon's motion for appropriate relief and vacated his guilty plea to attaining habitual felon status. *Garmon*, 296 N.C. App. at 734. We hold that the Court of Appeals erred by granting his motion for appropriate relief and that habitual felon indictments may be filed before principal felony indictments. The Court of Appeals also held that the trial court did not err by denying Mr. Garmon's motion to dismiss the keeping or maintaining a vehicle charge. *Id.* at 732. We hold that the State failed to present more than a scintilla of evidence that Mr. Garmon kept controlled substances in the vehicle under the subsection 90-108(a)(7) definition but, because the State may have sufficiently proved that he kept or maintained the vehicle for the purpose of selling controlled substances, we remand for further proceedings on the issue of whether the trial court erred in denying Mr. Garmon's motion to dismiss.

A. The Court of Appeals erred by granting Mr. Garmon's motion for appropriate relief because North Carolina statutes do not prohibit the filing of a habitual felon indictment before the principal felony indictment.

[1] If a person has been convicted of or pleaded guilty to three separate felonies, district attorneys may, in their discretion, charge defendants with attaining habitual felon status by filing an indictment. N.C.G.S. §§ 14-7.1, -7.3 (2025). The habitual felon indictment must be "separate from the indictment charging him with the principal felony" and should include the dates the prior felonies were committed, the dates the defendant pleaded guilty to or was convicted of the prior felonies, the name of the state in which the felonies were committed, and the court where the prior felony proceedings occurred.[3] *Id.* § 14-7.3. If a defendant has attained habitual felon status and is convicted of a principal felony, he is

3. "Prior felonies" refer to the three felonies required for a defendant to be indicted as a habitual felon. "Principal felony" refers to a subsequent felony committed after the three prior felonies to which the habitual felon indictment may attach.

sentenced four record levels higher than the classification of the principal felony. N.C.G.S. § 14-7.6 (2025).

Habitual felon status is not itself a separate crime, though, and "[t]he status itself, standing alone, will not support a criminal sentence." *State v. Allen*, 292 N.C. 431, 435 (1977); *see also State v. Patton*, 342 N.C. 633, 635 (1996). Instead, "[t]he only reason for establishing" habitual felon status "is to enhance the punishment which would otherwise be appropriate for the substantive felony which he has allegedly committed while in such a status." *Allen*, 292 N.C. at 435. Because attaining habitual felon status is not a separate crime with its own independent sentence, the proceeding to determine whether a defendant has attained habitual felon status must be connected to the proceeding for the principal felony, and the "habitual felon [indictment] is necessarily ancillary to" the principal felony indictment. *Id.* at 433–34; *see also State v. Cheek*, 339 N.C. 725, 727 (1995). On its own, the habitual felon indictment imposes no independent criminal sanctions—for the defendant to be convicted of attaining habitual felon status, proceedings must occur ancillary to proceedings on a principal felony. There is an important distinction between a habitual felon indictment being filed and a defendant being convicted and punished accordingly. The only practical effect of filing the habitual felon indictment before the defendant has committed a principal felony is to put the defendant on notice that, if he or she commits a principal felony, the State intends to proceed on the habitual felon enhancement.

Mr. Garmon challenged his habitual felon indictment because it was filed exactly one year before he was indicted on any charges stemming from the traffic stop and nearly ten months before the traffic stop occurred. The Court of Appeals, bound by the decision of a prior panel in *State v. Ross*, 221 N.C. App. 185 (2012), granted his motion for appropriate relief and vacated his habitual felon plea. *Garmon*, 296 N.C. App. at 733–34.

In *Ross*, the defendant was indicted for attaining habitual felon status on 22 September 2008, with a superseding habitual felon indictment filed on 11 May 2009. 221 N.C. App. at 186. The indictment was explicitly connected to pending charges for possession of a firearm by a felon. *Id.* (charging that defendant "did commit the felony of Possession of a Firearm by Felon . . . while being an habitual felon" (alteration in original)). Then, on 20 June 2009, the defendant was indicted for bribery of a juror, felony obstruction of justice, and solicitation to commit bribery of a juror. *Id.* at 187. The charges stemmed from the defendant's 17 and 18 June 2009 trial on drug charges unrelated to either indictment. *Id.* at 186–87. At trial, his attorney moved to dismiss all pending uncalendared

charges and "the prosecutor admitted that the habitual felon indictment was not calendared." *Id.* at 187 (cleaned up). However, while the trial court initially decided not to proceed on the habitual felon indictment, it ultimately determined the habitual felon indictment was ancillary to the bribery charges. *Id.* The defendant pleaded guilty to attaining habitual felon status, and the trial court sentenced him as a habitual felon. *Id.*

The *Ross* defendant argued that because the habitual felon indictment was filed before the bribery crimes occurred, the trial court lacked jurisdiction to accept his guilty plea to attaining habitual felon status. *Id.* at 188. The Court of Appeals agreed and held that the habitual felon indictment could not have been ancillary to the bribery indictments because they "had not yet occurred when the habitual felon indictment was returned." *Id.* at 192 (citing *State v. Flint*, 199 N.C. App. 709, 718 (2009)). The Court of Appeals vacated the defendant's habitual felon guilty plea and remanded for resentencing. *Id.*

However, the plain text of the Habitual Felon Act, N.C.G.S. §§ 14-7.1 to -7.6 (2025), does not support a requirement that the habitual felon indictment must follow an indictment for a principal felony. "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." *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209 (1990). This Court has "consistent[ly] refus[ed] to engraft additional unnecessary burdens upon the due administration of justice." *State v. Langley*, 371 N.C. 389, 392–93 (2018) (cleaned up) (citing *State v. Freeman*, 314 N.C. 432, 436 (1985)).

The provision of the Habitual Felon Act describing indictment requirements states:

> The district attorney, in his or her discretion, may charge a person as a habitual felon pursuant to this Article. An indictment which charges a person who is an habitual felon within the meaning of G.S. 14-7.1 with the commission of any felony under the laws of the State of North Carolina must, in order to sustain a conviction of habitual felon, also charge that said person is an habitual felon. The indictment charging the defendant as an habitual felon shall be separate from the indictment charging him with the principal felony.

N.C.G.S. § 14-7.3. Nothing in the statute requires specific timing for either the habitual felon indictment or the principal felony indictment. The two

indictments must be separate, but the State need not wait for a principal felony indictment to file a habitual felon indictment. In fact, since all that is required to indict a defendant for attaining habitual felon status is his or her conviction for three separate felony offenses, the indictment could logically come at any time after the third felony conviction and is not dependent on when the fourth felony offense is charged. The plain language of the Habitual Felon Act does not prohibit the filing of a habitual felon indictment before a defendant is indicted for a principal felony.

Further, since "[n]othing in the plain wording of N.C.G.S. § 14-7.3 requires a specific reference to the predicate substantive felony in the habitual felon indictment," the habitual felon indictment does not need to follow the principal felony indictment in order to meet all statutory requirements. *Cheek*, 339 N.C. at 728; *see also Patton*, 342 N.C. at 636. The habitual felon indictment need only include (1) the dates of the prior felony offenses, (2) the state of the prior felonies, (3) the dates defendant pleaded guilty to or was convicted of the prior felonies, and (4) the court where the convictions occurred. N.C.G.S. § 14-7.3. All the statutory requirements of the habitual felon indictment depend on the prior felonies, not the principal felony. The plain language of the statute does not indicate that the habitual felon indictment must follow the principal felony indictment. In the absence of such a statutory indication, it would be improper to impose an atextual requirement that the habitual felon indictment follow the principal felony indictment. *See Burgess*, 326 N.C. at 209; *Langley*, 371 N.C. at 392–93.

Our caselaw imposes procedural safeguards against problematic habitual felon proceedings detached from a principal felony, whether the indictment is filed before or after the principal felony indictment.[4] Since attaining habitual felon status is not a separate crime, even if a habitual felon indictment is filed before a principal felony indictment, the State cannot independently proceed on the habitual felon indictment until the defendant is prosecuted for a principal felony. *See Cheek*, 339 N.C. at 727; *Allen*, 292 N.C. at 433–34. And if a habitual felon indictment is filed before a defendant has committed a principal felony, the defense attorney may move to dismiss the indictment. *See* N.C.G.S. § 15A-954(a) (2025). If a defendant who has been indicted for attaining habitual felon status does not commit subsequent felonies, or if the indictment is dismissed, filing a habitual felon indictment does not independently create a criminal cause of action or impose criminal sanctions. *See Cheek*,

4. From the record, we do not discern any suggestion that the filing of the habitual felon indictment here or in any other case is intended as or represents an abuse of process.

339 N.C. at 727; *Allen*, 292 N.C. at 433–34; *Patton*, 342 N.C. at 635. The habitual felon indictment does not establish an independent cause of action to try a defendant for attaining habitual felon status. Instead, the indictment puts the defendant on notice that, if they commit a fourth felony offense, the State will proceed on the habitual felon indictment and, if convicted, the defendant could be sentenced as a habitual felon.

A "basic purpose behind our Habitual Felons Act is to provide notice to defendant that he is being prosecuted for some substantive felony as a recidivist." *Allen*, 292 N.C. at 436 (emphasis omitted); *see also Patton*, 342 N.C. at 636. The notice required for a habitual felon charge is not necessarily the same as for other charges. "[A] defendant charged as a habitual felon is not defending himself against the predicate substantive felony, but against a charge that he has at least three prior felony convictions," so the indictment must give notice that "he is being tried as a recidivist to enable him to prepare an adequate defense to that charge." *Cheek*, 339 N.C. at 729. While the State may file a superseding habitual felon indictment after the principal felony indictment to link the ancillary habitual felon charge to the principal felony, nothing in the plain language of the Habitual Felon Act prohibits the State from filing the habitual felon indictment before the principal felony indictment or requires that the habitual felon indictment be filed after the principal felony indictment.

Here, Mr. Garmon's habitual felon indictment was filed on 14 January 2020, ten months before the traffic stop and one year before he was indicted on the principal felony charges. Mr. Garmon's habitual felon indictment was not defective because it satisfied the four requirements in N.C.G.S. § 14-7.3 and the Habitual Felon Act does not require habitual felon indictments to follow principal felony indictments. Further, Mr. Garmon pleaded guilty to attaining habitual felon status in the same proceeding as the principal felony, so the fact that the indictment was filed before the principal felony occurred did not impose an improper independent sanction on Mr. Garmon. The Court of Appeals erred in holding that a habitual felon indictment must be filed after a principal felony has occurred and therefore erred in granting Mr. Garmon's motion for appropriate relief.

B. The State failed to provide sufficient evidence that Mr. Garmon kept or maintained the vehicle for the *keeping* of controlled substances, but we remand to the Court of Appeals to consider whether the State provided sufficient evidence that he used the vehicle for the *selling* of controlled substances.

[2] In North Carolina, it is a crime to "knowingly keep or maintain any . . . vehicle . . . which is used for the keeping or selling of [controlled

substances].” N.C.G.S. § 90-108(a)(7) (2025). The State must prove that the defendant “(1) knowingly (2) kept or maintained (3) a vehicle (4) which was used for the keeping or selling (5) of controlled substances.” *State v. Rogers*, 371 N.C. 397, 401 (2018) (cleaned up). Mr. Garmon challenges whether the State adequately proved element four: that he used the vehicle to keep or sell controlled substances.[5]

The word “keep” in N.C.G.S. § 90-108(a)(7) has different definitions under elements two and four. Under element two, it may be defined as “possessing something for at least a short period of time—or intending to retain possession of something in the future—for a certain use.” *Id.* at 402. We have previously held that a defendant “kept” a vehicle under element two where officers observed the defendant as the only person in the vehicle and evidence was recovered from the vehicle with a date and the defendant’s name. *See id.* at 402–03.

However, as applied to element four, keeping controlled substances, “[w]hen 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.” *Id.* (alteration in original) (quoting *In re Clayton-Marcus Co.*, 286 N.C. 215, 219 (1974)). “When subsection 90-108(a)(7) speaks of ‘the keeping . . . of’ drugs, it is referring to the storing of drugs.” *Id.* The defendant does not need to store drugs for a minimum time period, but it is also not sufficient for him to “merely hav[e] drugs in a car.” *Id.* at 406.

The keeping or maintaining a vehicle charge is distinct from a possession charge; “we do not believe that our legislature intended to create a separate crime simply because the controlled substance was temporarily in a vehicle.” *State v. Mitchell*, 336 N.C. 22, 33 (1994). Possessing a controlled substance on one occasion in the vehicle does not prove that the vehicle is used to keep that controlled substance. *Id.* Instead, the “focus of the inquiry is on the use, not the contents, of the vehicle,” with the use determined based on the totality of the circumstances. *Id.* at 34 (emphasis omitted). Therefore, the key question is, under the totality of the circumstances, “whether the defendant was using that vehicle . . . for the storing of drugs.” *Rogers*, 371 N.C. at 406.

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5. Both elements two and four were at issue at the Court of Appeals, but because the dissent only addressed element four, Mr. Garmon’s notice of appeal does not extend to reach element two. *Garmon*, 296 N.C. App. at 735 (Hampson, J., dissenting).

In *Rogers*, the defendant was convicted of keeping or maintaining a vehicle for the purpose of keeping or selling a controlled substance when officers found two bags of crack cocaine concealed behind the door to the car's gas cap compartment. *Id.* at 399–401. This Court held that the State provided sufficient evidence that the defendant used the vehicle to store the drugs. *Id.* at 403. There, officers observed the defendant stop the car, enter a hotel, and remain there for forty-five minutes without accessing the drugs, which indicated that he used the vehicle for more than merely transporting the drugs. *Id.* at 403–04. Further, the gas cap compartment was accessible only with a switch inside of the car, and officers did not observe any other person access the compartment or vehicle. *Id.* at 403. And while it was not determinative, this Court found it persuasive that the drugs were concealed and "in a place that is somewhat hard to access—and that is not inside the passenger compartment of the car at all" because "a defendant who wants to store contraband will, all other things equal, want to store it in a hidden place." *Id.* at 404. Under the totality of the circumstances, the evidence was sufficient to support the defendant's conviction. *Id.* at 406.

In contrast, in *Mitchell*, evidence at trial tended to prove that the defendant had possessed marijuana in his vehicle but not that his vehicle was used to keep or sell a controlled substance under subsection 90-108(a)(7). 336 N.C. at 32–33. There, police found a marijuana cigarette in the defendant's car, knew the defendant possessed two bags of marijuana while in the car, and subsequently found drug paraphernalia in his home. *Id.* at 25–26. This Court held that the evidence of drugs in his car was sufficient "for a jury reasonably to infer that defendant possessed the marijuana while he was in his vehicle," but was insufficient to prove that the defendant used his vehicle to keep or sell a controlled substance. *Id.* at 32–33. "At most, the State ha[d] shown that . . . defendant possessed marijuana while in his car and that on the following day his car contained a marijuana cigarette." *Id.* at 33. "This evidence raise[d] at most only a suspicion that defendant's car was used for either keeping or selling marijuana." *Id.* Because "[t]he focus of the inquiry is on the *use*, not the contents, of the vehicle," the mere possession of controlled substances in the vehicle was not enough for the State to meet its burden to prove that the defendant used his vehicle to keep or sell controlled substances. *Id.* at 34 (emphasis in original).

Here, the totality of the circumstances surrounding Mr. Garmon's possession of the drugs more closely tracks those in *Mitchell* than those in *Rogers*. Mr. Garmon clearly possessed controlled substances in his vehicle but, like the defendant in *Mitchell*, the State failed to produce

evidence that he used the vehicle to store the drugs. *See* 336 N.C. at 32–33. In *Rogers*, this Court determined that the drugs' inaccessibility and concealment indicated more than mere possession. 371 N.C. at 403–04. Here, though, the drugs and paraphernalia were accessible in a bookbag in the passenger compartment of the vehicle, not concealed or otherwise made inaccessible. The bookbag was by nature entirely self-contained and meant to facilitate transportation—the opposite of the definition of "keeping" under subsection 90-108(a)(7). *See id.* at 403. Mr. Garmon's bookbag was like the defendant's pocket in *Mitchell*, not the gas cap compartment in *Rogers*. While concealment and inaccessibility are not necessarily determinative, the facts here indicate only possession and do not establish that Mr. Garmon kept controlled substances in the vehicle under the subsection 90-108(a)(7) definition. Mr. Garmon clearly possessed drugs in the vehicle, but the transitory nature of the bookbag and its location in the easily-accessible passenger compartment of the vehicle are inconsistent under our caselaw with a conclusion that he stored the drugs in the car.

Instead, the drugs in the bookbag, in plain view and within arm's reach of Mr. Garmon, indicate only possession. Like in *Mitchell*, mere possession in the vehicle does not satisfy the State's burden. *See* 336 N.C. at 32–33. The State failed to present more than a scintilla of evidence to prove that Mr. Garmon kept or maintained the vehicle for the purpose of keeping controlled substances. Although the standard for the State to survive a motion to dismiss represents a low bar, the requirement to put on substantial evidence is not so low as to negate any meaningful review. Even with all reasonable inferences made in favor of the State, the evidence here cannot reasonably support that Mr. Garmon kept his vehicle to store drugs.

However, element four asks whether the defendant kept or maintained the vehicle for the keeping *or selling* of controlled substances. *Rogers*, 371 N.C. at 401. Even though there is insufficient evidence to prove that Mr. Garmon kept his vehicle for the purpose of keeping controlled substances, taking all facts in the light most favorable to the State, there may be adequate evidence to support that Mr. Garmon kept or maintained his vehicle for the purpose of selling controlled substances. Because we are limited to review this issue only as an appeal of right based on dissent under N.C.G.S. § 7A-30(2), and the dissent discussed only whether the State satisfied its burden that Mr. Garmon used the vehicle to keep controlled substances, not to sell them, we remand to the Court of Appeals for consideration of whether the State met its

burden to prove that Mr. Garmon used his vehicle to sell controlled substances under N.C.G.S. § 90-108(a)(7).

IV. Conclusion

The Court of Appeals erred in granting Mr. Garmon's motion for appropriate relief. Therefore, we reverse the Court of Appeals' judgment as to Mr. Garmon's habitual felon indictment. The State failed to present more than a scintilla of evidence that Mr. Garmon used his vehicle to keep controlled substances, but it is not clear whether the State met its burden as to whether Mr. Garmon used the vehicle to sell controlled substances. Therefore, we remand to the Court of Appeals for further proceedings on whether the trial court erred in denying Mr. Garmon's motion to dismiss.

REVERSED IN PART AND REMANDED.

Chief Justice NEWBY concurring in part and dissenting in part.

I join the majority in concluding that the timing of the indictment did not affect the trial court's subject matter jurisdiction to sentence defendant as a habitual felon. I disagree, however, with the majority's decision to remand the sufficiency-of-the-evidence question regarding whether defendant kept or maintained the vehicle to sell drugs. In my view, that question is properly before us and easily resolved. I respectfully concur in part and dissent in part.

"To convict a defendant of maintaining a vehicle for the keeping or selling of controlled substances, the State must show that the defendant (1) knowingly (2) kept or maintained (3) a vehicle (4) which was used for keeping *or* selling (5) of controlled substances." *State v. Garmon*, 296 N.C. App. 725, 728, 909 S.E.2d 768, 772 (2024) (emphasis added) (citing *State v. Rogers*, 371 N.C. 397, 401, 817 S.E.2d 150, 153 (2018)). Here, as the majority points out, only the fourth element is before this Court.

The trial court instructed the jury, albeit erroneously, that it should find that defendant violated N.C.G.S. § 90-108(a)(7) if the State proved "beyond a reasonable doubt that . . . defendant knowingly kept and maintained a vehicle . . . which was used for the purpose of unlawfully keeping *and* selling a controlled substance." (Emphasis added.) This instruction was erroneous because the trial court replaced "keeping *or* selling controlled substances" in subsection 90-108(a)(7) with

"keeping *and* selling controlled substances." Neither defendant nor the State objected to this mistake despite having ample opportunity to do so. Indeed, when the trial court read its proposed instructions to the parties during the charge conference, it used the phrase "keeping and selling" eight times. After evaluating the facts under these erroneously stringent instructions, the jury found defendant guilty of violating subsection 90-108(a)(7).

"A jury is presumed to follow the instructions given by the trial court." *State v. Chambers*, 387 N.C. 521, 527, 915 S.E.2d 96, 100 (2025) (citing *State v. Prevatte*, 356 N.C. 178, 254, 570 S.E.2d 440, 482 (2002)). Necessarily, then, the jury must have found beyond a reasonable doubt that defendant kept or maintained the car to sell drugs. The question becomes whether the record contains substantial evidence to support that finding.

"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 . . . .' " *Rogers*, 371 N.C. at 401, 817 S.E.2d at 153 (quoting *State v. Campbell*, 368 N.C. 83, 87, 772 S.E.2d 440, 444 (2015)). Substantial evidence is "the amount [of evidence] necessary to persuade a rational juror to accept a conclusion." *State v. Golder*, 374 N.C. 238, 249, 839 S.E.2d 782, 790 (2020). "[E]vidence is deemed less than substantial [only] if it raises no more than mere suspicion or conjecture as to the defendant's guilt." *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 139–40 (2002).

"In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Fritsch*, 351 N.C. 373, 378–79, 526 S.E.2d 451, 455 (2000). As a "general rule," if "any evidence tends to prove the fact in issue" or "reasonably conduces to its conclusion as a fairly logical and legitimate deduction, . . . the case should be submitted to the jury." *State v. Blagg*, 377 N.C. 482, 488, 858 S.E.2d 268, 273 (2021) (citation modified). "[I]n borderline or close cases, our courts have consistently expressed a preference for submitting issues to the jury." *State v. Weldy*, 271 N.C. App. 788, 803, 844 S.E.2d 357, 368 (2020) (Berger, J., dissenting) (quoting *State v. Coley*, 257 N.C. App. 780, 789, 810 S.E.2d 359, 365 (2018)).

Here, based facially on the record and the facts presented in the majority opinion, the sufficiency-of-the-evidence standard is easily met as to whether defendant kept or maintained a vehicle to sell drugs. The

evidence presented at trial tended to show that pursuant to a lawful search of a car driven by defendant, law enforcement found a backpack on the passenger-side floorboard. The bag contained, *inter alia*, a digital scale, a marijuana grinder, plastic bags, and several plastic baggies filled with different substances, later determined to be fentanyl, heroin, and marijuana. Elsewhere in the car, officers recovered a handgun and ammunition, and multiple documents—like a hotel receipt and Social Security card—bearing defendant's name. During the search, defendant told officers: "I got to make money somehow. That's all I know how to do. I know it ain't right, but I just do it for my kids." This is more than enough evidence to survive a motion to dismiss and permitted the jury to unanimously find that defendant kept or maintained the car to sell controlled substances.

Thus, the matter is easily resolved. The trial court was correct in denying the motion to dismiss the subsection 90-108(a)(7) charge. The Court of Appeals decision upholding the trial court's order should be affirmed. I respectfully concur in part and dissent in part.

STATE OF NORTH CAROLINA
v.
GARRY JOSEPH GUPTON

No. 444PA19-2

Filed 14 August 2026

Appeal and Error—ineffective assistance of counsel—claim apparent from the record—not raised on direct appeal—improperly raised in motion for appropriate relief

In a criminal case where the defendant, after unsuccessfully appealing his convictions for first-degree murder and arson to the Court of Appeals, filed a motion for appropriate relief (MAR) alleging that he had received ineffective assistance of counsel (IAC) at trial, the Supreme Court affirmed the subsequent denial of defendant's MAR on the ground that his IAC claims were procedurally barred under N.C.G.S. § 15A-1419(a)(3), which prohibits defendants from raising any post-conviction claims in an MAR that could have been adequately raised in a previous appeal. Here, defendant's IAC

claims relied exclusively on information available from the record on direct appeal from his convictions; thus, he was in a position to adequately raise those claims in that prior appeal, and his failure to do so meant that he was barred from raising them in his MAR. Further, defendant failed to argue that either of the exceptions (listed under section 15A-1419(b)) to the procedural bar under section 15A-1419(a)(3) applied to his MAR.

Justice EARLS dissenting.

Justice RIGGS joins in this dissenting opinion.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an unpublished, unanimous decision of the Court of Appeals, No. COA23-661 (N.C. Ct. App. July 16, 2025), affirming an order entered on 5 November 2021 by Judge R. Stuart Albright in Superior Court, Guilford County, denying defendant's motion for appropriate relief. Heard in the Supreme Court on 14 April 2026.

Jeff Jackson, Attorney General, by Teresa M. Postell, Special Deputy Attorney General, for the State-appellee.

Kristen L. Todd and Lauren E. Miller for defendant-appellant.

BERGER, Justice.

Defendant was sentenced to life in prison in 2017 following his convictions for first-degree murder and first-degree arson. On direct appeal, the Court of Appeals held that no error occurred at his trial. In 2020, defendant filed a motion for appropriate relief alleging he received ineffective assistance of counsel at trial. The MAR court concluded that defendant was in a position to adequately raise his claims on direct appeal but failed to do so, and his IAC claims were, therefore, procedurally barred pursuant to N.C.G.S. § 15A-1419. The Court of Appeals affirmed the MAR court's order, and defendant filed a petition for writ of certiorari with this Court, which was allowed. Because defendant was in a position to adequately raise his claims on direct appeal, defendant's IAC claims are procedurally barred, and we affirm the judgment of the Court of Appeals.

I. Factual and Procedural Background

In November 2014, defendant met Stephen White at a nightclub in Greensboro, and the pair later went to a local hotel.[1] Later that night, defendant had a confrontation with the night attendant. Shortly thereafter, smoke was seen coming from defendant's room. When law enforcement and firefighters arrived on scene, defendant's room was filled with smoke. Mr. White was found in the room lying face down on the floor. His body had smoldering burns, a television was on his head, and furniture covered his upper body. Mr. White suffered extensive burn-related injuries which required multiple surgeries, including amputation of both arms. About a week after the incident, Mr. White died from complications associated with his injuries.

Authorities determined that arson was the cause of the fire in the hotel room, and defendant was indicted for first-degree murder and first-degree arson in December 2014. At trial, defense counsel advanced several affirmative defenses, including not guilty by reason of insanity. In addition, the trial court denied multiple motions to dismiss related to sufficiency of the State's evidence.

Defendant was found guilty of first-degree murder and first-degree arson, and the trial court sentenced him to life in prison for first-degree murder and a consecutive term of sixty-four to eighty-nine months in prison for first-degree arson. On direct appeal, defendant argued that: (1) the trial court erred by denying his motions to dismiss because the State failed to present sufficient evidence of arson and failed to prove that defendant was sane when he committed the murder, and (2) the short-form indictment charging him with first-degree murder was facially invalid. *State v. Gupton* (*Gupton I*), No. COA18-818, 2019 WL 5213009, at *2–4 (N.C. Ct. App. Oct. 15, 2019). The Court of Appeals rejected defendant's arguments and concluded that defendant received a fair trial free from error. *Id.* at *4.

On 30 April 2020, defendant filed an MAR, arguing his trial counsel was ineffective because counsel: (1) failed to confront the State's case against him; (2) made "highly questionable admissions of guilt" and introduced "irrelevant prejudicial evidence"; (3) presented a "legally invalid insanity defense"; and (4) focused on capital sentencing at the expense

1. A more detailed recitation of facts can be found in the first decision of the Court of Appeals. *See State v. Gupton* (*Gupton I*), No. COA18-818, 2019 WL 5213009 (N.C. Ct. App. Oct. 15, 2019).

of the guilt-innocent phase. Defendant also asserted a fifth claim in his MAR, contending that he was afforded "only one trial attorney in violation of his constitutional right to two counsel" in a capital trial. Notably, none of these claims were raised on direct appeal.

In support of his MAR, defendant submitted the trial court record and transcript and an affidavit from one of his trial attorneys, Mr. Wayne Baucino. The State filed an answer responding to defendant's MAR and attached an affidavit from defendant's other trial attorney, Mr. Ames Chamberlin.

On 5 November 2021, the MAR court concluded that defendant's claims were procedurally barred under N.C.G.S. § 15A-1419 and entered an order denying the MAR. Alternatively, the MAR court determined that defendant's claims should be denied on the merits as a matter of law based on the unambiguous record.

Defendant petitioned the Court of Appeals for a writ of certiorari to review the MAR court's order. *See State v. Gupton* (*Gupton II*), No. COA23-661, 2025 WL 1949973 (N.C. Ct. App. July 16, 2025). The Court of Appeals allowed defendant's petition, but it failed to conduct the straightforward two-step analysis required by our precedent. *Id.*; *see also Cryan v. Nat'l Council of YMCAs*, 384 N.C. 569, 570 (2023) ("When contemplating whether to issue a writ of certiorari, our state's appellate courts *must* consider a two-factor test. That test examines (1) the likelihood that the case has merit or that error was committed below and (2) whether there are extraordinary circumstances that justify issuing the writ." (emphasis added)).[2] The Court of Appeals affirmed the MAR

2. We have stressed that "a writ of certiorari should issue only if the petitioner can show merit or that error was probably committed below . . . [and] only if there are extraordinary circumstances to justify it." *Cryan v. Nat'l Council of YMCAs*, 384 N.C. 569, 572 (2023) (cleaned up). However, since we decided *Cryan*, panels of the Court of Appeals have continued to use that court's pre-*Cryan* opinions to "serve as guideposts to help [them] exercise [their] discretion and determine in which cases a grant of certiorari is appropriate." *State v. Gardner*, 299 N.C. App. 251, 255 (2025). *But see id.* at 264 (Freeman, J., concurring in part and dissenting in part) (explaining that the Court of Appeals "may not ignore binding Supreme Court precedent and label such conduct an exercise of its 'discretion' "). This is error, and we take this opportunity to once again "remind the Court of Appeals that it is bound to apply properly the precedent of this Court." *See In re N.M.W.*, 389 N.C. 57, 57 (2026) (per curiam). While the Court of Appeals has discretion to allow or deny a petition for writ of certiorari, that court is bound by *Cryan* when exercising that discretion. *See, e.g.*, *State v. Lail*, 388 N.C. 431, 433 (2025) ("Although the abuse of discretion standard typically requires a manifestly arbitrary or unreasoned decision, . . . [a] ruling, which applie[s] the wrong legal standard, [i]s an abuse of discretion." (cleaned up)).

court's order, reasoning that because defendant was in an adequate position to raise these IAC claims on direct appeal but failed to do so, and because he failed to argue any exceptions to the bar provided by N.C.G.S. § 15A-1419(b), the MAR court did not err in concluding that defendant's claims were procedurally barred. *Gupton II*, 2025 WL 1949973, at *5. We allowed defendant's petition for writ of certiorari to review whether the Court of Appeals erred in affirming the order of the MAR court.

II. Standard of Review

This Court reviews decisions of the Court of Appeals to determine "whether the Court of Appeals committed any errors of law," and we therefore conduct "the same inquiry that the Court of Appeals was called upon to undertake in reviewing the [MAR] court's order." *Schooldev E., LLC v. Town of Wake Forest*, 386 N.C. 775, 785 (2024) (cleaned up). Accordingly, we review the MAR court's order 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. Tucker*, 385 N.C. 471, 484 (2023) (cleaned up). "We review issues of law," such as whether a claim is procedurally barred, "de novo." *Id.*

III. Discussion

A. Motions for Appropriate Relief

Post-conviction procedures generally serve two purposes: promoting finality of criminal judgments while at the same time providing a mechanism for relief for legitimate constitutional violations, consequential legal mistakes, newly discovered evidence, ineffective assistance of counsel, sentencing errors, or other substantial defects that affected the fairness or legality of the relevant proceedings. *See* N.C.G.S. § 15A-1415 (2025). An MAR must comply with procedural requirements set forth in section 15A-1420, identify the legal basis for the relief requested, and include facts supporting a defendant's requested relief. Thereafter, an MAR court "must determine the motion without an evidentiary hearing when the motion and supporting and opposing

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The apparent lack of uniform application of our precedent in this sphere is not a mere academic or technical issue. When one party's petition is assigned to a panel properly applying *Cryan*, and another party's functionally identical petition is assigned to a panel improperly applying the lower court's pre-*Cryan* cases, there is a very real possibility that those two parties will receive unequal treatment.

information present only questions of law," but may conduct an evidentiary hearing if one is "required to resolve questions of fact." N.C.G.S. § 15A-1420(c)(1), (3) (2025).

Unlike a direct appeal, an MAR may, consistent with the statute, address issues outside the trial record, and therefore it functions as a broader post-conviction remedy designed to address miscarriages of justice that may not have been fully reviewable on direct appeal. *See* N.C.G.S. §§ 15A-1414 to -1416, -1419 (2025). But our post-conviction relief statutes generally bar a defendant from raising a claim in an MAR when "[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). In such circumstances, "[t]he court shall deny the motion . . . unless the defendant can demonstrate" either: (1) "[g]ood cause for excusing the grounds for denial . . . [and] actual prejudice resulting from the defendant's claim"; or (2) "[t]hat failure to consider the defendant's claim will result in a fundamental miscarriage of justice." N.C.G.S. § 15A-1419(b).

"Subsection 15A-1419(a)(3) is not a general rule that *any* claim not brought on direct appeal is forfeited on state collateral review but rather requires the reviewing court, instead, to determine whether the particular claim at issue *could* have been brought on direct review." *Tucker*, 385 N.C. at 491–92 (cleaned up). A claim could have been brought on direct review if "the direct appeal record . . . 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." *State v. Bell*, 387 N.C. 262, 274–75 (2025) (cleaned up). Put simply, to avoid this procedural bar, defendants must simply "raise those . . . claims on direct appeal that are apparent from the record." *State v. Fair*, 354 N.C. 131, 167 (2001).

> The post-conviction procedure set forth above serves a critical role in our criminal justice system. Not only does it provide for review and potential relief to defendants convicted of crime, but the process also promotes finality. *See* N.C.G.S. § 15A-1415, Official Commentary (2021) ("[A]dditional finality has been added in G.S. 15A-1419 by making it clear that there is but one choice to raise available matters after the case is over, and if there has been a previous assertion of the error, or opportunity to assert the error, by motion or appeal, a later motion may be denied on that basis."); *see also* N.C.G.S. § 15A-1419,

> Official Commentary (2021) ("[O]nce . . . there has been opportunity to litigate a matter, there will not be a right to seek relief by additional motions at a later date. . . . [I]f there has been an opportunity to have the matter considered on a previous motion for appropriate relief or appeal the court may deny the motion for appropriate relief.").
>
> It is imperative, not only for the parties, but also for federal habeas review, that we strictly and regularly follow our post-conviction procedural requirements.

Tucker, 385 N.C. at 486 (alterations in original).

Whether a claim is apparent from the record and therefore subject to the procedural bar necessarily depends on the type of claim asserted. For some types of claims, the presence in the record of defense counsel's objection and the trial court's ruling on said objection is sufficient to place a defendant in a position to adequately raise that claim on direct appeal. *See id.* at 492 (concluding the defendant was in a position to adequately raise a *Batson* claim on direct appeal where the record demonstrated defense counsel "raised a *Batson* objection at trial, [and] receiv[ed] a ruling from the judge"). For other claims, like IAC claims, the inquiry is more nuanced.

B. Ineffective Assistance of Counsel Claims

All defendants in criminal proceedings possess a constitutional right to the effective assistance of counsel. *See State v. Oglesby*, 382 N.C. 235, 242 (2022). To prevail on an IAC claim, a defendant must demonstrate both that counsel's performance was deficient and that this deficient performance was prejudicial. *Id.* To satisfy the first prong, a defendant must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and show that "counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688–89 (1984). A defendant satisfies the second prong when he or she proves "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Because a defendant must demonstrate both deficient performance and prejudice to prevail, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in . . . order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697. Because the "object of an

ineffectiveness claim is not to grade counsel's performance," a reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Id.* When "it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice," the Supreme Court of the United States has instructed "that course should be followed." *Id.*

Regarding when such claims can be decided by an appellate court, we have stated that "IAC 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 the appointment of investigators or an evidentiary hearing." *Fair*, 354 N.C. at 166. However, "because of the nature of IAC claims, defendants will likely not be in a position to develop many IAC claims on direct appeal." *Id.* at 167. As it "is not the intention of this Court to deprive criminal defendants of their right to have IAC claims fully considered," when an IAC claim is asserted on direct appeal with an undeveloped record, our appellate courts generally "dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent MAR proceeding." *Id.*

"Nonetheless, to avoid procedural default under N.C.G.S. § 15A-1419(a)(3), defendants should necessarily *raise* those IAC claims on direct appeal that are apparent from the record." *Id.* (emphasis added); *see also Oglesby*, 382 N.C. at 245 ("[A]n appellate court's decision to deny or dismiss an IAC claim depends in part on that court's confidence in the record produced during the underlying proceeding."). Put another way, defendants must raise record-apparent IAC claims on direct appeal or the procedural bar applies.[3]

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3. There is no lack of clarity here contrary to the assertions in the dissent. N.C.G.S. § 15A-1419(a)(3) sets forth the procedural requirements, and *Fair*, *Oglesby*, and *State v. Long*, 354 N.C. 534 (2001), clarified whatever the statute left open. We agree with our colleagues that there is no blanket forfeiture rule for all IAC claims: those not apparent from the record need not be brought on direct appeal. *See* N.C.G.S. § 15A-1419(a)(3). But the dissent conflates "apparent from the record" with the ability to decide an IAC claim.

The question is whether a particular claim could have been brought on direct review. When an IAC claim is apparent from the record, it must be raised on direct appeal or else it is subject to the procedural bar. This is essentially a preservation requirement as illustrated in *Fair*. If the IAC claim is preserved, the appellate court must then determine whether the record permits resolution of the preserved claim. If the cold record suffices, the appellate court can decide the IAC claim. *See Fair*, 354 N.C. at 166. If resolving the IAC claim requires evidence outside the record, which is frequently the case, the appellate

The United States Court of Appeals for the Fourth Circuit examined the interplay between IAC claims and subsection 15A-1419(a)(3) in *McCarver v. Lee*, 221 F.3d 583 (4th Cir. 2000), which this Court has cited with approval. *See Fair*, 354 N.C. at 166. In *McCarver*, the defendant argued that "because [IAC] claims are ordinarily more appropriately raised in collateral proceedings, these claims are not consistently procedurally barred in collateral proceedings in North Carolina." *McCarver*, 221 F.3d at 589. But the Fourth Circuit properly understood that for the defendant there to prevail in his argument, "he would need to cite a non-negligible number of cases in which [IAC] claims could have been brought on direct review but were not, and in which the collateral review court nonetheless failed to bar the claim . . . because the claim was an [IAC] claim." *Id.* The defendant in *McCarver* could not make such a showing because "North Carolina courts have held that [IAC] claims that are not brought on direct review can be procedurally defaulted," and the Fourth Circuit rejected the defendant's assertion "that there is a general ineffective assistance of counsel claim exception to our holding that section 15A-1419(a)(3) is an independent and adequate state procedural bar." *Id.* at 589–90.

C. Defendant's Claims are Procedurally Barred

Having established that IAC claims are not exempt from subsection 15A-1419(a)'s procedural bar merely because such claims are routinely dismissed without prejudice on direct appeal, we turn to defendant's contention that the MAR court and the Court of Appeals erred in concluding his specific IAC claims are procedurally barred because he was in an adequate position to raise them on his direct appeal. Defendant's arguments turn on his assertion that the lower courts erred because neither court determined that his IAC claims "could have been established without the supporting affidavit" from his trial counsel, which was unavailable to him on his direct appeal, and because neither court determined "that the cold trial record was in fact sufficient in this case or point[ed] to anything that would have allowed [defendant] to present his IAC claims adequately on appeal."

To the extent defendant believes that subsection 15A-1419(a)(3) only operates to bar a claim if that claim could have been "established" on direct appeal, i.e., if the defendant would have prevailed on that claim

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court should dismiss without prejudice for the defendant to file an MAR in the trial court. *See Long*, 354 N.C. at 540. The latter is not a preservation issue, but rather a disposition one. Stated another way, a claim that is apparent from the transcript must be brought even if it may ultimately be dismissed for further investigation.

in his or her appeal, he proceeds from a mistaken premise. Subsection 15A-1419(a)(3) bars claims that the defendant "was in a position to *adequately raise*," not perfectly or even persuasively raise, upon a previous appeal. As the State correctly notes, to determine whether an IAC claim is barred we inquire whether a defendant could have made the same claim or claims in his direct appeal, not "whether the defendant [could have] previously raised claims that were worthy of relief."

Here, defendant's MAR consisted of eighty-four pages of background information, twenty-nine pages of argument addressing his five claims, and two exhibits which he incorporated by reference: an affidavit from one of his trial counsel and the pretrial hearing and trial transcripts. Defendant contends his claims are not procedurally barred because they were based on information obtained in, among other things, post-conviction discovery and conflicting affidavits from trial counsel. But as the MAR court correctly noted, counsel's affidavit was not cited by defendant in his MAR apart from two general references contained in the table of contents and a footnote on the first page. The affidavit was not cited or otherwise relied upon by defendant in the eighty-four pages of background information or the twenty-nine pages of argument in support of his claims. By contrast, defendant's MAR cites to the transcript, which was available in his direct appeal record, at least two hundred times.

Defendant's arguments in this appeal regarding the relevancy of the affidavit and its explanation of "trial strategy and impressions" fail to address the fundamental fact that the claims articulated in his MAR rely exclusively on information available from the record. Where, as here, a claim in an MAR relies exclusively on information contained in the direct appeal record, the conclusion that such a claim is "apparent from the record," *see Fair*, 354 N.C. at 167, is almost inescapable.

Because each of defendant's claims asserted in his MAR were readily apparent from the record on his direct appeal, there is no reason why defendant could not have raised identical claims in his previous appeal. This does not mean that it would have been impossible for defendant to raise *any* IAC claim in his MAR that would have survived the procedural bar. It simply means that "the particular claim[s] at issue," as articulated by defendant in his MAR, "could have been brought on direct review." *See Tucker*, 385 N.C. at 492 (cleaned up).

Defendant further argues that "[i]t is precisely because [these] IAC claims could not be decided on the cold trial record alone without further investigation that [defendant] supported his claims with an affidavit from one of his trial attorneys." But the MAR court's order, in which it

alternatively decided each claim on the merits based on the cold record, demonstrates that each of these claims could be determined based on the record alone. That this determination is unfavorable to defendant does not exempt his claims from the procedural bar.

Finally, defendant contends his claims are not subject to the procedural bar because in the absence of counsel's affidavit, the result of such an undeveloped claim in the Court of Appeals would have been dismissal without prejudice to his right to file an MAR in the trial court. But the inquiry is not the potential disposition of such a claim by the Court of Appeals but instead, whether the particular claim could have been adequately raised.

Again, the substance of the claims in defendant's MAR relies on material contained in the record, and it is uncontroverted that defendant failed to raise these claims on direct appeal. Where, as here, the claims articulated rely entirely on material contained in the direct appeal record, it is abundantly clear that these claims were "apparent from the record." *See Fair*, 354 N.C. at 167.

Accordingly, because defendant was in a position to adequately raise each of these claims in his previous appeal and defendant failed to argue that exceptions to the procedural bar provided by subsection 15A-1419(b) apply, both the MAR court and the Court of Appeals correctly determined that defendant's claims are procedurally barred.

IV. Conclusion

North Carolina's post-conviction procedure "serves a critical role in our criminal justice system" by providing "potential relief to defendants" and "promot[ing] finality." *Tucker*, 385 N.C. at 486. One of the ways our statutes promote finality is by putting defendants and attorneys on notice that "there is but one chance to raise available matters after the case is over, and if there has been a previous assertion of the error, or opportunity to assert the error, by motion or appeal, a later motion may be denied on that basis." N.C.G.S. § 15A-1415, Official Commentary (2025).

Here, the IAC claims articulated in defendant's MAR were based entirely on information contained in the direct appeal record, and he therefore had the opportunity to assert these claims on direct appeal but failed to do so. Defendant's claims are procedurally barred, and we affirm the judgment of the Court of Appeals.

AFFIRMED.

Justice EARLS dissenting.

Today the Court announces a new rule that the procedural bar in N.C.G.S. § 15A-1419(a)(3) (2025) is actually a preservation requirement. Defense counsel must assert ineffective assistance of counsel (IAC) claims on direct appeal to preserve those for future collateral review. *See* majority *supra* n.3. The Court does not explain how this preservation requirement is consistent with the text, structure, or legislative intent of North Carolina's post-conviction review statutes. It does not explain why it is justified in overturning this Court's precedent in *State v. Hyman*, 371 N.C. 363 (2018), or modifying the Court's recent decision in *State v. Bell*, 387 N.C. 262 (2025), among others. It does not even explain why it is fair to change the rules in this very case. Defendant Garry Gupton filed his direct appeal under the procedural bar standard as clarified in *Hyman*, but this Court now abandons *Hyman* and retroactively holds Mr. Gupton to a very different standard. The majority purports to apply this Court's precedent while doing anything but. The effect is to unfairly penalize criminal defendants who had no notice of this change and to prematurely close the courthouse doors to even meritorious claims that a conviction has been obtained in violation of constitutional rights. Because I would apply existing precedent to hold that Mr. Gupton's claims are not procedurally barred, I dissent.

I. Mr. Gupton's IAC Claims

Mr. Gupton's 118-page motion for appropriate relief (MAR) carefully detailed the procedural and factual history of his convictions for arson and first-degree murder in support of five claims of IAC. Each claim basically arose from a central premise: trial counsel, he alleged, provided constitutionally ineffective counsel by failing to confront the State's case against him. In essence, he alleged, counsel decided early on that Mr. Gupton had done what the State accused him of, even before seeing the substance of the State's evidence, and concluded that the best defense was insanity. This threshold strategic choice caused defense counsel to fail to meaningfully challenge whether the State's evidence was sufficient to prove its case: counsel failed to thoroughly investigate, introduce affirmative exculpatory evidence, and vigorously subject the State's case to adversarial testing, thereby prejudicing Mr. Gupton.

These allegations were supported by examples in the cold record, including where trial counsel failed to cross-examine the State's witnesses, to move to dismiss charges in light of "gaps" in the State's case, and to challenge or try to keep out prejudicial and inadmissible evidence.

They were also supported by specific references to evidence not in the record. For example, his motion alleged:

- Trial counsel did not make efforts to locate, interview, or subpoena any witnesses from the crime scene, the Battleground Inn, who described what had been seen and heard the early morning of 9 November 2014. That was so even as police investigators had spoken with a witness who had seen an unidentified man with a clean-shaven head fleeing the hotel after the fire alarm went off but did not capture the witness's name or information, and other witnesses heard items being thrown and yelling about the "KKK" at the time of the crimes.

- Trial counsel failed to elicit testimony showing substantial disruptions to the crime scene in between when firefighters arrived and investigators arrived. They failed to challenge the lack of information on ingress and egress into the hotel room or the presence of unexplained items found in the hotel room. Indeed, counsel in closing argument stated that one such item belonged to the victim, Mr. Stephen White, even though no record evidence supported that assertion.

- Counsel did not have Mr. Gupton's blood tested for common date rape drugs including Rohypnol and MDMA, even though Mr. Gupton and Mr. White had met that night drinking at a nightclub and investigators testified that Mr. Gupton appeared to be "diaphoretic" or profusely sweating, a common side effect of such drugs. A third-party had informed trial counsel that "confirmation testing could be performed on Mr. Gupton's blood which would reveal whether Rohypnol (a known date-rape drug) was one of the benzodiazepines which had been detected by the hospital's urine screen and the NMS Labs blood test," yet no such testing was performed.

- Counsel failed to hire or consult with an arson expert or to meaningfully cross-examine the State's arson expert. For example, counsel took no actions to meaningfully challenge that expert's circular reasoning that a short-circuit did not cause the fire because the fire caused the short-circuit.

- Counsel failed to seek to admit the victim's statements to his doctors when he was in critical condition and likely not to survive that he "recall[ed] checking into a room on the fourth floor of the Battleground Inn, that he had been drinking that night, that he was with a friend he had known for two years,

> that they did not get into a fight or disagreement, that he did not recall getting hit in the head or the room being on fire, that they went to sleep in the motel room, and that the next thing he remembered was waking up in the hospital."

On top of these specific allegations, the MAR attached and incorporated by reference an affidavit from Mr. Gupton's primary trial counsel, Wayne Baucino. Mr. Baucino corroborated that he "never considered that Mr. Gupton might not have committed these offenses" and "created in [his] mind early on an idea of what had happened in that hotel room, which included a sexual assault triggering a psychotic break leading to Mr. Gupton lighting the bedspread on fire." As a result of that choice, he never interviewed any witnesses from the hotel's fourth floor, did not "hire or consult any fire expert in this case or do anything to challenge the State's fire investigator's findings," determine how the fire was extinguished, or consult a forensic toxicologist. He "assumed NMS [Labs] tested Mr. Gupton's blood for everything." In retrospect, "[he] certainly believe[d] that at the very minimum [he] should have investigated the State's case and put the State more to the test than [he] did."

The substance of the MAR thus alleged that trial counsel for the guilt-innocence phase prematurely decided to defend Mr. Gupton on the basis of insanity, even before counsel received the State's discovery and realized how little evidence the State had of who was in the hotel room, what happened in the hotel room, or how the fire started—and even as Mr. Gupton's own recollection of what happened was inconsistent with physical evidence at the crime scene and varied over time. Mr. Gupton's IAC claims particularly challenged that trial counsel wrongly focused on a legally invalid insanity defense at the expense of challenging the State's case, made highly questionable admissions of guilt and admitted irrelevant and prejudicial evidence, and focused on the capital sentencing portion of the proceedings at the expense of trying to prove Mr. Gupton's innocence. These allegations drew from the record as well as evidence not admitted at trial but contained in trial counsel's files and trial counsel's own reflections as to defense strategy. Mr. Gupton's MAR was accompanied by a second motion for post-conviction discovery, for state funding to hire a psychiatrist and fire expert, and to test any remaining samples of Mr. Gupton's blood for certain drug substances. Mr. Gupton's first motion for post-conviction discovery had been denied because he had not yet filed an MAR.

II. The Procedural Bar Standard

The narrow question presented is whether Mr. Gupton's IAC claims are procedurally barred because "[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." *See* N.C.G.S. § 15A-1419(a)(3) (2025).

The particular contours of this procedural bar have not been a model of clarity. Indeed, more than twenty-five years ago, a judge on the United States Court of Appeals for the Fourth Circuit, hearing a petition for habeas corpus from another defendant, Ernest McCarver, whose claims were subject to this procedural bar, remarked that "North Carolina courts have not undertaken to construe this statutory language so as to provide the needed clarity" for when IAC claims must be raised on direct appeal. *McCarver v. Lee*, 221 F.3d 583, 599 (4th Cir. 2000) (Motz, J., concurring in the judgment). Although the "general practice in North Carolina [is to] hear[ ] ineffective assistance claims at the post-conviction stage," there were undefined exceptions that created confusion. *See id.* The opinion noted,

> Is a defendant "in a position to adequately raise" a claim whenever there are facts in the record to support it, or only when the facts as to the claim are undisputed? Must the representation that was assertedly ineffective have taken place prior to trial or prior to sentencing? Is a defendant "in a position to adequately raise" an ineffective assistance claim on direct appeal when the defendant is being represented on the appeal by his assertedly ineffective trial counsel? We simply do not know, because the scope of the exception, as well as the scope of the procedural rule that purportedly derives from it, have never been addressed by the North Carolina courts.

Id. Judge Motz concurred in the judgment only because even as she could not discern any consistency in North Carolina's application of the procedural bar to IAC claims, she concluded that Mr. McCarver was not prejudiced by the alleged IAC. *Id.* at 598.

The *McCarver* majority agreed that in North Carolina "the accepted practice is to raise claims of [IAC] in post-conviction proceedings, rather than direct appeal, due to the need for evidentiary development of these claims," and that this general rule is subject to "exceptions." *Id.* at 590 (majority opinion) (cleaned up) (quoting *Smith v. Dixon*, 14 F.3d 956, 969 (4th Cir. 1994)). Whatever the precise contours of those exceptions, however, Mr. McCarver's claims seemed to fit them: he alleged his counsel was constitutionally ineffective for letting a jury learn about a specific piece of evidence—a claim which was entirely focused on the

"the evidence that was available instead of the evidence that could have been generated." *Id.* at 592. Thus "it is plain that McCarver could have made the very [IAC] claim on direct review that he does today—and just as effectively." *Id.*

Following this decision from the Fourth Circuit, our Court endeavored to provide further guidance on the meaning of this MAR procedural bar, specifically the scope of exceptions to the general practice that IAC claims are appropriately brought post-conviction. Soon after, in *State v. Fair*, 354 N.C. 131 (2001), we rejected the argument that, as a category, all IAC claims must be raised post-conviction. *Id.* at 166. It was appropriate, we reasoned, to bring and resolve IAC claims on direct appeal 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 the appointment of investigators or an evidentiary hearing." *Id.* As examples, we noted that a challenge that counsel failed to object may be appropriately resolved on direct appeal, *see id.* (citing *State v. Blakeney*, 352 N.C. 287, 308–09 (2000)), where a challenge that counsel improperly admitted defendant's guilt without his consent was "appropriately deferred for consideration" post-conviction, *id.* (citing *State v. House*, 340 N.C. 187, 196–97 (1995)). This Court then elected to reach the merits of Mr. Fair's IAC challenges on direct appeal—most of which arose from on-the-record acts or omissions of counsel letting in certain evidence. We reviewed his IAC claims that Mr. Fair's lawyer wrongly elicited damning testimony on direct examination, failed to object on cross-examination to information subject to attorney-client privilege, failed to object during the State's closing argument, failed to object to Mr. Fair's impeachment regarding his post-arrest silence, and wrongly requested statutory mitigating factors as non-statutory mitigating factors. *Id.* at 167–68.

In *State v. Long*, 354 N.C. 534 (2001), we reiterated that *Fair* sought to resolve the issues identified in *McCarver*. *Id.* at 539–40. IAC claims should be raised on direct appeal, we explained, when "claims . . . may be *developed and argued* without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *Id.* (emphasis added) (quoting *Fair*, 354 N.C. at 166). "[G]iven the nature of IAC claims, 'defendants likely will not be in a position to adequately develop many IAC claims on direct appeal.' " *Id.* at 540 (quoting *Fair*, 354 N.C. at 167). Accordingly, we concluded that Mr. Long's IAC claim arising from defense counsel's preparation and preservation of the voluntary intoxication defense based on Long's consumption of alcohol was properly raised post-conviction because "evidentiary issues *may* need to

be developed before [the] defendant will be in a position to adequately raise his possible IAC claim." *Id.* (emphasis added). Put another way, we interpreted the statute to mean that a defendant could have "adequately raise[d] the ground or issue underlying the [IAC claim]" "upon a previous appeal," *see* N.C.G.S. § 15A-1419(a)(3), only when the claim could be "developed and argued" without evidence ancillary to the record. *Long*, 354 N.C. at 540 (cleaned up). Where evidentiary issues "may need to be developed," "a defendant will not be required to [raise an IAC claim on direct appeal]." *Id.* There, the defendant could not adequately the raise the issue of "trial counsels' preparation and preservation of the intoxication [defense]" on the cold record and that IAC claim thus should have been raised post-conviction. *Id.* at 539–40.

Accordingly, in the years that followed, we routinely dismissed IAC claims brought on direct appeal where a defendant would benefit from evidentiary or ancillary hearings to develop his claims, including because they involved the reasonableness of particular strategic choices by trial counsel. In *State v. Watts*, 357 N.C. 366 (2003), we dismissed an IAC claim based on counsel's failure to present any mitigating evidence during the sentencing phase raised on direct appeal because those claims required an evidentiary hearing to understand what mitigating evidence counsel had at that time and/or what additional evidence could have been obtained. *Id.* at 378. In *State v. Campbell*, 359 N.C. 644 (2005), we dismissed IAC claims on direct appeal arising from counsel's choice to argue self-defense and intoxication because "we cannot ascertain from the record the reason for defense counsel's strategy, [so] these issues require further evidentiary development." *Id.* at 693. We distinguished the other IAC challenges in the same appeal arising from counsel's failure to object or from statements made by the State during closing arguments. *Id.* at 691–94. Those claims did not require considerations of strategy or evidence outside of the record and thus were appropriate to resolve on direct appeal. *Id.* at 694; *see also State v. McNeill*, 360 N.C. 231, 251–52 (2006) (dismissing on direct appeal IAC claim based on counsel's failure to ask for stipulation as to defendant's church service re: non-statutory mitigating factors, without reviewing the merits of that argument, and directing that this claim may be brought post-conviction).

Likewise, on review of IAC challenges brought post-conviction, we repeatedly held that claims involving the reasonableness of counsel's strategic decisions were not procedurally barred if not first brought on direct appeal when they required factual development. For example, in *State v. Hyman*, 371 N.C. 363 (2018), the defendant claimed IAC because his attorney failed to withdraw as his counsel and serve as a witness for

the defense to testify to an exculpatory conversation she had with a key State's witness. *Id.* at 381–82. We held that claim was not procedurally barred because

> [t]he record developed at trial did not contain any information affirmatively tending to show that the alleged conversation between [the defendant's trial counsel] and [a key State's witness] actually occurred or whether [the defendant's trial counsel] had a strategic or tactical reason for failing to withdraw from her representation of defendant.

Id. at 384. The record did contain some information about this particular claim which was later relied on in the MAR—specifically the defendant's trial counsel's cross-examination of the State's witness about the alleged conversation and trial counsel's attempt to use a key piece of evidence on cross-examination of that witness. *Id.* at 385. Nonetheless, we held the claim was not procedurally barred. *Id.* We reasoned that "the extent to which [counsel's] acts or omissions had such a strategic or tactical motivation was a relevant issue about which the trial record is completely silent." *Id.* Moreover, the affirmative evidence the defendant would need to make out his IAC claim—such as the nature of trial counsel's possible testimony had she been a witness—did not exist in the record. *Id.* at 384–85. Simply put, the "defendant had no hope of making a viable showing . . . based upon the evidentiary record developed at trial." *Id.* at 384. Defendant was thus not "in a position to adequately raise the [IAC] claim asserted in his [MAR] on direct appeal." *Id.* at 383.

Similarly, in *State v. Todd*, 369 N.C. 707 (2017), we observed that counsel's reasonableness—or lack thereof—in failing to make certain arguments on direct appeal was a question of "whether . . . counsel made a strategic decision not to raise [that argument]," and if "such a decision was strategic," whether "that decision was a reasonable decision." *Id.* at 711–12. Where the record was "insufficient" to make those determinations, the IAC claim was properly resolved after an opportunity for factual development on remand. *Id.* at 712.

Since *Fair*, we have also cautioned that *Strickland*'s prejudice prong cannot operate to deny or procedurally bar IAC claims before defendants have a chance to show how counsel's allegedly deficient performance impacted the trial. *See Strickland v. Washington*, 466 U.S. 668, 693 (1984). "[I]t is not always possible to resolve a defendant's prejudice claim by looking to a cold record that was itself shaped by counsel's allegedly deficient performance." *State v. Oglesby*, 382 N.C. 235, 245

(2022). It would be "inconsistent with the right the Sixth Amendment protects" to "deny[ ] a defendant's IAC claim on direct appeal on the grounds that he cannot show prejudice based on a suspect record," *id.*, when the particular proceeding is itself "unreliable because of a breakdown in the adversarial process that our system counts on to produce just results," *id.* (quoting *Strickland*, 466 U.S. at 696). It follows that an appellate court's "confidence in the record produced during the underlying proceeding" and "the nature of the deficient performance an attorney allegedly rendered may be relevant in deciding whether it is appropriate to dispose of an IAC claim on direct appeal on prejudice grounds alone." *Id.* It may be improper to resolve an IAC claim on direct appeal on prejudice grounds where

> a defendant alleges that counsel performed deficiently in a manner that could plausibly undermine the validity of the adversarial proceeding as a mechanism for ascertaining facts—for example, by a failure to call witnesses who would have contributed to the evidentiary record or by a failure to raise a legal argument that deprived the defendant of an opportunity to introduce supporting evidence[.]

Id. at 245–46; *see also United States v. Cronic*, 466 U.S. 648, 655–56 (1984) (noting that the "very premise that underlies and gives meaning to the Sixth Amendment" is that, in "our adversary system of criminal justice[,] . . . partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free" (cleaned up)).

In *Oglesby*, we denied an IAC claim brought via MAR on prejudice grounds and without an evidentiary hearing where the defendant alleged counsel was ineffective for failing to ask the trial court at his resentencing hearing to consider running all his sentences concurrently. 382 N.C. at 243. That claim did not strike at our confidence in the underlying proceedings, and the record specifically failed to support that Mr. Oglesby was prejudiced by this discrete omission of counsel. *See id.* at 248 ("[T]he resentencing court was not deprived of any evidence or argument that could have influenced its [sentencing] decision . . . ."). Namely the trial court rejected a related legal argument at that same hearing: for Mr. Oglesby to show prejudice, we noted, "[w]e would have to conclude it was a reasonable probability that while choosing not to shorten his sentence by two and a half to three and a half years, the trial court nevertheless would have chosen to shorten his sentence by at least eight to

ten years" solely if asked to do so by defense counsel. *Id.* at 247. "This counterintuitive assertion is insufficient to demonstrate prejudice." *Id.*

The standard that emerged over decades of precedent thus somewhat clarified the doctrinal uncertainty identified in *McCarver*. We focused the procedural-bar inquiry on the information that would have been available to the defendant during the direct appeal and on what additional information, if any, defendant would need to develop and argue the particular IAC claim and a reviewing court would need to resolve the same: "[I]n 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." *Hyman*, 371 N.C. at 383 (emphasis added); *Bell*, 387 N.C. at 275 (same). After all, "the 'reasonableness' of counsel's performance at trial is a fact-intensive inquiry," *State v. Gillard*, 386 N.C. 797, 867 (2024) (quoting *Oglesby*, 382 N.C. at 243), so those types of claims may usually require "such ancillary procedures as the appointment of investigators or an evidentiary hearing," *id.* (quoting *Fair*, 354 N.C. at 166–67).

Applying our precedent, Mr. Gupton's claims are not procedurally barred. He was not in a position to adequately raise them on direct appeal because the record at that point did not "contain[ ] sufficient information to permit the reviewing court to make all the factual and legal determinations necessary to allow a proper resolution of [his] claim[s]." *See Hyman*, 371 N.C. at 383. Mr. Gupton alleged that his counsel made an unreasonable strategic choice to focus on a dubious insanity defense at the expense of challenging the State's case, relying in part on evidence not in the "cold record," *see Fair*, 354 N.C. at 166, but contained in an ancillary affidavit from trial counsel and other material from trial counsels' files, *see Todd*, 369 N.C. at 712 (remanding for an evidentiary hearing where "the record before this Court is not thoroughly developed regarding [the] defendant's appellate counsel's reasonableness, or lack thereof, in choosing not to" make particular arguments); *accord Campbell*, 359 N.C. at 693 (noting that reasonableness of counsel's choice to advance specific defenses required evidentiary hearings and thus could not be resolved on direct appeal); *Long*, 354 N.C. at 539 (same with trial counsel's preparation and preservation of a voluntary intoxication defense). Nowhere in the cold record did counsel plainly state the extent to which they failed to investigate. *Cf. Bell*, 387 N.C. at 274 (concluding that a *J.E.B.* claim was procedurally barred where the State made "multiple statements" in "open court" that "indicated the

State's gender-based motives for striking potential jurors"). Mr. Gupton's IAC claims relied not just on "evidence that was available" in the record but also on "evidence that could have been generated," specifically related to other suspects, causes of the fire, and defenses like involuntary intoxication. *See McCarver*, 221 F.3d at 592. He could not "just as effectively" have made his IAC claim on direct appeal. *See id.*

Mr. Gupton's MAR quite clearly raised extra-record factual disputes and fair doubts about the reasonableness of Mr. Gupton's counsels' performance. For example, the State's own answer to Mr. Gupton's MAR contained an affidavit from Mr. Gupton's other trial counsel, Ames Chamberlin, who confirmed he had serious concerns that "the jury would reject [Mr. Gupton's] insanity defense" but that there seemed to be no "better alternative" specifically because there was "no credible evidence to support a theory that a third party had killed" the victim. He reiterated that the decision to pursue the insanity defense was made before Mr. Chamberlin was appointed. According to him, he and his co-defense counsel subsequently failed to present affirmative evidence of Mr. White's statements or consult an independent arson expert because the State's story of what happened comported with the narrative they had already built around that defense.

Questions of what was reasonable under the circumstances known to counsel at the time and what could have been developed through sufficient additional factual investigation is the very heart of a fact-intensive *Strickland* claim. *See Strickland*, 466 U.S. at 691 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."). Here, that claim hangs on evidence not in the cold record from the direct appeal. Mr. Gupton's allegations that trial counsel unreasonably and broadly failed to challenge the State's evidence—an assertion trial counsel affidavits largely corroborate—calls into question "confidence in the record produced during the underlying proceeding" and makes this particular claim inappropriate to be resolved on the prejudice prong on direct appeal. *See Oglesby*, 382 N.C. at 245.

Had Mr. Gupton brought identical claims on direct appeal, featuring the same allegations and ample reliance on ancillary materials in trial counsel's files, a reviewing court most certainly would have determined that the record itself did not "contain[ ] sufficient information to . . . make all the factual and legal determinations necessary to allow a

proper resolution of the claim in question." *See Hyman*, 371 N.C. at 383. There would have been no "affirmative evidence" of defendant's claims. *See id.* at 385. He would not have been in a position to "develop[ ] and argue[ ]" his claims. *See Long*, 354 N.C. at 540. The court would have concluded that "trial counsels' preparation . . . of the [insanity defense]" involves extra-record "evidentiary issues." *See id.* at 539–40. The claims would have been dismissed. They are not procedurally barred for the same reason. *See Hyman*, 371 N.C. at 383 ("[I]n 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."); *accord Bell*, 387 N.C. at 274–75 ("*For this Court to determine that a claim could have been brought on direct review*, 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." (emphases added) (cleaned up)).

III. The Majority's New Standard

Instead of applying the established legal standard to the facts of this appeal, the majority radically breaks from our precedent, adopts a uselessly vague standard that requires formalistic and perfunctory preservations of rights on direct appeal to skirt a procedural bar, and largely ignores the substance of Mr. Gupton's allegations.

Start with how the majority describes the substance of Mr. Gupton's allegations. The majority briefly mentions the topline summary of Mr. Gupton's claims when reciting the factual and procedural background. *See* majority *supra* Part I. But when applying the legal standard to those claims, the majority ignores their substance. *See* majority *supra* Section III.C. Instead, the majority relies on the form of the MAR, including route tallies of the number of times the record is cited, the number of citations to the attached affidavit (notwithstanding that the opinion concedes the affidavit was incorporated by reference into the MAR), and the number of pages of background information and argument. These formalistic observations show, the majority contends, that the IAC claims "rely exclusively on information available from the record." *See* majority *supra* Section III.C.

It is unpersuasive as a matter of logic to so blatantly conflate matters of form with those of substance. It is also inconsistent with decades of precedent where this Court has modeled that the appropriate way to evaluate the procedural bar for an IAC claim is to look particularly at

the substance of the claim being alleged and then ask whether the discrete acts or omissions of counsel that are being challenged prejudiced defendant. *E.g.*, *Bell*, 387 N.C. at 274; *Oglesby*, 382 N.C. at 245; *Fair*, 354 N.C. at 167–68.

As further evidence for the majority's conclusion that Mr. Gupton's claims could have been raised on direct appeal, the majority points out that the trial court relied on the cold record alone when denying each of Mr. Gupton's claims on the merits. *See* majority *supra* Section III.C. For one thing, it hardly demonstrates meaningful appellate review to gesture vaguely to the very order on appeal as grounds for procedurally barring Mr. Gupton's right to even bring his claims. And ironically, doing so here exactly demonstrates that the trial court and the majority improperly barred Mr. Gupton's claims on prejudice grounds, looking solely at the cold record, before engaging with the substance of what Mr. Gupton actually alleged—that the record itself was a product of counsel's deficient performance and the potential evidence for his claims lay beyond the record.

The majority's reasoning on this point is circular. If the thrust of a defendant's IAC claim is that his defense lawyer made strategic choices that led the State's evidence to be accepted wholesale and not meaningfully challenged through the adversarial process, a reviewing court cannot just point to a record of those very same proceedings and conclude that the defendant would have been convicted anyway—or that an appellate court could possibly have so concluded if reviewing the claims on direct appeal. No right to effective counsel is being vindicated under those circumstances. This is plainly "inconsistent with the right the Sixth Amendment protects." *Oglesby*, 382 N.C. at 245.

Having reduced the substance of Mr. Gupton's IAC claims to general observations about the form of his MAR and the trial court's description of it, the majority proceeds to adopt a new standard for when an IAC claim is procedurally barred under N.C.G.S. § 15A-1419(a)(3): the procedural bar applies to those claims "that are apparent from the record," quoting a single sentence from *Fair*. *See* majority *supra* Section III.A. This standard is not the operative one from *Fair*. As discussed above, *Fair* focused on whether ancillary proceedings were needed to facilitate evidence of the IAC claim in question. 354 N.C. at 166. Claims need not be brought on direct review where "such ancillary procedures" are needed to "develop[ ] and argue[ ]" the claim. *Id.*

It is also not the standard sharpened by this Court over the two intervening decades. *Hyman* and *Bell* focused the procedural bar inquiry on

whether the Court of Appeals could have fairly disposed of the claims —whether "the direct appeal record . . . 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." *Hyman*, 371 N.C. at 383; *see also Bell*, 387 N.C. at 275.

The majority admits this. It stresses in a footnote that "apparent from the record" is different from a reviewing court's "ability to decide an IAC claim." *See* majority *supra* n.3. But *Hyman* and *Bell* and cases preceding it explicitly adopted the latter standard for what claims must be raised on direct appeal or else be procedurally barred. The majority should really explain why it is refusing to apply our precedent and thereby implicitly overturning at least half a dozen decisions of this Court.

It bears emphasizing that the majority's new standard is unworkable. The majority's standard asks whether "material contained in the record" made the claim "apparent." *See* majority *supra* Section III.C. What does this mean? Is a claim "apparent from the record" when there are any facts in the record to support it? If it is "apparent from the record" that trial counsel had *a* strategy, do all claims involving the reasonableness of that strategy also qualify? If trial counsel stays on as appellate counsel and must attack their own performance using their own record and trial files, is that also "apparent from the record"? The majority reverts our doctrine back to the uselessly vague standards in place under *McCarver*. The only thing "apparent" here is that the majority's rule raises more questions than it answers.

Importantly, too, IAC claims by definition allege constitutionally deficient counsel at a prior proceeding. *Strickland*, 466 U.S. at 687. At a high enough level of generality, then, every IAC claim contesting counsel's prior performance could effectively be "apparent from the record" and thus must be brought on direct appeal to avoid becoming procedurally barred. That is exactly the type of categorial preservation rule our Court has long disavowed. *See Fair*, 354 N.C. at 165 ("[Section] 15A-1419 is not a general rule that any claim not brought on direct appeal is forfeited on state collateral review. Instead, the rule requires North Carolina courts to determine whether the particular claim at issue could have been brought on direct review." (quoting *McCarver*, 221 F.3d at 589)). The majority offers no guidance for which IAC claims will be "apparent from the record" and which will not, further suggesting that it intends all IAC claims to be barred unless first raised on direct appeal.

The majority thus recasts the procedural bar as a formalistic preservation requirement—IAC claims may only be brought on collateral

review if on direct appeal the defendant reserved his right to bring a future IAC claim on collateral review. Again, that is not how this Court has interpreted the statute for decades.[1]

This interpretation is also inconsistent with the statutory text. The majority states that being in a position to "adequately" raise a claim does not mean "persuasively," or even whether the claim would be "worthy of relief." *See* majority *supra* Section III.C. But rewriting the statutory term "adequately raise" to mean something less than "worthy of relief" is inconsistent with the ordinary meaning of those words. *See Adequate*, *Webster's Third New International Dictionary* 25 (2002) (defining adequate as "fully sufficient for a specified or implied requirement," or "narrowly or barely sufficient," or "legally sufficient"). A party cannot "adequately raise" a claim they are in inadequate position to develop

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1. The majority cites *Schooldev East, LLC v. Town of Wake Forest*, 386 N.C. 775, 785 (2024), for the proposition that our Court reviews an MAR in the first instance for any errors of law. *See* majority *supra* Part II. This statement is quite odd. *Schooldev* involved an unusual appellate review posture where a superior court was sitting as an appellate court to review evidence presented to a local government in a quasi-judicial proceeding or for errors of law in the local government's decision in that proceeding. *Id.* at 784–85. In turn, the reviewing courts also sat as appellate courts. *Id.*

The context here is different. For appellate review of a trial court's decision to apply a procedural bar to a noncapital MAR, we review the Court of Appeals' decision for errors of law. *State v. Hyman*, 371 N.C. 363, 382–85 (2018); *State v. Bell*, 387 N.C. 262, 274–78 (2025). We do not typically review these cases at all, however, because the Court of Appeals is supposed to have final say in appeals of noncapital MARs. *See* N.C.G.S. § 15A-1422(f) (2025).

A consequence of relying on *Schooldev* is that the majority avoids directly reviewing the Court of Appeals' decision. Notably, that decision wildly misapplied *Bell* and our other precedents by concluding that Mr. Gupton's MAR was procedurally barred because "had he exercised reasonable diligence" he could have obtained the same affidavits from his trial counsel during the direct appeal and thus brought his claims then. *State v. Gupton*, No. COA23-661, slip op. at 12–13 (N.C. Ct. App. July 16, 2025) (unpublished), available at appellate.nccourts.org/opinions/?c=2&pdf=43596. The majority's choice to ignore the Court of Appeals' reasoning here invites even further confusion over the operative legal standard. It is also not difficult to see how our current judiciary is misapplying procedural rules in a manner that fails to protect the underlying Sixth Amendment right.

Side-stepping the Court of Appeals' decision here is also notable because the majority otherwise takes pains to chastise that court for failing to apply *Cryan v. National Council of YMCAs*, 384 N.C. 569 (2023), when it allowed Mr. Gupton's appeal via writ of certiorari. The majority does not explain, however, why our Court's own decision to allow his petition for writ of certiorari to review the Court of Appeals' decision comports with *Cryan*—that there are extraordinary circumstances and likely error below. *Id.* at 572–73. The majority instructs the intermediate appellate court to "do as we say, not as we do," it seems. We can only speculate that the extraordinary circumstance here is the majority's interest in taking a hatchet to "a principle of law [that] has become settled by a series of decisions." *See State v. Ballance*, 229 N.C. 764, 767 (1949).

and argue. Moreover, lawyers are not permitted under our professional rules to advance frivolous legal arguments. N.C. R. Pro. Conduct r. 3.1 (N.C. State Bar 2003). The legislature knows this and surely would not put defense counsel in a position of trying to raise and preserve an IAC claim the lawyer does not know to be meritorious. *See C Invs. 2, LLC v. Auger*, 383 N.C. 1, 13 (2022) ("The Legislature is presumed to know the existing law and to legislate with reference to it." (quoting *State v. S. Ry. Co.*, 145 N.C. 495, 542 (1907))).

The majority effectively supplants the default practice that most IAC claims must be brought on collateral review and only narrow exceptions may be addressed on direct appeal, with the inverse: all IAC claims must be brought on direct appeal to be preserved for collateral review or determined on the merits. The majority's opinion is thus an open invitation for courts to decide IAC claims on the prejudice prong on direct appeal, denying defendants a chance to build an evidentiary record to support their good-faith claims. This puts defendants in a catch-22: they must raise IAC claims on direct appeal before having evidence to prove deficient performance sufficient to overcome *Strickland*'s presumption of reasonableness and risk a ruling on the merits based on their inability to show prejudice, or wait to file an MAR with sufficient extra-record evidence and likely face a procedural bar in any event. This system cannot meaningfully protect the underlying Sixth Amendment right to effective assistance of counsel. It is a catch-22 that eliminates Sixth Amendment rights.

Not only does the majority offer no good reason for implicitly overturning our established precedent, but the "bait-and-switch" here works a significant injustice to criminal defendants who have relied on that precedent. North Carolina's appellate courts have for decades underscored that the general practice is to bring IAC claims post-conviction, subject to only narrow exceptions, and that the relevant inquiry is the reviewing court's ability to decide the claim. We need look no further than the defendant in this very case to see the injustice: Mr. Gupton filed his appellant's brief at the Court of Appeals in his direct appeal on 10 December 2018, right after this Court clarified the procedural bar standard in *Hyman* on 17 August 2018. Yet the majority now rejects *Hyman* and retroactively holds Mr. Gupton to a very different standard. This is not fair.

The legislature intentionally designed a system of post-conviction review for the purpose of marshalling ancillary evidence. Through these procedures, a defendant is entitled to post-conviction discovery and mechanisms to facilitate such fact-finding. *See* N.C.G.S. § 15A-1415(f)

(2025). Unlike on direct appeal, counsel in an MAR proceeding may obtain trial counsel's files, obtain post-conviction discovery, interview counsel, and conduct further investigation and interviews beyond the cold appellate record. The majority's formalistic preservation requirement is inconsistent with the text of the statute as well as the purposes of post-conviction review articulated by the legislature to ensure that convictions are not obtained "in violation of the Constitution of the United States or the Constitution of North Carolina." *See* N.C.G.S. § 15A-1415(b)(3) (2025).

Ultimately it is our Court's responsibility to articulate and consistently apply clear, fair standards for when and how defendants can make good faith claims of IAC as is their right under the Sixth Amendment. Because the majority's opinion abandons that responsibility and welcomes profound unfairness and further confusion into this part of our criminal justice system, I dissent.

Justice RIGGS joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
WILLIAM DAVID LINGERFELT

No. 38A25

Filed 14 August 2026

Sexual Offenders—sex offender registration—successive petitions to terminate—issue preclusion—tier level—law of the case

In a criminal case where defendant—who pleaded guilty to two counts of sexual activity by a substitute parent—filed three successive petitions for removal from the sex offender registry, the Court of Appeals properly affirmed the trial court's order denying his third petition on the ground that he was a Tier II offender under the Sex Offender Registration and Notification Act (SORNA) and, therefore, was ineligible to seek removal before the applicable twenty-five-year waiting period. Successive petitions to terminate sex offender registration are part of the same underlying case; therefore, they are subject to the law of the case doctrine, meaning that any ruling made as to one petition concerning a legal question—such as a defendant's tier status under SORNA—is binding on subsequent petitions. Consequently, because the trial court had already held in

a prior order—denying defendant's second petition—that defendant had committed a Tier II offense, and because defendant failed to appeal that ruling, defendant was precluded from challenging his tier designation on appeal from the subsequent order denying his third petition.

Justice RIGGS dissenting.

Justice EARLS joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) (2023) from the decision of a divided panel of the Court of Appeals, 297 N.C. App. 168 (2024), affirming an order denying defendant's petition for termination of sex offender registration entered on 22 May 2023 by Judge J. Thomas Davis, in Superior Court, McDowell County. Heard in the Supreme Court on 11 September 2025 and reheard following supplemental briefing on 17 February 2026.

Jeff Jackson, *Attorney General*, *by Reginaldo E. Williams Jr.*, *Assistant Attorney General*, *for the State-appellee.*

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

DIETZ, Justice.

In 2003, Defendant William David Lingerfelt pleaded guilty to two counts of sexual activity by a substitute parent. As a result, Lingerfelt was required to register as a sex offender.

Under state law, a person cannot petition to be removed from the sex offender registry until they meet the requirements of the federal Sex Offender Registration and Notification Act. Under SORNA, offenders convicted of "Tier I" offenses cannot petition for removal until 15 years after the date of registration. Those convicted of "Tier II" offenses must wait 25 years before seeking removal.

In 2019, Lingerfelt petitioned to be removed from the sex offender registry. The trial court denied the petition after determining that Lingerfelt was a Tier II offender, meaning he had to wait 25 years from his initial 2003 registration to seek removal. Lingerfelt did not appeal this ruling, although it was a final, appealable judgment.

In 2023, Lingerfelt again petitioned to be removed from the registry. The trial court again denied the petition because he was a Tier II offender and not yet eligible. This time, Lingerfelt appealed, arguing that he was a Tier I offender, not a Tier II offender, and thus was eligible for removal under SORNA.

The dispositive question for this Court is whether the failure to appeal the 2019 order bars Lingerfelt from contesting the legal ruling that he is a Tier II offender. As explained below, we hold that successive petitions to terminate sex offender registration are all parts of the same underlying case and subject to the doctrine of law of the case. Applying that doctrine here, Lingerfelt is procedurally barred from challenging his designation as a Tier II offender because he failed to appeal from the first judgment in this case addressing that legal question. As a result, the trial court properly denied his successive petition. We therefore modify and affirm the Court of Appeals' decision on this basis without addressing the remainder of the court's analysis.

Facts and Procedural History

In 2003, Defendant William David Lingerfelt pleaded guilty to two counts of sexual activity by a substitute parent in violation of N.C.G.S. § 14-27.7(a). The trial court imposed a suspended sentence of 18 to 31 months in prison, along with 36 months of supervised probation. As part of his sentence, Lingerfelt was required to register as a sex offender, which he did in February 2003. In May 2004, the trial court found Lingerfelt violated the conditions of probation and activated his suspended sentence.

Lingerfelt later filed three petitions for termination of sex offender registration under N.C.G.S. § 14-208.12A. Lingerfelt filed the first petition in 2017, fourteen years after his 2003 conviction and resulting registration. At the hearing on this first petition, the trial court declined to make a legal ruling on Lingerfelt's sex offender tier level under the federal Sex Offender Registration and Notification Act because Lingerfelt's petition was premature regardless of tier level. *See* 34 U.S.C. § 20915.

In 2019, Lingerfelt filed a second petition for termination of sex offender registration. This time, the trial court ruled that Lingerfelt was a "Tier II" offender under SORNA, meaning he was ineligible for relief until 25 years after his initial registration. The trial court handwrote this legal conclusion on the preprinted form next to a box asking whether the petitioner complied with SORNA's minimum registration requirements. The trial court did not check the box indicating compliance and

instead wrote "Tier 2 Offense. 25 Year Min." Lingerfelt did not appeal the trial court's order although it was a final, appealable judgment.

In 2023, Lingerfelt filed a third petition. Once again, the trial court denied the petition as premature because Lingerfelt had not waited until 25 years after his initial conviction and resulting registration. This time, Lingerfelt appealed.

The Court of Appeals affirmed the trial court's order in a divided opinion. *State v. Lingerfelt*, 297 N.C. App. 168 (2024). The majority held that Lingerfelt was a Tier II offender under SORNA and therefore ineligible for removal until 25 years after his initial registration. *Id.* at 170–78. The dissent asserted that Lingerfelt was a Tier I offender and thus eligible for removal if the trial court deemed it appropriate. *Id.* at 178–82 (Murphy, J., dissenting). The dissent would have vacated the order and remanded so that the trial court could exercise its discretion in deciding whether to remove Lingerfelt from the registry. *Id.*

Lingerfelt appealed to this Court based on the dissent. After questions arose during oral argument concerning the preclusive effect of the trial court's 2019 order, this Court directed the parties to submit supplemental briefing regarding whether "the trial court properly denied defendant's petition because the court's previous determination that defendant was a Tier II offender was the law of the case or was otherwise binding on the court in a subsequent petition." *State v. Lingerfelt*, 388 N.C. 514 (2025) (order).

Analysis

The core issues in this case are whether rulings on questions of law in successive petitions to terminate registration are subject to issue preclusion and, if so, which doctrine of preclusion applies—collateral estoppel, which applies to a ruling in a different proceeding, or law of the case, which applies to a ruling in the same proceeding.

As explained below, we hold that, under the language of the applicable statute, petitions to terminate registration are all part of the same underlying proceeding and are therefore subject to the doctrine of law of the case.

I. Background of North Carolina sex offender registration

North Carolina has a "registration requirement for persons convicted of certain offenses against minors or sexually violent offenses." N.C.G.S. § 14-208.6A (2025). This registration program is designed to assist federal, state, and local law enforcement agencies and to provide

the public with "relevant information" about convicted sex offenders living in their communities. *Id.* § 14-208.5.

Ten years after the date of initial registration, an offender may request to be removed from the registry and its accompanying requirements. *Id.* § 14-208.12A. To do so, the offender must file a petition to terminate registration in superior court. *Id.* § 14-208.12A(a). The court may terminate registration if the offender (1) has not been arrested for a subsequent offense requiring registration, (2) has complied with "federal standards applicable to the termination of a registration requirement," and (3) has satisfied the court that the offender is no longer a "current or potential threat to public safety." *Id.* § 14-208.12A(a1).

The "federal standards" referenced in the statute are governed by the Sex Offender Registration and Notification Act. *See* 34 U.S.C. § 20915. Under SORNA, an offender must maintain their sex offender registration for a minimum duration determined by their "tier" level: 15 years minimum for a Tier I offender, 25 years minimum for a Tier II offender, and life for a Tier III offender. *Id.* § 20915(a)(1)–(3).

The procedure for filing a petition to terminate registration in North Carolina is detailed in N.C.G.S § 14-208.12A. The petition must be filed in superior court "in the district where the person was convicted of the offense" for state offenses and "in the district where the person resides" for out-of-state offenses. *Id.* § 14-208.12A(a). When a petition is filed, the clerk of superior court must "place the petition on the criminal docket to be calendared by the district attorney." *Id.*

II. Preclusive effect of petition to terminate registration

With this background in mind, we turn to the preclusive effect of a ruling on a petition to terminate registration. Importantly, the registration statute expressly anticipates successive petitions to terminate registration. *Id.* § 14-208.12A(a3). Following the denial of a petition, the offender "may again petition the court for relief . . . one year from the date of the denial of the original petition to terminate the registration requirement." *Id.*

This one-year refiling provision advances the statute's purpose because the ultimate decision to grant a petition to terminate registration turns on whether the trial court is "satisfied that the petitioner is not a current or potential threat to public safety." *Id.* § 14-208.12A(a1)(3). If the offender is unable to persuade the court on this issue, the statute provides a one-year period in which the offender can make life changes that might address the court's concerns. *See id.* § 14-208.12A(a3).

It follows, then, that a trial court's ruling on whether an offender is a threat to public safety is not subject to issue preclusion. The General Assembly intended to give offenders the ability to return to court after at least one year has passed and, in effect, seek reconsideration of the trial court's earlier determination that the offender is a threat to public safety. Because this discretionary, fact-based determination is, by its nature, a matter over which reasonable jurists could reach different results, an earlier determination does not bar a court from reaching a different determination in the future, even on largely identical facts.

But the same is not true for the determination of an offender's tier level under SORNA. Unlike determining whether an offender is a threat to public safety, calculating an offender's tier level under SORNA is a legal question with only one objectively correct answer. *See State v. Moir*, 369 N.C. 370, 375–90 (2016). In the American legal system, we do not tolerate conflicting answers to pure legal questions. *See Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991). One of the principal reasons we have appellate courts is to prevent "divergent development" of legal issues by creating a system that can establish a single, precedential answer. *Id.* at 234.

Applying this principle here, the trial court's calculation of Lingerfelt's tier level under SORNA is subject to issue preclusion. It is not possible for a trial court to *correctly* rule that Lingerfelt is a Tier II offender in one petition but a Tier I offender in a successive petition. This is a legal question, so one of these two rulings is a legal error. If Lingerfelt believed the trial court's first ruling was an error, he was required to appeal that ruling to avoid its preclusive effect in future petitions. He cannot accept the ruling, decline to appeal, and then insist that a future court can rule a different way on the same question of law. *See Calloway v. Ford Motor Co.*, 281 N.C. 496, 501 (1972).

III. Type of preclusion applicable to successive petitions

Having established that an offender's tier level under SORNA is a legal question subject to preclusion, we turn to the second question: What doctrine of preclusion applies to successive petitions to terminate registration? Lingerfelt argues that the appropriate doctrine is collateral estoppel. Collateral estoppel applies to issues raised and actually litigated in an earlier legal proceeding. *State v. Summers*, 351 N.C. 620, 623 (2000). The doctrine protects litigants "from the burden of relitigating previously decided matters" when those matters arise in another, separate legal proceeding. *Thomas M. McInnis & Assocs. v. Hall*, 318 N.C. 421, 427 (1986).

By contrast, when an issue is decided in the *same* legal proceeding, the applicable form of preclusion is known as law of the case. *Williams v. Asheville Contracting Co.*, 257 N.C. 769, 771 (1962). Law of the case arises in two different ways. The first is when an appellate court rules on a question and returns a case to the lower courts. *See State v. Lewis*, 365 N.C. 488, 504–05 (2012). The ruling of that appellate court is "the law of the case" and therefore binding on the lower courts in that same proceeding. *Id.* The second form arises when a trial court rules on a legal matter in a final, appealable judgment, but no appeal is taken. *Williams*, 257 N.C. at 770–71. At that point, the trial court's ruling becomes "the law of the case" and binds the parties if the case is reopened, for example by remand from an appellate court reviewing unrelated issues. *Id.* at 771; *see also Summers*, 351 N.C. at 622. In other words, "when a party fails to appeal from a tribunal's decision that is not interlocutory, the decision below becomes 'the law of the case' and cannot be challenged in subsequent proceedings in the same case." *Boje v. D.W.I.T., L.L.C.*, 195 N.C. App. 118, 122 (2009).

Identifying which of these two preclusive doctrines applies in this case is meaningful. Collateral estoppel is an affirmative defense. *Old Republic Nat'l Title Ins. Co. v. Hartford Fire Ins. Co.*, 369 N.C. 500, 505 (2017). This means it must be asserted by the party seeking to invoke it. Courts cannot raise affirmative defenses on their own initiative. *Unifund CCR, LLC v. Francois*, 260 N.C. App. 443, 445 (2018). Here, the State did not raise collateral estoppel when Lingerfelt filed his successive 2023 petition and thus, if collateral estoppel is the appropriate doctrine, the issue is waived. *See Robinson v. Powell*, 348 N.C. 562, 566 (1998); *Moss v. N.C. Dep't of State Treasurer*, 282 N.C. App. 505, 517 (2022).

By contrast, law of the case is not an affirmative defense asserted by a litigant; it is a question of law for the courts. *See Fish v. Stetina*, 297 N.C. App. 733, 738 (2025). The doctrine is designed to protect the finality of court rulings and judgments that occur within the same legal proceeding. *Id.*; *see also Wellons v. White*, 229 N.C. App. 164, 179 (2013).

Applying these principles here, we hold that successive petitions to terminate registration under N.C.G.S. § 14-208.12A are all part of the same underlying proceeding and are therefore subject to law of the case. *See Williams*, 257 N.C. at 771. We reach this holding for several reasons.

First, petitions to terminate registration fall within a category of filings that are traditionally viewed as successive proceedings within a single criminal case, such as post-conviction filings and petitions for removal of satellite-based monitoring. *See generally State v. Cheers*, 285

N.C. App. 394, 396–98 (2022). These filings are not independent legal actions; instead, they are requests for relief from the effect of earlier court judgments. *See id.* They are therefore considered part of the same underlying case and a legal ruling on one petition is binding in future petitions. *See State v. Tucker*, 385 N.C. 471, 491–92, 514 (2023). And although the General Assembly has since codified this procedural rule for some post-conviction proceedings, the preexisting common law rule that they are all part of the same underlying case was not supplanted and remains in effect. *See State v. White*, 274 N.C. 220, 232 (1968).

Second, the procedure to terminate registration confirms that successive petitions are part of the same case. The statute requires the petition to be put on the criminal docket and to be calendared by the district attorney. N.C.G.S. § 14-208.12A(a). The General Assembly created this unusual process because, as noted above, these petitions are not independent legal actions. Every petition connects back to the underlying criminal judgment that compelled the initial registration. Indeed, the petitions in this case underscore that they are all filings in the same proceeding. Lingerfelt filed three petitions between 2017 and 2023. All of those petitions and corresponding court orders bear the same case number—the case number for Lingerfelt's underlying criminal case. *See Fish*, 297 N.C. App. at 740–41.

In sum, Lingerfelt's 2023 petition for removal from the sex offender registry was barred by law of the case. In 2019, the trial court entered a final, appealable order ruling that Lingerfelt was a Tier II offender not eligible for removal from the registry until 25 years after his initial 2003 registration. Lingerfelt did not appeal that order, rendering it the law of the case. *See Summers*, 351 N.C. at 622. As a result, that ruling cannot be challenged in a successive termination petition because that petition is part of "subsequent proceedings in the same case." *See Boje*, 195 N.C. App. at 122.

Finally, we acknowledge that the State did not assert a law of the case argument at the Court of Appeals. Because the State failed to do so, Lingerfelt insists that the argument is abandoned before this Court.

This is incorrect because the State is the appellee. Appellate review of a lower court ruling is strictly limited to the arguments presented by the *appellant* (absent certain nonwaivable issues such as subject matter jurisdiction). It "is not the role of the appellate courts to create an appeal for an appellant." *In re R.A.F.*, 384 N.C. 505, 512 (2023) (cleaned up). This is because litigants are not compelled to appeal a court judgment even if they believe it is legally wrong. They can choose to accept

some or all of an adverse judgment and allow the finality of that ruling to take effect. As a result, an appellate court will review only those issues the appellant presents to it, even if there appear to be other, unraised grounds that render the lower court judgment infirm. *In re E.H.*, 388 N.C. 100, 107–09 (2025).

But this principle does not apply to the arguments of the appellee. A reviewing court is not constrained to uphold a lower court ruling solely on the legal grounds presented by the appellee. Were it otherwise, it could compel an appellate court to reverse a judgment that is legally sound—in effect permitting litigants to stipulate to what the law is and, as a result, permitting them to force an appellate court to invalidate a proper trial court judgment. We do not allow this. *See Tucker*, 385 N.C. at 489–90. Instead, appellate courts must affirm lower court rulings if there is any legal ground to do so, even if the appellee did not raise that legal issue in its briefing. *See Shore v. Brown*, 324 N.C. 427, 428–29 (1989).

Of course, courts always benefit from the adversarial process, and so the better practice in this circumstance is to direct the parties to address the legal issue the appellee omitted through supplemental briefing, as we did here. *See State v. Lingerfelt*, 388 N.C. 514 (2025) (order). Having reviewed those supplemental briefs, we reject Lingerfelt's argument that this is a matter of collateral estoppel for the reasons discussed above. We hold that Lingerfelt's petition was barred by law of the case. We therefore affirm the Court of Appeals decision on that basis, without addressing the court's remaining analysis.

Conclusion

We modify and affirm the decision of the Court of Appeals.

MODIFIED AND AFFIRMED.

Justice RIGGS dissenting.

I disagree with the majority's holding that treats a ruling in one petition under N.C.G.S. § 14-208.12A as binding on future petitions, thereby requiring that the law of the case doctrine applied to procedurally bar Mr. Lingerfelt's 2023 petition. I do not read section 14-208.12A as the majority does, and in deference to the legislature, I would hold that even if the law of the case doctrine were the correct preclusion doctrine to apply, it does not control here. Importantly, both the State and Mr. Lingerfelt agree. Thus, the trial court was not bound by prior adjudications of Mr.

Lingerfelt's petitions because each subsequent petition is a new action under the statutory framework, and this Court should have reached the merits of Mr. Lingerfelt's case.

I. Background

Section 14-208.12A of the North Carolina General Statutes allows a trial court to grant relief to a petitioner and thus terminate the sex offender registration requirements if:

> (1) The petitioner demonstrates to the court that he or she has not been arrested for any crime that would require registration under this Article since completing the sentence,
>
> (2) The requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State, and
>
> (3) The court is otherwise satisfied that the petitioner is not a current or potential threat to public safety.

N.C.G.S. § 14A-208.12A(a1) (2025). "If the court denies the petition, the person may again petition the court for relief in accordance with this section one year from the date of the denial of the original petition to terminate the registration requirement." N.C.G.S. § 14A-208.12A(a3).

On 9 June 2023, Mr. Lingerfelt timely appealed to the Court of Appeals from a 2023 trial court order denying his petition to terminate registration on the sex offender registry. In a divided opinion, the Court of Appeals affirmed the trial court's denial of Mr. Lingerfelt's petition. *See State v. Lingerfelt*, 297 N.C. App. 168 (2024). The Court of Appeals first outlined the Sex Offender Registration and Notification Act (SORNA). *See id.* at 171. Applying *State v. Moir*, 369 N.C. 370 (2016), the Court of Appeals then selected the "categorical modified approach" as the appropriate means for determining whether Mr. Lingerfelt was eligible to have his sex offender obligation reduced based on his tier level under SORNA. *See id.* at 173. In applying this approach, the majority compared the relevant state statute, N.C.G.S. § 14-27.7(a), with the relevant federal statute, 18 U.S.C. § 2243(a), to determine whether there was a categorical match between the state and federal offenses. *See Lingerfelt*, 297 N.C. App. at 171, 175–77. The majority, agreeing with the dissent, noted that the federal statute includes an intent element in outlining its offense

and the state statute does not. *See id.* at 177. However, the majority reasoned there must be a *categorical* match between the state and federal statutes because "there is no *realistic probability* that North Carolina could or would enforce its statute in a way that would sweep in *unintentional* sexual activity by a substitute parent." *See Lingerfelt*, 297 N.C. App. at 177–78. Ultimately, the court concluded that the trial court did not err in denying Mr. Lingerfelt's petition and affirmed the decision. *See id.* at 178.

Judge Murphy dissented, holding that the majority opinion incorrectly applied *Moir*, which, in his view, held that when the state statute is broader than the generic, federal offense, there is no categorical match. *See id.* at 178–79 (Murphy, J., dissenting). He would have held that because the state statute clearly excludes any additional *mens rea* element, Mr. Lingerfelt was not a Tier II offender under the applicable federal law. *See id.* at 179. Judge Murphy would have vacated the trial court's order denying Mr. Lingerfelt's petition for termination of sex offender registration and remanded to the trial court for a new determination. *Id.* at 182. Still, Judge Murphy acknowledged that the ultimate decision on whether to terminate Mr. Lingerfelt's registration would fall to the trial court. *Id.*; *see In re Hamilton*, 220 N.C. App. 350, 359 (2012).

This case came to this Court after Mr. Lingerfelt appealed as of right based on the dissent at the Court of Appeals. The issue presented to this Court was whether the Court of Appeals erred when it affirmed the trial court's determination and subsequent denial of Mr. Lingerfelt's 2023 petition because it determined that Mr. Lingerfelt fell under Tier II for the purpose of removal from the sex offender registry.

On 11 September 2025, this Court heard oral arguments in this appeal. During the argument, Justice Dietz inquired whether the 2019 decision by a lower court on Mr. Lingerfelt's tier status binds any subsequent petitions under the law of the case doctrine. *See* Oral Argument at 6:59, *State v. Lingerfelt*, No. 38A25 (N.C. Sep. 11, 2025), https://www.youtube.com/watch?v=Q5YSkT_Dx5c. This argument was never raised by Mr. Lingerfelt or the State throughout the years of proceedings. Nevertheless, the Court subsequently ordered supplemental briefing on this issue. *See id.* at 32:42; *State v. Lingerfelt*, No. 38A25 (N.C. Sep. 19, 2025) (order).

II. Discussion

As a preliminary note, the majority suggests that, at least with respect to subsection (a1)(2) and the tier assignment for crimes committed under federal or other states' laws, "calculating an offender's tier

level under SORNA is a legal question with only one objectively correct answer." Accordingly, the majority concludes that the trial court's conclusion of Mr. Lingerfelt's tier level under SORNA is subject to issue preclusion. This is an oversimplification. The majority relies on *Moir*, where this Court held that trial courts should use the "modified categorial approach" in determining whether there is a match between a federal offense and a state offense for the purposes of tier determination under SORNA. *See Moir*, 369 N.C. at 375–90. I understand why, when focusing on the modified categorical approach, it seems like the question of tier should have only one "correct" answer. But even in *Moir*, the analysis is more nuanced. In footnote 9 in *Moir*, our Court explicitly noted that notwithstanding the general direction to use the modified categorical approach, the Court held

> that North Carolina courts should use the non-categorical or 'circumstance-specific approach' in addressing any age-related issues that may arise in the course of determining whether an individual seeking the termination of an existing sex offender registration requirement should be categorized as a Tier I, a Tier II, or a Tier III offender.

Id. at 385 n.9. This is the more fact-dependent approach to matching crimes, which, by definition, does not present a purely legal question. The evidence presented at the time, and the trial court's analysis of the facts, dictate the conclusion. Moreover, as we have seen in recent cases, *State v. Mincey*, No. 68A24, slip op. at 4 (N.C. May 22, 2026), the status of laws in other states changes with some regularity and courts receive misinformation about the details of statutes in other states. This also complicates what the majority describes as a purely legal question with an objectively correct answer.

The majority reasons that the successive petitions are all part of the same case; therefore, the issue of tier level is precluded by an earlier court's determination, and the law of the case doctrine applies to that issue. To the contrary, both Mr. Lingerfelt and the State essentially argue that the law of the case doctrine is pre-empted by the fact that the General Assembly has expressly allowed defendants to file a new petition to terminate their registration from the sex offender registry one year from a denied petition. Furthermore, both point to an absence in the statute of any language that suggests that rulings in earlier petition proceedings bind subsequent petition proceedings, regardless of under which prong an earlier petition is denied. I agree with the State and Mr. Lingerfelt's reading of the statute.

The plain language of the statute creating the process permitting successive petitions is consistent with a conclusion that each subsequent petition is a new legal action; therefore, sub-issues determined in a previously adjudicated petition are not binding on later petitions. As discussed above, section 14-208.12A(a)(a1) outlines three requirements a petitioner must satisfy when requesting removal from the sex offender registry: the petitioner has been on the registry for a period of at least ten years; they have not been arrested for any other registerable offenses; and their removal from the registry would not be in violation of any federal laws. The statute does not treat the three conditions for relief differently, suggesting that some are fact questions and some are legal questions or that some conditions can be re-examined yearly while others cannot. The statute, in prescribing that the court "may" grant relief if the three conditions are met, requires the court to assess all three conditions at each petition filing and each condition must be met for the petitioner to qualify for relief. N.C.G.S. § 14-208.12A(a1).

The majority suggests the one-year refiling provision advances the "statute's purpose" because "the ultimate decision to grant a petition to terminate registration turns on whether the trial court is 'satisfied that the petition is not a current or potential threat to public safety.' " *See* majority *supra* Part I. But as discussed above, that is not the only condition that the trial court must assess under subsection (a1), nor is it identified as the most important condition to be assessed. The fact that petitioners can refile only a year after denial, even though the number of years between each tier level is significantly more than a year, suggests that if a tier finding were intended to be binding, a subsequent petition should be barred until eligibility under the tier identified is reached. *See* N.C.G.S. § 14-208.12A; 42 U.S.C. § 16915(a) (providing that a Tier I offender must remain registered for fifteen years; Tier II for twenty-five years; and Tier III for a lifetime); *Moir*, 369 N.C. at 375–76. The statute creates no such restriction on subsequent petitions.

Additionally, the cases upon which the majority relies to suggest that a new petition is not an independent legal action are all distinguishable or do not support the majority's legal conclusion here. The majority relies on *State v. Cheers*, where the Court of Appeals addressed the removal of satellite-based monitoring (SBM), for the assertion that petitions to terminate registration are "successive proceedings" that fall within a "single criminal case." *See* majority *supra*, Part III (citing *Cheers*, 285 N.C. App. 394, 396–98 (2022)). First, that section 14-208.40A (governing SBM) requires successive petitions to be put on the criminal docket under the same case number does not necessarily mean that all

petitions under that statute are part of the same case implicating the law of the case doctrine. Rather, it is simply a procedure that allows easy referral to the underlying conviction.

More significantly, the procedural bars constraining post-conviction motions for appropriate relief (MARs) under section 15A-1419 show that the legislature knows how to create procedural bars where it intends to prioritize finality over the regular revisiting of a collateral consequence. The MAR procedural bar statute creates an *explicit* procedural bar against MARs when a defendant was in the position to raise a ground for relief and did not do so or when the ground or issue underlying the motion was previously determined on the merits upon an appeal or upon a previous motion or proceeding. N.C.G.S. § 15A-1419 (2025). But that does not support a reliance here on *State v. Tucker*, 385 N.C. 471 (2023), to assert that a "legal ruling on one petition is binding in future petitions." *See* majority *supra* Part III (citing *Tucker*, 385 N.C. at 491–92, 514); N.C.G.S. § 15A-1419. MARs, like petitions to be removed from the registry, are also docketed on the criminal docket under the original case in which the trial that led to conviction occurred. N.C.G.S §§ 15A-1413, -1420 (2025). But unlike the MAR statutes, the General Assembly provided a procedure for petitioners to file petitions for relief from the registry annually, and it did not similarly establish explicit procedural bars to keep petitioners from refiling for said relief like with MARs.

The majority's interpretation of the statute makes distinctions between the elements that a petitioner must prove each time he petitions which is not found in any of the statute's plain text. As such, it is erroneous and usurps the legislature's authority to establish the contours for seeking relief from the registration requirements.

I would also hold the law of the case doctrine does not apply here. Under the law of the case doctrine, this Court has explained that

> [a]s a general rule, when an appellate court passes on questions and remands the case for further proceedings to the trial court, the questions therein actually presented and necessarily involved in determining the case, and the decision on those questions become the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal, provided the same facts and the same questions, which were determined in the previous appeal, are involved in the second appeal.

Tenn.–Carolina Transp., Inc. v. Strick Corp., 286 N.C. 235, 239 (1974) (quoting *Collins v. Simms*, 257 N.C. 1, 11 (1962) (Parker, J., concurring in part and dissenting in part)).

Even to the extent the statutory structure for repetitioning does not create a very different kind of situation from ones in which law of the case applies, we should not apply it here. First, this Court has long recognized that appellate courts cannot assert arguments for the parties. *See, e.g.*, *In re E.H.*, 388 N.C. 100, 101 (2025); *In re A.M.O.*, 375 N.C. 717, 721 (2020) ("It is not the role of the appellate courts to create an appeal for an appellant." (cleaned up)). Although this Court requested supplemental briefing on the applicability of the law of the case to these facts, neither Mr. Lingerfelt nor the State raised this argument at any point during the proceedings nor in their supplemental briefings. Even though law of the case may not be an affirmative defense, we still have a long history of not making parties' arguments for them. Accepting the application of the doctrine would be in direct contravention of established precedent by this Court. *See In re E.H.*, 388 N.C. at 101. In other words, appellate review is strictly limited to the issues raised by the parties because those legal issues are considered "joined" after adversarial briefs. *See id.* (citing *State ex rel. Comm'r of Ins. v. N.C. Auto. Rate Admin. Off.*, 293 N.C. 365, 368 (1977)). To allow appellate courts to pose new arguments for the parties would "risk misunderstanding the record or announcing a legal rule that is simply wrong." *Id.* Because neither party mounted the law of the case argument, it was not preserved for appeal or our consideration. *See Moss v. N.C. Dep't of State Treasurer*, 282 N.C. App. 505, 517 (2022).

In conclusion, I would defer to the statute as written by the legislature and hold that the law of the case doctrine does not apply because each petition is a new proceeding and the prior adjudication is non-binding. Even if the law of the case doctrine did apply, it is an assertion that the State waived on appeal and neither party raised in its supplemental briefings. Because the majority's holding clearly contravenes the statute, I respectfully dissent.

Justice EARLS joins in this dissenting opinion.

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