372 N.C.—No. 4 Pages 362-728

GENERAL RULES OF PRACTICE; RULES OF APPELLATE PROCEDURE

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

NOVEMBER 14, 2019

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

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OF
NORTH CAROLINA

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SUPREME COURT OF NORTH CAROLINA

CASES REPORTED

FILED 16 AUGUST 2019

ORDERS

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

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ARREST

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unconstitutional as applied to individuals in defendant's category—those who were subject to mandatory lifetime SBM based solely on their statutorily defined status as a "recidivist" who also had completed their prison sentences and were no longer supervised by the State through probation, parole, or post-release supervision. Recidivists, as defined in the SBM statute, did not have a greatly diminished privacy interest in their bodily integrity or their daily movements; the SBM program constituted a substantial intrusion into those privacy interests; the State failed to demonstrate that the SBM program furthered its interest in solving crimes, preventing crimes, or protecting the public. **State v. Grady, 509.**

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causing the juvenile's removal from the parental home. Where an act of domestic violence and the discovery of an unexplained bruise on the daughter's arm led to her removal from her home, respondent-mother's failure to make reasonable progress to comply with her court-ordered case plan—for example, by abusing her Adderall prescription, failing to pass or submit to drug tests, and failing to complete a neuropsychological examination or participate in therapy—supported the trial court's termination of her parental rights. **In re B.O.A., 372.**

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No-merit brief—error by Court of Appeals—review of merits by Supreme Court—goal of resolving case expeditiously—After determining that the Court of Appeals erred in a termination of parental rights case by failing to conduct an independent review of the issues set out in a no-merit brief, the Supreme Court elected to conduct its own review of those issues in the interest of expeditiously resolving the case. The Supreme Court concluded that the trial court's order was supported by competent evidence and based on proper legal grounds. **In re L.E.M., 396.**

No-merit brief—independent review of issues by appellate court—The Court of Appeals erred by dismissing respondent-father's appeal from an order terminating his parental rights where respondent's attorney filed a no-merit brief pursuant to N.C. Rule of Appellate Procedure 3.1(d). The Supreme Court concluded that Rule 3.1(d) mandates an independent review on appeal of the issues contained in a no-merit brief, and it overruled the Court of Appeals decision to the contrary in *In re L.V.*, 814 S.E.2d 928 (N.C. Ct. App. 2018). **In re L.E.M., 396.**

Willful abandonment—due consideration of dispositional factors—Sufficient evidence existed to support the termination of respondent's parental rights based upon the willful abandonment and willful failure to pay child support. The trial court did not abuse its discretion in determining that termination would be in the children's best interests. **In re E.H.P., 388.**

SCHEDULE FOR HEARING APPEALS DURING 2019

NORTH CAROLINA SUPREME COURT

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

January 8, 9
February 4, 5, 6
March 4, 5, 6
April 8, 9, 10, 11
May 13, 14, 15
August 26, 27, 28, 29
September 30
October 1, 2
November 4, 5, 6, 7, 18, 19
December 9, 10, 11

ANDREA KIRBY CROWELL
v.
WILLIAM WORRELL CROWELL

No. 31A18

Filed 16 August 2019

Divorce—equitable distribution—distributive award—separate property

The trial court erred in an equitable distribution action by making a distributive award of separate property to pay a marital debt where the trial court noted that both parties were in their seventies and might not be able to pay their debts before their deaths. While N.C.G.S. § 50-20(e) neither explicitly allowed or excluded the use of separate property to satisfy a distributive award, the rest of the equitable distribution statute allowed for the distribution only of marital and divisible property. It would be inconsistent to read into this section the authority to use separate property to satisfy a distributive award.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 809 S.E.2d 325 (N.C. Ct. App. 2019), affirming in part and vacating in part a judgment and order entered on 15 August 2016 by Judge Christy T. Mann in District Court, Mecklenburg County. On 20 September 2018, the Court allowed plaintiff's petition for discretionary review of additional issues. Heard in the Supreme Court on 14 May 2019 in session in the Pitt County Courthouse in the City of Greenville pursuant to section 18B.8 of Chapter 57 of the 2017 Session Laws of the State of North Carolina.

Law Office of Thomas D. Bumgardner, PLLC, by Thomas D. Bumgardner, for plaintiff-appellant.

Hamilton Stephens Steele + Martin, PLLC, by Amy E. Simpson, for defendant-appellee.

BEASLEY, Chief Justice

In this case, we consider whether the Court of Appeals erred by upholding the trial court's distributive award in an equitable distribution action which contemplates the use of a spouse's separate property. We hold that it did. Plaintiff raised an additional issue for discretionary

review pertaining to corporate standing under North Carolina's equitable distribution statute, which we granted. We conclude that discretionary review of this issue was improvidently allowed.

I. Factual and Procedural Background

Plaintiff Andrea Crowell and defendant William Crowell were married in 1998 and divorced in 2015. Plaintiff initiated this action by filing a complaint on 17 February 2014 in District Court, Mecklenburg County, seeking equitable distribution of the parties' marital property, alimony, and postseparation support. Defendant filed an answer and counterclaim for equitable distribution. Following a three-day hearing, on 15 August 2016, the trial court entered an equitable distribution order and an order denying plaintiff's request for an award of alimony, the latter of which was not appealed. The trial court's decision regarding equitable distribution is the only decision on appeal.

The trial court found that the parties married in July 1998, legally separated in September 2013, and divorced in April 2015. No children were born of their marriage. The court found that defendant started several small real estate and development companies before the parties were married which he claimed were his separate property on the date of separation, but plaintiff claimed that she had a marital interest in each of them. The trial court found that after their marriage, the parties maintained a lavish lifestyle and lived significantly beyond their means. To fund their lifestyle, defendant sold his separate real and personal property and procured loans from the companies he owned.

When defendant began suffering from memory loss and dementia in 2011, his daughter from a previous marriage, Elizabeth Temple, was named president of the companies. Temple reviewed the company books and determined that both parties were borrowing money from the companies to the detriment of the companies and the other shareholders. Moreover, the companies were paying defendant inordinately high salaries and distributions. The court found that the loans "were made during the parties' marriage and most of the loaned money can be traced through deposits directly into the parties' personal joint bank account, to pay off personal credit cards, to purchase real estate in their personal name[s], and to [pay] expenses that had to be theirs personally." Although plaintiff claimed at trial that she had no knowledge of these loans, the court found her testimony not credible.

On the date of separation, the parties had incurred a significant amount of marital debt, which the trial court's findings detailed. This included debts to a majority of the companies in which defendant held

an ownership interest. The marital home, the primary marital asset, was sold after the date of separation for $1,075,000, the net proceeds of which were $230,657. Of that amount, $144,794 was distributed to plaintiff and $85,863 was distributed to defendant. The trial court found that plaintiff possessed two pieces of separate property at the time of separation—14212 Stewart's Bend Lane and 14228 Stewart's Bend Lane, in Charlotte, North Carolina (hereinafter, the "Stewart's Bend Properties"). The court noted that the parties also had stipulated to this effect in the final pretrial order.

The record indicates and the parties do not dispute that both of the Stewart's Bend Properties were acquired in the early 2000s by CKE Properties, LLC ("CKE").[1] According to the final pretrial order, plaintiff is "100% Owner" of CKE" and "the [o]nly purpose of the company is to own the real estate she purchased through a 1031 exchange using her separate funds." At issue in this appeal is the trial court's disposition of these two pieces of plaintiff's property.

14212 Stewart's Bend Lane

Plaintiff obtained two loans applicable to the 14212 Stewart's Bend Lane property. Although these loans were in plaintiff's name only, the trial court concluded that they were marital debts because the loans were obtained during the marriage and the proceeds were used for a marital purpose. The court distributed the debts, along with this parcel of separate real property to plaintiff; however, the court gave defendant credit for payments he made towards these loans between the dates of separation and divorce.

14228 Stewart's Bend Lane

As to the 14228 Stewart's Bend property, the trial court found that defendant obtained a loan secured by the property during the marriage but the proceeds were used for a marital purpose. The court distributed this marital debt to plaintiff, along with the underlying separate real property. Defendant made payments towards the loan between the dates of separation and divorce, and the court gave him credit for those payments.

The trial court noted that before the date of divorce in 2015, husband asked plaintiff to sell the house and lot at this address to eliminate the marital debt and divide the proceeds between them, but plaintiff

1. The final pretrial order states that CKE purchased both properties in 2002. The Rule 9(d) supplement to the record contains warranty deeds and property appraisals purporting to show that these properties were acquired in 2003.

refused to do so. Shortly after that, plaintiff "gifted" the home to her son Gentry Kirby.[2] The court found that at the time of this gift, the property was worth $390,000, "resulting in a $100,000 'gift' of equity to Mr. Kirby." The court found the transfer to be fraudulent as intended to deceive creditors and that Kirby was not a good faith purchaser. Therefore, the court found that the home and/or equity in the property may be considered when "determining the equitable distribution of the property and/or the distributive award that Plaintiff/Wife may be required to pay." The court further found that "Mr. Kirby does not need to be a party to this lawsuit in order for the Court to consider this property and the disposition thereof as part of this litigation."

Distributive Award

Ultimately, the trial court determined that the property should be divided equally, and that, to accomplish this result, plaintiff must pay defendant a distributive award of $824,294. The court noted that both parties are in their mid-seventies, that neither party was employed at the time, that defendant would not be able to obtain employment because of his physical condition, and that "[n]either party has any liquid marital property left." The court further found that due to a number of factors, "[t]here was no choice but to distribute all the debts to Defendant/Husband . . . which results in a heavy burden he may never be able to pay before his death and a distributive award owed by Plaintiff/Wife that she may never be able to pay before her death."

Noting that plaintiff lacks the means and ability to pay the $824,294 distributive award in full, the trial court stated in pertinent part:

> 198. . . . The Court finds [plaintiff] has the ability to pay the distributive award only as follows:
>
> . . . .
>
> **b) 145 Myer's Mill & 14212 Stewart's Bend:**
>
> Plaintiff/Wife shall be entitled to keep 14512 Myer's Mill so that she may continue to reside there. Plaintiff/Wife will sell 14212 Stewart's Bend and pay the net proceeds to Defendant/Husband.
>
> **c) 14228 Stewart's Bend:** Plaintiff/Wife can obtain a deed to this house back from Mr. Kirby, sell the property and distribute the net proceeds to Defendant/Husband

2. Plaintiff transferred 14228 Stewart's Bend Lane to Kirby on or about 29 May 2015.

> or she can have Mr. Kirby pay to Defendant/Husband $90,000 which represents the majority of equity he gained during the fraudulent "gift/transfer" to him of this property.

In the distributive portion of the order, the trial court ordered plaintiff to do as follows:

> **b) . . . 14212 Stewart's Bend:** Within thirty (30) days of the date of the execution of this Judgment/Order Plaintiff/Wife shall sign a listing agreement with a realtor selected by Defendant/Husband and will take all efforts to sell 14212 Stewart's Bend for fair market value. Plaintiff/Wife will cooperate with price reductions and repair requests recommended by the real estate agent and will accept any unconditional offer made within 2% of the then asking price. All of the net proceeds shall be paid to Defendant/Husband.
>
> **c) 14228 Stewart's Bend:** Within sixty (60) days of the date of the execution of this Judgment/Order Plaintiff/Wife shall sign a listing agreement with a realtor selected by Defendant/Husband and will take all efforts to sell this home for fair market value; OR Mr. Kirby will pay to Defendant/Husband $90,000 which represents the majority of the equity he gained during the fraudulent "gift/transfer" to him of this property.

Plaintiff appealed.

In a partially divided decision filed on 2 January 2018, the Court of Appeals affirmed in part and vacated in part the trial court's equitable distribution judgment and order. *Crowell*, 809 S.E.2d 325. In relevant part, the majority upheld the portion of the order directing plaintiff to sell the Stewart's Bend Properties. *Id.* at 331, 339. It determined that

> where the trial court was properly considering—not distributing—plaintiff's separate property in distributing the marital estate, specifically considering plaintiff's ability to pay a distributive award to defendant, the trial court did not abuse its discretion in ordering plaintiff to liquidate separate property in order to pay the distributive award.

Id. at 339. On this basis, the majority also concluded that neither CKE nor Kirby was a necessary party to the action in order for the trial court to order plaintiff to take action affecting title to the Stewart's Bend Properties, notwithstanding any respective ownership interests in those

properties they may possess. *Id.* at 333–334. As to the alternate $90,000 amount that Kirby was ordered, in the alternative, to pay, the panel unanimously concluded that the trial court lacked jurisdiction to require Kirby to pay funds to defendant where he was not a party to the action, and struck that portion of the order. *Id.* at 334.

In a separate opinion concurring in part and dissenting in part, Judge Murphy dissented from the majority's determinations that CKE was not a necessary party and that Kirby was not a necessary party except as to the alternative money judgment against him. *Id.* at 339 (Murphy, J., concurring in part and dissenting in part). The dissent disagreed with the majority's determination that "the trial court . . . merely considered the separate [Stewart's Bend Properties] in distributing the marital estate." *Id.* at 340. Rather, the dissent concluded that "[i]nstead of considering the separate property, the trial court improperly restricted the abilities and rights of CKE," which "must list the property at 14212 Stewart's Bend and pay proceeds to [d]efendant," and "Kirby, [who] must transfer title of 14228 Stewart's Bend to [p]laintiff" to be sold. *Id.* Thus, as the dissenting judge reasoned, the trial court improperly "entered an equitable distribution judgment and order affecting the rights and interests of parties not joined in the action." *Id.*[3] In sum, the dissent concluded that "CKE and Kirby are necessary parties to this action, and the trial court lacked the power to require their action or affect their rights without first being joined as parties." *Id.*

Plaintiff appealed as of right based upon the dissenting opinion. She also sought discretionary review of additional issues, which this Court granted in part on 20 September 2018.

II. Discussion

Plaintiff contends that the Court of Appeals erred by sanctioning the trial court's distribution of her separate property contrary to North Carolina law. This is a question of statutory interpretation, and where questions of statutory interpretation exist, this Court reviews them de novo. *In re Foreclosure of Vogler Realty, Inc.*, 365 N.C. 389, 392, 722 S.E.2d 459, 462 (2012). We agree with plaintiff.

In equitable distribution actions, Section 50-20 of the North Carolina General Statutes authorizes trial courts to distribute marital

3. The dissent opined that, in addition, the trial court's order prevents these non-parties from raising defenses and protections under the Uniform Fraudulent Transfer Act or exercising their constitutional rights to a jury trial. *Crowell*, 809 S.E.2d 340. As we resolve this case upon other grounds, we need not reach this additional basis for the dissenting opinion.

and divisible property between divorcing parties. *See* N.C.G.S. § 50-20(a) (2017) ("Upon application of a party, the court shall determine what is the marital property and divisible property and shall provide for an equitable distribution of the marital property and divisible property between the parties in accordance with the provisions of this section."). "Marital property" is "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of separation of the parties, and presently owned." N.C.G.S. § 50-20(b). "Separate Property" constitutes "all real and personal property acquired by a spouse before marriage." *Id.*

"Following classification, property classified as marital is distributed by the trial court, while separate property remains unaffected." *McLean v. McLean*, 323 N.C. 543, 545, 374 S.E.2d. 376, 378 (1988) (citing *Hagler v. Hagler*, 319 N.C. 287, 289, 354 S.E.2d 228, 232 (1987)). "Pursuant to the Equitable Distribution Act, the trial court is only permitted to distribute marital and divisible property." *Mugno v. Mugno*, 205 N.C. App. 273, 277, 695 S.E.2d. 495, 498 (2010) citing N.C.G.S. § 50-20(a); *Hagler*, 319 N.C. at 289, 354 S.E.2d. 232. Separate property may not be distributed. *See Clark v. Dyer*, 236 N.C. App. 9, 21, 762 S.E.2d 838, 844 (2014) (observing that the trial court correctly declined to distribute real property it considered to be separate property "since the trial court cannot distribute separate property."). Here, the trial court found, and the parties stipulated, that both the Stewart's Bend Properties were plaintiff's separate property.

The issue is whether the trial court distributed separate property for purposes of Section 50-20 when it ordered plaintiff to liquidate her separate property to pay a distributive award. We hold that it did. We further conclude that there is no distinction to be made between "considering" and "distributing" a party's separate property in making a distribution of marital property or debt where the effect of the resulting order is to divest a party of property rights she acquired before marriage.

As an initial matter, the idea that the trial court may "consider" a spouse's separate property in making a distribution of the marital property appears to have originated in *Miller v. Miller*, 97 N.C. App. 77, 80, 387 S.E.2d 181, 184 (1990). There, the Court of Appeals held that a spouse who failed to support his claim that certain debt was marital did not meet his burden to "present evidence from which the trial court can classify, value and distribute the property" because

> [t]he requirements that the trial court (1) classify and value all property of the parties, both separate and marital, (2) *consider the separate property in making a distribution of*

> *the marital property*, and (3) distribute the marital property, necessarily exist only when evidence is presented to the trial court which supports the claimed classification, valuation and distribution.

Id. at 80, 387 S.E.2d at 184 (emphasis added). While this language has been frequently quoted by the Court of Appeals, until the present case, it has been in the context of the type of issue presented in *Miller*—a failure of one party to present evidence of the proper classification of property as marital, divisible, or separate.[4] *See, e.g.*, *Cushman v. Cushman*, 244 N.C. App. 555, 566, 781 S.E.2d 499, 506 (2016); *Young v. Gum*, 185 N.C. App. 642, 649 S.E.2d 469 (2007).

N.C.G.S. § 50-20 provides that the trial court making an equitable distribution will consider separate property in one context only: the trial court must consider "[a]ny direct contribution to an increase in value of separate property which occurs during the course of the marriage." N.C.G.S. § 50-20(c)(8). Thus, a party who, during the marriage, causes an increase in value in her spouse's separate property can receive some credit for that increase in value during the equitable distribution proceeding. *See Turner v. Turner*, 64 N.C. App. 342, 346, 307 S.E.2d 407, 409 (1983) ("If . . . an equity in [separate] property developed during the marriage because of improvements or payments contributed to by defendant, that equity (as distinguished from a mere increase in value of separate property, excluded by the statute) could be marital property, in our opinion, upon appropriate, supportable findings being made. *And if not marital property, such equity, if it developed, would be a factor requiring consideration by the court, along with the other factors specified in the statute, before determining how much of the marital property each party is entitled to receive.*" (emphasis added)).

Here, the trial court's "consideration" of plaintiff's separate property did not occur in the context of whether defendant contributed to an increase in the property's value or determining the amount of marital property and debt that should be distributed to each party. Instead, the trial court ordered plaintiff to *use* specific items of separate property to satisfy marital debt, immediately affecting her rights in that property. As a result, to ascertain the legality of this order, we must further determine

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4. Taken in context, the reference to "consideration" of separate property contained in *Miller* is clearly intended to recognize a trial judge's undoubted authority to consider the amount of separate property held by each party in determining the amount of marital property and debt that should be distributed to each party at the conclusion of the equitable distribution process.

whether a court's distributive award may reach separate property in this way.

To resolve the issue, we consider the plain language of the equitable distribution statute and, to the extent there is any ambiguity, its apparent purpose. *Diaz v. Div. of Soc. Servs. & Div. of Med. Assistance, N.C. Dep't of Health & Human Servs.*, 360 N.C. 384, 386–87, 628 S.E.2d 1, 3 (2006). Section 50-20(a) states that the trial court "shall provide for an equitable distribution of the marital property and divisible property between the parties in accordance with the provisions of this section." Regarding distributive awards, subsection (e) of the statute provides that, where the presumption in favor of in-kind distribution is rebutted,

> the court in lieu of in-kind distribution shall provide for a distributive award in order to achieve equity between the parties. The court may provide for a distributive award to facilitate, effectuate or supplement a distribution of marital or divisible property. The court may provide that any distributive award payable over a period of time be secured by a lien on specific property.

N.C.G.S. § 50-20(e). While we note that the text of this subsection does not exclude the requiring the use of separate property to satisfy a distributive award, it does not explicitly allow such a use either. However, an intent to avoid directly affecting a party's rights in separate property can be inferred from the text of section 50-20, which provides only for "distribution of the *marital property and divisible property* between the parties." N.C.G.S. § 50-20(a) (emphasis added). Our courts cannot "delete words used" or "insert words not used" in a statute. *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014). In light of the fact that the rest of the equitable distribution statute allows for the distribution of only marital and divisible property, it is inconsistent to read into this subsection the authority for the trial court to order the use of separate property to satisfy a distributive award, and we decline to do so today.

As this Court has long observed, only marital property is to be distributed and separate property is to "remain[ ] *unaffected*." *McLean*, 323 N.C. at 545, 374 S.E.2d. at 378 (emphasis added). Therefore, we conclude that trial courts are not permitted to disturb rights in separate property in making equitable distribution award orders. Here, the trial court ordered plaintiff to liquidate the Stewart's Bend Properties "to pay down the distributive award." Because this component of the trial court's order unquestionably disturbed plaintiff's rights in her separate

property, the trial court's actions amounted to an impermissible distribution of that property. The Court of Appeals' determination to the contrary is overruled.

We acknowledge that where a marriage is in debt, it is difficult to envision a scenario in which the making of a distributive award will not affect a party's separate property in some manner. Nevertheless, within the confines of N.C.G.S. § 50-20, the trial court in this case was only permitted to use that debt in calculating the amount of the distributive award, not to dictate how the debt was to be paid.[5] Accordingly, we reverse the Court of Appeals' holding that the trial court did not err by issuing a distributive award ordering plaintiff to liquidate the Stewart's Bend Properties, and we remand for further proceedings.

Plaintiff further argues, based upon the Court of Appeals' dissenting opinion, that the trial court could not exercise jurisdiction over CKE and Kirby when they were not joined as parties in the equitable distribution action. The parties stipulated and the trial court found that the Stewart's Bend Properties were plaintiff's separate property on the date of separation. In light of our holding that the trial court lacked statutory authority to order disposition of plaintiff's separate property, it is not necessary to reach this issue.

In sum, we hold: (1) the Court of Appeals erred in upholding the trial court's order directing plaintiff to liquidate her separate property to pay down the distributive award because it effectively distributed her separate property and (2) discretionary review of whether N.C.G.S. § 50-20 grants corporations standing to seek reimbursement for debts was improvidently allowed.

Accordingly, we reverse the holding of the Court of Appeals and remand for further proceedings consistent with this opinion.

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

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5. This is not intended to modify or limit the ordinary civil contempt power of the trial court pursuant to N.C.G.S. § 5A-21 should plaintiff fail to comply with the distribution order. Under that authority, all of plaintiff's assets may be taken into account when assessing her ability to comply with the order.

IN RE B.O.A.

[372 N.C. 372 (2019)]

IN THE MATTER OF B.O.A.

No. 264PA18

Filed 16 August 2019

Termination of Parental Rights—failure to make reasonable progress—direct or indirect factors leading to removal

The Court of Appeals erred by reversing the trial court's order terminating respondent-mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(2) for failure to make reasonable progress in correcting the conditions that led to her daughter's removal from her home. "Conditions of removal," as contemplated by N.C.G.S. § 7B-1111(a)(2), includes all of the factors that directly or indirectly contributed to causing the juvenile's removal from the parental home. Where an act of domestic violence and the discovery of an unexplained bruise on the daughter's arm led to her removal from her home, respondent-mother's failure to make reasonable progress to comply with her court-ordered case plan—for example, by abusing her Adderall prescription, failing to pass or submit to drug tests, and failing to complete a neuro-psychological examination or participate in therapy—supported the trial court's termination of her parental rights.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 818 S.E.2d 331 (N.C. App. 2018), reversing and remanding an order terminating parental rights entered on 8 September 2017 by Judge Caroline S. Burnette in District Court, Granville County. Heard in the Supreme Court on 28 May 2019 in session in the State Capitol Building in the City of Raleigh.

Hicks & Wrenn, PLLC, by C. Gill Frazier, II, and N. Kyle Hicks for petitioner Granville County Department of Social Services, and Bell, Davis & Pitt, P.A., by Derek M. Bast, Guardian ad Litem Program attorney for the minor child, appellants.

Edward Eldred Attorney at Law, PLLC, by Edward Eldred, for respondent-appellee mother.

Elizabeth Kennedy-Gurnee and Jamie Hamlett for North Carolina Association of Social Services Attorneys, amicus curiae.

ERVIN, Justice.

The issue before the Court in this case is whether the Court of Appeals correctly held that the trial court had erred by determining that the parental rights of respondent-mother Lauren B. in her daughter, B.O.A.,[1] were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2) on the grounds that respondent-mother had failed to make reasonable progress in correcting the conditions that led to Bev's removal from her home. After careful consideration of the relevant legal authorities in light of the record evidence, we reverse the Court of Appeals' decision.

Bev was born to respondent-mother and Harry A.[2] on 4 April 2015. On 9 August 2015, the Butner Department of Public Safety was called to the family home after respondent-mother sought emergency assistance to deal with assaultive conduct in which the father was engaging against her. As a result of this altercation, both parties were placed under arrest. In view of the fact that Bev was present in the family home at the time of the disturbance and had a lengthy bruise on her arm, investigating officers notified the Granville County Department of Social Services about what had occurred. On 10 August 2015, DSS filed a petition alleging that Bev was a neglected juvenile because she lived "in an environment injurious to the juvenile's welfare." On the same date, Judge Daniel F. Finch entered an order granting nonsecure custody of Bev to DSS based upon the fact that Bev had a bruised right arm.

On 20 August 2015, a social worker met with respondent-mother for the purpose of developing an Out of Home Service Agreement, or case plan.[3] In the resulting case plan, respondent-mother agreed, among other things, to obtain a mental health assessment; complete domestic violence counseling and avoid situations involving domestic violence; complete a parenting class and utilize the skills learned in the class during visits with the child; remain drug-free; submit to random drug screenings; participate in weekly substance abuse group therapy meetings; continue to attend medication management sessions; refrain from engaging in criminal activity; and maintain stable income for at least

1. The juvenile will be referred to throughout the remainder of this opinion as "Bev," which is a pseudonym used for ease of reading and to protect the juvenile's privacy.

2. Bev's father, Harry A., voluntarily relinquished his parental rights to Bev on 9 November 2016 and is not currently a party to this proceeding.

3. Although the case plan to which respondent-mother and DSS agreed does not appear in the record, its contents are reflected in a report that DSS submitted on 14 January 2016.

three months. After a hearing held on 17 and 18 December 2015, Judge J. Henry Banks entered an order on 12 January 2016, in which he found, among other things, that the home maintained by Bev's parents constituted an "injurious environment"; that respondent-mother was "in therapy for domestic violence, addiction, ADHD/ADD and rape"; and that respondent-mother was being prescribed medication, and concluded that Bev was a neglected juvenile as defined in N.C.G.S. § 7B-101(15). As a result, Judge Banks adjudicated Bev to be a neglected juvenile, required that Bev remain in DSS custody, permitted respondent-mother to participate in supervised visitations with Bev on a weekly basis, and "continue[d] the remainder of the dispositional phase of the hearing" to allow DSS to modify its dispositional recommendations following an additional meeting with the parents. On 5 February 2016, Judge Finch entered a dispositional order in which he ordered that Bev remain in DSS custody, that the existing visitation arrangements be continued, and that respondent-mother comply with the provisions of the case plan to which she had agreed with DSS.

Over the course of the ensuing year, periodic review proceedings were conducted, each of which resulted in the entry of orders requiring DSS to attempt to reunify Bev with respondent-mother. After a review hearing held on 15 December 2016, Judge Carolyn J. Thompson entered an order on 11 January 2017 discontinuing reunification efforts and changing Bev's permanent plan from reunification to adoption. On 24 January 2017, DSS filed a petition seeking to have respondent-mother's parental rights in Bev terminated on the grounds that respondent-mother had neglected Bev and had "willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to removal of the juvenile."

The termination petition came on for hearing before the trial court on 13 July 2017 and 17 August 2017. On 8 September 2017, the trial court entered an order in which it found as fact, among other things, that:

> 9. [Respondent-mother] signed a[case plan] with [DSS] on August 20, 2015, but she has not met the terms of that Agreement.
>
> 10. [Respondent-mother] completed a domestic violence class . . . but has not demonstrated the skills she was to learn in that. In the last six months, [respondent- mother]

has called the police on her live-in boyfriend and father of her new born child.

11. [Respondent-mother] has not remained free of controlled substances, and has continued to test positive for controlled substances (even during her recent pregnancy).

12. [Respondent-mother] admitted that she does not take her medications as prescribed and takes her prescriptions, "when she feels like it[.]"

13. [Respondent-mother] has tested positive for extremely high levels of amphetamines . . . .

. . . .

29. [Respondent-mother] was to engage in therapy as part of her [case plan] and there is no credible evidence of therapy.

30. [T]here is no credible evidence that [respondent-mother] is able to protect her child.

31. [Respondent-mother] was to complete a neuropsychological examination as part of her [case plan], but [she] never rescheduled her examination appointment after having the examination explained to her by the social worker and the psychologist.

32. [Respondent-mother] declined a visit with the juvenile on December 27, 2016 after [DSS] changed the plan to adoption and ceased reunification efforts.

33. [Respondent-mother] continues to make excuses and cannot demonstrate what she has learned during her parenting classes and continues to shift her focus away from the juvenile during multiple visitations.

34. [Respondent-mother] exhibits delusional tendencies, as evidenced by her statement to the court that she "could pass the Bar today."

35. [Respondent-mother] has remained hostile and combative to [DSS] and has not completed her [case plan].

36. [Respondent-mother] has not demonstrated an ability to put her child first.

> 37. [Respondent-mother] revoked her consent for [DSS] to have access to her mental health records.
>
> 38. [Respondent-mother] continues to make inconsisten[t statements] regarding her medical diagnosis.
>
> 39. [Respondent-mother] has willfully left the minor child in an out of home placement for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile, pursuant to N.C.G.S. §7B-1111(a)(2).

After determining that respondent-mother's parental rights in Bev were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2)[4] and that the termination of respondent-mother's parental rights in Bev would be in Bev's best interests, the trial court ordered that respondent-mother's parental rights in Bev be terminated. Respondent-mother noted an appeal to the Court of Appeals from the trial court's termination order.

In seeking relief from the trial court's termination order before the Court of Appeals, respondent-mother argued that the trial court had erred by terminating her parental rights in Bev pursuant to N.C.G.S. § 7B-1111(a)(2) given that the trial court's findings of fact did not support its conclusion that she had failed to show reasonable progress in correcting the conditions that led to Bev's removal. *In re B.O.A.*, 818 S.E.2d 331, 333 (N.C. Ct. App. 2018). More specifically, respondent-mother contended that Bev had been removed from the parental home as the result of concerns relating to domestic violence and the bruising of Bev's arm and that the trial court's findings of fact did not establish that she had failed to address these concerns. *Id.*

In reversing the trial court's termination order, the Court of Appeals began by determining that a number of the trial court's findings of fact lacked sufficient evidentiary support and failed to support its ultimate conclusion that respondent-mother had failed to correct the domestic violence-related problems that had led to Bev's removal from respondent-mother's home. *Id.* at 334–36. For example, the Court of Appeals held with respect to Finding of Fact No. 10 that respondent-mother's decision to call the police based upon the abusive conduct of her live-in boyfriend did not reflect a failure to learn how to address domestic violence-related

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4. The trial court did not address the allegation that respondent-mother's parental rights in Bev were subject to termination for neglect pursuant to N.C.G.S. § 7B-1111(a)(1) in its termination order.

problems given the absence of any evidence tending to show "that the incident involved violence, force, or any actions constituting domestic violence under [N.C.G.S. § 50B-1(a)]." *Id.* at 335. Similarly, the Court of Appeals held that the trial court had erred in making Finding of Fact No. 30, which referred to the absence of "credible evidence" tending to show that respondent-mother was "able to protect her child," on the grounds that DSS bore the burden of proving that respondent-mother's parental rights in Bev were subject to termination and that "DSS did not present any evidence to support a conclusion that [r]espondent[-mother] was not capable of protecting Bev." *Id.* at 335. Moreover, the Court of Appeals determined that the trial court had erred by making Finding of Fact No. 33, which addressed the extent to which respondent-mother had had difficulty focusing upon the juvenile during her visits with Bev given that "Bev was not removed from the home due to [r]espondent's lack of focus with the child, but rather for domestic violence between the parents and an unexplained bruise." *Id.* at 336. Finally, after acknowledging that the case plan to which respondent-mother had agreed with DSS attempted to address issues "pertaining to substance abuse, medication management, mental health/psychological issues, and parenting skills," the Court of Appeals noted that, since these concerns were not enunciated "in either the nonsecure custody order or neglect petition [so as] to put [r]espondent on notice of these conditions," such concerns could not be considered as having contributed to Bev's removal from respondent-mother's home for purposes of N.C.G.S. § 7B-1111(a)(2) given that "[t]he plain language [of the relevant statute] states that the court may terminate parental rights if the parent willfully fails to make reasonable progress 'in correcting those conditions which led to the removal of the juvenile.' " *Id.* (quoting N.C.G.S. § 7B-1111(a)(2)). Thus, the Court of Appeals determined that respondent-mother's failure to make progress with respect to her substance abuse, mental health, income, and other problems in the manner enumerated in the case plan to which she had agreed with DSS was "not relevant in determining whether grounds exist under [N.C.G.S. §] 7B-1111(a)(2) to terminate her parental rights for failure to make reasonable progress to alleviate the conditions that led to Bev's removal." *Id.* As a result, the Court of Appeals reversed the trial court's termination order. On 5 December 2018, this Court granted DSS's request for discretionary review of the Court of Appeals' decision in this case.

In seeking to persuade us to reverse the Court of Appeals' decision, DSS and the Guardian ad Litem argue that the Court of Appeals had erroneously construed N.C.G.S. §7B-1111(a)(2) in an overly constricted manner and had, for that reason, defined the "conditions which led to a

juvenile's removal" in an excessively narrow way. More specifically, DSS and the Guardian ad Litem contend that the Court of Appeals' holding rests upon the flawed assumption that the conditions of removal for purposes of N.C.G.S. § 7B-1111(a)(2) are limited to those which constituted the triggering event that led to DSS's involvement with the family and which were expressly delineated in the initial abuse and neglect petition. According to DSS and the Guardian ad Litem, the Court of Appeals erroneously focused its analysis exclusively upon the issue of whether respondent-mother had made reasonable progress addressing issues relating to domestic violence, and had declined to consider respondent-mother's substance abuse, mental health, and parenting difficulties, all of which were, in DSS's view, properly understood to be among the conditions that led to Bev's removal from respondent-mother's home. As a result, DSS and the Guardian ad Litem contend that the Court of Appeals erred by refusing to treat respondent-mother's failure to comply with the court-ordered case plan to which she had agreed with DSS as relevant to the issue of whether respondent-mother had failed to make reasonable progress in correcting the conditions that led to Bev's removal from the family home for purposes of N.C.G.S. § 7B–1111(a)(2).

Respondent-mother, on the other hand, asserts that the Court of Appeals properly interpreted the "clear and unambiguous" language of N.C.G.S. § 7B–1111(a)(2) by focusing its analysis upon the issue of domestic violence, which was the only condition that could have reasonably been understood to have resulted in Bev's removal from the family home. According to respondent-mother, the relevant statutory language necessarily refers to nothing more than the event or circumstance that resulted in the juvenile's physical removal from the family home. For that reason, respondent-mother further contends that the conditions of removal to which reference is made in N.C.G.S. § 7B-1111(a)(2) must have been known to DSS at the time of the juvenile's removal and must have been reflected in the petition that led to the placement of the juvenile in the custody of some person other than his or her parents. In view of the fact that DSS did not know of any condition, other than issues relating to domestic violence, that would have led to Bev's removal from the family home at the time that it filed its initial petition, the fact that DSS never amended its petition to allege additional grounds for removal, and the fact that the District Court never specified additional grounds for removal in any subsequent order, respondent-mother asserts that the Court of Appeals properly held that the only conditions that the trial court was entitled to consider in determining whether respondent-mother's parental rights in Bev were subject to termination pursuant N.C.G.S. § 7B–1111(a)(2) were those relating

to domestic violence and the presence of a bruise on Bev's arm. Moreover, even if other conditions, such as substance abuse, are generally related to the existence of domestic abuse, respondent-mother argues that the record is devoid of any evidence tending to show that such conditions played any part in Bev's removal from respondent-mother's home in this case. As a result, respondent-mother asserts that the Court of Appeals correctly determined that the trial court's findings failed to support its conclusion that she had failed to make sufficient progress toward correcting the conditions that led to Bev's removal from the family home.

Finally, while acknowledging that a trial judge is authorized by N.C.G.S. § 7B-904(d1)(3) to adopt case plans aimed at addressing the possible causes of a juvenile's removal from the family home and the particular needs of the juvenile's family, respondent-mother argues that a parent's failure to comply with those aspects of a case plan that do not address the conditions that led to the juvenile's removal from the family home are irrelevant to the ground for termination of a parent's parental rights enunciated in N.C.G.S. § 7B–1111(a)(2). According to respondent-mother, a parent's failure to comply with any case plan provision that is not directly related to domestic violence and the bruise found upon Bev's arm might well be relevant to a determination that her parental rights in Bev were subject to termination for neglect pursuant to N.C.G.S. § 7B–1111(a)(1), but would not support a determination that her parental rights in Bev were subject to termination for failure to make reasonable progress pursuant to N.C.G.S. § 7B–1111(a)(2). As a result, respondent-mother urges us to uphold the Court of Appeals' decision in this case.

According to well-established law, this Court reviews trial court orders in cases in which a party seeks to have a parent's parental rights in a child terminated by determining whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether those findings support the trial court's conclusions of law. *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982). A trial court's finding of fact that is supported by clear, cogent, and convincing evidence is deemed conclusive even if the record contains evidence that would support a contrary finding. *Id.* at 403–04, 293 S.E.2d at 132.

A termination of parental rights proceeding consists of an adjudication stage that is followed by a dispositional stage. *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). At the adjudication stage, the trial court must "take evidence, find the facts, and . . . adjudicate the existence or nonexistence of any of the circumstances set forth in [N.C.G.S. §] 7B-1111 which authorize the termination of parental rights of the

respondent." N.C.G.S. § 7B-1109(e); *see In re D.H.*, 232 N.C. App. 217, 219, 753 S.E.2d 732, 734 (2014). According to N.C.G.S. § 7B–1111(a)(2), a trial judge may terminate a parent's parental rights in a child in the event that it finds that "[t]he parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C.G.S. § 7B–1111(a)(2). As the Court of Appeals has consistently held, a finding by the trial court that any one of the grounds for termination enumerated in N.C.G.S. § 7B–1111(a) exists is sufficient to support a termination order. *See In re C.M.S.*, 184 N.C. App. 488, 491, 646 S.E.2d 592, 594 (2007) (citing *In re Taylor*, 97 N.C. App. 57, 64, 387 S.E.2d 230, 233–34 (1990)); *see also Moore*, 306 N.C. 404, 293 S.E.2d 133 (stating that, "[i]f either of the three grounds aforementioned is supported by findings of fact based on clear, cogent and convincing evidence, the order appealed from should be affirmed"). Assuming that the trial court finds that one or more of the grounds for termination set out in N.C.G.S. § 7B-1111(a) exist, it must proceed to the dispositional stage, during which it must "determine whether terminating the parent's rights is in the juvenile's best interest." N.C.G.S. § 7B-1110; *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 615 (1997).

The ultimate issue before us in this case revolves around the manner in which the reference to "those conditions that led to the removal of the juvenile" contained in N.C.G.S. § 7B-1111(a)(2) should be construed. In construing statutory language, "it is our duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used." *Lunsford v. Mills*, 367 N.C. 618, 623, 766 S.E.2d 297, 301 (2014) (citing *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009)). "Legislative intent controls the meaning of a statute," *Brown v. Flowe*, 349 N.C. 250, 522, 507 S.E.2d 894, 895 (1998) (quoting *Shelton v. Morehead Mem'l Hosp.*, 318 N.C. 76, 81, 347 S.E.2d 824, 828 (1986)), with the legislative intent to be determined "first from the plain language of the statute, then from the legislative history, 'the spirit of the act and what the act seeks to accomplish.' " *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664, 548 S.E.2d 513, 517 (2001) (quoting *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998)). "When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute." *Diaz v. Div. of Soc. Servs. & Div. of Med. Assistance, N. Carolina Dep't of Health & Human Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006).

In overturning the trial court's determination that respondent-mother's parental rights in Bev were subject to termination pursuant

to N.C.G.G. § 7B-1111(a)(2), the Court of Appeals appears to have concluded that the relevant statutory language is "clear and unambiguous" and can be "implemented according to the plain meaning of its terms." *B.O.A.*, 818 S.E.2d at 336 (quoting *Lanvale Properties, LLC v. Cty. of Cabarrus*, 366 N.C. 142, 154, 731 S.E.2d 800, 809 (2012)). However, nothing in the relevant statutory language suggests that the only "conditions of removal" that are relevant to a determination of whether a particular parent's parental rights in a particular child are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2) are limited to those which are explicitly set out in a petition seeking the entry of a nonsecure custody order or a determination that a particular child is an abused, neglected, or dependent juvenile. Instead, the relevant statutory language appears to us to be subject to a number of potentially possible interpretations in addition to that adopted by the Court of Appeals. For example, the relevant statutory language can easily be read to encompass all of the conditions that led to the child's removal from the parental home, including both those inherent in the events immediately surrounding the child's removal from the home and any additional underlying factors that contributed to the difficulties that resulted in the child's removal. A careful examination of the relevant statutory language in the context of other related statutory provisions suggests that a more expansive reading of the reference to "those conditions that led to the removal of the juvenile" contained in N.C.G.S. § 7B-1111(a)(2) is the appropriate one.

According to N.C.G.S. § 7B-904(d1)(3), a trial judge has the authority to require the parent of a juvenile who has been adjudicated to be abused, neglected, or dependent to "[t]ake appropriate steps to remedy conditions in the home that led to or contributed to the juvenile's adjudication or to the court's decision to remove custody of the juvenile from the parent, guardian, custodian, or caretaker." After examining N.C.G.S. § 7B-904(d1)(3), we believe that the General Assembly clearly contemplated that, in the event that a juvenile is found to have been abused, neglected, or dependent, the trial judge has the authority to order a parent to take any step needed to remediate the conditions that "led to or contributed to" either the juvenile's adjudication or the decision to divest the parent of custody. Put another way, the trial judge in an abuse, neglect, or dependency proceeding has the authority to order a parent to take any step reasonably required to alleviate any condition that directly or indirectly contributed to causing the juvenile's removal from the parental home. In addition, N.C.G.S. §7B-904(d1)(3) authorizes the trial judge, as he or she gains a better understanding of the relevant family dynamic, to modify and update a parent's case plan in subsequent review proceedings conducted pursuant to N.C.G.S. § 7B-906.1. Thus, the

relevant statutory provisions appear to contemplate an ongoing examination of the circumstances that surrounded the juvenile's removal from the home and the steps that need to be taken in order to remediate both the direct and the indirect underlying causes of the juvenile's removal from the parental home, an approach that is simply inconsistent with the one-time determination that is assumed to be appropriate by the Court of Appeals' decision in this case. As a result, in the interests of remaining consistent with the overall statutory scheme for dealing with juvenile abuse, neglect, and dependency issues, we conclude that the "conditions of removal" contemplated by N.C.G.S. § 7B-1111(a)(2) include all of the factors that directly or indirectly contributed to causing the juvenile's removal from the parental home.

In addition to its reliance upon what it believed to be the plain meaning of the relevant statutory language, the Court of Appeals justified its decision to overturn the trial court's termination order on certain notice-related considerations. In essence, the Court of Appeals held that the trial court was not entitled to consider certain of the "conditions" addressed in respondent-mother's court-approved case plan because "DSS failed to allege any of these conditions in either the nonsecure custody order or neglect petition to put [r]espondent on notice of these conditions." *B.O.A.*, 818 S.E.2d at 336. Although a trial court would clearly err by terminating a parent's parental rights in a child for failure to make reasonable progress pursuant to N.C.G.S. § 7B–1111(a)(2) in the event that this ground for termination had not been alleged in the termination petition or motion, *see In re S.R.G.*, 195 N.C. App. 79, 83, 671 S.E.2d 47, 50 (2009) (holding that the failure to allege that the parent's parental rights were subject to termination pursuant to N.C.G.S. § 7B–1111(a)(2) deprived the trial court of the right to terminate the parent's parental rights on the basis of that statutory ground for termination), no such error occurred in this case. On the contrary, DSS explicitly alleged that respondent-mother's parental rights in Bev were subject to termination on the grounds

> [t]hat the parent has willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to removal of the juvenile.

In view of the fact that nothing in the relevant statutory provisions limits the "conditions for removal" to those specified in any initial abuse, neglect, or dependency petition or any subsequent amendment to that

petition and the fact that DSS adequately alleged that it was seeking to terminate respondent-mother's parental rights in Bev pursuant to N.C.G.S. § 7B-1111(a)(2), we are not persuaded that the notice-related concerns expressed by the Court of Appeals justify overturning the trial court's termination order.

The broader reading of the relevant statutory language that we believe to be appropriate is also consistent with the manner in which those provisions have been applied by our state's appellate courts in the past. As an initial matter, we note that N.C.G.S. § 7B-904(d1)(3) has traditionally been construed very broadly. For example, in *In re A.R.*, 227 N.C. App. 518, 522, 742 S.E.2d 629, 632–33 (2013), the Court of Appeals upheld a trial court order entered in an abuse and neglect proceeding requiring the parents to comply with a case plan that instructed them to obtain substance abuse evaluations, participate in drug screenings, and comply with the treatment recommendations made by the relevant medical and mental health professionals despite the fact that the juveniles were initially removed from their parents' home as the result of domestic violence concerns on the grounds that compliance with these requirements would "assist respondents in both understanding and resolving the possible underlying causes of respondents' domestic violence issues." *Id.* at 520, 522, 742 S.E.2d at 631–33. As a result, the Court of Appeals has clearly recognized that the trial court's authority to adopt a case plan pursuant to N.C.G.S. § 7B-904(d1)(3) is sufficiently broad to permit rectification of both the immediate cause of the need for governmental intervention into the family's life and the conditions that contributed in a more indirect way to that need for governmental intervention.

In addition, the Court of Appeals has treated parental compliance with a broadly drafted case plan as pertinent to the inquiry required by N.C.G.S. § 7B-1111(a)(2). For example, in *In re J.G.B.*, 177 N.C. App. 375, 380–81, 628 S.E.2d 450, 455 (2006), the Court of Appeals upheld the trial court's decision to consider a mother's failure to make reasonable progress toward compliance with her case plan in determining whether her parental rights were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2) even though that case plan addressed issues beyond those that immediately led to the juvenile's removal from the family home. After noting that the order placing the juveniles in nonsecure custody stated that "there was a reasonable factual basis to believe that [the child] was 'exposed to a substantial risk of physical injury or sexual abuse because the parent, guardian, or custodian . . . failed to provide, or is unable to provide, adequate supervision or protection' " and that the provisions of the mother's case plan required her to maintain stable

employment, obtain and maintain safe housing, provide medical care for the juvenile, attend weekly visitations, and demonstrate appropriate parenting skills, *id.* at 377–78, 628 S.E.2d at 452–53, the trial court found that, even though the mother had visited with the juvenile on numerous occasions, she had maintained employment only for a short period of time, had failed to maintain sustainable housing arrangements, and had attended some, but not all, of the juvenile's medical appointments. *Id.* at 380, 628 S.E.2d at 455. Based upon these and other findings, the trial court determined that, "[a]lthough the [mother] has made some progress toward her case plan goals, the amount of progress she has made is not reasonable under the circumstances and in fact, she has not completed any of her case plan goals," *id.* at 380–81, 628 S.E.2d at 455, and concluded that the mother's parental rights in the child were subject to termination on the grounds of both neglect, N.C.G.S. § 7B-1111(a)(1), and failure to make reasonable progress in correcting the conditions that led to the child's removal from the parental home pursuant to N.C.G.S. § 7B–1111(a)(2). *Id.* at 381, 628 S.E.2d at 455. Had the Court of Appeals, in the course of deciding *In re J.G.B.*, construed N.C.G.S. § 7B-1111(a)(2) consistently with the approach adopted by the Court of Appeals in this case, it would likely have reversed, rather than affirmed, the trial court order at issue in that case.

A careful review of relevant decisions by both the Court of Appeals and this Court, *see D.L.W.*, 368 N.C. at 845, 788 S.E.2d at 168 (holding that a trial court could correctly determine that a parent whose children had been removed from the family home because of domestic violence and a failure to provide adequate housing and meet the children's minimal needs were subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2) based, in part, upon the parent's failure to comply with a case plan provision ordering the parent to create a budgeting plan), reflects a consistent judicial recognition that parental compliance with a judicially adopted case plan is relevant in determining whether grounds for termination exist pursuant to N.C.G.S. § 7B–1111(a)(2) even when there is no direct and immediate relationship between the conditions addressed in the case plan and the circumstances that led to the initial governmental intervention into the family's life, as long as the objectives sought to be achieved by the case plan provision in question address issues that contributed to causing the problematic circumstances that led to the juvenile's removal from the parental home. The adoption of a contrary approach would amount to turning a blind eye to the practical reality that a child's removal from the parental home is rarely the result of a single, specific incident and is, instead, typically caused by the confluence of multiple factors, some of which are immediately apparent

and some of which only become apparent in light of further investigation. A restrictive construction of the relevant provisions of N.C.G.S. § 7B-1111(a)(2) of the type adopted by the Court of Appeals in this case would fail to recognize the complexity of the issues that must frequently be resolved in abuse, neglect, and dependency cases and would unduly handicap our trial courts in their efforts to rectify the effects of abuse, neglect, and dependency.

We do not, of course, wish to be understood as holding that a trial judge's authority to adopt a case plan pursuant to N.C.G.S. § 7B-904(d1)(3) is unlimited or that the reference to the "conditions of removal" contained in N.C.G.S. § 7B-1111(a)(2) has no meaning whatsoever.[5] Instead, a trial judge should refrain from finding that a parent has failed to make "reasonable progress . . . in correcting those conditions which led to the removal of the juvenile" simply because of his or her "failure to fully satisfy all elements of the case plan goals." *In re J.S.L.*, 177 N.C. App. 151, 163, 628 S.E.2d 387, 394 (2006). On the other hand, a trial court has ample authority to determine that a parent's "extremely limited progress" in correcting the conditions leading to removal adequately supports a determination that a parent's parental rights in a particular child are subject to termination pursuant to N.C.G.S. § 7B-1111(a)(2); *see*, *e.g.*, *In re S.N.*, 194 N.C. App. 142, 149, 669 S.E.2d 55, 60 (2008), *aff'd*, 363 N.C. 368, 677 S.E.2d 455 (2009) (upholding the termination of a mother's parental rights in a child pursuant to N.C.G.S. § 7B-1111(a)(2) given that the mother only made limited progress in correcting the conditions that led to the child's removal from her home and made no attempt to regain custody of her children until after she became at risk of losing them). As a result, as long as a particular case plan provision addresses an issue that, directly or indirectly, contributed to causing the juvenile's removal from the parental home, the extent to which a parent has reasonably complied with that case plan provision is, at minimum, relevant to the determination of whether that parent's parental rights in his or her child are subject to termination for failure to make reasonable progress pursuant to N.C.G.S. § 7B-1111(a)(2).

A careful review of the record satisfies us that the necessary nexus between the components of the court-approved case plan with which respondent-mother failed to comply and the "conditions which led to [Bev's] removal" from the parental home exists in this case. Admittedly,

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5. For example, requiring a parent with no history of substance abuse and whose alleged parenting deficiencies do not appear to be drug-related to submit to random drug screening or to submit to drug treatment might well exceed allowable grounds.

the triggering event that led to Bev's placement in DSS custody was an act of domestic violence and the discovery of an unexplained bruise located on Bev's arm. However, a careful examination of the record clearly reflects that a much broader list of concerns contributed to causing the events that directly and immediately contributed to Bev's adjudication as a neglected juvenile and her removal from the parental home. In the initial adjudication order, Judge Banks found that respondent-mother was "currently in therapy for domestic violence, addiction, ADHD/ADD and rape and is prescribed medication" and that the entry of a dispositional order should be continued until DSS had had an opportunity "to further modify its recommendations after a CFT meeting with" the parents. Similarly, Judge Finch found in the subsequent dispositional order that "there continue[ ] to be concerns with substance abuse, domestic violence and visitations." A report submitted by DSS that was accepted into the record at the adjudication hearing indicates, among other things, that respondent-mother was "in a substance abuse program for which she is taking Suboxone," that respondent-mother "was extremely disruptive with [ ] extensive crying and interrupting others" during a meeting involving DSS personnel and others, that respondent-mother admitted that she suffered from ADHD, that one of the individuals who initially provided domestic violence services to respondent-mother recommended that respondent-mother receive outpatient therapy, and that respondent-mother had previously been diagnosed as suffering from severe ADHD, post-traumatic stress disorder, and borderline intellectual functioning. Moreover, a report that was submitted by DSS and accepted into the record at the dispositional hearing indicates that respondent-mother was receiving treatment for anxiety and depressed mood, that respondent-mother had been diagnosed as suffering from post-traumatic stress disorder, that respondent-mother was not complying with the requirements of her Suboxone regimen, and that respondent-mother became angry and acted out with regularity during her dealings with DSS personnel and others. Finally, respondent-mother voluntarily agreed upon a case plan with DSS and never contended prior to the termination hearing that its components did not address issues that contributed to causing the conditions that led to Bev's removal from her home.

The various reports and orders contained in the record reflect an early recognition of the fact that a complex series of interrelated factors contributed to causing the conditions that led to Bev's removal from respondent-mother's home. There is widespread recognition that post-traumatic stress disorder can result from domestic violence. Similarly, common sense indicates that certain mental disorders and unaddressed

substance abuse problems can make an individual more susceptible to domestic violence. Thus, the history shown in these reports and orders reveals the existence of a sufficient nexus between the conditions that led to Bev's removal from respondent-mother's home and the provisions of the court-ordered case plan relating to respondent-mother's mental health issues, substance abuse treatment, and medication management problems. As a result, we are fully satisfied that the trial court had an adequate basis for finding the required relationship between the components of respondent-mother's case plan and the "conditions that led to [Bev's] removal" from respondent-mother's home for purposes of N.C.G.S. § 7B-1111(a)(2) existed in this case.

The trial court's termination order contained multiple findings of fact detailing respondent-mother's failure to comply with numerous components of her court-ordered case plan. Although respondent-mother challenged a number of the trial court's findings of fact as lacking in sufficient evidentiary support, the record provides ample justification for the trial court's determination that respondent-mother had entered into a judicially approved case plan with DSS and "ha[d] not met the terms of that [a]greement." Among other things, the trial court found "ample evidence that [respondent-mother had] abuse[d] her Adderall prescription" and had "admitted that she does not take her medications as prescribed and takes her prescriptions, 'when she feels like it.' " In addition, the trial court made findings of fact concerning respondent-mother's failure to pass random drug tests or failure to submit to drug tests and to refrain from using illegal substances. In addition, the trial court found that respondent-mother had failed to complete the required neuropsychological examination or to participate in required therapy sessions. Similarly, the trial court found that respondent-mother was unable to "demonstrate what she has learned during her parenting classes and continue[d] to shift her focus away from the juvenile during multiple visitations." A careful review of these unchallenged findings of fact satisfies us that respondent-mother failed to comply with all but the most minimal requirements of her court-ordered case plan and that the limited progress that she did make cannot be fairly described as reasonable. As a result, we conclude that the trial court's unchallenged findings of fact amply demonstrate that respondent-mother's parental rights were subject to termination for failing to make reasonable progress toward correcting the conditions that resulted in Bev's removal from the family home pursuant to N.C.G.S. § 7B-1111(a)(2).

Thus, we hold that the trial court's unchallenged findings of fact, including those regarding respondent's failure to comply with the

provisions of her court-ordered case plan, adequately supported the trial court's conclusion that respondent-mother willfully left Bev in DSS custody for a period of twelve months without making reasonable progress toward correcting the conditions that led to Bev's removal from respondent-mother's home and that the Court of Appeals erred by reaching a contrary result. As a result, we reverse the Court of Appeals' decision in this case.

REVERSED.

IN THE MATTER OF E.H.P. AND K.L.P.

No. 70A19

Filed 16 August 2019

Termination of Parental Rights—willful abandonment—due consideration of dispositional factors

Sufficient evidence existed to support the termination of respondent's parental rights based upon the willful abandonment and willful failure to pay child support. The trial court did not abuse its discretion in determining that termination would be in the children's best interests.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from orders entered on 14 January 2019 by Judge Monica Leslie in District Court, Graham County. This matter was calendared for argument in the Supreme Court on 1 August 2019 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

No brief for petitioner-appellee mother.

Wendy C. Sotolongo, Parent Defender, by Annick Lenoir-Peek, Deputy Parent Defender, for respondent-appellant father.

DAVIS, Justice.

This case involves a termination of parental rights proceeding initiated by petitioner-mother (petitioner) against respondent-father (respondent). In this appeal, we consider whether the trial court erred

by terminating respondent's parental rights based upon the grounds of willful abandonment and willful failure to pay child support. Because we conclude that sufficient evidence existed to support the termination of respondent's parental rights on the basis of willful abandonment and that the trial court did not abuse its discretion in determining that termination of respondent's parental rights would be in the children's best interests, we affirm the trial court's orders.

Factual and Procedural Background

Petitioner and respondent were married in 2007 and had two daughters together. Kelly and Emily (the children) were born in 2006 and 2009, respectively.[1] The parties separated in 2012.

In August 2013, petitioner filed a motion for temporary emergency custody of the children. In the Temporary Custody Judgment entered in District Court, Graham County on 17 December 2013, petitioner was awarded sole temporary custody of the children "until such time as this matter is resolved by the Court through a permanent custody hearing." The Temporary Custody Judgment contained the following pertinent findings of fact:

> 5. [Respondent] did not appear for the hearing of this matter and has never filed any form of responsive pleading, motion, or other such documentation in response to [petitioner's] Complaint.
>
> 6. The Court takes Judicial notice . . . that the [respondent] was in fact validly served and provided Notice of this hearing by the Sheriff of Loudon County, Tennessee, where [respondent] had been incarcerated.
>
> . . . .
>
> 9. Throughout the relationship of the parties, the [respondent] committed numerous acts of domestic violence against the [petitioner].
>
> 10. The parties separated on July 23, 2012 due to the [respondent's] drug addiction and a series of acts of domestic violence by the [respondent] . . . against the [petitioner] wherein the [respondent] choked the [petitioner] and hit her in the face with his elbow

1. Pseudonyms are used throughout this opinion to protect the identities of the minor children.

causing bruising and a laceration to the person of the [petitioner].

11. The minor children of the parties were present while the [respondent] engaged in the acts of violence against the [petitioner].

. . . .

14. The [respondent] is addicted to methamphetamine and currently has charges pending against him in the State of North Carolina and Tennessee for larceny, assault on a female by strangulation, and drug related charges.

The Temporary Custody Judgment further provided that respondent "shall have no contact with the minor children until allowed such by further Order of this Court." Respondent never filed any motions seeking to alter the custody arrangement set forth in the Temporary Custody Judgment.

On 25 June 2018, petitioner filed petitions seeking to terminate respondent's parental rights to both children on the grounds of willful failure to pay child support and willful abandonment pursuant to N.C.G.S. § 7B-1111(a)(4) and (7), respectively. Petitioner alleged that respondent had willfully failed to pay child support for a continuous period of six months immediately preceding the filing of the petitions. She further alleged that respondent had neither attempted to see or communicate with the children during the six years preceding the filing of the petitions nor sent the children any cards or presents during that time period.

Respondent was served with the petitions at the Sampson County Correctional Institution in Clinton, North Carolina, where he had been incarcerated since January 2018 and was serving an eight-month sentence for violating his probation. On 17 July 2018, he filed answers to the petitions in which he denied that grounds existed to terminate his parental rights.

A hearing was held on the petitions to terminate respondent's parental rights in District Court, Graham County on 17 October 2018 before the Honorable Monica Leslie. At the hearing, the trial court received testimony from petitioner, respondent, the children's stepfather, the guardian *ad litem* for each child, and respondent's brother.

At the conclusion of the hearing, the trial court informed the parties that it was terminating respondent's parental rights to both children

on the ground of willful abandonment. The court stated as follows with regard to the ground of willful failure to pay child support:

> [T]here was not a child support order introduced as evidence nor was there any payment schedule or any evidence of when payments were made that were introduced to the Court, and the Court isn't able to determine what, if any, payments have or have not been made within the past six months . . . prior to the filing of the petition.
>
> . . . .
>
> Based on the high standard of proof and the lack of evidence about either an order or what payments have been made, the Court does not find by clear, cogent, and convincing evidence the nonsupport ground. However, the Court, having found one ground for termination of parental rights, will move on to the dispositional phase of the proceeding.

On 14 January 2019, the trial court entered adjudication and disposition orders as to each juvenile terminating respondent's parental rights. However, contrary to the statements made by the court at the 17 October hearing in announcing its ruling, the court's written orders stated that sufficient evidence existed to support termination based upon both grounds alleged in the petitions. Respondent gave timely notice of appeal to this Court pursuant to N.C.G.S. § 7B-1001(a1)(1).[2]

Analysis

On appeal, respondent argues that the trial court erred by both finding that grounds existed to terminate his parental rights to the children and concluding that the termination of his parental rights was in the children's best interests. We disagree.

Our Juvenile Code sets forth a two-step process for the termination of parental rights. At the adjudication stage, the petitioner bears the burden of proving by clear, cogent, and convincing evidence that grounds exist for termination pursuant to section 7B-1111 of the General Statutes. N.C.G.S. § 7B-1109(e) (2017). If the trial court finds that grounds exist for termination, it then proceeds to the dispositional stage at which it

2. Effective 1 January 2019, appeals taken from orders granting or denying a motion or petition to terminate parental rights lie directly with this Court. *See* N.C.G.S. § 7B-1001(a1)(1) (2017).

must "determine whether terminating the parent's rights is in the juvenile's best interest" based on the following factors:

> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

Id. § 7B-1110(a) (2017).

We review a trial court's adjudication under N.C.G.S. § 7B-1111 "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984) (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)). The trial court's assessment of a juvenile's best interests at the dispositional stage is reviewed for abuse of discretion. *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citing *In re L.M.T.*, 367 N.C. 165, 171, 752 S.E.2d 453, 457 (2013)).

I. Adjudicatory Phase

Here, the trial court determined that two grounds existed to terminate respondent's parental rights: willful failure to pay child support pursuant to N.C.G.S. § 7B-1111(a)(4) and willful abandonment under N.C.G.S. § 7B-1111(a)(7). "If either of the [two] grounds aforesaid is supported by findings of fact based on clear, cogent and convincing evidence, the order[s] appealed from should be affirmed." *In re Moore*, 306 N.C. at 404, 293 S.E.2d at 133; *see also* N.C.G.S. § 7B-1111(a) (2017) ("The court may terminate the parental rights upon a finding of one or more [grounds for termination.]").

We first address the trial court's ruling that grounds existed to terminate respondent's parental rights based upon willful abandonment. Termination pursuant to this ground requires proof that "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition." N.C.G.S § 7B-1111(a)(7)

(2017). We have held that "[a]bandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child." *In re Young*, 346 N.C. 244, 251, 485 S.E.2d 612, 617 (1997) (quoting *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986)); *see also Pratt v. Bishop*, 257 N.C. 486, 502, 126 S.E.2d 597, 608 (1962) ("Abandonment requires a wilful intent to escape parental responsibility and conduct in effectuation of such intent."). "It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Id.* at 501, 126 S.E.2d at 608.

In its 14 January 2019 orders, the trial court took judicial notice of the Temporary Custody Judgment. Both 14 January adjudication orders also contained the following pertinent findings of fact:

> 4. That within the [Temporary Custody] Order, the Court ordered that the Respondent was to have no contact with the minor children until allowed such by further Order of the Court. That the Respondent never filed a Motion asking for contact with the minor children.
>
> 5. Respondent Father states that he tried to provide some gifts for the minor children for 3 years after the separation, but the Petitioner did not accept the gifts so Respondent stopped trying.
>
> 6. That Respondent ha[d] no substance abuse issue for the past year, but has struggled throughout the minor children's life with substance abuse.
>
> . . . .
>
> 9. . . . That the Respondent has not made a regular child support payment for more than year [sic] or preceding the filing of this petition.
>
> . . . .
>
> 11. That Respondent acknowledged that he was not at a good point in his life as to why he has not tried to contact the children or filed anything with the Court.

Based upon these findings of fact, the trial court concluded that sufficient grounds existed to terminate respondent's parental rights to both children pursuant to N.C.G.S. § 7B-1111(a)(7).

Respondent concedes that he had no contact with the children from 25 December 2017 to 25 June 2018—the relevant six-month period for purposes of N.C.G.S. § 7B-1111(a)(7). *See In re Young*, 346 N.C. at 251, 485 S.E.2d at 617 ("[S]ince the petition for terminating respondent's parental rights was filed on 6 May 1994, respondent's behavior between 6 November 1993 and 6 May 1994 is determinative" for purposes of an abandonment determination.). He contends, nevertheless, that the trial court erred by determining he willfully abandoned the children because he was forbidden to contact them under the provisions of the Temporary Custody Judgment.

We are satisfied that sufficient evidence supported the trial court's determination that respondent willfully abandoned his children pursuant to N.C.G.S. § 7B-1111(a)(7). By his own admission, respondent had no contact with his children during the statutorily prescribed time period. In addition, he made no effort to have any form of involvement with the children for several consecutive years following the entry of the Temporary Custody Judgment. While respondent ascribes this inaction to the no-contact provision contained in the Temporary Custody Judgment, this argument is unavailing. A temporary custody order is by definition provisional, and the order at issue here expressly contemplated the possibility that the no-contact provision would be modified in a future order. No attempt was made by respondent, however, to alter the terms of the Temporary Custody Judgment so as to allow contact between him and the children.

Similarly, the fact that respondent was incarcerated for almost the entirety of the six-month period preceding the filing of the termination petition does not preclude a finding of willful abandonment under N.C.G.S. § 7B-1111(a)(7). *See In re M.A.W.*, 370 N.C. 149, 153, 804 S.E.2d 513, 517 (2017) ("Our precedents are quite clear—and remain in full force—that '[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision.' " (alteration in original) (quoting *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006)). Indeed, the record reveals that respondent was aware during his incarceration of his ability to seek relief from the trial court's orders. Respondent testified that he filed a motion while he was incarcerated asking the trial court to suspend his child support obligations. When asked by petitioner's counsel why he never filed a similar motion seeking a custody modification or visitation rights with his children, he stated that he "wasn't in a place in [his] life to -- to really be a father or a parent."

Thus, we conclude that respondent's conduct meets the statutory standard for willful abandonment and affirm the trial court's adjudication

pursuant to N.C.G.S. § 7B-1111(a)(7). As previously noted, an adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights. *See In re Moore*, 306 N.C. at 404, 293 S.E.2d at 133; *see also* N.C.G.S. § 7B-1110(a). Therefore, we need not address respondent's contention that the trial court erred in determining that grounds likewise existed to support termination based on willful failure to pay child support. *See In re P.L.P.*, 173 N.C. App. at 8, 618 S.E.2d at 246 ("[W]here the trial court finds multiple grounds on which to base a termination of parental rights, and 'an appellate court determines there is at least one ground to support a conclusion that parental rights should be terminated, it is unnecessary to address the remaining grounds.' " (quoting *In re Clark*, 159 N.C. App. 75, 78 n.3, 582 S.E.2d 657, 659 n.3 (2003))).

II. Dispositional Phase

Respondent's final argument is that the trial court erred by concluding the termination of his parental rights is in the children's best interests. He asserts that he is "now able to meet his legal and financial obligations" and contends that in the event his parental rights are terminated and the children are not adopted by their stepfather "they will lose any benefits they could have received from [respondent]." Once again, we disagree.

Prior to the 17 October 2018 termination hearing, the guardian *ad litem* appointed for each child submitted written reports to the court recommending that respondent's parental rights be terminated. At the hearing, the trial court heard testimony from the children's stepfather, who attested to his love for the children and his desire to adopt them.

In its termination orders, the trial court made detailed findings of fact addressing the dispositional criteria set forth in N.C.G.S. § 7B-1110(a). Specifically, the court found "there is a strong likelihood that the children will be adopted by their step[-]father" if respondent's parental rights are terminated; that the children have "no bond" with respondent and are "extremely bonded with the Petitioner and their step[-]father"; and that the children have all of their "medical, physical and emotional needs . . . met" in their current environment.

The trial court also made findings that "Respondent's home is extremely unstable" and that his conduct "has been such as to demonstrate that he would not promote the healthy and orderly physical and emotional wellbeing of the [children]." Respondent has not challenged any of these findings, and they are therefore binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citing *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962)). Thus,

we are satisfied that the trial court's findings reflect due consideration of the dispositional factors in N.C.G.S. § 7B-1110(a) and constitute a valid exercise of its discretion in determining that the termination of respondent's parental rights is in the best interests of the children.

Conclusion

For the reasons set out above, we affirm the 14 January 2019 orders of the trial court terminating respondent's parental rights.

AFFIRMED.

IN THE MATTER OF L.E.M.

No. 383A18

Filed 16 August 2019

1. Termination of Parental Rights—no-merit brief—independent review of issues by appellate court

The Court of Appeals erred by dismissing respondent-father's appeal from an order terminating his parental rights where respondent's attorney filed a no-merit brief pursuant to N.C. Rule of Appellate Procedure 3.1(d). The Supreme Court concluded that Rule 3.1(d) mandates an independent review on appeal of the issues contained in a no-merit brief, and it overruled the Court of Appeals decision to the contrary in *In re L.V.*, 814 S.E.2d 928 (N.C. Ct. App. 2018).

2. Termination of Parental Rights—no-merit brief—error by Court of Appeals—review of merits by Supreme Court—goal of resolving case expeditiously

After determining that the Court of Appeals erred in a termination of parental rights case by failing to conduct an independent review of the issues set out in a no-merit brief, the Supreme Court elected to conduct its own review of those issues in the interest of expeditiously resolving the case. The Supreme Court concluded that the trial court's order was supported by competent evidence and based on proper legal grounds.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 820 S.E.2d 577 (N.C. Ct. App. 2018), dismissing an appeal from a termination of parental rights order

entered on 5 January 2018 by Judge John K. Greenlee in District Court, Gaston County. Heard in the Supreme Court on 28 May 2019 in session in the State Capitol Building in the City of Raleigh.

Elizabeth Myrick Boone for petitioner-appellee Gaston County Department of Social Services.

Nelson Mullins Riley & Scarborough LLP, by Reed J. Hollander, for appellee Guardian ad Litem.

Wendy C. Sotolongo, Parent Defender, by Annick Lenoir-Peek, Deputy Parent Defender, for respondent-appellant father.

DAVIS, Justice.

In this case we consider whether Rule 3.1 of the North Carolina Rules of Appellate Procedure requires our appellate courts to independently review the issues presented in a "no-merit" brief filed in an appeal from an order terminating a respondent's parental rights. Based on our determination that Rule 3.1 mandates an independent review on appeal of the issues contained in a no-merit brief, we vacate the decision of the Court of Appeals.

Factual and Procedural Background

In September 2015, the Gaston County Department of Social Services (DSS) became involved with respondent-father (respondent) and his family in order to assist with the medical care of one of respondent's two children. As of 4 January 2016, both respondent and the mother of the children were incarcerated, and the children were placed in foster care. An adjudication hearing was held on 23 February 2016 in District Court, Gaston County before the Honorable John K. Greenlee. Following the hearing, both of the children were adjudicated neglected and dependent. The court awarded DSS continued custody of the juveniles and directed respondent to comply with the terms of his DSS case plan as a condition of regaining custody. Respondent was able to satisfy some of the conditions of the case plan, but on 1 June 2016, he was arrested and subsequently extradited to West Virginia.

On 11 April 2017, the trial court entered an order ceasing reunification efforts with respondent. The following day, DSS filed a petition to terminate the parental rights of respondent as to his son, L.E.M. The petition alleged that respondent's parental rights should be terminated based upon three separate grounds: (1) neglect, (2) failure to make

reasonable progress to correct the conditions that led to the removal of the juvenile, and (3) dependency. *See* N.C.G.S. § 7B-1111(a)(1), (2), (6) (2017). A termination of parental rights hearing was held on 13 November 2017, and on 5 January 2018, the trial court entered an order terminating respondent's parental rights on the basis of neglect and failure to make reasonable progress. Respondent appealed the trial court's order to the Court of Appeals.

At the Court of Appeals, respondent's attorney filed a no-merit brief pursuant to North Carolina Rule of Appellate Procedure 3.1(d). In this brief, counsel conceded that, based upon her review of the record, she did not believe any meritorious issues existed that could support respondent's appeal. Nevertheless, the brief identified three issues for appellate review.

Despite acknowledging that the no-merit brief was in compliance with Rule 3.1(d), the Court of Appeals dismissed respondent's appeal. Citing the Court of Appeals' decision in *In re L.V.*, 814 S.E.2d 928 (N.C. Ct. App. 2018), the majority held that it lacked the authority to consider respondent's appeal because "[n]o issues have been argued or preserved for review in accordance with our Rules of Appellate Procedure." *In re L.E.M.*, 820 S.E.2d 577, 579 (N.C. Ct. App. 2018) (alteration in original) (quoting *In re L.V.*, 814 S.E.2d at 929).

In an opinion concurring in the result only, Judge Arrowood agreed with the majority that the panel was required to dismiss the appeal based on *In re L.V.* but expressed his belief that *In re L.V.* "erroneously altered the jurisprudence of cases arising under Rule 3.1 of the North Carolina Rules of Appellate Procedure." *Id.* (Arrowood, J., concurring). Judge Arrowood observed that the Court of Appeals "has consistently interpreted Rule 3.1(d) to require our Court to conduct an independent review in termination of parental rights cases in which counsel filed a no-merit brief and the respondent-parent did not file a *pro se* brief." *Id.* at 580.

Chief Judge McGee issued a dissenting opinion, stating her belief that the Court of Appeals was not bound by *In re L.V.* because that opinion is "contrary to settled law from prior opinions of this Court." *Id.* at 581 (McGee, C.J., dissenting). Respondent appealed to this Court as of right based upon the dissent.

Analysis

[1] In this appeal respondent contends that the Court of Appeals erred in dismissing his appeal instead of conducting an independent review of

the issues identified in his counsel's no-merit brief. In analyzing respondent's argument, it is helpful to first examine the origin of no-merit briefs in North Carolina.

The concept of the no-merit brief originated in the United States Supreme Court's decision in *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967). In *Anders*, an indigent defendant was convicted of felony possession of marijuana and sought to appeal. After determining that there was no legitimate basis upon which to appeal the conviction, the defendant's attorney wrote a letter to the appellate court stating that his review of the record did not reveal the existence of any meritorious appellate issues and seeking leave to withdraw from the case. *Id.* at 739–40, 742, 18 L. Ed. 2d at 495, 497.

Based on its desire to ensure that a criminal defendant's right to counsel was appropriately safeguarded while simultaneously seeking to prevent the filing of frivolous appeals, the Supreme Court adopted the following rule:

> [I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

Id. at 744, 18 L. Ed. 2d at 498.

This Court first expressly applied *Anders* in reviewing a criminal defendant's no-merit brief in *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985). The Court of Appeals in 2000 declined to apply *Anders*-like procedures in appeals from orders terminating parental rights. *See In re Harrison*, 136 N.C. App. 831, 833, 526 S.E.2d 502, 503 (2000). Seven years later, the Court of Appeals once again held that, based on its previous

holding in *In re Harrison*, it lacked authority to extend *Anders* protections to the filing of no-merit briefs in termination of parental rights cases. *In re N.B.*, 183 N.C. App. 114, 117, 644 S.E.2d 22, 24 (2007). In its opinion, however, the Court of Appeals urged the "Supreme Court or the General Assembly to reconsider this issue." *Id.* at 117, 644 S.E.2d at 24. In 2009, Rule 3.1(d) was adopted, which stated as follows:

> **No-Merit Briefs.** In an appeal taken pursuant to N.C.G.S. § 7B-1001, if, after a conscientious and thorough review of the record on appeal, appellate counsel concludes that the record contains no issue of merit on which to base an argument for relief and that the appeal would be frivolous, counsel may file a no-merit brief. In the brief, counsel shall identify any issues in the record on appeal that might arguably support the appeal and shall state why those issues lack merit or would not alter the ultimate result. Counsel shall provide the appellant with a copy of the no-merit brief, the transcript, the record on appeal, and any Rule 11(c) supplement or exhibits that have been filed with the appellate court. Counsel shall also advise the appellant in writing that the appellant has the option of filing a pro se brief within thirty days of the date of the filing of the no-merit brief and shall attach to the brief evidence of compliance with this subsection.

N.C. R. App. P. 3.1(d) (2018).[1]

Between the adoption of Rule 3.1(d) in 2009 and the Court of Appeals' decision in *In re L.V.*, the Court of Appeals issued numerous unpublished opinions and three published decisions reviewing no-merit briefs in termination of parental rights cases and in other cases arising under our Juvenile Code involving the abuse, neglect, or dependency of children. *See, e.g.*, *In re A.A.S.*, 812 S.E.2d 875, 879 (N.C. Ct. App. 2018); *In re M.J.S.M.*, 810 S.E.2d 370, 374–75 (N.C. Ct. App. 2018); *In re M.S.*, 247 N.C. App. 89, 94, 785 S.E.2d 590, 593–94 (2016).

In *In re L.V.*, however, the Court of Appeals—for the first time since the adoption of Rule 3.1(d)—refused to consider the issues raised in a

1. The Rules of Appellate Procedure were amended in December 2018. As of 1 January 2019, the provision authorizing no-merit briefs previously contained in Rule 3.1(d) is now codified in subsection (e). While the language addressing no-merit briefs as set out in Rule 3.1(e) differs in certain respects from that formerly contained in Rule 3.1(d), the two provisions are substantially similar.

properly filed no-merit brief on appeal from an order terminating parental rights. In its analysis the Court of Appeals stated the following:

> Respondent appeals from orders terminating her parental rights to the minor children L.V. and A.V. On appeal, Respondent's appellate counsel filed a no-merit brief pursuant to Rule 3.1(d) stating that, after a conscientious and thorough review of the record on appeal, he has concluded that the record contains no issue of merit on which to base an argument for relief. N.C. R. App. P. 3.1(d). Respondent's counsel complied with all requirements of Rule 3.1(d), and Respondent did not exercise her right under Rule 3.1(d) to file a *pro se* brief. No issues have been argued or preserved for review in accordance with our Rules of Appellate Procedure.

In re L.V., 814 S.E.2d at 928–29 (footnotes omitted). The Court of Appeals then dismissed the respondent's appeal. *Id.* at 929.

Since *In re L.V.* was decided, panels of the Court of Appeals have differed in their approach to no-merit briefs filed under Rule 3.1(d). *See*, *e.g.*, *In re I.B.*, 822 S.E.2d 472 (N.C. Ct. App. 2018) (finding no requirement for an independent review but exercising discretion to review no-merit brief and affirming trial court's termination of parental rights order); *In re I.P.*, 820 S.E.2d 586 (N.C. Ct. App. 2018) (dismissing appeal filed pursuant to Rule 3.1(d)); *In re A.S.*, 817 S.E.2d 798, 2018 WL 4201062 (N.C. Ct. App. 2018) (per curiam) (unpublished) (summarily affirming trial court's adjudication of neglect order on basis that all appellate issues had been abandoned); *In re M.V.*, 817 S.E.2d 507, 2018 WL 3734805 (N.C. Ct. App. 2018) (unpublished) (conducting an independent review of issues raised in no-merit brief and affirming trial court's termination of parental rights order).

In determining the proper interpretation of Rule 3.1(d), we must be mindful of the fundamental interests implicated in a proceeding involving the termination of parental rights. The United States Supreme Court has recognized that "[w]hen the State initiates a parental rights termination proceeding . . . . '[a] parent's interest in the accuracy and justice of the decision to terminate his or her parental status is . . . a commanding one.' " *Santosky v. Kramer*, 455 U.S. 745, 759, 71 L. Ed. 2d 599, 610 (1982) (quoting *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27, 68 L. Ed. 2d 640, 650 (1981)); *see Atkinson v. Downing*, 175 N.C. 244, 246, 95 S.E. 487, 488 (1918) ("It is fully recognized in this State that parents have prima facie the right of the custody and control of their . . . children, a

natural and substantive right not to be lightly denied or interfered with except when the good of the child clearly requires it.").

We conclude that the text of Rule 3.1(d) plainly contemplates appellate review of the issues contained in a no-merit brief. Rule 3.1(d) expressly authorizes counsel to file a no-merit brief identifying issues that could potentially support an appeal and requires an explanation in such briefs as to why counsel believes the identified issues do not require reversal of the trial court's order. Rule 3.1(d) further mandates that counsel provide the parent copies of the no-merit brief along with the record on appeal and the transcript of the proceedings in the trial court. Counsel are further directed to inform the parent in writing that he or she is permitted to submit a pro se brief to the appellate court within thirty days of the filing of the no-merit brief. *See* N.C. R. App. P. 3.1(d).

These specific requirements governing the filing of no-merit briefs clearly suggest that such briefs will, in fact, be considered by the appellate court and that an independent review will be conducted of the issues identified therein. In our view, it would be inconsistent with both the language and purpose of Rule 3.1(d) to construe this provision as either foreclosing independent appellate review of the issues set out in the no-merit brief entirely or making appellate review of those issues merely discretionary. Our interpretation of the Rule is further supported by the fact that while it requires that parents be advised by counsel of their opportunity to file a pro se brief, Rule 3.1(d) neither states nor implies that appellate review of the issues set out in the no-merit brief hinges on whether a pro se brief is actually filed by a parent. Accordingly, we overrule the Court of Appeals' decision in *In re L.V.*

Our holding today furthers the significant interest of ensuring that orders depriving parents of their fundamental right to parenthood are given meaningful appellate review. We observe that our General Assembly has expressly recognized the importance of protecting the interests of parents in termination proceedings by conferring upon them a right to appointed counsel in such cases. *See* N.C.G.S. § 7B-1101.1 (2017).

[2] Having determined that the Court of Appeals erred in failing to conduct an independent review of the issues set out in the no-merit brief filed by respondent's counsel, we would normally remand this case to the Court of Appeals with instructions for it to conduct such a review. But in furtherance of the goals of expeditiously resolving cases arising under our Juvenile Code and obtaining permanency for the juvenile in this case, we instead elect to conduct our own review of the issues raised in the no-merit brief.

In her twenty-five page brief, respondent's attorney identified three issues that could arguably support an appeal but stated why she believed each of those issues lacked merit. Based upon our careful review of the issues identified in the no-merit brief in light of our consideration of the entire record, we are satisfied that the trial court's 5 January 2018 order was supported by competent evidence and based on proper legal grounds. Accordingly, we affirm the trial court's order terminating respondent's parental rights.

Conclusion

For the reasons set out above, we hereby affirm the trial court's order terminating respondent's parental rights. The opinion of the Court of Appeals dismissing respondent's appeal is vacated.

VACATED.

IN THE MATTER OF T.N.H.

No. 92A19

Filed 16 August 2019

Termination of Parental Rights—neglected juvenile—sufficiency of evidence

The trial court's conclusion that grounds existed pursuant to N.C.G.S. § 78-1111(a)(9) was sufficient in and of itself to support termination of respondent's parental rights. Furthermore, the trial court made sufficient findings in determining that termination was in the best interests of the child.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 17 December 2018 by Judge Monica Bousman in District Court, Wake County. This matter was calendared in the Supreme Court on 1 August 2019 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Office of the Wake County Attorney, by Mary Boyce Wells, for petitioner-appellee Wake County Human Services.

Everett Gaskins Hancock LLP, by Katherine A. King, for appellee Guardian ad Litem.

Mercedes O. Chut for respondent-appellant mother.

EARLS, Justice.

Respondent mother appeals from the trial court's order terminating her parental rights to T.N.H. (Troy).[1] We affirm.

On 24 September 2015, Wake County Human Services (WCHS) obtained non-secure custody of Troy and his sister, T.B.,[2] after receiving reports of alleged domestic violence between respondent and Troy's father C.H. WCHS subsequently filed a petition in which it claimed that Troy and T.B. were neglected juveniles. The petition claimed that respondent alleged that C.H. had assaulted her and threatened to kill Troy and T.B. WCHS further noted that respondent had a history of sixteen prior Child Protective Services (CPS) reports of neglect dating back to 2000. Several of respondent's older children have been removed from her care due to neglect and have not been returned to her care.

On 18 November 2015, based on stipulations made by the parties, Troy and T.B. were adjudicated to be neglected juveniles. On 8 January 2016, the trial court entered a dispositional order in which it left custody of Troy and T.B. with WCHS and ordered respondent to comply with an out of home family services agreement. Troy and T.B. were placed in foster care and respondent was ordered to comply with a visitation plan that included visitation to be supervised by WCHS. On 13 September 2016, the trial court adopted an initial primary permanent plan of reunification with a secondary permanent plan of adoption.

On 10 July 2017, the trial court held a review hearing regarding Troy pursuant to N.C.G.S. § 7B-906.1. At that time, Troy had been placed with his paternal grandmother, J.H., for approximately eight and a half months and was thriving in his placement with her. The trial court found, however, that respondent was not making adequate progress towards satisfying the requirements of her case plan within a reasonable amount of time, that respondent had acted in a manner inconsistent with Troy's health or safety, and that it was unlikely that Troy could return to her care within six months. The trial court determined that the best primary permanent plan for Troy was guardianship and that Troy should

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading. *See* N.C. R. App. P. 42(b)(1).

2. Respondent's parental rights to T.B. were terminated by order entered on 6 September 2017. That order is not the subject of this appeal.

be placed in the guardianship of J.H. Respondent and C.H. were granted visitation with Troy, which was to be supervised and monitored by J.H.

On 9 January 2018, WCHS received a report that Troy was neglected and had received improper supervision. Upon investigation, WCHS determined that in December 2017, J.H. had allowed Troy to stay unsupervised with his parents in a motel room where they had been living, in violation of the trial court's orders. During Troy's stay with his parents, he left the motel room and met a man. The man took Troy to a store, bought Troy a toy, then took Troy back to his motel room where he bathed him, washed his genitals, and took photos of Troy naked. Following this incident, J.H. noticed regression in Troy's behavior and Troy told J.H. about the incident. J.H. notified Troy's father about the disclosure and C.H. soon told respondent about the incident. However, neither respondent, C.H., or J.H. contacted WCHS to report the suspected sexual abuse. Troy's disruptive behavior subsequently became so severe that he was hospitalized at UNC Hospital on 21 January 2018 and transferred to Central Regional Hospital on 24 January 2018. On 14 February 2018, WCHS obtained non-secure custody of Troy and filed a petition alleging that Troy was a neglected juvenile. On 7 June 2018, the trial court adjudicated Troy to be a neglected juvenile, terminated J.H.'s guardianship, and continued custody with WCHS. Respondent was not allowed visitation with Troy.

On 14 August 2018, WCHS filed a motion to terminate respondent's and C.H.'s parental rights on two grounds. The first ground was neglect. *See* N.C.G.S. § 7B-1111(a)(1) (2017). The second ground was that respondent's parental rights with respect to another child had been terminated involuntarily and she lacked the ability or willingness to establish a safe home. *See* N.C.G.S. § 7B-1111(a)(9) (2017). The trial court held a hearing on the motion to terminate on 13 December 2018, but C.H. could not attend because he was hospitalized so the hearing was continued as to C.H. On 17 December 2018, the trial court entered an order finding that the evidence in the case established facts sufficient to support the termination of respondent's parental rights on both grounds alleged in the motion. The trial court further concluded it was in Troy's best interests that respondent's parental rights be terminated. Accordingly, the trial court terminated respondent's parental rights. Respondent gave timely notice of appeal to this Court pursuant to N.C.G.S. §§ 7A-27(a)(5) and 7B-1001(a1)(1).

Respondent argues on appeal that the trial court erred in terminating her parental rights because it did not receive sufficient evidence or make adequate findings of fact.

Our Juvenile Code provides for a two-stage process for the termination of parental rights: the adjudicatory stage and the dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2017). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes. N.C.G.S. § 7B-1109(e), (f) (2017). We review a trial court's adjudication under N.C.G.S. § 7B-1109 "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984) (citing *In re Moore*, 306 N.C. 394, 404, 293 S.E.2d 127, 133 (1982)). "If [the trial court] determines that one or more grounds listed in section 7B-1111 are present, the court proceeds to the dispositional stage, at which the court must consider whether it is in the best interests of the juvenile to terminate parental rights." *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citing *In re Young*, 346 N.C. 244, 247, 485 S.E.2d 612, 614–15 (1997); N.C.G.S. § 7B-1110).

Here, the trial court made extensive findings of fact in support of its determination that grounds existed to support the termination of respondent's parental rights. The court found that respondent had a history of CPS reports for neglect and that at least four of her children had been removed from her care. Troy was born prematurely at thirty weeks and respondent tested positive for both cocaine and marijuana at Troy's birth. Another child of respondent's was born prematurely at twenty-seven weeks and tested positive for cocaine at birth. Over the years there were several reports concerning respondent regarding: improper care, lack of housing, and substance abuse by respondent and C.H. There were also reports that C.H. was violent in the home and that he abused drugs in front of respondent's child. One of respondent's other sons was alleged to have been sexually abused by an individual in the neighborhood. Another report alleged that respondent allowed a registered sex offender to come into the home and that he sexually assaulted one of respondent's children.

In addition to past reports of neglect, the court found that Troy came into foster care after respondent alleged that C.H. grabbed Troy and threatened to "snap off [his] head[.]" C.H. then allegedly bit respondent and chased her with a meat cleaver. Despite this violent incident, respondent dismissed the domestic violence protective order against C.H. Respondent failed to make sufficient progress towards reunification with Troy and as a result, Troy's paternal grandmother J.H. was awarded guardianship. However, in 2018 Troy was adjudicated to

be a neglected juvenile for the second time after the court found that J.H. had allowed Troy's parents to have unsupervised contact with him, which resulted in Troy being sexually abused. The sexual abuse experienced by Troy was never reported by respondent, C.H., or J.H. As a result, all three individuals were charged with felony child abuse. Troy was diagnosed with post-traumatic stress disorder (PTSD) following an evaluation due to the sexual abuse. Another physician diagnosed Troy with anxiety disorder based on PTSD and noted Troy experienced aggression, oppositional behavior, frequent nightmares, and bowel incontinence. Despite the physicians' findings, respondent, C.H., and J.H. did not believe that Troy had been sexually abused.

Finally, the court found during the 2018 adjudication of neglect for Troy that respondent had not remedied many of the same problems that she faced in the 2015 adjudication of neglect for Troy. Respondent continued to lack safe, stable housing, failed to make progress in demonstrating appropriate parenting skills, and failed to acquire treatment for substance abuse, mental health, and domestic violence. Respondent was diagnosed with cocaine, cannabis, and alcohol use disorder. The court also found that respondent continued to be incarcerated for the felony child abuse charge against her. Because Troy had been adjudicated to be neglected twice, the court found that there was a high likelihood that Troy would be neglected again if he returned to respondent's care.

Findings of fact not challenged by respondent are deemed supported by competent evidence and are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citing *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962)). Moreover, we review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights. *In re Moore*, 306 N.C. at 404, 293 S.E.2d at 133.

Our Juvenile Code places a duty on the trial court as the adjudicator of the evidence. It mandates that "[t]he court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent." N.C.G.S. § 7B-1109(e) (2017). Section 1A-1, Rule 52(a)(1) of the North Carolina General Statutes provides in pertinent part: "In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law[.]" N.C.G.S. § 1A-1, Rule 52(a)(1) (2017). This Court has held:

> [W]hile Rule 52(a) does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate

> facts, it does require *specific findings* of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.

Quick v. Quick, 305 N.C. 446, 451–52, 290 S.E.2d 653, 658 (1982) (emphasis in original).

Respondent makes several challenges to the findings of fact in this case. Respondent first argues that findings of fact 9–13, 15, 20–23, and 25–27 were improper because they merely recite prior allegations, describe what various people not in court, or unidentified, believed about certain events, and do not meet the standard for evidentiary findings sufficient to support conclusions of law. Respondent references a Court of Appeals case where the respondent similarly argued that the trial court failed to make sufficient findings of fact, but instead merely recited the testimony of witnesses at the hearing. *See In re C.L.C.*, 171 N.C. App. 438, 445–446, 615 S.E.2d 704, 708 (2005), *aff'd per curiam in part and disc. rev. improvidently allowed in part*, 360 N.C. 475, 628 S.E.2d 760 (2006). In that case, the Court of Appeals, applying Rule 52(a)(1) of the North Carolina Rules of Civil Procedure and this Court's opinion in *Quick*, determined that:

> While the trial court did include findings of fact that summarized the testimony, the court also made the necessary ultimate findings of fact. There is nothing impermissible about describing testimony, so long as the court ultimately makes its own findings, resolving any material disputes. The testimony summaries were not the ultimate findings of fact; those findings were found elsewhere in the order.

C.L.C., 171 N.C. App. at 446, 615 S.E.2d at 708. Here, the challenged findings include procedural facts about the case, for example, finding of fact 11 states: "On January 9, 2002 three of [respondent's] older children were taken into foster care for neglect and those children were not returned to the care of [respondent]." In large part they include findings of fact from prior orders in the case, such as finding of fact 20: "The parents did not take sufficient precautions to prevent [Troy] from leaving the motel room unaccompanied." Rather than being summaries of testimony which occurred in *C.L.C.*, the trial court in this case relied partly on evidence from prior proceedings and findings in earlier orders, which as discussed below, is proper and appropriate.

Respondent further argues that findings 12 and 13 were insufficiently explanatory. Specifically, respondent contends that finding of fact 12[3] fails to establish the conditions which led to Troy's removal in 2012, merely stating "*concerns* with a lack of housing, improper care, and substance abuse." Finding of fact 13[4] described a report about a sexual offender who is "believed" to have sexually abused one of respondent's older children. However, these findings do contain specific allegations and they, as well as other findings challenged by respondent, were stipulated to by respondent when Troy was adjudicated neglected in 2015 and the trial court made the same findings in its 2015 and 2018 adjudications. *See In re Ordinance of Annexation No. 1977-4*, 296 N.C. 1, 14, 249 S.E.2d 698, 706 (1978) ("[S]tipulations constitute judicial admissions binding on the parties and dispense with the necessity of proving the stipulated fact. Such stipulations continue in force for the duration of the controversy and preclude the later assertion of a position inconsistent therewith." (citations omitted)). Furthermore, respondent did not appeal from the trial court's adjudication order. Therefore, respondent is bound by the doctrine of collateral estoppel from re-litigating these findings of fact. *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973) (Under the doctrine of collateral estoppel, parties "are precluded from retrying fully litigated issues that were decided in any prior determination and were necessary to the prior determination.").

Respondent next argues that the trial court improperly relied on findings from dispositional orders, where the evidence was subject to a lower standard of proof, to establish that respondent had not made adequate progress towards reunification and had not corrected the conditions that led to Troy's removal. Respondent further contends that WCHS did not offer sufficient evidence at the termination hearing to enable the trial court to make an independent determination that she had not made

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3. Finding of Fact 12 states: "On April 9, 2009 there were concerns with a lack of housing, improper care, and substance abuse on the part of [respondent] and [C.H.]. On September 18, 2012 there were concerns that [C.H.] was violent and aggressive in the home and that [respondent] and [C.H.] were abusing drugs in the presence of [respondent]'s child, [T.B.]."

4. Finding of Fact 13 states: "[Troy] was born premature at thirty weeks and [respondent] tested positive for cocaine and marijuana at [Troy's] birth. There were also concerns that [respondent]'s son [Tq. B.] had been sexually abused by someone in the neighborhood and that the family was facing eviction December 27, 2012. On July 5, 2013 there was a report that [C.H.] was smoking marijuana on a daily basis in the presence of the children and [Troy], who had respiratory problems. On October 14, 2013 there was a report that [respondent] was allowing [A.J.] in the home and [A.J.] is a registered sex offender who is believed to have sexually assaulted one of [respondent]'s older children."

progress towards satisfying the requirements of her case plan. However, the evidence is more extensive than respondent acknowledges.

A trial court may take judicial notice of findings of fact made in prior orders, even when those findings are based on a lower evidentiary standard because where a judge sits without a jury, the trial court is presumed to have disregarded any incompetent evidence and relied upon the competent evidence. *Munchak Corp. v. Caldwell*, 301 N.C. 689, 694, 273 S.E.2d 281, 285 (1981). As this Court has stated:

> [E]vidence of neglect by a parent prior to losing custody of a child—including an adjudication of such neglect—is admissible in subsequent proceedings to terminate parental rights. The trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect and the probability of a repetition of neglect.

In re Ballard, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984). We agree with the Court of Appeals' precedent holding that the trial court may not rely solely on prior court orders and reports but must receive some oral testimony at the hearing and make an independent determination regarding the evidence presented. *In re A.M.*, *J.M.*, 192 N.C. App. 538, 541–42, 665 S.E.2d 534, 536 (2008), *appeal after remand*, 201 N.C. App. 159, 688 S.E.2d 118 (2009) (unpublished).

Here, the trial court took judicial notice of the record. We note, however, that several of the trial court's findings of fact regarding respondent's lack of progress were not taken from prior dispositional orders, which have a lower standard of proof, but from the 2018 adjudicatory order in which the findings were proven by the higher standard of "clear and convincing evidence." N.C.G.S. § 7B-805 (2017). In the 2018 adjudicatory order, while recounting the historical facts of the case, the trial court found as fact that respondent "did not make sufficient progress towards remedying the conditions which brought [Troy] into the custody of WCHS and failed to complete the Out of Home Family Services Agreement and comply with all of the orders of the Court in order to timely reunify with [Troy]." In addition to taking judicial notice of the record, the social worker assigned to the case testified at the hearing regarding respondent's historical and current lack of progress, and respondent testified that she had not yet taken any parenting classes. The trial court's findings of fact appear to be based, at least in part, on testimony provided at the hearing, sufficient to demonstrate that the trial court made an independent determination regarding the evidence presented. Accordingly, we conclude that respondent's argument is without merit.

Respondent alternatively argues that, even assuming *arguendo* the trial court's findings were not merely based solely on prior dispositional orders, the evidence generally does not support findings of fact 15, 28, 31, 32, 35[a], and 35[b] (the trial court's order erroneously contained two findings of fact 35). Our review of the record evidence indicates that there is support for each of these findings.

For example, the social worker testified in detail and without contradiction about the events which led to WCHS assuming non-secure custody in February 2018. The social worker testified that while Troy was placed in guardianship with J.H., respondent was given unsupervised visitation with Troy in violation of the trial court's orders and that Troy was sexually abused while in respondent's care. The social worker additionally testified as to respondent's case plan, her persistent failure to comply with her case plan, her various diagnoses, and her failure to make progress. Finally, the social worker testified that in her opinion, if Troy were returned to respondent's custody, there was a high likelihood that there would be a repetition of neglect.

Respondent specifically argues, regarding finding of fact 15, that the trial court erred by finding that she may still be in a relationship with C.H. At the termination hearing, when asked whether she and C.H. considered themselves to still be "together," respondent replied: "We communicate." This Court has previously held that it is the trial judge's duty to consider all the evidence, pass upon the credibility of the witnesses, and determine the reasonable inferences to be drawn from the testimony. *In re D.L.W.*, 368 N.C. at 843, 788 S.E.2d at 167–68. Even if an inference that respondent is still "in a relationship" with C.H. is not reasonably drawn from the "we communicate" answer, this fact is not determinative of the ultimate conclusion that grounds exist to terminate respondent's parental rights. In other words, even if respondent is no longer in a relationship with C.H., the remaining findings in the case are more than sufficient to support the ultimate termination order.

Respondent further contends that there was no evidence that she had no plans "to live independently for the foreseeable future." Yet, respondent herself testified that she planned to live with an aunt upon her release from prison and she did not offer any plan for transitioning to independent living. Accordingly, we conclude the clear and convincing evidence in the record supported the trial court's findings of fact on this point.

Respondent separately argues that the trial court wholly failed to find as fact that Troy was sexually abused. However, the trial court specifically found in finding of fact 19 and finding of fact 35 that while in

respondent's care, Troy was sexually abused. Thus, respondent's contention is without merit.

We next turn to whether the trial court's findings of fact support its conclusion that grounds existed to terminate respondent's parental rights. The trial court adjudicated the existence of two grounds to terminate respondent's parental rights. First, neglect under N.C.G.S. § 7B-1111(a)(1). Second, that respondent's parental rights to another child had previously been terminated and respondent lacked the ability or willingness to establish a safe home for Troy under N.C.G.S. § 7B-1111(a)(9). "If either of the [two] grounds aforesaid is supported by findings of fact based on clear, cogent and convincing evidence, the order appealed from should be affirmed." *In re Moore*, 306 N.C. at 404, 293 S.E.2d at 133.

Section 7B-1111(a)(9) allows for the termination of parental rights where "[t]he parental rights of the parent with respect to another child of the parent have been terminated involuntarily by a court of competent jurisdiction and the parent lacks the ability or willingness to establish a safe home." N.C.G.S. § 7B-1111(a)(9) (2017). A "safe home" is defined by the Juvenile Code as one "in which the juvenile is not at substantial risk of physical or emotional abuse or neglect." N.C.G.S. § 7B-101(19) (2017).

Here, respondent does not dispute that her parental rights to another child were terminated by a court of competent jurisdiction. Rather, respondent argues the record does not support a finding that she lacked the ability or was unwilling to establish a safe home for Troy. The record shows that at the time of the termination hearing, respondent was still incarcerated with an unknown release date and had no stable home to provide for Troy upon her release from incarceration. This Court recognizes that "[i]ncarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision." *In re M.A.W.*, 370 N.C. 149, 153, 804 S.E.2d 513, 517 (2017) (quoting *In re P.L.P.*, 173 N.C. App. 1, 10, 618 S.E.2d 241, 247 (2005), *aff'd per curiam*, 360 N.C. 360, 625 S.E.2d 779 (2006)) (citation omitted). However, the record indicates that respondent had a history of unstable housing, that she had not satisfactorily completed her case plan, and that Troy was sexually abused while in respondent's care during a time when she was living in a motel room. The record further demonstrates that respondent did not believe Troy was sexually abused, that she did not report the abuse, that she does not understand the trauma that Troy suffered or the seriousness of his mental health needs, and that she will be unable to meet his needs. We thus conclude the record supports the trial court's finding that respondent lacked the willingness or ability to establish a safe home. Accordingly, we hold the trial court did not err by concluding that grounds

existed pursuant to N.C.G.S. § 7B-1111(a)(9) to terminate respondent's parental rights.

The trial court's conclusion that grounds existed pursuant to N.C.G.S. § 7B-1111(a)(9) is sufficient in and of itself to support termination of respondent's parental rights. Furthermore, the trial court made sufficient findings in determining that the termination of respondent's parental rights was in Troy's best interest. *See* N.C.G.S. § 7B-1110(a) (2017). Accordingly, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

IN THE MATTER OF T.T.E.

No. 238A18

Filed 16 August 2019

1. Juveniles—delinquency—petition—disorderly conduct—sufficient allegation

Where the delinquency petition charging a juvenile with disorderly conduct substantially tracked the language of the statute, N.C.G.S. § 14-288.4, the juvenile and his parents had sufficient notice of, and the trial court had subject matter jurisdiction over, the charged offense.

2. Juveniles—delinquency—disorderly conduct—sufficiency of evidence

There was sufficient evidence to withstand a juvenile's motion to dismiss a charge of disorderly conduct where the State presented evidence tending to show that the juvenile threw a chair at his brother across a high school cafeteria where other students were present; the juvenile then ran out of the cafeteria; the juvenile cursed at the school resource officer, who handcuffed him; other students became involved and cursed at the officer; and the officer arrested another student during the confrontation.

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 818 S.E.2d 324 (N.C. Ct. App. 2018), vacating

adjudication and disposition orders entered on 27 February 2017 by Judge Susan M. Dotson-Smith in District Court, Buncombe County. Heard in the Supreme Court on 28 May 2019 in session in the State Capitol Building in the City of Raleigh.

Joshua H. Stein, Attorney General, by Janelle E. Varley, Assistant Attorney General, for the State-appellant.

Glenn Gerding, Appellate Defender, by Heidi E. Reiner, Assistant Appellate Defender, for juvenile-appellee.

MORGAN, Justice.

This juvenile delinquency case concerns the sufficiency of evidence required to survive a juvenile's motion to dismiss a petition alleging disorderly conduct. In light of the relatively low threshold of evidence needed to send such a matter to the finder of fact, we conclude that the district court here did not err in denying the juvenile's motion to dismiss that charge. Accordingly, we reverse the decision of the Court of Appeals with respect to this issue.

Factual Background and Procedural History

On 8 November 2016, two juvenile petitions were filed in the District Court, Buncombe County, alleging that the juvenile T.T.E. was delinquent because of his commission of the offenses of (1) disorderly conduct and (2) resisting a public officer. The disorderly conduct petition alleged that the juvenile, a junior at Clyde A. Erwin High School (EHS), "did intentionally cause a public disturbance at [EHS], Buncombe County NC, by engaging in violent conduct. This conduct consisted of throwing a chair toward another student in the school's cafeteria." The petition regarding the allegation of resisting a public officer stated that the juvenile was delinquent as a result of "[f]leeing the scene of a disorderly conduct incident, resisting the officer's attempts to escort him to the office, having to be handcuffed to be safe, and cursing at the officer."

At the adjudication hearing that was conducted on 20 and 23 February 2017, the State called two witnesses. Deputy Mickey Ray of the Buncombe County Sheriff's Office was the school resource officer at EHS on the date of the juvenile's allegedly delinquent behavior. Deputy Ray testified that on the date of the incident giving rise to the juvenile petition, he was in the cafeteria during "Warrior period," a time slot during the school day when students can receive tutoring and "get to just come out and relax a little bit, maybe hang out in the cafeteria, or hang out on

other parts of the campus, just to get a little break from everything else." Deputy Ray stated that he saw the juvenile "pick up a chair and throw it across the cafeteria" before the juvenile ran out of the room. Deputy Ray pursued the juvenile for twenty-five to thirty yards, and once Deputy Ray caught up to the student, the officer grabbed the juvenile while still behind him. In response to Deputy Ray's instruction to "come back with me," the juvenile "resisted," saying, "No. No. No."

Deputy Ray brought the juvenile to the school lobby and searched him, at which point "all the other kids started trying to get involved." According to the officer's testimony, the juvenile was cursing at Deputy Ray, who decided to put handcuffs on the juvenile. Other students also began to yell at the officer, and Deputy Ray felt the need to handcuff and later to arrest one of the students who had tried to involve himself in the situation with the juvenile. When asked, "Based on . . . how the other students reacted" to the juvenile's act of throwing the chair and then resisting Deputy Ray's attempt to stop and question him, whether the incident "in any way disrupt[ed] or disturb[ed] the process of the school," specifically with regard to students' efforts to go to classes, Deputy Ray responded, "Yes, sir. Absolutely."

Upon further examination at trial, Deputy Ray provided additional details about the school cafeteria incident. He related that the juvenile "chucked" the chair underhandly, but he was unable to say whether the juvenile had thrown the chair "at" anyone in particular; however, the juvenile told Deputy Ray that he had thrown the chair at the juvenile's brother—another EHS student—in the course of "playing or something." Regarding his perception of the juvenile's intent behind the act of throwing the chair, Deputy Ray was asked the following question at trial and responded as follows:

> Q. Did it appear to you that, based on what you saw with the chair throwing incident, that [juvenile] was playing, or did it seem like something that was a little more violent?
>
> A. I couldn't really tell, because just like I told you at the beginning, it's just something I ain't never seen before in my 10 years of working as an SR [school resource officer] in the city schools and the county schools. That's the first time I've seen something like that.

On cross-examination, Deputy Ray testified that he did not see any students have to duck or otherwise maneuver to avoid the chair thrown by the juvenile. Deputy Ray also tempered the testimony that he

offered on direct examination by stating that he could not definitively say whether the juvenile's actions were actually disruptive to other students as they went to class.

In addition to Deputy Ray's account, the district court also heard testimony from the State's witness Tate McQueen, a history teacher and soccer coach at EHS. McQueen did not see the chair-throwing incident in the cafeteria but did observe Deputy Ray pursuing the juvenile after the occurrence. McQueen followed Deputy Ray in order to provide assistance as the situation unfolded. At trial, McQueen offered his description of what he observed:

> When I rounded the corner from the main foyer to the language arts, or foreign language hall, I observed Officer Ray with a student. At that time, the student was pulling away from Officer Ray. I did not see the moment in which they first came in contact. I observed Officer Ray telling the student to come with him. The student was pulling away.
>
> And as the student and Officer Ray were coming back into the main foyer towards the office, we had a significant safety issue with students gravitating towards that situation. Officer Ray was trying to deal with one student, and there were, I would say, three, four, upwards of five students that were now engaging in this process. Others were stopping instead of going to class. Once that release bell rings, they have about five minutes to get to class. If you've been to Erwin, you know how expansive our building is, so if they are not moving, they are going to be late for class. They will be late for instruction. At that time, I turned as a buffer for Officer Ray. I was parroting what he was saying, which is "Go to class," while also trying to get the student to calm down and stop. There was a lot of profanity that was being directed at Officer Ray from [juvenile], and there were others. My involvement at that point was to plead with the student to please stop, and to be calm, and that he was making it worse. "Just stop and breathe. You are making it worse."
>
> At this point, another student reaches in and physically grabs [juvenile] to pull him. Officer Ray is turning to tell students to go to class. The student that has made contact with [juvenile] to pull him is refusing to go to class and comply. At that point, Officer Ray took a hand and

> grabbed that student and had both students, essentially, held. They slid down the wall maybe two feet, maybe three, to the conference room. They went in. I went in behind them, so I observed that part of the process.

The juvenile did not testify or present any evidence. Through counsel, the juvenile moved to dismiss both petitions on the basis that the State had presented insufficient evidence to support an adjudication of delinquency.

The district court denied the motion to dismiss and found as fact that "[j]uvenile threw a chair in the cafeteria where students and teacher[s] were present and ran away [illegible]. Juvenile refused to cooperate with officer when asked and became belligerent. Juvenile delayed the investigation and caused a scene instead of cooperating." The district court adjudicated the juvenile to be delinquent for disorderly conduct and for resisting a public officer. On 27 February 2017, the district court entered an order imposing a Level 1 disposition. The juvenile gave notice of appeal.

In the Court of Appeals, the juvenile argued that his petition for disorderly conduct under N.C.G.S. § 14-288.4 was defective because it did not specify the subsection of the statute that he had allegedly violated. The juvenile also challenged on appeal the district court's denial of his motion to dismiss both petitions due to insufficiency of the evidence. The entire Court of Appeals panel agreed that the evidence was insufficient to support the juvenile's adjudication of delinquency for resisting a public officer, and the court therefore vacated the adjudication and disposition for this charge. *In re T.T.E.*, 818 S.E.2d 324, 328–29 (N.C. Ct. App. 2018).[1] However, the Court of Appeals panel divided regarding the sufficiency of the evidence to support the disorderly conduct adjudication. The majority agreed with the juvenile that

> [t]he evidence was not sufficient to show that the juvenile fought, engaged in violent conduct, or created an imminent risk of fighting or other violence. Although there were other students in the cafeteria—a very large room—when the juvenile threw a chair, no other person was nearby, nor did the chair hit a table or another chair or anything else. Juvenile then ran out of the cafeteria. This is not "violent conduct or . . . conduct creating the threat

1. The resolution of the alleged offense of resisting a public officer is not before this Court.

> of imminent fighting or other violence." No one was hurt or threatened during the event and juvenile did not escalate the situation by yelling, throwing other things, raising fists, or other such conduct that along with the throwing of the chair could be construed to indicate escalating violent behavior. Throwing a single chair with no other person nearby and without attempting to hit another person and without hitting even any other item in the cafeteria is not disorderly conduct as defined by North Carolina General Statute § 14-288.4(a)(1).

Id. at 327–28 (citing and quoting N.C.G.S. § 14-288.4(a)(1)). The Court of Appeals consequently vacated the juvenile's adjudication of delinquency on the charge of disorderly conduct as well as the disposition that the district court had entered upon that delinquency adjudication. *Id.* at 328. In light of this outcome, the majority did not address the juvenile's contention that there was a fatal defect in the disorderly conduct petition.

The dissenting judge disagreed with the majority regarding the sufficiency of the evidence on the charge of disorderly conduct, opining that

> viewing this evidence in the light most favorable to the State, the safety resource officer's testimony that juvenile threw a chair, which the juvenile admitted he was throwing at another student, his brother, provided substantial evidence of violent conduct, from which the trial court could reasonably determine that juvenile's act of throwing a chair at another student amounted to violent conduct.

Id. at 330 (Arrowood, J., concurring in part and dissenting in part). Regarding the alleged defect in the disorderly conduct petition, the dissenting judge further opined:

> The petition at issue alleged juvenile violated N.C. Gen. Stat. § 14-288.4 when he "did intentionally cause a public disturbance at Clyde A. Erwin High School, Buncombe County NC, by engaging in violent conduct. This conduct consisted of throwing a chair toward another student in the school's cafeteria." Because this language closely tracks the statutory language of N.C. Gen. Stat. § 14-288.4(a)(1), "[d]isorderly conduct is a public disturbance intentionally caused by any person who . . . [e]ngages in fighting or other violent conduct or in conduct creating the threat of imminent fighting or other violence[,]" and the petition lists the offense as N.C. Gen. Stat.

> § 14-288.4, I would hold that, based on the totality of the circumstances, the petition averred the charge with sufficient specificity that juvenile was clearly apprised of the conduct for which he was charged. *See State v. Simpson*, 235 N.C. App. 398, 402-403, 763 S.E.2d 1, 4-5 (2014) (holding an indictment was not fatally defective even though it did not list which subsection of a statute the defendant was charged with violating because it was clear from the indictment which subsection was charged). Therefore, the petition was not fatally defective, and the trial court had jurisdiction to enter the adjudication and disposition orders against juvenile.

Id. at 329–30.

The State filed a motion for temporary stay and a petition for writ of *supersedeas* on 1 August 2018. This Court allowed the motion to stay on 2 August. On 21 August 2018, the State filed its notice of appeal in this Court based upon the dissent in the lower appellate court. We allowed the State's petition for writ of *supersedeas* on 4 September 2018.

Analysis

[1] As an initial matter, we briefly address the question of whether the delinquency petition charging disorderly conduct sufficiently alleged a violation of N.C.G.S. § 14-288.4. "[A] petition in a juvenile action serves essentially the same function as an indictment in a felony prosecution and is subject to the same requirement that it aver every element of a criminal offense, with sufficient specificity that the accused is clearly apprised of the conduct for which he is being charged." *In re Griffin*, 162 N.C. App. 487, 493, 592 S.E.2d 12, 16 (2004); *see also In re Burrus*, 275 N.C. 517, 530, 169 S.E.2d 879, 887 (1969) ("Notice must be given in juvenile proceedings which would be deemed constitutionally adequate in a civil or criminal proceeding; that is, notice must be given the juvenile and his parents sufficiently in advance of scheduled court proceedings to afford them reasonable opportunity to prepare, and the notice must set forth the alleged misconduct with particularity." (citation omitted)), *aff'd sub nom. McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (plurality opinion). As the dissenting opinion in the present case correctly noted, the petition here closely tracked the language of N.C.G.S. § 14-288.4. This Court has long held that

> the "true and safe rule" for prosecutors in drawing indictments is to follow strictly the precise wording of the statute because a departure therefrom unnecessarily raises doubt

> as to the sufficiency of the allegations to vest the trial court with jurisdiction to try the offense. Nevertheless, it is not the function of an indictment to bind the hands of the State with technical rules of pleading; rather, its purposes are to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime. Thus, . . . an indictment shall not be quashed "by reason of any informality or refinement" if it accurately expresses the criminal charge in "plain, intelligible, and explicit" language sufficient to permit the court to render judgment upon conviction.

State v. Sturdivant, 304 N.C. 293, 310–11, 283 S.E.2d 719, 731 (1981) (footnote and citations omitted). Here, the State followed the articulated "true and safe rule" by substantially employing the terminology of N.C.G.S. § 14-288.4 in the delinquency petition that initiated the disorderly conduct action. Because the petition averred the offense of disorderly conduct with sufficient specificity to clearly apprise the juvenile here of the offense with which he was charged, the district court was properly cloaked with subject-matter jurisdiction over this alleged offense.

[2] With the jurisdictional issue having been addressed, we turn to the substantive issue regarding the sufficiency of the evidence presented by the State at trial to withstand the juvenile's motion to dismiss.

This Court performs de novo review of the denial of a motion to dismiss for insufficiency of the evidence in order to determine "*only* whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Turnage*, 362 N.C. 491, 493, 666 S.E.2d 753, 755 (2008) (emphasis added) (quoting *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996)); *see also*, *e.g.*, *State v. Hunt*, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (2012). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Turnage*, 362 N.C. at 493, 666 S.E.2d at 755 (quoting *Crawford*, 344 N.C. at 73, 472 S.E.2d at 925). In undertaking this determination, "[a]ny contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered." *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009) (citations omitted). "[S]o long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also

'permits a reasonable inference of the defendant's innocence.' " *Id.* at 99, 678 S.E.2d at 594 (quoting *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 140 (2002)).

"Disorderly conduct is a public disturbance intentionally caused by any person who" perpetrates one or more acts listed in the General Statutes. N.C.G.S. § 14-288.4(a) (2017). In the case at bar, the disorderly conduct petition averred that the juvenile was delinquent for a violation of section 14-288.4(a)(1). Although the juvenile petitions did not specifically cite subdivision (a)(1) of that statute, we note that the juvenile's alleged act of "throwing a chair toward another student in the school's cafeteria" placed him in the category of "any person who . . . [e]ngages in fighting or other violent conduct or in conduct creating the threat of imminent fighting or other violence." *Id.* § 14-288.4(a)(1). A "public disturbance" is defined as:

> Any annoying, disturbing, or alarming act or condition exceeding the bounds of social toleration normal for the time and place in question which occurs in a public place or which occurs in, affects persons in, or is likely to affect persons in a place to which the public or a substantial group has access. The places covered by this definition shall include, but not be limited to, highways, transport facilities, *schools*, prisons, apartment houses, places of business or amusement, or any neighborhood.

Id. § 14-288.1(8) (2017) (emphasis added). Accordingly, this Court must determine whether, as we view the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference, *see Miller*, 363 N.C. at 98, 678 S.E.2d at 594, substantial evidence was presented at the adjudication hearing that the juvenile perpetrated an "annoying, disturbing, or alarming act or condition exceeding the bounds of social toleration normal for the time and place" by means of "[e]ngag[ing] in fighting or other violent conduct or in conduct creating the threat of imminent fighting or other violence." N.C.G.S. §§ 14-288.1(8), -288.4(a)(1).

The juvenile contends that the evidence presented by the State could support an inference that he was simply engaged in horseplay with his brother, that he did not intend to harm any person or property, and that he did not actually cause harm to any person or property. While we do not disagree that such inferences could be drawn from the evidence, *any* contradictions or conflicts in the evidence are resolved in favor of the State on a motion to dismiss for insufficiency of the evidence. The

juvenile's misconstruction of the law is likewise exhibited in the erroneous conclusion of the Court of Appeals majority that "[t]hrowing a single chair with no other person nearby and without attempting to hit another person and without hitting even any other item in the cafeteria is not disorderly conduct as defined by North Carolina General Statute § 14-288.4(a)(1)." *In re T.T.E.*, 818 S.E.2d at 328 (majority opinion). Based on its own review of the evidence presented at the adjudication hearing, the majority of the lower appellate court erroneously decided to ultimately determine whether the juvenile committed the offense of disorderly conduct. But the proper question before the district court, the Court of Appeals, and now this Court, when considering the juvenile's motion to dismiss based on all of the evidence presented at the adjudication hearing, which must be viewed in the light most favorable to the State, is whether the evidence merely could support an inference that the juvenile committed the offense of disorderly conduct. *See Miller*, 363 N.C. at 98, 678 S.E.2d at 594.

In the light most favorable to the State, the evidence presented at the adjudication hearing tended to show that the juvenile threw a chair at his brother across the EHS cafeteria where other students were present. The juvenile then ran out of the cafeteria and through the school's hallways. The juvenile's behavior occurred during a part of the school day when students were not in class and were allowed to move relatively freely about the campus in order to receive tutoring and to relax. As a result, a number of EHS students were able to observe the interaction between the juvenile and Deputy Ray after the school resource officer saw the juvenile throw the chair and after the deputy was able to successfully pursue the juvenile. While the school resource officer executed his responsibilities which included a search of the juvenile, the juvenile cursed at the deputy. After the school resource officer opted to place the juvenile in handcuffs, other students also directed profane words toward the deputy in raised voices and became actively involved in the interaction between the two, resulting in the officer handcuffing and arresting another EHS student. The deputy considered the juvenile's act of throwing the chair as constituting conduct that disrupted or disturbed the process of school, including the efforts of students to attend their classes in a timely fashion. EHS faculty member McQueen described the circumstances as constituting "a significant safety issue with students gravitating towards that situation" to the extent that the teacher and coach "turned as a buffer for Officer Ray."

Upon viewing this evidence in the light most favorable to the State and giving the State the benefit of every reasonable inference as required

by *Miller*, we conclude that substantial evidence was presented at the adjudication hearing that the juvenile perpetrated an "annoying, disturbing, or alarming act . . . exceeding the bounds of social toleration normal for" Clyde A. Erwin High School during the course of the instructional day through a public disturbance as defined by N.C.G.S. § 14-288.1(8) by "engaging in violent conduct" by "throwing a chair toward another student in the school's cafeteria." As a result, the juvenile petition alleged a violation of N.C.G.S. § 14-288.4, which defines the public disturbance of disorderly conduct. The evidence presented by the State was sufficient to warrant the denial of the juvenile's motion to dismiss the petition that alleged his commission of the delinquent act of disorderly conduct. In applying the *Miller* standard to the current case, the district court properly denied the juvenile's motion to dismiss.

Based on the foregoing considerations, as to the issue before this Court on appeal, namely, whether the Court of Appeals majority erred in holding that the State's evidence was insufficient to support the adjudication for disorderly conduct, the decision of the Court of Appeals is reversed. Accordingly, we reverse the decision of the Court of Appeals vacating the adjudication and disposition orders relating to that offense. The Court of Appeals decision to vacate the adjudication and disposition orders entered in regard to the charge of resisting a public officer remains undisturbed.

REVERSED.

Justice EARLS, dissenting.

Here the State presented evidence that a high school student threw a chair in his school cafeteria. Beyond the basic fact that a chair was thrown, the State's sole witness to this event, the school's resource officer, provided few details regarding the specifics of this chair-throwing, save that the chair did not hit anyone, that the officer did not see anyone moving to avoid being hit by the chair, and that the officer could not say, despite being very close to the student, whether there was any risk of the chair striking any other person or object in the cafeteria. The officer testified that the student later told him that the student had thrown the chair "at his brother because they were playing or something." The majority considers this testimony to be substantial evidence from which a rational juror could find—beyond a reasonable doubt—that the student, T.T.E., is guilty of the Class 2 misdemeanor offense of disorderly conduct on the basis that he *intentionally* caused a public disturbance by engaging in *violent conduct*. Either the majority is adopting

an uncommonly broad view of what constitutes violent conduct, or, in applying what it deems a "relatively low threshold" for sufficiency of the evidence,[1] the majority is mistaking evidence that raises a mere suspicion of guilt for substantial evidence. In any event, because I conclude that the State presented insufficient evidence that T.T.E. committed the offense of disorderly conduct by intentionally causing a public disturbance by engaging in violent conduct, I respectfully dissent.

"Disorderly conduct" is a criminal offense defined as "a public disturbance[2] intentionally caused by any person who" commits any of the acts set forth in N.C.G.S. § 14-288.4(a)(1)-(8), including, *inter alia*, any person who:

> (1) Engages in fighting or other violent conduct or in conduct creating the threat of imminent fighting or other violence.
>
> . . . .
>
> (6) Disrupts, disturbs or interferes with the teaching of students at any public or private educational institution or engages in conduct which disturbs the peace, order or discipline at any public or private educational institution or on the grounds adjacent thereto.

N.C.G.S. § 14-288.4(a)(1), (6) (2017). Here, Deputy Mickey Ray of the Buncombe County Sheriff's Office filed a petition in district court on 8 November 2016 alleging that T.T.E. was a delinquent juvenile because he had committed the Class 2 misdemeanor offense of disorderly conduct by "intentionally caus[ing] a public disturbance at Clyde A. Erwin High School, Buncombe County NC, by engaging in violent conduct. This conduct consisted of throwing a chair toward another student in the school's cafeteria."

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1. The majority cites no precedent for the assertion that the sufficiency of evidence standard requires only a "relatively low threshold" of evidence.

2. As the majority notes, a "public disturbance" is defined as:

> Any annoying, disturbing, or alarming act or condition exceeding the bounds of social toleration normal for the time and place in question which occurs in a public place or which occurs in, affects persons in, or is likely to affect persons in a place to which the public or a substantial group has access. The places covered by this definition shall include, but not be limited to, highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.

N.C.G.S. § 14-288.1 (2017).

The majority concludes that although the disorderly conduct petition did not specify which of the various subsections of N.C.G.S. § 14-288.4(a) was at issue, the petition gave sufficient notice to T.T.E. of the specific conduct and offense for which he was being charged because it closely tracked the language of N.C.G.S. § 14-288.4(a)(1) ("Engages in . . . violent conduct"). Assuming *arguendo* that T.T.E. did have sufficient notice that he was being charged under (a)(1),[3] the State was, as a result, necessarily limited to proceeding on what was alleged in the petition—namely, that T.T.E. intentionally committed the offense of disorderly conduct under (a)(1) by "engaging in violent conduct," specifically "by throwing a chair toward another student in the cafeteria."

Accordingly, the State was required to present *substantial evidence* that T.T.E. intentionally caused a public disturbance by engaging in violent conduct by throwing a chair toward another student in the cafeteria. *See State v. Barnes*, 345 N.C. 146, 148, 478 S.E.2d 188, 189 (1996) (stating that a "motion to dismiss must be allowed unless the State presents substantial evidence of each element of the crime charged" (quoting *State v. Davis*, 340 N.C. 1, 11, 455 S.E.2d 627, 632, *cert. denied*, 516 U.S. 846 (1995))). "Evidence is not substantial if it arouses only a suspicion about the fact to be proved, even if the suspicion is strong." *State v. Sumpter*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986) (citing *State v. Malloy*, 309 N.C. 176, 179, 305 S.E.2d 718, 720 (1983)); *see also State v. Turnage*, 362 N.C. 491, 494, 666 S.E.2d 753, 755 (2008) ("A motion to dismiss should be granted, however, 'where the facts and circumstances warranted by the evidence do no more than raise a suspicion of guilt or conjecture since there would still remain a reasonable doubt as to defendant's guilt.' " (quoting *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988))). While the majority, in its discussion of the applicable de novo standard of review, correctly notes that "[s]ubstantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion," *Turnage*, 362 N.C. at 493, 666 S.E.2d at 755 (citation omitted), it is helpful to bear in mind the nature of this "conclusion" that must be adequately supported. Specifically, "[s]ubstantial evidence is evidence from which any rational trier of fact could find the fact to be proved *beyond a reasonable doubt*." *Sumpter*, 318 N.C. at 108, 347 S.E.2d at 399 (emphasis added) (citing *State v. Pridgen*, 313 N.C. 80, 94–95, 326 S.E.2d

3. It is worth noting, however, that the State attempted to prove T.T.E.'s guilt at the adjudicatory hearing under both (a)(1) and (a)(6) ("Disrupts, disturbs or interferes with the teaching of students at any public or private educational institution or engages in conduct which disturbs the peace, order or discipline at any public or private educational institution or on the grounds adjacent thereto.").

618, 627 (1985)); *see also State v. Trull*, 349 N.C. 428, 447, 509 S.E.2d 178, 191 (1998) ("A defendant's motion to dismiss must be denied if the evidence considered in the light most favorable to the State permits a rational jury to find beyond a reasonable doubt the existence of each element of the charged crime and that defendant was the perpetrator." (citation omitted)). After all, the evidentiary standard in a juvenile delinquency proceeding is the same as that in adult criminal proceedings. *See* N.C.G.S. § 7B-2409 (2017) ("The allegations of a petition alleging the juvenile is delinquent shall be proved beyond a reasonable doubt."); *see also*, *e.g.*, *In re A.N.C.*, *Jr.*, 225 N.C. App. 315, 324, 750 S.E.2d 835, 841 (2013) ("A 'juvenile is therefore entitled to have the evidence evaluated by the same standards as apply in criminal proceedings against adults.' " (quoting *In re Heil*, 145 N.C. App. 24, 28, 550 S.E.2d 815, 819 (2001))).

The only evidence presented here by the State concerning T.T.E's actions in the cafeteria was the testimony of Deputy Ray, who was the school resource officer for Clyde A. Erwin High School at the time of the incident. Although Ray was an eyewitness to the chair-throwing, as discussed further below, the most salient part of his testimony with respect to the offense charged was his second-hand relation of what T.T.E. told him after the incident:

> Q. And did [T.T.E.] ever tell you why he threw the chair?
>
> A. He said he was -- him and his brother -- he said he threw it at his brother because they were playing or something.
>
> . . . .
>
> THE WITNESS: [T.T.E.] told me that him and his brother was having some issues, or were playing or something. And he threw the chair at his brother.
>
> . . . .
>
> Q. So students would not have been disrupted, in that they weren't in that area to begin with, correct?
>
> A. Yes, there was students there. At one particular time, there were students. They were not -- at the time that he threw the chair, I don't know if there was students at that particular time or not, because they were running from him, each other. They were playing -- horse playing with each other.
>
> Q. Okay. So let's go back. Now we have students horse playing. So who was horse playing with whom?

> A. Well, according to his statement, after I talked to him and asked him what happened, he said that him and his brother was horse playing or he was doing something with his brother. And they were going at it.

Viewing it in the light most favorable to the State, Ray's testimony in this respect can fairly be said to raise a suspicion that T.T.E. engaged in violent conduct, but no more than a suspicion. For instance, any inference from this testimony alone that T.T.E. was attempting to *strike* or *injure* his brother with the chair, would not be one from which a rational jury could find such facts beyond a reasonable doubt. I cannot conclude that on the basis of this second-hand relation of T.T.E.'s out of court statements—to the effect that T.T.E. threw a chair at his brother because they were playing or something—any rational trier of fact could find beyond a reasonable doubt that T.T.E. intentionally threw a chair in a manner that constituted *violent conduct* in order to cause a public disturbance.

Certainly, there are ways in which throwing a chair would conceivably constitute violent conduct. Yet, unless the majority intends to hold that throwing a chair in a school cafeteria is *per se* violent conduct,[4] the

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4. This notion was rejected by the Court of Appeals majority below. Misconstruing that part of the opinion, the majority here asserts that the majority below "erroneously decided to ultimately determine whether the juvenile committed the offense of disorderly conduct." A fair reading of the Court of Appeals majority's decision, however, clearly shows that the court was not purporting to adjudicate an ultimate issue of fact, but rather concluded that the State's evidence only gave rise to a reasonable inference that a chair was thrown, which, without more, is not violent conduct as a matter of law and is therefore insufficient evidence to be presented to the jury:

> The State contends the evidence shows "arguably violent conduct" because *if* the juvenile had thrown the chair at another student and *if* it hit them, "it presumably would have hurt them."
>
> Although we view the evidence in the light most favorable to the State, we do not go so far as to come up with hypothetical events that could have happened if juvenile actually did something in addition to what the actual evidence shows. . . . The State simply asks we infer too much from the evidence it presented.
>
> The evidence was not sufficient to show that the juvenile fought, engaged in violent conduct, or created an imminent risk of fighting or other violence. Although there were other students in the cafeteria—a very large room—when the juvenile threw a chair, no other person was nearby, nor did the chair hit a table or another chair or anything else. Juvenile then ran out of the cafeteria. This is not "violent conduct or . . . conduct creating the threat of imminent fighting or other violence." No one was hurt or threatened during the event and juvenile did not escalate the situation by yelling, throwing other things, raising fists, or other such conduct that along with the throwing of the chair could be construed to indicate escalating violent behavior. Throwing a single chair with no other person

specifics would seem necessary: How far and high did the chair travel? Was the chair thrown overhand or underhand? Was the chair moving fast or slow? Was the chair thrown with great force? How big was the chair? Did the chair make a loud crash? Was T.T.E. trying to hit his brother, or anyone or anything else? Was his brother waiting to catch the chair? Did the chair come close to hitting anything? The sole eyewitness to testify at the hearing on this issue, Deputy Ray, did provide the answers to a few of these questions. Of course, viewing his testimony in the light most favorable to the State, Ray's description of the event itself must largely be ignored as it tends to contradict the State's suggestion that that this chair-throwing amounted to violent conduct. *See State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009) (stating that "evidence unfavorable to the State is not considered" (citing *State v. Parker*, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001), *cert. denied*, 535 U.S. 1114 (2002))).

According to Ray, the incident happened during "Warrior period . . . where all the students get to just come out and relax a little bit, maybe hang out in the cafeteria." Ray was at the cafeteria wall, "just standing there observing" the 50 or 60 students in the cafeteria at that time. Near the end of Warrior period, Ray saw T.T.E. pick up a chair and throw it "in an underhanded motion." According to Ray, "I noticed [T.T.E.] pick up a chair and throw it across the cafeteria, kind of like, throw it across. . . . I saw him pick up the chair, I thought he was just going to move it, but he kind of picked it up and chucked it." Ray testified:

> Q. And you testified that this is in a cafeteria full of students -- about 50 or 60 students, correct?
>
> A. Yes.
>
> Q. And none of these students were touched with the chair?
>
> A. No. Because --
>
> Q. Did you see any students ducking from the chair being thrown across the cafeteria?
>
> A. No. I didn't see any of that.

> nearby and without attempting to hit another person and without hitting even any other item in the cafeteria is not disorderly conduct as defined by North Carolina General Statute § 14-288.4(a)(1). We vacate juvenile's adjudication and disposition for disorderly conduct.

In re T.T.E., 818 S.E.2d at 327–28 (citations omitted) (second alteration in original).

After throwing the chair, T.T.E. "ran out of the cafeteria, and ran down to the foreign language halls." Ray testified that when T.T.E. threw the chair, he was "very close by" to T.T.E. and that T.T.E. was "pretty much, within [his] full range of sight." Despite his close proximity to T.T.E., Ray had few other details to offer:

> Q. And did he throw it at anybody in particular, that you know of?
>
> A. I can't remember, to be honest.
>
> . . . .
>
> Q. Did it appear to you that, based on what you saw with the chair throwing incident, that [T.T.E.] was playing, or did it seem like something that was a little more violent?
>
> A. I couldn't really tell[.]
>
> . . . .
>
> Q. . . . Were any of the tables hit, whenever this chair was moved?
>
> A. I can't recall.
>
> Q. Do you know if any of the chairs were hit, due to the chair being moved or thrown?
>
> A. I can't recall. Once he threw the chair, I turned around and went out, after he ran.
>
> . . . .
>
> Q. Okay. So let's stop right there. Can you remember, if you recall, what was [T.T.E.] looking at when the chair was thrown?
>
> A. Well, he looked down to pick up the chair, and he picked it up and threw it.
>
> Q. And there were no children in his general vicinity, correct?
>
> A. I can't really -- I can't tell.

Thus, Ray's description of the event does little to bolster what is missing from T.T.E.'s out of court statement—that is explain what, exactly, about this chair-throwing made it violent conduct done intentionally to cause a public disturbance.

The majority, perhaps recognizing the paucity of evidence concerning the actual throwing of the chair, devotes considerable attention to the evidence regarding what occurred *after* the chair was thrown in the cafeteria, when the "6'3-and-a-half" Deputy Ray chased down the "5 foot" tall T.T.E. in the foreign language hallway, "snuck up on him" and grabbed him by the sweatshirt, then "brought him back up to the main lobby where [Ray] put him on the wall, just to search him, and then put cuffs on him." It was at that point that T.T.E. "started cussing, calling [Ray] all kind of names" and was "when all the other kids started trying to get involved."[5] According to Ray, "Another guy, I had to handcuff him also, because he was trying to keep me from, you know, getting -- just, you know, detaining him. So, he came up behind me, and I grabbed him and put him on the wall also." This evidence was relevant to defendant's adjudication for the charge of resisting a public officer, which the Court of Appeals unanimously vacated for insufficient evidence, *In re T.T.E.*, 818 S.E.2d 324, 328–29 (2018), and which, because the State did not seek further review of that decision, is not before this Court. This evidence presumably would have been relevant had the State elected to adjudicate T.T.E. for disorderly conduct under a different section of N.C.G.S. § 14-288.4 and for conduct separate from that listed in the petition. This evidence, however, is irrelevant as to whether T.T.E. intentionally caused a public disturbance by engaging in violent conduct "by throwing a chair toward another student in the cafeteria."

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5. The majority states that "[t]he deputy considered the juvenile's act of throwing the chair as constituting conduct that disrupted or disturbed the process of school, including the efforts of students to attend their classes in a timely fashion." This portion of the hearing was, in part, an attempt by the prosecutor to elicit testimony regarding N.C.G.S. § 14-288.4(a)(6), which was not alleged in the petition. More importantly, however, this statement was referring, not to the throwing of the chair in the cafeteria, of which there was no evidence concerning any disruption, but rather to T.T.E.'s conduct in the hallway when being detained by Ray:

> Q. Now, as [T.T.E.] was pulling away from you and yelling at you, what duty were you trying to perform?
>
> A. I was trying to detain him and bring him back to the office to sit down and have a discussion with the administrators and do what I needed to do. And at that point in time, he was resisting and didn't want to come.
>
> Q. Based on your view of how the other students reacted to all of this as it was going on, did it, in your opinion, in any way disrupt or disturb the process of the school --
>
> A. Absolutely.
>
> Q. -- by which I mean, going back to classes?
>
> A. Yes, sir. Absolutely.

Indeed, much of the issue in this case stems from the fact while the petition limited the State to adjudicating T.T.E. for disorderly conduct based on his actions in the cafeteria, the State sought in earnest to adjudicate T.T.E. for his conduct after he threw the chair and left the cafeteria. For instance, at the hearing, the State argued in closing:

> When that one student throws a chair, and then 50 or 60 students see the deputy standing up against the wall with his arms crossed, and doesn't do anything, now chair throwing is okay in the school cafeteria. So he goes down there to address that situation, make sure it doesn't happen again. And then it blew way out of proportion. It did not have to do that. Cuffs did not have to get involved. This did not -- this whole thing did not have to happen. It could've just been a quick, "Hey, what's going on? You horsing around? Well, don't do that anymore." But it was [T.T.E.] that elevated that situation.
>
> . . . .
>
> Violent conduct is not just picking up a chair and removing it from the floor entirely, but also when you are standing in a hallway, surrounded by a bunch of students, a crowd, and telling an officer, "Fuck you. You ain't shit," and physically fighting with him. Now, that's absolutely disorderly conduct.

Certainly, "chair throwing . . . in the school cafeteria" is normally not acceptable conduct, and schools have disciplinary measures to address it. There are, however, countless situations in which such behavior falls short of "fighting or other violent conduct." When the State seeks to invoke criminal processes on the basis of such conduct, it must present substantial evidence that the conduct amounts to a criminal offense. Here the State failed to do so. Accordingly, I dissent.

IN RE Z.L.W.

[372 N.C. 432 (2019)]

IN THE MATTER OF Z.L.W., Z.M.W.

No. 116A19

Filed 16 August 2019

Termination of Parental Rights—disposition—not an abuse of discretion

The trial court did not abuse its discretion by concluding that termination of respondent's parental rights was in the best interests of two children. The trial court appropriately considered the factors stated in N.C.G.S. § 78-1110(a) when determining their best interests, and the determination that respondent's strong bond with the children was outweighed by other factors was not manifestly unsupported by reason.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order entered on 12 December 2018 by Judge Doretta L. Walker in District Court, Durham County. This matter was calendared in the Supreme Court on 1 August 2019 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

The Law Office of Derrick J. Hensley, PLLC, by Derrick J. Hensley, Esq., and Senior Assistant County Attorney Bettyna Belly Abney, for petitioner-appellee Durham County Department of Social Services.

Daniel Heyman for appellee Guardian ad Litem.

Mary McCullers Reece for respondent-appellant father.

NEWBY, Justice.

Respondent appeals from the trial court's order terminating his parental rights to Z.L.W. and Z.M.W. (Zena and Zadie).[1] We affirm.

On 19 March 2015, the Durham County Department of Social Services (DSS) filed a petition alleging that Zena and Zadie were neglected juveniles. DSS had received a Child Protective Services report on 9 June 2014

1. Pseudonyms are used to protect the identities of the juveniles and for ease of reading. *See* N.C. R. App. P. 42(b)(1).

claiming that respondent, the father of the juveniles, was "extremely violent" with the juveniles' mother in their presence and had given her a black eye. The person who filed the report expressed concern that respondent might kill the juveniles and their mother. The person further reported an incident during which respondent drove off recklessly with the juveniles in the car while they were not safely secured and that respondent had threatened to fire multiple gun shots at the mother's residence.

DSS began providing services in July 2014. Respondent was required to complete a mental health and substance abuse assessment, engage in domestic violence counseling, and participate in a parent education program. In August 2014, respondent tested positive for marijuana. In September 2014, he completed a substance abuse assessment, but declined a drug screen. Respondent was referred to Carolina Outreach for mental health services, but could not be reached at the contact numbers he provided to social workers. Respondent also failed to attend a parenting education program. At the time the neglect petition was filed, respondent was in the Durham County Detention Center facing criminal charges of assault on a female, driving while license revoked, larceny, and second-degree trespassing.

On 5 May 2015, the trial court adjudicated Zena and Zadie neglected based on findings of fact as stipulated by the parties. The trial court ordered that custody remain with their mother and required both the mother and respondent to comply with a case plan to correct the conditions that led to the adjudication of neglect.

On 4 November 2015, the trial court entered a review order in which it found that respondent failed to participate in mental health or substance abuse services and used profanity when speaking with a DSS social worker. During a hearing on 3 February 2016, the juveniles' mother tested positive for cocaine. On 3 March 2016, the trial court entered a review order noting the mother's continued use of illegal substances and granting custody of Zena and Zadie to their maternal grandmother.

In a review order entered on 27 April 2016, the trial court found that respondent had not complied with recommended services. In June 2016, the maternal grandmother could no longer provide housing for Zena and Zadie, and she made arrangements for the paternal grandmother to provide care for the juveniles. In a review order entered on 12 September 2016, the trial court granted DSS legal custody, but ordered that Zena and Zadie continue to reside with the paternal grandmother. The placement ended, however, after respondent took Zena and Zadie out of the paternal grandmother's home during an unauthorized visit. In

a permanency planning review order entered on 20 October 2017, the trial court ceased reunification efforts and ordered DSS to file a petition to terminate respondent's and the mother's parental rights.

On 29 June 2017, DSS filed a motion and petition to terminate respondent's and the mother's parental rights on the grounds of neglect, willful failure to make reasonable progress, and failure to pay support. *See* N.C.G.S. § 7B-1111(a)(1)–(3) (2017). DSS additionally alleged that respondent had failed to legitimize Zena. *See id.* § 7B-1111(a)(5) (2017). On 10 April 2018, the mother relinquished her parental rights. On 12 December 2018, the trial court entered an order in which it determined grounds existed to terminate respondent's parental rights regarding Zena pursuant N.C.G.S. § 7B-1111(a)(1), (2), and (5), and regarding Zadie pursuant to N.C.G.S. § 7B-1111(a)(1) and (2). The trial court further concluded it was in Zena's and Zadie's best interests that respondent's parental rights be terminated. Accordingly, the trial court terminated respondent's parental rights. Respondent gave timely notice of appeal pursuant to N.C.G.S. §§ 7A-27(a)(5) and 7B-1001(a1)(1), but improperly designated the Court of Appeals as the court to which appeal was being taken. On 3 May 2019, respondent filed a petition for writ of certiorari, and this Court allowed the petition on 22 May 2019.

Respondent's sole argument on appeal is that the trial court abused its discretion when it determined termination of his parental rights was in Zena's and Zadie's best interests. We disagree.

Our Juvenile Code provides for a two-stage process for the termination of parental rights: the adjudicatory stage and the dispositional stage. *Id.* §§ 7B-1109, -1110 (2017). At the adjudicatory stage, the petitioner bears the burden of proving by "clear, cogent, and convincing evidence" the existence of one or more grounds for termination under section 7B-1111(a) of the North Carolina General Statutes. *Id.* § 7B-1109(e), (f) (2017). During the adjudicatory stage in this case, the trial court found that statutory grounds to terminate respondent's paternal rights existed, and that finding is not being challenged on appeal.

When the trial court finds grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), it proceeds to the dispositional stage where it must "determine whether terminating the parent's rights is in the juvenile's best interest" based on the following factors:

(1) The age of the juvenile.

(2) The likelihood of adoption of the juvenile.

(3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.

(4) The bond between the juvenile and the parent.

(5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.

(6) Any relevant consideration.

Id. § 7B-1110(a) (2017). The trial court's assessment of a juvenile's best interest at the dispositional stage is reviewed only for abuse of discretion. *In re D.L.W.*, 368 N.C. 835, 842, 788 S.E.2d 162, 167 (2016) (citing *In re L.M.T.*, 367 N.C. 165, 171, 752 S.E.2d 453, 457 (2013); *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984)). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

Here, at disposition, the trial court incorporated its adjudicatory findings by reference and made a finding of fact regarding Zena's and Zadie's ages. Additionally, the trial court found as fact:

> 4. **As to the likelihood of adoption:** [Zena and Zadie] have been in the custody of [DSS] since June 28, 2016. They have been in a total of two placements: a kinship placement with their paternal grandmother, and, currently, a DSS foster home. The girls' current foster parents have expressed their desire to adopt [Zena and Zadie] and provide them with a 'forever home'. They have been providing care for [Zena and Zadie] since March 2017. There is a high probability of adoption.
>
> 5. [Zena and Zadie] express a desire to be loved. They love their parents. [Zena] is old enough to understand that there are concerns with her parents' ability to care for her and her sister. Both girls desire to be nurtured. They have bonded with their foster parents and extended foster family. [Zena and Zadie] deserve to be placed with a family who will supply all their basic, emotional, educational, and medical needs.

6. **Achieving the permanent plan:** The primary plan for permanence is Adoption, with a concurrent plan of Guardianship. Termination of the rights of [respondent] would help achieve the primary permanent plan of adoption.

7. **Bond with [respondent]:** [Respondent] has not provided day to day care for [Zena and Zadie] in several years. He attended many of the visits available to him. [Zena and Zadie] have a bond with [respondent]. They have expressed that they love [respondent]. However, [respondent's] bond with [Zena and Zadie] has diminished over the long time they have spent in foster care.

. . . .

9. **Quality of relationship with prospective adoptive parent:** There is a strong bond between [Zena and Zadie] and their prospective adoptive parents. [Zena and Zadie] are very affectionate towards their foster parents, and that affection is sincerely reciprocated. The foster parents refer to the girls as "their girls." Both foster parents are teachers and have provided love, support, and met the basic, educational, and medical needs of the girls. They have incorporated the girls into their family, taking them on family trips to Iowa to meet their family. The girls have bonded well with the foster parents' families.

10. The foster parents have expressed their desire to adopt them and to have them permanently become a part of their family.

11. **Other relevant factors:** The Court remains deeply concerned about [respondent's] lack of progress to address [the] core issues of this case. At the time of this hearing, [respondent] reported [that he] continued to search for a mental health provider. [Respondent] offered no satisfactory explanation to this court for not complying with mental health services and not complying with substance abuse treatment, or his failure to attend parenting classes or domestic violence counseling. The Court finds it is paramount that [Zena and Zadie] have a permanent and safe home, and if [Zena and Zadie] were returned to the care of [respondent], [Zena and Zadie] would suffer

> irreparable harm and the progress [Zena and Zadie] have obtained while in their current placements would be dismantled if returned to [respondent]. The court is also concerned about the safety of [Zena and Zadie] in [respondent's] care, in lieu [sic] of the continued incident[s] of domestic violence and unstable housing. Furthermore, [respondent] describes his childhood while residing with his biological [parents] as being traumatic. [Respondent] expressed that he was beaten, slapped and kicked by his mother and that his mother drank a lot. [Respondent] also expressed that his mother has changed, and he wants his mother to have [Zena and Zadie]. This Court is not recommending removing the children from their current plan.

Respondent does not challenge any of the trial court's dispositional findings; thus, they are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (citing *Schloss v. Jamison*, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962)).

Respondent argues that, though the trial court made findings regarding the enumerated factors, it should have given stronger consideration to the bond between himself and the children and considered options that would have allowed them to maintain their parent-child relationship. Respondent cites testimony from the social worker assigned to the case that Zena and Zadie "love their dad" and "always ask about him, want to see him." Respondent also testified that Zena and Zadie loved him and his family very much "because they know we're going to be there." Respondent thus argued, given the mother's relinquishment of her parental rights and the strong bond between him and his children, the decision to terminate his parental rights constituted an abuse of discretion. We are not persuaded.

In this case, the trial court made extensive findings regarding the strong bond between respondent and Zena and Zadie. The trial court also found, however, that the bond had diminished over the long time that Zena and Zadie had spent in foster care. Furthermore, the bond between parent and child is just one of the factors to be considered under N.C.G.S. § 7B-1110(a), and the trial court is permitted to give greater weight to other factors. *Cf.*, *e.g.*, *In re C.L.C.*, 171 N.C. App. 438, 448, 615 S.E.2d 704, 709–10 (2005) (holding that, while the mother emphasized she had a strong bond with her child, the trial court was "entitled to give greater weight to other facts that it found"), *aff'd per curiam in part*, *disc. review improvidently allowed in part*, 360 N.C. 475, 628 S.E.2d 760 (2006). Here the trial court also made uncontested findings that Zena

and Zadie had a strong bond with their foster parents; there was a strong likelihood of adoption; and termination of respondent's parental rights would aid in the permanent plan of adoption. Additionally, the trial court, when considering other relevant factors, expressed its concern regarding respondent's lack of progress in addressing the core issues of the case. Specifically, respondent "offered no satisfactory explanation to [the trial] court for not complying with mental health services and not complying with substance abuse treatment, or his failure to attend parenting classes or domestic violence counseling." The trial court believed that Zena and Zadie would suffer irreparable harm and the progress they had made since their removal from home would be "dismantled" if they were returned to his care due to his failure to address his many issues. Consequently, we conclude the trial court appropriately considered the factors stated in N.C.G.S. § 7B-1110(a) when determining Zena's and Zadie's best interests and that the trial court's determination that other factors outweighed respondent's strong bond with Zena and Zadie was not manifestly unsupported by reason.

Respondent further argues that, given the strong bond between him and Zena and Zadie, the trial court should have considered other dispositional alternatives, such as granting guardianship or custody to the foster family, thereby leaving a legal avenue by which Zena and Zadie could maintain a relationship with their father. We disagree. While the stated policy of the Juvenile Code is to prevent "the unnecessary or inappropriate separation of juveniles from their parents," N.C.G.S. § 7B-100(4) (2017), we note that "the best interests of the juvenile are of paramount consideration by the court and . . . when it is not in the juvenile's best interest to be returned home, the juvenile will be placed in a *safe, permanent home within a reasonable amount of time*," *id.* § 7B-100(5) (2017) (emphasis added); *see also In re Montgomery*, 311 N.C. at 109, 316 S.E.2d at 251 (emphasizing that "the fundamental principle underlying North Carolina's approach to controversies involving child neglect and custody [is] that the best interest of the child is the polar star").

We therefore hold the trial court's conclusion that termination of respondent's parental rights was in Zena's and Zadie's best interests did not constitute an abuse of discretion. Accordingly, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

STATE v. BOWMAN

[372 N.C. 439 (2019)]

STATE OF NORTH CAROLINA
v.
DUVAL LAMONT BOWMAN

No. 274A18

Filed 16 August 2019

Constitutional Law—Confrontation Clause—cross-examination of State's principal witness—plea negotiations for pending charges—potential bias

The trial court violated the Confrontation Clause in a murder trial by significantly limiting defendant's cross-examination of the State's principal witness concerning plea negotiations for pending charges against her and her possible bias for the State. Because this witness was crucial to the State's case—she was the only witness to provide direct evidence of defendant's presence at the crime scene, and no physical evidence linked defendant to the crime—the error was not harmless beyond a reasonable doubt.

Justice ERVIN dissenting.

Justice NEWBY joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 818 S.E.2d 718 (N.C. Ct. App. 2018), vacating a judgment entered on 27 July 2016 by Judge Richard S. Gottlieb in Superior Court, Forsyth County, and remanding for a new trial. On 24 October 2018, the Court allowed the State's petition for discretionary review of additional issues. Heard in the Supreme Court on 14 May 2019 in session in the Pitt County Courthouse in the City of Greenville pursuant to section 18B.8 of Chapter 57 of the 2017 Session Laws of the State of North Carolina.

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

Richard Croutharmel for defendant-appellee.

EARLS, Justice.

At defendant Duval Bowman's trial for the 2014 murder of Anthony Johnson, Lakenda Malachi was the only witness to provide direct evidence of Bowman's presence at the scene. Bowman sought to impeach Malachi's testimony by introducing evidence that Malachi was in plea negotiations over pending charges against her and that she would receive favorable treatment for her testimony against Bowman, but the trial court sustained objections to defense counsel's questions. Bowman was found guilty of attempted robbery with a dangerous weapon, possession of a firearm by a felon, and the first-degree murder of Anthony Johnson. He was sentenced to life imprisonment without parole.

Defendant argued at the Court of Appeals that the trial court committed reversible error by preventing his counsel from adequately cross-examining Malachi regarding the pending charges. The Court of Appeals' majority agreed with defendant, holding that the trial court committed constitutional error by restricting defendant's cross-examination of Malachi and that the error was not harmless beyond a reasonable doubt. *State v. Bowman*, 818 S.E.2d 718, 719 (N.C. Ct. App. 2018). Judge Dillon agreed that the trial court erred by limiting the cross-examination of Malachi but concluded the error was harmless beyond a reasonable doubt. *Id.* at 722 (Dillon, J., dissenting). The State filed its appeal of right based on Judge Dillon's dissenting opinion. We must now determine whether the trial court violated defendant's Sixth Amendment right to confront witnesses against him by limiting defendant's cross-examination of the State's principal witness and whether that error was harmless beyond a reasonable doubt. Because we agree that the trial court committed prejudicial error, we affirm the Court of Appeals' holding and its order that defendant receive a new trial.

Factual and Procedural Background

A. Facts

Defendant, Johnson, and Malachi were all involved in the illicit drug business. Around the time of his murder, Johnson was engaged to Malachi and they lived together with their four-year-old son. At trial, the State presented no physical evidence linking defendant to the shooting but argued that Malachi's testimony established defendant's guilt. Defendant also testified at trial, denying his involvement in the murder, and raising the suggestion that Malachi may have murdered Johnson. Necessarily either defendant or Malachi must have been misrepresenting essential facts about Johnson's death.

According to Malachi's trial testimony, around 3:00 a.m. on 23 February 2014, defendant went to Malachi's house to confront Johnson about

money he owed defendant. Once in the living room where Johnson and Malachi were on the couch, defendant asked Malachi, "Where your gun at?" Defendant was referring to Malachi's 9-millimeter, semiautomatic pistol. Malachi told defendant she had her gun on her, but she was lying to him. Malachi then looked on the shelf in the living room where she normally kept her weapon, but did not see it there. Malachi testified that she left the living room to look for the gun but turned around and saw defendant wearing white latex gloves and holding a gun in each hand. Defendant was standing over Johnson and stated, "Ya'll did me dirty." Malachi turned and ran to her bedroom and heard shots being fired as she ran away. She also heard defendant rattling things in the living room. Malachi then ran to the couple's son's room, locked the door, and hid in the closet. The couple's son was asleep in his bedroom when defendant kicked in the door then walked towards the son's bed. Upon seeing this, Malachi came out of the closet and told defendant that she would find the money for him. The couple's son continued to sleep throughout the encounter.

Malachi asked Johnson where the money was before defendant began stomping on Johnson as he lay motionless on the floor. As Malachi looked for the money, defendant hit her with the two handguns and threatened to shoot her in the feet. Defendant said he was going to kill Johnson and walked into the kitchen. Seeing her chance to escape, Malachi ran out of the house and hid near her neighbor's house until she saw what appeared to be a green station wagon drive away from her house. Malachi then rang her neighbor's doorbell until they responded. Once inside, Malachi asked to use their telephone and made calls to two different male friends whom she hoped would come pick up her son before police arrived. The neighbors called the police after Malachi finished her calls.

Johnson was pronounced dead when police arrived. He had been shot once in the leg and twice in the back. A revolver was used in the killing, as well as a 9-millimeter, semiautomatic pistol, but the police found no guns. They did find a box for a 9-millimeter Glock handgun in a shoe box on the top shelf of the closet in the master bedroom, along with various rounds of ammunition, a handgun magazine, and a receipt for the purchase of the gun. A gunshot residue test on Malachi's hands showed some amounts of lead, antimony, and barium but overall was an inconclusive result. However, Malachi had washed her hands while at the neighbor's house. Bowman was apprehended three weeks later in New York and denied any involvement in Johnson's death.

At trial, defendant denied murdering Johnson. Defendant also testified that Malachi and Johnson had a violent relationship and that Malachi carried a gun. Malachi was jealous of Johnson because he cheated on her and she would become physically violent with Johnson. She was particularly violent when she drank alcohol. Malachi admitted that she drank alcohol the night of Johnson's murder. A few weeks before the murder, Malachi was upset with Johnson over another woman who was at a liquor house with him.

On the night in question, defendant went to a liquor house around 11:00 p.m. Defendant then met a friend named Lorenzo Peace around 11:30 p.m. Peace had defendant drop him off at a friend's house before defendant drove back to the liquor house in Peace's vehicle. Around midnight, defendant left the liquor house to conduct a drug transaction with a man named Jay. Afterwards, defendant returned to the liquor house. Defendant met Peace at Bill's Truck Stop at about 5:00 a.m. before returning home. Sometime after arriving home, defendant received a phone call alerting him that Johnson was dead. Defendant fled to New York after receiving threatening messages and learning he was accused of Johnson's murder.

B. Pretrial Proceedings

The State filed a motion in limine to preclude the defense from questioning Malachi about her pending drug trafficking charges in Guilford County. Defendant objected to the State's request, arguing that there was an e-mail exchange between the Guilford County prosecutor handling Malachi's drug charges and the Forsyth County prosecutor involved in defendant's murder trial. Based on the e-mail exchange concerning a possible plea deal, the trial court ruled that defendant could question Malachi about the pending drug charges, as well as what she knew about any potential deals or favorable treatment as a result of her testimony at trial.

C. Trial

During cross-examination, defense counsel questioned Malachi regarding several drug charges pending against her including: one count of trafficking in methamphetamine, one count of conspiracy to traffic in methamphetamine, one count of trafficking in marijuana, and one count of conspiracy to traffic in marijuana. Malachi admitted that these charges were pending against her in Guilford County and admitted that she was aware that each of the charges involving methamphetamine carried a sentence of 90 months to 120 months in prison. Similarly, Malachi acknowledged that each of the charges involving marijuana carried a

mandatory sentence of 25 to 30 months in prison. Defense counsel then questioned Malachi about a possible plea deal.

> Q. What, if anything, have you been offered from the State at this point regarding those pending charges?
>
> A. I don't know nothing about that.
>
> Q. So nothing has been finalized in Guilford County?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.

[ ]

> Q. You're not aware of any current plea offer at this point. Correct?
>
> A. Yes, sir.
>
> Q. Have you – – are you aware that there are such things as plea offers?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: I'll allow that one question.

[ ]

> Q. Ma'am?
>
> A. Yes, sir.
>
> Q. What, if anything, do you hope to gain out of testifying here for the State with regard to those five pending charges?
>
> A. Justice for Anthony Johnson.
>
> Q. So you don't think you're going to get anything out of it for the charges you got?
>
> [PROSECUTOR]: Objection.
>
> THE COURT: Sustained.

[ ]

> Q. Are you aware of any other considerations you might have for those pending charges right now?

[PROSECUTOR]: Objection.

THE COURT: Sustained.

The jury found defendant guilty of first-degree murder, attempted robbery with a dangerous weapon, and possession of a firearm by a felon. The trial court arrested judgment on the conviction for attempted armed robbery and consolidated the other two convictions. Defendant was sentenced to life in prison without parole.

Analysis

In general, we review a trial court's limitation on cross-examination for abuse of discretion. *See State v. McNeil*, 350 N.C. 657, 678, 518 S.E.2d 486, 499 (1999). If the trial court errs in excluding witness testimony showing possible bias, thus violating the Confrontation Clause, the error is reviewed to determine whether it was harmless beyond a reasonable doubt. *Id.* at 678, 518 S.E.2d at 499. "The Sixth Amendment to the Constitution guarantees the right of an accused in a criminal prosecution 'to be confronted with the witnesses against him.' " *Davis v. Alaska*, 415 U.S. 308, 315 (1974). An accused confronts the witnesses against him through cross-examination, which tests "the believability of a witness and the truth of his testimony." *Id.* at 316. By way of the Confrontation Clause, the accused is guaranteed effective cross-examination, but "[t]rial judges retain broad discretion to preclude cross-examination that is repetitive or that is intended to merely harass, annoy or humiliate a witness." *State v. Mason*, 315 N.C. 724, 730, 340 S.E.2d 430, 434 (1986) (citations omitted). Here, we must first determine whether the trial court violated defendant's Sixth Amendment right by limiting his cross-examination of Malachi and if so, whether that error was harmless beyond a reasonable doubt.

Generally, a defendant may not cross-examine a witness regarding pending charges. *See State v. Abraham*, 338 N.C. 315, 353, 451 S.E.2d 131, 151 (1994) (error to allow cross-examination of prior bad acts, plea deal, and pending warrant). *See also State v. Jones*, 329 N.C. 254, 259, 404 S.E.2d 835, 837 (1991) (cross-examination of a pending charge could not be used to impeach a witness). An exception to this rule is compelled by the Sixth Amendment Confrontation Clause when defendant seeks to show bias or undue influence by the state because of the pending charges. *See Davis*, 415 U.S. at 315. Such potential bias or influence is present when a witness faces pending charges in the same jurisdiction he testifies in, allowing a defendant to cross-examine the witness concerning the charges. *See State v. Murrell*, 362 N.C. 375, 404, 665 S.E.2d 61, 80 (2008). However, where a witness faces pending charges in a separate

jurisdiction than the one he testifies in, a defendant must "provide[ ] [ ] supporting documentation of a[ ] discussion between the two district attorneys' offices to demonstrate that [the witness]'s testimony [i]s biased." *Murrell* at 404, 665 S.E.2d at 80.

This issue was addressed by this Court in *State v. Prevatte*, 346 N.C. 162, 484 S.E.2d 377 (1997). In *Prevatte*, the defendant was on trial for first-degree murder where the state's principal witness was an eyewitness to the murder. 346 N.C. at 162, 484 S.E.2d at 378. The eyewitness had been indicted on nine charges of forgery and uttering forged checks in another county at the time he testified. *Id.* at 163, 484 S.E.2d at 378. Even though it was a different county, the same district attorney was in charge of both cases. *Id.* at 163, 484 S.E.2d at 378. During trial, the court prohibited the defendant from questioning the witness regarding the pending criminal charges and whether he had been promised anything in exchange for his testimony. *Id.* at 163–64, 484 S.E.2d at 378. Instead, the court held a voir dire hearing outside the presence of the jury in which the defendant was allowed to cross-examine the witness about the charges. *Id.* at 164, 484 S.E.2d at 378. Because the questioning took place outside their presence, jurors were prevented from hearing the testimony that could have shown the witness's bias. *Id.* at 164, 484 S.E.2d at 378. This Court stated, "[t]he fact that the trial of [the witness] on the forgery and uttering charges had been continued for eighteen months might have led the jury to believe the State was holding those charges in abeyance pending the witness' testimony in this case." *Id.* at 164, 484 S.E.2d at 378. As a result, this Court issued the defendant a new trial, holding that the trial court committed constitutional error in limiting the cross-examination of the witness and "that the error was not harmless." *Id.* at 164, 484 S.E.2d at 378–79. The State argued that during the voir dire hearing, the defendant testified that there was no agreement for his pending charges in exchange for his testimony. *Id.* at 164, 484 S.E.2d at 378. In response, the Court reasoned that even if the witness's "testimony show[ed] that [the witness] expected nothing from the State for his testimony against the defendant[,] [t]he effect of the handling of the pending forgery and uttering charges on the witness was for the jury to determine" and "[n]ot letting the jury do so was error." *Id.* at 164, 484 S.E.2d at 378–79. The Court based its reasoning on *Davis v. Alaska* in holding that the error was not harmless beyond a reasonable doubt. *Id.* at 163–64, 484 S.E.2d at 378.

Davis involved a witness who was on probation for burglarizing two residences when he testified as an eyewitness against the defendant. 415 U.S. at 310–11. Since the witness was a juvenile at the time, the State

made a motion for a protective order regarding the witness's juvenile record, which the trial court granted. *Id.* at 311. The protective order barred the defendant from inquiring about the witness's probationary status or criminal record. *Id.* at 312. As a result, it was impossible for the defendant to show the witness's possible bias during cross-examination. *Id.* at 312. On appeal, the Supreme Court determined:

> Since defense counsel was prohibited from making inquiry as to the witness' being on probation under a juvenile court adjudication, [the witness]'s protestations of unconcern over possible police suspicion that he might have had a part in the [crime] and his categorical denial of ever having been the subject of any similar law enforcement interrogation went unchallenged.

Id. at 313–14. The Court emphasized that "the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on [the witness]'s testimony which provided 'a crucial link in the proof . . . of [the defendant's] act.' " *Id.* at 317 (second alteration in original) (quoting *Douglas v. Alabama*, 380 U.S. 415, 419 (1965)). Because the jury was prohibited from learning about the witness's probationary status and whether the witness's criminal record motivated his testimony, the defendant was "denied the right of effective cross-examination . . . 'and no amount of showing of want of prejudice would cure it.' " *Id.* at 318 (citation omitted) (quoting *Smith v. Illinois*, 390 U.S. 129, 131 (1968)).

Here, the trial judge allowed defendant to cross-examine Malachi in the presence of the jury concerning the pending charges against her. Although the court did not completely deny defendant the right to cross-examine Malachi, it did place "a *significant limitation* on [ ] defendant's cross-examination of the State's principal witness." *State v. Hoffman*, 349 N.C. 167, 180, 505 S.E.2d 80, 88 (1998) (emphasis added). Thus, defendant was "denied the right of *effective* cross-examination." *Davis*, 415 U.S. at 318 (emphasis added). Malachi, like the witnesses in *Prevatte* and *Davis*, was the State's principal witness and was present when Johnson was murdered. At the time of the trial, Malachi was facing criminal charges that, if convicted, could result in her imprisonment for more than nineteen years.

In a voir dire hearing that was held outside the presence of the jury, defendant's evidence demonstrated that the prosecutor responsible for Malachi's drug charges was in communication with the prosecutor responsible for defendant's murder trial. The two prosecutors had exchanged e-mails concerning a possible plea deal for Malachi based

on her testimony at defendant's trial. Recognizing that Malachi was the only witness to the crime and that she was facing more than a decade in prison because of her pending drug charges, the State "had a strong[ ] weapon to control [Malachi]." *Prevatte*, 346 N.C. at 164, 484 S.E.2d at 378.

During trial, the court limited defendant's cross-examination of Malachi several times. When defendant asked Malachi whether a deal had been finalized in Guilford County concerning her pending charges, the prosecutor objected and the court sustained the objection. Likewise, when defendant asked Malachi whether she thought she was "going to get anything out of it" for the charges pending against her based on her testimony, the court again sustained the prosecutor's objection. Finally, defendant asked Malachi whether she was aware of any current considerations she might have for her pending charges. Before Malachi could answer, the prosecutor again objected and the court sustained the motion. Here, the concern with the court's limitations on cross-examination lies not with whether Malachi received a plea deal, but with the jury's inability to consider her testimony. By limiting Malachi's testimony, the court prohibited the jury from considering evidence that could have shown bias on Malachi's part. To reiterate, "[t]he effect of the handling of the pending . . . charges on [Malachi] was for the jury to determine" and "[n]ot letting the jury do so was error." *Prevatte* at 164, 484 S.E.2d at 378–79. Accordingly, the trial court abused its discretion in limiting defendant's cross-examination of Malachi, thereby violating the Confrontation Clause.

This Court in *State v. Hoffman* held that although the trial court erred in prohibiting the defendant's cross-examination of a witness about charges pending against him, the error was harmless. 349 N.C. at 181, 505 S.E.2d at 89. Unlike here, the witness in *Hoffman* was not a principal witness but only a corroborating witness. *Id.* at 180, 505 S.E.2d at 88. As such, the State's case did not rest solely on the witness's testimony. *Id.* at 180, 505 S.E.2d at 88 ("[The witness's] minimal importance [wa]s evidenced by the fact that the prosecutor scarcely mentioned him in his closing argument."). In addition to the witness's lack of significance to the State's case, the defendant was able to "thoroughly impeach[ ]" the witness regarding prior inconsistent statements and a lengthy history of past convictions. *Id.* at 180–81, 505 S.E.2d at 88–89. Finally, there was substantial evidence showing the defendant's guilt aside from the witness's testimony. *Id.* at 181, 505 S.E.2d at 89. The defendant was charged with robbery with a dangerous weapon and first-degree murder. *Id.* at 173, 505 S.E.2d at 84. The State presented evidence at the defendant's trial showing that the defendant was seen outside of the victim's store before the robbery and murder occurred. *Id.* at 181, 505 S.E.2d at 89.

Another witness testified that the defendant had asked him to rob the store with the defendant. *Id.* at 181, 505 S.E.2d at 89. Other witnesses testified that the defendant admitted to murdering the victim. *Id.* at 181, 505 S.E.2d at 89. Finally, physical evidence found at the scene of the crime was consistent with a witness's testimony regarding what the defendant had told the witness about the crime. *Id.* at 181, 505 S.E.2d at 89. Because there was substantial evidence against the defendant along with the impeachment evidence against the State's corroborating witness, the trial court's error "was harmless beyond a reasonable doubt." *Id.* at 181, 505 S.E.2d at 89.

In this case, the State argues that any error committed by the trial court was harmless beyond a reasonable doubt based on the thoroughness of defendant's cross-examination of Malachi and her impeachment over prior inconsistent statements. *See McNeil*, 350 N.C. at 680, 518 S.E.2d at 500 (evidence of the thorough impeachment of a witness regarding inconsistent statements may result in harmless error). In *McNeil* this Court reasoned that "as in *Hoffman*, [the] defendant here thoroughly impeached [the witness] regarding her prior inconsistent statements and prior convictions." 350 N.C. at 680, 518 S.E.2d at 500. The Court found no error in *McNeil* and pointed out that the defendant had pleaded guilty to both counts of first-degree murder and only challenged errors in his sentencing phase. 350 N.C. at 680, 518 S.E.2d at 500. *See also State v. Atkins*, 349 N.C. 62, 505 S.E.2d 97 (1998) (finding no error where the defendant argued the trial court denied him the right to confront a witness testifying against him in his sentencing phase after pleading guilty to first-degree murder).

However, as in *Prevatte*, here Malachi was the key witness against defendant and was vital to the State's case due to the lack of other evidence against defendant. There was no physical evidence linking defendant to the crime and no other witnesses who placed him at the scene. While the State presented circumstantial evidence at trial, its case relied heavily on Malachi's testimony. Therefore, it was crucial for defendant to demonstrate Malachi's possible bias to the jury. The trial court erred by limiting the cross-examination of the State's principal witness when there was a lack of substantial evidence linking defendant to the crime and the error was not harmless beyond a reasonable doubt.

Conclusion

Because the trial court erred in limiting defendant's cross-examination of the State's principal witness and because that error was not harmless beyond a reasonable doubt, defendant is entitled to a new trial.

Accordingly, we affirm the decision of the Court of Appeals vacating the verdict and judgment of the superior court. The cause is remanded to the Court of Appeals for further remand to the Superior Court in Forsyth County for a new trial.

AFFIRMED AND REMANDED.

Justice ERVIN dissenting.

I do not believe, for the reasons set forth in more detail below, that the trial court impermissibly limited defendant's ability to cross-examine Ms. Malachi. On the contrary, while the trial court did sustain the State's objections to certain questions that defendant attempted to pose to Ms. Malachi on cross-examination, the record clearly reflects that defendant "was . . . able to get his contentions before the jury," *State v. Ray*, 336 N.C. 463, 473, 444 S.E.2d 918, 925 (1994), and the Court has not identified any information necessary to support his bias-related challenge to Ms. Malachi's credibility that the jury did not hear. As a result, I respectfully dissent from the Court's decision to affirm the Court of Appeals' decision to award defendant a new trial.

As a general proposition, the scope of cross-examination is committed to the sound discretion of the trial court. In other words, "defendant's right to cross-examination is not absolute," *State v. Guthrie*, 110 N.C. App. 91, 93, 428 S.E.2d 853, 854 (1993), with "the scope of cross-examination [being] subject to appropriate control in the sound discretion of the court." *State v. Coffey*, 326 N.C. 268, 290, 389 S.E.2d 48, 61 (1990); *see also Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110, 39 L.Ed.2d 347, 353 (1974) (stating that the right of cross-examination is "[s]ubject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation"); *State v. Ward*, 354 N.C. 231, 261, 555 S.E.2d 251, 270 (2001) (holding that "the limits placed by the trial court on defendant's cross-examination of these witnesses [constituted] an appropriate exercise of its discretion" given that "the questions called for incompetent hearsay testimony, were unduly repetitive or argumentative, or were simply improper in form"); *State v. Mason*, 315 N.C. 724, 730, 340 S.E.2d 430, 434 (1986) (stating that "trial judges retain broad discretion to preclude cross-examination that is repetitive").

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend VI. In *Davis*, the United States Supreme

Court held that the defendant had a Sixth Amendment right to question a witness who was on probation about his probationary status in order to establish that the witness might be motivated to testify for the prosecution for the purpose of reducing or eliminating his own exposure to criminal prosecution or other adverse consequences. *Davis*, at 415 U.S. 316–319, 94 S. Ct. at 1110–11, 39 L. Ed.2d at 347. Even in that context, however, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant[, with] 'the Confrontation Clause [serving to] guarantee[ ] an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S. Ct. 1431, 1435, 89 L. Ed. 2d 674, 683 (1986) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S. Ct. 292, 295, 86 L. Ed. 2d 15, 19 (1985) (per curiam) (emphasis in the original)).

A number of decisions of this Court have considered the appropriateness of various trial court rulings concerning the extent to which criminal defendants were entitled to cross-examine prosecution witnesses concerning pending criminal charges for the purpose of showing that those witnesses were biased in favor of the prosecution and against the defendant. For example, in *State v. Prevatte*, 346 N.C. 162, 162–64, 484 S.E. 2d 377, 377–79 (1997), the defendant was under indictment for nine counts of forgery and uttering. The trial court refused to allow the defendant to question or elicit testimony from a prosecution witness concerning that witness's pending charges for the purpose of establishing that the witness "had been promised or expected anything in regard to the charges in exchange for his testimony." *Id.* at 163, 484 S.E.2d at 378. In holding that the trial court's ruling was erroneous and awarding the defendant a new trial, this Court stated, in reliance upon *Davis*, that, when the State "had a strong[ ] weapon to control the witness," such as the ability to utilize the plea negotiation process to persuade the witness in question to testify on behalf of the State, the defendant must be allowed to question the witness concerning his or her pending criminal charges. *Id.* at 164, 484 S.E.2d at 378–79.

On the other hand, in *State v. Atkins*, 349 N.C. 62, 80–81, 505 S.E.2d 97, 109 (1998), the trial court, after refusing to allow the defendant to question the State's principal witness about whether she could receive the death penalty in the event that she declined to testify for the State, permitted the defendant to ask the witness "[w]hat kind of promises

. . . has the State made you in exchange for your testimony," to which the witness replied, simply, "None." *Atkins*, 349 N.C. at 81, 505 S.E.2d at 109. Although the defendant in *Atkins* challenged the trial court's decision to sustain the State's objection to the question asking, "[s]o you can't get the death penalty, can you," on appeal, this Court rejected defendant's contention that the trial court's ruling impermissibly interfered with his confrontation rights on the grounds that "[t]he trial court allowed exactly the type of questioning mandated by *Prevatte*" and that "[d]efendant was clearly allowed to inquire into any potential bias of [the witness] based upon any arrangement between the witness and the prosecution." *Id.* at 80–81, 505 S.E.2d at 109. As a result, this Court's confrontation-related jurisprudence focuses upon whether the defendant was allowed to engage in sufficient cross-examination to support an argument to the jury that the witness was biased in favor of the prosecution rather than upon whether the trial judge sustained an objection to any particular question.

As the majority notes, limitations upon the scope of cross-examination imposed by trial judges are reviewed on appeal using an abuse of discretion standard. *See State v. McNeil*, 350 N.C. 657, 678, 518 S.E. 2d 486, 499 (1999). "[A] trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016) (quoting *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986)). "Absent a showing of an abuse of discretion or that prejudicial error has resulted, the trial court's ruling will not be disturbed on review." *State v. Maynard*, 311 N.C. 1, 10, 316 S.E.2d 197, 202–03 (1984).

A careful examination of the record reveals that defendant was afforded ample opportunity to cross-examine Ms. Malachi concerning her pending Guilford County drug charges, which had been the subject of communications with those responsible for prosecuting defendant. In anticipation of trial, the State filed a motion in limine seeking the entry of an order that, among other things, precluded defendant from cross-examining Ms. Malachi about the criminal charges that were pending against her in Guilford County. Prior to the beginning of the trial, the trial court heard arguments concerning the State's motion in limine. At the conclusion of those arguments, the trial court determined that:

> [H]aving heard arguments of counsel, having reviewed the motion on the limited question of whether or not the charges and any potentially favorable treatment as a result

> – *that testimony will be allowed*, and the motion is overruled to that limited extent.
>
> *The defendant will be allowed to ask about the nature of the charges and what the defendant knew about any potential deals or favorable treatment as a result of her testimony here.*
>
> In reaching that decision, I have done a balancing test. And I find that it is relevant. I also find that it's – in order to actually get a context requires a little bit of background to it. But it's not going to be at this point an in-depth discussion of those facts.

(emphasis added). After the completion of Ms. Malachi's testimony on direct examination and prior to the beginning of her cross-examination, the trial court conducted additional proceedings out of the presence of the jury for the purpose of addressing a number of potential evidentiary issues, including the extent to which defendant would be allowed to question Ms. Malachi concerning her pending criminal charges. Following a recitation of the questions that defendant intended to ask Ms. Malachi concerning those pending charges, the trial court delineated the scope of the cross-examination questioning that it intended to permit:

> You may ask if she – you may ask about the charges. You may ask if she has been offered any incentive to testify. And you may ask if she is hoping to gain a benefit, either a reduction in sentence if she pleads guilty or otherwise, as a result of her testimony here. You may also ask her – and it may be a lead-up question – if she's aware of the potential sentences that she would be facing.

During her cross-examination in the presence of the jury by defendant's trial counsel, Ms. Malachi testified that

> Q. Isn't it true on [21 January 2015], you were charged by the High Point Police Department with one count of trafficking in methamphetamine, one count of conspiracy to traffic in methamphetamine, one count of trafficking in marijuana and one count of conspiracy to traffic in marijuana?
>
> . . . .
>
> A. Yes, sir.

Q. And those charges are still pending, are they not?

A. Yes, sir.

After establishing that Ms. Malachi knew that "the trafficking in methamphetamine and the conspiracy to traffic in methamphetamine carry a sentence of 90 months minimum to 120 months maximum," that "the trafficking in marijuana charges" "each . . . carr[y] a mandatory sentence of 25 months minimum to 30 months maximum active prison time," that these cases were pending in Guilford County, and that she was represented by counsel, the following additional proceedings occurred:

Q. What, if anything, have you been offered from the State at this point regarding those pending charges?

A. I don't know nothing about that.

Q. So nothing has been finalized in Guilford County?

MR. TAYLOR: Objection.

THE COURT: Sustained.

BY MR. JAMES:

Q. You're not aware of any current plea offer at this point. Correct?

A. Yes, sir.

Q. Have you – are you aware that there are such things as plea offers?

MR. TAYLOR: Objection.

THE COURT: I'll allow that one question.

BY MR. JAMES:

Q. Ma'am?

A. Yes, sir.

Q. What, if anything, do you hope to gain out of testifying here for the State with regard to those five pending charges?

A. Justice for Anthony Johnson.

> Q. So you don't think you're going to get anything out of it for the charges you got?
>
> MR. TAYLOR: Objection.
>
> THE COURT: Sustained.
>
> BY MR. JAMES:
>
> Q. Are you aware of any other considerations you might have for those pending charges right now?
>
> MR. TAYLOR: Objection.
>
> THE COURT: Sustained.

As a result, defendant's trial counsel was allowed to establish that, at the time of defendant's trial, Ms. Malachi had been charged in Guilford County with one count of trafficking in methamphetamine, one count of conspiracy to traffic in methamphetamine, one count of trafficking in marijuana, and one count of conspiracy to traffic in marijuana; that she faced sentences of 90 to 120 months imprisonment in each of the methamphetamine-related cases and sentences of 25 to 30 months imprisonment in each of the marijuana-related cases; that she was aware of the plea negotiation process; that she was not aware that any plea offer had been extended to her in these Guilford County cases; and that she "hoped to gain" "[j]ustice for Anthony Johnson" by testifying for the State against defendant. I am hard put to understand why this information, without more, does not suffice to support an argument to the jury that Ms. Malachi was biased in favor of the State and against defendant by virtue of the leverage given to the State by virtue of the existence of these pending Guilford County charges.

In holding that the trial court placed impermissible limitations upon defendant's ability to cross-examine Ms. Malachi about the potentially biasing effect of her pending Guilford County drug charges, the Court focuses solely upon the fact that the trial court sustained the State's objections to questions inquiring whether anything "had been finalized in Guilford County," whether she thought that she was "going to get anything out of [testifying] for the charges you got," and whether she was "aware of any other considerations you might have for her pending charges right here." Although the Court states that, "[b]y limiting [Ms.] Malachi's testimony, the court prohibited the jury from considering evidence that could have shown bias on [Ms.] Malachi's part," the record contains no support for the Court's apparent assumption that Ms. Malachi's answers to the questions to which the State's objections were sustained would have benefitted defendant. On the contrary, Ms.

Malachi testified on voir dire that she was not expecting to receive any benefit for testifying on the State's behalf at defendant's trial and that the only goal that she sought to achieve by testifying for the State against defendant was to obtain justice for Anthony Johnson.

In addition, the record reflects that the trial court had ample justification for sustaining the State's objections to each of the three questions upon which the Court's decision rests and certainly did not act in an arbitrary and capricious manner in making the challenged rulings, particularly given the extensive cross-examination of Ms. Malachi that the trial court otherwise allowed.[1] After the trial court sustained the State's objection to defendant's question inquiring whether anything had "been finalized in Guilford County," the trial court allowed defendant to ask Ms. Malachi whether she was "aware of any current plea offer at this point" and received what amounted, in substance, to a negative answer. Thus, the record establishes that Ms. Malachi actually provided the information that defendant sought to obtain by posing the first question to which the trial court sustained the State's objection. Furthermore, the questions to which the second and third of the State's successful objections were directed inquired if Ms. Malachi thought that she was "going to get anything out of [testifying] for the charges you got" and if she was "aware of any other considerations she might have for those pending charges right now." Immediately prior to the posing of these questions, defendant had asked Ms. Malachi what she "hope[d] to gain out of testifying here for the State with regard to those five pending charges" and was told, consistently with the answer that she had given to essentially the same question on voir dire, "[j]ustice for Anthony Johnson." Aside from the fact that Ms. Malachi had already effectively answered the second of these two questions when she testified that she did not have a plea offer at the time that she testified for the State at defendant's trial, the second and third of the three questions to which the trial court sustained the State's objections essentially repeated a question that the trial court had already allowed defendant to pose and that Ms. Malachi had already answered.[2] As a result, rather than impermissibly

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1. Although the Court acknowledges that defendant's claim is subject to abuse of discretion, rather than *de novo*, review in stating the applicable standard of review, the Court does not, as best I can tell, ever take the applicable standard of review into consideration at any point in its analysis and never makes reference to the applicable standard of review in analyzing the validity of defendant's claim.

2. In the event that defendant believes that Ms. Malachi's statement that she hoped to achieve "[j]ustice for Anthony Johnson" was not responsive to the question that defendant posed, he could have moved to strike Ms. Malachi's statement as unresponsive.

constraining defendant's ability to question Ms. Malachi concerning bias-related issues arising from the existence of the charges that were pending against her in Guilford County, the trial court rulings to which the Court's holding is directed represent nothing more than the appropriate exercise of the trial court's discretion to control the scope and extent of cross-examination for the purpose of preventing confusion and eliminating undue repetition. *Ward*, 354 N.C. at 261, 555 S.E.2d at 270 (holding that "the questions [that defendant sought to pose concerning the events that took place on the day of a murder and the witness's plea agreements] called for incompetent hearsay testimony, were unduly repetitive or argumentative, or were simply improper in form"); *McNeill*, 350 N.C. at 678, 518 S.E.2d 499 (holding that "further cross-examination relating to [the witness's] unserved warrants . . . would be repetitive and cumulative of the evidence already presented") (citing *State v. Howie*, 310 N.C. 613, 616, 313 S.E.2d 554, 556 (1984)).

The Court's decision in this case cannot, at least in my opinion, be squared with our existing decisional law concerning the nature and extent of the trial court's authority to control the scope and extent of a defendant's ability to question a prosecution witness concerning bias-related issues arising from the existence of pending criminal charges. For example, this case does not involve the total preclusion of cross-examination concerning a witness's pending charges of the type that this Court determined to have been erroneous in *Prevatte*, 346 N.C. at 164, 484 S.E.2d at 378–79, and *State v. Hoffman*, 349 N.C. 167, 181, 505 S.E.2d 80, 89 (1998) (holding that "the trial court erred by not allowing defendant to cross-examine [a prosecution witness] regarding his pending charges for breaking and entering"). On the contrary, the cross-examination that the trial court allowed concerning Ms. Malachi's pending charges in this case was much more extensive than that deemed to be sufficient in *McNeill*, 350 N.C. at 676–78, 518 S.E.2d. at 498–99 (holding that the trial court permitted a sufficient inquiry into a prosecution witness's pending charges by allowing "defendant wide latitude to expose [the witness's] alleged bias and motive by allowing cross-examination regarding all of [her] prior convictions" and instructing the jury that the witness was testifying pursuant to a plea agreement that provided her with a charge reduction and a sentence concession in return for her testimony, that the witness was an accomplice deemed to have an interest in the outcome of the proceeding, and that defendant contended that the witness had made false, contradictory, and conflicting statements), and *Atkins*, 349 N.C. at 81, 505 S.E.2d at 109 (holding that the trial court had allowed a sufficient inquiry into a prosecution's pending charges by permitting defendant to inquire "[w]hat kind of promises . . . has the

State made you in exchange for your testimony"). Simply put, the result reached by the Court in this case is fundamentally inconsistent with our prior decisions concerning the nature and extent of a defendant's right to cross-examine prosecution witnesses concerning any pending charges that they might be facing at the time of their testimony, at least two of which have held that much more limited questioning than that which the trial court allowed in this case satisfied the requirements of the Confrontation Clause.

In summary, a careful review of the record reveals that the trial court allowed an extensive exploration of the criminal charges that Ms. Malachi was facing at the time that she testified on behalf of the State and against defendant. The evidence that defendant's trial counsel elicited during his thorough cross-examination of Ms. Malachi supplied sufficient information to support a concentrated attack upon her credibility given that Ms. Malachi admitted that she was facing serious criminal charges in Guilford County, that she was familiar with the plea negotiation process, and that no proposed plea agreement had been extended to her at the time of defendant's trial. The trial court had legitimate justification for sustaining each of the successful objections that the State asserted during the relevant portion of Ms. Malachi's cross-examination, and the Court has failed to point to any additional evidence or any additional bias-related argument that defendant would have been able to elicit in the absence of the trial court's ruling. Finally, the Court's decision conflicts with our existing jurisprudence concerning the nature and extent of a criminal defendant's right to cross-examine prosecution witnesses concerning pending criminal charges. As a result, for all of these reasons, I respectfully dissent from the Court's decision to affirm the Court of Appeals' decision that defendant should be awarded a new trial.

Justice NEWBY joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
JAMES HAROLD COURTNEY, III

No. 160PA18

Filed 16 August 2019

Constitutional Law—double jeopardy—hung journey—dismissal by State

Defendant's second prosecution for second-degree murder violated his Double Jeopardy rights where a first trial ended in a hung jury, the State took a voluntary dismissal, and defendant was retried and convicted after new DNA evidence emerged. Jeopardy continued after the mistrial, and the State could have retried defendant again without violating his double jeopardy rights; however, the State made a binding decision not to retry the case when it made the unilateral choice to enter a final dismissal. That decision was tantamount to an acquittal.

Justice NEWBY dissenting.

Justice ERVIN 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, 817 S.E.2d 412 (N.C. Ct. App. 2018), vacating a judgment entered on 9 November 2016 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Supreme Court on 15 May 2019 in session in the New Bern City Hall in the City of New Bern pursuant to section 18B.8 of Chapter 57 of the 2017 Session Laws of the State of North Carolina.

Joshua H. Stein, Attorney General, by Jess D. Mekeel, Special Deputy Attorney General, and Benjamin O. Zellinger, Assistant Attorney General, for the State-appellant.

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

Tin Fulton Walker & Owen, PLLC, by Matthew G. Pruden; and Devereux & Banzhoff, PLLC, by Andrew B. Banzhoff, for North Carolina Advocates for Justice, amicus curiae.

HUDSON, Justice

This case comes to us by way of the State's appeal from a unanimous decision of the Court of Appeals holding that defendant's right to be free from double jeopardy was violated when the State voluntarily dismissed defendant's charge after his first trial ended in a hung jury mistrial. Defendant was retried nearly six years later, after new evidence emerged. The State argues that jeopardy is deemed never to have attached because of the mistrial, so that defendant was not in jeopardy at the time that his second trial began. In the alternative, the State argues that, even if defendant remained in jeopardy following the mistrial, the State's voluntary dismissal without leave did not terminate that jeopardy and that the State was not barred from trying the defendant a second time. We are not persuaded by either of the State's arguments and, thus, affirm the Court of Appeals.

Today we recognize, in accordance with double jeopardy principles set out by this Court and the United States Supreme Court, that jeopardy attaches when the jury is empaneled and continues following a mistrial until a terminating event occurs. We hold that when the State enters a voluntary dismissal under N.C.G.S. § 15A-931 after jeopardy has attached, jeopardy is terminated in the defendant's favor, regardless of the reason the State gives for entering the dismissal. The State cannot then retry the case without violating a defendant's right to be free from double jeopardy. When the State dismisses a charge under section 15A-931 after jeopardy has attached, jeopardy terminates. Thus, we affirm the decision of the Court of Appeals vacating defendant's conviction on double jeopardy grounds and remand to the trial court for further proceedings consistent with this opinion.

Background

Defendant was arrested on 2 November 2009 for the murder of James Carol Deberry, which was committed three days earlier on 31 October 2009; he was indicted on 30 November 2009. Defendant's trial began on 6 December 2010, at which point a jury was empaneled and evidence presented. On 9 December 2010, the trial court declared a mistrial after the jury foreperson reported that the jury was hopelessly deadlocked. Defendant was released the same day. Following the hung jury mistrial declaration, the trial court continued the case so the State could decide whether it would re-try defendant on the murder charge. The trial court held status hearings on 16 December 2010 and on 10 February 2011. The trial court's orders from both hearings noted that the case had ended in mistrial and that it would be continued to another status hearing for the

State to decide whether it intended to re-try defendant. Ultimately, the State entered a dismissal of the murder charge against defendant on 14 April 2011[1], by filing form AOC-CR-307 with the trial court. Like many similar forms, form AOC-CR-307 includes multiple options; the State may use the form to enter a dismissal, a dismissal with leave, or a notice of reinstatement for a case that had previously been dismissed with leave. The State left blank the sections for dismissal with leave and reinstatement but checked the box in the "dismissal" section next to the statement "[t]he undersigned prosecutor enters a dismissal to the above charge(s) and assigns the following reasons." The State checked the box marked "other" in the list of reasons for dismissal and wrote underneath: "hung jury, state has elected not to re-try case." In addition, the State modified a statement on the form to reflect the circumstances so that it reads: "A jury has ~~not~~ been impaneled ~~nor~~ and has evidence [sic] been introduced." The State's voluntary dismissal of the charge was signed by the prosecutor.

Several years passed, and the State discovered additional evidence related to the case. In 2013 and 2014, fingerprints and DNA from a cigarette found at the scene of the murder were found to belong to an individual named Ivan McFarland. A review of the cell phone activity for McFarland and defendant revealed that defendant had McFarland's cell phone number in his phone, that five calls had been made between the two phones on the night of the murder, and that cell phone tower data placed both men in the vicinity near where the murder occurred.

A second warrant for defendant's arrest for murder was issued on 16 June 2015,[2] and defendant was re-indicted on 6 July 2015. On 7 October 2016, defendant filed a motion to dismiss the indictment based on N.C.G.S. § 15A-931, the voluntary dismissal statute, on estoppel and double jeopardy grounds, as well as a second motion to dismiss the murder charge for violating defendant's rights to a speedy trial under the state and federal constitutions. On 10 October 2016, the trial court in open court denied defendant's motion to dismiss based

1. The parties' filings disagree on which day in April 2011 the State entered its dismissal. However, the copy of the form included in the record appears to be dated 14 April 2011, which is also the date referenced in the Court of Appeals opinion. Any disagreement over the date does not impact the result of the case.

2. McFarland was also indicted for the murder, and, as noted by the Court of Appeals, his trial was apparently scheduled to take place after defendant's trial. However, the record is silent as to the outcome of McFarland's trial.

on double jeopardy.[3] Defendant was tried for the second time 31 October 2016 through 9 November 2016 in the Superior Court in Wake County. At that trial, the jury found defendant guilty of second-degree murder, and the trial court sentenced defendant to between 220 and 273 months in prison.

Defendant appealed to the Court of Appeals, where he argued that his right to be free from double jeopardy was violated when the State re-tried him on the same charge following its voluntary dismissal of the charge after defendant's first trial ended in a hung jury mistrial. In a unanimous opinion filed on 15 May 2018, the Court of Appeals agreed with defendant that his second prosecution violated the Double Jeopardy Clause of the United States Constitution. *State v. Courtney*, 817 S.E.2d 412, 422 (N.C. Ct. App. 2018) The Court of Appeals noted that the Double Jeopardy Clause does not prevent the State from retrying a defendant following a hung jury mistrial, but it listed three categories of jeopardy-terminating events that do bar a subsequent prosecution—jury acquittals, judicial acquittals, and "certain non-defense-requested terminations of criminal proceedings, such as non-procedural dismissals or improperly declared mistrials, that for double jeopardy purposes are functionally equivalent to acquittals." *Id.* at 418 (citing *Lee v. United States*, 432 U.S. 23, 30, 97 S. Ct. 2141, 2145, 53 L. Ed. 2d 80, 87 (1977); *United States v. Scott*, 437 U.S. 82, 99–100, 98 S. Ct. 2187, 2198, 57 L. Ed. 2d 65, 79–80 (1978)). The panel concluded that the dismissal entered by the State in this case fell within this third category, "interpret[ing] section 15A-931 as according that dismissal the same constitutional finality and conclusiveness as an acquittal for double jeopardy purposes." *Id.* at 419. Thus, the Court of Appeals concluded that the trial court had erred in denying defendant's motion to dismiss his 2015 indictment, and it vacated defendant's conviction.[4] On 20 September 2018, we allowed the State's petition for discretionary review of the decision of the Court of Appeals.

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3. Defendant's motion to dismiss based on speedy trial grounds was denied in open court on 31 October 2016, and an order with findings of fact and conclusions of law was filed on 3 November 2016.

4. Defendant raised three other issues before the Court of Appeals. Defendant argued, in the alternative, that the trial court erred in denying his motion to dismiss based on a violation of his right to a speedy trial. In addition, defendant argued that certain evidence was erroneously admitted at trial and that his statutory right not to be tried within a week of his arraignment was violated. Because the Court of Appeals found defendant's double jeopardy issue to be dispositive, it did not address his remaining three arguments, none of which are the subject of this appeal. *Courtney*, 817 S.E.2d at 416.

Analysis

The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution states that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb[.]" U.S. Const. amend. V. The U.S. Constitution's guaranty against double jeopardy applies to the states through the Fourteenth Amendment, *see Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 2062, 23 L. Ed. 2d 707, 716 (1969), and we have long recognized that the Law of the Land Clause found in our state's constitution also contains a prohibition against double jeopardy, N.C. Const. art. I, § 19; *State v. Sanderson*, 346 N.C. 669, 676, 488 S.E.2d 133, 136 (1997); *see also State v. Crocker*, 239 N.C. 446, 80 S.E.2d 243 (1954). "The underlying idea [of this constitutional protection] is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187–88, 78 S. Ct. 221, 223, 2 L. Ed. 2d 199, 204 (1957). In situations where jeopardy has not attached or where, having attached, jeopardy has not yet been terminated, the State retains the power to proceed with a prosecution. But under the Double Jeopardy Clause, "once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106, 123 S. Ct. 732, 736, 154 L. Ed. 2d 588, 595 (2003) (citation omitted).

When the Double Jeopardy Clause is implicated, an individual's right to be free from a second prosecution is not up for debate based upon countervailing policy considerations. *See Burks v. United States*, 437 U.S. 1, 11 n.6, 98 S. Ct. 2141, 2147 n.6, 57 L. Ed. 2d 1, 9 n.6 (1978) ("[W]here the Double Jeopardy Clause is applicable, its sweep is absolute. There are no 'equities' to be balanced, for the Clause has declared a constitutional policy, based on grounds which are not open to judicial examination.").

We review *de novo* a defendant's claim that a prosecution violated the defendant's right to be free from double jeopardy. *State v. Sparks*, 362 N.C. 181, 186, 657 S.E.2d 655, 658 (2008). The United States Supreme Court has recognized a two-pronged analysis to determine whether a violation of the Double Jeopardy Clause has occurred: "First, did jeopardy attach to [the defendant]? Second, if so, did the proceeding end in such a manner that the Double Jeopardy Clause bars his retrial?"

Martinez v. Illinois, 572 U.S. 833, 838, 134 S. Ct. 2070, 2074, 188 L. Ed. 2d 1112, 1117 (2014).

The State asks this Court to hold that neither of these two preconditions for a double jeopardy violation were present here and that, therefore, the re-trial in this case did not offend double jeopardy principles. First, the State argues that, notwithstanding the fact that the defendant was tried once for this murder charge, jeopardy never attached under these circumstances, meaning that jeopardy attached for the first time when the jury was empaneled in the second trial. Second, the State contends that, even if jeopardy did attach when the jury was empaneled and sworn in the first trial, the prosecution's voluntary dismissal of the indictment under N.C.G.S. § 15A-931 was not an event that terminated jeopardy. We are not persuaded by either argument and conclude that the unanimous panel below correctly held that the second trial of defendant violated his rights under the Double Jeopardy Clause.

I. Attachment and Continuation of Jeopardy

"There are few if any rules of criminal procedure clearer than the rule that 'jeopardy attaches when the jury is empaneled and sworn.' " *Martinez*, 572 U.S. at 839, 134 S. Ct. at 2074, 188 L. Ed. 2d at 1117 (citations omitted). *See also State v. Shuler*, 293 N.C. 34, 42, 235 S.E.2d 226, 231 (1977) ("Jeopardy attaches when a defendant in a criminal prosecution is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn.").

Though retrials may proceed in certain circumstances without violating the Due Process Clause, such as when a trial ends in mistrial or when a defendant secures the relief of a new trial after an original conviction is vacated on appeal,[5] *see Richardson v. United States*, 468 U.S. 317, 326, 104 S. Ct. 3081, 3086, 82 L. Ed. 2d 242, 251 (1984), "it became firmly established by the end of the 19th century that a defendant could be put in jeopardy even in a prosecution that did not culminate in a conviction or an acquittal, and this concept has been long established as an integral part of double jeopardy jurisprudence." *Crist v. Bretz*, 437 U.S. 28, 34, 98 S. Ct. 2156, 2160, 57 L. Ed. 2d 24, 30 (1978).

In *Richardson v. United States*, the United States Supreme Court, recognizing that jeopardy attaches when a jury is sworn, held that a

5. Because we recognize that the State may proceed with a retrial when a defendant secures the relief of a new trial after an original conviction is vacated on appeal, the dissent's assertion that our holding "would also apply to cases reversed on appeal" is incorrect. Our holding is limited to the facts presented here.

hung jury mistrial does not terminate that jeopardy in the defendant's favor. 468 U.S. at 326, 104 S. Ct. at 3086, 82 L. Ed. 2d at 251. Specifically, the Court stated

> we reaffirm the proposition that a trial court's declaration of a mistrial following a hung jury is not an event that terminates the original jeopardy to which petitioner was subjected. The Government, like the defendant, is entitled to resolution of the case by verdict from the jury, and jeopardy does not terminate when the jury is discharged because it is unable to agree.

Id. The *Richardson* Court rejected the defendant's implicit argument that his hung jury mistrial was a jeopardy-terminating event but, importantly, recognized the fact that jeopardy had attached and remained attached following the mistrial. *Id.* at 325, 104 S. Ct. at 3086, 82 L. Ed. 2d at 251 ("Since jeopardy attached here when the jury was sworn, petitioner's argument necessarily assumes that the judicial declaration of a mistrial was an event which terminated jeopardy in his case and which allowed him to assert a valid claim of double jeopardy. But this proposition is irreconcilable with [the Court's prior cases], and we hold on the authority of these cases that the failure of the jury to reach a verdict is not an event which terminates jeopardy.") (citing *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569, 97 S. Ct. 1349, 1353, 51 L. Ed.2d 642 (1977)).

The principle affirmed in *Richardson* that the original jeopardy continues, rather than terminates, following a hung jury mistrial, has been reaffirmed in more recent statements from the Court. *See Yeager v. United States*, 557 U.S. 110, 118, 129 S. Ct. 2360, 2366, 174 L. Ed. 2d 78, 87 (2009) ("[W]e have held that the second trial does not place the defendant in jeopardy 'twice.' Instead, a jury's inability to reach a decision is the kind of 'manifest necessity' that permits the declaration of a mistrial and the *continuation of the initial jeopardy* that commenced when the jury was first impaneled.") (emphasis added) (citations omitted).

The State concedes that jeopardy attaches when a jury is empaneled; however, it argues that the occurrence of a hung jury mistrial sets in motion a legal fiction in which the clock is wound back, placing the case back in pre-trial status such that jeopardy is deemed never to have attached.[6] The State's argument posits two necessary conditions.

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6. At oral argument, counsel for the State instead argued that jeopardy "unattaches," a phenomenon that the State specifically disclaims in its brief. *Compare* New Brief for the State at 8, *State v. Courtney*, No. 160PA18 (N.C. November 21, 2018) ("Although the

First, the State argues that the United States Supreme Court has never held that jeopardy continues following a mistrial, notwithstanding the clear language to the contrary found in *Richardson* and *Yeager*. The State contends that the multiple statements by the Court appearing to embrace the doctrine of continuing jeopardy are *dicta* because a number of those cases did not squarely address the Double Jeopardy Clause's limits on prosecutors' ability to bring a second prosecution on the same charge following a declaration of a hung-jury mistrial that was not sought by the defendant. The State argues that even *Richardson*'s continuing jeopardy discussion is "[a]rguably . . . dictum because by finding a mistrial was not a terminating event, it was immaterial whether or not jeopardy had continued, as opposed to the case being placed back in the pre-trial posture[.]"

The second element of the State's argument that jeopardy did not attach appears to be as follows: because the U.S. Supreme Court, in the State's view, has not formally adopted the continuing jeopardy doctrine, this Court is free to follow its own precedent on the matter. The State further argues that this Court has explicitly held that upon the declaration of a hung jury mistrial, a legal fiction goes into effect under which jeopardy is deemed never to have attached at the first trial, meaning that no jeopardy exists to continue and eventually terminate. Thus, the State contends that, following his 2010 trial, defendant was placed in precisely the same position in which he stood before trial, and it was only when the jury was empaneled at defendant's second trial in 2016 that jeopardy first attached. We find both components of the State's proffered theory that defendant was not in jeopardy at the time of the mistrial to be wholly without merit.

In *Richardson*, the Supreme Court stated multiple times that jeopardy, which existed prior to a mistrial, does not terminate following the

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court below believed the State was contending jeopardy 'unattached' with the mistrial, the State's actual argument is that, based on case law from this Court, the mistrial created the legal fiction that jeopardy *never attached* in the first place.") (citation and footnote omitted) (emphasis in original) *with* Oral Argument at 55:08–55:18, 57:36–57:51, *State v. Courtney*, No. 160PA18 (N.C. May 15, 2019) ("I would ask this Court to look at this Court's holding in *State v. Lachat*, which found that when there is a mistrial, jeopardy unattaches."; "After a hung jury, the jeopardy in that situation unattaches and then when the State made this dismissal, the State was in a pretrial procedure at that point, and therefore the State could bring back these charges and retry the defendant.") (emphases added). While we primarily focus here on the State's contention in its brief that jeopardy never attached, we also find no legal support for its alternative formulation that jeopardy "unattaches" following a hung jury mistrial. Both arguments—that jeopardy never attached and that jeopardy unattached—are foreclosed by the continuing jeopardy principle embraced by the United States Supreme Court in *Richardson*.

mistrial. The Court in *Richardson* "reaffirm[ed] the proposition that a trial court's declaration of a mistrial following a hung jury is not an event that terminates *the original jeopardy to which petitioner was subjected*," and reiterated that "*jeopardy does not terminate when the jury is discharged* because it is unable to agree." *Richardson*, 468 U.S. at 326, 104 S. Ct. at 3086, 82 L. Ed. 2d at 251 (emphases added). The State argues, however, that merely because the *Richardson* Court held that "jeopardy does not terminate" following a hung jury mistrial "does not necessarily mean that jeopardy had continued" because, under the State's theory, jeopardy would not terminate because jeopardy would no longer be deemed in effect. While this is a creative argument, it is foreclosed by a commonsense reading of *Richardson*.

First, the *Richardson* Court clearly contemplates the continuation of jeopardy at the time of the mistrial. If the Court had intended to say that jeopardy, which attaches when the jury is empaneled, can—only in the singular context of a hung jury mistrial—be retroactively deemed never to have attached, it could have done so. Instead, the Court stated that the *original jeopardy* did not terminate, thus signaling that jeopardy continued. We see no logical interpretation of the Court's declaration in *Richardson* that the original jeopardy did not terminate other than to acknowledge that the original jeopardy *continued*.[7]

Second, the outcome and legal significance of *Richardson* cannot be separated from its text. The continuing jeopardy doctrine reaffirmed by *Richardson* provided a rationale for the longstanding practice of permitting retrial following a hung jury mistrial that was consistent with the guarantee of the Double Jeopardy Clause. *See Richardson*, 468 U.S. at 324, 104 S. Ct. at 3085, 82 L. Ed. 2d at 250 (citing *Logan v. United States*, 144 U.S. 263, 297–98, 12 S. Ct. 617, 627–28, 36 L. Ed. 429, 441 (1892); *Arizona v. Washington*, 434 U.S. 497, 509, 98 S. Ct. 824, 832, 54 L. Ed. 2d 717, 730 (1978)).

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7. The dissenting justice in *Richardson* also acknowledged the Court's adoption of the continuing jeopardy principle. Writing in dissent in *Richardson*, Justice Brennan argued that the majority's approach "improperly ignores the realities of the defendant's situation and *relies instead on a formalistic concept of 'continuing jeopardy.'* " *Richardson*, 468 U.S. at 327, 104 S. Ct. at 3087, 82 L. Ed. 2d at 252 (Brennan, J., concurring in part and dissenting in part) (emphasis added). *See also Yeager v. United States*, 557 U.S. 110, 129, 129 S. Ct. 2360, 2372, 174 L. Ed. 2d 78, 94 (2009) (Scalia, J., dissenting) ("This Court has extended the protections of the Double Jeopardy Clause by holding that jeopardy attaches earlier: at the time a jury is empanelled and sworn.. . . . [D]ischarge of a deadlocked jury does not 'terminat[e] the original jeopardy.' *Under this continuing-jeopardy principle*, retrial after a jury has failed to reach a verdict is not a new trial but part of the same proceeding.") (emphasis added) (footnote omitted) (citations omitted).

The State here argues against the existence of a legal principle that secures the government's right to retry a defendant following mistrial in the face of legal opposition to those retrials on double jeopardy grounds. The State rejects the principle that permitted the Government to prevail in *Richardson*—that jeopardy continues, rather than terminates, following a mistrial—in favor of an argument that, following a mistrial, jeopardy neither continues nor terminates but rather is deemed never to have attached in the first place. Thus, the State's argument that the Supreme Court has not embraced the principle of continuing jeopardy following a mistrial is unsupported by either the text or context of *Richardson*.

The State also points to *United States v. Sanford*, 429 U.S. 14, 97 S. Ct. 20, 50 L. Ed. 2d 17 (1976) (per curiam) to support its argument that, following a hung jury mistrial, a defendant is placed back in a pre-trial posture and jeopardy is deemed not to have attached. In *Sanford*, defendants were indicted for illegal game hunting, and their trial resulted in a hung jury mistrial. *Id.* at 14, 97 S. Ct. at 20, 50 L. Ed. 2d at 19. Four months later, as the Government was preparing to retry the case, the trial court granted the defendants' motion to dismiss the indictment, concluding that the Government had consented to the activities described in the indictment. *Id.* The Government appealed. *Id.* The Supreme Court reversed a decision of the circuit court dismissing the Government's appeal on double jeopardy grounds, concluding that "[t]he dismissal in this case, like that in [*Serfass v. United States*, 420 U.S. 377, 95 S. Ct. 1055, 43 L. Ed. 2d 265 (1975)], was prior to a trial that the Government had a right to prosecute and that the defendant was required to defend," *id.* at 16, 97 S. Ct. at 21–22, 50 L. Ed. 2d at 20, and that "in such cases a trial following the Government's successful appeal of a dismissal is not barred by double jeopardy," *id.* at 16, 97 S. Ct. at 22, 50 L. Ed. 2d at 20.

Though the State is correct that *Sanford* includes language analogizing the dismissal in that case to the pretrial dismissal considered in *Serfass*, *see id.* at 16, 97 S. Ct. at 21, 50 L. Ed. 2d at 20, there are two reasons why *Sanford* does not control here. First, *Richardson* was decided eight years *after Sanford*, meaning that if the two opinions were in conflict, *Richardson* would control. The Court in *Sanford* issued only a brief *per curiam* opinion without oral argument, *see id.* at 16, 97 S. Ct. at 22, 50 L. Ed. 2d at 20 (Brennan & Marshall, JJ., dissenting from summary reversal and indicating that they would have set the case for oral argument); however, the Court included a more robust analysis of double jeopardy principles in its later opinion in *Richardson*.

Second, the result in *Sanford* is consistent with the principle discussed two years later in *United States v. Scott*. In *Scott*, the Court held

that the State was permitted to appeal a defendant-requested dismissal of charges after jeopardy had attached. 437 U.S. at 101, 98 S. Ct. at 2198–99, 57 L. Ed. 2d at 80–81. The Court explained that

> the defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant. . . . [T]he Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice.

Id. at 98–99, 98 S. Ct. at 2198, 57 L. Ed. 2d at 79. Unlike in *Sanford* and *Scott*, the dismissal here was entered unilaterally by the State rather than by a trial court granting defendant's request. Thus, this line of cases is not applicable to the facts before us.

We now move to the second element of the State's theory that jeopardy attached for the first time at defendant's second trial. As the sole support for its theory that this Court has adopted the principle that jeopardy is deemed never to have previously attached at the point that the trial court declares a mistrial, the State points to a single statement from this Court's decision in *State v. Lachat*, 317 N.C. 73, 343 S.E.2d 872 (1986). The State notes that we stated in *Lachat* that "[w]hen a mistrial is declared properly for such reasons [as a deadlocked jury], 'in legal contemplation there has been no trial.' " 317 N.C. at 82, 343 S.E.2d at 877 (quoting *State v. Tyson*, 138 N.C. 627, 629, 50 S.E. 456, 456 (1905)).

The *Lachat* Court quoted this phrase from our 1905 decision in *State v. Tyson*, 138 N.C. at 629, 50 S.E. at 456. In *Tyson*, we held that a defendant's double jeopardy right was not violated when the jury was empaneled, the trial court declared a mistrial due to the intoxication of one of the jurors, and the defendant was re-tried and convicted. *Id.* We stated in *Tyson* that

> [w]here a jury has been impaneled and charged with a capital felony, and the prisoner's life put in jeopardy, the court has no power to discharge the jury, and hold the prisoner for a second trial, except in cases of absolute necessity. Where such absolute necessity appears from the findings of the court, and in consequence thereof the jury has been discharged, then in legal contemplation there has been no trial.

Id. (citation omitted). Significantly, though we stated that there had been "no trial" in this situation, such that the defendant was not subject to double jeopardy, we did not state that, due to the mistrial, there had been "no jeopardy." To the contrary, by noting that a jury may be discharged only "in cases of absolute necessity" after "the prisoner's life [has been] put in jeopardy," we implicitly acknowledged—from the post-mistrial perspective—that the defendant in *Tyson* had been in jeopardy during his first trial.

Eight decades later in *Lachat*, this Court quoted the phrase from *Tyson* in a somewhat different context. In *Lachat*, we held that a defendant's second trial should have been barred due to former jeopardy[8] based on the particular findings of fact and conclusions made by the trial court. *Lachat*, 317 N.C. at 74, 83–84, 343 S.E.2d at 872, 877. Our ruling in *Lachat* was a fact-specific determination that the trial court had erred in declaring a mistrial before making a proper determination on whether the jury was, in fact, hopelessly deadlocked. *Id.* at 84–85, 343 S.E.2d at 878. In setting out the applicable law in that case, we stated that the double jeopardy principle

> is not violated where a defendant's first trial ends with a mistrial which is declared for a manifest necessity or to serve the ends of public justice. "It is axiomatic that a jury's failure to reach a verdict due to a deadlock is a 'manifest necessity' justifying the declaration of a mistrial." When a mistrial is declared properly for such reasons, "in legal contemplation there has been no trial."

State v. Lachat, 317 N.C. at 82, 343 S.E.2d at 877 (first citing and quoting *State v. Simpson*, 303 N.C. 439, 447, 279 S.E.2d 542, 547 (1981), then quoting *Tyson*, 138 N.C. at 629, 50 S.E. at 456). Thus, the Court opined that following a properly declared mistrial, including a mistrial declared due to a hopelessly deadlocked jury, "in legal contemplation there has been no trial." Because *Lachat* explicitly involved an *improperly* declared mistrial, any discussion of the consequences stemming from a *properly* declared mistrial is not conclusive on this point. More importantly, the "no trial" language quoted in *Lachat* again falls far short of declaring that a defendant in such a situation has not been placed in jeopardy. Nor could this Court have made such a statement, given that, just two years

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8. *Lachat* was not decided under the Double Jeopardy Clause of the United States Constitution but rather "on adequate and independent grounds of North Carolina law." 317 N.C. at 77, 343 S.E.2d at 874.

earlier, the Supreme Court in *Richardson* had embraced the doctrine that jeopardy continues following a hung jury mistrial.[9]

This Court's prior statements that "in legal contemplation there has been no trial" were made in the context of explaining why the State is permitted to retry a defendant following a properly declared mistrial, which was also the context for the U.S. Supreme Court's embrace of the continuing jeopardy doctrine in *Richardson*. The State contends that "[i]f a hung jury creates the legal fiction that 'there has been no trial,' then by definition a jury was never empaneled and defendant was never placed in jeopardy." But in our view the State reads this explanatory phrase from our prior opinions too expansively. Contrary to the State's view, this Court did not with those eight words adopt an exception to the longstanding rule recognized by this Court and the United States Supreme Court that jeopardy attaches when a jury is empaneled, nor did we hold that a legal fiction acts to invalidate the jeopardy that a defendant, even one who is later retried, did in fact experience at a first trial.[10]

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9. In its brief, the State also references *State v. Sanders*, 347 N.C. 587, 496 S.E.2d 568 (1998), the most recent case from this Court to quote *Tyson*'s "no trial" language, though as with *Lachat*, it provides no analysis of the case. In *Sanders*, we upheld the propriety of a trial court's declaration of a mistrial due to the "manifest necessity" of jury misconduct in a sentencing proceeding, such that the defendant's double jeopardy rights would not be violated by a subsequent sentencing proceeding. *Id.* at 599–601, 496 S.E.2d at 576–77. In setting forth the reasoning for our conclusion, we discussed the right of a defendant to be free from double jeopardy and noted that this right is not violated when a mistrial is declared due to manifest necessity. *Id.* at 599, 496 S.E.2d at 576. Then we stated that "[w]hen a mistrial has been declared properly, 'in legal contemplation there has been no trial.' " *Id.* (quoting *Tyson*, 138 N.C. at 629, 50 S.E. at 456). As is the case with *Tyson* and *Lachat*, *Sanders* includes no statement that jeopardy is deemed, following the mistrial, never to have attached in the first place. Like *Lachat*, *Sanders* also post-dated *Richardson*, which would have foreclosed any holding that jeopardy did not remain attached following a mistrial.

10. Although the State contends this Court already adopted its proffered legal fiction as a holding in *Lachat*, it also seeks to highlight the usefulness of legal fictions by analogizing this situation before us to other situations where legal fictions have been employed. In a footnote on legal fictions in its brief, the State contends that "[h]ere, resetting the proceedings after a hung jury mistrial to pre-trial status is not all that different than other legal fictions such as *nunc pro tunc* orders and the relation-back doctrine." One of the cases the State cites in this discussion is *Costello v. Immigration & Naturalization Serv.*, 376 U.S. 120, 130, 84 S. Ct. 580, 586, 11 L. Ed. 2d 559, 565 (1964). But *Costello* declined to apply the relation-back doctrine in the manner urged by the government in that case and disparaged the legal fiction concept in the process. *Id.* at 130, 84 S. Ct. at 586, 11 L. Ed. 2d 559, 565–66 ("The relation-back concept is a legal fiction at best, and even the respondent concedes that it cannot be 'mechanically applied.' . . . This Court declined to apply the fiction in a deportation context in [a prior] case, and we decline to do so now."). The Court further stated that, "[i]n this area of the law, involving as it may the equivalent of banishment or exile, we do well to eschew technicalities and fictions and to deal instead with realities." *Id.* at 131, 84 S. Ct. at 587, 11 L. Ed. 2d at 566.

The State argues that "the continuing jeopardy doctrine . . . is a slender reed upon which to base a determination that defendant's double jeopardy rights were violated." On the contrary, we conclude that this century-old statement from this Court is a "slender reed" intended only to explain the State's ability to re-try a defendant following a mistrial. This Court has not adopted an elaborate legal fiction under which jeopardy attaches when a jury is empaneled and then simply ceases to apply when the trial court declares a mistrial. This Court has not embraced the proposition proffered by the State and does not do so today. Instead, relying upon the commonsense meaning of binding Supreme Court precedents, we reaffirm that jeopardy continues following a mistrial until the occurrence of a jeopardy-terminating event.

Because we conclude that the original jeopardy continued following defendant's mistrial, we turn to the second part of our analysis and consider whether the State's subsequent dismissal of defendant's murder indictment terminated the original jeopardy, such that defendant's second trial placed him in jeopardy a second time in violation of both the federal and state constitutions.

II. Voluntary Dismissal Terminating Jeopardy

Defendant concedes that the State, under the doctrine of continuing jeopardy, could have retried him following the mistrial without violating the Double Jeopardy Clause. He argues, however, that the State's unilateral decision to enter a voluntary dismissal of the murder indictment under N.C.G.S. § 15A-931 after jeopardy had attached was an event that terminated defendant's original jeopardy, thus preventing the State from subsequently retrying him. We hold that where, as here, the State dismisses a charge under section 15A-931 after jeopardy has attached, a defendant's right to be free from double jeopardy under the federal and state constitutions is violated if the State initiates a subsequent prosecution on the same charge. Thus, we affirm the holding of the Court of Appeals that the State's dismissal of a charge under section 15A-931 is binding on the state and is tantamount to an acquittal, making it a jeopardy-terminating event for double jeopardy purposes.

North Carolina has two statutes governing the State's ability to voluntarily dismiss charges, either with or without leave to reinstate those charges. Section 15A-931 of the General Statutes ("Voluntary dismissal of criminal charges by the State.") reads as follows:

> Except as provided in G.S. 20-138.4,[11] the prosecutor may dismiss any charges stated in a criminal pleading including those deferred for prosecution by entering an oral dismissal in open court before or during the trial, or by filing a written dismissal with the clerk at any time. The clerk must record the dismissal entered by the prosecutor and note in the case file whether a jury has been impaneled or evidence has been introduced.

N.C.G.S. § 15A-931(a) (2017).

By contrast, N.C.G.S. § 15A-932 ("Dismissal with leave when defendant fails to appear and cannot be readily found or pursuant to a deferred prosecution agreement.") allows a prosecutor to dismiss charges with leave to reinstate them under specific circumstances. Under section 15A-932,

> The prosecutor may enter a dismissal with leave for nonappearance when a defendant:
>
> > (1) Cannot be readily found to be served with an order for arrest after the grand jury had indicted him; or
> >
> > (2) Fails to appear at a criminal proceeding at which his attendance is required, and the prosecutor believes the defendant cannot be readily found.

N.C.G.S. § 15A-932(a) (2017) and

> The prosecutor may enter a dismissal with leave pursuant to a deferred prosecution agreement entered into in accordance with the provisions of Article 82 of this Chapter.

Id. § 15A-932(a1). A prosecutor may reinstate charges dismissed with leave under these provisions upon apprehension of a defendant who previously could not be found or if a defendant fails to comply with the terms of a deferred prosecution agreement. *Id.* § 15A-932(d), (e).

Section 15A-932 establishes a few specifically enumerated circumstances in which the State may dismiss a charge with leave to refile, such that a dismissal under this statute does not necessarily contemplate the

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11. The statute referenced herein applies only to implied-consent and impaired driving with license revoked offenses and requires that a voluntary dismissal by the State be accompanied by detailed reasons and other information related to the case. N.C.G.S. § 20-138.4(a)(1), (b) (2017).

end of the prosecution. All other voluntary dismissals entered by the State are governed by section 15A-931. In *State v. Lamb*, 321 N.C. 633, 641, 365 S.E.2d 600, 604 (1988) we contrasted the effect of these two provisions, nothing that section 15A-931 provides "a simple and final dismissal which terminates the criminal proceedings under that indictment" (citing N.C.G.S. § 15A-931 official cmt.) while a dismissal under section 15A-932 "results in removal of the case from the court's docket, but the criminal proceeding under the indictment is *not* terminated." (emphasis in original). Before a defendant has been tried, "[s]ection 15A-931 does not bar the bringing of the same charges upon a new indictment," *id.* but, even in a pre-attachment context, the key characteristic of a dismissal entered under 15A-931 is its finality. In the context of an analysis of the now-repealed Speedy Trial Act in *Lamb*, we noted that the finality provided by the statute precluded consideration of any time that accrued between the time when a first indictment was dismissed under section 15A-931 and a new indictment was secured for purposes of a statutory speedy trial claim; by contrast, no such consequence resulted from a section 15A-932 dismissal.[12]

It appears that the legislature contemplated the possibility that a dismissal under section 15A-931 might have double jeopardy implications and, further, that the State might enter a voluntary dismissal sometime other than during the middle of a trial. Section 15A-931(a) dictates that "[t]he clerk must record the dismissal entered by the prosecutor *and note in the case file whether a jury has been impaneled or evidence has been introduced*" and directs that the State may dismiss a charge "by entering an oral dismissal in open court before or during the trial, or by filing a written dismissal with the clerk *at any time*." (Emphases added). The State suggested at oral argument that the statutory language contemplating the attachment of jeopardy was intended only to ward against the double jeopardy implications of a voluntary dismissal entered by the State *mid-trial*. But this contention is undermined by the specific language in the statute authorizing entry of a dismissal before a trial, during a trial, or *at any time*.

While the text of section 15A-931 fully supports the conclusion that the legislature intended a dismissal under this section to have such a

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12. In *Lamb*, the State entered a pretrial dismissal of the indictment "[w]ith [l]eave [p]ending the completion of the investigation." 321 N.C. at 635, 365 S.E.2d at 601. However, because none of the circumstances described in section 15A-932 actually occurred, we concluded that the "with leave" language was merely surplusage and that the dismissal in fact was entered under section 15A-931. *Id.* at 642, 365 S.E.2d at 604–05.

degree of finality that double jeopardy protections would come into play, this reading finds further support in the official commentary to the statute. *See State v. Jones*, 819 S.E.2d 340, 344 (N.C. 2018) ("The commentary to a statutory provision can be helpful in some cases in discerning legislative intent." (quoting *Parsons v. Jefferson-Pilot Corp.*, 333 N.C. 420, 425, 426 S.E.2d 685, 689 (1993)); *State v. Williams*, 315 N.C. 310, 327, 338 S.E.2d 75, 85 (1986) ("Although the official commentary was not drafted by the General Assembly, we believe its inclusion in The Criminal Procedure Act is some indication that the legislature expected and intended for the courts to turn to it for guidance when construing the Act.").

The Criminal Code Commission provided the following commentary to section 15A-931:

> The case of *Klopfer v. North Carolina*, 386 U.S. 213, held in 1967, that our system of "nol pros" was unconstitutional when it left charges pending against a defendant and he was denied a speedy trial. Thus the Commission here provides for a simple and final dismissal by the solicitor. No approval by the court is required, on the basis that it is the responsibility of the solicitor, as an elected official, to determine how to proceed with regard to pending charges. This section does not itself bar the bringing of new charges. That would be prevented if there were a statute of limitations which had run, *or if jeopardy had attached when the first charges were dismissed.*

N.C.G.S. § 15A-931 (2017) (official cmt.) (emphasis added). The explicit statement in the commentary that the bringing of new charges "would be prevented . . . if jeopardy had attached when the first charges were dismissed," *id.*, provides further insight into the legislature's intent for a 15A-931 dismissal. This commentary suggests that such a dismissal would be viewed as a jeopardy-terminating event for purposes of the Double Jeopardy Clause.

In reaching its conclusion that the State's dismissal of defendant's murder charge was a terminating event that prevented him from being retried, the Court of Appeals "f[ou]nd further guidance from [this] Court's explanation and application of the 'State's election' rule." *State v. Courtney*, 817 S.E.2d 412, 420 (N.C. Ct. App. 2018) (citing *State v. Jones*, 317 N.C. 487, 346 S.E.2d 657 (1986)). Like the panel below, we also find the rule discussed in *Jones* to be instructive here. In *Jones*, this Court

reviewed the case of a defendant whose indictment arguably[13] was sufficient to charge him with first-degree rape but who was arraigned only on the charge of second-degree rape. *Jones*, 317 N.C. at 491–92, 346 S.E.2d at 659–60. No discussion at all of a first-degree rape charge occurred until after the close of all evidence, when the prosecutor proposed an instruction on first-degree rape. *Jones*, 317 N.C. at 491, 346 S.E.2d at 659. Jones was ultimately convicted of first-degree rape, *id.*, and appealed his conviction to this Court. In our decision vacating defendant's conviction for first-degree rape, we held that

> by unequivocally arraigning the defendant on second-degree rape and by failing thereafter to give *any notice whatsoever*, prior to the jury being impaneled and jeopardy attaching, of an intent instead to pursue a conviction for first-degree rape arguably supported by the short-form indictment, the State made a binding election not to pursue the greater degree of the offense, and such election was tantamount to an acquittal of first-degree rape.

Id. at 494, 346 S.E.2d at 661 (emphasis in original).[14]

While the State correctly notes that this case presents a different circumstance from that detailed in *Jones*, it does not adequately explain why a prosecutor's unilateral, post-attachment decision to terminate the entire prosecution should be *less* binding on the State than its post-attachment decision to pursue a lesser charge. By making the unilateral choice to enter a final dismissal of defendant's murder charge after jeopardy had attached, the State made a binding decision not to retry the case. Thus, we conclude that the State's post-attachment dismissal of defendant's indictment was tantamount to, or the functional equivalent of, an acquittal, which terminated the original jeopardy that had continued following the declaration of a hung jury mistrial in defendant's case.

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13. The *Jones* Court did not reach the issue of whether or not the indictment, which contained a sufficient description of first-degree rape in the body of the indictment but also contained a caption and statutory citation that both referenced second-degree rape, would have been sufficient to charge first-degree rape absent the State's post-jeopardy election. 317 N.C. at 493, 346 S.E.2d at 660–61.

14. In reaching our conclusion in *Jones* that the State had made a binding election to pursue only the charge of second-degree rape, we also noted that the State had "that charge [for second-degree rape] entered of record in the clerk's minutes of arraignment." *Id.* at 493, 346 S.E.2d at 660-61.

Conclusion

At his first trial, defendant was unquestionably placed in jeopardy, which continued after his first trial ended with a hung jury mistrial. As explained by the continuing jeopardy doctrine, the mistrial was not a terminating event that deprived the State of the opportunity to retry defendant. Rather, as defendant acknowledges, the State at that time could have tried defendant again on the existing charge without violating his double jeopardy rights. Instead of exercising that opportunity to retry defendant, the State entered a final dismissal of the charge, unilaterally and irrevocably terminating the prosecution and, with it, defendant's original jeopardy. Under the Double Jeopardy Clause, the State was then barred from retrying defendant for the same crime.[15]

Because defendant's jeopardy remained attached following the mistrial declaration in his first trial and was terminated when the State subsequently entered a dismissal of the charge under N.C.G.S. § 15A-931, we conclude that defendant's second prosecution was barred by the Double Jeopardy Clause and that the trial court erred in denying defendant's motion to dismiss his 2015 murder indictment on double jeopardy grounds. Thus, we affirm the Court of Appeals' decision vacating defendant's murder conviction.

AFFIRMED.

Justice NEWBY dissenting.

The general principles governing double jeopardy provide that when a trial ends in a mistrial the State can retry that defendant on the same charges. Procedurally, the subsequent new trial has all the same stages as the original one, including a pretrial stage. A dismissal during the pretrial stage does not prevent a subsequent re-indictment and retrial. The majority ignores these general principles and, by its holding, makes North Carolina an outlier in the country. Guided by a misapplication of the concept of continuing jeopardy, the majority effectively eliminates a complete, new trial after a mistrial (or reversal on appeal), removing any pretrial proceedings. Under its theory, once jeopardy attaches with the first trial, it continues, affecting everything that occurs thereafter. The majority's interpretation of continuing jeopardy means any motion

15. Of course there may have been crimes other than lesser included offenses of murder with which defendant could have been charged arising from the same incident. *See State v. Wilson*, 338 N.C. 244, 261, 449 S.E.2d 391, 401 (1994).

or dismissal after a mistrial is treated as if made midtrial. Thus, after a mistrial, a pretrial dismissal is deemed an acquittal. Because of the majority's hyper-technical application of its view of the continuing jeopardy theory, defendant's murder conviction is vacated, and he goes free. The fundamental right against being tried twice for the same crime does not require this outcome.

The State's dismissal here does not address defendant's guilt or innocence and therefore is not the functional equivalent of a jury verdict of acquittal. Regardless of which abstract legal theory of jeopardy informs this Court, it should not stray from the fundamental concepts governing mistrials and double jeopardy. The mistrial here returned the criminal proceedings to a pretrial status and allowed for a dismissal of the charge without prejudice. This approach is consistent with the long-established precedent of the Supreme Court of the United States and this Court that, after a mistrial, the trial process "proceed[s] anew," *United States v. Scott*, 437 U.S. 82, 92, 98 S. Ct. 2187, 2194, 57 L. Ed. 2d 65, 75 (1978), as if "there has been no trial," *State v. Tyson*, 138 N.C. 627, 629, 50 S.E. 456, 456 (1905). Thereafter, defendant was properly re-indicted and retried, resulting in the jury convicting defendant of murder; that conviction is now judicially erased. Allowing the State to take a pretrial dismissal after a mistrial and subsequently to retry defendant does not offend the safeguard against double jeopardy. I respectfully dissent.

I. Facts and Procedural History

In 2009 the State charged defendant with the first-degree murder of James Deberry based in part on Deberry's dying statement after being shot. On 6 December 2010, defendant's trial began. Three days later, the trial court declared a mistrial after the jury was unable to reach a verdict. On 16 December 2010, the trial court issued a judgment form noting "Mistrial Con't to next Status Hearing for State to decide if case to be retried."

On 14 April 2011, the State dismissed the murder charge against defendant by filing the standard Form AOC-CR-307 in accordance with N.C.G.S. § 15A-931, circling "Dismissal" in handwriting, rather than "Notice of Reinstatement," on the form. The form has no checkbox to indicate a mistrial, and the State selected the fourth checkbox option "Other: (*specify)*," and specified below "hung jury, State has elected not to re-try case." The State noted that, in the mistrial, "A jury has ~~not~~ been impaneled ~~nor~~ and has [sic] evidence been introduced." Notably, the State did not check any box on the form that could signify a finding of defendant's guilt or innocence despite having these checkbox options:

"No crime is charged"; "insufficient evidence to warrant prosecution"; and defendant "agreed to plead guilty."

The State obtained more evidence linking defendant to Deberry's death and, on 6 July 2015, a grand jury issued a new indictment against defendant for first-degree murder. Before his second trial, defendant unsuccessfully moved to dismiss the new indictment on double jeopardy grounds. On 7 November 2018, the jury convicted defendant of second-degree murder.

On appeal defendant conceded, and the majority agrees, that the State could retry him on the mistried murder charge without transgressing double jeopardy protections. The Court of Appeals held, and now a majority of this Court holds, that the prosecutor's post-mistrial voluntary dismissal of the original murder indictment possessed "the same constitutional finality and conclusiveness as an acquittal." *State v. Courtney*, 817 S.E.2d 412, 414 (N.C. Ct. App. 2018). Thus, defendant's second trial put him in jeopardy twice for the same charge in violation of the principles of double jeopardy.

In affirming the Court of Appeals, the majority holds

> that when the State enters a voluntary dismissal under N.C.G.S. § 15A-931 after jeopardy has attached, jeopardy is terminated in the defendant's favor, regardless of the reason the State gives for entering the dismissal. The State cannot then retry the case without violating a defendant's right to be free from double jeopardy. When the State dismisses a charge under section 15A-931 after jeopardy has attached, jeopardy terminates.

In its view, once jeopardy attaches with the empaneling of the first jury, jeopardy infects each aspect of the proceeding thereafter, even after a mistrial. Thus, the majority "hold[s] that where, as here, the State dismisses a charge under section 15A-931 after jeopardy has attached, a defendant's right to be free from double jeopardy under the federal and state constitutions is violated if the State initiates a subsequent prosecution on the same charge." Of note, its analysis would also apply to cases reversed on appeal. The majority attempts to support this position by misapplying precedent from the Supreme Court of the United States and this Court.

The majority's hyper-technical application of the "continuing jeopardy" theory is flawed because it does not ask the correct fundamental question: After a mistrial, are the parties returned to the same position

procedurally as before the original trial? If so, there is a procedural pretrial period during which the State can take a voluntary dismissal. At this stage, no jury is currently empaneled; various pretrial proceedings must occur. Precedent from the Supreme Court of the United States and this Court indicates that, after a mistrial, the proceeding returns to a pretrial status. Thus, a dismissal following a mistrial and before a new jury is empaneled is a pretrial dismissal which is not akin to an acquittal.

The majority's approach confuses defendant with "an *acquitted* defendant [who] may not be retried" regardless of the reason for the acquittal. *Arizona v. Washington*, 434 U.S. 497, 503, 98 S. Ct. 824, 829, 54 L. Ed. 2d 717, 726 (1978) (emphasis added). Defendant's first trial ended with a hung jury, resulting in a mistrial. A hung jury is not an acquittal, *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580, 6 L. Ed. 165, 165 (1824), nor is a pretrial dismissal an acquittal. Retrying defendant on a new indictment does not violate the prohibition against double jeopardy.

II. Governing Principles of Double Jeopardy

The Fifth Amendment of the United States Constitution contains a guarantee that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V; *see also Benton v. Maryland*, 395 U.S. 784, 794–96, 89 S. Ct. 2056, 2062–63, 23 L. Ed. 2d 707, 716–17 (1969) (incorporating the Double Jeopardy Clause to the States by the Fourteenth Amendment and noting its "fundamental nature" rooted in the English common law and dating back to the Greeks and Romans); *State v. Brunson*, 327 N.C. 244, 247, 393 S.E.2d 860, 863 (1990) (recognizing the law of the land clause of the North Carolina Constitution as affording the same protections as the Double Jeopardy Clause of the federal constitution).

"Our double jeopardy case law is complex, but at its core, the Clause means that those acquitted or convicted of a particular 'offence' cannot be tried a second time for the same 'offence.' " *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019) (quoting U.S. Const. amend. V); *see id.* at 1966–67 (discussing the "abstract principle" that double jeopardy allows two punishments for "[a] single act" under the political theory of dual sovereignty); *see also Green v. United States*, 355 U.S. 184, 186–87, 78 S. Ct. 221, 223, 2 L. Ed. 2d 199, 204 (1957) (recognizing "former" or "double jeopardy" as "designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense" (citing 4 William Blackstone, *Commentaries* *335)).

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that

> the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. at 187–88, 78 S. Ct. at 223, 2 L. Ed. 2d at 204. Further, double jeopardy principles work "to preserve the finality of judgments." *Crist v. Bretz*, 437 U.S. 28, 33, 98 S. Ct. 2156, 2159, 57 L. Ed. 2d 24, 30 (1978).

"[A] defendant is placed in jeopardy in a criminal proceeding once the defendant is put to trial before the trier of the facts, whether the trier be a jury or a judge." *United States v. Jorn*, 400 U.S. 470, 479, 91 S. Ct. 547, 554, 27 L. Ed. 2d 543, 553 (1971). Thus, jeopardy generally attaches "when the jury is empaneled and sworn." *Crist*, 437 U.S. at 35, 98 S. Ct. at 2161, 57 L. Ed. 2d at 553. "Without risk of a determination of guilt, jeopardy does not attach, and neither an appeal nor further prosecution constitutes double jeopardy." *Serfass v. United States*, 420 U.S. 377, 391–92, 95 S. Ct. 1055, 1064, 43 L. Ed. 2d 265, 276 (1975). Thus, "once a defendant is placed in jeopardy for an offense, and jeopardy terminates with respect to that offense, the defendant may neither be tried nor punished a second time for the same offense." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 106, 123 S. Ct. 732, 736, 154 L. Ed. 2d 588, 595 (2003).

Hence, an acquittal is final even if obtained erroneously. *See Green*, 355 U.S. at 188, 192, 78 S. Ct. at 223–24, 226, 2 L. Ed. 2d at 204, 207. Even so, "an 'acquittal' cannot be divorced from the procedural context"; it has "no significance . . . unless jeopardy has once attached and an accused has been subjected to the risk of conviction." *Serfass*, 420 U.S. at 392, 95 S. Ct. at 1065, 43 L. Ed. 2d at 276. An acquittal, by its very definition, requires some finding of innocence and "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S. Ct. 1349, 1355, 51 L. Ed. 2d 642, 651 (1977). Therefore, jeopardy will always terminate following a defendant's acquittal, regardless of whether the acquittal originated from a jury or judge. *See Evans v. Michigan*, 568 U.S. 313, 328–29, 133 S. Ct. 1069, 1080–81, 185 L. Ed. 2d 124, 140 (2013).

Generally, a conviction or guilty plea likewise brings finality if it represents the final judgment "with respect to the guilt or innocence of the defendant." *Burks v. United States*, 437 U.S. 1, 15, 98 S. Ct. 2141, 2149,

57 L. Ed. 2d 1, 12 (1978). The State cannot retry a convicted defendant in pursuit of harsher punishment. *See Green*, 355 U.S. at 190–91, 78 S. Ct. at 225–226, 2 L. Ed. 2d at 205–06 (discussing when the State is precluded from retrying on a greater offense). For the same reason, double jeopardy principles operate to defeat prosecutorial efforts to dismiss a case midtrial in hope of procuring a more favorable jury. Once jeopardy attaches in a trial, if the jury is wrongfully discharged without defendant's consent, he cannot be tried again with a different jury on the same charges. *Id.* at 188, 78 S. Ct. at 224, 2 L. Ed. 2d at 204 ("This prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict."); *see also Gori v. United States*, 367 U.S. 364, 369, 81 S. Ct. 1523, 1526–27, 6 L. Ed. 2d 901, 905 (1961).

Nonetheless, the law provides certain exceptions to the strict application of the bare text of the Fifth Amendment. For example, the protection against double jeopardy "does not bar reprosecution of a defendant whose conviction is overturned on appeal." *Justices of Bos. Mun. Court v. Lydon*, 466 U.S. 294, 308, 104 S. Ct. 1805, 1813, 80 L. Ed. 2d 311, 324 (1984). Some cases discussing this principle rely on the theory of "continuing jeopardy" to justify imposing a new trial following a defendant's successful appeal. *See, e.g.*, *id.* at 309, 312, 104 S. Ct. at 1814, 1815, 80 L. Ed. 2d at 325, 327 (opining that jeopardy stays on a single and continuous course throughout the judicial proceedings and thus a new trial offers more protection to the defendant because he has two opportunities to secure an acquittal); *Green*, 355 U.S. at 189–193, 78 S. Ct. at 224–27, 2 L. Ed. 2d at 205–08 (offering continuing jeopardy as one "rationalization" to justify a new trial following a successful appeal).

Similarly, "[w]hen a trial court declares a mistrial, it all but invariably contemplates that the prosecutor will be permitted to proceed anew notwithstanding the defendant's plea of double jeopardy." *Scott*, 437 U.S. at 92, 98 S. Ct. at 2194, 57 L. Ed. 2d at 75. To "proceed anew" after a properly declared mistrial means a fresh start with a complete, new trial, having all the procedural stages as the original one. Thus, whether after an appeal or a mistrial, double jeopardy protection is not implicated by a complete, new trial.

III. Unique Nature of Mistrials

"[W]ithout exception, the courts [in this country] have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial. This rule accords recognition to

society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws." *Arizona*, 434 U.S. at 509, 98 S. Ct. at 832, 54 L. Ed. 2d at 730.

> The double-jeopardy provision of the Fifth Amendment . . . does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. There may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict. *In such event the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again.* . . . It is settled that the duty of the judge in this event is to discharge the jury and direct a retrial.

Wade v. Hunter, 336 U.S. 684, 688–89, 69 S. Ct. 834, 837, 93 L. Ed. 974, 978 (emphasis added), *reh'g denied*, 337 U.S. 921, 69 S. Ct. 1152, 93 L. Ed. 1730 (1949). Seemingly contrary to the general rules governing double jeopardy, the jeopardy from the first trial is not regarded to have attached, continued, or ended in a way that can preclude a second trial. *See id.* at 688–89, 69 S. Ct. at 837, 93 L. Ed. at 978. A mistried defendant's "valued right to have his trial completed by a particular tribunal must . . . be subordinated to the public's interest in fair trials designed to end in just judgments." *Id.* at 689, 69 S. Ct. at 837, 93 L. Ed. at 978. Defendant is entitled to a fair trial, and the State is entitled to a fair opportunity to prosecute the crime; both defendant and the State are entitled to a jury verdict on the charges. *See Arizona*, 434 U.S. at 509, 98 S. Ct. at 832, 54 L. Ed. 2d at 730.

The Supreme Court of the United States first set out the general rule regarding mistrials in *United States v. Perez* by considering "whether the discharge of the jury by the Court from giving any verdict upon the indictment, with which they were charged, without the consent of the prisoner, is a bar to any future trial for the same offence." *Perez*, 22 U.S. at 579, 6 L. Ed. at 578. The Court concluded that "the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of

public justice would otherwise be defeated." *Id.* at 580, 6 L. Ed. at 578 (contemplating the sound discretion by the trial court in declaring a mistrial). Under circumstances of manifest necessity, "a discharge [of the jury] constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial." *Id.* at 580, 6 L. Ed. at 579–80.

In *United States v. Sanford*, the Court confirmed that "[t]he Government's right to retry the defendant, after a mistrial, in the face of his claim of double jeopardy is generally governed by the test laid down in *Perez* . . . ." 429 U.S. 14, 16, 97 S. Ct. 20, 21, 50 L. Ed. 2d 17, 20 (1976) (footnote omitted). In that case the respondents successfully moved to dismiss the indictment post-mistrial but before the new trial had begun. *Id.* at 14–15, 97 S. Ct. at 20–21, 50 L. Ed. 2d at 19. On appeal the Court agreed "that jeopardy attached at the time of the empaneling of the jury for the first trial," but disagreed that the procedural "sequence of events in the District Court" presented a bar from retrying respondents under the Double Jeopardy Clause. *Id.* at 15, 97 S. Ct. at 21, 50 L. Ed. 2d at 19.

The Court determined that "the indictment terminated, not in [respondent's] favor, but in a mistrial declared, *sua sponte*, by the District Court." *Id.* at 15, 97 S. Ct. at 21, 50 L. Ed. 2d at 19. "Where the trial is terminated in this manner," *Perez* provides "the classical test for determining whether the defendants may be retried without violating the Double Jeopardy Clause." *Id.* at 15, 97 S. Ct. at 21, 50 L. Ed. 2d at 19–20. Reviewing respondent's post-mistrial motion to dismiss, the Court concluded: "The situation of a hung jury presented here is precisely the situation that was presented in *Perez*, and therefore the Double Jeopardy Clause does not bar retrial of these respondents on the indictment which had been returned against them." *Id.* at 16, 97 S. Ct. at 21, 50 L. Ed. 2d at 20 (citation omitted).

The Court compared the procedural posture of *Sanford* to its then recent case *Serfass v. United States*. *Sanford*, 429 U.S. at 16, 97 S. Ct. at 21–22, 50 L. Ed. 2d at 20. *Serfass* involved a *pretrial* motion to dismiss an indictment *outside* the context of a mistrial; thus, the Court indicated the procedure after a mistrial was to begin afresh, including a pretrial period. *Serfass*, 420 U.S. at 379–81, 387–93, 95 S. Ct. at 1058–59, 1062–65, 43 L. Ed. 2d at 268–70, 273–77. In *Serfass* the Court held that a pretrial order dismissing an indictment did not affect the government's right to reprosecute the petitioner because there was no determination of guilt or innocence by the fact-finder. *Id.* at 389, 95 S. Ct. at 1063, 43 L. Ed. 2d at 274. Because the motion was pretrial, "[a]t no time during or following the hearing on petitioner's motion to dismiss the indictment

did the District Court have jurisdiction to do more than grant or deny that motion, and neither before nor after the ruling did jeopardy attach." *Id.* at 389, 95 S. Ct. at 1063, 43 L. Ed. 2d at 275. The Court also rejected the petitioner's assertion that dismissing the indictment, even if the trial court based its decision on facts that would constitute a defense at trial, was the functional equivalent of an acquittal. *Id.* at 390, 95 S. Ct. at 1063–64, 43 L. Ed. 2d at 275.

By analogizing the *post-mistrial* motion to dismiss an indictment in *Sanford* to the *pretrial* motion to dismiss the indictment in *Serfass*, the Court signifies the procedural similarities between those cases; both involved a dismissal during a pretrial stage. Retrial does not offend the protections afforded by the Double Jeopardy Clause. Thus, applying *Sanford* and *Serfass*, if a mistrial terminates the criminal proceeding, intervening motions between mistrial and the beginning of a defendant's second trial do not trigger double jeopardy protections. This principle is illustrated by this Court's long-stated view that "[w]hen a mistrial has been declared properly, 'in legal contemplation there has been no trial.' " *State v. Sanders*, 347 N.C. 587, 599, 496 S.E.2d 568, 576 (1998) (quoting *Tyson*, 138 N.C. at 629, 50 S.E. at 456).[1]

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1. Federal circuit courts have reached the same conclusion. *See, e.g.*, *Chatfield v. Ricketts*, 673 F.2d 330, 332 (10th Cir.) ("The *Sanford* court obviously concluded that since the government has a right to retry the defendant following a mistrial because of a hung jury, the period following the mistrial is a pretrial period. During the pretrial period, a prosecutor may dismiss charges, and the Double Jeopardy Clause does not prohibit the prosecutor from reasserting the same charges at a later date."), *cert. denied*, 459 U.S. 843, 103 S. Ct. 96, 74 L. Ed. 2d 88 (1982); *Arnold v. McCarthy*, 566 F.2d 1377, 1388 (9th Cir. 1978) ("Once a mistrial had been fairly ordered the situation became analogous to the pretrial period in which the prosecutor has undisputed authority to dismiss charges without fear of being prohibited from reasserting them by the Fifth Amendment. Subsequent to the declaration of a mistrial for reasons which satisfy the 'manifest necessity' standards of the Double Jeopardy Clause, the state can dismiss criminal charges without forfeiting the right to retry them."); *Dortch v. United States*, 203 F.2d 709, 710 (6th Cir.) (per curiam) (The sequence of a mistrial, "a *nolle prosequi*[,] and a dismissal without prejudice do[es] not bar a second prosecution for the same offense, inasmuch as such terminations are not tantamount to acquittal."), *cert. denied*, 346 U.S. 814, 74 S. Ct. 25, 98 L. Ed. 342 (1953); *Lynch v. United States*, 189 F.2d 476, 478–79 (5th Cir.) ("When the mistrial was declared, the Government was at liberty to try the appellants again on the same indictment or to obtain a new indictment. A mistrial in a case is no bar to a subsequent trial of defendants."), *cert. denied*, 342 U.S. 831, 72 S. Ct. 50, 96 L. Ed. 629 (1951).

State courts have reached the same conclusion. *See, e.g.*, *Duncan v. State*, 939 So. 2d 772, 774–77 (Miss. 2006) (allowing re-indictment following mistrial due to hung jury on original indictment and the prosecutor's nolle prosequi of original indictment despite double jeopardy claim); *Casillas v. State*, 267 Ga. 541, 542, 480 S.E.2d 571, 572 (1997) ("[A] properly granted mistrial removes the case from the jury and a nolle prosequi entered thereafter, even without the consent of the defendant, does not have the effect of an acquittal. Since the nolle prosequi of the original indictment of Casillas was entered only

Like the trial court in *Sanford*, the majority here confuses the theory of jeopardy with the procedural "sequence of events." *See Sanford*, 429 U.S. at 15, 97 S. Ct. at 21, 50 L. Ed. 2d at 19. The procedural posture of *Sanford* determined the effect of the dismissal. Because the case after mistrial was in its pretrial stage, the dismissal was not a terminating event.

The majority seeks to minimize the holding of *Sanford*, saying that *Richardson v. United States*, 468 U.S. 317, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (1984), somehow limits *Sanford* and, without analysis, that a motion to dismiss by a defendant is qualitatively different than a dismissal by the State. Under its misapplication of the "continuing jeopardy" theory, however, jeopardy would infect all aspects of the proceeding. Regardless of which party makes the motion, the granting of a motion to dismiss after jeopardy attached in the first trial would be a terminating event. The correct question asks at what trial stage was the motion made or the dismissal was taken, not the identity of the party that initiated it.

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after the mistrial was declared, he was not acquitted of any crimes charged in that original indictment and there is no bar to his retrial for the crimes charged in the new indictment." (citations omitted)); *State v. Gaskins*, 263 S.C. 343, 347, 210 S.E.2d 590, 592 (1974) ("If, after a mistrial has been duly ordered, the prosecuting officer enters a *nolle prosequi*, such will not be a bar to a subsequent prosecution for the same offense. . . . [as it] would not adjudicate either the innocence or the guilt of the respondent and would be no bar to his future prosecution for the same offense."(citations omitted)); *id.* (recognizing the differing effects of a pretrial dismissal following a mistrial and a midtrial dismissal that may occur during the second trial); *In re Weir*, 342 Mich. 96, 99, 69 N.W.2d 206, 208 (1955) ("The dismissal of the former prosecution . . . following disagreement of the jury is not to be considered as an acquittal either on the facts or on the merits." (citing, *inter alia*, *People v. Pline*, 61 Mich. 247, 28 N.W. 83 (1886))); *Smith v. State*, 135 Fla. 835, 839, 186 So. 203, 205 (1939) ("It is well settled in this state that a mistrial by reason of the inability of the jury to agree does not constitute former jeopardy. Nor is the entry of a *nolle prosequi* a bar to another information for the same offense. After the mistrial the case stood as if it had never been tried, and a *nolle prosequi* entered then had no different effect in favor of the defendant than if it had been entered prior to the trial." (citations omitted)); *Pline*, 61 Mich. at 251, 28 N.W. at 84 (concluding that the sequence of a mistrial, a subsequent nolle prosequi, followed by a new trial does not offend the defendant's right against double jeopardy).

Courts have applied the same principle following a reversal on appeal. *See*, *e.g.*, *C.K. v. State*, 145 Ohio St. 3d 322, 325, 49 N.E.3d 1218, 1221–22 (2015) ("[T]he dismissal of an indictment without prejudice on remand from a reversal does not bar future prosecution of the accused."); *United States v. Davis*, 873 F.2d 900, 903 (6th Cir.) ("In the leading case of *United States v. Ball*, 163 U.S. 662, 16 S. Ct. 1192, 41 L. Ed. 300 (1896), the Supreme Court held that a defendant who succeeded in having his murder conviction set aside because of a legal defect in the indictment was not 'twice put in jeopardy,' in violation of the Constitution, when retried on a new and legally sufficient indictment."), *cert. denied*, 493 U.S. 923, 110 S. Ct. 292, 107 L. Ed. 2d 271 (1989).

IV. Continuing Jeopardy

While the majority's misapplication of the "continuing jeopardy theory" causes it to miss the fundamental question regarding the procedural posture of this case, a discussion of the development of the theory is helpful. Similar to granting a new trial after appeal, courts have put forward different legal theories that justify a second trial following a mistrial, but the theories result in the same conclusion: The State may proceed with a complete, new trial following a mistrial.

The majority relies heavily on *Richardson* to justify its outcome here. In that case the jury acquitted Richardson of some but not all federal narcotics charges brought against him, resulting in a hung jury on those remaining charges and a declared mistrial. *Richardson*, 468 U.S. at 318–19, 104 S. Ct. at 3082–83, 82 L. Ed. 2d at 246–47. The trial court scheduled defendant's new trial. *Id.* at 318, 104 S. Ct. at 3082, 82 L. Ed. 2d at 246. Richardson moved to bar the retrial, arguing that "if the Government failed to introduce sufficient evidence to establish his guilt beyond a reasonable doubt at his first trial [on the acquitted charges], he may not be tried again following a declaration of a mistrial because of a hung jury." *Id.* at 322–23, 104 S. Ct. at 3084, 82 L. Ed. 2d at 249.

The Court in *Richardson* recognized that "[t]he case law dealing with the application of the prohibition against placing a defendant twice in jeopardy following a mistrial because of a hung jury has its own sources and logic." *Id.* at 323, 104 S. Ct. at 3085, 82 L. Ed. 2d at 249–50. Citing "this settled line of cases," it reaffirmed that "a failure of the jury to agree on a verdict was an instance of 'manifest necessity' which permitted a trial judge to terminate the first trial and retry the defendant, because 'the ends of public justice would otherwise be defeated.' " *Id.* at 323–24, 104 S. Ct. at 3085, 82 L. Ed. 2d at 250 (quoting *Perez*, 22 U.S. at 580, 6 L. Ed. at 165).

The Court emphasized Richardson's situation involved a mistrial and distinguished it from the outcome of *Burks v. United States*, a non-mistrial case. *Id.* at 325–26, 104 S. Ct. at 3086, 82 L. Ed. 2d at 250–51 (citing *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)). The Court introduced this discussion by refusing "to uproot this settled line of cases by extending the reasoning of *Burks*, which arose out of an appellate finding of insufficiency of evidence to convict following a jury verdict of guilty, to a situation where the jury is unable to agree on a verdict." *Id.* at 324, 104 S. Ct. at 3085, 82 L. Ed. 2d at 250. The Court then summarized its holding in *Burks* as equating "an appellate court's finding of insufficient evidence to convict on appeal from a judgment of

conviction" as an acquittal "for double jeopardy purposes." *Id.* at 325, 104 S. Ct. at 3086, 82 L. Ed. 2d at 251. *Burks* "obviously did not establish, consistently with cases such as *Perez*, that a hung jury is the equivalent of an acquittal." *Id.* at 325, 104 S. Ct. at 3086, 82 L. Ed. 2d at 251.

In distinguishing Richardson's situation from that of a defendant in a nonmistrial case, the Court recognized that mistrials present unique exceptions that terminate a criminal proceeding in a way that permits retrial without giving rise to a double jeopardy claim. *See id.* at 325, 104 S. Ct. at 3086, 82 L. Ed. 2d at 251 ("[T]he failure of the jury to reach a verdict is not an event which terminates jeopardy."). The concurring opinion in *Richardson* calls this "continuing jeopardy" theory "a formalistic concept" unnecessary to justifying the general policy behind retrying mistrials. *Id.* at 327, 329, 104 S. Ct. at 3087, 3088, 82 L. Ed. 2d at 252, 254 (Brennan, J., concurring in part and dissenting in part) ("[S]trong policy reasons may justify subjecting a defendant to two trials in certain circumstances notwithstanding the literal language of the Double Jeopardy Clause" and without "seek[ing] to justify such a retrial by pretending that it was not really a new trial at all but was instead simply a 'continuation' of the original proceeding." (quoting *Lydon*, 466 U.S. at 321, 104 S. Ct. at 1820, 80 L. Ed. 2d at 333 (Brennan, J., concurring in part and concurring in judgment))).

As demonstrated by *Richardson*, mistrials presuppose a future prosecution. *See id.* at 326, 104 S. Ct. at 3086, 82 L. Ed. 2d at 251 (majority opinion) ("The Government, like the defendant, is entitled to resolution of the case by verdict from the jury, and jeopardy does not terminate when the jury is discharged because it is unable to agree."). Tellingly, in *Richardson* both the majority opinion's theory and the concurring opinion's theory result in the same general rule that the State may retry a defendant following a mistrial.

The Supreme Court of the United States "ha[s] constantly adhered to the rule that a retrial following a 'hung jury' does not violate the Double Jeopardy Clause." *Id.* at 323–24, 104 S. Ct. at 3085, 82 L. Ed. 2d at 250 (A hung jury "permit[s] a trial judge to terminate the first trial and retry the defendant, because 'the ends of public justice would otherwise be defeated.' " (quoting *Perez*, 22 U.S. at 580, 6 L. Ed. at 165)). Here the majority now uses *Richardson*'s "continuing jeopardy" justification that *allows* a new trial following a mistrial to *prevent* a new trial, by holding that the prosecutor's pretrial dismissal was a "terminating event" to the jeopardy that had attached at the original trial. Regardless of the legal theory posited to *justify* a new trial following a mistrial, that same theory cannot then be used to *prohibit* the same.

In a case with facts similar to the instant case, the Supreme Court of Mississippi applied the general principles of double jeopardy under the continuing jeopardy theory in the context of two previous mistrials for the same defendant. *Beckwith v. State*, 615 So. 2d 1134, 1135–36 (Miss. 1992), *cert. denied*, 510 U.S. 884, 114 S. Ct. 232, 126 L. Ed. 2d 187 (1993). Beckwith was indicted and tried twice for the murder of civil rights activist Medgar Evers, resulting in hung juries and mistrials. *Id.* at 1135. In 1969, five years after his second mistrial, the prosecutor entered a *nolle prosequi*, noticing his intent not to prosecute further. *Id.* In 1990, twenty-six years after the last mistrial, the State again indicted Beckwith for murder. *Id.* On interlocutory appeal, Beckwith claimed another trial would violate his constitutional right against double jeopardy. *Id.* at 1136.

Applying federal precedent and Mississippi law, that court first recognized that "[d]efendants may be repeatedly retried . . . following mistrials granted because the jury was deadlocked and could not reach a unanimous verdict." *Id.* at 1147. The court further determined the *nolle prosequi* was akin to " 'retiring' or 'passing' an indictment to the files [and] [wa]s not an acquittal barring further prosecution, following which the case may be reopened upon motion of the State"; it "did not terminate the original jeopardy, and the State was not barred thereafter from seeking the re-indictment of and re-prosecuting the defendant from the same offense." *Id.* The court continued, "If, following a mistrial declared in such an instance, the State does what it considers manifestly fair, and moves to dismiss the case, it would be shockingly wrong to hold that it could never have the case re-opened upon discovery of additional evidence." *Id.* at 1148. Therefore, "the entry of the *nolle prosequi* in 1969 did not terminate Beckwith's original jeopardy or accrue unto him the right not to be re-indicted and re-prosecuted for the same offense." *Id.*

V. Effect of the Voluntary Dismissal

A voluntary dismissal during a pretrial phase following a mistrial is not the equivalent of an acquittal and cannot prevent a retrial. A prosecutor may take "a simple and final dismissal which terminates the criminal proceedings under that indictment" at any time. *State v. Lamb*, 321 N.C. 633, 641, 365 S.E.2d 600, 604 (1988) (citing N.C.G.S. § 15A-931 (1983)). A dismissal at a pretrial stage does not prevent re-indictment and retrial. Of note, there is no statute of limitations applicable to murder in North Carolina, nor does dismissal and re-indictment implicate speedy trial concerns. *See State v. Johnson*, 275 N.C. 264, 271, 167 S.E.2d 274, 279 (1969).

The standard dismissal form used by the prosecutor here does not contemplate proceedings after a mistrial (or reversal on appeal). The form lists the sections of the General Statutes to which it corresponds, including, at issue here, section 15A-931 governing general dismissals,[2] which provides in pertinent part:

> (a) . . . [T]he prosecutor may dismiss any charges stated in a criminal pleading including those deferred for prosecution by entering an oral dismissal in open court before or during the trial, or by filing a written dismissal with the clerk at any time. The clerk must record the dismissal entered by the prosecutor and note in the case file whether a jury has been impaneled or evidence has been introduced.
>
> (a1) Unless the defendant or the defendant's attorney has been notified otherwise by the prosecutor, a written dismissal of the charges against the defendant filed by the prosecutor shall be served in the same manner prescribed for motions under G.S. 15A-951. In addition, the written dismissal shall also be served on the chief officer of the custodial facility when the record reflects that the defendant is in custody.

N.C.G.S. § 15A-931(a) to (a1) (2017). A dismissal under N.C.G.S. § 15A-931 terminates the criminal proceedings under that indictment. *Id.* § 15A-931 official cmt. (2017). It does not prohibit indicting the same defendant later on the same charges, *see id.*, but a new indictment is necessary to do so, *see Lamb*, 321 N.C. at 635, 641, 365 S.E.2d at 601, 604 (reviewing a pretrial dismissal for an apparent lack of evidence under N.C.G.S. § 15A-931 that did not preclude later re-indictment on the same charges). In contrast, "[s]ection 15A-932 provides for a dismissal 'with leave' " that removes "the case from the court's docket, but the criminal

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2. The form includes additional statute cites. *See* N.C.G.S. § 15A-302(e) (2017) ("Dismissal by Prosecutor. — If the prosecutor finds that no crime or infraction is charged in the citation, or that there is insufficient evidence to warrant prosecution, he may dismiss the charge and so notify the person cited. An appropriate entry must be made in the records of the clerk. It is not necessary to enter the dismissal in open court or to obtain consent of the judge."); N.C.G.S. § 15A-932(b) (2017) (captioned "Dismissal with leave when defendant fails to appear and cannot be readily found or pursuant to a deferred prosecution agreement" that "results in removal of the case from the docket of the court, but all process outstanding retains its validity . . .").

A dismissal under sections 15A-931 and 15A-932 "results in termination or indeterminate suspension of the prosecution of a criminal charge." N.C.G.S. § 15A-1381(6) (2017).

proceeding under the indictment is *not* terminated. All outstanding process retains its validity and the prosecutor may reinstitute the proceedings by filing written notice with the clerk without the necessity of a new indictment." *Id.* at 641, 365 S.E.2d at 604 (citing N.C.G.S. § 15A-932 (1983)). A proper dismissal under N.C.G.S. § 15A-931 prevents a claim of a speedy trial violation, *id.*, whereas an indefinite continuance may give rise to one.

The dismissal statutes were enacted in response to an opinion issued by the Supreme Court of United States, *Klopfer v. North Carolina*, to provide "a simple and final dismissal." *See* N.C.G.S. § 15A-931 official cmt. (citing *Klopfer v. North Carolina*, 386 U.S. 213, 87 S. Ct. 988, 18 L. Ed. 2d 1 (1967)). In that case the Supreme Court of the United States invalidated a North Carolina procedure, referred to as the "*nolle prosequi* with leave," because it violated Klopfer's right to a speedy trial. *Klopfer*, 386 U.S. at 222, 87 S. Ct. at 993, 18 L. Ed. 2d at 7. Klopfer was indicted for misdemeanor criminal trespassing in January 1964, and his trial ended in a mistrial in March 1964. *Id.* at 217, 87 S. Ct. at 990, 18 L. Ed. 2d at 4–5. The trial court initially continued the case for another term in April 1965 before the State took a "*nolle prosequi* with leave" eighteen months after the indictment. *Id.* at 217–18, 87 S. Ct. at 990–91, 18 L. Ed. 2d at 5.

In effect the *nolle prosequi* with leave allowed the indictment to remain pending for an indeterminate time period, indefinitely postponing prosecution while at the same allowing the case to be docketed on the court's calendar at any time. *Id.* at 214, 87 S. Ct. at 984, 18 L. Ed. 2d at 3. In the meantime, Klopfer could not obtain a dismissal of the charge or demand the case be set for trial. *Id.* at 216, 87 S. Ct. at 990, 18 L. Ed. 2d at 4. The Court concluded:

> The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes. By indefinitely prolonging this oppression, as well as the "anxiety and concern accompanying public accusation," the criminal procedure condoned in this case by the Supreme Court of North Carolina clearly denies the petitioner the right to a speedy trial which we hold is guaranteed to him by the Sixth Amendment of the Constitution of the United States.

Id. at 222, 87 S. Ct. at 993, 18 L. Ed. 2d at 7 (footnote omitted) (quoting *United States v. Ewell*, 383 U.S. 116, 120, 86 S. Ct. 773, 776, 15 L. Ed. 2d

627, 630 (1966)). Notably, Klopfer's victory meant he "was entitled to be tried in accordance with the protection of the confrontation guarantee of the Sixth Amendment" following his mistrial, rather than a substantive dismissal of the charges. *Id.* at 222, 87 S. Ct. at 993, 18 L. Ed. 2d at 7–8 (quoting *Pointer v. Texas*, 380 U.S. 400, 406, 85 S. Ct. 1065, 1069, 13 L. Ed. 2d 923, 928 (1965)).

Nonetheless, the majority declares that the section 15A-931 dismissal here provides a newfound "terminating event" that now bars retrial following a mistrial. Under the majority's reasoning, because jeopardy attached in defendant's original mistrial, the State's dismissal following the mistrial occurred during "jeopardy" and thus is treated as a midtrial dismissal. The majority overlooks the mistrial principle that the "jeopardy" of the mistrial does not preclude a retrial. The initial jury was discharged, and a new trial must take place to put defendant at risk of conviction. Before the new trial began, during the new pretrial phase, the State could dismiss the pending indictment without being prohibited from re-indicting and retrying defendant.

The statute clearly governs voluntary dismissals at trials generally and does not, on its face, even address the unique circumstances involved in a mistrial. Moreover, the form associated with the statute does not specifically include nor contemplate the procedure following a mistrial. The State signified defendant's first trial terminated with a hung jury by handwriting and without suggesting any substantive or conclusive finding on defendant's guilt or innocence. The dismissal here is not substantive; it does not speak to defendant's guilt or innocence and cannot be equated to an acquittal.

By the statute's text and application, it is unlikely that the General Assembly intended it to place North Carolina outside the longstanding double jeopardy principles that govern mistrials. It is more likely that the General Assembly intended to abolish a specific procedure that threatened a defendant's right to a speedy trial when an indictment remained pending against him and to prevent prosecutorial efforts to dismiss a case midtrial in hope of procuring a more favorable jury. Double jeopardy concerns that may arise in a midtrial dismissal simply do not arise in the pretrial stages. Even under a continuing jeopardy theory of mistrials, a nonsubstantive voluntary dismissal by the State does not preclude a retrial following a mistrial. *See Beckwith*, 615 So. 2d at 1148. A prosecutor can dismiss an indictment following a mistrial under N.C.G.S. § 15A-931, in keeping with defendant's constitutional right to a speedy trial, without compromising the State's undeniable right to retry a mistried case should new evidence surface.

It is indisputable that the State can enter a pretrial section 15A-931 dismissal and later re-indict. The majority places the State in the impossible position of choosing to proceed to a new trial with what one jury deemed insufficient evidence or lose any opportunity to hold the defendant accountable for the crime. Instead of rushing to a retrial, the ends of justice may be best served by waiting. Over time, as with this case, new witnesses may come forward or improvements may be made in forensic evidence testing. The new evidence might exonerate the defendant or implicate him. A pretrial dismissal, whether during the initial stage or during the pretrial stage after mistrial, can serve the ends of justice. Thereafter, as with this defendant and with Beckwith, armed with new evidence the State can retry the defendant even years later.

The majority's reliance on the State's election rule, as described in *State v. Jones*, underscores the majority's mistaken view of the procedural posture of this case. 317 N.C. 487, 346 S.E.2d 657 (1986). In that case the trial proceeded on a charge of second degree rape; however, at the close of evidence, the State proposed a jury instruction on first degree rape, and the trial court gave that instruction. *Id.* at 491, 346 S.E.2d at 659–60. The jury ultimately convicted the defendant on first degree rape. *Id.* In reversing the first degree rape conviction, this Court "h[e]ld that the State made a binding election," after the jury was empaneled, "not to pursue a verdict of guilty of first degree rape, thereby effectively assenting to an acquittal of the maximum offense arguably charged by the indictment." *Id.* at 493, 346 S.E.2d at 660. The majority says the State cannot adequately explain why

> a prosecutor's unilateral, post-attachment decision to terminate the entire prosecution should be less binding on the State than its post-attachment decision to pursue a lesser charge. By making the unilateral choice to enter a final dismissal of defendant's murder charge after jeopardy had attached, the State made a binding decision not to retry the case.

Clearly, the majority confuses the trial stages at which the actions were taken; the charge election occurred during trial whereas the post-mistrial dismissal here was taken during the pretrial stage.

VI. Conclusion

Does a mistrial result in a new proceeding with a pretrial period? The clear language from this Court says that, following a mistrial, "the jury has been discharged . . . [and] in legal contemplation there has been no trial." *Tyson*, 138 N.C. at 629, 50 S.E. at 456. Likewise, the Supreme

Court of the United States says the proceeding begins anew after a mistrial. *See Scott*, 437 U.S. at 92, 98 S. Ct. at 2194, 57 L. Ed. 2d at 75. Thus, the dismissal here was a pretrial dismissal, which is not an acquittal, and the State is not barred from proceeding with a new indictment and trial. The majority's hyper-technical misapplication of the "continuing jeopardy" theory is not supported by applicable law and results in a convicted murderer being freed. I respectfully dissent.

Justice ERVIN joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
RAUL PACHICANO DIAZ

No. 412PA17

Filed 16 August 2019

1. Constitutional Law—surrender of Fifth Amendment right to assert Sixth Amendment right—admission to affidavit of indigency to prove defendant's age—element of charges

In defendant's trial for abduction of a child and statutory rape charges, the trial court erred by allowing defendant's affidavit of indigency to be admitted to prove his age, which was an element of the charges. The trial court's decision impermissibly required defendant to surrender one constitutional right—his Fifth Amendment right against compelled self-incrimination—to assert another—his Sixth Amendment right to the assistance of counsel as an indigent defendant.

2. Evidence—erroneously admitted in violation of defendant's constitutional rights—proof of age at trial—victim's opinion testimony

The Court of Appeals erred by concluding that the trial court's erroneous admission of defendant's affidavit of indigency to prove his age in his trial for abduction of a child and statutory rape was not harmless beyond a reasonable doubt and granting defendant a new trial. The State was not required to prove defendant's exact date of birth; the victim's opinion testimony was competent as to the issue of defendant's age; and other evidence admitted at trial—the testimony of the victim (who had attended high school

with defendant and had engaged in an intimate relationship with him for several months) that defendant was born in November 1995—left no reasonable possibility that the jury would have unduly relied on defendant's affidavit of indigency to convict him.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 808 S.E.2d 450 (N.C. Ct. App. 2017), granting defendant a new trial in part and finding no error in part upon appeal from judgments entered on 18 May 2016 by Judge Jeffrey B. Foster in Superior Court, Pitt County. Heard in the Supreme Court on 10 April 2019.

Joshua H. Stein, Attorney General, by Neil Dalton, Special Deputy Attorney General, for the State-appellant.

Marilyn G. Ozer for defendant-appellee.

HUDSON, Justice.

This case is before us pursuant to the State's petition in the alternative for discretionary review[1] of the Court of Appeals' opinion which granted defendant a new trial on his abduction of a child and statutory rape charges after determining that he was prejudiced by the trial court's decision to allow his affidavit of indigency to be admitted to prove his age—an element of the charges—in violation of his constitutional right against self-incrimination. *State v. Diaz*, 808 S.E.2d 450, 457 (N.C. Ct. App. 2017). Pursuant to the State's petition in the alternative for discretionary review, we now address whether:

> . . . the Court of Appeals err[ed] when it . . . held there was a self-incrimination clause violation where a form filled out by the defendant was admitted into evidence to show the defendant's age which was an element of his crimes, when the defendant's age was testified to without objection by uncontroverted testimony by the victim who lived in the same household.

We conclude that admission of the affidavit was in error; however, because the trial court's error in allowing the affidavit of indigency to be

1. The State's notice of appeal based upon a constitutional question was dismissed *ex mero motu* on 9 May 2018.

admitted was harmless beyond a reasonable doubt, we affirm the Court of Appeals' opinion in part and reverse it in part.[2]

I. Factual and Procedural Background

At trial, the State offered the only evidence. The factual background of this case was established mainly through the testimony of the juvenile victim, Julie.[3] Julie's testimony tended to show the following.

Defendant and Julie met and began dating in the "late fall, early winter" of 2014. At the time they met, Julie was a freshman in high school and defendant was a senior at the same high school. Julie was fourteen years old, and she would not turn fifteen until 21 July 2015. Defendant told Julie that he was eighteen, but Julie later found out that he was nineteen. Julie testified that defendant's birthdate was 26 November 1995. On cross-examination, Julie testified that she never saw defendant's driver's license, birth certificate, or passport.

After they met, Julie and defendant began "talking." However, at the end of January 2015, Julie and defendant began skipping school to have sex at defendant's house. The two continued having sex through April of 2015. Julie testified that she wanted to have sex with defendant all "but the first time."

At one point in March or April of 2015, defendant asked Julie if he could record them while they were having sex. Julie testified that defendant's request was unexpected and that although she initially did not object to it, she was later worried that defendant might "use[ ] [i]t to manipulate [her]." Defendant made four separate recordings and the trial court admitted all of them into evidence.

On 14 April 2015, Julie and defendant left North Carolina. Julie testified that although it was defendant's idea to leave North Carolina, she agreed to leave with him because: (1) she thought she was in love with him; (2) he told her that she would never see him again if she did not come with him; and (3) she was scared that he was going to use the recordings that he took of them having sex to manipulate her to go with him. Julie ultimately testified on cross-examination that although, in her view, defendant did not force her to leave with him, she "felt forced."

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2. We are not reviewing the Court of Appeals' conclusions as to: (1) the amount of defendant's bond on the affidavit of indigency, *Diaz*, 808 S.E.2d at 455–56; and (2) defendant's motion to dismiss the abduction of a child charge, *id.* at 457–58. Those issues are not before us.

3. The Court of Appeals used this pseudonym in order to protect the identity of the juvenile. *Diaz*, 808 S.E.2d at 452 n.1. We will also use that pseudonym in this opinion.

After leaving North Carolina, defendant and Julie first went to defendant's uncle's house in New Mexico. Defendant's uncle, however, "didn't help [them]." He told them that they needed to "go back and do things right." He also told Julie that she needed to call her mother. Julie did so, but she did not tell her mother where she and defendant were.

After leaving defendant's uncle's house, Julie and defendant went to Broken Arrow, Oklahoma. Julie testified that they "tried to get settled" there. They got an apartment together, and both she and defendant found jobs. Julie testified that at that point, the two were "[b]asically starting a new life" and "helping each other out." Julie testified that although she was "in favor of being out" in Oklahoma, she "kind of wanted to go back." Julie and defendant were away from North Carolina for about a month in total before U.S. Marshals found them in Oklahoma. Once they were found, U.S. Marshals arranged for Julie to return home to Greenville, N.C., on a flight from Oklahoma to Charlotte. Julie had no interaction with defendant after she returned home.

On 2 June 2015, Julie made a written statement to one of the U.S. Marshals who picked her up at the airport in Charlotte. Julie testified at trial that she still loved defendant and felt like she had to protect him at the time that she wrote the statement. The statement tended to: (1) contradict Julie's trial testimony that it was defendant who came up with the idea to record them having sex back in March or April; and (2) demonstrate that defendant was willing to take Julie back home if she wanted to go back.

On 14 September 2015, defendant was indicted for: (1) one count of abduction of a child under N.C.G.S. § 14-41; (2) three counts of statutory rape under then N.C.G.S. § 14-27.7A(b);[4] and (3) four counts of first-degree sexual exploitation of a minor under N.C.G.S. § 14-190.16.

On 6 October 2015, defendant completed and signed an affidavit of indigency so that a court-appointed attorney could be assigned to his case. Within the sworn affidavit, defendant listed his date of birth as 20 November 1995.

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4. Now amended and recodified as N.C.G.S. § 14-27.25. *See* An Act to Enact the Women and Children's Protection Act of 2015, S.L. 2015-62, § 1(a), 2015 N.C. Sess. Laws 135, 135–36 (amending N.C.G.S. § 14-27.7A); An Act to Reorganize, Rename, and Renumber Various Sexual Offenses to Make Them More Easily Distinguishable From One Another as Recommended by the North Carolina Court of Appeals in *State of North Carolina v. Slade Weston Hicks, Jr.*," and to Make Other Technical Changes, S.L. 2015-181, § 7(a)–(b), 2015 N.C. Sess. Laws 460, 461–62 (recodifying N.C.G.S. § 14-27.7A as N.C.G.S. § 14-27.25 and amending the recodified statute according to the changes made in "S.L. 2015-62").

Defendant's trial began on 16 May 2016. At trial, Julie testified to the facts stated herein.[5] At the end of Julie's testimony, the State offered as evidence a copy of defendant's affidavit of indigency. The State asserted that the affidavit was a self-authenticating document under Rule 902 of the North Carolina Rules of Evidence. Defendant objected to the admission of the affidavit on the grounds of "relevance, due process, hearsay, confrontation." The trial court ruled that the affidavit was admissible because under "Rule 902 Rules of Evidence, it is a self-authenticating document." The trial court then allowed the State to publish the affidavit to the jury. At the close of the State's evidence, defendant moved to dismiss all charges. The trial court denied defendant's motion to dismiss.

The jury found defendant guilty of the following: (1) one count of abduction of a child, (2) three counts of statutory rape; and (3) four counts of second-degree sexual exploitation. At sentencing, the trial court sentenced defendant as a prior record level I offender. The court consolidated sentencing for defendant's abduction of a child and statutory rape convictions and sentenced him to a term of 65 to 138 months in prison. The trial court also ordered defendant to pay $1,054.51 in restitution as a civil judgment. Further, the trial court sentenced defendant to consecutive, suspended terms of 25 to 90 months in prison for each second-degree sexual exploitation conviction. Lastly, the court ordered 36 months of supervised probation for each second-degree sexual exploitation conviction. Defendant entered his notice of appeal on 19 May 2016.

The Court of Appeals granted defendant a new trial on his abduction of a child and statutory rape charges. *Diaz*, 808 S.E.2d at 452, 457–58. In so doing, the court reached two conclusions that are pertinent here. First, the Court of Appeals concluded that "the trial court erred in admitting the affidavit of indigency, which showed Defendant's age—an element in the abduction of a child charge and the statutory rape charges—over Defendant's objection. The State cannot violate Defendant's right against self-incrimination to prove an element of charges against Defendant." *Id.* at 456. Specifically, the Court of Appeals reasoned that "Defendant cannot be required to complete an affidavit of indigency to receive his right to counsel, and the State then use the affidavit against Defendant, violating his constitutional right against self-incrimination." *Id.* As supporting authority, the Court of Appeals relied on our decision in *State v. White*, where we stated that "[a] defendant cannot be required to surrender one constitutional right in order to assert another." *Id.* (bracket

5. The State also offered testimony from Julie's mother.

in original) (citation omitted) (quoting *State v. White*, 340 N.C. 264, 274, 457 S.E.2d 841, 847 (1995); *see also Simmons v. United States*, 390 U.S. 377, 394, 88 S. Ct. 967, 976, 19 L. Ed. 2d 1247, 1259 (1968).

Second, the Court of Appeals concluded that the trial court's constitutional error in admitting the affidavit of indigency was not harmless beyond a reasonable doubt under N.C.G.S. § 15A-1443(b) because:

> Julie's testimony about Defendant's date of birth was incorrect. Julie testified Defendant was born on 26 November 1995, but the affidavit reflects that Defendant was born on 20 November 1995. Additionally, as evinced through cross-examination, Julie did not testify regarding a basis for her knowledge. Julie had never seen an official document showing Defendant's correct date of birth or age.

Diaz, 808 S.E.2d at 457.

We allowed the State's petition in the alternative for discretionary review on 9 May 2018 and now review whether the Court of Appeals erred in concluding that: (1) the trial court erred when it admitted defendant's affidavit of indigency into evidence, *id.* at 456; and (2) the trial court's error in admitting the affidavit of indigency was not harmless beyond a reasonable doubt, *id.* at 457.

II. Analysis

Because we conclude that the trial court's error in admitting the affidavit of indigency was harmless beyond a reasonable doubt, we affirm the decision of the Court of Appeals in part and reverse it in part.

"It is well settled that de novo review is ordinarily appropriate in cases where constitutional rights are implicated." *Piedmont Triad Regional Water Auth. v. Sumner Hills Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001) (citing *State v. Rogers*, 352 N.C. 119, 124, 529 S.E.2d 671, 674–75 (2000); *Ornelas v. United States*, 517 U.S. 690, 696–97, 116 S. Ct. 1657, 1661–62, 134 L. Ed. 2d 911, 918–19 (1996)); *see also State v. Bowditch*, 364 N.C. 335, 340, 700 S.E.2d 1, 5 (2010) ("An appellate court reviews conclusions of law pertaining to a constitutional matter de novo." (citing *State v. Williams*, 362 N.C. 628, 632, 669 S.E. 2d 290, 294 (2008))).

A. Whether the Court of Appeals erred in concluding that the trial court committed constitutional error when it admitted defendant's affidavit of indigency into evidence.

[1] Under the Sixth Amendment to the United States Constitution, an indigent defendant has a right to the assistance of counsel, and this right has been extended to indigent defendants in state courts by the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 342–45, 83 S. Ct. 792, 795–97, 9 L. Ed. 2d 799, 804–806 (1963).

Under the Fifth Amendment to the United States Constitution,[6] individuals "shall [not] be compelled in any criminal case to be witness[es] against [themselves]." *Pennsylvania v. Muniz*, 496 U.S. 582, 588, 110 S. Ct. 2638, 2643, 110 L. Ed. 2d. 528, 543 (1990) (quoting U.S. Const. amend. V). Further, although the privilege against self-incrimination "does not protect a suspect from being compelled by the State to produce 'real or physical evidence,' " *Id.* at 589, 110 S. Ct. at 2643, 110 L. Ed. 2d. at 543 (quoting *Schmerber v. California*, 384 U.S. 757, 764, 86 S. Ct. 1826, 1832, 16 L. Ed. 2d. 908, 916 (1966)), it does protect a suspect "from being compelled to testify against [one]self, or otherwise provide the State with evidence of a testimonial or communicative nature," *id.* at 589, 110 S. Ct. at 2643, 110 L. Ed. 2d. at 543–44 (quoting *Schmerber*, 384 U.S. at 761, 86 S. Ct. at 1830, 16 L. Ed. 2d. at 914). In order for a communication to be testimonial within the meaning of the Fifth Amendment, it "must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against [one]self." *Id.* at 589, 110 S. Ct. at 2643, 110 L. Ed. 2d. at 544 (quoting *Doe v. United States*, 487 U.S. 201, 210, 108 S. Ct. 2341, 2347, 101 L.Ed.2d 184, 197 (1988)). " '[T]he vast majority of verbal statements thus will be testimonial' because '[t]here are very few instances in which a verbal statement, either oral or written, will not convey information or assert facts.' " *Id.* at 597, 110 S. Ct. at 2648, 110 L. Ed. 2d at 549 (second alteration in original) (quoting *Doe*, 487 U.S. at 213, 108 S. Ct. at 2349, 101 L. Ed. 2d at 199).

In considering the "purposes of the [Fifth Amendment] privilege," *id.* at 595, 110 S. Ct. at 2647, 110 L. Ed. 2d at 547–48 (footnote omitted) (citing *Doe*, 487 U.S. at 212–13, 108 S. Ct. at 2348–49, 101 L.Ed.2d at 198–199), the Court has concluded that they are served when "the

6. The Fifth Amendment is applicable to the States through the Fourteenth Amendment under *Malloy v. Hogan*, 378 U.S. 1, 3, 84 S. Ct. 1489, 1491, 12 L. Ed. 2d 653, 656 (1964).

privilege is asserted to spare the accused from having to reveal, directly or indirectly, [ ] knowledge of facts relating [the accused] to the offense or from having to share [the accused's] thoughts and beliefs with the Government." *Id.* at 595, 110 S. Ct. at 2647, 110 L. Ed. 2d. at 548 (quoting *Doe*, 487 U.S. at 213, 108 S. Ct. at 2349, 101 L.Ed.2d at 199). "At its core, the privilege reflects our fierce 'unwillingness to subject those suspected of a crime to the cruel trilemma of self-accusation, perjury or contempt.' " *Id.* at 596, 110 S. Ct. at 2647, 110 L. Ed. 2d at 548 (quoting *Doe*, 247 U.S. at 212, 108 S. Ct. at 2348, 101 L. Ed. 2d at 198). "Whatever else it may include, therefore, the definition of 'testimonial' evidence articulated in *Doe* must encompass all responses to questions that, if asked of a sworn suspect during a criminal trial, could place the suspect in the 'cruel trilemma.' " *Id.* at 596–97, 110 S. Ct. at 2648, 110 L. Ed. 2d at 549. "The difficult question whether a compelled communication is testimonial for purposes of applying the Fifth Amendment often depends on the facts and circumstances of the particular case." *Doe*, 487 U.S. at 214–15, 108 S. Ct. at 2350, 101 L. Ed. 2d at 200 (citing *Fisher v. United States*, 425 U.S. 391, 410, 96 S. Ct. 1569, 1581, 48 L. Ed. 2d 39, 56 (1976)).

"It is consistent with the history of and the policies underlying the Self-Incrimination Clause to hold that the privilege may be asserted only to resist compelled explicit or implicit disclosures of incriminating information." *Id.* at 212, 108 S. Ct. at 2348, 101 L. Ed. 2d at 198. "A defendant cannot be required to surrender one constitutional right in order to assert another." *White*, 340 N.C. at 274, 457 S.E.2d at 847 (citing *Simmons*, 390 U.S. at 394, 88 S. Ct. at 976, 19 L. Ed. 2d at 1259). The United States Supreme Court's opinion in *Simmons* provides an instructive illustration of when a defendant is impermissibly compelled to testify by a circumstance in which "one constitutional right should have to be surrendered in order to assert another." *Simmons*, 390 U.S. at 394, 88 S. Ct. at 976, 19 L. Ed. 2d. at 1259. In *Simmons*, the trial court allowed testimony that the defendant gave to establish his Fourth Amendment standing during a hearing on a motion to suppress to be used against him in the guilt phase of his trial. *Id.* at 389, 88 S. Ct. 973–74, 19 L. Ed. 2d. at 1256. In concluding that "these circumstances" were "intolerable," *id.* at 394, 88 S. Ct. at 976, 19 L. Ed. 2d. at 1259, the Court reasoned that:

> "[a] defendant is 'compelled' to testify in support of a motion to suppress only in the sense that if he refrains from testifying he will have to forgo a benefit, and testimony is not always involuntary as a matter of law simply because it is given to obtain a benefit. However, the assumption which underlies this reasoning is that the defendant has

> a choice: he may refuse to testify and give up the benefit. When this assumption is applied to a situation in which the 'benefit' to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created. Thus, in this case [defendant] was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination."

Id. at 393–94, 88 S. Ct. at 976, 19 L. Ed. 2d. at 1259 (footnotes omitted).

Here, we affirm the Court of Appeals' conclusion that the trial court committed constitutional error when it admitted defendant's affidavit of indigency into evidence. In doing so, the trial court required defendant "to surrender one constitutional right," his Fifth Amendment right against compelled self-incrimination, "in order to assert another," his right to the assistance of counsel as an indigent defendant under the Sixth Amendment. *White*, 340 N.C. at 274, 457 S.E.2d at 847 (citing *Simmons*, 390 U.S. at 394, 88 S. Ct. at 976, 19 L. Ed. 2d. at 1259).

Specifically, as an indigent person, defendant had a constitutional right to the assistance of counsel in state court. *Gideon*, 372 U.S. at 342–45, 83 S. Ct. at 795–97, 9 L. Ed. 2d at 804–06. In order to assert that right, North Carolina law requires an indigent person to complete an affidavit of indigency which is a sworn statement made before a court. N.C.G.S. § 7A-451(c1) (2015) (providing that the determination of indigency will be made "[u]pon application, supported by the defendant's affidavit"); *id.* § 7A-453(a) (providing that after the Office of Indigent Services makes a preliminary determination as to indigency, "[t]he court shall make the final determination"); *id.* § 7A-456(a) (recognizing that statements "in regard to the question of [a defendant's] indigency" are "made . . . under oath or affirmation."). Therefore, when defendant was completing his affidavit of indigency, he was asserting his Sixth Amendment right to assistance of counsel.

Additionally, by completing the affidavit of indigency, defendant also implicated his Fifth Amendment right to be free from compulsory self-incrimination. Specifically, "on the facts and circumstances of th[is] particular case," defendant's communication on his affidavit of indigency that his birthdate is "11/20/95," is testimonial. *Doe*, 487 U.S. at 214–15, 108 S. Ct. at 2350, 101 L. Ed. 2d at 200 (citing *Fisher*, 425 U.S. at 410, 96 S. Ct. at 1581, 48 L. Ed. 2d at 56). First, in providing his date of birth on the affidavit, defendant did "explicitly . . . relate a factual assertion or disclose information." *Muniz*, 496 U.S. at 589, 110 S. Ct. at 2643, 110 L.

Ed. 2d. at 544 (quoting *Doe*, 487 U.S. at 210, 108 S. Ct. at 2347, 101 L. Ed. 2d at 197).

Second, defendant's sworn statement, N.C.G.S. § 7A-456(a), as to his age on his affidavit of indigency, if asked of him as "a sworn suspect during a criminal trial, [w]ould place [him] in the 'cruel trilemma' " *Muniz*, 496 U.S. at 597, 110 S. Ct. at 2648, 110 L. Ed. 2d at 549, of "self-accusation, perjury or contempt.' " *Id.* at 596, 110 S. Ct. at 2647, 110 L. Ed. 2d at 548 (quoting *Doe*, 487 U.S. at 212, 108 S. Ct. at 2348, 101 L. Ed. 2d at 198). Specifically, defendant's charges relevant to this issue are his charges for abduction of a child and statutory rape. The crime of abduction of a child requires that the victim be "any minor child who is *at least four years younger* than the person" abducting the victim. N.C.G.S. § 14-41(a) (2015) (emphasis added). Further, the particular type of statutory rape that defendant was charged with required that "defendant engage[ ] in vaginal intercourse or a sexual act with another person who is 13, 14, or 15 years old and the defendant is more than four but less than six years older than the person[.]" *Id.* § 14-27.7A(b) (2015). Therefore, had defendant been asked to state his date of birth by the prosecutor at trial, he would have faced the "cruel trilemma of self-accusation, perjury or contempt." *Id.* at 596, 110 S. Ct. at 2647, 110 L. Ed. 2d at 548 (quoting *Doe*, 247 U.S. at 212, 108 S. Ct. at 2348, 101 L. Ed. 2d at 198).

In addition to the above, defendant's statement of his date of birth on his affidavit of indigency was testimonial "on the facts and circumstances of th[is] particular case," *Doe*, 487 U.S. at 214–15, 108 S. Ct. at 2350, 101 L. Ed. 2d at 200 (citing *Fisher*, 425 U.S. at 410, 96 S. Ct. at 1581, 48 L. Ed. 2d at 56), because the General Statutes treat an affidavit of indigency as a sworn statement—made before a court under penalty for false statements—to establish defendant's entitlement to services. Specifically, the General Statutes required that defendant support his application with a sworn affidavit. N.C.G.S. § 7A-451(c1) ("Upon application, supported by the defendant's affidavit . . . ."); *see also id.* § 7A-456(a) (recognizing that the affidavit would be made "under oath or affirmation"). Defendant's own affidavit of indigency itself required that all of his statements be "Sworn/Affirmed" by him. Further, even though the Office of Indigent Defense Services has some authority to make a preliminary determination as to a defendant's indigency, "[t]he court shall make the final determination," of a defendant's indigency. *Id.* at § 7A-453(a). Moreover, defendant would have been subject to penalty had he made false statements on his affidavit of indigency. *See id.* § 7A-456(a)–(b) (stating that making a false statement "under oath or affirmation in regard to the question of [ ] indigency constitutes a Class I felony," and

requiring "[a] judicial official making the determination of indigency" to notify the applicant of the penalty); *see also State v. Denny*, 361 N.C. 662, 667–68, 652 S.E.2d 212, 215 (2007) (upholding defendant's perjury conviction for making a false statement on his affidavit of indigency concerning his real estate assets). Defendant's own affidavit even states that he is making statements concerning his indigency "[u]nder penalty of perjury." These facts and circumstances demonstrate that defendant's statement of his birthdate on his affidavit was testimonial.

That defendant's statement was testimonial is not the end of the analysis; in order to implicate his Fifth Amendment right, it must also have been compelled. *Doe*, 487 U.S. at 212, 108 S. Ct. at 2348, 101 L. Ed. 2d at 198 (". . . the privilege may be asserted only to resist *compelled* explicit or implicit disclosures of incriminating information." (emphasis added))). Here, like in *Simmons*, although defendant's decision to disclose his date of birth on his affidavit of indigency could be seen as voluntary "[a]s an abstract matter," *Simmons*, 390 U.S. at 393, 88 S. Ct. at 976, 19 L. Ed. 2d at 1259, we cannot overlook the "undeniable tension [that] is created" by the fact that defendant needed to disclose his date of birth in order to exercise his right to the assistance of counsel, which is a " 'benefit' . . . afforded by another provision of the Bill of Rights," *id.* at 394, 88 S. Ct. at 976, 19 L. Ed. 2d at 1259. In such an instance, the "reasoning . . . that the defendant has a *choice*: he may refuse to testify and give up the benefit," is ultimately unpersuasive. *See id.* at 394, 88 S. Ct. at 976, 19 L. Ed. 2d at 1259 (emphasis added). Therefore, defendant's statement of his birthdate on his affidavit of indigency was a compelled, testimonial statement that triggered his Fifth Amendment privilege against compulsory self-incrimination.

Accordingly, by allowing defendant's affidavit of indigency to be admitted into evidence here, the trial court committed constitutional error by "requir[ing] [defendant] to surrender one constitutional right in order to assert another." *White*, 340 N.C. at 274, 457 S.E.2d at 847 (citing *Simmons*, 390 U.S. at 394, 88 S. Ct. at 976, 19 L. Ed. 2d at 1259). Like in *Simmons* where defendant "was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination," here defendant "was obliged either to give up" his right, as an indigent, to the assistance of counsel under the Sixth Amendment, "or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination." *Simmons*, 390 U.S. at 394, 88 S. Ct. at 976, 19 L. Ed. 2d at 1259.

The State's argument to the contrary that this case is governed by our prior decision in *State v. Banks*, 322 N.C. 753, 370 S.E.2d 398 (1988), is unpersuasive. In *Banks*, a police deputy was allowed to testify at trial that the defendant told the deputy that his birthdate was "8 May 1956" as the deputy was "booking" defendant. 322 N.C. at 758, 370 S.E.2d at 402. In that case, the defendant challenged the deputy's testimony on the ground that "evidence of his age was obtained in violation of his privilege against compulsory self-incrimination."[7] *Id.* at 758, 370 S.E.2d at 402. In reliance on our previous decision in *State v. Ladd*, we concluded that "the *Miranda* requirements are inapplicable to routine questions asked during the booking process unless such questions are designed to elicit incriminating information from a suspect." *Id.* at 760, 370 S.E.2d at 403; *see also id.* at 759, 370 S.E.2d at 402–403 (citing and quoting *State v. Ladd*, 308 N.C. 272, 286–87, 302 S.E.2d 164, 173 (1983)). We concluded that the deputy's questioning defendant as to his birthdate during the booking procedure was not "designed to elicit incriminating information from" defendant because the deputy was asking for "certain routine information" that was "regularly obtain[ed]," including "the suspect's name, date of birth, age, sex, race, social security number and address." *Id.* at 760, 370 S.E.2d at 403. Further, we concluded that the *Ladd* exception applied because the deputy "was not investigating any crime nor did he interrogate defendant for the purpose of eliciting incriminating information." *Id.* at 760, 370 S.E.2d at 403. As such, we ultimately concluded "that defendant's Fifth Amendment privilege against compulsory self-incrimination was not violated," notwithstanding defendant's argument that his "age [wa]s an essential element of the crimes for which he was being booked." *Id.* at 760, 370 S.E.2d at 403.

Our decision in *Banks* is inapplicable here because *Banks* dealt with a wholly separate basis for concluding that a defendant was compelled to give incriminating testimony. Here, we are not concerned with—and we make no conclusions in regard to—whether defendant was compelled to state his birthdate on his affidavit of indigency because he was being interrogated while under police custody as was the case in *Miranda v. Arizona*, 384 U.S. 436, 439, 86 S. Ct. 1602, 1609, 16 L. Ed. 2d 694, 704 (1966). Rather, defendant was compelled to state his birthdate on his affidavit of indigency because doing so was necessary to obtain a "benefit . . . afforded by another provision of the Bill of Rights." *Simmons*, 390 U.S. at 394, 88 S. Ct. at 976, 19 L. Ed. 2d at 1259. Therefore, the issue

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7. The defendant in *Banks* also challenged the admission of the deputy's testimony because the State failed to disclose the statement during voluntary discovery. *Banks*, 322 N.C. at 758, 370 S.E.2d at 402.

of whether the *Ladd* exception to *Miranda* would hypothetically apply here had defendant been subject to interrogation in police custody is irrelevant. *See Banks*, 322 N.C. at 760, 370 S.E.2d at 403 (disagreeing with defendant's argument "the testimony would not be admissible under the *Ladd* exception to *Miranda* requirements"). The compulsion that defendant encountered here, standing alone, is "intolerable." *Simmons*, 390 U.S. at 394, 88 S. Ct. at 976, 19 L. Ed. 2d at 1259.

B. Whether the Court of Appeals erred in concluding that the trial court's error was not harmless beyond a reasonable doubt.

[2] In his brief, defendant argues that forcing a defendant to choose between constitutional rights under *Simmons* and *White* constitutes reversible error.

"A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C.G.S. § 15A-1443(b) (2017). A constitutional error is not harmless beyond a reasonable doubt if "there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *State v. Soyars*, 332 N.C. 47, 58, 418 S.E.2d 480, 487 (1992) (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705, 710 (1967)).

Here, the Court of Appeals concluded that the error in admitting defendant's affidavit of indigency was not harmless beyond a reasonable doubt because "Julie's testimony about Defendant's date of birth was incorrect," and "as evinced through cross-examination, Julie did not testify regarding a basis for her knowledge. Julie had never seen an official document showing Defendant's correct date of birth or age." *Diaz*, 808 S.E.2d at 457. The State now argues that the admission of defendant's affidavit of indigency was harmless beyond a reasonable doubt because: (1) "there is no requirement that a person see another's driver[']s license, birth certificate or passport to know the other person's age;" (2) the victim—whose testimony as to defendant's age received no objection at trial—"was intimately involved with the defendant for an extended period of time" and the jury was "highly likely" to believe such testimony; and (3) even though there was a six-day discrepancy between defendant's actual birthdate and the date that the victim testified to, the discrepancy was harmless because the victim's testimony still established that defendant was born in November 1995.

Here we conclude that there is no "reasonable possibility" that the admission of defendant's affidavit of indigency "might have contributed to the conviction." *Soyars*, 332 N.C. at 58, 418 S.E.2d at 487 (quoting *Chapman*, 386 U.S. at 24, 87 S. Ct. at 828, 17 L. Ed. 2d at 710).

Before analyzing the evidence of defendant's age offered at trial, we must clarify, under North Carolina law: (1) what it means for the State to be required to prove a defendant's age; and (2) what evidence is competent to prove a defendant's age. First, "when the fact that [a defendant] was at the time in question over a certain age is one of the essential elements to be proved by the State," the State "must prove only that [the defendant] was at the time of the offense charged over [that age]." *Banks*, 322 N.C. at 758, 370 S.E.2d at 402 (quoting *State v. Gray*, 292 N.C. 270, 287, 233 S.E.2d 905, 916 (1977)). Therefore, "the exact age of the defendant is not in issue, nor need the state prove it." *Id.* at 758, 370 S.E.2d at 402 (quoting *Gray*, 292 N.C. at 287, 233 S.E.2d at 916). This rule, however, should not be "extend[ed] to any case, criminal or civil, where the exact age of someone must be proved." *Id.* at 758, 370 S.E.2d at 402 (emphasis in the original) (quoting *Gray*, 292 N.C. at 287, 233 S.E.2d at 916).

Here, neither defendant's charge of abducting a child nor his charge of statutory rape required the State to prove his exact age. Specifically, with regard to the abduction of a child charge, the State only had to prove that defendant was at least four years older than Julie when she was a minor. *See* N.C.G.S. § 14-41(a). With regard to defendant's statutory rape charge, the State only had to prove that defendant was "more than four but less than six years older than" Julie when she was "13, 14, or 15 years old." *Id.* § 14-27.7A(b). As such, the State was never required to prove defendant's exact age. Therefore, the Court of Appeals' reasoning that the error in admitting defendant's affidavit of indigency was not harmless beyond a reasonable doubt because "Julie's testimony about Defendant's date of birth was incorrect," is a red-herring. *Diaz*, 808 S.E.2d at 457.

Having clarified what the State was required to prove at trial, we now turn to the issue of what evidence is competent to establish the age of a person. The Court of Appeals seems to have concluded that the admission of defendant's affidavit of indigency was not harmless beyond a reasonable doubt on account of the fact that Julie's testimony as to defendant's age could not have been competent because she never saw "an official document showing Defendant's correct date of birth or age." *See id.* at 457. The conclusion that Julie's testimony as to defendant's age was incompetent unless she saw official documentation showing

defendant's date of birth is without legal support. Specifically, under Rule 701 of the North Carolina Rules of Evidence, a lay witness may provide testimony as to that witness's "opinions or inferences" which are: (1) "rationally based on the perception of the witness"; and (2) "helpful to a clear understanding of [the witness's] testimony or the determination of a fact in issue." N.C. R. Evid. 701. In *Banks*, we determined that this rule allowed a police deputy to testify as to the defendant's age based upon the deputy's "ample opportunity to observe defendant both during the booking process and while they were together in the courtroom." *Banks*, 322 N.C. at 757, 370 S.E.2d at 401. We concluded that the deputy's opinion testimony as to the defendant's age comported with the requirements of Rule 701 of the North Carolina Rules of Evidence because it "was rationally based on his perception of defendant, and it was helpful to the jury in determining the age requirements of the crimes charged." *Banks*, 322 N.C. at 757, 370 S.E.2d at 401.

Here, there is an even stronger argument than in *Banks* that Julie's testimony "was rationally based on her perception[s]" of defendant. N.C. R. Evid. 701. Specifically, Julie attended the same high school as defendant where, at the time, she was a member of the freshman class, and he was a member of the senior class. They engaged in an intimate relationship that lasted for several months, including a few weeks during which they "basically start[ed] a new life" together in Oklahoma. As a result, Julie had even more of an opportunity to form a rational opinion as to defendant's age than the deputy in *Banks* who only observed the defendant in that case for the duration of the booking process and while the defendant was in the courtroom. *Banks*, 322 N.C. at 757, 370 S.E.2d at 401. Further, Julie's testimony was helpful to "the determination of a fact in issue" here, that fact being defendant's age. N.C. R. Evid. 701. Therefore, the Court of Appeals' apparent conclusion that Julie's opinion as to defendant's age was somehow incompetent is unfounded. *See Diaz*, 808 S.E.2d at 457.

Having clarified that the State was not required to prove defendant's date of birth at trial, and that Julie's opinion testimony was competent as to the issue of defendant's age, we now turn to analyzing the evidence admitted at trial as to defendant's age in order to determine whether the admission of his affidavit of indigency was harmless beyond a reasonable doubt. We conclude that there is no "reasonable possibility that [defendant's affidavit of indigency] might have contributed to [his] conviction[s]," *Soyars*, 332 N.C. at 58, 418 S.E.2d at 487 (quoting *Chapman*, 386 U.S. at 24, 87 S. Ct. at 828, 17 L. Ed. 2d at 710). Specifically, although Julie did incorrectly testify as to the day that defendant was

born, she did correctly testify that he was born in November of 1995. This evidence established that defendant was nineteen years old at all times relevant to the abduction of a child and statutory rape charges.[8] Julie's testimony that her birth date was 21 July 2000 established that she was fourteen years old at all times relevant to the charges against defendant. As such, Julie's testimony provided evidence that supported defendant's guilt. *See* N.C.G.S. § 14-41(a) (requiring that a defendant be at least four years older than the abducted minor); *id.* § 14-27.7A(b) (requiring that a defendant be "more than four but less than six years older than" a victim who is either "13, 14, or 15 years old"). Given that Julie's testimony resulted from her intimate relationship with defendant that lasted several months, and involved them "basically starting a new life" together, such testimony constituted strong and essentially uncontradicted evidence of defendant's age, and there is no "reasonable possibility" that the jury would have unduly relied on defendant's affidavit of indigency to convict defendant. *Soyars*, 332 N.C. at 58, 418 S.E.2d at 487 (quoting *Chapman*, 386 U.S. at 24, 87 S. Ct. at 828, 17 L. Ed. 2d at 710).

Accordingly, we reverse the conclusion of the Court of Appeals that the trial court's error in admitting defendant's affidavit of indigency was not harmless beyond a reasonable doubt. *Diaz*, 808 S.E.2d at 457.

III. Conclusion

Because we conclude that the trial court's constitutional error in admitting defendant's affidavit of indigency into evidence was harmless beyond a reasonable doubt, we affirm in part and reverse in part the ruling of the Court of Appeals.

AFFIRMED IN PART; REVERSED IN PART.

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8. Per defendant's indictments, the relevant date for the abduction of a child charge is "on or about" 14 April 2015. The relevant dates for the statutory rape charges are: (1) "on or about" 14 April 2015; (2) between 1 March 2015 and 15 March 2015; and (3) between 16 March 2015 and 31 March 2015.

STATE OF NORTH CAROLINA
v.
TORREY GRADY

No. 179A14-3

Filed 16 August 2019

Satellite-Based Monitoring—mandatory lifetime SBM monitoring—Fourth Amendment balancing test—bodily integrity and daily movements

North Carolina's satellite-based monitoring (SBM) program, N.C.G.S. § 14-208.40A(c) and 14-208.40B(c), was held unconstitutional as applied to individuals in defendant's category—those who were subject to mandatory lifetime SBM based solely on their statutorily defined status as a "recidivist" who also had completed their prison sentences and were no longer supervised by the State through probation, parole, or post-release supervision. Recidivists, as defined in the SBM statute, did not have a greatly diminished privacy interest in their bodily integrity or their daily movements; the SBM program constituted a substantial intrusion into those privacy interests; the State failed to demonstrate that the SBM program furthered its interest in solving crimes, preventing crimes, or protecting the public.

Justice NEWBY dissenting.

Justice MORGAN joins in this dissenting opinion.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 817 S.E.2d 18 (N.C. Ct. App. 2018), reversing an order for satellite-based monitoring entered on 26 August 2016 by Judge Phyllis M. Gorham in Superior Court, New Hanover County. Heard in the Supreme Court on 8 January 2019.

Joshua H. Stein, Attorney General, by Teresa M. Postell, Assistant Attorney General, and Joseph Finarelli, Special Deputy Attorney General, for the State-appellant.

Glenn Gerding, Appellate Defender, and Lewis Everett for defendant-appellee.

Christopher Brook for American Civil Liberties Union of North Carolina Legal Foundation; and Nathan Freed Wessler, pro hac vice, and Brandon J. Buskey, pro hac vice, for American Civil Liberties Union Foundation, amici curiae.

EARLS, Justice.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by the government. U.S. Const. amend. IV. The United States Supreme Court has determined that North Carolina's satellite-based monitoring (SBM) of sex offenders, which involves attaching an ankle monitor "to a person's body, without consent, for the purpose of tracking that individual's movements," constitutes a search within the meaning of the Fourth Amendment. *Grady v. North Carolina*, 135 S. Ct. 1368, 1370 (2015) (per curiam). The Supreme Court remanded the case for an examination of "whether the State's monitoring program is reasonable—when properly viewed as a search." *Id.* at 1371. In its per curiam opinion, the Supreme Court noted, among other things, the following:

> The State's program is plainly designed to obtain information. And since it does so by physically intruding on a subject's body, it effects a Fourth Amendment search.
>
> That conclusion, however, does not decide the ultimate question of the program's constitutionality. The Fourth Amendment prohibits only *unreasonable* searches. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations. *See, e.g.*, *Samson v. California*, 547 U.S. 843 (2006) (suspicionless search of parolee was reasonable); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (random drug testing of student athletes was reasonable). The North Carolina courts did not examine whether the State's monitoring program is reasonable—when properly viewed as a search—and we will not do so in the first instance.

Id. (citations omitted). In accordance with this decision, this case was ultimately remanded to the superior court, which entered an order determining the SBM program to be constitutional. The Court of Appeals reversed, but only as to Mr. Grady individually. We conclude that the

Court of Appeals erroneously limited its holding to the constitutionality of the program as applied only to Mr. Grady, when our analysis of the reasonableness of the search applies equally to anyone in Mr. Grady's circumstances. *Cf. Graham v. Florida*, 560 U.S. 48, 82 (2010) (holding that state statutes mandating a sentence of life imprisonment without the possibility of parole are unconstitutional as applied to a specific group, namely juveniles who did not commit homicide).

In North Carolina, "SBM's enrollment population consists of (1) offenders on parole or probation who are subject to State supervision, (2) unsupervised offenders who remain under SBM by court order for a designated number of months or years, and (3) unsupervised offenders subject to SBM for life, who are also known as 'lifetime trackers.' " *State v. Bowditch*, 364 N.C. 335, 338, 700 S.E.2d 1, 3 (2010). Mr. Grady is in the third of these categories in that he is subject to SBM for life and is unsupervised by the State through probation, parole, or post-release supervision. Additionally, Mr. Grady is a "recidivist," which makes lifetime SBM mandatory as to him without any individualized determination of the reasonableness of this search. Because we conclude that the relevant portions of N.C.G.S. §§ 14-208.40A(c) and 14-208.40B(c) are unconstitutional as applied to all individuals who, like Mr. Grady, are in the third *Bowditch* category and who are subject to mandatory lifetime SBM based solely on their status as a "recidivist," we modify and affirm the opinion of the Court of Appeals.

Background

Mr. Grady is required by North Carolina statute to enroll in the SBM program and to wear an ankle monitor at all times for the remainder of his life based on two sex crimes that he committed when he was seventeen and twenty-six years old and for which he has fully served his criminal sentences. *State v. Grady*, 817 S.E.2d 18 (N.C. Ct. App. 2018). On 13 September 2006, Grady pleaded guilty to indecent liberties with a child and was sentenced to a minimum of thirty-one and a maximum of thirty-eight months of imprisonment. For felony sentencing purposes, Grady stipulated to the aggravating factor that the fifteen-year-old victim was impregnated as a result of his crime, which occurred when he was twenty-six years old. He also stipulated to certain prior convictions, including a 16 January 1997 plea of no contest to a second-degree sex offense committed when he was seventeen years old and a 6 January 2004 plea of guilty to failure to register as a sex offender. Grady was unconditionally released from prison on 25 January 2009 and received certification that his rights of citizenship were "BY LAW AUTOMATICALLY RESTORED."

Over a year later, on 12 March 2010, the North Carolina Department of Correction (DOC) sent a letter to Grady informing him that it had made an initial determination that he met the statutory criteria of a "recidivist," which would require his enrollment in the SBM program, and giving him notice to appear at a hearing at which the court would determine his eligibility for SBM. Before a hearing was held, he pleaded guilty on 27 October 2010 to failure to maintain his address with the sex offender registry and was sentenced to twenty-four to twenty-nine months in prison. He served that term of imprisonment and was again unconditionally released on 24 August 2012. A new hearing was scheduled for 14 May 2013 in the Superior Court in New Hanover County to determine if Grady should be required to enroll in the State's SBM program.

North Carolina's SBM Program

North Carolina's SBM program for sex offenders[1] became effective on 1 January 2007 as a result of the ratification of "An Act To Protect North Carolina's Children/Sex Offender Law Changes," which directed the DOC to "establish a sex offender monitoring program that uses a continuous satellite-based monitoring system . . . . to monitor" the locations of certain categories of sex offenders. An Act To Protect North Carolina's Children/Sex Offender Law Changes, ch. 247, sec. 15, 2005 N.C. Sess. Laws (Reg. Sess. 2006) 1065, 1074–79 (codified as amended at N.C.G.S. §§ 14-208.40 to -208.45 (2017 & Supp. 1 2018)); *see also Bowditch*, 364 N.C. at 337, 700 S.E.2d at 3 ("As authorized by the legislation, DOC established and began administering the SBM program on 1 January 2007."). The General Assembly mandated that the "[SBM] program shall use a system that provides . . . [t]ime-correlated and continuous tracking of the geographic location of the subject using a global positioning system based on satellite and other location tracking technology." Ch. 247, sec. 15.(a), 2005 N.C. Sess. Laws (Reg. Sess. 2006) at 1075 (codified as amended at N.C.G.S. § 14-208.40(c)(1)).

In general terms, North Carolina's statutory framework for the satellite-based monitoring of convicted sex offenders establishes that an offender who is (a) classified as a sexually violent predator, (b) a recidivist, (c) convicted of an aggravated offense, or (d) an adult

1. North Carolina law also provides for the use of SBM with individuals sentenced to house arrest as a condition of probation, see N.C.G.S. § 15A-1343(a1) (2017), or post-release supervision, *see id.* § 15A-1368.4(e)(13) (2017). All references to "the SBM program" herein are only to the statutory framework for sex offenders that is codified as amended at N.C.G.S. §§ 14-208.40 to -208.45 (2017 & Supp. 1 2018).

convicted of statutory rape of a child or statutory sex offense with a victim under the age of thirteen must submit to SBM for life. *See* N.C.G.S. §§ 14-208.40A(c), -208.40B(c) (2017). The statutes provide for no individualized assessment of the offender; the court has no discretion over whether to impose SBM or for how long; and no court has the authority to terminate SBM for these individuals. *Id.* All other sex offenders may be ordered to submit to SBM if, based on a risk assessment, the offender "requires the highest possible level of supervision and monitoring." *Id.* §§ 14-208.40A(d)-(e), -208.40B(c) (2017). For these individuals the court specifies the period of time that the offender must be enrolled in the SBM program. *Id.* §§ 14-208.40A(e), -208.40B(c).

Section 14-208.6(2b) of the North Carolina General Statutes defines a "recidivist" as "[a] person who has a prior conviction for an offense that is described in G.S. 14-208.6(4)," which, in turn, defines a "reportable conviction." N.C.G.S. § 14-208.6(2b) (Supp. 1 2018). "Reportable convictions," which encompass a range of statutorily defined sex crimes, including "[a] final conviction for an offense against a minor," "a sexually violent offense," "or an attempt to commit any of those offenses," *id.* § 14-208.6(4)(a) (Supp. 1 2018), are final convictions that trigger the registration requirements of the "statewide sex offender registry." *See id.* § 14-208.7(a) (2017) (stating that "[a] person who is a State resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides"). An individual who has a prior conviction for a reportable offense, and therefore meets the statutory definition of a "recidivist," must maintain registration with the sex offender registry for life. *Id.* § 14-208.23 (2017).

An individual who is subjected to lifetime SBM may file a request with the Post-Release Supervision and Parole Commission to terminate the SBM requirement. Such a request, however, cannot be filed until at least one year after the individual: "(i) has served his or her sentence for the offense for which the satellite-based monitoring requirement was imposed, and (ii) has also completed any period of probation, parole, or post-release supervision imposed as part of the sentence." *Id.* § 14-208.43(a) (2017). If the individual has not been convicted of any further reportable offenses and "has substantially complied with the provisions of this Article ["Sex Offender and Public Protection Registration Programs"], the Commission may terminate the monitoring requirement if the Commission finds that the person is not likely to pose a threat to the safety of others." *Id.* § 14-208.43(b) (2017). An individual enrolled in the SBM program "shall cooperate with the Division . . . and the requirements of the [SBM] program." *Id.* § 14-208.42 (2017). Moreover, the Division

> shall have the authority to have contact with the offender at the offender's residence or to require the offender to appear at a specific location as needed for the purpose of enrollment, to receive monitoring equipment, to have equipment examined or maintained, and for any other purpose necessary to complete the requirements of the [SBM] program.

Id. An individual who "fails to enroll" or "tampers with, removes, vandalizes, or otherwise interferes with the proper functioning of a [monitoring] device" is guilty of a felony, and it is a Class 1 misdemeanor for an individual to "fail[ ] to provide necessary information . . . or fail[ ] to cooperate with the . . . guidelines and regulations for the program." N.C.G.S. § 14-208.44(a)-(c) (2017); *see also id.* § 14-208.44(d) (2017) ("For purposes of this section, 'enroll' shall include appearing, as directed . . . to receive the necessary equipment.").

If an individual is convicted of a reportable conviction and a court has made no prior SBM determination, as was the case with Grady, the Division of Adult Correction and Juvenile Justice (the Division) is required to make an initial determination whether the individual is required to enroll in SBM, and, if so, to schedule a "bring back" hearing for a court to determine by using the same criteria described above whether the offender must enroll in SBM. *Id.* § 14-208.40B.

Today nearly every state uses SBM to some degree. *See* Avlana Eisenberg, *Mass Monitoring*, 90 S. Cal. L. Rev. 123, 125 (2017). Only twelve states, however, allow lifetime monitoring,[2] and of those, only two, North Carolina and California, mandate lifetime monitoring without any individualized assessment of risk, even for individuals who have completed their sentences, and without meaningful judicial review over

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2. These states are California, Florida, Kansas, Louisiana, Maryland, Michigan, Missouri, North Carolina, Oregon, Rhode Island, South Carolina, and Wisconsin. Cal. Penal Code § 3004(b) (West 2016); Fla. Stat. § 948.012(4) (2016); Kan. Stat. Ann. § 22-3717(u) (2016); La. Rev. Stat. Ann. § 15:560.3(A)(3) (2016); Md. Code Ann., Crim. Proc. § 11-723(d)(3)(i) (LexisNexis 2016); Mich. Comp. Laws § 750.520n (2016); Mo. Rev. Stat. § 217.735(4) (2016); N.C.G.S. §§ 14-208.40A(c), -208.40B(c); Or. Rev. Stat. §§ 137.700, 144.103 (2016); 11 R.I. Gen. Laws § 11-37-8.2.1 (2016); S.C. Code Ann. § 23-3-540 (Supp. 2018); Wis. Stat. § 301.48 (2016). *See generally Comment: Tracking the Constitution - the Proliferation and Legality of Sex-Offender GPS-Tracking Statutes*, 42 Seton Hall L. Rev. 1169, 1172–90 (2012) (categorizing types of GPS monitoring statutes). Georgia's lifetime monitoring statute, Ga. Code Ann. § 42-1-14(e) (2016), was declared unconstitutional by that state's Supreme Court. *See Park v. State*, 305 Ga. 348, 360–61, 825 S.E.2d 147, 158 (2019).

time. *See* Cal. Penal Code § 3004(b) (West 2016); N.C.G.S. §§ 14-208-40A, -208.40B, -208.43. Some states provide for both individualized assessments to determine if lifetime SBM is appropriate and the opportunity to petition a court to be removed from SBM. *See*, *e.g.*, La. Rev. Stat. Ann. § 15:560.5 (2016); Wis. Stat. § 301.48 (2016).[3] Other states only apply lifetime SBM to offenders who are subject to lifetime parole supervision or who otherwise would receive a sentence of life imprisonment. *See*, *e.g.*, Fla. Stat. § 948.012 (2016); Kan. Stat. Ann. § 22-3717(u) (2016); Mo. Rev. Stat. § 217.735 (2016); Or. Rev. Stat. § 144.103 (2016); 11 R.I. Gen. Laws § 11-37-8.2.1 (2016). Still other states provide for individualized assessments and sentencing discretion. *See*, *e.g.*, Md. Code Ann., Crim. Proc. § 11-723 (LexisNexis 2016); *People v. Kern*, 288 Mich. App. 513, 794 N.W.2d 362 (2010) (per curiam) (holding that defendants put on probation or sent to a local jail as opposed to the penitentiary are not subject to lifetime SBM under Michigan's statute so that the defendant, who was convicted of second-degree criminal sexual conduct, was, because of his jail sentence, not subject to Michigan's lifetime SBM program, citing Mich. Comp. Laws §§ 750.520, 791.285). Finally, several states give offenders the opportunity to petition a court to have the SBM requirement lifted. *See*, *e.g.*, Mo. Rev. Stat. § 217.735(5) (2016); S.C. Code Ann. § 23-3-540(H) (Supp. 2018). Another characteristic of most of the other eleven state lifetime SBM programs is that, compared with North Carolina's program, they apply to persons convicted of a smaller category of offenses, which typically include only the most egregious crimes involving child victims. As a result, North Carolina makes more extensive use of lifetime SBM than virtually any other jurisdiction in the country.

Grady's SBM Claims

Prior to the 14 May 2013 bring back hearing, Grady filed a motion to deny the State's SBM application and to dismiss the proceeding, in which he argued, *inter alia*, that "the imposition of the monitoring upon Defendant violates his rights to be free from unreasonable search and

3. The dissent refers to Wisconsin's SBM statute as "functionally identical" to North Carolina's statute, quoting *Belleau v. Wall*, 811 F.3d 929, 939 (7th Cir. 2016) (Flaum, J., concurring). While the two statutes may be identical in the sense that they involve GPS monitoring using an ankle bracelet, they do not establish functionally identical programs. Wisconsin's program subjects only child sex offenders to lifetime SBM; individualized assessments are required before some offenders can be enrolled in the program; the department administering the program can substitute passive position system monitoring for active SBM; and both the offender and the department can apply to a court to request termination of lifetime tracking. *See* Wis. Stat. § 301.48 (2016).

seizure as guaranteed by the Fourth Amendment of the United States Constitution and Article I, Section 20 of the North Carolina Constitution." At the hearing, the State argued that, based on the evidence of Grady's conviction for taking indecent liberties with a child and his prior conviction for second-degree sex offense, he met the statutory definition of being a "recidivist"—that is, a person who has a prior conviction for a reportable offense. N.C.G.S. § 14-208.6(2b). Grady conceded that he qualified as a recidivist under the statute but argued, *inter alia*, that "the imposition of the GPS monitoring device itself and the 24/7 tracking" constitute an unreasonable search and seizure under both the state and federal constitutions, and the statute subjecting him to SBM is "unconstitutional on its face, and as it applies to Mr. Grady." The trial court denied Grady's motion, finding that the SBM program is not unconstitutional. The trial court further found that Grady met the statutory definition of "recidivist" and, accordingly, ordered him to enroll in the SBM program "for the remainder of the defendant's natural life." Grady appealed the trial court's order imposing lifetime SBM to the Court of Appeals.

At the Court of Appeals, Grady argued that " 'the constant GPS monitoring (and the imposition of the GPS equipment for that purpose)' used in SBM violates his constitutional protections against unreasonable searches and seizures," *State v. Grady*, 233 N.C. App. 788, 759 S.E.2d 712, 2014 WL 1791246, at *1 (2014) (unpublished), relying on the United States Supreme Court's decision in *United States v. Jones*, 565 U.S. 400, 404 (2012) ("We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.' " (footnote omitted)). The Court of Appeals, in an unpublished opinion, determined that it was bound by the decision of a prior panel that had "considered and rejected the argument that 'if affixing a GPS to an individual's vehicle constitutes a search of the individual, then the arguably more intrusive act of affixing an ankle bracelet to an individual must constitute a search of the individual as well.' " *Grady*, 2014 WL 1791246, at *2 (quoting *State v. Jones*, 231 N.C. App. 123, 127, 750 S.E.2d 883, 886 (2013)). After this Court dismissed defendant's appeal and denied his petition for discretionary review, *State v. Grady*, 367 N.C. 523, 762 S.E.2d 460 (2014), the United States Supreme Court granted his petition for writ of certiorari, *Grady*, 135 S. Ct. at 1371.

In a per curiam opinion, the Supreme Court stated that the Court of Appeals' determination that North Carolina's "system of nonconsensual satellite-based monitoring does not entail a search within the meaning of the Fourth Amendment" is "inconsistent with [the] Court's

precedents." *Id.* at 1370; *see Jones*, 565 U.S. at 406 n.3 ("Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, . . . a search has undoubtedly occurred."); *see also Florida v. Jardines*, 569 U.S. 1, 11 (2013) (reaffirming that a search occurs "when the government gains evidence by physically intruding on constitutionally protected areas" (citing *Jones*, 565 U.S. at 409)). The Court opined that, in light of its previous decisions, "it follows that a State also conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements." *Grady*, 135 S. Ct. at 1370. The Court noted, however, that this conclusion did not end the analysis, because a search must be unreasonable in order to be unconstitutional. *Id.* at 1371. Accordingly, the Court granted defendant's petition for writ of certiorari, vacated the Court of Appeals' decision, and "remanded for further proceedings not inconsistent with this opinion." *Id.*

On 11 June 2015, this Court issued an order remanding the matter to the Court of Appeals for reconsideration in light of the decision of the United States Supreme Court. On 23 October 2015, defendant filed in the Court of Appeals a "Motion to Remand to Superior Court and to Stay the Order Imposing [SBM]." The Court of Appeals issued an order on 6 November 2015 granting defendant's motion to remand the case to superior court while denying his motion to stay SBM.

On 16 June 2016, the Superior Court in New Hanover County held a remand hearing to determine whether subjecting defendant to nonconsensual lifetime SBM constitutes a reasonable search under the Fourth Amendment. At the hearing, the State presented evidence, including: a certified copy of the judgment and commitment for defendant's prior conviction for second-degree sex offense; defendant's criminal record; printouts of N.C.G.S. §§ 14-208.5 (stating the "Purpose" of Article 27A) and 14-208.43 ("Request for termination of satellite-based monitoring requirement"); and two photographs of the equipment currently used in the program: the ExacuTrack One ankle monitor (or ET-1) and its accompanying "beacon"—a device that must be placed in the home of the individual subjected to SBM.

Grady, on the other hand, presented evidence that included statistical reports tending to show that sex offenders are less likely to reoffend than other categories of convicted felons and that the vast majority of sex offenses are committed against victims who know their offender, statistical information about individuals currently enrolled in the State's SBM program, the Policy and Procedure Manual from the Department of Community Corrections governing "Technology and

Monitoring Programs," including SBM, the ET-1's instructional "client guide" provided to monitored individuals, the Division's "Guidelines and Regulations" form that is required to be signed by monitored individuals, and an excerpt from the Division's "Train the Trainer" SBM training session.

The only witness called by the State was Scott Pace, a probation supervisor in the Division, who brought with him an ET-1 and a beacon. Officer Pace testified to the operation of the SBM equipment and to his understanding of the program. An individual enrolled in the SBM program is not permitted to remove the ET-1, which is required to be worn at all times, and it is a felony to attempt to remove or interfere with it. According to Pace, the ET-1 weighs 8.7 ounces, "about half a pound," and is "waterproof up to 15 feet," allowing the individual to shower, bathe, or swim in a pool or the ocean. Pace explained that the individual is responsible for maintaining the charge of the ET-1's lithium battery and added that "if they're moving a lot, if there's a lot of activity . . . the more battery it uses." Moreover, Pace stated that "[t]he batteries have a life span" and as the battery ages, "it won't hold a charge as long." The individual must charge the ET-1 two hours every day by plugging it into an electrical outlet, during which time the individual must remain tethered to the wall by the ET-1's fifteen foot charging cord. According to Pace, "we tell them to charge it two hours a day just so they don't lose the charge. Failure to charge the monitor, we'll lose signal, . . . and that is a violation."[4]

When the charge of the ET-1's battery runs low, Pace explained, "the unit will actually talk to you and it will say, 'low battery, go charge.' " "That message will keep repeating itself until they acknowledge" by placing a finger on a divot on the ET-1. Pace explained that officers can send other messages to individuals through the ET-1's audible message system, such as "Call your officer," and that "they're supposed to follow the message, whatever the message may be." Similarly, the ET-1 plays a repeating voice message when the signal is lost. Pace testified that "there can be issues with equipment" and the ET-1 can temporarily lose signal due to the positioning of satellites. Moreover, "[h]omes with metal roofs kind of interfere[ ] with the signal. Big buildings, such as WalMart. When they go in places such as that it could interfere with the signal." In those situations, Pace explained, individuals are "supposed to go outside and try to gain signal back" and to acknowledge the alert by pressing the divot on the ET-1.

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4. This instruction is reflected in the Division's "Train the Trainer" materials introduced into evidence by defendant, which states: "Charge for 2 hours per day."

Individuals subjected to SBM must also submit to quarterly equipment checks at their homes. Pace stated that every three months, Division officers go to the individual's house to "make sure that the equipment has not been tampered with . . . and that it's in correct working order." Pace testified that while an individual could technically refuse entry into the home, "[w]e prefer to go in the house" in order "to see where the beacon is at, because it has to be situated a certain way." Additionally, the Division's "Guidelines and Regulations," which the individual is required to sign upon enrollment, provide: "I understand a unit in the home will be assigned to me and it will be necessary for a designated representative of SCC to enter my residence or other location(s) where I may temporarily reside to install, retrieve, or periodically inspect the unit."

Pace testified that the "mapping function" allows him to retrieve historical location information "up to I think it's six months, and after six months we can call [the equipment provider], and back further than that they keep them, and they can send them to us via email." The mapping function also allows officers to observe monitored individuals in real time. As Pace testified, "For SBM cases, yes, it's 24-7, it's live, current location." Regarding the accuracy of the location information, Pace stated: "In my experience, it's been pretty accurate. I mean, people that's taken it off, I've gone right to the locations and retrieved units that people's taken off and discarded on streets, trash cans, in the woods. I mean, it's taken me right there to it, you know."

After receiving the evidence and considering the oral and written arguments of the parties, the superior court entered an order on 26 August 2016 upholding the imposition of lifetime SBM on defendant. The court summarized the evidence at length. Among other things, the trial court noted:

> The ankle monitor does not monitor or reveal the activities of the offender—it merely monitors his location. The device does not confine the person to their residence or any other specific location. The ankle monitor and related equipment requires a quarterly (three months) review/inspection by the State to ensure that the device is in proper working order.
>
> In addition to Officer Pace's testimony, the State also entered into evidence photographs of the SBM equipment, certified copies of the judgments for the two sex offenses, the defendant's criminal history, and statutory provisions of Part 5 of Article 27A of Chapter 14 of N.C.G.S. ("Sex

> Offender Monitoring"). In both his cross examination of the State's witness Officer Pace and in his case-in-chief, the defendant admitted into evidence, among other exhibits, multiple studies of recidivism rates of sex offenders versus other criminals; the State's policy, procedures and rules governing SBM, and additional photographs of the SBM equipment.

The court ultimately concluded[5] that

> based on the totality of the circumstances analysis, . . . satellite based monitoring of the defendant is a reasonable search.
>
> The Court has considered defendant's argument that the satellite based monitoring statute is facially unconstitutional. The Court rejects this argument and finds that the statute is constitutional on its face.

Accordingly, the trial court ordered defendant to enroll in SBM "for the remainder of [his] natural life." Defendant appealed the trial court's order to the Court of Appeals.

At the Court of Appeals, defendant argued that the State failed to establish that the imposition of lifetime SBM is a reasonable search. *Grady*, 817 S.E.2d at 22. In a divided opinion filed on 15 May 2018, the Court of Appeals reversed the trial court's SBM order. *Id.* at 28. The Court of Appeals majority noted that the imposition of SBM intruded upon defendant's Fourth Amendment interests by the physical attachment of the ankle monitor to his body, "a constitutionally protected area," and through the monitor's continuous GPS tracking. *Id.* at 25 (quoting *Jones*, 565 U.S. at [407] n.3). The majority determined that the physical intrusion caused by the permanent attachment of the ankle monitor, along with its audible voice messages and the necessity of charging it for two hours daily, was "more inconvenient than intrusive, in light of defendant's

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5. To determine the appropriate legal test of reasonableness under the Fourth Amendment, the trial court relied on two cases from other jurisdictions, *People v. Hallak*, 310 Mich. App. 555, 873 N.W.2d 811 (2015), *rev'd in part and remanded*, 499 Mich. 879, 876 N.W.2d 523 (2016) (per curiam order), and *Belleau v. Wall*, 811 F.3d 929 (7th Cir. 2016). To assess North Carolina's interest in preventing recidivism, the trial court relied on *Smith v. Doe*, 538 U.S. 84, 103 (2003) ("The risk of recidivism posed by sex offenders is 'frightening and high.' " (quoting *McKune v. Lile*, 536 U.S. 23, 34 (2002) (plurality opinion)), and *McKune*, 536 U.S. at 32–33 ("Sex offenders are a serious threat in this Nation. . . . When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.")).

diminished expectation of privacy as a convicted sex offender." *Id.* On the other hand, the majority stated that the continuous GPS tracking was "uniquely intrusive." *Id.* (quoting *Belleau v. Wall*, 811 F.3d 929, 940 (7th Cir. 2016) (Flaum, J., concurring)). The majority acknowledged the State's compelling interest in protecting the public from sex offenders but determined that "the State failed to present any evidence of [SBM's] efficacy in furtherance of the State's undeniably legitimate interests." *Id.* at 27. Accordingly, the majority concluded that although, based solely on his status as a sex offender, "defendant's expectation of privacy is appreciably diminished as compared to law-abiding citizens," the State failed to establish "that lifetime SBM of defendant is a reasonable search under the Fourth Amendment." *Id.* at 28.

In a separate opinion, one member of the panel dissented from the majority's conclusion that lifetime SBM of defendant is unreasonable and thus would have affirmed the trial court's order. *Id.* (Bryant, J., dissenting). Believing that "the majority asks the State to meet a burden of proof greater than our General Assembly envisioned as necessary and greater than Fourth Amendment jurisprudence requires," *id.*, the dissenting judge concluded that under the totality of the circumstances, "the degree to which SBM participation promotes legitimate governmental interests—the prevention of criminal conduct or the apprehension of defendant should he reoffend," outweighed "the degree to which participation in the SBM program intrudes upon defendant's privacy." *Id.* at 31.

On 19 June 2018, the State filed a notice of appeal as of right based on the dissenting opinion in the Court of Appeals pursuant to N.C.G.S. § 7A-30(2).

Standard of Review

In reviewing a trial court order, "we are 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, . . . and whether those factual findings in turn support the judge's ultimate conclusions of law.' " *State v. Williams*, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). We review decisions of the Court of Appeals for errors of law. *State v. Romano*, 369 N.C. 678, 685, 800 S.E.2d 644, 649 (2017) (citing *State v. Brooks*, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994)).

"Whether a statute is constitutional is a question of law that this Court reviews de novo." *Id.* at 685, 800 S.E.2d at 649. "In exercising de novo review, we presume that laws enacted by the General Assembly

are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond [a] reasonable doubt." *Cooper v. Berger*, 370 N.C. 392, 413, 809 S.E.2d 98, 111 (2018) (quoting *State ex rel. McCrory v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016)). "The presumption of constitutionality is not, however, and should not be, conclusive." *Moore v. Knightdale Bd. of Elections*, 331 N.C. 1, 4, 413 S.E.2d 541, 543 (1992).

Analysis

Defendant argues that North Carolina's SBM program effects an unreasonable search and is unconstitutional both on its face and as applied to him under the Fourth Amendment to the United States Constitution. In light of our analysis of the program and the applicable law, we conclude that the State's SBM program is unconstitutional in its application to all individuals in the same category as defendant—specifically, individuals who are subject to mandatory lifetime SBM based solely on their status as a statutorily defined "recidivist"[6] who have completed their prison sentences and are no longer supervised by the State through probation, parole, or post-release supervision. We decline to address the application of SBM beyond this class of individuals.

"A facial challenge is an attack on a statute itself as opposed to a particular application." *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2449 (2015); *see also id.* (explaining that facial challenges to "statutes authorizing warrantless searches" can be brought under the Fourth Amendment). A party making a facial challenge "must establish that a 'law is unconstitutional in all of its applications.' " *Id.* at 2451 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)). In contrast, "the determination whether a statute is unconstitutional as applied is strongly influenced by the facts in a particular case." *State v. Packingham*, 368 N.C. 380, 393, 777 S.E.2d 738, 749 (2015), *rev'd and remanded*, 137 S. Ct. 1730 (2017). This case was remanded by the

6. We stress that our holding applies to individuals who, like defendant, are subjected to mandatory lifetime SBM based *solely* on a finding that they meet the statutory definition of a "recidivist." We do not address the constitutionality of the SBM program as applied to the other subcategories of offenders to which mandatory lifetime SBM applies, even if they may also qualify as a recidivist. *See* N.C.G.S. §§ 14-208.40A(c), -208.40B(c) (stating that an offender who is classified as a sexually violent predator, convicted of an aggravated offense, or is an adult convicted of statutory rape of a child or statutory sex offense with a victim under the age of thirteen must submit to SBM for life). In other words, contrary to the assertions by the dissent, if, for example, an offender is determined to be both a sexually violent predator and a recidivist (unlike Mr. Grady), our holding in this case does not address the constitutionality of an order requiring that offender to enroll in the SBM program for life on the grounds of being a sexually violent predator.

United States Supreme Court with instructions to "examine whether the State's monitoring program is reasonable." *Grady*, 135 S. Ct. at 1371. While this directive could be interpreted as instructing us to address the facial constitutionality of the State's SBM program in its entirety, we address instead the constitutionality of the SBM program as applied to the narrower category of recidivists to which defendant belongs. *See Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 472, 206 S.E.2d 141, 145 (1974) ("[W]hen asked to determine the constitutionality of a statute, the Court will do so only to the extent necessary to determine that controversy. It will not undertake to pass upon the validity of the statute as it may be applied to factual situations materially different from that before it." (citations omitted)).

The "basic purpose" of the Fourth Amendment "is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Mun. Court*, 387 U.S. 523, 528 (1967); *see Schmerber v. California*, 384 U.S. 757, 767 (1966) ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."); *see also Riley v. California*, 134 S. Ct. 2473, 2494 (2014) ("[T]he Fourth Amendment was the founding generation's response to the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity."). In reviewing the constitutionality of a search, "the ultimate measure . . . is 'reasonableness,' " which " ' "is judged by balancing [the search's] intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." ' "[7] *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652–53 (1995) (quoting *Skinner v. Ry. Labor Execs.' Ass'n.*, 489 U.S. 602, 619 (1989)).

The Supreme Court has explained that "[w]here a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, . . . reasonableness generally requires the obtaining of a judicial warrant" supported by a showing of probable cause.[8] *Id.* at

7. In the interest of brevity and clarity, additional references to this quotation will eliminate parenthetical information and internal quotation marks.

8. A judicial warrant serves to "assure[ ] the citizen that the intrusion is authorized by law, and that it is narrowly limited in its objectives and scope" and "also provides the detached scrutiny of a neutral magistrate, and thus ensures an objective determination whether an intrusion is justified in any given case." *Skinner*, 489 U.S. at 622 (citations omitted); *see also Katz v. United States*, 389 U.S. 347, 357 (1967) (explaining that "the Constitution requires 'that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police' " (alteration in original) (quoting *Wong Sun v. United State*s, 371 U.S. 471, 481–82 (1963))).

653 (citing *Skinner*, 489 U.S. at 619); *see Camara*, 387 U.S. at 528–29 ("[O]ne governing principle . . . has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." (citations omitted)). Therefore, we start with the "basic Fourth Amendment principle" that warrantless searches are presumptively unreasonable. *United States v. Karo*, 468 U.S. 705, 714–15 (1984).

Nonetheless, "there are exceptions to the warrant requirement. When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable." *Illinois v. McArthur*, 531 U.S. 326, 330 (2001) (citations omitted). Exceptions to the warrant requirement "are 'jealously and carefully drawn,' " and the "burden is on those seeking the exemption to show the need for it." *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) (first quoting *Jones v. United States*, 357 U.S. 493, 499 (1958); then quoting *United States v. Jeffers*, 342 U.S. 48, 51 (1951)).

Additionally, in the absence of a warrant, "the Court has preferred 'some quantum of individualized suspicion . . . [as] a prerequisite to a constitutional search or seizure.' " *Maryland v. King*, 569 U.S. 435, 447 (2013) (alterations in original) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976)); *see also Chandler v. Miller*, 520 U.S. 305, 313 (1997) ("To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing." (citing *Vernonia*, 515 U.S. at 652–53)). Yet individualized suspicion is not required in every case, because "[t]he touchstone of the Fourth Amendment is reasonableness, not individualized suspicion." *Samson v. California*, 547 U.S. 843, 855 n.4 (2006); *see also King*, 569 U.S. at 447 ("[T]he Fourth Amendment imposes no irreducible requirement of [individualized] suspicion." (quoting *Martinez-Fuerte*, 428 U.S. at 561)).

Here the State contends that the SBM program falls within a category of "special needs" searches, described in some cases as another exception to the requirement of an individualized warrant.[9] The Supreme

9. Defendant asserts, and the Court of Appeals below agreed, that the State waived its special needs argument by failing to raise this issue in the trial court. Given that the Supreme Court in its remand order cited to *Vernonia*, a special needs case that was cited by the State in the trial court, and given the significant role that this issue often plays in the totality-of-the-circumstances analysis, we will address this issue on the merits as part of the reasonableness inquiry. We note that the balancing test articulated in *Vernonia*, 515 U.S. at 652–53 ("[W]hether a particular search meets the reasonableness standard " 'is

Court has recognized that programmatic searches performed in the absence of a warrant or individualized suspicion may be permissible "in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *O'Connor v. Ortega*, 480 U.S. 709, 720 (1987) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment)).[10] "When such 'special needs'—concerns other than crime detection—are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Chandler*, 520 U.S. at 314 (first citing *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665–66 (1989); then citing *Skinner*, 489 U.S. at 668).

Although the State asserts, somewhat ambiguously, that SBM is "in full accord with the analysis applicable to special needs searches," the State never actually identifies[11] any special need "beyond the normal need for law enforcement." *Griffin v. Wisconsin*, 483 U.S. 868, 873

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judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." ' " (quoting *Skinner*, 489 U.S. at 619)), is not unique to special needs cases, but rather is the same general Fourth Amendment balancing test that weighs " 'the promotion of legitimate governmental interests' against 'the degree to which [the search] intrudes upon an individual's privacy,' " *King*, 569 U.S. at 448 (alteration in original) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)), or, as the Supreme Court phrased the test in its per curiam decision, the "nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations," *Grady*, 135 S. Ct. at 1371.

10. For example, the Court has recognized special needs in the context of a State's supervision of probationers by probation officers, "a situation in which there is an ongoing supervisory relationship—and one that is not, or at least not entirely, adversarial—between the object of the search and the decisionmaker." *Griffin v. Wisconsin*, 483 U.S. 868, 879 (1987); *see also*, *e.g.*, *Vernonia*, 515 U.S. at 653–54 (recognizing " 'special needs' to exist in the public school context" in which "children . . . have been committed to the temporary custody of the State as schoolmaster"); *cf. City of Indianapolis v. Edmond*, 531 U.S. 32, 44 n.1 (2000) (not recognizing any special need in the state's vehicular narcotics checkpoints because the "primary purpose . . . is to advance the general interest in crime control").

11. The State asserts that a special need must only go "beyond the regular law enforcement duty" and argues that the dangerousness of sex offenders gives rise to a special need just as the dangerousness of impaired drivers gave rise to a special need justifying the sobriety checkpoints in *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990). In *Sitz* the Court did not find any special need; instead, it concluded that prior decisions involving checkpoints required addressing reasonableness under general balancing principles. *See id.* at 450 (rejecting the respondents' argument based on *Von Raab* "that there must be a showing of some special governmental need 'beyond the normal need' for criminal law enforcement before a balancing analysis is appropriate" and stating that

(1987) (quoting *T.L.O.*, 469 U.S. at 351). Because defendant is not on probation or supervised release, but rather is unsupervised, this is not a situation, as in *Griffin*, in which there is any "ongoing supervisory relationship" between defendant and the State. *Id.* at 879; *see also id.* at 875 (stating that "[probation] restrictions are meant to assure that the probation serves as a period of genuine rehabilitation"). Nor is there any indication in the record that the "primary purpose" of SBM is anything other than to "advance the general interest in crime control." *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 n.1 (2000).

On the contrary, as Officer Pace testified and as the State repeatedly made clear in its brief[12] and at oral arguments,[13] the primary purpose of SBM is to solve crimes. This intent is also reflected in the SBM program's enabling legislation, *see* N.C.G.S. § 14-208.40(d) (providing that the SBM program is designed to "monitor subject offenders and correlate their movements to reported crime incidents"); *see also id.* § 14-208.5 (2017) (providing that the purpose of the Article is to assist "law enforcement officers' efforts to protect communities, conduct investigations, and quickly apprehend offenders"), as well as the statutory definition of "satellite-based monitoring" in the Criminal Procedure

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Von Raab "was in no way designed to repudiate our prior cases dealing with police stops of motorists on public highways," "which utilized a balancing analysis" (citations omitted)). Other checkpoint cases that implicate special governmental needs are based on either controlling illegal immigration near the border or regulating highway safety. *See Edmond*, 531 U.S. at 41 ("We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing. . . . [E]ach of the checkpoint programs that we have approved was designed primarily to serve purposes closely related to the problems of policing the border or the necessity of ensuring roadway safety.").

12. The State explained in its brief: "While the [ankle monitor] cannot itself physically prevent a crime, it is a useful investigative tool for law enforcement in *solving crimes and excluding monitored offenders as suspects*"; SBM "*speed[s] up apprehension of criminals* before they commit additional crimes"; "[t]his case presents one of those circumstances where the government's *need to detect or deter criminal violations* is sufficiently compelling to justify the search authorized by the [SBM] program for convicted sex offenders"; "[w]hile deterrence may be difficult to demonstrate, a more easily understood use of the location information gained from this search is *speed in 'apprehension of criminals before they commit additional crimes*' "; and SBM has " 'the potential to significantly improve both the criminal justice system and police investigative practices' by *quickly identifying those who are or may be guilty and quickly eliminating those who are not*." (Emphases added.) (Citations omitted.)

13. The State, when asked a direct question at oral argument ("Just so I look at this correctly, what does the State contend the *specific purpose* of this program is?"), responded: "The *specific purpose* of this program is to allow law enforcement to be able to *investigate and quickly apprehend sex offenders* to protect the public from sex offenders."

Act, *see id.* § 15A-101.1(3a) (defining SBM as "monitoring with [a] . . . device . . . that timely records and reports or records the person's presence near or within a crime scene or prohibited area or the person's departure from a specified geographic location, and that has incorporated into the software the ability to automatically compare crime scene data with locations of all persons being electronically monitored so as to provide any correlation daily or in real time"). Because the State has not proffered any "concerns other than crime detection," *Chandler*, 520 U.S. at 314, the "special needs" doctrine is not applicable here. *Cf. Park v. State*, 305 Ga. 348, 356, 825 S.E.2d 147, 155 (2019) (holding that Georgia's SBM program is not "divorced from the State's general interest in law enforcement" and therefore does not come within the scope of the special needs exception).

We cannot agree with defendant, however, that this determination is dispositive of the reasonableness inquiry. On the contrary, the Supreme Court instructed us that "[t]he reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady*, 135 S. Ct. at 1371. Therefore, we must consider whether the warrantless, suspicionless search here is reasonable when "its intrusion on the individual's Fourth Amendment interests" is balanced "against its promotion of legitimate governmental interests." *Vernonia*, 515 U.S. at 652–53.

I. Intrusion Upon Reasonable Privacy Expectations

A. Nature of the Privacy Interest

In addressing the search's "intrusion on the individual's Fourth Amendment interests," "[t]he first factor to be considered is the nature of the privacy interest upon which the search here at issue intrudes," or, in other words, "the scope of the legitimate expectation of privacy at issue." *Id.* at 652–54, 658. Notably, "[t]he Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as 'legitimate,' " which "varies . . . with context, . . . depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park." *Id.* at 654 (quoting *T.L.O.*, 469 U.S. at 338 (majority opinion)). The SBM program implicates a number of constitutionally-recognized privacy concerns.

First, the SBM program, which requires "attach[ing] a device to a person's body, without consent," *Grady*, 135 S. Ct. at 1370, and which prohibits the removal of that device, implicates defendant's Fourth

Amendment interest in "be[ing] secure in [his] person." U.S. Const. amend. IV. The Supreme Court specifically noted that the SBM program "is plainly designed to obtain information. And since it does so by physically intruding on a subject's body, it effects a Fourth Amendment search." *Grady*, 135 S. Ct. at 1371. Additionally, the equipment checks performed by government officers every three months, during which defendant must allow them entrance into his home, implicate his "right . . . to be secure in [his] . . . house[ ]." U.S. Const. amend. IV; *see Silverman v. United States*, 365 U.S. 505, 511 (1961) (stating that "[a]t the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." (first citing *Entick v. Carrington*, 19 Howell's State Trials 1029, 1066 (1765); then citing *Boyd v. United States*, 116 U.S. 616, 626–30 (1886)). Finally, the search's GPS location monitoring implicates an expectation of privacy recently addressed by the Supreme Court in *Carpenter v. United States*—defendant's "expectation of privacy in his physical location and movements." 138 S. Ct. 2206, 2215 (2018).

The Court in *Carpenter*, after analyzing two lines of cases stemming from *United States v. Knotts*, 460 U.S. 276 (1983), and *United States v. Jones*, 565 U.S. 400 (2012), concluded that "when the Government accessed CSLI [cell-site location information] from the [petitioner's] wireless carriers, it invaded [the petitioner's] reasonable expectation of privacy in the whole of his physical movements" and thereby conducted a search. *Carpenter*, 138 S. Ct. at 2219. The Court explained:

> A person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, "what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz*, 389 U.S., at 351–352. . . .
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> . . . Mapping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts. As with GPS information, the time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his "familial, political, professional, religious, and sexual associations." [*Jones*, 565 U.S.] at 415 (opinion of SOTOMAYOR, J.). These location records "hold for many Americans the 'privacies of life.' " *Riley*, 134 S. Ct., at 2494–2495 (quoting *Boyd*, 116 U.S., at 630). And like GPS monitoring, cell phone tracking is remarkably easy, cheap, and efficient compared to traditional

> investigative tools. With just the click of a button, the Government can access each carrier's deep repository of historical location information at practically no expense.
>
> In fact, historical cell-site records present even greater privacy concerns than the GPS monitoring of a vehicle we considered in *Jones*. Unlike the bugged container in *Knotts* or the car in *Jones*, a cell phone—almost a "feature of human anatomy," *Riley*, 134 S. Ct., at 2484—tracks nearly exactly the movements of its owner. While individuals regularly leave their vehicles, they compulsively carry cell phones with them all the time. A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor's offices, political headquarters, and other potentially revealing locales. Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user.

Id. at 2217–18 (first alteration in original) (citations omitted).

The SBM program "present[s] even greater privacy concerns than the" CSLI considered in *Carpenter*. *Id.* at 2218. While a cell phone tracks more closely the movements of its owner than the bugged container in *Knotts* or the car in *Jones* because it is "almost a 'feature of human anatomy,' " *id.*, the ankle monitor becomes, in essence, a feature of human anatomy, *see id.* ("[W]hen the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user."). Thus, SBM does not, as the trial court concluded, "merely monitor[ ] [defendant's] location"; instead, it "gives police access to a category of information otherwise unknowable," *id.*, by "provid[ing] an all-encompassing record of the holder's whereabouts," and "an intimate window into [defendant's] life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations,' " *id.* at 2217 (quoting *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)); *id.* ("These location records 'hold for many Americans the "privacies of life." ' " (quoting *Riley*, 134 S. Ct. at 2494–95)). As the Court of Appeals majority stated, the SBM program's "continuous warrantless search of defendant's location" is "uniquely intrusive." *Grady*, 817 S.E.2d at 25 (majority opinion) (quoting *Belleau*, 811 F.3d at 940).

The State disputes the legitimacy of defendant's expectations of privacy, contending that defendant's legitimate expectations of privacy

are diminished due to his status as a convicted sex offender.[14] Even if, as the State contends, defendant's expectations of privacy, in comparison to those of the public at large, are "greatly diminished," even "drastically reduced," "by virtue of the various conditions imposed by the sex offender registry, including the ongoing collection of otherwise private information made available to law enforcement and the public at large," defendant's expectations of privacy are not completely eliminated. Moreover, the State has vastly overstated the extent to which defendant's expectation of privacy is diminished by the requirement that he participate in the sex offender registry. When registering with the sex offender registry, an individual must give the sheriff certain information, including, in pertinent part: the person's full name, any aliases, date of birth, sex, race, height, weight, eye color, hair color, driver's license number, home address, the type of offense for which the person was convicted, the date of conviction, the sentence imposed, a current photograph taken by the sheriff at the time of registration, the person's fingerprints taken by the sheriff at the time of registration, and any online identifier that the person uses or intends to use. N.C.G.S. § 14-208.7(b) (2017). Most of this information becomes public record and is part of the registry that is maintained by the Department of Public Safety and made available for public inspection on the Internet. *Id.* § 14-208.10 (2017). Before changing their addresses, individuals required to register also must report in person and give written notice to the sheriff; the

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14. The Supreme Court has found certain types of individuals to have *diminished* expectations of privacy, including individuals arrested for serious offenses, *see King*, 569 U.S. at 462 ("The expectations of privacy of an individual taken into police custody 'necessarily [are] of a diminished scope.' " (alteration in original) (quoting *Bell v. Wolfish*, 441 U.S. 520, 557 (1979))), probationers and parolees, *see, e.g.*, *Griffin*, 483 U.S. at 874 (explaining that "[p]robation is simply one point (or, more accurately, one set of points) on a continuum of possible punishments" and probationers "do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions' " (second and third alterations in original) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972))); *see also Samson*, 547 U.S. at 850 ("On this continuum, parolees have fewer expectations of privacy than probationers, because parole is more akin to imprisonment than probation is to imprisonment."), railroad employees based upon their voluntary participation in an industry with a history of extensive regulation, *Skinner*, 489 U.S. at 627 (stating that "the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively"), and high school athletes based upon both "the schools' custodial and tutelary responsibility for children," *Vernonia*, 515 U.S. at 656, and the students' voluntary participation in school sports, *id.* at 657 (stating that "[s]chool sports are not for the bashful" and "there is 'an element of "communal undress" inherent in athletic participation' " (quoting *Schaill v. Tippecanoe Cty. Sch. Corp.*, 864 F.2d 1309, 1318 (7th Cir. 1988)), amended by *Schaill*, 864 F.2d 1309 (1989)). The Supreme Court has never reached such a conclusion with respect to individuals convicted of committing sex crimes who are not subject to ongoing governmental supervision.

same in-person reporting requirements apply to registrants who intend to move to another state, change their academic status, change their employment status (if obtaining or terminating employment at an institution of higher education), change or add an online identifier, or change their name. *Id.* § 14-208.9 (2017). Additionally, an offender is subject to criminal penalties for failure to comply with the registration requirements. *Id.* § 14-208.11 (2017).

None of the conditions imposed by the registry implicate an individual's Fourth Amendment "right . . . to be secure in [his] person[ ]" or his expectation of privacy "in the whole of his physical movements," *Carpenter*, 138 S. Ct. at 2219. We recognize that an individual required to register has a diminished expectation of privacy with respect to the information and other materials provided to the sheriff and made available to the public online, but we cannot agree with the State that these statutory requirements "greatly diminish[ ]" that individual's expectation of privacy in every context.[15] Even if defendant has no reasonable expectation of privacy concerning where he lives because he is required to register as a sex offender, he does not thereby forfeit his expectation of privacy in all other aspects of his daily life. This is especially true with respect to unsupervised individuals like defendant who, unlike probationers and parolees, are not on the "continuum of possible [criminal] punishments" and have no ongoing relationship with the State. *Griffin*, 483 U.S. at 874; *see also Packingham*, 137 S. Ct. at 1737 (holding unconstitutional a state statute that prohibited sex offenders from accessing social networking websites and noting the "troubling fact that the law imposes severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system"). The State does not explain how defendant's provision of limited information concerning his address, employment, and appearance, in addition to his photograph and fingerprints, as part of a "civil, regulatory scheme" meaningfully reduces his expectation of privacy in his body and in his every movement every day for the rest of his life. *See*, *e.g.*, *Park*, 305 Ga. at 355, 825 S.E.2d at 154 (holding that there is no reduced expectation of privacy by virtue of participation in a sex offender registry because "[w]hile the registration requirements . . . reveal information such as the convicted sex offender's address and restrict certain areas where the offender may be legally present . . . this has nothing to do with State officials *searching* that individual

15. The same is true of other limitations to which our dissenting colleagues direct our attention, including the exclusion of sex offenders from certain occupations and certain locations, such as schools.

by attaching a device to his body and constantly tracking that person's movements in order to look for evidence of a crime without a warrant").

The State also argues, relying on *Bowditch*, that defendant's expectations of privacy are diminished due to his status as a convicted felon. *See Bowditch*, 364 N.C. at 349–50, 700 S.E.2d at 11 ("[I]t is beyond dispute that convicted felons do not enjoy the same measure of constitutional protections, including the expectation of privacy under the Fourth Amendment, as do citizens who have not been convicted of a felony." (citations omitted)). However, this reads too much into *Bowditch*'s limited assessment of Fourth Amendment protections. The Court in *Bowditch* rejected the defendants' challenges to the SBM program under the ex post facto clauses of our state and federal constitutions, concluding that the legislature established North Carolina's SBM program not as a punishment but as a civil, regulatory scheme. *Id.* at 351–52, 700 S.E.2d at 12–13. In support of this contention, Mr. Bowditch argued that the SBM program was punitive because it required people to waive their Fourth Amendment rights with respect to their homes by granting Division of Community Corrections personnel regular access to their residences for equipment maintenance. *Id.* at 363–64, 700 S.E.2d at 19–20 (Hudson, J., dissenting) (in-home equipment maintenance requirement "is a clear infringement on their Fourth Amendment rights"). In response, the majority concluded that "felons convicted of multiple counts of indecent liberties with children are not visited by DCC personnel for random searches, but simply to ensure the SBM system is working properly." *Id.* at 350, 700 S.E.2d at 11 (majority opinion). *Bowditch* did not address the defendants' expectations of privacy with respect to the physical search of their person or their expectations of privacy in their location and movements.

Moreover, the cases relied upon in *Bowditch* to support the general proposition that persons convicted of felonies forfeit certain constitutional protections either deal exclusively with prisoners and probationers, do not hold that a conviction creates a diminished expectation of privacy, or do not address privacy rights at all. *See Griffin*, 483 U.S. at 880 (upholding certain limited warrantless searches of individuals' homes during their probation); *Velasquez v. Woods*, 329 F.3d 420 (5th Cir. 2003) (per curiam) (rights of inmates serving prison sentences); *Russell v. Gregoire*, 124 F.3d 1079, 1093–94 (9th Cir. 1997) (stating that an analysis of privacy rights does not assume a diminished expectation of privacy simply because the individual was previously convicted of a crime), *cert. denied*, 523 U.S. 1007 (1998); *Jones v. Murray*, 962 F.2d 302, 310–11 (4th Cir.) (holding that Virginia's DNA data bank program, requiring inmates to involuntarily provide a blood sample before their release, is a

reasonable search under the Fourth Amendment because inmates have a "questionable claim of privacy to protect" their identity and because the intrusion is "minimal"), *cert. denied*, 506 U.S. 977 (1992); *Standley v. Town of Woodfin*, 362 N.C. 328, 661 S.E.2d 728 (2008) (does not address privacy rights); *State v. Bryant*, 359 N.C. 554, 614 S.E.2d 479 (2005) (does not involve privacy rights).

Contrary to the State's argument, there is no precedent for the proposition that persons such as defendant, who have served their sentences and whose legal rights have been restored to them (with the exception of the right to possess firearms, *see* N.C.G.S. § 13-1 (2017)), nevertheless have a diminished expectation of privacy in their persons and in their physical locations at any and all times of the day or night for the rest of their lives. Indeed, courts that have examined this question in the Fourth Amendment context have reached a contrary conclusion. *See Friedman v. Boucher*, 580 F.3d 847, 858 (9th Cir. 2009) (Nonconsensual DNA collection was an unreasonable search under the Fourth Amendment; no diminished expectation of privacy exists because "Friedman was not on parole. He had completed his term of supervised release successfully and was no longer the supervision of [sic] any authority."); *Trask v. Franco*, 446 F.3d 1036, 1043–44 (10th Cir. 2006) (holding that the plaintiff "enjoyed the full protection of the Fourth Amendment" because her probation had been discharged); *Moore v. Vega*, 371 F.3d 110, 116 (2d Cir. 2004) (stating that while parolees have diminished liberty interests, "[b]ecause plaintiff is not a parolee, she cannot be subjected to the same burdens upon her privacy"); *Doe v. Prosecutor*, 566 F. Supp. 2d 862, 883 (S.D. Ind. 2008) (declining to find a diminished expectation of privacy based upon a sex crime conviction, opining that "[a] person's status as a felon who is no longer under any form of punitive supervision therefore does not permit the government to search his home and belongings without a warrant"); *see also Park*, 305 Ga. at 354, 825 S.E.2d at 153 ("It cannot be said that an individual who has completed the entirety of his or her criminal sentence, including his or her parole and/or probation requirements, would have the same diminished privacy expectations as an individual who is *still* serving his or her sentence."); *State v. Ross*, 423 S.C. 504, 511–12, 815 S.E.2d 754, 757 (2018) (holding that lifetime SBM for a defendant not on probation and "no longer under the jurisdiction of the sentencing court" involves a different Fourth Amendment analysis than that applicable to a defendant who was on probation); *cf. Commonwealth v. Feliz*, 481 Mass. 689, 691, 119 N.E.3d 700, 704 (2019) (holding that Massachusetts's SBM program, as applied to the particular defendant, a probationer, was an unconstitutional search under Article 14 of the Massachusetts Declaration of Rights).

While a person's status as a convicted sex offender may affect the extent to which the State can infringe upon fundamental rights, "the fact of 'diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely.' " *Carpenter*, 138 S. Ct. at 2219 (quoting *Riley*, 134 S. Ct. at 2488). A person may have a lessened interest in the privacy of his address because he has already made that information public, or a lessened interest in the privacy of matters material to his voluntary participation in a certain activity, *e.g.*, *Vernonia*, 515 U.S. at 657 (discussing voluntary participation in school athletics), but having served his sentence, paid his debt to society, and had his rights restored, his expectation of privacy is not automatically and forever "significantly diminished" under the Fourth Amendment for all purposes. Instead, except as reduced for possessing firearms and by providing certain specific information and materials to the sex offender registry, defendant's constitutional privacy rights, including his Fourth Amendment expectations of privacy, have been restored.

B. Character of the Intrusion Complained of

"Having considered the scope of the legitimate expectation of privacy at issue here, we turn next to the character of the intrusion that is complained of," which contemplates the "degree" of and "manner" in which the search intrudes upon legitimate expectations of privacy. *Id.* at 658. In that regard, we note first that the trial court is required to order lifetime SBM, without any individual assessment of the offender or his offense characteristics, for individuals in the same category as defendant—that is, any unsupervised individual who meets the statutory definition of a "recidivist."

According to the State, "the duration of these searches *may be limited* since offenders ordered to enroll for life may petition to be removed after only one year." (Emphasis added.) (Citing N.C.G.S. § 14-208.43.) Yet this "[r]equest for termination" process does little to remedy what is absent at the front end of this warrantless search—that is, "the detached scrutiny of a" judicial officer "ensur[ing] an objective determination whether an intrusion is justified in any given case." *Skinner*, 489 U.S. at 622 (citation omitted). The termination requests are directed not to a judicial officer but the Post-Release Supervision and Parole Commission, which is furnished no meaningful criteria[16] for evaluating

16. As stated above, the Commission may only consider termination of SBM "[i]f it is determined that the person has not received any additional reportable convictions during the period of satellite-based monitoring and the person has substantially complied with the provisions of this Article ["Sex Offender and Public Protection Registration Programs"]." N.C.G.S. § 14-208.43(c).

these requests other than the vague direction that "the Commission may terminate the monitoring requirement if the Commission finds that the person is *not likely to pose a threat to the safety of others*." N.C.G.S. § 14-208.43(c) (2017) (emphasis added). Given that defendant has been statutorily deemed to pose such a threat to the safety of others that he must maintain lifetime registration with the statewide registry, *id.* § 14-208.23, and is prohibited for the remainder of his life from being "[o]n the premises of any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds," *id.* § 14-208.18(a)(1) (2017), and from being "[o]n the State Fairgrounds during the period of time each year that the State Fair is conducted," *id.* § 14-208.18(a)(4) (2017), it would appear that few, if any, sex offenders are ever likely to satisfy that requirement. Indeed, this incongruity bears out in practice, as from the years 2010 through 2015, the Commission received sixteen requests for termination by individuals subjected to lifetime SBM and denied all of them.

The lack of judicial discretion in ordering the imposition of SBM on any particular individual and the absence of judicial review of the continued need for SBM is contrary to the general understanding that judicial oversight of searches and seizures, in the form of a warrant requirement, is an important check on police power. Indeed, the South Carolina Supreme Court has held that electronic monitoring under their state law " 'must be ordered by the court' only after the court finds electronic monitoring would not be an unreasonable search based on the totality of the circumstances presented in an individual case." *Ross*, 423 S.C. at 515, 815 S.E.2d at 759. Similarly, that Court also held that it was unconstitutional to impose lifetime satellite monitoring with no opportunity for judicial review, stating: "The complete absence of any opportunity for judicial review to assess a risk of re-offending, . . . is arbitrary and cannot be deemed rationally related to the legislature's stated purpose of protecting the public from those with a high risk of re-offending." *State v. Dykes*, 403 S.C. 499, 508, 744 S.E.2d 505, 510 (2013) (citations omitted), *cert. denied*, 572 U.S. 1089 (2014). Thus, the fact that North Carolina's mandatory SBM program involves no meaningful judicial role is important in the analysis of the constitutionality of the program.

Mr. Grady, of course, must not only wear the half-pound ankle monitor at all times and respond to any of its repeating voice messages, but he also must spend two hours of every day plugged into a wall charging the ankle monitor. We cannot agree with the Court of Appeals that these

physical restrictions,[17] which require defendant to be tethered to a wall for what amounts to one month out of every year, are "more inconvenient than intrusive." *Grady*, 817 S.E.2d at 25; *see T.L.O.*, 469 U.S. at 337 ("[E]ven a limited search of the person is a substantial invasion of privacy." (citing *Terry v. Ohio*, 392 U.S. 1, 24–25 (1967)).

Nor can we agree with the State that "[t]he physical intrusion here is minimal." The State, in reliance upon *Maryland v. King*, asserts: "Just as DNA swabbing is not a significant intrusion beyond that associated with fingerprinting, so too SBM is not a significant intrusion beyond that associated with sex offender registration." In *King* the Court determined that, in comparison to the intrusions that accompanied valid arrests, including booking, photographing, fingerprinting, and a search of "the person and the property in his immediate possession," "including 'requir[ing] at least some detainees to lift their genitals or cough in a squatting position,' " *King*, 569 U.S. at 462 (alteration in original) (first quoting *United States v. Edwards*, 415 U.S. 800, 803 (1974); then quoting *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 334 (2012)), the DNA swab—"[a] gentle rub along the inside of the cheek"—"involve[d] an even more brief and still minimal intrusion," *id.* at 463; *see also*, *e.g.*, *Vernonia*, 515 U.S. at 658 (concluding that the intrusion caused by the process of collecting samples for urinalysis was "*negligible*" where the "conditions [of doing so] are nearly identical to those typically encountered in public restrooms" (emphasis added)); *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 448, 450–51 (1990) (concluding that the "measure of the intrusion on motorists stopped briefly at sobriety checkpoints—is *slight*" when the checkpoints involved "preliminary questioning and observation by checkpoint officers" and "[t]he average delay for each vehicle was approximately 25 seconds" (emphasis added)). In light of what we view as the substantial differences between, on the one hand, an individual having to register his address, photograph, and other limited details pertaining to himself and the offense or offenses for which he was convicted with the sheriff and, on the other hand, an individual

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17. The Supreme Court has made clear that any restrictions that accompany a search must be considered in evaluating the search's intrusiveness. *See Skinner*, 489 U.S. at 618 ("In view of our conclusion that the collection and subsequent analysis of the requisite biological samples must be deemed Fourth Amendment searches, we need not characterize the employer's antecedent interference with the employee's freedom of movement as an independent Fourth Amendment seizure. . . . For present purposes, it suffices to note that any limitation on an employee's freedom of movement that is necessary to obtain the blood, urine, or breath samples contemplated by the regulations must be considered in assessing the intrusiveness of the searches effected by the Government's testing program. (citing *United States v. Place*, 462 U.S. 696, 707–09 (1983))).

being required to wear an ankle appendage, which emits repeating voice commands when the signal is lost or when the battery is low, and which requires the individual to remain plugged into a wall every day for two hours, we cannot conclude, as the Court did in *King*, that "[t]he additional intrusion . . . is not significant" or that the SBM program "does not increase the indignity already attendant to" the sex offender registry. 569 U.S. at 459, 464; *see also Feliz*, 481 Mass. at 704, 119 N.E.3d at 713 (stating that "GPS monitoring . . . gathers much more information than" taking blood samples for a DNA database "and gathers this information over a much longer period of time. The experience of accommodating a device that remains attached to the body for a prolonged period of time differs materially from the one-time, minimal physical intrusion occasioned by a properly conducted DNA test.").

In our view, the physical intrusion accompanying SBM is distinct in its nature from that attendant upon sex offender registration. Notably, in considering whether Alaska's sex offender registration process constituted a retroactive punishment in violation of the Ex Post Facto Clause, the Supreme Court stated that the registration process "is more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality." *Smith v. Doe*, 538 U.S. 84, 99 (2003); *see id.* at 105 ("[T]he notification system is a passive one: An individual must seek access to the information."). With the ET-1 and its repeating voice commands, of course, an individual must "appear in public with some visible"—and audible—"badge of past criminality." *Id.* at 99.

In addition to the SBM program's physical intrusiveness, we also note the lifetime impingement upon defendant's expectation of privacy "in the whole of his physical movements." *Carpenter*, 138 S. Ct. at 2219. Numerous courts have recognized the intrusiveness of this aspect of SBM, which makes vast information about a person available to the State at the click of a mouse. The Court of Appeals majority stated, and we agree, that the SBM program's "continuous, warrantless search of defendant's location" by GPS technology is "uniquely intrusive." *Grady*, 817 S.E.2d at 25. As the D.C. Circuit observed:

> Prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble. These types of information can each reveal more about a person than does any individual trip viewed in isolation. Repeated visits to a church, a gym, a bar, or a bookie tell a story not told by any single visit, as

> does one's not visiting any of these places over the course of a month. The sequence of a person's movements can reveal still more; a single trip to a gynecologist's office tells little about a woman, but that trip followed a few weeks later by a visit to a baby supply store tells a different story. A person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups – and not just one such fact about a person, but all such facts.

United States v. Maynard, 615 F.3d 544, 562 (D.C. Cir. 2010) (footnote omitted), *aff'd sub nom. State v. Jones*, 565 U.S. 400. Simply put, GPS monitoring permits "a detailed chronicle of a person's physical presence compiled every day, every moment." *Carpenter*, 138 S. Ct. at 2220. And even in an era in which GPS capabilities on cell phones are well known, society's expectation has been that such comprehensive and detailed information about an individual's movements would be private. *See Jones*, 565 U.S. at 430 (Alito, J., concurring in judgment). Compiling and maintaining a complete record of our every movement is "not what we expect anyone to do, and it reveals more than we expect anyone to know." *Maynard*, 615 F.3d at 563 (citation omitted).

In sum, in light of the physical intrusiveness of the ET-1, the quarterly equipment checks, and the extent to which GPS locational tracking provides an "intimate window" into an individual's "privacies of life," we conclude that the mandatory imposition of lifetime SBM on an individual in defendant's class works a deep, if not unique, intrusion upon that individual's protected Fourth Amendment interests.

II. Nature and Purpose of the Search

The balancing analysis that we are called upon to conduct here requires us to weigh the extent of the intrusion upon legitimate Fourth Amendment interests against the extent to which the SBM program sufficiently "promot[es] . . . legitimate governmental interests" to justify the search, thus rendering it reasonable under the Fourth Amendment. *Vernonia*, 515 U.S. at 652–53. In this aspect of the balancing test, we "consider the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it." *Id.* at 660.

Our earlier conclusion that the nature of the State's concern was not "beyond the normal need for law enforcement" does not, of course, constitute a holding that the State's interest in solving crimes and facilitating

apprehension of suspects so as to protect the public from sex offenders is not compelling. "Sexual offenses are among the most disturbing and damaging of all crimes, and certainly the public supports the General Assembly's efforts to ensure that victims, both past and potential, are protected from such harm." *Bowditch*, 364 N.C. at 353, 700 S.E.2d at 13 (Hudson, J., dissenting). Nonetheless, the question remains whether the SBM program's "*promotion* of legitimate governmental interests" outweighs "its intrusion on the individual's Fourth Amendment interests." *Vernonia*, 515 U.S. at 653 (emphasis added); *see King*, 569 U.S. at 461 ("[A] significant government interest does not alone suffice to justify a search. The government interest must outweigh the degree to which the search invades an individual's legitimate expectations of privacy.").

In its order, the trial court summarized portions of the testimony of the State's only witness, Mr. Pace. While this section of the order explains in some detail what the SBM does not prohibit or restrict, it does not address what, if anything, the evidence showed about how successfully the program advances its stated purpose of protecting the public from sex offenders. *See* N.C.G.S. § 14-208.5 ("[I]t is the purpose of this Article to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies, to require the exchange of relevant information about those offenders among law enforcement agencies, and to authorize the access to necessary and relevant information about those offenders to others as provided in this Article."). Although the trial court did not make any findings based upon Mr. Pace's testimony concerning the efficacy issue, Mr. Pace testified that wearing the SBM device will not prevent anyone from committing a crime, but that it could be a useful investigative tool if a crime has already been committed. According to Pace, unsupervised individuals in the SBM program like Grady are monitored by officers in Raleigh. Pace testified that while "officers are required by policy" in the case of supervised individuals to "trail their points three times a week," he was "not sure about unsupervised cases," stating, "All I know is the statute says that we have to monitor them." This is reflected in the DCC's Policy and Procedure Manual, which mandates that for supervised individuals, officers will "[r]eview points 3 times per week for patterns of movement indicating risk for re-offense and issues related to public safety" but contains no guidelines for the monitoring of unsupervised individuals.

The State did not present any evidence in the trial court regarding the recidivism rates of sex offenders. The State relies, as did the trial court, on the Supreme Court's decision in *McKune v. Lile*, in which the

Court stated that "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." 536 U.S. 23, 33 (2002) (plurality opinion) (first citing Crimes Against Children Research Ctr., Univ. of N.H., *Fact Sheet 5; Sex Offenses* 24, 27; then citing Bureau of Justice Statistics, U.S. Dep't of Justice, *Recidivism of Prisoners Released in 1983*, at 6 (1997)); *id.* at 34 (describing the "risk of recidivism" among sex offenders as "frightening and high"). Yet, the Supreme Court subsequently stated in *United States v. Kebodeaux* that while "[t]here is evidence that recidivism rates among sex offenders are higher than the average for other types of criminals," "[t]here is also conflicting evidence on the point." 570 U.S. 387, 395–96 (2013) (citations omitted). Aside from the fact that these statements are not evidence, the judicial statements upon which the trial court and the State rely are, when considered in their entirety, inconclusive.

At the hearing, defendant presented evidence tending to show that recidivism rates for sex offenders are lower than the recidivism rates for other offenders. For instance, defendant presented excerpts from reports of the North Carolina Sentencing and Policy Advisory Commission concerning "Offenders Placed on Probation or Released from Prison" for the years 2005–06, 2008–09, 2010–11, and 2013 which show that in North Carolina, "[s]ex offenders generally had lower recidivism rates than most groups." Defendant also presented an April 2014 "Special Report" from the Department of Justice, Bureau of Justice Statistics, studying "Recidivism of Prisoners Released in 30 States in 2005: Patterns from 2005 to 2010," which shows that "[a]mong violent offenders, the annual recidivism rates of prisoners sentenced for homicide or sexual assault were lower than those sentenced for assault or robbery across the 5-year period." Thus, the only actual evidence concerning the threat posed by the recidivism of sex offenders tends to suggest that sex offender recidivism rates are not unusually high.

The lack of evidence in this case contrasts sharply with the record that the Supreme Court has examined and found sufficient in other Fourth Amendment contexts. For example, in *Vernonia* the Court reviewed extensive evidence of the importance of controlling drug use by students as well as particular facts about the crisis that existed in that school district, in which disciplinary actions had reached "epidemic proportions." *Vernonia*, 515 U.S. at 661–63. Similarly, in *Samson*, empirical evidence documented the recidivism rates of California's parolees. *Samson*, 547 U.S. at 853. These cases make clear that the extent of a problem justifying the need for a warrantless search cannot simply be

assumed; instead, the existence of the problem and the efficacy of the solution need to be demonstrated by the government.

Our dissenting colleagues contend that we must defer to the General Assembly's legislative findings concerning the significance of the problem the SBM program is intended to address and the risk of sex offenders re-offending, as codified at N.C.G.S. § 14-208.5 (stating the "Purpose" of Article 27A), despite the absence of any record evidence supporting the State's position; however, legislative findings are entitled to only limited deference in determining the constitutionality of legislative enactments, *see Martin v. N.C. Hous. Corp.*, 277 N.C. 29, 44, 175 S.E.2d 665, 673 (1970). Specifically, the Court in *Martin*, after quoting the relevant legislative findings, stated:

> If the constitutionality of a statute . . . depends on the existence or nonexistence of certain facts and circumstances, the existence of such facts and circumstances will generally be presumed for the purpose of giving validity to the statute, . . . if such a state of facts can reasonably be presumed to exist, and if any such facts may be reasonably conceived in the mind of the court. *This rule does not apply if the evidence is to the contrary, or if facts judicially known or proved, compel otherwise.*

Id. at 44, 175 S.E.2d at 673 (ellipsis in original) (emphasis added) (citation omitted)); *see also*, *e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994) ("That Congress' predictive judgments are entitled to substantial deference does not mean, however, that they are insulated from meaningful judicial review altogether. On the contrary, we have stressed in First Amendment cases that the deference afforded to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law.' " (plurality opinion) (first quoting *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 129 (1989); then citing *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978)). As we have already noted, in this case the only evidence contained in the record fails to support the legislative findings as they are characterized and relied upon by our dissenting colleagues.[18]

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18. The dissent further states that the legislature's "finding is supported by United States Supreme Court precedent." In the same vein, the trial court relied upon *McKune*, as well as two cases from other jurisdictions, *Hallak* and *Belleau*, rather than the evidence presented at the hearing. Yet, as we noted above, the Supreme Court subsequently observed in *Kebodeaux* that while "[t]here is evidence that recidivism rates among sex offenders are higher than the average for other types of criminals," "[t]here is also

Aside from the inconsistency between the relevant legislative findings and the actual evidence contained in the record, the statement of purpose found in N.C.G.S. § 14-208.5, was enacted when the sex offender registration program was created in 1995 and retained as amended in 1997, and predates the creation of the SBM program in 2007. The extent to which this provision's findings relate specifically to SBM is limited, as evidenced by the statutory language, which contemplates the need to know where sex offenders live rather than the need for twenty-four hour real-time monitoring of their every movement. *See* N.C.G.S. § 14-208.5 (stating "that law enforcement officers[ ] . . . are impaired by the lack of information available to law enforcement agencies about convicted offenders who live within the agency's jurisdiction," that "[r]elease of information about these offenders will further the governmental interests of public safety," and that "it is the purpose of this Article to assist law enforcement . . . by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies"). Furthermore, while N.C.G.S. § 14-208.5 is relevant to, but not dispositive of, the "nature and immediacy of" the State's concern in protecting the public from sex offenders, *Vernonia*, 515 U.S. at 660, the statute says absolutely nothing about the effectiveness of SBM in the "promotion of legitimate governmental interests," *id.* at 652–53. Thus, the legislative findings upon which our dissenting colleagues rely are not determinative of the outcome with respect to this constitutional issue.

The State also argues that the SBM program "is a useful investigative tool for law enforcement in solving crimes and excluding monitored offenders as suspects" and "speed[s] up apprehension of criminals before they commit additional crimes." The State did not present any empirical evidence demonstrating that the SBM program effectively advances this interest. Moreover, the State has not directed this Court to, nor are we aware of, a single instance dating back to the initial implementation of the SBM program in January 2007 in which the SBM program

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conflicting evidence on the point." 570 U.S. at 395–96. Moreover, in *Samson*, while the Court relied on its prior decisions in concluding that "[t]he State's interests [in supervising parolees] . . . are substantial," 547 U.S. at 853 (first citing *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 365 (1998); then citing *Griffin*, 483 U.S. at 879; and then citing *United States v. Knights*, 534 U.S. 112, 121 (2001)), this did not end the inquiry. Rather, the Court also considered the available evidence and expressly concluded that "[t]he empirical evidence presented in this case *clearly demonstrates* the significance of these interests to the State of California." *Id.* (emphasis added). Here, in contrast to *Samson*, the empirical evidence before the trial court does not "clearly demonstrate[ ] the significance of" the State's interest in the continuous satellite-based monitoring of recidivist sex offenders. *Id.*

assisted law enforcement in apprehending or exonerating a suspected sex offender in North Carolina, or anywhere else. The State's inability to produce evidence of the efficacy of the lifetime SBM program in advancing any of its asserted legitimate State interests weighs heavily against a conclusion of reasonableness here.

The State also argues that the SBM program serves as an effective deterrent. Deterrence, of course, is one of "the two primary objectives of criminal punishment." *Kansas v. Hendricks*, 521 U.S. 346, 361–62 (1997). Because the SBM program is not a form of criminal punishment, but rather a "civil, regulatory scheme," "[t]he SBM program's foremost purpose is not to deter crime." *Bowditch*, 364 N.C. at 351–52, 700 S.E.2d at 12–13 (majority opinion).[19] Moreover, even if the State can permissibly justify the intrusive effects of the SBM program based on this "secondary effect," *id.* at 351, 700 S.E.2d at 12, the State has not presented any evidence demonstrating that the SBM program is effective at deterring crime.[20] Thus, the State's deterrence argument, like the other arguments it has advanced with respect to the efficacy issue, fails for lack of evidentiary support.

It is well established that the State bears the burden of proving the reasonableness of a warrantless search. *Coolidge*, 403 U.S. at 455. While the State's asserted interests here are without question legitimate, what this Court is duty bound to determine is whether the warrantless search imposed by the State on recidivists under the SBM program actually serves those legitimate interests. The State has the burden of coming forward with some evidence that its SBM program assists in apprehending sex offenders, deters or prevents new sex offenses, or otherwise

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19. The dissent's contention that "the SBM program's primary purpose is to serve the special need of reducing sex crime recidivism through deterrence" directly contradicts the decision of the Court in *Bowditch*. 364 N.C. at 351–52, 700 S.E.2d at 12–13 (stating "[t]he SBM program's foremost purpose is not to deter crime").

20. The dissent suggests that the efficacy of SBM as a deterrent is "self-evident." However, there is social science research that addresses this question. *See*, *e.g.*, Marc Renzema, *Evaluative research on electronic monitoring*, *in Electronically Monitored Punishment: International and critical perspectives*, 247, 247–70 (Mike Nellis, Kristel Beyens & Dan Kaminski eds., 2013) (summarizing all research available on the deterrent effect of electronic monitoring); Deeanna M. Button et al., *Using Electronic Monitoring to Supervise Sex Offenders: Legislative Patterns and Implications for Community Corrections Officers*, 20 Crim. Just. Pol'y Rev. 414, 418 (2009) (reporting that the most thorough review to date of research on electronic monitoring effectiveness concluded that "applications of electronic monitoring as a tool for reducing crime are not supported by existing data"). At an absolute minimum, we are not satisfied that unsupported assumptions of the type upon which our dissenting colleagues rely suffice to render an otherwise unlawful search reasonable.

protects the public. Simply put, as the U.S. Supreme Court explained in *Ferguson v. City of Charleston*, "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose." 532 U.S. 67, 86 (2001) (quoting *Edmond*, 531 U.S. at 42). Here, despite having the burden of proof, the State concedes that it did not present any evidence tending to show the SBM program's efficacy in furthering the State's legitimate interests. *Grady*, 817 S.E.2d at 27. We cannot simply assume that the program serves its goals and purposes when determining whether the State's interest outweighs the significant burden that lifetime SBM imposes on the privacy rights of recidivists subjected to it. *Cf. Doe v. Cooper*, 842 F.3d 833, 846 (4th Cir. 2016) ("[N]either anecdote, common sense, nor logic, in a vacuum, is sufficient to carry the State's burden of proof. Thus, while the State's argument may be conceptually plausible, it presented no evidence or data to substantiate it before the district court." (citing *United States v. Carter*, 669 F.3d 411, 418–19 (4th Cir. 2012))).

To be clear, the scope of North Carolina's SBM program is significantly broader than that of other states. Lifetime monitoring for recidivists is mandated by our statute for anyone who is convicted of two sex offenses that carry a registration requirement. A wide range of different offenses are swept into this category. For example, a court is required to impose lifetime SBM on an offender who twice attempts to solicit a teen under the age of sixteen in an online chat room to meet with him, regardless of whether the person solicited was actually a teen or an undercover officer, or whether any meeting ever happened. *See* N.C.G.S. § 14-202.3 (2017); *State v. Fraley*, 202 N.C. App. 457, 688 S.E.2d 778, *disc. rev. denied*, 364 N.C. 243, 698 S.E.2d 660 (2010). Not only does the lifetime imposition of SBM vastly exceed the likely sentence such an offender would receive on a second offense, in addition, the State has simply failed to show how monitoring that individual's movements for the rest of his life would deter future offenses, protect the public, or prove guilt of some later crime.

Applying the correct legal standard to the record in this case, we conclude that the State has not met its burden of establishing the reasonableness of the SBM program under the Fourth Amendment balancing test required for warrantless searches. In sum, we hold that recidivists, as defined by the statute, do not have a greatly diminished privacy interest in their bodily integrity or their daily movements merely by being also subject to the civil regulatory requirements that accompany the status of being a sex offender. The SBM program constitutes a substantial

intrusion into those privacy interests without any showing by the State that the program furthers its interest in solving crimes that have been committed, preventing the commission of sex crimes, or protecting the public. In these circumstances, the SBM program cannot constitutionally be applied to recidivists in Grady's category on a lifetime basis as currently required by the statute.

Conclusion

For the reasons stated, we hold that the application of the relevant portions of N.C.G.S. §§ 14-208.40A(c) and 14-208.40B(c) to individuals in the same category as defendant, under which these individuals are required to submit to a mandatory, continuous, nonconsensual search by lifetime satellite-based monitoring, violates the Fourth Amendment to the United States Constitution. The category to which this holding applies includes only those individuals who are not on probation, parole, or post-release supervision; who are subject to lifetime SBM solely by virtue of being recidivists as defined by the statute; and who have not been classified as a sexually violent predator, convicted of an aggravated offense, or are adults convicted of statutory rape or statutory sex offense with a victim under the age of thirteen. As applied to these individuals, the intrusion of mandatory lifetime SBM on legitimate Fourth Amendment interests outweighs the "promotion of legitimate governmental interests." *Vernonia*, 515 U.S. at 653.

The generalized notions of the dangers of recidivism of sex offenders, for which the State provided no evidentiary support, cannot justify so intrusive and so sweeping a mode of surveillance upon individuals, like defendant, who have fully served their sentences and who have had their constitutional rights restored. The unsupported assumption—that if a crime is committed at some unspecified point in the future, the ankle monitor worn during all of the intervening years by one of these individuals, who may or may not pose a risk, may potentially aid in inculpating or exonerating that individual—does not advance the State's interest in a manner that outweighs the intrusiveness of mandatory lifetime SBM upon that individual's legitimate expectations of privacy. In contrast to the SBM provisions governing other offenders, which include an individualized "risk assessment" and judicial determinations regarding whether the individual "requires the highest possible level of supervision and monitoring," and, if so, for how long, N.C.G.S. §§ 14-208.40A(d)-(e), -208.40B(c); *see*, *e.g.*, *State v. Griffin*, 818 S.E.2d 336, 338–39, 342 (N.C. Ct. App. 2018) (explaining that at the bring back hearing, the State introduced a "Static-99," "an actuarial report designed to estimate the probability of sex offender recidivism, which placed Defendant in

the 'moderate-low' category," noting, *inter alia*, that the defendant did not complete the SOAR sex offender treatment program while in prison, but reversing the trial court's imposition of thirty years of SBM),[21] the provisions governing recidivists present no opportunity for determinations by the court regarding what particular risk, if any, is posed by the individual and whether a particular duration of SBM will, in any meaningful way, serve the State's interest in combating that risk. We conclude that in such circumstances, the Fourth Amendment, which "secure[s] 'the privacies of life' against 'arbitrary power' " and "place[s] obstacles in the way of a too permeating police surveillance," *Carpenter*, 138 S. Ct. at 2214 (first quoting *Boyd*, 116 U.S. at 630; then quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)), prohibits the mandatory imposition of lifetime SBM on this class of individuals.

We note that the remedy we employ here is neither squarely facial nor as-applied. *See Citizens United v. FEC*, 558 U.S. 310, 331 (2010) ("[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. The distinction . . . goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." (citing *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 477–78 (1995))); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1321, 1341 (2000) (stating that "[t]here is no single distinctive category of facial, as opposed to as-applied, litigation" and "facial challenges are less categorically distinct from as-applied challenges than is often thought"). For instance, the statutory provisions authorizing lifetime SBM do not delineate between supervised and unsupervised offenders, nor do they specify the exact type of monitoring hardware that is to be used or what regulations the Division may adopt to administer the program and track monitored individuals. Our holding is as-applied in the sense that it addresses the current implementation of the SBM program and does not enjoin all of the program's applications or even all applications of the specific statutory provision we consider here (authorizing lifetime SBM based on a finding that an individual is a recidivist) because this provision is still enforceable against a recidivist during the period of his or her State supervision and because our holding does not extend to a recidivist who also has been convicted of an aggravated offense, or is also an adult convicted

21. We refer to this case solely to illustrate how the SBM provisions for other offenders allow an opportunity for an individualized determination, whereas the SBM provisions that apply to the class of offenders at issue here provide none.

of statutory rape or statutory sex offense with a victim under the age of thirteen, or is also a sexually violent predator. On the other hand, our holding is facial in that it is not limited to defendant's particular case but enjoins application of mandatory lifetime SBM to other unsupervised individuals when the SBM is authorized based solely on a "recidivist" finding that does not involve a sexually violent predator classification, an aggravated offense, or statutory rape or statutory sex offense with a victim under the age of thirteen by an adult. Thus, our holding has both facial and as-applied characteristics. *See Doe v. Reed*, 561 U.S. 186, 194 (2010) (stating that the plaintiffs' claim "obviously has characteristics of both" as-applied and facial challenges).

Regardless, the Supreme Court has explained that "[t]he label is not what matters" and to the extent that a "claim and the relief that would follow . . . reach beyond the particular circumstances of" the party before the court, the party "must . . . satisfy our standards for a facial challenge to the extent of that reach." *Id.* (citing *United States v. Stevens*, 559 U.S. 460, 472–73 (2010)); *see, e.g.*, *Patel*, 135 S. Ct. at 2450–51 (explaining that a facial challenge requires that "no set of circumstances exists under which the [statute] would be valid," or in other words, "that a 'law is unconstitutional in all of its applications' " (first quoting *United States v. Salern*o, 481 U.S. 739, 745 (1987) (alteration in original); then quoting *Wash. State Grange*, 552 U.S. at 449)). Here the "reach" of our holding extends to applications of mandatory lifetime SBM of unsupervised individuals authorized solely on a finding that the individual is a recidivist and without any findings that the individual was convicted of an aggravated offense, or is an adult convicted of statutory rape or statutory sex offense with a victim under the age of thirteen, or is a sexually violent predator. For the reasons stated, including the uncorroborated assertions regarding the extent of the general threat posed by the recidivism of sex offenders and the lack of any showing by the State that SBM effectively promotes its interest in combating that threat, the lack of any individualized assessment of the offender or his offense characteristics and of any meaningful opportunity for termination of SBM, and the unique intrusiveness of SBM upon legitimate privacy interests of recidivists, we conclude that no circumstances exist in which these applications would be valid.

The dissent takes issue with the facial aspect of our holding, contending that the Court must assess whether lifetime SBM can ever reasonably be applied to an individual who qualifies as a recidivist "in all circumstances," including the worst offenders such as sexually violent predators. According to the dissent, it must be established that "a statute

could never constitutionally require enrollment of a defendant in lifetime SBM whose conduct meets the statutory definition of a recidivist." But the dissent mistakes the reach of our holding and contemplates circumstances beyond the applications of SBM we consider here. An inquiry into whether any statute, or any application of a statute, could permissibly require enrollment in lifetime SBM of an individual who happens to qualify as a recidivist on some other basis is separate from an inquiry into whether these specific applications of the SBM program authorizing a lifetime search of individuals solely *because* they are recidivists are permissible—when considering, "the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady*, 135 S. Ct. at 1371.

In *Patel* the Supreme Court explained that "when addressing a facial challenge to a statute authorizing warrantless searches, the proper focus of the constitutional inquiry is searches that the law actually authorizes, not those for which it is irrelevant." 135 S. Ct. at 2451. The SBM statutes include multiple provisions authorizing lifetime warrantless searches, and here we address a limited application of one such provision. Specifically, we consider—and limit our holding to—a warrantless search of an unsupervised individual that is authorized based solely on a finding that the individual is a recidivist, with no finding (or even any record evidence) that the individual was convicted of an aggravated offense, or is an adult convicted of statutory rape or statutory sex offense with a victim under the age of thirteen, or is a sexually violent predator.[22] For the reasons discussed, the State has not established that

22. The dissent chides our decision for not investigating the "most heinous crimes" that also meet the statutory requirements of recidivists, such as aggravated offenses and sexually violent predators. We explicitly exclude such applications of SBM that are authorized based on these classifications from the extent of the reach of our remedy, which is concerned only with lifetime SBM authorized based solely on the fact that an individual is a recidivist. We decline to address whether the interests of the State and the individual with respect to sex offenders who commit these "most heinous crimes" would permissibly authorize mandatory lifetime SBM under the Fourth Amendment balancing test. Nonetheless, the dissent, in seeking to enlarge the scope of our holding, ventures outside of the record, considers background information regarding defendant's first conviction that was not presented to the trial court in this case, and then makes its own finding of fact that defendant's first conviction was an aggravated offense. While this off-shore fishing expedition is ultimately irrelevant because it involves information not properly before the Court, we note that it illustrates one of the flaws in the application we enjoin—that is, the mandatory imposition of lifetime SBM solely because an individual is a recidivist precludes any individualized assessment of the offender, in which the State could present, and the trial court could consider, other bases that may permissibly authorize the search when balancing "the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady*, 135 S. Ct. at 1371; *cf. Miller v. Alabama*, 567 U.S. 460, 489 (2012) (holding mandatory sentencing laws

this is a reasonable, categorical basis for the imposition of lifetime SBM under the Fourth Amendment. Thus, the warrantless search authorized by this application of the SBM program can never be reasonable, or, in other words, this portion of the "law is unconstitutional in all of its applications." *Id.* at 2451 (quoting *Wash. State Grange*, 552 U.S. at 449). The fact that, even with respect to this same defendant, there may potentially be *different* statutory provisions that, in considering "the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations," *Grady*, 135 S. Ct. at 1371, *may* constitutionally authorize a warrantless lifetime search—though we express no opinion on the validity of such searches at this time—is irrelevant because those searches do not involve applications of the specific statutory provision that we herein enjoin. *See Patel*, 135 S. Ct. at 2451 ("[T]he constitutional 'applications' that petitioner claims prevent facial relief here are irrelevant to our analysis because they do not involve actual applications of the statute.").

We reach this decision mindful of our duty, "to declare the law unconstitutional in a proper case," which "cannot be declined," *S. Ry. Co. v. Cherokee County*, 177 N.C. 87, 88, 97 S.E. 758, 759 (1919), and also to "not undertake to pass upon the validity of the statute as it may be applied to factual situations materially different from that before it," *Bulova Watch Co.*, 285 N.C. at 472, 206 S.E.2d at 145 (citations omitted); *see also, e.g.*, *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328–29 (2006) ("[W]hen confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force or to sever its problematic portions while leaving the remainder intact." (first citing *United States v. Raines*, 362 U.S. 17, 20–22 (1960); then citing *United States v. Booker*, 543 U.S. 220, 227–29 (2005))). As this Court has previously explained, "[a] statute may be valid in part and invalid in part. If the parts are independent, or separable, but not otherwise, the invalid part may be rejected and the valid part may stand, provided it is complete in itself and capable of enforcement." *State v. Smith*, 265 N.C. 173, 179, 143 S.E.2d 293, 298 (1965) (quoting *Constantian v. Anson County*, 244 N.C. 221, 228, 93 S.E.2d 163, 168 (1956)); *see also Pope v. Easley*, 354 N.C. 544, 548, 556 S.E.2d 265, 268 (2001) (per curiam) ("[T]he inclusion of a severability clause within legislation will be interpreted as a clear statement of legislative intent to strike an unconstitutional provision and to allow the balance to

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imposing life without parole on all juvenile homicide offenders "regardless of their age and age-related characteristics and the nature of their crimes" facially unconstitutional).

be enforced independently." (citing *Fulton Corp. v. Faulkner*, 345 N.C. 419, 421[–22], 481 S.E.2d 8, 9 (1997))). Given that other provisions of the SBM program can be enforced independently of the specific applications we enjoin here, and given the inclusion of a severability clause by the General Assembly in the SBM enabling legislation, *see* ch. 247, sec. 21, 2005 N.C. Sess. Laws (Reg. Sess. 2006) at 1085 ("The provisions of this act are severable. If any provision is held invalid by a court of competent jurisdiction, the invalidity does not affect other provisions of the act that can be given effect without the invalid provision."), we decline to address, and express no opinion on, the constitutionality of either the broader statutory framework or other provisions not implicated by the current appeal. Those provisions, as valid enactments of the General Assembly, are presumed to be constitutional and remain fully in effect. We are only ruling on the statute as currently written.

Thus, our decision today does not address whether an individual who is classified as a sexually violent predator, or convicted of an aggravated offense, or is an adult convicted of statutory rape or statutory sex offense with a victim under the age of thirteen may still be subjected to mandatory lifetime SBM—regardless of whether that individual is also a recidivist. N.C.G.S. §§ 14-208.40A(c), -208.40B(c). These applications of the SBM program are not before the Court at this time. Furthermore, we do not address whether an individual who has "committed an offense that involved the physical, mental, or sexual abuse of a minor" can be subjected to SBM for a term of years specified by the court if, following a risk assessment by the Division, "the court determines that the offender does require the highest possible level of supervision and monitoring." *Id.* §§ 14-208.40A(d)-(e), -208.40B(c). Moreover, because our holding enjoins application only to unsupervised individuals, and because of the independent statutory provisions governing conditions for parole, post-release supervision, and probation, an individual who is a recidivist is still automatically subject to SBM during the period of State supervision. *See id.* §§ 15A-1374(b1) (2017) (stating that "[i]f a parolee is in a category described by G.S. 14-208.40(a)(1) . . . the [Post-Release Supervision and Parole] Commission must require as a condition of parole that the parolee submit to [SBM]"), -1368.4(b1)(6) (2017) (requiring that an individual "in the category described by G.S. 14-208.40(a)(1)" submit to SBM as a condition of post-release supervision), -1343(b2)(7) (2017) (mandating that an individual "described by G.S. 14-208.40(a)(1)" submit to SBM as a special condition of probation).

In sum, for the foregoing reasons we conclude that the Court of Appeals erred in limiting its holding to the constitutionality of the

program as applied only to defendant, when the analysis of the reasonableness of the search applies equally to anyone in defendant's circumstances. Because we conclude that the relevant portions of N.C.G.S. §§ 14-208.40A(c) and 14-208.40B(c) are unconstitutional as applied to all individuals in the category herein described, we modify and affirm the decision of the Court of Appeals.

MODIFIED AND AFFIRMED.

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

Justice NEWBY dissenting.

The Supreme Court of the United States held that the North Carolina statutory scheme for satellite-based monitoring (SBM) of a limited class of sex offenders effected a Fourth Amendment search and remanded this case for consideration of whether the search was reasonable. As the Supreme Court stated, "The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." *Grady v. North Carolina*, 135 S. Ct. 1368, 1371, 191 L. Ed. 2d 459, 462 (2015) (per curiam). For guidance, the Supreme Court provided two examples of categorical searches which specifically addressed the reasonableness inquiry. *Id.* at 1371, 191 L. Ed. 2d at 462–63 (citing *Samson v. California*, 547 U.S. 843, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (2006); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995)). This case raises substantial competing interests: the State's interest in protecting children from sexual abuse and an individual's right to privacy from government monitoring. The Fourth Amendment's reasonableness test requires balancing these interests to determine whether the government's SBM is a reasonable search of this limited class of sex offenders.

Using the remand as an opportunity to make a broad policy statement, the majority, though saying it addresses only one statutory classification, recidivist, applies an unbridled analysis which understates the crimes, overstates repeat sex offenders' legitimate expectations of privacy, and minimizes the need to protect society from this limited class of dangerous sex offenders. The majority's sweeping opinion could be used to strike down every category of lifetime monitoring under the SBM statute.

The majority appears to pick and choose between the characteristics of as-applied and facial challenges in finding a statute wholly unconstitutional. Nonetheless, its analysis does not support its conclusion that the statute is unconstitutional, either facially or as applied to this defendant. Its approach does not consider the specific facts of this defendant's convictions and improperly classifies this defendant's crimes under the statute. Creating an "as-applied" category not found in the statute, the majority fails to conduct the proper constitutionality inquiry, which requires it to consider lifetime SBM for the highest risk sex offender that falls within the statute's recidivist category. To reach its result, the majority minimizes and mischaracterizes the heinous crimes committed by defendant and others covered by the statute and diminishes the State's significant interest in protecting its citizens. The majority usurps the role of the legislature, denying the legislature's findings of the significance of this societal problem and rejecting the efficacy of its solution. Further, it rejects the facts found by the trial court and finds its own.

Here defendant's crimes of sexually assaulting children on two occasions make him a member of two statutory classes of sex offenders—aggravated offenders and recidivists—whom the General Assembly has determined to be among the most dangerous to society. Sex offenders who target children pose a unique threat to public safety, and the State's interest in protecting children from sexual assault is paramount. Sadly, these despicable crimes targeting vulnerable children are on the rise. The General Assembly carefully crafted a regulatory framework to protect the public by deterring sexual violence. To accomplish this purpose, the statute provides lifetime SBM for only a small group of the worst sex offenders. While courts must continue to carefully review the government's intrusions upon reasonable privacy interests as search technology develops, here the State's paramount interest outweighs the State's intrusion into defendant's diminished Fourth Amendment privacy interests. Because the SBM program is constitutional, both facially and as applied to defendant, I respectfully dissent.

I. Facts and Procedural History

Defendant's crimes qualify him as an aggravated sex offender and a violent recidivist under the statutory framework.[1] On 10 May 1996, defendant, then aged seventeen, committed a sexual assault involving anal sex on a seven-year-old boy while the victim's younger brother watched. Defendant was charged with first-degree sexual offense and

1. Because defendant's status as a recidivist was uncontested, neither party fully developed the record as to the other lifetime SBM categories applicable to defendant's crimes.

taking indecent liberties with children. On 16 January 1997, he pled no contest to a second-degree sex offense, defined as "engag[ing] in a sexual act . . . by force and against the will of the other person," and received a sentence of seventy-two to ninety-six months. N.C.G.S. § 14 -27.5(a) (2013) (current version at id. § 14-27.27(a) (Supp. 2018)).

On 5 August 2002, defendant was released from prison. Only seventeen months later on 6 January 2004, defendant was convicted of not having registered as a sex offender. The trial court suspended his twenty-one to twenty-six month sentence and ordered thirty-six months of probation. On 21 September 2004, defendant received notice of multiple probation violations, and after a hearing, the trial court granted defendant another chance by placing him on intensive supervision on 16 December 2004. On 23 February 2005, however, defendant's probation was revoked because of additional probation violations, and the trial court reinstated defendant's active sentence.

Beginning in January 2005, before the revocation of his probation and while under intensive supervision, defendant, then aged twenty-six, engaged in an illegal sexual relationship with and impregnated a fifteen-year-old girl. On 13 September 2006, defendant pled guilty to taking indecent liberties with a child, and the State dismissed a statutory rape charge. Defendant received and served a sentence of thirty-one to thirty-eight months. The Department of Correction (DOC) unconditionally discharged defendant on 25 January 2009.

On 12 March 2010, DOC sent defendant a letter giving notice of defendant's upcoming SBM determination hearing. Before that hearing could take place, however, defendant was arrested on 16 July 2010 for again failing to properly comply with the sex offender registry requirements. On 27 October 2010, defendant pled guilty and this time received a sentence of twenty-four to twenty-nine months. Defendant was released from prison on 24 August 2012, and on 14 May 2013, the trial court conducted defendant's SBM determination hearing and concluded that defendant's two sex crimes were "sexually violent offenses" and that defendant met the criteria for a recidivist sex offender.[2] *See id.*

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2. Though not addressed by the trial court, defendant's conviction for anally penetrating a seven-year-old boy constitutes an "aggravated offense" under the statute, providing an alternate and independent ground for imposing lifetime SBM. *See* N.C.G.S. § 14-208.6(1a) (Supp. 2018) (An "[a]ggravated offense" is "[a]ny criminal offense that includes . . . engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old."). That defendant is an aggravated offender is a conclusion of law, not a finding of fact, because the underlying facts of and conviction for the assault that satisfy the statutory criteria were previously found by a trial court.

§ 14-208.6(2b), (5) (Supp. 2018). As required by statute, the trial court ordered defendant to enroll in lifetime SBM. *See id.* § 14-208.40B(c) (2017). Significantly, since enrolling in SBM more than six years ago, defendant has not been charged with any additional offenses.

Defendant appealed the SBM order, and the Court of Appeals affirmed the trial court order. *State v. Grady*, 233 N.C. App. 788, 759 S.E.2d 712, 2014 WL 1791246, at *2–3 (2014) (unpublished). Upon further appeal to the United States Supreme Court, defendant asserted enrollment in lifetime SBM violates the Fourth Amendment. Concluding that continuous satellite-based location monitoring effects a Fourth Amendment search, the Supreme Court vacated the lower court's judgment and remanded this case to our Court to "examine whether the State's monitoring program is reasonable" under the Fourth Amendment. *Grady*, 135 S. Ct. at 1371, 191 L. Ed. 2d at 463.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by the government. U.S. Const. amend. IV.

> The Fourth Amendment prohibits only unreasonable searches. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations. *See, e.g.*, *Samson v. California*, 547 U.S. 843, 126 S. Ct. 2193, 165 L. Ed. 2d 250 (2006) (suspicionless search of parolee was reasonable); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995) (random drug testing of student athletes was reasonable).

Grady, 135 S. Ct. at 1371, 191 L. Ed. 2d at 462–63. The Supreme Court's remand mandate instructed this Court to determine whether lifetime SBM is a reasonable search for those classified as the most dangerous sex offenders. "[W]e 'examin[e] the totality of the circumstances' to determine whether a search is reasonable within the meaning of the Fourth Amendment." *Samson*, 547 U.S. at 848, 126 S. Ct. at 2197, 165 L. Ed. 2d at 256 (second alteration in original) (quoting *United States v. Knights*, 534 U.S. 112, 118, 122 S. Ct. 587, 591, 151 L. Ed. 2d 497, 505 (2001)). This examination must consider the government's purpose in conducting the search and the nature of the search balanced with the degree of intrusion upon the recognized privacy interest. *See Grady*, 135 S. Ct. at 1371, 191 L. Ed. 2d at 462–63. In assessing reasonable expectations of privacy, "[t]he Fourth Amendment does not protect all subjective expectations

of privacy, but only those that society recognizes as 'legitimate.' What expectations are legitimate varies, of course, with context." *Vernonia*, 515 U.S. at 654, 115 S. Ct. at 2391, 132 L. Ed. 2d at 575 (citing and quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 337–38, 105 S. Ct. 733, 740–41, 83 L. Ed. 2d 720, 731–32 (1985)).

By citing *Samson* and *Vernonia*, the Supreme Court suggested that both the general reasonableness test and special needs doctrine are pertinent in evaluating the reasonableness of the SBM statute. *See Samson*, 547 U.S. at 852 n.3, 126 S. Ct. at 2199 n.3, 165 L. Ed. 2d at 259 n.3 (applying a general reasonableness test); *Vernonia*, 515 U.S. at 653, 115 S. Ct. at 2391, 132 L. Ed. 2d at 574 (applying the special needs doctrine). Though involving different criteria, both analyses require the balancing test specified in the remand order to determine whether the statute at issue here is valid. *See Samson*, 547 U.S. at 848, 126 S. Ct. at 2197, 165 L. Ed. 2d at 256; *Vernonia*, 515 U.S. at 652–53, 115 S. Ct. at 2390, 132 L. Ed. 2d at 574.

In *Samson* the Supreme Court applied "general Fourth Amendment principles" to evaluate the reasonableness of a statute that required parolees to agree to any warrantless search, without cause, at any time. 547 U.S. at 846, 853 n.3, 126 S. Ct. at 2196, 2200 n.3, 165 L. Ed. 2d at 255, 260 n.3. The Supreme Court evaluated the search's reasonableness "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.* at 848, 126 S. Ct. at 2197, 165 L. Ed. 2d at 256 (quoting *Knights*, 534 U.S. at 118–19, 122 S. Ct. at 591, 151 L. Ed. 2d at 505). The Supreme Court first concluded that parolees "have severely diminished expectations of privacy by virtue of their status alone." *Id.* at 852, 126 S. Ct. at 2199, 165 L. Ed. 2d at 259. Then viewing that diminished privacy in the totality of the circumstances, the Supreme Court concluded the warrantless search did not intrude upon "an expectation of privacy that society would recognize as legitimate," despite the unlimited breadth of the right to search and regardless of the crime of conviction. *Id.* at 852, 126 S. Ct. at 2199, 165 L. Ed. 2d at 259. Therefore, balancing no intrusion upon any reasonable expectation of privacy against the State's substantial interests in deterring recidivism, the Supreme Court found the statute constitutional under the Fourth Amendment. *Id.* at 853, 857, 126 S. Ct. at 2200, 2202, 165 L. Ed. 2d at 259–60, 262.

In *Vernonia* the Supreme Court applied the same balancing test for a warrantless search "when special needs, beyond the normal need for law enforcement, ma[d]e the warrant . . . requirement impracticable."

515 U.S. at 653, 115 S. Ct. at 2391, 132 L. Ed. 2d at 574 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873, 107 S. Ct. 3164, 3168, 97 L. Ed. 2d 709, 717 (1987)). A school policy required that high school athletes consent to random drug screenings in order to participate in school athletics. *Id.* at 650, 115 S. Ct. at 2389, 132 L. Ed. 2d at 572. The Court determined that student athletes had diminished expectations of privacy because the school had a special relationship with the students (*in loco parentis*) and because "[p]ublic school locker rooms [where the drug screenings take place] . . . are not notable for the [bodily] privacy they afford." *Id.* at 655–57, 115 S. Ct. at 2391–93, 132 L. Ed. 2d at 575–77. Next, the Court examined the intrusion upon privacy by the drug screening process and determined it had a "negligible" effect on the defendant's privacy interests. *Id.* at 658, 115 S. Ct. at 2393, 132 L. Ed. 2d at 578. Moreover, the State's important interest in deterring drug use among teenagers, particularly for the narrow, at-risk category of student athletes, justified the search under a Fourth Amendment reasonableness analysis. *Id.* at 661–62, 665, 115 S. Ct. at 2395, 2397, 132 L. Ed. 2d at 579–80, 582.

On remand in the present case, this Court further remanded this matter to the trial court to proceed according to the United States Supreme Court's mandate. The trial court held a new hearing on 16 June 2016. The State introduced evidence that defendant's GPS ankle monitor weighs less than nine ounces. The monitor holds a charge for about three days, but offenders are encouraged to charge the monitor two hours per day. A "beacon" set up in defendant's home helps preserve the monitor's battery life when defendant is in the beacon's range. A probation officer reviews the monitor and the beacon every three months to ensure the equipment is operating correctly. Unsupervised offenders, like defendant, have no direct contact with probation officers except for quarterly reviews. The monitor provides continuous location tracking of defendant. The SBM system displays defendant's location information as a series of points with arrows that are overlaid onto a map, and a probation officer can view the information as a still image or an image in motion. Officers have access to defendant's live location as well as historic location data for the preceding six months. As of 30 June 2015, only two probation officers were responsible for monitoring the data from over five hundred unsupervised offenders.

In its order, the trial court again determined that defendant's crimes were "sexually violent offenses," which required him to register as a sex offender, and that he was a recidivist, which met the criteria for lifetime SBM. In assessing the reasonableness of the search, the trial court noted the State's evidence characterizing the ankle monitor as

small, nonintrusive, and "not prohibit[ing] any defendant from traveling, working, or otherwise enjoying the ability to legally move about as he wishes." The trial court found that "[t]he ankle monitor does not monitor or reveal the activities of the offender—it merely monitors his location."

While the trial court noted defendant's submission of the State's policies governing SBM and multiple studies of recidivism rates, it found persuasive the long line of United States Supreme Court decisions acknowledging the special threat of repeat sex offenders. The trial court stated:

> The United States Supreme Court has long recognized the dangers of recidivism in cases of sex offenders. *Smith v. Doe*, 538 U.S. 84, 103 (2003) ("The risk of recidivism posed by sex offenders is frightening and high."); *McKune v. Lile*, 536 U.S. 24, 34 (2002) ("[s]ex offenders are a serious threat [ ] in this nation . . . . When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault."). Additionally, it is within the purview of state governments to recognize and reasonably react to a known danger in order to protect its citizens. *Samson v. California*, 547 U.S. 843, 848 (2006) ("This Court has acknowledged the grave safety concerns that attend recidivism" and "the Fourth Amendment does not render the States powerless to address these concerns effectively.").

(second alteration in original). Ultimately, the trial court concluded "that based on the totality of the circumstances . . . [SBM] of the defendant is a reasonable search. The Court has considered the defendant's argument that the [SBM] statute is facially unconstitutional. The Court rejects this argument and finds that the statute is constitutional on its face."[3]

When substantial and immediate harm threatens children, a State may take proactive, programmatic measures to prevent that harm. *See*

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3. At the various stages throughout the appellate process, it has been unclear whether defendant is making a facial or an as-applied challenge. Generally, it appears defendant has asserted a facial challenge or has attempted to articulate a hybrid of facial and as-applied challenges. On remand from the United States Supreme Court, the trial court explicitly found the statute to be constitutional on its face, thereby indicating that defendant's argument, at least as understood by the trial court, was that the statute was facially unconstitutional. The Court of Appeals, however, held that the State failed to meet its evidentiary burden that the statute was reasonable as applied to defendant. *See State v. Grady*, 817 S.E.2d 18, 28 (N.C. Ct. App. 2018). Defendant argues both facial and as-applied invalidity in his brief here.

Bd. of Educ. v. Earls, 536 U.S. 822, 835–38, 122 S. Ct. 2559, 2567–69, 153 L. Ed. 2d 735, 747–49 (2002); *Vernonia*, 515 U.S. at 658 n.2, 115 S. Ct. at 2393 n.2, 132 L. Ed. 2d at 578 n.2 (noting the search at issue was a "prophylactic" "blanket search" designed to protect students and deter drug use). The General Assembly has clearly stated the purpose of North Carolina's "Sex Offender and Public Protection Registration Programs" is to proactively protect children and others from dangerous sex offenders:

> The General Assembly recognizes that sex offenders often pose a high risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount governmental interest.
>
> The General Assembly also recognizes that persons who commit certain other types of offenses against minors . . . pose significant and unacceptable threats to the public safety and welfare of the children in this State and that the protection of those children is of great governmental interest. Further, the General Assembly recognizes that law enforcement officers' efforts to protect communities, conduct investigations, and quickly apprehend offenders who commit sex offenses or certain offenses against minors are impaired by the lack of information available to law enforcement agencies about convicted offenders who live within the agency's jurisdiction. . . .
>
> Therefore, it is the purpose of this Article to assist law enforcement agencies' efforts to protect communities by requiring persons who are convicted of sex offenses or of certain other offenses committed against minors to register with law enforcement agencies, to require the exchange of relevant information about those offenders among law enforcement agencies, and to authorize the access to necessary and relevant information about those offenders to others as provided in this Article.

N.C.G.S. § 14-208.5 (2017).

Likewise, the United States Supreme Court has recognized that " 'sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people.' And it is clear that a legislature 'may pass valid laws to protect children' and other victims of sexual

assault 'from abuse.' " *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736, 198 L. Ed. 2d 273, 281 (2017) (quoting *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244–45, 122 S. Ct. 1389, 1399, 152 L. Ed. 2d 403, 417 (2002)). Furthermore, " '[t]he victims of sex assault are most often juveniles,' and '[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.' " *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4, 123 S. Ct. 1160, 1163, 155 L. Ed. 2d 98, 103 (2003) (quoting *McKune v. Lile*, 536 U.S. 24, 32–33, 122 S. Ct. 2017, 2024, 153 L. Ed. 2d 47, 56–57 (2002) (plurality opinion)). The Supreme Court has emphasized the magnitude of the harm inflicted upon victims, noting a sexual assault on a child "has a permanent psychological, emotional, and sometimes physical impact on the child." *Kennedy v. Louisiana*, 554 U.S. 407, 435, 128 S. Ct. 2641, 2658, 171 L. Ed. 2d 525, 548 (2008) (citations omitted); *see also id.* at 467–68, 128 S. Ct. at 2676–77, 171 L. Ed. 2d at 568–69 (Alito, J., dissenting) (discussing the long-term developmental problems sexually abused children can experience (citations omitted)).

Thus, the General Assembly has determined violent sex offenders should be deterred from committing additional sex offenses. To further its paramount interest in protecting the public—especially children—from sex offenders, the General Assembly enacted various programs to monitor and deter sex offenders after their release. For example, "North Carolina, like every other state in the nation, enacted a sex offender registration program to protect the public from the unacceptable risk posed by convicted sex offenders." *State v. Bryant*, 359 N.C. 554, 555, 614 S.E.2d 479, 480 (2005), *superseded on other grounds by statute*, An Act to Protect North Carolina's Children/Sex Offender Law Changes, Ch. 247, Sec. 8.(a), 2005 N.C. Sess. Laws (Reg. Sess. 2006) 1065, 1070. *See generally Smith v. Doe*, 538 U.S. 84, 103, 123 S. Ct. 1140, 1145, 155 L. Ed. 2d 164, 174–75 (2003). Similarly, with the encouragement of Congress, forty-eight states and the District of Columbia have electronic monitoring available for some sex offenders.[4] *See* 42 U.S.C. § 16981 (2012)

4. *See* 28 C.F.R. § 2.204(b)(2)(iii) (2018) (permitting electronic tracking in Washington, D.C.); Ala. Code § 15-20A-20 (LexisNexis 2018); Alaska Stat. § 12.55.027(d), (g)(3) (2018); Ariz. Rev. Stat. Ann. § 13-902(G) (Supp. 2018); Ark. Code Ann. § 12-12-923 (2016); Cal. Penal Code § 3004(b) (West Supp. 2019); Colo. Rev. Stat. §§ 18-1.3-204(2)(a)(XIV.5), -1007(2) (2018); Conn. Gen. Stat. Ann. § 53a-30(a)(14) (West Supp. 2019); Del. Code Ann. tit. 11, § 4121(u) (2015); Fla. Stat. Ann. § 948.30(2)-(3) (West Supp. 2019); Ga. Code Ann. § 42-1-14(e) (Supp. 2017); Haw. Rev. Stat. Ann. § 706-624(2)(p) (LexisNexis Supp. 2018); Idaho Code § 18-8308(3) (2016); 730 Ill. Comp. Stat. Ann. 5/5-8A-6 (West Supp. 2019); Ind. Code Ann. § 11-13-3-4(j) (LexisNexis Supp. 2018); Iowa Code Ann. § 692A.124(1) (West 2016); Kan. Stat. Ann. § 22-3717(u) (Supp. 2018); La. Stat. Ann. § 15:560.4(A) (2012); Me. Rev. Stat. Ann. tit. 17-A, § 1204(2-A)(N) (Supp. 2018); Md. Code Ann., Crim. Proc. § 11-723(d)(3)(i)

(current version at 34 U.S.C.A. § 20981 (West 2017)) (authorizing grants to states that implement twenty-four-hour, continuous GPS monitoring programs for sex offenders).

North Carolina's "sex offender monitoring program . . . uses a continuous satellite-based monitoring system" for narrowly and categorically defined classes of sex offenders who present a significant enough threat of reoffending to "require[ ] the highest possible level of supervision and monitoring." N.C.G.S. § 14-208.40(a) (2017). The four categories of offenders who require continuous lifetime SBM to protect public safety are (1) sexually violent predators, (2) recidivists, (3) aggravated offenders, and (4) adults convicted of statutory rape or a sex offense with a victim under the age of thirteen. *Id.* § 14-208.40A(c) (2017). A "sexually violent predator" is a person who "has been convicted of a sexually violent offense," such as rape or incest, and "who suffers from a mental abnormality or personality disorder," as determined by a board of experts, that makes the person likely to purposely foster relationships with the intent of sexual victimization or to engage in sexually violent offenses against strangers. *Id.* §§ 14-208.6(5)-(6), -208.20 (2017 & Supp. 2018). Second, "recidivists" have had at least two "reportable convictions." *Id.* § 14-208.6(2b). Reportable convictions are serious crimes, including "sexually violent offenses" and various "offense[s] against a minor," such as kidnapping. *Id.* § 14-208.6(1m), (4)(a) (Supp. 2018). Third, perpetrators of aggravated offenses have convictions for "engaging in a sexual act involving vaginal, anal, or oral penetration" either (1) through use or threat of force or (2) with a child under twelve years old. *Id.* § 14-208.6(1a) (Supp. 2018). The fourth category includes convictions of any sex act by a person over eighteen years old against any victim under thirteen years old. *Id.* § 14-27.28 (2017).

(LexisNexis 2018); Mass. Ann. Laws ch. 265, § 47 (LexisNexis Supp. 2019); Mich. Comp. Laws Ann. § 750-520n(1) (West Supp. 2019); Minn. Stat. Ann. § 609.135(5a)(b)(8), (5a)(c) (West 2018); Miss. Code Ann. § 99-19-84 (2015); Mo. Ann. Stat. § 217.735(4) (West Supp. 2019); Mont. Code Ann. § 46-18-206 (2017); Neb. Rev. Stat. Ann. § 83-174.03(4)(g) (LexisNexis 2019); Nev. Rev. Stat. Ann. § 176A.410(2)(b) (LexisNexis 2016); N.H. Rev. Stat. Ann. § 651:2(V)(b) (LexisNexis Supp. 2018); N.J. Stat. Ann. § 30:4-123.92 (West 2008); N.M. Stat. Ann. § 31-21-10.1(E) (Supp. 2018); N.Y. Penal Law § 65.10(4), (5-a) (McKinney Supp. 2019); N.C.G.S. § 14-208.40A(c) (2017); N.D. Cent. Code § 12.1-32-07(3)(f) (Supp. 2017); Ohio Rev. Code Ann. § 2929.13(L) (West Supp. 2019); Okla. Stat. Ann. tit. 22, § 991a(A)(12) (West Supp. 2019); Or. Rev. Stat. § 144.103(2)(c) (2017); 42 Pa. Stat. and Cons. Stat. Ann. § 9799.30 (West 2014); 11 R.I. Gen. Laws § 11-37-8.2.1 (Supp. 2018); S.C. Code Ann. § 23 -3-540 (Supp. 2018); S.D. Codified Laws § 24-15A-24 (2013); Tenn. Code Ann. § 40-39-303 (Supp. 2018); Tex. Code Crim. Proc. Ann. art. 42A.301(b)(16) (West 2018); Utah Code Ann. § 77-18-1(8)(d) (LexisNexis Supp. 2018); Va. Code Ann. § 19.2-303 (2015); Wash. Rev. Code Ann. § 9.94A.704(5)(b) (West 2019); W. Va. Code Ann. § 62-11D-3(a) (LexisNexis 2014); Wis. Stat. Ann. § 301.48 (West 2019); Wyo. Stat. Ann. § 7-13-1102(b)(i) (2017).

In short, mandatory SBM applies only to a small subset of individuals who commit the most serious sex crimes or are repeat offenders. The General Assembly has determined certain convicted sex offenders—namely sexually violent predators, recidivists, perpetrators of aggravated offenses, and adults who sexually victimize children under thirteen years old—"pose a high risk of engaging in sex offenses even after being released from incarceration . . . and that protection of the public from sex offenders is of paramount governmental interest." *Id.* § 14-208.5. Accordingly, the statute categorically requires the trial court to "order the offender to enroll in a satellite-based monitoring program for life." *Id.* § 14-208.40A(c). Though the program is commonly referred to as "lifetime" monitoring, one year after a defendant completes his sentence, probation, or parole, the defendant may petition the Post-Release Supervision and Parole Commission for termination of enrollment. *Id.* §§ 14-208.41(a), -208.43 (2017). The defendant must show he has not been convicted of any additional qualifying convictions, has substantially complied with the SBM and registration programs, and "is not likely to pose a threat to the safety of others." *Id.* § 14-208.43(c).

II. The Majority's Holding

The majority "hold[s] that the application of the relevant portions of N.C.G.S. §§ 14-208.40A(c) and 14-208.40B(c) to individuals in the same category as defendant, under which these individuals are required to submit to a mandatory, continuous, nonconsensual search by lifetime satellite-based monitoring, violates the Fourth Amendment to the United States Constitution. The category to which this holding applies includes only those individuals who are not on probation, parole, or post-release supervision; who are subject to lifetime SBM solely by virtue of being recidivists as defined by the statute; and who have not been classified as a sexually violent predator, convicted of an aggravated offense, or are adults convicted of statutory rape or statutory sex offense with a victim under the age of thirteen." Thus, the majority "conclude[s] that the Court of Appeals erred in limiting its holding to the constitutionality of the program as applied only to defendant, when the analysis of the reasonableness of the search applies equally to anyone in defendant's circumstances."

It is undisputed that defendant is a recidivist. To qualify as a recidivist under the statute, a defendant must have multiple "reportable convictions." *Id.* § 14-208.6(2b). For example, reportable convictions include comparatively minor sex crimes where the victim is not physically harmed, such as secretly photographing a person for the purpose of gratifying sexual desires (a Class I felony) or solicitation of a child

using a computer to commit a sex act (a Class H felony), as well as those society would consider as the worst sex crimes, such as first-degree forcible rape (a Class B1 felony) and child sex trafficking (a Class B2 felony). *See id.* § 14-208.6(4)(a), (d). If a defendant is convicted of at least two reportable offenses, he qualifies as a recidivist, and the trial court must order the defendant's enrollment in lifetime SBM. Considering the various crimes within the statute's purview, a proper constitutional analysis requires an understanding of the distinction between a facial challenge to the statute and a challenge only as applied to defendant. An as-applied challenge would maintain that the statute is overly broad by including defendant within the recidivist classification, whereas a facial challenge asserts that the statute operates unconstitutionally as to all possible defendants who qualify as recidivists.

The majority holds SBM for any unsupervised defendant falling within the recidivist category is unconstitutional without stating why its analysis applies precisely, but only, to those in this category. Despite its holding, the majority's logic seems to concede the SBM statute's constitutionality. Like those crimes of many other violent sex offenders, defendant's crimes fit two statutory categories: recidivist and aggravated offender. The majority suggests that SBM is unconstitutional for the recidivist category but not for the aggravated offender. Concluding SBM is constitutional for an aggravated offender who is also a recidivist undermines the holding that the entire recidivist category is unconstitutional.

III. Reasonableness As Applied to Defendant

An as-applied challenge concedes a statute's general constitutionality but instead "claim[s] that a statute is unconstitutional on the facts of a particular case or in its application to a particular party." *As-Applied Challenge*, *Black's Law Dictionary* (10th ed. 2014). The majority fails to conduct such an analysis. Instead of focusing on the individualized facts of defendant's case as required by an as-applied challenge, the majority generally uses defendant's "circumstances" to create its category encompassing all unsupervised recidivist sex offenders, regardless of the individual offenses represented. *Cf. Graham v. Florida*, 560 U.S. 48, 91–96, 130 S. Ct. 2011, 2039–42, 176 L. Ed. 2d 825, 856–60 (2010) (Roberts, C.J., concurring in judgment) (promoting a fact-based, instead of a categorical, approach for as-applied challenges). Thus, the majority facially strikes down N.C.G.S. § 14-208.40A(b)(ii) and related provisions that require lifetime SBM for recidivists. *See City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2457–58, 192 L. Ed. 2d 435, 453 (2015) (Scalia, J., dissenting) (remarking that "the *reasoning* of a decision may suggest

that there is no permissible application of a particular statute . . . . [and] in this sense, the facial invalidation of a statute is a logical consequence of the Court's opinion, [even if it is] not the immediate effect of its judgment" (citation omitted)). An as-applied challenge should focus on the specific facts underlying a defendant's convictions, and a defendant's as-applied challenge fails if the defendant's conduct is the targeted harm the General Assembly intended to curtail. *See Bryant*, 359 N.C. at 565, 614 S.E.2d at 486 (stressing that "the role of the legislature is to balance the weight to be afforded to disparate interests and to forge a workable compromise among those interests" and that "[t]he role of the Court is not to sit as a super legislature and second-guess the balance struck by the elected officials" (quoting *Henry v. Edmisten*, 315 N.C. 474, 491, 340 S.E.2d 720, 731 (1986))). If, however, the statute is overly broad as applied to defendant's specific circumstances, the statute is unconstitutional as applied to him. *See Britt v. State*, 363 N.C. 546, 549–50, 681 S.E.2d 320, 322–23 (2009).

In *Britt* this court analyzed an as-applied challenge to a new statute that prohibited the plaintiff from owning a firearm because of his nonviolent, drug-related felony conviction decades earlier. *Id.* at 547, 681 S.E.2d at 321. The plaintiff complied with the statute and then challenged its constitutionality as applied to him. *Id.* at 548–49, 681 S.E.2d at 322. After noting his longstanding law-abiding history and, when allowed, his lawful and peaceful possession of firearms, this Court restored the plaintiff's right to possess a firearm. *Id.* at 550, 681 S.E.2d at 323 ("[I]t is unreasonable to assert that a nonviolent citizen who has responsibly, safely, and legally owned and used firearms for seventeen years is in reality so dangerous that any possession at all of a firearm would pose a significant threat to public safety."). In other words, by examining both the plaintiff's previous conviction and subsequent actions, this Court determined that the statute was overly broad and thus unconstitutional as applied to the plaintiff.

Here the statute is not overly broad as applied to defendant because it appears he, as a consequence of his aggravated and repeated sex crimes, poses exactly the public danger the legislature sought to address. He forcibly sodomized a seven-year-old boy with another child watching and, as a result, spent six years in prison. Upon release, defendant failed to register as a sex offender and was placed on probation. He received notice of multiple probation violations, and after a hearing, the trial court gave defendant a second chance by placing him on intensive supervision. While subject to intensive supervision and less than three years after his release from prison, defendant began an illegal

sexual relationship with a minor, whom he impregnated. After serving his subsequent prison sentence, defendant again failed to comply with sex offender registry requirements. His resulting two-year prison sentence delayed his initial SBM hearing until he was again released. Since 1996, when not incarcerated, the longest period of time defendant has not committed a sex crime against a minor is the six years (from 2013 to the present) he has been enrolled in SBM. Thus, his underlying convictions for sexually violent offenses and subsequent actions contravene any as-applied argument, for defendant sits squarely within the class of aggravated and recidivist offenders the General Assembly intended to address.

IV. Facial Reasonableness of the Statute

A facial challenge maintains the statute "always operates unconstitutionally." *Facial Challenge*, *Black's Law Dictionary* (10th ed. 2014). "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100, 95 L. Ed. 2d 697, 707 (1987); *see also Patel*, 135 S. Ct. at 2449, 2451, 192 L. Ed. 2d at 443, 446 (majority opinion) (applying the *Salerno* standard to a Fourth Amendment facial challenge). In other words, to succeed in a facial challenge, defendant must shoulder the heavy burden of showing that the statute's SBM requirement could never be reasonably applied to any offender who falls within the statutorily defined categories. *See Patel*, 135 S. Ct. at 2451, 192 L. Ed. 2d at 445 ("[A] [party] must establish that a 'law is unconstitutional in all of its applications.' " (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, 128 S. Ct. 1184, 1190, 170 L. Ed. 2d 151, 160 (2008))). In the present case, defendant therefore must prove a statute could never constitutionally require enrollment of a defendant in lifetime SBM whose conduct meets the statutory definition of a recidivist. In other words, to support its holding, the majority must show that lifetime SBM is unreasonable for the most heinous crimes that meet the statutory requirements of recidivists and determine if SBM is unreasonable as to every defendant who committed those crimes.

Even though, as discussed, defendant's history of repeated sexual assaults on children places him squarely within the class of those identified by the legislature as requiring SBM to deter their behavior, defendant's behavior here does not encompass all possible scenarios in which the lifetime SBM statute may apply to recidivists. To support its holding, the majority must show that lifetime SBM is unreasonable for everyone

who meets the recidivist classification in all circumstances, including the worst violent offenders. Of note, the United States Supreme Court has upheld civil commitment statutes targeting some of these sexually violent predators. *See Kansas v. Hendricks*, 521 U.S. 346, 350, 117 S. Ct. 2072, 2076, 138 L. Ed. 2d 501, 508 (1997). Thus, the balancing test must include the incremental impact on reasonable privacy interests of those for whom civil commitment may be available.

Under both *Samson*'s test for individuals with diminished expectations of privacy and *Vernonia*'s special needs doctrine, the lifetime SBM statute is facially constitutional. A Seventh Circuit panel applied the mandate provided by the United States Supreme Court in *Grady* to an SBM statute "functionally identical to" North Carolina's statute. *Belleau v. Wall*, 811 F.3d 929, 939 (7th Cir. 2016) (Flaum, J., concurring). The court held, *inter alia*, that lifetime SBM constituted a reasonable search under *Grady*. *Id.* at 936–37 (majority opinion).

Belleau was a sexually violent predator recently released from civil commitment. *Id.* at 931. The court first noted Belleau's privacy interests were "severely curtailed as a result of his criminal activities" even though he was not on parole or probation because "persons who have demonstrated a compulsion to commit very serious crimes . . . must expect to have a diminished right of privacy as a result of the risk of their recidivating—and . . . the only expectation of privacy that the law is required to honor is an 'expectation . . . that society is prepared to recognize as reasonable.' " *Id.* at 935 (third alteration in original) (quoting *Katz v. United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 516, 19 L. Ed. 2d 576, 588 (1967) (Harlan, J., concurring)). The majority discussed at length the dangers and underreporting of child sexual assaults as well as the high rates of recidivism among convicted sex offenders. *Id.* at 932–34. Thus, the court concluded the "*incremental* effect of the challenged statute" on Belleau's privacy was "slight," and the search was reasonable under the Fourth Amendment. *Id.* at 934–35, 936–37.

In a concurring opinion, Judge Flaum likewise concluded that the lifetime SBM statute did not violate the Fourth Amendment. In doing so he examined "two threads of Fourth Amendment case law: searches of individuals with diminished expectation of privacy [as in *Samson*] . . . and 'special needs' searches [as in *Vernonia*]." *Id.* at 939 (Flaum, J., concurring). Because the monitoring program's primary purpose was to reduce recidivism, Judge Flaum determined the program served a valid special need; nevertheless, a complete analysis of the search also must balance the public interest and the intrusion on reasonable privacy interests in a context-specific inquiry. *Id.* at 939–40. Judge Flaum first

recognized the government's strong interest in protecting juveniles from sex offenders. *Id.* at 940 (citing *Lile*, 536 U.S. at 32–33, 122 S. Ct. at 2024, 153 L. Ed. 2d at 56–57 (plurality opinion)). While acknowledging the significant privacy interest at issue, *id.* (citing *Riley v. California*, 573 U.S. 373, 396, 134 S. Ct. 2473, 2490, 189 L. Ed. 2d 430, 447–48 (2014)), he opined that "the weight of this privacy interest [was] somewhat reduced by Belleau's diminished expectation of privacy. . . . [because] a felon's expectation of privacy lies somewhere in-between that of a parolee or probationer and an ordinary citizen," *id.* at 940–41 (citations omitted). Judge Flaum concluded that because the intrusion upon this diminished privacy was "relatively limited in its scope" when compared with the State's purpose, the SBM statute constituted a reasonable Fourth Amendment search. *Id.* at 941.

Here, as did the trial court, I agree with the reasoning of the Seventh Circuit and would hold North Carolina's SBM program effects a reasonable search. First, lifetime SBM enrollees have reduced privacy expectations given the nature of their acts and the resulting convictions. Second, the incremental intrusion upon this reduced privacy is slight. Third, the State's interest in, and its special need for, deterring recidivist violent sex offenders is paramount. Finally, this governmental interest outweighs the intrusion upon an SBM enrollee's diminished expectation of privacy in a context-specific balancing test that considers the totality of the circumstances.

The Seventh Circuit's analysis is persuasive here because, for all considerations relevant to a Fourth Amendment analysis, the Wisconsin SBM statute is "functionally identical to" the North Carolina SBM statute. *Id.* at 939. Both statutes require continuous lifetime SBM for a categorically defined group of convicted sex offenders. *See* N.C.G.S. § 14-208.40; Wis. Stat. Ann. § 301.48(2) (West 2019). The civil SBM programs may apply to unsupervised offenders after they have completed parole, probation, or civil commitment. *See Belleau*, 811 F.3d at 932 (majority opinion) (recognizing that the offender was "not on bail, parole, probation, or supervised release"); *State v. Grady*, 817 S.E.2d 18, 24 (N.C. Ct. App. 2018) ("Unsupervised offenders . . . are statutorily required to submit to SBM . . . ."). Moreover, in one notable difference, the Wisconsin statute prohibits certain offenders from ever requesting termination of lifetime SBM and does not allow any offender to petition for termination for at least twenty years, but the North Carolina statute allows a person to apply for termination of "lifetime" SBM beginning one year following the offender's release from prison and completion of any post-release supervision. *Compare* Wis. Stat. Ann. § 301.48(6)(b)(2), (3), *with* N.C.G.S. § 14-208.43(a).

An analysis of facial constitutionality starts with defining the scope of the privacy interests involved. "[I]t is beyond dispute that convicted felons do not enjoy the same measure of constitutional protections, including the expectation of privacy under the Fourth Amendment, as do citizens who have not been convicted of a felony." *State v. Bowditch*, 364 N.C. 335, 349–50, 700 S.E.2d 1, 11 (2010) (citations omitted); *see also Vernonia*, 515 U.S. at 654, 115 S. Ct. at 2391, 132 L. Ed. 2d at 575 ("[T]he legitimacy of certain privacy expectations vis-à-vis the State may depend upon the individual's legal relationship with the State."). Because of their own conduct and propensities that led to their underlying convictions and statutory classifications, felony sex offenders face a plethora of rights restrictions, specifically a reduction in their Fourth Amendment privacy expectations "that society recognizes as 'legitimate.' " *Vernonia*, 515 U.S. at 654, 115 S. Ct. at 2390–91, 132 L. Ed. 2d at 575 (quoting *T.L.O.*, 469 U.S. at 338, 105 S. Ct. at 741, 83 L. Ed. 2d at 732).

For example, restrictions on firearms possession and voting rights evince a felon's reduced constitutional protections. *Cf. District of Columbia v. Heller*, 554 U.S. 570, 626, 128 S. Ct. 2783, 2816–17, 171 L. Ed. 2d 637, 678 (2008) (affirming that the "longstanding prohibitions on the possession of firearms by felons" survive Second Amendment scrutiny); *Richardson v. Ramirez*, 418 U.S. 24, 56, 94 S. Ct. 2655, 2671, 41 L. Ed. 2d 551, 572 (1974) (holding that disenfranchisement of convicted felons who had completed their sentences did not violate the Equal Protection Clause). Furthermore, the sex offender registration requirements of all fifty states manifest a diminished expectation of privacy for sex offenders. *Cf. Smith*, 538 U.S. at 89–90, 123 S. Ct. at 1145, 155 L. Ed. 2d at 174–75. Society clearly does not afford violent sex offenders a full legitimate expectation of location-based privacy, as exemplified by the limitations on sex offenders' movements. *See* N.C.G.S. § 14-208.18(a)(1), (4) (2017) (prohibiting sex offenders from being present at "any place intended primarily for the use, care, or supervision of minors, including, but not limited to, schools, children's museums, child care centers, nurseries, and playgrounds," as well as the State Fair); *Standley v. Town of Woodfin*, 362 N.C. 328, 333, 661 S.E.2d 728, 732 (2008) (upholding prohibition on convicted sex offenders entering public parks). Felony sex offenders may also be barred from certain occupations and professions, a harsh sanction that limits them from choosing where they work and what type of livelihood they may pursue. *E.g.*, N.C.G.S. § 84-28(b)(1), (c) (2017) (attorney); *id.* § 90-14(a)(7), (c) (2017) (medical doctor); *id.* § 93-12(9)(a) (2017) (certified public accountant); *id.* § 93A-6(b)(2) (2017) (real estate broker). Thus, while recidivist sex offenders have a somewhat greater expectation of privacy than a probationer or parolee, they do not have

the same expectations of privacy as members of the general public in light of their prior offenses.[5,6] *See Belleau*, 811 F.3d at 934–35 (majority opinion) ("Focus[ing] . . . on the *incremental* effect of the challenged statute on . . . privacy . . . [reveals that the] effect is slight" in the context of a convicted violent sex offender's diminished expectation of privacy); *see also Samson*, 547 U.S. at 852, 126 S. Ct. at 2199, 165 L. Ed. 2d at 259 (finding no intrusion upon a parolee's diminished expectation of privacy); *Vernonia*, 515 U.S. at 658, 115 S. Ct. at 2393, 132 L. Ed. 2d at 577 (concluding the intrusion upon privacy was "negligible" in light of student athlete's reduced expectation of privacy at school).

First, the physical limitations imposed by SBM are "more inconvenient than intrusive" and do not materially invade defendant's diminished privacy expectations. *Grady*, 817 S.E.2d at 25. As noted by the trial court, the ankle monitor weighs less than nine ounces, and it "does not

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5. The majority asserts that "except as reduced for possessing firearms and by providing certain specific information and materials to the sex offender registry, defendant's constitutional privacy rights, including his Fourth Amendment expectations of privacy, have been restored." The majority's logic is backwards. Defendant's expectation of privacy is not reduced "by" the sex offender registry; rather, the sex offender registry may require defendant to provide information *because* his privacy rights are reduced. The majority offers no explanation for why the scope of diminished privacy expectations is restricted to only those reductions implicated by firearm possession and the sex offender registry. Rather, the actual issue is what reductions in reasonable expectations of privacy does society recognize as legitimate for recidivist violent sex offenders. *See Vernonia*, 515 U.S. at 654, 115 S. Ct. at 2391, 132 L. Ed. 2d at 575 (quoting *T.L.O.*, 469 U.S. at 338, 105 S. Ct. at 741, 83 L. Ed. 2d at 732).

6. In *Carpenter v. United States*, the Supreme Court held that, for citizens without a reduced expectation of privacy, government tracking of a suspect's location without a warrant substantially intrudes upon reasonable privacy rights. 138 S. Ct. 2206, 2217, 201 L. Ed. 2d 507, 521 (2018). There the police acquired the defendant's cell site location information (CSLI) containing the time-stamped locations of his cell phone for an extended period of time. *See id.* at 2217, 2220, 201 L. Ed. 2d at 521, 525 (narrowly limiting the holding to "legitimate expectation[s] of privacy in the record of [the defendant's] physical movements as captured through CSLI"). The Court expressed concern that allowing police to surreptitiously invade reasonable expectations in this manner would expose an expansive class of individuals (i.e., anyone with a cell phone) to unfettered government surveillance. *See id.* at 2218, 201 L. Ed. 2d at 522 ("Only the few without cell phones could escape this tireless and absolute surveillance."). Here those concerns are not present. Lifetime SBM only applies to a narrow, statutorily defined class of convicted sex offenders. The police have no discretion over who is searched, and thus the SBM program does not raise the same concerns of arbitrary, universal tracking at issue in *Carpenter*. *See id.* at 2213, 201 L. Ed. 2d at 517 ("The basic purpose of [the Fourth] Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." (internal quotation marks and citation omitted)); *see also id.* at 2214, 201 L. Ed. 2d at 518 ("[A] central aim of the Framers was to place obstacles in the way of too permeating police surveillance." (internal quotation marks and citation omitted)).

prohibit any defendant from traveling, working, or otherwise enjoying the ability to legally move about as he wishes." Charging the monitor takes at most two hours per day, which poses an insignificant burden considering the ubiquity of other personal electronic devices the average person charges every day.

Second, regarding the effect on other privacy interests, SBM falls on a spectrum of possible "regulatory schemes that address the recidivist tendencies of convicted sex offenders." *Bowditch*, 364 N.C. at 341, 700 S.E.2d at 6. At one end of the continuum, civil commitment involves a highly invasive affirmative restraint and deprivation of rights similar to imprisonment. *See Hendricks*, 521 U.S. at 350, 117 S. Ct. at 2076, 138 L. Ed. 2d at 508; *Belleau*, 811 F.3d at 932. Next, career and travel limitations significantly restrict the exercise of fundamental freedoms. Finally, on the other end of the sex offender civil regulatory spectrum, registration statutes impose the fewest restrictions on a defendant's liberty, yet they still require the offender to provide certain information to law enforcement and the public. *See* N.C.G.S. § 14-208.10 (2017).

At the urging of Congress, every state has adopted a sex offender registration act that requires collection, maintenance, and distribution of information about the registered sex offender and imposes penalties for noncompliance. *E.g.*, N.C.G.S. § 14-208.7 (2017). *See generally Smith*, 538 U.S. at 89–90, 123 S. Ct. at 1145, 155 L. Ed. 2d at 174–75. The purposes of sex offender registration are to provide notification to the community and deter future sex offenses. *See Smith*, 538 U.S. at 102–03, 123 S. Ct. at 1152, 155 L. Ed. 2d at 183. When registering, a sex offender must provide his full name, any aliases, date of birth, sex, race, height, weight, eye color, hair color, driver's license number, home address, the type of offense, the date of conviction, the sentence imposed, a current photograph, fingerprints, and any online identifiers (such as social media usernames). N.C.G.S. § 14-208.7(b). Every six months, the sex offender must verify that his registration information has not changed, and the registrant must provide timely updates regarding any change of address or name, enrollment status in school, or online identifiers. *Id.* §§ 14-208.9, -208.9A (2017). Moreover, the sex offender's name, sex, address, physical description, picture, conviction dates, offenses, sentences imposed, and registration status are publicly available, and "[t]he sheriff shall release any other relevant information that is necessary to protect the public concerning a specific person." *Id.* § 14-208.10. Ten years after registering, a sex offender may petition to terminate his registration. *Id.* § 14-208.12A (2017).

Thus, along the spectrum of possible regulatory schemes, SBM's privacy intrusion is most similar to sex offender registration. Both programs mandate disclosing information to the State that is not ordinarily required for the general public. Both protect the public through deterrence. Both allow for termination, SBM after one year and registration after ten years. In contrast with the other options, "[t]he SBM program does not detain an offender [or resemble imprisonment] in any significant way." *Bowditch*, 364 N.C. at 349, 700 S.E.2d at 11. Additionally, "[t]he monitoring taking place in the SBM program is far more passive and is distinguishable from the type of State supervision imposed on probationers," and "[o]ccupational debarment is far more harsh than an SBM program." *Id.* at 346, 349, 700 S.E.2d at 9–10; *see also Doe v. Bredesen*, 507 F.3d 998, 1005 (6th Cir. 2007) (citing *Smith*, 538 U.S. at 100, 123 S. Ct. at 1151, 155 L. Ed. 2d at 181) (noting SBM is less harsh than occupational debarment), *cert. denied*, 555 U.S. 921, 129 S. Ct. 287, 172 L. Ed. 2d 210 (2008).

Accordingly, in the totality of the circumstances, SBM that provides information regarding physical location and movements effects a small, incremental intrusion in the context of the diminished expectation of privacy that society would recognize as legitimate. SBM does not prevent a defendant from going anywhere he is otherwise allowed to go. The tracking mechanism only passively collects location data; as the trial court found, "[T]he ankle monitor does not monitor or reveal the activities of the offender—it merely monitors his location." *See also Belleau*, 811 F.3d at 936 ("It's untrue that 'the GPS device burdens liberty . . . by its continuous surveillance of the offender's activities'; it just identifies locations; it doesn't reveal what the wearer of the device is doing at any of the locations." (alteration in original) (quoting *Commonwealth v. Cory*, 454 Mass. 559, 570, 911 N.E.2d 187, 196 (2009))). Where a defendant is unsupervised, no one regularly monitors the defendant's location, significantly lessening the degree of intrusion. *See id.* at 941 (Flaum, J., concurring). Furthermore, though the program is referred to as "lifetime" monitoring, a defendant may petition to be removed from SBM after one year. N.C.G.S. § 14-208.43 (permitting termination if a defendant shows he has not been convicted of any additional qualifying convictions, has substantially complied with the SBM program, and "is not likely to pose a threat to the safety of others"). Therefore, in the context of diminished privacy expectations, SBM's degree of intrusion is minimal.

On the other hand, regarding "the public interest, in this case, the state's interest can hardly be overstated." *Belleau*, 811 F.3d at 940. The General Assembly has "recognize[d] that sex offenders often pose a high

risk of engaging in sex offenses even after being released from incarceration or commitment and that protection of the public from sex offenders is of paramount governmental interest." N.C.G.S. § 14-208.5. More specifically, "[t]he General Assembly also recognizes . . . that the protection of [sexually abused] children is of great governmental interest." *Id.* This finding is supported by United States Supreme Court precedent, congressional action, the public policy of all fifty states, and "the moral instincts of a decent people." *Packingham*, 137 S. Ct. at 1736, 198 L. Ed. 2d at 281; *see* 34 U.S.C.A. § 20981; *Conn. Dep't of Pub. Safety*, 538 U.S. at 4, 123 S. Ct. at 1163, 155 L. Ed. 2d at 103; *Smith*, 538 U.S. at 89–90, 123 S. Ct. at 1145, 155 L. Ed. 2d at 174–75.[7] Therefore, requiring enrollment in SBM accomplishes the General Assembly's purpose of protecting the public by deterring violent sex offenders from committing further sex crimes, thereby "promot[ing] . . . legitimate governmental interests." *Samson*, 547 U.S. at 848, 126 S. Ct. at 2197, 165 L. Ed. 2d at 256 (quoting *Knights*, 534 U.S. at 119, 122 S. Ct. at 591, 151 L. Ed. 2d at 505).[8]

Finally, the paramount governmental interest outweighs the minimal intrusion upon diminished privacy interests when considering the totality of possible circumstances that may arise under the statute. Here the facially challenged statutes reasonably provide for lifetime SBM for the worst recidivist sexual offenders, and lifetime SBM is significantly less invasive than civil commitment or other regulatory options available for those offenders. The majority, however, putting itself in the

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7. When presented with conflicting evidence supporting the legislature's public policy determinations, courts should defer to the legislature's findings of fact, especially where, like here, that determination is overwhelmingly corroborated. Additionally, the trial court considered "multiple studies of recidivism rates of sex offenders versus other criminals" and found the search reasonable in light of this evidence.

8. "[I]t is undisputed that the [SBM] law promotes deterrence . . . . [which] appears to be the primary purpose of the law." *Belleau*, 811 F.3d at 943; *accord Bredesen*, 507 F.3d at 1007. Moreover, the efficacy of SBM as a deterrent is self-evident: The search "deter[s] future offenses by making the plaintiff aware that he is being monitored and is likely therefore to be apprehended should a sex crime be reported at a time, and a location, at which he is present." *Belleau*, 811 F.3d at 935 (majority opinion); *see also Vernonia*, 515 U.S. at 663, 115 S. Ct. at 2395–96, 132 L. Ed. 2d at 581 (remarking that the "efficacy" of the search was "self-evident" where the goal was to deter drug use by athletes and the school promulgated the drug-testing policy so that athletes would know they would be tested); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 629–30, 109 S. Ct. 1402, 1420, 103 L. Ed. 2d 639, 668 (1989) (recognizing that it is "common sense" that employees must "know they will be tested" for drugs and alcohol in order to deter substance abuse). Thus, there is no need for individualized inquiries into the efficacy of deterring a particular defendant, nor is the State required to prove this common sense principle with empirical evidence. Nonetheless, since 1996, when not incarcerated, the longest period of time defendant has not committed a sex crime against a minor is the six years he has been subject to SBM.

place of the legislature, would draft a statute excluding sexually violent recidivists from mandatory lifetime SBM, yet the case law is clear that courts should not assume the role of the legislature when the legislative categories are reasonable. *See*, *e.g.*, *Smith*, 538 U.S. at 103–04, 123 S. Ct. at 1153, 155 L. Ed. 2d at 184 ("[Where] [t]he legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class[,] . . . . [a State is] not preclude[d] . . . from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences."); *Bredesen*, 507 F.3d at 1007 ("[O]ur role is not to invalidate the [SBM] program if the . . . Legislature has not struck the perfect balance between the regulatory purpose of the program and its burdens on [our] citizens, but rather to determine whether the means chosen are reasonable."). The majority expresses concern that "[a] wide range of different offenses are swept into" the statute's definition of recidivist, but if the statute is ever overbroadly applied to a defendant, he can bring an as-applied challenge that takes into account his specific convictions, circumstances, and facts. *See Britt*, 363 N.C. at 549–50, 681 S.E.2d at 322–23.

Moreover, the majority's sweeping analysis jeopardizes most applications of the lifetime SBM statute. Despite the majority's strenuous insistence that its reasoning only addresses lifetime SBM for recidivists without affecting lifetime SBM for sexually violent predators, aggravated offenders, and adults who otherwise sexually victimize children under thirteen years old, the facts, analysis, and ultimate outcome of this case demonstrate otherwise. The majority's approach is devoid of any discussion as to why SBM is unconstitutional for the worst crimes that would place a defendant in the statutory category of recidivist. Further, by upholding the reversal, without remand of the trial court's order requiring lifetime SBM, the majority's disposition does not effect the result it claims in its reasoning. Rather, affirming the Court of Appeal's reversal removes defendant, whose convictions satisfy the statutory definition for an aggravated offender, from the lifetime SBM program without directing the trial court to determine whether he qualifies for lifetime SBM as an aggravated offender. This decision would seem to prevent lifetime SBM for a defendant who is a recidivist but also qualifies for lifetime SBM under a different statutory subsection.[9] Thus, not only does the majority's facial analysis fail to consider all possible scenarios in

9. Notably, the trial court could not alternatively enroll a recidivist defendant in SBM for a term of years either. N.C.G.S. § 14-208.40A(d).

which the lifetime SBM statute may apply to recidivists, but it also does not address the specific result of its holding on defendant here. Because the statute requiring lifetime SBM can be constitutionally applied to sexually violent recidivists, such as defendant, defendant's facial challenge should fail.

V. Special Needs Search[10]

Lastly, the SBM program serves a "special need[ ], beyond the normal need for law enforcement, [that] make[s] the warrant and probable-cause requirement impracticable." *Vernonia*, 515 U.S. at 653, 115 S. Ct. at 2391, 132 L. Ed. 2d at 574 (quoting *Griffin*, 483 U.S. at 873, 107 S. Ct. at 3168, 97 L. Ed. 2d at 717). The special needs doctrine does not apply where "the primary purpose of the . . . program is to uncover evidence of ordinary criminal wrongdoing," *City of Indianapolis v. Edmond*, 531 U.S. 32, 41–42, 121 S. Ct. 447, 454, 148 L. Ed. 2d 333, 343 (2000), but conversely, "a program satisfies a special need if the program 'is not undertaken for the investigation of a specific crime,' " *Belleau*, 811 F.3d at 940 (quoting *Green v. Berge*, 354 F.3d 675, 678 (7th Cir. 2004)). " '[S]pecial needs' have been found 'not because the rules [for warrants and probable cause] are inconvenient to follow,' but rather 'because in such situations, the rules are not needed to prevent the mischief that [warrants] are designed to prevent.' " *United States v. Amerson*, 483 F.3d 73, 82 (2d Cir. 2007) (second alteration in original) (quoting *Nicholas v. Goord*, 430 F.3d 652, 680 (2d Cir. 2005) (Lynch, J., concurring), *cert. denied*, 549 U.S. 953, 127 S. Ct. 384, 166 L. Ed. 2d 270 (2006)), *cert. denied*, 552 U.S. 1042, 128 S. Ct. 646, 169 L. Ed. 2d 515 (2007). "The need for a warrant is perhaps least when the search involves no discretion that could properly be limited by the 'interpo[lation of] a neutral magistrate between the citizen and the law enforcement officer.' " *Maryland v. King*, 569 U.S. 435, 447, 133 S. Ct. 1958, 1969–70, 186 L. Ed. 2d 1, 20 (2013) (alteration in original) (quoting *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 667, 109 S. Ct. 1384, 1391, 103 L. Ed. 2d 685, 703 (1989)); *see also Delaware v. Prouse*, 440 U.S. 648, 653–54, 99 S. Ct. 1391, 1396, 59 L. Ed. 2d 660, 667

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10. Because defendant has a reduced expectation of privacy, the special needs doctrine does not apply here. *See Maryland v. King*, 569 U.S. 435, 463, 133 S. Ct. 1958, 1978, 186 L. Ed. 2d 1, 30 (2013) ("The special needs cases . . . do not have a direct bearing on the issues presented in this case, because unlike the search of a citizen who has not been suspected of a wrong, [the defendant] has a reduced expectation of privacy."); *Samson*, 547 U.S. at 852 n.3, 126 S. Ct. at 2199 n.3, 165 L. Ed. 2d at 259 n.3 ("[W]e [do not] address whether . . . [the] search . . . is justified as a special need . . . because our holding under general Fourth Amendment principles renders such an examination unnecessary."). Nevertheless, in accordance with the Supreme Court's mandate and in response to the majority opinion, I discuss the application of the special needs doctrine *arguendo*.

(1979) (remarking that the Fourth Amendment's purpose "is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials" (footnote omitted)).

Thus, case law recognizes that the government's interest in deterring at-risk individuals from activity detrimental to public safety is a special need when the search does not constitute an investigation of a specific crime and does not involve the exercise of discretion by law enforcement officers. *See Vernonia*, 515 U.S. at 658 n.2, 115 S. Ct. at 2393 n.2, 132 L. Ed. 2d at 578 n.2 (distinguishing the "prophylactic and distinctly *non*punitive purposes (protecting student athletes from injury, and deterring drug use in the student population)" of the programmatic search effected by drug testing from " 'evidentiary' searches, which generally require probable cause"); *see also Von Raab*, 489 U.S. at 666, 109 S. Ct. at 1391, 103 L. Ed. 2d at 702 (upholding a drug-screening program "to deter drug use" among certain United States Customs Service employees as a special needs search); *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 632–33, 109 S. Ct. 1402, 1421–22, 103 L. Ed. 2d 639, 670 (1989) (finding that, because a drug-screening program for railroad employees was "designed not only to discern [drug and alcohol] impairment but also to deter it," the search was a special needs search that furthered the government's interest in deterring "hazardous conduct" that puts the public at risk).

Here the SBM program's primary purpose is to serve the special need of "protecting the public against recidivist tendencies of convicted sex offenders." *Bowditch*, 364 N.C. at 351, 700 S.E.2d at 12 (recognizing deterrence as a purpose and effect of SBM). Because "there is no specific crime to give rise to probable cause," the search effected by the SBM program is not predicated on the judgment or discretion of law enforcement or any other government official, and "[a]ccordingly, the traditional safeguards of the Fourth Amendment, such as the warrant requirement, are unworkable." *Belleau*, 811 F.3d at 941.[11] Thus, the SBM program is constitutional pursuant to the special needs doctrine.

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11. As a secondary benefit, the program creates a repository of information that law enforcement may use to detect or preclude the enrollee's involvement in future sex offenses. While the "[i]nformation gathered from this program may, at some later time, be used as evidence in a criminal prosecution, . . . the program is setup [sic] to obviate the likelihood of such prosecutions" and, therefore, still falls within the scope of the special needs doctrine. *Belleau*, 811 F.3d at 940. Furthermore, the collection of this information provides the deterrent effect.

VI. Conclusion

"Although privacy is a value of constitutional magnitude, it must yield, on occasion, to the state's substantial interest to protect the public through reasonable regulations in appropriate circumstances. This case presents one of those circumstances." *Belleau*, 811 F.3d at 939. The search arising from the SBM statute for a limited category of high-risk recidivist sex offenders, given the totality of the circumstances, is a reasonable search under the Fourth Amendment. The purpose of the SBM program in protecting the public from sex crimes is of paramount importance. As demonstrated by several other constitutionally sound regulations designed to protect the public from sex offenders, defendant's reasonable expectation of privacy is significantly diminished because of his multiple child sex offenses. Given his diminished privacy expectations, the incremental nature of the search providing location information and the method of data collection via an ankle bracelet are more inconvenient than intrusive. While courts must continue to "approach the government's use of [GPS technology] with caution, to ensure that it does not upset the balance of rights bestowed by the Constitution," *id.* at 938–39, the SBM search here is reasonable, and the statute is constitutional. The decision of the Court of Appeals should be reversed and the trial court's SBM order reinstated. Accordingly, I respectfully dissent.

Justice MORGAN joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
ROBERT DWAYNE LEWIS

No. 140PA18

Filed 16 August 2019

1. Search and Seizure—warrant—search of residence—probable cause

A search warrant did not establish probable cause to search a residence where it did not connect defendant with the residence and provided no basis for the magistrate to conclude that evidence of the robberies being investigated would likely be found inside the home.

2. Search and Seizure—probable cause—warrant—probable cause

Probable cause for a warrant to search a vehicle did not exist where the officer had the necessary information but did not include it in the affidavit. Some of that information was contained in an unsworn attachment listing the property to be searched.

Justice MORGAN concurring in part and dissenting in part.

Justice NEWBY joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a consolidated appeal from two decisions of the Court of Appeals, one a published opinion reported at 816 S.E.2d 212 (N.C. Ct. App. 2018), vacating and remanding judgments entered on 7 February 2017 by Judge Richard T. Brown in Superior Court, Hoke County, and the other an unpublished opinion reported at 812 S.E.2d 730 (N.C. Ct. App. 2018), vacating and remanding judgments entered on 6 April 2017 by Judge Kendra D. Hill in Superior Court, Johnston County. Heard in the Supreme Court on 13 May 2019 in session in the Halifax County Courthouse in the Town of Halifax pursuant to section 18B.8 of Chapter 57 of the 2017 Session Laws of the State of North Carolina.

Joshua H. Stein, *Attorney General*, *by Milind Dongre*, *Assistant Attorney General*, *for the State-appellant/appellee.*

Glenn Gerding, *Appellate Defender*, *by Kathryn L. VandenBerg*, *Assistant Appellate Defender*, *for defendant-appellant/appellee.*

DAVIS, Justice.

This case presents the unique circumstances of an officer possessing information that would suffice to establish probable cause for the issuance of a search warrant but failing to include pertinent portions of this information in his affidavit in support of the warrant. Because we conclude that the omission of key facts in the search warrant application in this case resulted in a lack of probable cause for the issuance of the search warrant for either defendant's residence or vehicle, we affirm in part and reverse in part the decision of the Court of Appeals.

Factual and Procedural Background

On 21 September 2014, a man armed with a handgun and wearing dark clothing and a blue piece of cloth covering his face entered a Family Dollar store in Hoke County. The man told a store employee to take the money from the store's safe, place the money in a bag, and give the bag to him. After the employee complied with his demand, the man told her to go into the bathroom and stay there until he had exited the store. A witness outside the store saw the man flee the scene in a dark blue Nissan Titan pickup truck.

A similar robbery occurred at a Dollar General store in Hoke County on 26 September 2014. On that occasion, as two employees were closing the store, a man holding a handgun and wearing dark clothing and a blue face covering approached them. He directed the employees to empty the money from the safe and cash registers into a bag and give it to him. The suspect then ordered the employees to enter the bathroom and remain there until he left the store.

Two days later, on 28 September, a third robbery took place at another Dollar General store in Hoke County. A man armed with a handgun and wearing dark clothing and a blue face covering ordered store employees to give him the money in the store's safe. Upon obtaining the money, the man ordered the employees to go into the bathroom and then fled the premises. Law enforcement officers did not receive a description of the vehicle driven by the suspect for either the 26 September or 28 September robberies.

A fourth robbery took place during the early morning hours of 19 October 2014 at a Sweepstakes store in Smithfield in nearby Johnston County. A man armed with a handgun wearing dark clothing and a blue face covering forced an employee to retrieve money from the store's safe. As he exited the store, the man was recognized and identified as defendant Robert Dwayne Lewis by a Smithfield police officer who was

familiar with him from a previous encounter. Defendant fled the scene in a dark gray Kia Optima. Law enforcement officers subsequently engaged in a high-speed pursuit but were unable to apprehend defendant during the chase.

That same day, officers from the Smithfield Police Department notified the Hoke County Sheriff's Office of the Sweepstakes store robbery and asked that deputies be on the lookout for a dark gray Kia Optima being driven by defendant. The officers also provided the license plate number of the Kia Optima and informed the Sheriff's Office that the address associated with the Kia Optima's registration was 7085 Laurinburg Road in Raeford, North Carolina.

Shortly after beginning his shift at 7:00 a.m. on 19 October 2014, Deputy Tim Kavanaugh of the Hoke County Sheriff's Office drove past the residence located at 7085 Laurinburg Road. He observed a blue Nissan Titan truck parked in the yard in front of the home. Deputy Kavanaugh did not, however, see a Kia Optima matching the description of the vehicle observed in connection with the Smithfield robbery earlier that morning.

Deputy Kavanaugh then continued with his normal patrol duties. He drove back by the home at 7085 Laurinburg Road at approximately 1:00 p.m. on that same day. At that time, Deputy Kavanaugh saw a dark gray Kia Optima parked in the yard in front of the house in addition to the Nissan Titan that he had previously observed. He then parked across the street from the home "[t]o see if [he] could possibly identify anybody coming from the residence . . . or . . . one of the vehicles leaving from the residence."

Shortly thereafter, a man matching the suspect's description exited the house and walked to the residence's mailbox across the street. Deputy Kavanaugh approached the man and asked him for his name. The man identified himself as Robert Lewis, after which Deputy Kavanaugh immediately placed him under arrest.

After arresting defendant, Deputy Kavanaugh approached the residence and spoke to Waddell McCollum, defendant's stepfather, on the front doorstep of the home. McCollum informed Deputy Kavanaugh that defendant lived at the residence. He further stated that defendant owned the Kia Optima and that, although McCollum owned the Nissan Titan, defendant also drove that vehicle on occasion.

When he finished speaking to McCollum, Deputy Kavanaugh walked over to the Kia Optima parked in the front yard "and looked inside

of the passenger area, the rear of the vehicle, and observ[ed] in plain sight a BB&T money bag on the passenger floor of the vehicle." Deputy Kavanaugh also saw dark clothing in the back seat of the Kia.

Following defendant's arrest, Detective William Tart of the Hoke County Sheriff's Office—who had been investigating the three Hoke County robberies—prepared a search warrant application seeking permission to search the residence at 7085 Laurinburg Road as well as the Nissan Titan and Kia Optima parked in front of the home. The sworn affidavit accompanying Detective Tart's search warrant application described in detail the 21 September, 26 September, and 28 September 2014 Hoke County robberies as well as the 19 October 2014 Johnston County robbery. The affidavit noted the similarities between the four robberies as to both the clothing worn by the robber and the manner in which the crimes were carried out. The affidavit also stated that Smithfield police officers had identified defendant as the perpetrator of the 19 October 2014 robbery and that he had been arrested at the 7085 Laurinburg Road residence. The affidavit, however, failed to (1) disclose that defendant lived at 7085 Laurinburg Road, (2) contain any other information linking defendant to that address, (3) describe the circumstances surrounding his arrest at that address, or (4) mention Deputy Kavanaugh's interactions with defendant or his stepfather.

With regard to the vehicles, the affidavit stated that defendant had driven away from the 21 September Hoke County robbery in a dark blue Nissan Titan and that he had fled the scene of the 19 October Johnston County robbery in a Kia Optima. The affidavit further related that a dark blue Nissan Titan "was observed at the residence of 7085 Laurinburg Road . . . on October 19, 2014 by Hoke County Patrol Deputies when serving a felony arrest warrant on [defendant]." The affidavit did not mention the fact that Deputy Kavanaugh had also seen a Kia Optima parked in front of the residence. Nor did it relate that the deputy had seen potentially incriminating evidence upon looking into the window of the Kia Optima.

An unsworn attachment to the search warrant application listed a "dark blue Nissan Titan pick-up truck" and a "gray 2013 Kia Optima EX four door car" among the property to be searched by law enforcement officers if the warrant was issued. This attachment also contained registration information and a VIN number for each vehicle. Based upon the information provided in Detective Tart's affidavit, a magistrate issued a search warrant for the 7085 Laurinburg Road residence, the Nissan Titan, and the Kia Optima.

Detective Tart executed the search warrant on 19 October 2014. He seized various items of evidence that were located inside the Kia Optima. These items included the BB&T bank bag that Deputy Kavanaugh had previously viewed through the window of the vehicle, which contained receipts and other documents connected to the Smithfield robbery. Detective Tart also seized a blue helmet liner that was consistent with the face covering worn by the suspect and a rusty handgun from the Kia.[1]

On 21 September 2015, defendant was indicted by a Hoke County grand jury on three counts of robbery with a dangerous weapon, five counts of second-degree kidnapping, and one count of attempted robbery with a dangerous weapon.[2] He was indicted on 5 October 2015 by a Johnston County grand jury on charges of robbery with a dangerous weapon and two counts of second-degree kidnapping. A second Johnston County grand jury subsequently indicted him on 2 November 2015 for common law robbery.[3]

On 2 March 2016, defendant filed motions to suppress in both the Superior Court, Hoke County and the Superior Court, Johnston County in which he sought to exclude evidence obtained during the execution of the search warrant by Detective Tart. In his motion, he argued that the evidence should be suppressed on the grounds that (1) an "insufficient connection" existed "between the items sought and property to be searched," and (2) the search of the Kia Optima was not permissible under the plain view doctrine.

Defendant's motion to suppress was heard on 7 April 2016 in Superior Court, Hoke County before the Honorable Tanya T. Wallace. Both Deputy Kavanaugh and Detective Tart testified at the hearing. During his testimony, Deputy Kavanaugh related that he traveled to the Laurinburg Road residence on 19 October 2014 in response to a report from Johnston County law enforcement officers that a possible suspect living at that location had been seen fleeing the scene of the Smithfield robbery in a Kia Optima. He further testified that the report provided a description of the suspect as well as his name (identifying him as defendant) and address. Deputy Kavanaugh also stated that while on the premises of the residence, he spoke with defendant's stepfather,

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1. The record is unclear as to the nature of the evidence discovered by Detective Tart during his search of the residence or the Nissan Titan.

2 Defendant's indictment for attempted robbery with a dangerous weapon stemmed from a separate incident that allegedly occurred on 9 September 2014.

3. The indictment for common law robbery was based on a separate incident alleged to have occurred on 30 August 2014.

who confirmed that defendant lived at 7085 Laurinburg Road. Deputy Kavanaugh testified that following his conversation with defendant's stepfather, he observed dark clothing and a BB&T bank bag through the window of the Kia Optima.

On 10 June 2016, the trial court entered an order denying defendant's motion to suppress. In its order, the court concluded that the affidavit in support of Detective Tart's search warrant application sufficiently established probable cause to support the magistrate's issuance of a warrant authorizing a search of the 7085 Laurinburg Road residence, the Nissan Titan, and the Kia Optima. The court further ruled that "[n]otwithstanding the affidavit of probable cause to search the Kia," the evidence viewed by Deputy Kavanaugh through the window of the Kia Optima before issuance of the search warrant was lawfully obtained under the plain view doctrine.

On 7 February 2017, defendant entered an *Alford* plea in Superior Court, Hoke County as to all the charges for which he had been indicted in that county but expressly preserved his right to appeal the denial of his motion to suppress. The Honorable Richard T. Brown sentenced him to three consecutive terms of 103 to 136 months of imprisonment. Defendant gave timely notice of appeal from the Hoke County judgments to the Court of Appeals.

On 6 April 2017, defendant entered an *Alford* plea in Superior Court, Johnston County to the charges for which he had been indicted in that venue. He once again preserved his right to appeal the denial of his motion to suppress.[4] The Honorable Kendra D. Hill sentenced him to terms of imprisonment of 103 to 136 months for his robbery with a dangerous weapon conviction, 50 to 72 months for each second-degree kidnapping conviction, and 25 to 39 months for his common law robbery conviction—all to be served consecutively. Defendant filed a timely notice of appeal from the Johnston County judgments to the Court of Appeals.

In the Court of Appeals, defendant argued that Judge Wallace erred by denying his motion to suppress because (1) the search warrant affidavit submitted by Detective Tart was insufficient to establish probable cause to search either the home at 7085 Laurinburg Road or the two vehicles parked in front of the residence, and (2) the plain view doctrine

4. No separate order was entered in the Superior Court, Johnston County matter in connection with defendant's motion to suppress. Instead, it appears from the record that Judge Wallace's order was made a part of the court file in the Johnston County case.

did not permit the search of the Kia Optima. On 1 May 2018, the Court of Appeals issued two opinions regarding defendant's separate appeals from the Hoke County and Johnston County judgments. A published opinion, *State v. Lewis*, 816 S.E.2d 212 (N.C. Ct. App. 2018) (*Lewis I*), addressed defendant's Hoke County appeal, and an unpublished opinion, *State v. Lewis*, 812 S.E.2d 730, 2018 WL 2016031 (N.C. Ct. App. 2018) (unpublished) (*Lewis II*), addressed his Johnston County appeal.

In its published opinion, the Court of Appeals held that the affidavit supporting Detective Tart's search warrant application was sufficient to establish probable cause to search the Nissan Titan and Kia Optima parked in front of the residence but was insufficient to establish probable cause to search the dwelling itself. *Lewis I*, 816 S.E.2d at 213. With regard to its conclusion that the search warrant affidavit did not establish probable cause to search the home, the Court of Appeals noted that the affidavit failed to state that defendant resided at 7085 Laurinburg Road. *Id.* at 217. The Court of Appeals further reasoned that, based solely upon the information contained in the affidavit, "7085 Laurinburg Road could have been . . . someone else's home with no connection to Lewis at all. That Lewis visited that location, without some indication that he may have stowed incriminating evidence there, is not enough to justify a search of the home." *Id.*

With regard to the vehicles, the Court of Appeals held that probable cause existed for the issuance of the warrant because Detective Tart's affidavit "contained enough information, together with reasonable inferences drawn from that information, to establish a substantial basis to believe that the evidence sought probably would be found in the blue Nissan Titan and Kia Optima located at 7085 Laurinburg Road." *Id.* at 216. The Court of Appeals explained its reasoning as follows:

> There was evidence that the same suspect committed four robberies, the first while driving a dark blue Nissan Titan and the fourth while driving a Kia Optima. Later on the same day of the fourth robbery, officers arrested Lewis. When they located him they saw—of all the makes, models, and colors of all the vehicles in the world—a dark blue Nissan Titan, matching the description of the vehicle used in the first robbery. These facts were more than sufficient for the magistrate to conclude that, if officers returned to that location and found a dark blue Nissan Titan and Kia Optima there, there was probable cause to believe that those vehicles contained evidence connected to the robberies.

Id. at 217.

Because it could not determine from the record "which evidence officers seized from the vehicles and which evidence they seized from the home," the Court of Appeals vacated defendant's convictions and remanded the case "with instructions for the trial court to allow [defendant's] motion to suppress the evidence seized from the residence located at 7085 Laurinburg Road." *Id.* Based upon its holding that probable cause supported the issuance of the search warrant for the vehicles, the Court of Appeals did not address defendant's additional argument that a search of the Kia Optima was not supported by the plain view doctrine. *Id.* at 217. In its opinion in *Lewis II*, the Court of Appeals reached identical conclusions regarding the trial court's order denying defendant's motions to suppress.[5]

The State filed petitions for discretionary review on the issue of whether probable cause existed to support a search of the residence. Defendant, in turn, filed petitions for discretionary review on the issue of whether the search warrant affidavit established probable cause to search the Kia Optima. We granted all of the parties' petitions.[6]

Analysis

The Fourth Amendment to the United States Constitution states that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV. " '[A] neutral and detached magistrate,' not an 'officer engaged in the often competitive enterprise of ferreting out crime,' must determine whether probable cause exists." *State v. Allman*, 369 N.C. 292, 294, 794 S.E.2d 301, 303 (2016) (quoting *Illinois v. Gates*, 462 U.S. 213, 240, 76 L. Ed. 2d 527, 549 (1983)). This determination must be based upon the totality of the circumstances. *E.g.*, *State v. Benters*, 367 N.C. 660, 664, 766 S.E.2d 593, 597 (2014).

"The task of the issuing magistrate is simply to make a practical, common[-]sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State*

5. Based upon its ruling that defendant's convictions must be vacated, the Court of Appeals dismissed as moot a petition for certiorari filed by defendant seeking review of the factual basis for his *Alford* pleas to the two second-degree kidnapping charges. *Lewis II*, 2018 WL 2016031, at *1.

6. The parties' appeals from *Lewis I* and *Lewis II* were subsequently consolidated for review by this Court.

v. Arrington, 311 N.C. 633, 638, 319 S.E.2d 254, 257–58 (1984) (quoting *Gates*, 462 U.S. at 238, 76 L. Ed. 2d at 548). It is well established that "a magistrate is entitled to draw reasonable inferences from the material supplied to him by an applicant for a warrant." *State v. Sinapi*, 359 N.C. 394, 399, 610 S.E.2d 362, 365 (2005) (citation omitted). This Court has opined that "as long as the pieces fit together well and yield a fair probability that a police officer executing the warrant will find contraband or evidence of a crime at the place to be searched, a magistrate has probable cause to issue a warrant." *Allman*, 369 N.C. at 294, 794 S.E.2d at 303.

We have recognized that "great deference should be paid a magistrate's determination of probable cause and . . . after-the-fact scrutiny should not take the form of a *de novo* review." *Arrington*, 311 N.C. at 638, 319 S.E.2d at 258. Thus, "[r]eviewing 'courts should not invalidate warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner.' " *Allman*, 369 N.C. at 294, 794 S.E.2d at 303 (second and third alterations in original) (quoting *State v. Riggs*, 328 N.C. 213, 221, 400 S.E.2d 429, 434 (1991)). "This deference, however, is not without limitation. A reviewing court has the duty to ensure that a magistrate does not abdicate his or her duty by 'mere[ly] ratif[ying] . . . the bare conclusions of [affiants].' " *Benters*, 367 N.C. at 665, 766 S.E.2d at 598 (alterations in original) (quoting *Gates*, 462 U.S. at 239, 76 L. Ed. 2d at 549).

I. Search of Residence

[1] We first address whether the search warrant affidavit at issue established probable cause for law enforcement officers to conduct a search of the residence located at 7085 Laurinburg Road. In evaluating the sufficiency of the affidavit, we are guided by our decision in *State v. Campbell*, 282 N.C. 125, 191 S.E.2d 752 (1972).

In *Campbell* the defendant lived in a home with two roommates. *Id.* at 130, 191 S.E.2d at 756. All three residents of the dwelling were suspected drug dealers with outstanding arrest warrants for the sale and possession of narcotics. *Id.* at 130, 191 S.E.2d at 756. Law enforcement officers sought to obtain a search warrant for the residence. The affidavit in support of the warrant stated that the affiant possessed arrest warrants for the three men living in the home. *Id.* at 130, 191 S.E.2d at 756. It further reported that the defendant and his roommates "all have sold narcotics to Special Agent J. M. Burns of the SBI and are all actively involved in drug sales to Campbell College students; this is known from personal knowledge of affiant, interviews with reliable confidential informants and local police officers." *Id.* at 130, 191 S.E.2d at 756.

We held that the affidavit was "fatally defective," explaining our reasoning as follows:

> The affidavit implicates those premises *solely as a conclusion of the affiant.* Nowhere in the affidavit is there any statement that narcotic drugs were ever possessed or sold in or about the dwelling to be searched. Nowhere in the affidavit are any underlying circumstances detailed from which the magistrate could reasonably conclude that the proposed search would reveal the presence of illegal drugs in the dwelling. The inference the State seeks to draw from the contents of this affidavit—that narcotic drugs are illegally possessed on the described premises—does not reasonably arise from the facts alleged. Therefore, nothing in the foregoing affidavit affords a reasonable basis upon which the issuing magistrate could conclude that any illegal possession or sale of narcotic drugs had occurred, or was occurring, on the premises to be searched.

Id. at 131, 191 S.E.2d at 757.

This Court reached a contrary conclusion in *Allman* with respect to whether a search warrant affidavit established probable cause to search the defendant's residence. In *Allman*, the defendant, Brittany Allman, lived in a home with half-brothers named Sean Whitehead and Jeremy Black, to whom she was not related.[7] *Allman*, 369 N.C. at 292, 794 S.E.2d at 302. Law enforcement officers sought a search warrant for the residence after stopping a vehicle in which Whitehead and Black were traveling, leading to the discovery of 8.1 ounces of marijuana and over $1600 in cash inside the car. *Id.* at 292–93, 794 S.E.2d at 302.

The affidavit accompanying the search warrant in *Allman*—in addition to describing the discovery of contraband in the vehicle—stated that the affiant had run criminal record checks on the two men and learned that both of them had been previously charged with offenses related to the sale and possession of illegal drugs. *Id.* at 295, 794 S.E.2d at 304. The affidavit further stated the following:

> During the vehicle stop, Whitehead maintained that he and Black lived at 30 Twin Oaks Drive in Castle Hayne, North Carolina. . . .

7. Although the opinion in *Allman* related primarily to the activities of Whitehead and Black, the defendant was also charged with offenses pertaining to the manufacture, possession, and sale or delivery of illegal drugs.

> On the same day as the vehicle stop, [the affiant] went to 30 Twin Oaks Drive. When he got there, he discovered that neither half-brother lived at that address but that Whitehead's and Black's mother, Elsie Black, did. Ms. Black told Detective Bacon that the two men lived at 4844 Acres Drive in Wilmington and had not lived at 30 Twin Oaks Drive for about three years. She described the Acres drive property as a small one-story residence that had "a big, tall privacy fence in the backyard" and said that "there should be an old red truck and an old white truck at the house." At that point, another detective went to 4844 Acres Drive. The property matched the description given by Ms. Black, and one of the two trucks outside of the house was registered to Jeremy Black.

Id. at 295, 794 S.E.2d at 304 (footnote omitted).

This Court held that the facts set out in the affidavit were sufficient to establish probable cause to search the Acres Drive residence that the defendant shared with the two men. *Id.* at 298, 794 S.E.2d at 306. While "acknowledg[ing] that nothing in Detective Bacon's affidavit directly linked defendant's home with evidence of drug dealing," *id.* at 297, 794 S.E.2d at 305, we determined that the magistrate could have reasonably inferred that evidence of drug dealing was likely to be found in the home

> [b]ased on the mother's statement that Whitehead and Black really lived at [the same residence as the defendant] . . . . [a]nd based on the insight from Detective Bacon's training and experience that evidence of drug dealing is likely to be found at a drug dealer's home, and the fact that Whitehead lied about where he and Black lived . . . .

Id. at 296, 794 S.E.2d at 305. We distinguished the facts and result in *Allman* from our decision in *Campbell*, in part, by noting that "while a suspect in this case lied to [the officer who stopped their vehicle] about his true address, nothing in the *Campbell* opinion indicates that any of the subjects of that search lied to the authorities about their home address. So *Campbell* does not alter our conclusion." *Id.* at 297, 794 S.E.2d at 305.

In *State v. McKinney*, 368 N.C. 161, 775 S.E.2d 821 (2015), we likewise distinguished *Campbell* in holding that probable cause supported the issuance of a warrant to search the dwelling of a suspected drug dealer. *Id.* at 166, 775 S.E.2d at 825–26. In *McKinney*, law enforcement officers received a tip that the defendant was conducting drug deals in

his apartment as well as in the parking lot of his apartment complex. *Id.* at 162, 775 S.E.2d at 823. In response to the tip, officers began surveilling the defendant's residence. They observed a visitor leave the dwelling after only being there six minutes. *Id.* at 162, 775 S.E.2d at 823. After stopping the visitor's vehicle for a traffic violation, officers discovered marijuana in the car and $4258 in cash on the driver's person. *Id.* at 162, 775 S.E.2d at 823. Officers arrested Roy Foushee, the driver of the vehicle, and subsequently found texts on his cell phone in which he appeared to have arranged a drug transaction with the defendant that coincided with the timing of his visit to the defendant's apartment. *Id.* at 162, 775 S.E.2d at 823.

Following this arrest, law enforcement officers sought and obtained a search warrant for the defendant's apartment. The affidavit accompanying the warrant application "described the nature of the citizen complaint that triggered the investigation, the results of the officers' surveillance, the arrest of Foushee, the material found on Foushee's person and in his car, and the text messages recovered from Foushee's telephone." *Id.* at 162, 775 S.E.2d at 823. In concluding that the statements contained in the affidavit were sufficient to support the issuance of a search warrant for the defendant's residence, we distinguished the circumstances at issue in that case from those of *Campbell*. "Unlike the case at bar, the affidavit in *Campbell* included no information indicating that drugs had been possessed in or sold from the dwelling to be searched. As a result, *Campbell* does not control the outcome here." *Id.* at 166, 775 S.E.2d at 826.

In the present case the search warrant affidavit submitted by Detective Tart contained statements that a suspect wearing dark clothing, using a blue face covering, and carrying a handgun had committed similar robberies of Hoke County stores on 21 September, 26 September, and 28 September 2014. The affidavit also stated that the suspect fled the scene of the first robbery in a "dark blue Nissan Titan with an unknown NC registration. This description is consistent with a dark blue Nissan Titan that was observed at the residence of 7085 Laurinburg Road . . . on October 19, 2014 by Hoke County Patrol Deputies when serving a felony arrest warrant on Robert Lewis."

The affidavit further asserted that a Sweepstakes store in Johnston County was robbed "in the earlier hours of [the] morning" of 19 October by a man armed with a handgun who was wearing dark clothing and a blue face covering. The affidavit stated that "[t]he clothing description and method of operation were similar to those robberies previously described within Hoke County." In addition, the affidavit contained a

statement that the suspect had been identified as defendant by Smithfield law enforcement officers and had fled the scene in a Kia Optima.

Critical to our analysis of this issue, however, is the information that was *not* contained in Detective Tart's affidavit. His affidavit failed to set forth any of the circumstances surrounding defendant's arrest at 7085 Laurinburg Road and offered no explanation as to why law enforcement officers had gone to that address in the first place. Notably, the affidavit did not include the fact that the address had been provided by Johnston County law enforcement officers. It also failed to include any details of Deputy Kavanaugh's conversation with defendant's stepfather—who had confirmed that defendant lived in the home—and contained no mention of the fact that a Kia Optima was parked in front of the residence at the time of defendant's arrest.

We conclude that the information contained in the affidavit failed to establish the existence of probable cause to search the residence at 7085 Laurinburg Road. The affidavit simply did not connect defendant with the residence that the officers wished to search in any meaningful way beyond the mere fact that he was arrested there and that a dark blue Nissan Titan was observed in the vicinity of the house at that time. Defendant could have been present at 7085 Laurinburg Road at the time of his arrest for any number of reasons. Absent additional information linking him to the residence or connecting the house with criminal activity, no basis existed for the magistrate to infer that evidence of the robberies would likely be found inside the home.

The State relies heavily on *Allman* in support of its argument that probable cause existed to support the issuance of a search warrant for 7085 Laurinburg Road even in the absence of evidence directly linking the residence with the robberies. But *Allman* is easily distinguishable. In that case the officer's affidavit established that a suspected drug dealer had lied about where he lived—suggesting that evidence of criminal activity would likely be found in his residence. *Allman*, 369 N.C. at 295, 794 S.E.2d at 304. The affidavit further noted that law enforcement officers had later received information from the suspects' mother as to their actual address and subsequently corroborated that information before applying for a search warrant. *Id.* at 295, 794 S.E.2d at 304. Unlike the present case, the affidavit in *Allman* stated not only that the residence to be searched was connected to the suspects but also that—based on the officer's training and experience and the fact that one of the suspects had lied about where they lived—it likely contained evidence of the crime for which a warrant was sought. *Id.* at 295–96, 794 S.E.2d at 304. *McKinney* is likewise distinguishable from the present case because the

search warrant affidavit there contained information implicating both the defendant and his residence in the criminal activity being investigated. *McKinney*, 368 N.C. at 166, 775 S.E.2d at 826.

We therefore hold that the allegations contained in Detective Tart's affidavit failed to provide the magistrate with a sufficient basis from which to conclude that probable cause existed to search the 7085 Laurinburg Road residence.[8] Accordingly, we affirm the ruling of the Court of Appeals that defendant's motion to suppress evidence seized from the residence should have been allowed.

II. Search of the Kia Optima

[2] The final issue before us is whether Detective Tart's affidavit in support of the search warrant established probable cause to support a search of the Kia Optima.[9] Defendant argues that the Court of Appeals erred in affirming the trial court's determination that probable cause existed to support that search because the affidavit failed to "explain why evidence . . . would be found in the Kia Optima listed as a vehicle to be searched" or "state that there was a Kia Optima at the Laurinburg Road address."

In focusing—as we must—not on the totality of the evidence that Detective Tart had gathered but rather solely on the information that was actually set out in his affidavit, we agree that the affidavit failed to establish probable cause for the search of the Kia Optima. As noted above, the statements in Detective Tart's affidavit failed to mention the presence of a Kia Optima at 7085 Laurinburg Road at the time of defendant's arrest. Indeed, beyond stating that defendant fled the scene of the 19 October 2014 robbery in a "new model 4-door Kia Optima," the affidavit provided no other information whatsoever concerning the Kia Optima.[10]

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8. We note that in its order denying defendant's motion to suppress, the trial court relied, in part, upon testimony at the suppression hearing from Deputy Kavanaugh and Detective Tart that was not contained in Detective Tart's affidavit. The court's reliance on this testimony was improper because it was required to evaluate the existence of probable cause for the search warrant based solely on the information in the affidavit that was available to the magistrate at the time the warrant was issued. *See Benters*, 367 N.C. at 673–74, 766 S.E.2d at 603 (appellate court erred in determining existence of probable cause to support issuance of search warrant by "relying upon facts elicited at [the suppression] hearing that went beyond 'the four corners of [the] warrant.' " (second alteration in original)).

9. In his appeal to this Court, defendant has not argued that probable cause was lacking for the search of the Nissan Titan. Therefore, that issue is not before us.

10. The affidavit failed to mention that Deputy Kavanaugh had even seen the Kia Optima, much less that he had observed the presence of potentially incriminating evidence upon looking through the window of the vehicle.

It is true that an unsworn attachment to the search warrant application listed "[a] gray 2013 Kia Optima EX four door car with NC registration BMB4863; VIN# 5XXGN4A7XDG192163" among the property to be searched by officers upon execution of the search warrant. But Detective Tart's sworn affidavit itself contained no mention of this identifying information for the vehicle. Nor did it explain how this information had been obtained. Consequently, while the information possessed by Detective Tart would have been sufficient to authorize a search warrant for the Kia Optima had it all been contained within his affidavit, his failure to include crucial information concerning the vehicle rendered the affidavit insufficient to establish probable cause.

Accordingly, we hold that the Court of Appeals erred in affirming the trial court's determination that probable cause existed to support the issuance of a search warrant for the Kia Optima. Because the Court of Appeals did not address the trial court's alternative ruling that the search of the vehicle was supported under the plain view doctrine, we remand this case to the Court of Appeals for a determination of that issue.

Conclusion

For the reasons set forth above, we affirm the portions of the Court of Appeals' decisions holding that defendant's motion to suppress should have been allowed as to evidence seized from defendant's residence and reverse the portions of the Court of Appeals' decisions holding that probable cause existed to support the issuance of the search warrant for the Kia Optima. The Court of Appeals' ruling that probable cause existed to support the search of the Nissan truck is not before us and is left undisturbed. We remand this case for determination by the Court of Appeals whether the evidence seized from the Kia Optima was admissible under the plain view doctrine.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Justice MORGAN concurring in part and dissenting in part.

I respectfully dissent from the position taken by my learned colleagues of the majority that there was a lack of probable cause for the issuance of the search warrant by the magistrate to authorize law enforcement's search of defendant's Kia Optima. While I agree with the majority view which concludes that the Court of Appeals correctly determined that defendant's motion to suppress should have been allowed as to evidence seized from his residence because the information contained in the search warrant did not sufficiently connect defendant to the house

so as to provide a basis for the magistrate to infer that evidence of the robberies would likely be found in the home, nonetheless I disagree with the outcome that the lower appellate court should be reversed regarding its determination that probable cause existed to authorize the magistrate's issuance of the search warrant. Since I would therefore affirm in totality the decision of the Court of Appeals, consequently there would be no need for the case to be remanded to the lower appellate court, as directed by the majority, for a determination concerning whether the evidence seized from the Kia Optima was admissible under the plain view doctrine, because the application of the doctrine would be of no consequence in light of the finding of probable cause.

My discomfort with the majority's opinion stems from its regrettable rigidity in tightly clinging to the legal rudiments of the establishment and recognition of probable cause in search warrant affidavits which this Court has historically declared, while exhibiting its remarkable reticence to equally embrace the practical realities which law enforcement officers and magistrates must face in the establishment and recognition of probable cause in search warrant affidavits which this Court has also addressed in its opinions. In my view, an appropriate balance of the considerations of legal requirements and practical aspects which this Court has cited regarding the existence of probable cause in search warrant applications would better serve the ends of justice in the instant case by determining the existence of probable cause in the search warrant affidavit at issue to allow the search of defendant's Kia Optima, demonstrating the proper balancing approach between legal requirements and practical aspects which govern the ascertainment of probable cause in search warrant affidavits, and providing a clearer precedent for law enforcement officers and magistrates to consult in order to better comprehend the salient circumstances to be submitted and evaluated for the existence of probable cause in search warrants.

The majority is certainly correct in its recitation of principles enunciated by this Court in such cases as *State v. Allman*, 369 N.C. 292, 794 S.E.2d 301 (2016), *State v. Benters*, 367 N.C. 660, 766 S.E.2d 593 (2014), *State v. Sinapi*, 359 N.C. 394, 610 S.E.2d 362 (2005), and *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984) regarding the requirement that a neutral and detached magistrate is to issue a search warrant only upon the existence of probable cause being shown, with such a determination to be made based upon the totality of the circumstances in arriving at a practical and commonsense decision in light of all of the circumstances set forth in the affidavit. The prevailing viewpoint also recognizes the considerations declared in these rulings that appellate

"courts should not invalidate [search] warrant[s] by interpreting [search warrant] affidavit[s] in a hypertechnical, rather than a commonsense, manner," *State v. Riggs*, 328 N.C. 213, 222, 400 S.E.2d 429, 434 (1991) (quoting *Illinois v. Gates*, 462 U.S. 213, 236 (1983)), and that a magistrate is entitled to draw reasonable inferences from the material supplied through application for a search warrant and has probable cause to issue the warrant "as long as the pieces fit together well and yield a fair probability that a police officer executing the warrant will find contraband or evidence of a crime at the place to be searched . . . ." *Allman*, 369 N.C. at 294, 794 S.E.2d at 303 (citing *Massachusetts v. Upton*, 466 U.S. 727, 733 (1984) (per curiam) and *Gates*, 462 U.S. at 230–31).

In the present case, while the majority has demonstrated its awareness of all of these guiding principles by citing them in its opinion, unfortunately the majority readily implements only the standards that it chooses to employ, and conveniently neglects the standards that it chooses to ignore. The majority has elected to emphasize that the investigating detective's search warrant affidavit "failed to mention the presence of a Kia Optima at 7085 Laurinburg Road at the time of defendant's arrest" and that "beyond stating that defendant fled the scene of the 19 October 2014 robbery in a 'new model 4-door Kia Optima,' the affidavit provided no other information whatsoever concerning the Kia Optima." However, as to the fact that "an unsworn attachment to the search warrant application listed '[a] gray 2013 Kia Optima EX four door car with NC registration BMB4863; VIN# 5XXGN4A7XDG192163' among the property to be searched by officers upon execution of the search warrant," the majority has elected to minimize the extensive detail utilized to identify the vehicle sought to be searched by opting to emphasize that the investigating detective's "sworn affidavit itself contained no mention of this identifying information for the vehicle." Based on these considerations, the majority concludes that if all of the aforementioned information had been contained in the investigating detective's sworn search warrant affidavit rather than in an unsworn attachment to the search warrant application, coupled with a sworn description of the manner in which he obtained this identifying information for the Kia Optima, then the search warrant would have been deemed to contain the requisite probable cause.

In applying this Court's enunciated principles that a magistrate is entitled to draw inferences from the material supplied to obtain a search warrant based upon the totality of the circumstances in arriving at a practical and commonsense decision in light of all of the circumstances set forth in the affidavit, I conclude that the magistrate satisfactorily

determined that probable cause existed for the issuance of a search warrant to authorize law enforcement's search of defendant's Kia Optima. The majority's requirement that the information which establishes probable cause must be *included in* the sworn search warrant affidavit instead of *attached to* the sworn search warrant affidavit in order to be considered by a magistrate invokes the type of hypertechnical mandate for a probable cause determination which this Court has expressly disavowed. Unfortunately, however, the majority here demands this kind of precision in lieu of the magistrate's practical and commonsense approach to construe the informative material which was physically appended to the sworn search warrant affidavit as being inherently intended in its presentation format to illustrate that it was a part of the entire search warrant application to be evaluated by the magistrate as to its fair probability that a police officer executing the warrant would find contraband or evidence of the Johnston County robbery in the Kia Optima. In light of all of these facts and circumstances which were being navigated by two different law enforcement agencies in two different counties which were coordinating their investigative resources in an effort to resolve a spate of crimes, the magistrate involved here should have been accorded the authority to refrain from imposing a hypertechnical requirement upon the investigating detective in favor of the practical and commonsense decision to consider the totality of the information contained in the combined application of the sworn search warrant affidavit as well as the unsworn attachment of detailed information which was physically appended to it in order to arrive at the determination of the existence of probable cause to search defendant's vehicle.

In the very first sentence of its opinion, the majority acknowledges that this case presents unique circumstances regarding an officer's possession of information "that would suffice to establish probable cause for the issuance of a search warrant but fail[s] to include pertinent portions of this information in his affidavit in support of the warrant." "The resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *Riggs*, 328 N.C. at 222, 400 S.E.2d at 435 (quoting *Gates*, 462 U.S. at 237 n.10) (brackets omitted). Guided by this Court's precedent in applying it to the recognized uniqueness of the circumstances presented in this case, I would affirm the decision of the Court of Appeals.

Justice NEWBY joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
MOLLIE ELIZABETH B. McDANIEL

No. 161A18

Filed 16 August 2019

Possession of Stolen Property—doctrine of recent possession—possession two weeks after items stolen

The evidence presented of defendant's possession of stolen goods was sufficient to support her convictions for felonious breaking and entering and felonious larceny under the doctrine of recent possession. Defendant acknowledged that she had control and possession of the stolen items, in the bed of her pickup truck, on a date two weeks after the items allegedly were stolen.

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

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 817 S.E.2d 6 (N.C. Ct. App. 2018), vacating defendant's convictions on appeal from judgments entered on 24 January 2017 by Judge J. Thomas Davis in Superior Court, McDowell County. Heard in the Supreme Court on 8 April 2019.

Joshua H. Stein, Attorney General, by Deborah M. Greene, Assistant Attorney General, and Lauren Lewis Ikpe, Assistant Attorney General, for the State-appellant.

Gilda C. Rodriguez for defendant-appellee.

MORGAN, Justice.

This appeal by the State of North Carolina, which comes to this Court on the basis of a dissenting opinion which was issued in the disposition of this case by the North Carolina Court of Appeals, requires consideration of the doctrine of recent possession and its utilization here to prove the charges of breaking and entering and the charge of larceny. In the appellate court below, the majority and the dissent disagreed on

the issue of whether the State presented sufficient evidence to establish that defendant in this case actually possessed the allegedly stolen property pursuant to the cited legal doctrine in order to survive a motion to dismiss. In light of our conclusion that the evidence presented at trial concerning defendant's possession of goods was sufficient to support defendant's conviction under the doctrine of recent possession, we reverse the Court of Appeals' decision and remand the case for consideration of defendant's arguments not addressed therein.

Factual Background and Procedural History

The charges in this matter arose from at least two apparent breakins and thefts of items from an unoccupied house located at 30 Woody Street in Marion. Daniel Patrick Sheline, Sr. had inherited the three-bedroom house and a trailer on five acres of land upon his father's death in February 2014. Sheline lived in Black Mountain and neither he nor anyone else resided at the 30 Woody Street address after his father's death. On 20 March 2014, Sheline spent time at 30 Woody Street, sorting through the personal property that had belonged to his father and to Sheline's deceased brother. Sheline had paid particular attention to the items in the house on that date, forming a "sort of . . . inventory in [his] mind" of the items inside the house, including those stored in the basement. When Sheline left the house, he engaged the lock on the knob of the front door, but did not employ the deadbolt lock. Sheline secured the basement door from the inside of the house by inserting a screwdriver through a padlock such that the door could not be opened from the outside. The only other door entering the house, which was located on the side of the building, had been nailed shut. Sheline had not given anyone permission to enter 30 Woody Street or to remove any items from the property.

On 1 April 2014, Sheline returned to 30 Woody Street, accompanied by his wife on this occasion. He discovered that someone had tampered with the front door, because its deadbolt lock was now engaged. Sheline further found that the basement door was ajar, the padlock that had secured the basement door was missing, and an adjacent window had been pried open. A number of items were missing from the house, including a monitor heater, copper tubing, an aluminum ladder, a lawnmower, and a cuckoo clock, as well as electrical wiring and various plumbing fixtures. Sheline's wife reported the theft to the McDowell County Sheriff's Office ("MCSO"). Lieutenant Detective Andy Manis of the MCSO initiated an investigation. On 2 April 2014, Manis's captain received a tip that some of the property which had been removed from 30 Woody Street could be found at a house located at 24 Ridge Street

in Marion, about a quarter of a mile from 30 Woody Street. In following up on the tip, Manis went to 24 Ridge Street and discovered outside of the house a monitor heater, some copper tubing, an aluminum ladder, a lawnmower, pipes, and wiring. Sheline subsequently identified the items as those which were taken from 30 Woody Street. When Manis knocked on the door of 24 Ridge Street, a woman who identified herself as Stephanie Rice answered and reported that two people in a white Chevrolet pickup truck with an extended cab had unloaded the items earlier that day. Following this phase of the investigation, warrants were issued for defendant Mollie Elizabeth B. McDaniel and Michael Nichols in connection with the 2 April break-in and theft at 30 Woody Street.

On 4 April 2014, MCSO Detective Jason Grindstaff received a report that an unauthorized person had again entered the house at 30 Woody Street and was seen departing that location in a white pickup truck that turned onto Ridge Street. Grindstaff drove to 24 Ridge Street and saw defendant sitting in the driver's seat of a white pickup truck which was parked in the driveway of the house located across the street from the 24 Ridge Street address. Defendant gave Grindstaff permission to search the truck, and Grindstaff discovered an Atari gaming system, glassware, china, and an antique clock radio in the bed of the vehicle. Grindstaff then arrested defendant, who was subsequently charged with one count of felonious breaking and entering and one count of felonious larceny based upon events that allegedly occurred on or about 20 March 2014, and one count of felonious breaking and entering and one count of felonious larceny based upon events that allegedly occurred on or about 4 April 2014.

The charges arising from the events of 20 March and 4 April 2014 were joined for trial. Sheline, Manis, and Grindstaff testified at trial to the facts recounted above. In addition, Grindstaff testified that defendant had admitted to him that she had taken the property which was found in the white pickup truck at the time of her arrest from a house on Woody Street, but defendant claimed that she had permission to remove the property. Grindstaff further testified that defendant told Grindstaff that Michael Nichols had asked her to help remove items from the house at 30 Woody Street after an unidentified neighbor had given Nichols permission to enter the premises.

At the close of the State's evidence, defendant entered a general motion to dismiss all of the charges which arose from the alleged 20 March 2014 and 4 April 2014 occurrences. While defendant did not offer any legal argument in support of her dismissal motion, defendant emphasized her position on the dismissal of the 20 March charges. After

a brief discussion, the trial court agreed with defendant and allowed the motion to dismiss the 20 March charges, reasoning as follows:

> I don't see any connection between being across the street except in the proximity of it.
>
> As to the file number 14 CRS 50512, which is the indictment from March 20, 2014, which based on the evidence is the first breaking and entering and larceny, the Court is going to allow your motion. As to the other one on April 4, 2014, which is file 14 CRS 50509, the Court is going to deny your motion there. You basically got an admission that she went to the house and got that stuff out of that house. You have problems with that one.

After a recess for lunch, the trial court expressed confusion about its previous decision regarding defendant's motion to dismiss:

> THE COURT: Let's go back to this motion for directed verdict. Let me go back and revisit that a little bit. The way I see the evidence is [that] we have got evidence of one breaking and entering, then we have this defendant with the property at a particular time with an admission that she went in there and took some of that property. I'm not sure—I may have dismissed the wrong one because basically what it comes down to is you have one breaking and entering. The one I dismissed was alleged on April 4.
>
> [DEFENSE COUNSEL]: I thought you dismissed the other one.
>
> THE COURT: I did dismiss the other one, but what I am telling you is I may have gotten them backwards. I should have dismissed the April 4 one and left the March 20 one in place based on this evidence. I want to make sure I have time to correct that since nothing has happened at this point in time.
>
> I want to revisit that, but I want to see—I understand your continuing evidence of two breaking and enterings. The way I see it is the only testimony as to opening the window, the door, all the situations are from one incidence. We don't have any testimony there was any sort of entry that second time, and that admission that she makes was not peculiar to [when].

> The evidence that you brought out about somebody reported seeing the car, I think all that does is goes to the state of mind of this officer. I think it's only offered for that purpose. If it's offered for any other purpose I think it would violate the hearsay rule. I think that's the only reason it comes in; therefore, it cannot be used as substantive evidence of any particular crime.
>
> As a result thereof, I may have dismissed—by dismissing the April 4 allegation, I am basically—I may have committed error to the State because that's the later one, and it would be hard for you to relate the original breaking and entering that was testified to today to that indictment because it was the wrong date.
>
> I may have [dis]missed the wrong one. I want to hear from you, at least from that analysis, what your position is. I can correct it right now without any prejudice to the defendant. I was thinking it over through lunch and I may have dismissed the wrong one.

After an extended exchange with the prosecutor and defense counsel, the trial court resolved the motions to dismiss as follows:

> So that dismissal is stricken. So the indictment in 14 CRS 50512 as to the allegations of the March 20, 2014, on or about that date, is still in place both as to the breaking and entering and as to the larceny.
>
> Now, as to the other file, which is file number 50509, the Court believes the only evidence that's been produced by the State—that there has not been substantial evidence shown of two breaking and enterings. There has only been substantial evidence as to one breaking and entering. I am relating that to the March 20, 2014 indictment.
>
> Therefore, the breaking and entering charge in the indictment in File No. 14 CRS 50509 is dismissed. But the second count, larceny after breaking and entering, there is evidence to show that that stuff was acquired as a result of the original breaking and entering, that there was evidence to show, so the Court is not dismissing that larceny charge. The jury will just have to consider these two larcenies separately. If the jury comes back and finds her guilty of both larcenies, the Court would have to entertain

> whether or not arrested judgment would be appropriate to combine those larcenies into that single larceny, but that may depend on some of the evidence that comes out here in the second part of this case.

After this reconsideration by the trial court of its decision to grant defendant's motion to dismiss the 20 March 2014 charges of one count of felonious breaking and entering and one count of felonious larceny and its denial of defendant's motion to dismiss the 4 April 2014 charges of one count of felonious breaking and entering and one count of felonious larceny, the trial court changed its rulings. At this stage in the proceedings, the trial court struck its previous dismissals and restored both of the 20 March 2014 charges, hence denying defendant's motion to dismiss those charges; however, with regard to the 4 April 2014 charges, the trial court allowed defendant's motion to dismiss the felonious breaking and entering charge and denied defendant's motion to dismiss the felonious larceny charge.

Defendant testified that in October 2013 she was doing salvage work at an old abandoned house at 50 Woody Street with her friend Michael Nichols and that she and Nichols had visited the house next door at 30 Woody Street. Defendant stated that "an elderly gentleman" answered the door at 30 Woody Street and allowed defendant and Nichols to remove scrap metal and a plow from the home's basement. Defendant explained that she had stopped working at 50 Woody Street in November or December 2013 because she felt that Nichols was "shirking" and leaving most of the work to her. Defendant testified that after her unemployment benefits which she had been collecting from the termination of a previous job ran out, she contacted Nichols to work with him again.

Defendant further testified that on 2 April 2014, at Nichols' request, defendant drove Nichols to the house at 50 Woody Street, where the two "loaded some stuff on [defendant's] truck." Defendant stated that Nichols told her that the items stored outside and underneath the house at 50 Woody Street belonged to a friend of Nichols. Defendant explained that she performed salvage work at 50 Woody Street alone on 3 April, and that she returned to the house on 4 April after Nichols told her that she could "look around and see if there [was] anything [defendant] might be interested in." Defendant stated that she took various items from the attic of 50 Woody Street and put them in the bed of her pickup truck. Defendant said she then drove to Nichols' home at 24 Ridge Street and parked across the street, only to see Nichols and another man driving away after loading aluminum cans into the vehicle. At this point, Detective Grindstaff arrived on the scene.

Defendant testified that when Grindstaff asked her, "You have been up there at that house, haven't you? I said, Yes." Defendant explained that she later realized that the detective misunderstood her admission to be a reference to the house at 30 Woody Street, while defendant had been referring to the house next door at 50 Woody Street. Defendant insisted in her testimony that she had not been to 30 Woody Street since October 2013 and had believed that, on that occasion, she and Nichols had permission to remove the plow and other items from 30 Woody Street at that time. Defendant further testified that she believed that she had permission to remove the various items of property from 50 Woody Street in April 2014, including the goods that Grindstaff discovered in the bed of her pickup truck.

At the close of all of the evidence, defendant moved to dismiss the remaining charges of one count of felonious breaking and entering and two counts of felonious larceny. The trial court denied the motion. Following the arguments of counsel, the trial court instructed the jury, *inter alia*, on the doctrine of recent possession as follows:

> For this doctrine to apply the State must prove three things beyond a reasonable doubt:
>
> First, that the property was stolen.
>
> Second, that the defendant had possession of this property. A person possesses property when that person is aware of its presence and has, either alone or together with others, both the power and intent to control its disposition or use.
>
> And third, that the defendant had possession of this property so soon after it was stolen and under such circumstances as to make it unlikely that the defendant obtained possession honestly.
>
> If you find these things from the evidence beyond a reasonable doubt, you may consider them together with all other facts and circumstances in deciding whether or not the defendant is guilty of breaking or entering and larceny.

The jury returned verdicts finding defendant guilty of felonious breaking and entering and felonious larceny in file number 14 CRS 50512 (the 20 March 2014 charges) and felonious larceny in file number 14 CRS 50509 (the remaining 4 April 2014 charge). With the agreement of the prosecutor and defense counsel, the trial court then arrested judgment on the felonious larceny offense in 14 CRS 50509. The trial court imposed

consecutive terms of incarceration of six to seventeen months on each of the two convictions arising from the events of 20 March 2014, suspended the active sentences, imposed sixty months of supervised probation, and required defendant to serve an active sentence of four months as a condition of probation. The trial court also ordered payment of restitution and attorney fees. Defendant appealed.

At the North Carolina Court of Appeals, defendant raised two issues, asserting that the trial court erred in (1) denying her motion to dismiss on the basis of insufficiency of the evidence that she was the perpetrator of the 20 March 2014 breaking and entering and the subsequent larceny and (2) placing her on supervised probation for sixty months without making a statutorily required finding that such extended term of probation was necessary. With regard to the sufficiency of the evidence, defendant noted that the State did not present any direct evidence linking defendant either to breaking and entering or to larceny after breaking and entering, instead relying upon the doctrine of recent possession. On appeal, defendant contended that the evidence at trial was insufficient to send the charges to the jury for consideration as to both her culpable possession of the items allegedly stolen on 20 March 2014 and the recency of her possession of said items.

The Court of Appeals was divided in its decision. The majority agreed with defendant's position regarding the imputation to her of possession of the property at issue and vacated the judgments entered upon her convictions. *See State v. McDaniel*, 817 S.E.2d 6 (N.C. Ct. App. 2018). The majority began by observing that

> Defendant was not convicted of breaking and entering, or sentenced for larceny, in connection with the stolen property *actually found in her possession* on 4 April 2014. Defendant was convicted on charges stemming from a breaking and entering and larceny that, according to the relevant indictment, occurred "on or about" 20 March 2014. That indictment specifically described the property stolen on that date as "a Sears pushmower, aluminum ladder, monitor heater, 100 gallons of kerosene, electrical wiring, flooring[,] and a German [cuckoo] clock." These items were discovered by Lt. Det. Manis at 24 Ridge Street on 2 April 2014, outside Defendant's presence, although Defendant admitted she drove a short distance with the property in her truck earlier that day. Thus, the State's own evidence suggested that up to two weeks may have passed between the alleged breaking and entering and larceny, on

> or around 20 March 2014, and the discovery of the stolen property, on 2 April 2014, and the property was not actually found in Defendant's possession.

Id. at 12 (alterations in original). The majority went on to note that the only evidence that defendant actually possessed the items alleged to have been stolen on 20 March 2014 was her own testimony that "she was briefly in possession of the stolen property on 2 April 2014, when she transported it a few blocks from a building at 50 Woody Street, where the property was being stored, to the residence at 24 Ridge Street." *Id.* at 13.

The majority cited precedent from this Court including *State v. Maines*, 301 N.C. 669, 674, 273 S.E.2d 289, 293 (1981) ("[T]he stolen goods were found in defendant's custody and subject to his control and disposition to the exclusion of others though not necessarily found in defendant's hands or on his person so long as he had the power and intent to control the goods . . . ."), and *State v. Wilson*, 313 N.C. 516, 536, 330 S.E.2d 450, 464 (1985) ("It is not always necessary that the stolen property be actually in the hands of the defendant in order to trigger the inference that he is the thief. The doctrine [of recent possession] is equally applicable where the stolen property is under the defendant's personal control [in the form of the defendant's girlfriend wearing the stolen watch several weeks after the alleged theft]."). Ultimately, the Court of Appeals majority in the instant case opined:

> The State contends that, because Defendant "ha[d] the power and intent to control the access to and use of [her truck][,] [she] ha[d] possession of the [vehicle's] known contents[ ]" when, by her own admission, she transported the stolen property on 2 April 2014. According to the State, Defendant was "the driver and only authorized user of the truck[,]" and "there [was] no evidence that [ ] Nichols was present in the truck at the time [Defendant] had possession of the stolen items." Even taking these statements as true, they do not establish exclusive possession.

Id. at 15 (alterations in original) (footnote omitted). In light of this determination regarding exclusive possession, the majority did not consider defendant's arguments concerning the temporal proximity component of the doctrine of recent possession based on the passage of time between the alleged theft on 20 March 2014 and defendant's admitted transfer of the items from one location to another via her pickup truck on 2 April 2014.[1]

1. Neither the majority nor the dissent addressed defendant's contentions of error concerning the length of her supervised probation.

Judge Tyson dissented because, in his view,

> Defendant admitted she alone had transported the items that had been stolen on or about 20 March 2014 in her truck and she had unloaded them at the Ridge Street address. Her possession of the recently stolen goods was exclusive and 100% within her control at that time. Whether the two weeks, which may have passed between the breaking and entering and larceny and the discovery of the property being stolen, and Defendant's admitted possession, is too remote to apply the doctrine of recent possession was a proper question for the jury and does not support vacating Defendant's conviction as a matter of law.

Id. at 17 (Tyson, J., dissenting) (*citing Wilson*, 313 N.C. at 536–37, 330 S.E.2d at 464).

On 1 June 2018, the State filed a motion for temporary stay and a petition for writ of supersedeas in this Court. On the same date, the Court allowed the motion for temporary stay. The State filed its notice of appeal on 19 June 2018 based upon the dissenting opinion in the Court of Appeals. The Court allowed the State's petition for writ of supersedeas on 25 June 2018.

Analysis

We consider a trial court's ruling on a motion to dismiss de novo. *See State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980).

> Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.
>
> If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed.

Id. at 98, 261 S.E.2d at 117 (citations omitted). In challenges to the sufficiency of evidence, this Court reviews the evidence in the light most favorable to the State. *E.g.*, *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992). Contradictions and discrepancies are for the fact-finder to resolve. *Id.* at 544, 417 S.E.2d at 761. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial, or

both. *E.g.*, *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984). "Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988) (citation omitted). If "a reasonable inference of defendant's guilt may be drawn from the circumstances," then "it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty." *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978) (emphasis omitted) (quoting *State v. Rowland*, 263 N.C. 353, 358, 139 S.E.2d 661, 665 (1965)). "Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered." *State v. Miller*, 363 N.C. 96, 98, 678 S.E.2d 592, 594 (2009) (citations omitted).

The doctrine of recent possession is

> a rule of law that, upon an indictment for larceny, possession of recently stolen property raises a presumption of the possessor's guilt of the larceny of such property. The presumption is strong or weak depending upon the circumstances of the case and the length of time intervening between the larceny of the goods and the discovery of them in defendant's possession. Furthermore, when there is sufficient evidence that a building has been broken into and entered and thereby the property in question has been stolen, the possession of such stolen property recently after the larceny raises presumptions that the possessor is guilty of the larceny and also of the breaking and entering.

Maines, 301 N.C. at 673–74, 273 S.E.2d at 293 (citations omitted). Applying the doctrine in that case, the Court stated that

> the stolen goods were found in defendant's custody and subject to his control and disposition to the exclusion of others though not necessarily found in defendant's hands or on his person so long as he had the power and intent to control the goods . . . .
>
> The "exclusive" possession [may include] . . . . joint possession of co-conspirators or persons acting in concert in which case the possession of one criminal accomplice would be the possession of all. . . .

Id. at 674–75, 273 S.E.2d at 293–94 (citation omitted). In sum, the Court in *Maines* concluded that "the evidence must show the person accused

of the theft had complete dominion, which might be shared with others, over the property . . . which sufficiently connects the accused person to the crime. *Id.* at 675, 273 S.E.2d at 294.

In the present case, defendant was convicted by a jury on the charges of felonious breaking and entering and felonious larceny in case file 14 CRS 50512. These convictions arose from an indictment which listed the property stolen on the offense date of 20 March 2014 as "a Sears pushmower, aluminum ladder, monitor heater, 100 gallons of kerosene, electrical wiring, flooring and a German cuckoo clock." The evidence at trial, taken in the light most favorable to the State, tended to show that: (1) items listed in the indictment which charged defendant with commission of the alleged 20 March offenses were discovered at 24 Ridge Street on 2 April 2014; (2) two unnamed individuals reportedly had unloaded those items listed in the indictment from a white pickup truck and left them at 24 Ridge Street; (3) an individual operating a white pickup truck was seen entering 30 Woody Street on 4 April 2014, removing items from the house, driving away from the address, and then turning onto Ridge Street; (4) on that same date, MCSO Detective Grindstaff discovered items which were reported as stolen from 30 Woody Street earlier that day in the bed of a pickup truck with defendant seated in the driver's seat; (5) defendant admitted that she had loaded the items listed in the indictment as stolen from 30 Woody Street on 4 April 2014 into the bed of her truck on that date; (6) defendant admitted that at some point in April, she had "load[ed] up" into her pickup truck "the ladder you have spoken of, and the monitor heater, and various other things that were all under" the house at 50 Woody Street and delivered these items to Ridge Street; and (7) defendant acknowledged that she had previously visited the house at 30 Woody Street in October 2013 and participated in the removal of various items from the residence.

In sum, defendant acknowledged that she was in control of, and in possession of, the aluminum ladder, monitor heater, and other items identified in the 20 March indictment as of 2 April 2014, which was two weeks after the alleged 20 March offenses involving these items. Even under defendant's self-serving testimony, her possession of the property at issue is deemed to be exclusive despite her effort to minimize her criminal culpability by couching her possession and transportation of the stolen items as the responsibility of Nichols, who also was charged in connection with the 20 March 2014 offenses. Defendant's position is unpersuasive because the extent and strength of her ownership interest in the property is inconsequential in evaluating the existence of the determinative factors undergirding the doctrine of recent possession in

the face of defendant's motion to dismiss. " '[E]xclusive' possession" may include "joint possession of co-conspirators or persons acting in concert in which case the possession of one criminal accomplice would be the possession of all." *Maines*, 301 N.C. at 675, 273 S.E.2d at 294. Taken in the light most favorable to the State and giving the State the benefit of every reasonable inference, the evidence presented at trial constituted substantial evidence of the second prong under the doctrine of recent possession—exclusive possession. Defendant was aware of the presence of the property which was situated in the bed of her white pickup truck and had, either by herself or together with her co-worker and joint actor Nichols, both the power and intent to control the disposition or use of the items. *See Wilson*, 313 N.C. at 536, 330 S.E.2d at 464. Thus, the Court of Appeals majority erred in vacating defendant's convictions.

We therefore reverse the decision of the Court of Appeals and remand this case to that appellate court for consideration of defendant's argument regarding the third prong of the doctrine of recent possession—the sufficiency of the recency of defendant's possession of the property at issue—as well as consideration of defendant's argument that the trial court erred in imposing upon her an extended term of probation.

REVERSED AND REMANDED.

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

Justice EARLS dissenting.

The evidence to support Ms. McDaniel's conviction for breaking and entering, and larceny after breaking and entering, based on her alleged possession of items stolen from the uninhabited residence at 30 Woody Street on 20 March 2014 is insufficient. McDaniel's conviction is not based on the items found in her possession on 4 April 2014, but instead is based on the items *not found* in her possession from a breaking and entering that occurred on or about 20 March 2014. *State v. McDaniel*, 817 S.E.2d 6, 8–9 (N.C. Ct. App. 2018). The doctrine of recent possession requires the State to show beyond a reasonable doubt that:

> (1) the property described in the indictment was stolen; (2) the stolen goods were found in defendant's custody and subject to his control and disposition to the exclusion of others though not necessarily found in defendant's hands or on his person so long as he had the power and intent to

> control the goods; . . . and (3) the possession was recently after the larceny, mere possession of stolen property being insufficient to raise a presumption of guilt.

State v. Maines, 301 N.C. 669, 674, 273 S.E.2d 289, 293 (1981) (citations omitted). At issue in this case is whether, taking all the evidence in the light most favorable to the State, there is substantial evidence of the second element above. *See State v. Barnes*, 345 N.C. 146, 148, 478 S.E.2d 188, 189–90 (1996). The stolen items, namely a monitor heater, copper tubing, aluminum ladder, lawnmower, pipes, and wiring, were never found in McDaniel's possession. McDaniel instead admitted to briefly transporting the items for her employer Nichols on 2 April 2014. The State offered no evidence that McDaniel had the "power and intent to control the goods" to the exclusion of others, between the date of the breaking and entering that occurred on or about 20 March 2014 and the date McDaniel admitted to transporting the items on 2 April 2014. Furthermore, there was no evidence that McDaniel even knew the items had been stolen from 30 Woody Street at the time she was transporting them for her employer. "Proof of a defendant's recent possession of stolen property, standing alone, does not shift the burden of proof to the defendant. That burden remains on the State to demonstrate defendant's guilt beyond a reasonable doubt." *Maines*, 301 N.C. at 674, 273 S.E.2d at 293 (citation omitted).

At the time of the breaking and entering, McDaniel was working for Nichols by collecting items for transportation to the scrapyard. The two often worked at 50 Woody Street searching for items in and around the house to sell to the scrapyard and frequently used McDaniel's truck to transport the items. McDaniel testified at trial that while at the home located at 50 Woody Street, Nichols asked her to load the property at issue onto her truck, drive it down the hill, and unload it outside his residence because he was storing it for a friend. McDaniel had no knowledge the property was stolen. Taking the evidence in the light most favorable to the State, the State only showed McDaniel briefly possessed the stolen property up to two weeks after the breaking and entering occurred. McDaniel's conviction therefore rested only upon her brief possession of the stolen property that she was instructed to transport for another, specifically her employer Nichols.

This Court has warned that "[t]he applicability of the doctrine of the inference of guilt derived from the recent possession of stolen goods depends upon the circumstance and character of the possession." *State v. Weinstein*, 224 N.C. 645, 650, 31 S.E.2d 920, 924 (1944). Although McDaniel admitted to temporarily possessing the stolen property, the

possession was under a unique circumstance and character due to McDaniel's employment status. "It is not sufficient to charge [the stolen property] to be the property of one who is a mere servant, although he may have had actual possession at the time of the larceny." *State v. Greene*, 289 N.C. 578, 584, 223 S.E.2d 365, 369 (1976) (quoting *State v. Jenkins*, 78 N.C. 478, 479 (1878)); *see also State v. Campbell*, 810 S.E.2d 803, 819 (N.C. Ct. App. 2018) ("[A]n employee in possession of property on behalf of the employer does not have a sufficient ownership interest in the property."). It is essential to understand the legal implications of the fact that McDaniel was an employee of Nichols', and that she was acting under his direction when she transported the property.[1] Here, because McDaniel was a mere employee of Nichols' and acting under his directive when she transported the property, her possession was not that of herself but of her employer. *See Greene*, 289 N.C. at 584, 223 S.E.2d at 369 ("his possession is the possession of his master.") (quoting *Jenkins*, 78 N.C. at 479).

In addition to possessing stolen property, the second element of the doctrine requires that the defendant have "the power and *intent* to control the goods." *Maines*, 301 N.C. at 674, 273 S.E.2d at 293 (citations omitted) (emphasis added). Contrary to the majority's view, McDaniel lacked the intent to control the stolen property. Instead, evidence showed that subsequent to Nichols' orders, McDaniel transported the items from 50 Woody street to 24 Ridge Street, a house a short distance away. Proof of McDaniel's lack of intent to possess the property was present after she unloaded the property because she failed to return to the residence to take possession and control of the items. Evidence further showed that McDaniel had no affiliation to the residence where she unloaded the property and was not present when the items were discovered. The State failed to offer any evidence to contradict McDaniel's version of events and McDaniel never gave conflicting stories concerning the property to law enforcement. *Cf. State v. May*, 292 N.C. 644, 659–60, 235 S.E.2d 178, 188 (1977) (judgment of nonsuit properly denied where "[t]he State's evidence is sufficient to contradict and rebut defendant's exculpatory statement, and casts great doubt upon the credibility of defendant's statement.").

The majority today holds that in this case, defendant's recent possession of stolen property *alone* is sufficient to support a conviction for breaking and entering and larceny after breaking and entering. However,

1. Similarly, a pawn shop owner is not guilty of larceny through the doctrine of recent possession if she has possession of stolen goods that were pawned. Instead, the State places regulations on pawn shop owners "to prevent unlawful property transactions [ ] in stolen property." N.C.G.S. § 66-386(1) (2012).

"[p]roof of a defendant's recent possession of stolen property, standing alone, does not shift the burden of proof to the defendant." *Maines* at 674, 273 S.E.2d at 293. Because the State failed to come forward with substantial evidence that McDaniel had exclusive possession over the stolen property with the power and intent to control the items, the Court of Appeals' decision should be affirmed.

STATE OF NORTH CAROLINA
v.
BILLY DEAN MORGAN

No. 150A18

Filed 16 August 2019

Probation and Parole—revocation—after expiration—no finding of good cause

The trial court erred by revoking defendant's probation without a finding that good cause for doing so existed. The trial court's judgment contained no findings referencing the existence of good cause, and the record was devoid of any indication that the trial court was aware that defendant's probationary term had expired when it entered its judgments. The case was remanded for a determination of good cause because the Supreme Court was unable to determine from the record that no evidence existed that would allow a determination of good cause.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 814 S.E.2d 843 (N.C. Ct. App. 2018), affirming in part and vacating and remanding in part judgments entered on 9 September 2016 by Judge Jeffrey P. Hunt in Superior Court, McDowell County. Heard in the Supreme Court on 8 April 2019.

Joshua H. Stein, Attorney General, by Brenda Eaddy, Assistant Attorney General, for the State.

Glenn Gerding, Appellate Defender, by Sterling Rozear, Assistant Appellate Defender, for defendant-appellant.

DAVIS, Justice.

The issue before us in this case is whether a trial court is permitted to revoke a defendant's probation after his probationary period has expired without making a finding of fact that good cause exists to do so under the circumstances. Because we conclude that such a finding is statutorily required, we reverse the decision of the Court of Appeals and remand this matter for further proceedings.

Factual and Procedural Background

On 20 May 2013, defendant Billy Dean Morgan was indicted by a McDowell County Grand Jury on two counts of assault with a deadly weapon inflicting serious injury. A hearing was held in Superior Court, McDowell County on 28 August 2013 before the Honorable J. Thomas Davis at which defendant pled no contest to those charges. The court sentenced him to consecutive terms of twenty-nine to forty-seven months of imprisonment, suspended the sentences, and placed him on supervised probation for thirty-six months.

Defendant's probation officer, Christopher Poteat, filed violation reports on 12 May 2016 alleging that defendant had willfully violated the terms of his probation by (1) failing to report to Officer Poteat; (2) failing to pay money owed to the clerk of superior court; (3) failing to pay probation supervision fees; and (4) committing a new criminal offense. A warrant for defendant's arrest for felony probation violations was issued on that same date. On 23 May 2016, Officer Poteat filed an additional violation report in which he asserted that defendant had absconded his probation. Defendant was subsequently arrested for violating terms of his probation.

Defendant's probationary term expired on 28 August 2016. Twelve days later, a hearing was held in Superior Court, McDowell County before the Honorable Jeffrey P. Hunt. At the hearing, defendant's counsel admitted that defendant had "violated probation by failing to report, failing to pay money and supervision fees, and being convicted of a new crime while on probation and absconding." Officer Poteat testified that defendant had missed two consecutive appointments with him in May 2015. He further stated that defendant "started going downhill" in October 2015 and "missed appointments on November 10, February 3, and February 29 that all had to be rescheduled."

In addition, Officer Poteat testified that defendant had been admitted to Grace Hospital on 29 March 2016 and remained in that facility's mental health ward until 19 April. According to Officer Poteat, defendant did not contact him until 1 May, which was twelve days after his

release from the hospital. On that date, Officer Poteat instructed defendant to report to him the following Wednesday. When defendant failed to show up for that appointment, Officer Poteat filed the 23 May probation violation report alleging that he had absconded.

Defendant did not testify on his own behalf at the 9 September 2016 hearing, but his counsel informed the trial court that his mental health problems had worsened in May 2015 when his ten-year-old son was removed from his custody. Defense counsel further stated that defendant was able to comply with the terms of his probation when he was taking his medication. Defense counsel asked the court to grant a continuance to give defendant, who was then employed, a chance to pay his outstanding probation fees. In response, the trial court stated: "No, I am going to revoke his probation for absconding and for the conviction. He will do the sentences that were imposed by the original judgments."

On that same date, the trial court entered judgments using AOC Form CR-607 revoking defendant's probation and activating his suspended sentences. The judgments contained the following pertinent findings:

> The defendant is charged with having violated specific conditions of the defendant's probation as alleged in the . . . Violation Report(s) on file herein, which is incorporated by reference.
>
> . . . .
>
> The condition(s) violated and the facts of each violation are as set forth . . . in Paragraph(s) 1 of the Violation Report or Notice dated 05/23/2016 [and] in Paragraph(s) 1-4 of the Violation Report or Notice dated 05/12/2016.
>
> . . . .
>
> The Court may revoke defendant's probation . . . for the willful violation of the condition(s) that he/she not commit any criminal offense . . . or abscond from supervision[.]

The judgments concluded as follows:

> Based upon the Findings of Fact set out on the reverse side, the Court concludes that the defendant has violated a valid condition of probation upon which the execution of the active sentence was suspended, and that continuation, modification or special probation or criminal contempt is not appropriate, and the Court ORDERS that the

> defendant's probation be revoked, that the suspended sentence be activated, and the defendant be imprisoned[.]

On 16 September 2016, defendant filed a handwritten pro se "Inmate Grievance/Request Form" with the McDowell County Jail indicating his intention to appeal from the 9 September judgments. Defendant's filing, however, failed to specifically identify both the rulings from which his appeal was being taken and the court to which he intended to appeal. Defendant's appellate counsel filed a petition for writ of certiorari with the Court of Appeals on 30 May 2017 requesting "review of the judgments and orders of the McDowell County Superior Court." The Court of Appeals determined that defendant had failed to file a legally valid notice of appeal but allowed his petition for certiorari.

In seeking relief from the trial court's judgments before the Court of Appeals, defendant argued that the court erred by revoking his probation after the expiration of his thirty-six-month probationary period by failing to make a specific finding that it was doing so for "good cause shown and stated" as required by N.C.G.S. § 15A-1344(f)(3). *State v. Morgan*, 814 S.E.2d 843, 847 (N.C. Ct. App. 2018). The majority in the Court of Appeals rejected this contention, citing that court's earlier decision in *State v. Regan*, 253 N.C. App. 351, 800 S.E.2d 436 (2017), in which it concluded that N.C.G.S. § 15A-1344(f)(3) does not require trial courts to make any specific findings of good cause shown in order to properly revoke a defendant's probation after the expiration of his probationary term. *Id.* at 357, 800 S.E.2d at 440. In *Regan*, the Court of Appeals determined that a finding of good cause could be inferred from the transcript of the defendant's probation violation hearing and the judgments entered by the court. *See id.* at 358, 800 S.E.2d at 440–41 ("Both the transcript of the probation violation hearing and the judgments entered reflect that the trial court considered the evidence and found good cause to revoke Defendant's probation.").

Noting that it was bound by its prior decision in *Regan*, *Morgan*, 814 S.E.2d at 847, the Court of Appeals majority held that the trial court did not err by revoking defendant's probation after the expiration of his probationary term, concluding that:

> [A]t the hearing, defendant admitted all of the State's allegations. After hearing from Officer Poteat and defendant's attorney, the trial court announced its decision to "revoke his probation for absconding and for the conviction." Consequently, "[b]oth the transcript of the probation violation hearing and the judgments entered reflect that the

> trial court considered the evidence and found good cause to revoke" defendant's probation.

Id. at 848 (quoting *Regan*, 253 N.C. App. at 358, 800 S.E.2d at 440–41).[1]

In a dissenting opinion, Chief Judge McGee asserted that *Regan* was both in conflict with this Court's decision in *State v. Bryant*, 361 N.C. 100, 637 S.E.2d 532 (2006), and inconsistent with the text of N.C.G.S. § 15A-1344(f). *Morgan*, 814 S.E.2d at 851–53. (McGee, C.J., dissenting). For these reasons, Chief Judge McGee would have held that "the trial court was required to make a finding of fact that the State demonstrated 'for good cause shown and stated that [Defendant's] probation should be . . . revoked.' " *Id.* at 853 (alterations in original) (quoting N.C.G.S. § 15A-1344(f)(3)). Defendant appealed as of right to this Court based upon the dissent.

Analysis

The issue for resolution in this appeal is whether the Court of Appeals erred by affirming the trial court's revocation of defendant's probation without making a specific finding that good cause existed to do so despite the expiration of his probationary period. For the reasons set out below, we conclude that the trial court's order failed to comply with N.C.G.S. § 15A-1344(f)(3).

This Court has made clear that a trial court "may, at any time during the period of probation, require defendant to appear before it, inquire into alleged violations of the conditions, and, if found to be true, place the suspended sentence into effect." *State v. Camp*, 299 N.C. 524, 527, 263 S.E.2d 592, 594 (1980) (citations and emphasis omitted). But the trial court "may not do so after the expiration of the period of probation except as provided in G.S. 15A-1344(f)." *Id.* at 527, 263 S.E.2d at 594 (citations and emphasis omitted).

Section 15A-1344(f) provides, in pertinent part:

> (f) Extension, Modification, or Revocation after Period of Probation. — The court may extend, modify, or revoke probation after the expiration of the period of probation if all of the following apply:

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1. The Court of Appeals also vacated a civil judgment for costs and attorneys' fees that had been entered against defendant by the trial court based on its determination that defendant was not provided notice and an opportunity to be heard on the final amount of attorneys' fees awarded. *Morgan*, 814 S.E.2d at 849. This portion of the Court of Appeals' opinion, however, is not currently before us.

(1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.

(2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.

(3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.

N.C.G.S. § 15A-1344(f) (2017).

It is axiomatic that "[w]hen construing legislative provisions, this Court looks first to the plain meaning of the words of the statute itself." *State v. Ward*, 364 N.C. 157, 160, 694 S.E.2d 729, 731 (2010) (citation omitted). "When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) (citation omitted); *see also State v. Beck*, 359 N.C. 611, 614, 614 S.E.2d 274, 277 (2005) ("If the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." (citation omitted)).

We are further guided in our decision by the canon of statutory construction that a statute may not be interpreted "in a manner which would render any of its words superfluous." *State v. Coffey*, 336 N.C. 412, 417, 444 S.E.2d 431, 434 (1994) (citations omitted). This Court has repeatedly held that "a statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant. It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage." *Porsh Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981) (citations omitted).

In *State v. Bryant*, this Court construed language in a prior version of N.C.G.S. § 15A-1344(f) in connection with the revocation of a defendant's probation following the expiration of her probationary period. At the time *Bryant* was decided, N.C.G.S. § 15A-1344(f) provided, in relevant part:

> (f) Revocation after Period of Probation. — The court may revoke probation after the expiration of the period of probation if:
>
> (1) Before the expiration of the period of probation the State has filed a written motion with the clerk indicating its intent to conduct a revocation hearing; and
>
> (2) *The court finds that the State has made reasonable effort to notify the probationer and to conduct the hearing earlier.*

N.C.G.S. § 15A-1344(f) (2005) (emphasis added) (amended 2008).

In *Bryant*, the trial court activated the defendant's suspended sentence seventy days after the expiration of her period of probation "without making a finding that the State had exerted reasonable efforts to conduct a hearing before the expiration of the probationary period." 361 N.C. at 104–05, 637 S.E.2d at 536. On appeal to this Court, the State argued that, despite the absence of an express finding of fact on that issue, the record contained evidence that would have supported such a finding and that, as a result, the order was in compliance with N.C.G.S. § 15A-1344(f). *Id.* at 103, 637 S.E.2d at 535.

We rejected the State's argument and held that the statutory language "[t]he court finds" contained in N.C.G.S. § 15A-1344(f)(2) required the trial court to make a specific finding of fact. *Id.* at 104–05, 637 S.E.2d at 536. We further held that this requirement was not satisfied simply because evidence existed in the record that *could* have supported such a finding. *Id.* at 103–04, 637 S.E.2d at 534–35. We explained our reasoning as follows:

> In analyzing this statute, we use accepted principles of statutory construction by applying the plain and definite meaning of the words therein, as the language of the statute is clear and unambiguous. The statute unambiguously requires the trial court to make a judicial finding that the State has made a reasonable effort to conduct the probation revocation hearing during the period of probation set out in the judgment and commitment.
>
> . . . .
>
> The State argues that the unsworn remarks of defendant's counsel, along with the scheduled hearing date

> noticed on defendant's probation violation report, satisfy the statutory requirement. . . . Although this argument is creative, it is contrary to the explicit statutory requirement that "the court find . . . the State has made reasonable effort to notify the probationer and to conduct the hearing earlier." The statute makes no exception to this finding of fact requirement based upon the strength of the evidence in the record.

Id. at 102–03, 637 S.E.2d at 534–35 (footnote and internal citations omitted).

We addressed a similar issue in *State v. Coltrane*, 307 N.C. 511, 299 S.E.2d 199 (1983), in which the trial court revoked the defendant's probation without affording her the opportunity to confront adverse witnesses at the probation revocation hearing. *Id.* at 513, 299 S.E.2d at 201. The controlling statute stated that a defendant at a probation revocation hearing is entitled to "confront and cross-examine adverse witnesses *unless the court finds good cause for not allowing confrontation*." *Id.* at 513, 299 S.E.2d at 201 (emphasis added). Because "[n]o findings were made [by the trial court] that there was good cause for not allowing confrontation," we held that the trial court failed to comply with this statutory requirement and therefore reversed the decision of the Court of Appeals affirming the trial court's revocation order. *Id.* at 516, 299 S.E.2d at 202.

In the present case, it is undisputed that the trial court's 9 September 2016 judgments contained no findings referencing the existence of good cause to revoke defendant's probation despite the expiration of his probationary term. Indeed, the record is devoid of any indication that the trial court was even aware that defendant's probationary term had already expired when it entered its judgments.

We conclude that both the plain language of N.C.G.S. § 15A-1344(f)(3) and our prior decisions in *Bryant* and *Coltrane* compel the conclusion that the trial court erred by activating defendant's sentences without first making such a finding. While *Bryant* and *Coltrane* concerned different statutory provisions than the one at issue here, both cases support the proposition that when the General Assembly has inserted the phrase "the court finds" in a statute setting out the exclusive circumstances under which a defendant's probation may be revoked, the specific finding described in the statute must actually be made by the trial court and such a finding cannot simply be inferred from the record. *See Bryant*, 361 N.C. at 102–03, 637 S.E.2d at 534–35; *Coltrane*, 307 N.C. at 516, 299 S.E.2d at 202.

Our conclusion fully comports with the principles of statutory construction set out above. Were we to hold, as the State argues, that N.C.G.S. § 15A-1344(f)(3) does not require a specific finding of good cause to revoke a defendant's probation after his probationary period has ended as long as the court has found that the defendant violated a condition of probation, subsection (f)(3) would be rendered superfluous. Subsection (f)(2) of N.C.G.S. § 15A-1344 makes clear that in order to revoke a defendant's probation following the expiration of his probationary term, the trial court must first make a finding that the defendant did violate a condition of his probation. After making such a finding, trial courts are then required by subsection (f)(3) to make an *additional* finding of "good cause shown and stated" to justify the revocation of probation even though the defendant's probationary term has expired.

Thus, by contending the trial court's determination that defendant did, in fact, violate conditions of his probation simultaneously satisfied subsections (f)(2) and (f)(3), the State incorrectly conflates two separate and distinct findings that must be made by the trial court under these circumstances. As such, the State's argument is inconsistent with well-settled rules for interpreting statutes. *See*, *e.g.*, *Lunsford v. Mills*, 367 N.C. 618, 628, 766 S.E.2d 297, 304 (2014) ("[I]t is a fundamental principle of statutory interpretation that courts should 'evaluate [a] statute as a whole and . . . not construe an individual section in a manner that renders another provision of the same statute meaningless.' " (alterations in original) (quoting *Polaroid Corp. v. Offerman*, 349 N.C. 290, 297, 507 S.E.2d 284, 290 (1998), *cert. denied*, 526 U.S. 1098 (1999), *abrogated on other grounds by Lenox, Inc. v. Tolson*, 353 N.C. 659, 548 S.E.2d 513 (2001)); *Coffey*, 336 N.C. at 418, 444 S.E.2d at 434 ("We construe each word of a statute to have meaning, where reasonable and consistent with the entire statute, because '[i]t is always presumed that the legislature acted with care and deliberation . . . .' " (alterations in original) (quoting *State v. Benton*, 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1970)). To the extent *Regan* holds that an express finding of good cause shown and stated is not required by N.C.G.S. § 15A-1344(f)(3), that portion of *Regan* is overruled.

Having determined that the Court of Appeals erred in affirming the trial court's 9 September 2016 judgments, the only remaining question is whether remand to the trial court is appropriate for it to determine whether good cause exists to revoke defendant's probation despite the expiration of his probationary period and, if so, to make an appropriate finding of fact as required by subsection (f)(3). We stated in *Bryant* that "[i]n the absence of statutorily mandated factual findings, the trial

court's jurisdiction to revoke probation after expiration of the probationary period is not preserved." *Bryant*, 361 N.C. at 103, 637 S.E.2d at 534. We further noted, however, that "[o]rdinarily[ ] when [there is a failure] to make a material finding of fact . . ., the case must be remanded . . . for a proper finding." *Id.* at 104, 637 S.E.2d at 535 (first, third, fourth, and fifth alterations in original) (quoting *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 674, 599 S.E.2d 888, 904 (2004)).

In *Bryant*, after determining that the trial court had failed to comply with the requirements of N.C.G.S. § 15A-1344(f), we proceeded to determine whether the record contained sufficient evidence to permit the necessary finding of "reasonable efforts" by the State to have conducted the probation revocation hearing earlier. *Id.* at 104, 637 S.E.2d at 535–36. Noting that the record was "devoid of any persuasive evidence as to why there was more than a two-month delay in conducting [the] probation revocation hearing," we concluded that "remand is not a proper remedy . . . because the record lacks sufficient evidence to support such a finding." *Id.* at 104, 637 S.E.2d at 535–36.

In the present case, conversely, we are unable to say from our review of the record that no evidence exists that would allow the trial court on remand to make a finding of "good cause shown and stated" under subsection (f)(3). Accordingly, we remand this matter to the Court of Appeals for further remand to the trial court for a finding of whether good cause exists to revoke defendant's probation despite the expiration of his probationary period and—assuming good cause exists—to make a finding in conformity with N.C.G.S. § 15A-1344(f)(3).

Conclusion

For the reasons stated above, we reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for further remand to the superior court for proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

STATE v. OSBORNE

[372 N.C. 619 (2019)]

STATE OF NORTH CAROLINA
v.
SHELLEY ANNE OSBORNE

No. 355PA18

Filed 16 August 2019

1. Criminal Law—sufficiency of evidence—all evidence considered—clarification of prior case law

The Supreme Court clarified that its opinion in *State v. Ward*, 364 N.C. 133 (2010), involved the issue of admissibility rather than sufficiency of evidence. When considering the sufficiency of the evidence to support a criminal conviction, it does not matter whether any (even all) of the record evidence should not have been admitted. In other words, all of the evidence—regardless of its admissibility—must be considered when determining whether there was sufficient evidence to support a criminal conviction. In addition, the Supreme Court disapproved of the portion of the Court of Appeals dissenting opinion adopted by the Supreme Court in *State v. Llamas-Hernandez*, 363 N.C. 8 (2009), that suggested that the lack of expert testimony identifying the substance in this case as heroin means that the trial court erred by denying defendant's motion to dismiss for insufficient evidence.

2. Drugs—sufficiency of evidence—possession of heroin—all admitted evidence considered

The trial court did not err by denying defendant's motion to dismiss a charge of possession of heroin for insufficiency of the evidence where the evidence admitted at trial showed that defendant told an investigating officer that she had ingested heroin, that several investigating officers identified the substance seized in defendant's hotel room as heroin, and that the substance field-tested positive for heroin twice. This and all other record evidence, when considered in its entirety and without regard to the admissibility of any evidence, was sufficient to show that the substance at issue was heroin.

Justice EARLS concurring.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous decision of the Court of Appeals, 821 S.E.2d 268 (N.C. Ct. App. 2018), vacating in part and finding no error in part in judgments entered

on 21 February 2017 by Judge Edwin G. Wilson, Jr. in Superior Court, Randolph County. Heard in the Supreme Court on 29 May 2019 in session in the State Capitol Building in the City of Raleigh.

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

Meghan Adelle Jones for defendant-appellee.

ERVIN, Justice.

The issue before the Court in this case is whether the Court of Appeals erroneously determined that the trial court erred by denying defendant Shelley Anne Osborne's motion to dismiss a charge of possession of heroin for insufficiency of the evidence. After careful consideration of the record in light of the applicable law, we reverse the decision of the Court of Appeals and remand this case to the Court of Appeals for consideration of defendant's remaining challenge to the trial court's judgment.

I. Factual Background

A. Substantive Facts

On 17 November 2014, officers of the Archdale Police Department responded to a call emanating from a local Days Inn hotel, in which they found defendant; a second woman; and defendant's two children, who appeared to be approximately four and five years old. According to Officer Jeffrey Harold Allred, the Archdale Days Inn is a place where "it's easier for people that want to do those types of things – prostitution, drugs – to – to get a room" given the hotel's cheap rates. Officer Jeremy Paul Flinchum testified that he had seen heroin, which he described as a grayish-tan or white rock, in the past and that he had responded to eight to ten heroin overdose calls during his law enforcement career.

After arriving at the Days Inn, Officer Flinchum found defendant, who was "unresponsive," "turning blue" around her face and lips, and having difficulty breathing, in a hotel room bathroom. Upon regaining consciousness, defendant "confirm[ed] to [Officer Flinchum] that she had ingested heroin." According to Officer Flinchum, investigating officers found "a syringe that had been thrown over the balcony into the parking lot"; syringes in the hotel room's refrigerator; two spoons, which are objects "used in part of the process of making the rock into a fluid substance to introduce to the body," one of which had a "residue"; and

"some heroin," which took a "rock form," had "a white, grayish color," and reacted positively when field-tested for the presence of heroin. Similarly, Officer Allred testified, without objection, that the substance seized from defendant's hotel room appeared to be heroin and that paraphernalia like that discovered in defendant's hotel room was typically used to ingest heroin. Officer Phillip Patton Love also testified, without objection, that, following his entry into defendant's hotel room, he collected "the rock heroin" that was found at the scene and that syringes and burnt spoons are "normal stuff you see when we . . . show up at overdoses that are dealing with heroin." Officer Flinchum conducted a second field test of the substance found in defendant's hotel room in the presence of the jury and testified, without objection, that the test was positive for the presence of heroin.

B. Procedural History

On 14 September 2015, the Randolph County grand jury returned bills of indictment charging defendant with possession of heroin and two counts of misdemeanor child abuse. The charges against defendant came on for trial before the trial court and a jury at the 20 February 2017 criminal session of the Superior Court, Randolph County.

At the close of the State's case, defendant unsuccessfully moved to dismiss the heroin possession charge for insufficiency of the evidence, arguing, in part, that the State was required, in accordance with this Court's decision in *State v. Ward*, 364 N.C. 133, 147, 694 S.E.2d 738, 747 (2010), to establish the identity of the substance that defendant allegedly possessed using a chemical test and that "a visual inspection is not enough" to support a determination that the substance in question was heroin. After resting without presenting any evidence, defendant renewed her dismissal motion, which the trial court again denied.

On 21 February 2017, the jury returned verdicts finding defendant guilty as charged. Based upon the jury's verdicts, the trial court entered a judgment sentencing defendant to a term of six to seventeen months imprisonment based upon her conviction for possessing heroin and a second judgment sentencing defendant to a consecutive term of sixty days imprisonment based upon her consolidated convictions for misdemeanor child abuse. However, the trial court suspended defendant's sentences for a period of twenty-four months and placed defendant on supervised probation subject to the usual terms and conditions of probation and the special condition that defendant participate in drug treatment. Defendant noted an appeal to the Court of Appeals from the trial court's judgments.

In seeking relief from the trial court's judgments before the Court of Appeals, defendant contended, among other things, that the trial court had erred by denying her motion to dismiss the heroin possession charge on the grounds that the State had failed to present sufficient evidence to show that the substance that defendant allegedly possessed was heroin.[1] *State v. Osborne*, 821 S.E.2d 268, 270 (N.C. Ct. App. 2018). In determining that "the State's evidence did not establish beyond a reasonable doubt that the seized substance was heroin," *id.* at 272 (citing *Ward*, 364 N.C. at 147, 694 S.E.2d at 747), the Court of Appeals held that the State was required under *Ward* to establish the identity of controlled substances using "some form of scientifically valid chemical analysis" and that defendant could not be properly convicted of heroin possession in the absence of such evidence, *id.* at 269-70 (quoting *Ward*, 364 N.C. at 147, 694 S.E.2d at 747). Because defendant "did not identify the seized substance as heroin" and, instead, "told the officers that she had ingested heroin," the Court of Appeals held that this case was distinguishable from cases upholding controlled substance-related convictions based upon the defendant's admission to or presentation of evidence concerning the identity of the substance in question. *Id.* at 271 (describing *State v. Nabors*, 365 N.C. 306, 718 S.E.2d 623 (2011), and *State v. Williams*, 367 N.C. 64, 744 S.E.2d 125 (2013), as holding "that a defense witness's in-court testimony identifying a substance as cocaine was sufficient to overcome a motion to dismiss even in the absence of forensic analysis," and describing *State v. Ortiz-Zape*, 367 N.C. 1, 743 S.E.2d 156 (2013), as holding "that an officer's testimony concerning the defendant's out-of-court identification of the substance as cocaine, combined with the officer's own testimony that the substance appeared to be cocaine, was sufficient to survive a motion to dismiss"). The Court of Appeals observed that it had attempted "to synthesize this line of cases into a coherent rule of law" in *State v. Bridges*, 810 S.E.2d 365 (N.C. Ct. App.), *disc. rev. denied*, 371 N.C. 339, 813 S.E.2d 856 (2018), in which a police officer's unobjected to testimony that the defendant had made an extrajudicial admission that she had "a bagg[ie] of meth hidden in her bra" and that he had located such a baggie in her bra sufficed to support the denial of a motion to dismiss for insufficiency of the evidence. For this reason, the Court of Appeals expressed its "reluctan[ce] to further expand the *Bridges* holding to apply in cases where the defendant did not actually identify the seized substance" given the likelihood that

1. In addition, defendant argued that the trial court had plainly erred by admitting certain evidence identifying the substance located in the hotel room as heroin. As a result of its decision to vacate defendant's conviction on sufficiency of the evidence grounds, the Court of Appeals did not reach defendant's evidentiary claim.

such a holding would "eliminate the need for scientifically valid chemical analysis in many — perhaps most — drug cases" and undermine this Court's decision in *Ward*. *Osborne*, 821 S.E.2d at 271. Employing this logic,[2] the Court of Appeals held that, given the State's concession that it had failed to present evidence of a "scientifically valid chemical analysis identifying the seized substance as heroin," the State had not "establish[ed] beyond a reasonable doubt that the seized substance was heroin" and that the trial court had erred by denying defendant's motion to dismiss for insufficiency of the evidence. *Id.* at 272 (citing *Ward*, 364 N.C. at 147, 694 S.E.2d at 747). As a result, the Court of Appeals vacated the trial court's judgment stemming from defendant's heroin possession conviction. *Id.* This Court granted the State's petition seeking discretionary review of the Court of Appeals' decision.

II. Substantive Legal Analysis

In seeking to persuade us to reverse the Court of Appeals' decision, the State argues that, had the Court of Appeals viewed the admitted evidence in the light most favorable to the State, as decisions such as *State v. Mann*, 355 N.C. 294, 301, 560 S.E.2d 776, 781 (2002), and *State v. Robbins*, 309 N.C. 771, 774–75, 309 S.E.2d 188, 190 (1983), require, it would have determined that the field "tests correctly and chemically confirmed the substance's identity as heroin." In the State's view, the Court of Appeals "ignore[d] the field tests" and violated a "long standing maxim," articulated by this Court in *State v. Vestal*, 278 N.C. 561, 567, 180 S.E.2d 755, 760 (1971), that courts consider "incompetent evidence which has been admitted . . . as if it were competent" in determining the sufficiency of the evidence to support a defendant's conviction. Relying upon *State v. Lane*, 365 N.C. 7, 27, 707 S.E.2d 210, 223 (2011), and *State v. McCraw*, 300 N.C. 610, 618-19, 268 S.E.2d 173, 178 (1980), the State contends that defendant's failure to object to the admission of the field tests at trial rendered the results of those tests "properly considered by the jury" and relieved the State of any need to show that the tests were "a sufficiently valid or reliable method of identifying heroin." According to the State, it "did not dispute whether — let alone concede that — a chemical field test for the presence of heroin was not a scientifically valid chemical analysis," as it "had no need to do so."

In addition, the State contends that, even if the field tests did not, standing alone, suffice to identify the substance that defendant allegedly possessed, the evidence, when viewed in its entirety, "was nevertheless

2. The Court of Appeals noted that "this issue is unsettled and may merit further review in our Supreme Court." *Osborne*, 821 S.E.2d at 270.

sufficient to establish the substance's identity as heroin." In support of this assertion, the State notes that *Ward* addressed the issue of the admissibility of evidence concerning the identity of a controlled substance rather than the sufficiency of the evidence to support a conviction and is not, for that reason, relevant to the issue that is before the Court in this case. On the contrary, the State asserts that the sufficiency of the evidence to establish the identity of the substance that defendant allegedly possessed should be decided based upon our decision in *Nabors*, 365 N.C. at 313, 718 S.E.2d at 627, in which the testimony of one of the defendant's witnesses identifying the substance that the defendant allegedly possessed with the intent to sell or deliver as cocaine sufficed to preclude allowance of a motion to dismiss for insufficiency of the evidence. In the State's view, defendant's admission to the investigating officers that she had ingested heroin, like the testimony at issue in *Nabors*, was sufficient to support defendant's heroin possession conviction. According to the State, "[s]o long as an oral admission works as a proper method of identification," "it should do so here" as well.

In seeking to persuade us to affirm the Court of Appeals' decision, defendant argues that, in order to convict a person of possessing a controlled substance, the State must prove the identity of the substance in question by adducing evidence of a scientifically valid chemical analysis performed by a person with expertise in interpreting the results of such an analysis. In support of this argument, defendant relies upon the fact that heroin is defined in N.C.G.S. § 90-89(2)(j) "in terms of its chemical composition." In defendant's view, the use of a definition like that set out in N.C.G.S. § 90-89(2)(j) implies, given the logic utilized in *Ward*, 364 N.C. at 143–44, 694 S.E.2d at 744, "the necessity of performing a chemical analysis to accurately identify controlled substances before the criminal penalties in [Section] 90-95 are imposed." Similarly, defendant contends that *State v. Llamas-Hernandez*, 189 N.C. App. 640, 652, 659 S.E.2d 79, 86 (2008) (Steelman, J., concurring, in part, and dissenting, in part), *rev'd per curiam for reasons stated in dissent*, 363 N.C. 8, 673 S.E.2d 658 (2009), clearly indicates that expert testimony is required to establish that the substance that the defendant had been charged with possessing is, in fact, a controlled substance.

In addition, defendant directs our attention to *State v. McKinney*, 288 N.C. 113, 118–19, 215 S.E.2d 578, 582 (1975), and *State v. Board*, 296 N.C. 652, 658–59, 252 S.E.2d 803, 807 (1979), in which we reversed Court of Appeals decisions affirming convictions for distributing THC and possessing and distributing MDA, respectively, on the grounds that the State had failed to adduce sufficient evidence to establish the identity of

the substances in question. In defendant's view, *McKinney* and *Board* stand for the proposition that a chemical analysis is necessary in order to establish the identity of a particular controlled substance. Similarly, defendant argues that our decision in *Nabors* does not control the outcome in this case given that the defendant in that case, who elicited evidence from one of his own witnesses that the substance that he allegedly both possessed and sold and delivered was cocaine, invited the error about which he sought to complain on appeal. In the same vein, defendant argues that in *Williams*, 367 N.C. at 69, 744 S.E.2d at 125, and *Ortiz-Zape*, 367 N.C. at 13–14, 743 S.E.2d 156, both of which relied upon *Nabors* in upholding controlled substance convictions on harmless error grounds, the record contained evidence tending to show that the defendant had identified the relevant substance as cocaine. In this case, on the other hand, defendant did not present any evidence identifying the substance that she was charged with possessing as heroin.

In defendant's view, the field tests performed by Officer Flinchum do not constitute acceptable methods for proving the identity of a controlled substance. In advancing this argument, defendant deduces that the tests in question were "color test reagents for the preliminary identification of drugs" and directs our attention to a law review article and news reports stating that "[s]uch drug tests are subject to no regulation by a central agency" and "routinely produce false positives." In addition, defendant notes that the General Assembly has determined that evidence concerning the "actual alcohol concentration result" derived from the performance of a portable breath test cannot be utilized in determining whether reasonable grounds exist for believing that an implied consent offense had been committed and argues that the enactment of the relevant statutory provision indicates that the field tests utilized in this case should not be deemed sufficient to support the denial of a motion to dismiss for insufficiency of the evidence.

Finally, defendant argues that the other evidence upon which the State relied in order to identify the substance that defendant allegedly possessed as heroin, such as the testimony of Officers Flinchum, Allred, and Love that, in their opinion, the substance in question appeared to them to be heroin on the basis of a visual examination and defendant's admission that she "had ingested heroin," should not suffice to identify the substance that defendant was charged with possessing as heroin given that the testimony of the investigating officers did not rest upon scientifically reliable chemical tests admitted using expert testimony and that, unlike the situations at issue in *Nabors* and *Williams*, witnesses presented by defendant did not identify the substance that was

located in the hotel room and that formed the basis of the drug possession charge as heroin. As a result, defendant urges us to affirm the Court of Appeals' decision to overturn her heroin possession conviction.

"Felonious possession of a controlled substance has two essential elements. The substance must be possessed and the substance must be knowingly possessed." *State v. Galaviz-Torres*, 368 N.C. 44, 48, 772 S.E.2d 434, 437 (2015) (quoting *State v. Weldon*, 314 N.C. 401, 403, 333 S.E.2d 701, 702 (1985)). Put another way, in order "[t]o obtain a conviction for possession of a controlled substance, the State bears the burden of proving two elements beyond a reasonable doubt: (1) defendant possessed the substance; and (2) the substance was a controlled substance." *State v. Harris*, 361 N.C. 400, 403, 646 S.E.2d 526, 528 (2007) (citing N.C.G.S. § 90–95(a) (2005)).

"In ruling on 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." *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (quoting *Mann*, 355 N.C. at 301, 560 S.E.2d at 781). Substantial evidence is the amount "necessary to persuade a rational juror to accept a conclusion." *Id.* at 574, 780 S.E.2d at 826 (quoting *Mann*, 355 N.C. at 301, 560 S.E.2d at 781). In evaluating the sufficiency of the evidence to support a criminal conviction, the evidence must be considered "in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *Id.* at 574, 780 S.E.2d at 826 (quoting *State v. Powell*, 299 N.C. 95, 99, 261 S.E.2d 114, 117 (1980)). In other words, if the record developed before the trial court contains "substantial evidence, whether direct or circumstantial, or a combination, 'to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.' " *Id.* at 575, 780 S.E.2d at 826 (quoting *State v. Golphin*, 352 N.C. 364, 458, 533 S.E.2d 168, 229 (2000)). "Moreover, both competent and incompetent evidence that is favorable to the State must be considered by the trial court in ruling on a defendant's motion to dismiss." *State v. Nabors*, 365 N.C. at 312, 718 S.E.2d at 627 (citing *State v. Israel*, 353 N.C. 211, 216, 539 S.E.2d 633, 637 (2000)).

In determining whether the evidence presented for the jury's consideration was sufficient to identify the substance located in defendant's hotel room as heroin, the Court of Appeals stated that "the question is not whether the State's evidence was strong, but whether that evidence 'establish[ed] the identity of the controlled substance beyond a reasonable doubt,' " *Osborne*, 821 S.E.2d at 271 (alteration in original)

(quoting *Ward*, 364 N.C. at 147, 694 S.E.2d at 747), and concluded that, "[a]pplying *Ward* here, the State's evidence did not establish beyond a reasonable doubt that the seized substance was heroin,"[3] *id.* at 272 (citing *Ward*, 364 N.C. at 147, 694 S.E.2d at 747)). In essence, the Court of Appeals accepted the validity of defendant's argument that, according to *Ward*, the only evidence that can suffice to identify the substance that a defendant is charged with possessing, manufacturing, selling, or delivering as a controlled substance for sufficiency of the evidence purposes is a scientifically valid chemical analysis performed by a person with expertise in interpreting the results produced by such an

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3. The statement from the Court of Appeals' decision quoted in the text can be read as suggesting, perhaps inadvertently, that an appellate court reviewing a sufficiency of the evidence claim is required to determine both that the record contains evidence tending to show the existence of each element of the charged offense and that the jury could reasonably find the existence of each element of the offense charged beyond a reasonable doubt based upon the evidence in question. Our sufficiency of the evidence jurisprudence does not call for such a two-step inquiry, which tends to suggest the appropriateness of some sort of appellate credibility determination rather than leaving all such credibility determinations to the jury. *See*, *e.g.*, *State v. Hyatt*, 355 N.C. 642, 665–66, 566 S.E.2d 61, 76–77 (2002) (rejecting the defendant's argument that the testimony of witnesses who "were felons with significant criminal histories," whose "respective accounts of the events at trial [both] conflicted with earlier statements to police" and "were self-serving," did not constitute sufficient evidence to support defendant's convictions for first-degree murder, robbery with a dangerous weapon, and first-degree kidnapping on the grounds that the "[d]efendant's proposition would occasion the fall of a long-standing principle in our jurisprudence that we are unprepared to abandon: that it is the province of the jury, not the court, to assess and determine witness credibility" (first citing *State v. Parker*, 354 N.C. 268, 278, 553 S.E.2d 885, 894 (2001); then citing *State v. Bonney*, 329 N.C. 61, 77, 405 S.E.2d 145, 154 (1991); then citing *State v. Orr*, 260 N.C. 177, 179, 132 S.E.2d 334, 336 (1963); then citing *State v. Wood*, 235 N.C. 636, 637-38, 70 S.E.2d 665, 667 (1952); then citing *State v. Bowman*, 232 N.C. 374, 376, 61 S.E.2d 107, 108–09 (1950); and then citing S*tate v. McLeod*, 196 N.C. 542, 544–45, 146 S.E. 409, 410 (1929))); *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255–56 (2002) (stating that, in ruling upon a motion to dismiss for insufficiency of the evidence "[t]he trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility") (quoting *Parker*, 354 N.C. at 278, 553 S.E.2d at 894)); *State v. Barnes*, 334 N.C. 67, 75-76, 430 S.E.2d 914, 919 (1993) (stating that, "[o]nce the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then ' "it is for the jury to decide whether the facts, taken singly or in combination, satisfy [it] beyond a reasonable doubt that the defendant is actually guilty" ' " (second alteration in original) (emphasis omitted) (quoting *State v. Thomas*, 296 N.C. 236, 244, 250 S.E.2d 204, 209 (1978))); *State v. McAvoy*, 331 N.C. 583, 589, 417 S.E.2d 489, 493–94 (1992) (stating that, "[i]f there is substantial evidence of each element of the offense charged, or any lesser included offenses, the trial court must deny the motion to dismiss as to those charges supported by substantial evidence and submit them to the jury for its consideration; the weight and credibility of such evidence is a question reserved for the jury" (citing *State v. Vause*, 328 N.C. 231, 236–37, 400 S.E.2d 57, 61 (1991))). Instead, as long as the record contains evidence which tends to show the existence of each element of the charged offense, a defendant's dismissal motion should be denied.

analysis. The State, on the other hand, argues that the Court of Appeals and defendant have misapprehended the nature of our decision in *Ward* given that it "only involved admissibility not sufficiency." As a result, it is necessary for us to analyze the meaning and reach of our decision in *Ward* to properly decide this case.

[1] The sole issue addressed in *Ward* was "whether the trial court abused its discretion by permitting [an analyst] to give expert opinion testimony identifying certain pills based solely on a visual inspection methodology." 364 N.C. at 139, 694 S.E.2d at 742. In determining that the trial court had abused its discretion by permitting the expert to identify the controlled substance using such a methodology, *id.* at 148, 694 S.E.2d at 747–48, the Court relied upon its decision in *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458, 597 S.E.2d 674, 686 (2004), which "established three steps 'for evaluating the admissibility of expert testimony' " pursuant to N.C.G.S. § 8C-1, Rule 702, with those steps including whether "the expert's proffered method of proof [is] sufficiently reliable as an area for expert testimony," *Ward*, 364 N.C. at 140, 694 S.E.2d at 742 (quoting *Howerton*, 358 N.C. at 458, 597 S.E.2d at 686). In determining that the visual identification evidence at issue in *Ward* should not have been admitted for the jury's consideration, 364 N.C. at 142, 694 S.E.2d at 743, we noted that "[t]he proponent of the expert witness, in this case the State, has 'the burden of tendering the qualifications of the expert' and demonstrating the propriety of the testimony under this three-step approach," *id.* at 140, 694 S.E.2d at 742 (quoting *Crocker v. Roethling*, 363 N.C. 140, 144, 675 S.E.2d 625, 629 (2009) (plurality opinion)). The Court determined that the challenged evidence should not have been admitted on the grounds that "the visual inspection methodology . . . proffered as an area for expert testimony is not sufficiently reliable to identify the substances at issue," *id.* at 142, 694 S.E.2d at 743, given (1) the absence of significant evidence "either implying that identification of controlled substances by mere visual inspection is scientifically reliable or suggesting that [the analyst's] particular methodology was uniquely reliable" and (2) the failure of the State's expert witness to provide "any scientific data or demonstration of the reliability of his methodology," *id.* at 144, 694 S.E.2d at 745. As we noted in stating that "[t]his holding is limited to North Carolina Rule of Evidence 702," *id.* at 147, 694 S.E.2d at 747, our decision in *Ward* focused solely upon the admissibility of the challenged evidence and did not address the sufficiency of the evidence to support the defendant's convictions in that case.

We recognize that, even though *Ward* did not address the sufficiency of the challenged evidence to establish the identity of the substances

at issue in that case, the opinion in *Ward* has been deemed to be relevant to such inquiry in a number of decisions, including the Court of Appeals' decision in this case. *See, e.g.*, *Bridges*, 810 S.E.2d at 366, 367, 370 (holding that the trial court did not err by denying a motion to dismiss a charge of possession of methamphetamine on the grounds that the testimony of a law enforcement officer that the defendant had told the officer that "she had a baggy of meth hidden in her bra" coupled with evidence of the "crystal-like substance found in [d]efendant's bra," taken together, constituted "proof sufficient to establish the presence of the first element" of the possession charge pursuant to *Ward*); *State v. James*, 240 N.C. App. 456, 459, 770 S.E.2d 736, 738–39 (2015) (determining, after noting that the defendant did not make "the sufficiency of the sample size a basis for [his] motion to dismiss," that, had the issue been properly preserved for purposes of appellate review, a chemical analysis of one pill along with visual examination of the remaining pills sufficed to permit a jury "to conclude that defendant possessed and transported 28 grams or more of a Schedule II controlled substance"); *see also State v. Blackwell*, 207 N.C. App. 255, 259, 699 S.E.2d 474, 476–77 (2010) (noting, in determining whether the admission of a laboratory report constituted plain error, that, "[w]ithout the erroneous admission of the laboratory reports," "the case against defendant would have been subject to dismissal at the close of the State's evidence" given that "the identification of the substance as cocaine was a fundamental part of the State's case" according to *Ward*). The confusion reflected in these decisions concerning the proper manner in which *Ward* should be understood may have arisen from our statement that:

> We acknowledge that controlled substances come in many forms and that we are unable to foresee every possible scenario that may arise during a criminal prosecution. Nevertheless, the burden is on the State to establish the identity of any alleged controlled substance that is the basis of the prosecution. Unless the State establishes before the trial court that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required. This holding is limited to North Carolina Rule of Evidence 702.

Ward, 364 N.C. at 147, 694 S.E.2d at 747; *see Osborne*, 821 S.E.2d at 270. Although the quoted language has been cited in addressing sufficiency of the evidence issues in a number of cases, including those referenced above, the passage in question explicitly states that the sole issue before

the Court in *Ward* involved the issue of admissibility rather than the issue of sufficiency. Thus, for purposes of examining the sufficiency of the evidence to support a criminal conviction, it simply does not matter whether some or all of the evidence contained in the record should not have been admitted; instead, when evaluating the sufficiency of the evidence, all of the evidence, regardless of its admissibility, must be considered in determining the validity of the conviction in question. *State v. Vestal*, 278 N.C. at 567, 180 S.E.2d at 760 (stating that, "[i]n determining such motion, incompetent evidence which has been admitted must be considered as if it were competent" (first citing *State v. Cutler*, 271 N.C. 379, 382-83, 156 S.E.2d 679, 681 (1967) (stating that "[a]ll of the evidence actually admitted, whether competent or incompetent, including that offered by the defendant, if any, which is favorable to the State, must be taken into account and so considered by the court in ruling upon the motion [for nonsuit in a criminal action]"); and then citing *State v. Virgil*, 263 N.C. 73, 75, 138 S.E.2d 777, 778 (1964) (same)). For that reason, a reviewing court errs to the extent that it determines whether the evidence suffices to support a defendant's criminal conviction by ascertaining whether the evidence relevant to the issue of the defendant's guilt should or should not have been admitted and then evaluating whether the admissible evidence, examined without reference to the allegedly inadmissible evidence that the trial court allowed the jury to hear, sufficed to support the defendant's conviction.

Additional confusion about the relevance of the principles enunciated in *Ward* to sufficiency of the evidence issues may stem from our decision in *Llamas-Hernandez*, 363 N.C. at 8, 673 S.E.2d at 658, in which this Court, in a per curiam opinion, reversed the Court of Appeals' decision "[f]or the reasons stated in the dissenting opinion." According to the dissenting opinion that this Court adopted in *Llamas-Hernandez*, the trial court erred by admitting lay opinion testimony concerning the identity of the controlled substance in which the defendant allegedly trafficked. After making this determination, the dissenting judge stated that "expert testimony [is] required to establish that a substance is in fact a controlled substance," 189 N.C. App. at 652, 659 S.E.2d at 86 (Steelman, J., concurring, in part, and dissenting, in part), and that, "[w]ithout [the lay opinion] testimony, there was no evidence before the jury as to the nature of the white powder," so that "[t]he trial court erred in denying defendant's motion to dismiss the Class G trafficking offense," *id.* at 654–55, 659 S.E.2d at 88. Aside from the fact that the dissenting judge did not explain in detail why the appropriate remedy for the erroneous admission of the visual identification testimony would be a determination that the evidence did not suffice to support the defendant's

conviction rather than a new trial and the fact that the issue actually in dispute between the parties related to admissibility rather than sufficiency, the remedial result reached in *Llamas-Hernandez* is inconsistent with numerous decisions of this Court, such as *Nabors*, *Vestal*, *Cutler*, and *Virgil*.[4] As a result, to the extent that *Llamas-Hernandez* suggests that the result reached by the Court of Appeals in this case was the correct one, that portion of our decision in *Llamas-Hernandez* is disapproved.

[2] In view of the fact that the absence of an admissible chemical analysis of the substance that defendant allegedly possessed does not necessitate a determination that the record evidence failed to support the jury's decision to convict defendant of possessing heroin, the only thing that remains for us to do in order to decide this case is to determine whether, when analyzed in accordance with the applicable legal standard, the evidence adduced at defendant's trial sufficed to support her conviction. A careful review of the evidence admitted at defendant's trial establishes that defendant told an investigating officer that she had ingested heroin, that several investigating officers identified the substance seized in the defendant's hotel room as heroin, and that the substance that defendant was charged with possessing field-tested positive for heroin on two different occasions. Assuming, without in any way deciding, that some of this evidence might have been subject to exclusion if defendant had objected to its admission, no such objection was lodged. Thus, the record, when considered in its entirety and without regard to whether specific items of evidence found in the record were or were not admissible, contains ample evidence tending to show that the substance that defendant allegedly possessed was heroin.[5] As a result, the Court of

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4. To be absolutely clear, the appropriate remedy for prejudicial error resulting from the admission of evidence that should not have been admitted has traditionally been for the defendant to receive a new trial rather than for the charges that had been lodged against that defendant to be dismissed for insufficiency of the evidence. *See*, *e.g.*, *State v. Craven*, 367 N.C. 51, 58, 744 S.E.2d 458, 462 (2013) (determining that the Court of Appeals, by vacating a conviction on the grounds that evidence had been erroneously admitted and the error was prejudicial, had ordered a remedy that was "erroneous as a matter of law" and that the Court of Appeals should, instead, "have ordered a new trial" (citing *State v. Littlejohn*, 264 N.C. 571, 574, 142 S.E.2d 132, 134–35 (1965))). For that reason, the sole remedy available to a criminal defendant faced with an attempt on the part of the State to elicit evidence identifying a controlled substance that fails to satisfy the principles enunciated in *Ward* is to object to the admission of that evidence and to challenge any decision on the part of the trial court to admit that evidence as part of a bid for a new trial on appeal.

5. The Court of Appeals and defendant have both emphasized that in this case, unlike *Nabors*, *Williams*, and *Ortiz-Zape*, the evidence upon which the State relied in arguing that the record contained adequate support for the jury's finding of defendant's guilt did not

Appeals erred by holding that the trial court erroneously denied defendant's motion to dismiss the heroin possession charge for insufficiency of the evidence.

III. Conclusion

Thus, for the reasons set forth above, we hold that the Court of Appeals erred by determining that the trial court had erroneously denied defendant's motion to dismiss the possession of heroin charge that had been lodged against her for insufficiency of the evidence. As a result, the Court of Appeals' decision in this case is reversed and this case is remanded to the Court of Appeals for consideration of defendant's remaining challenge to the trial court's judgment.

REVERSED AND REMANDED.

Justice EARLS concurring.

I concur with the analysis in the majority opinion, but write separately to note a threshold matter of immunity and jurisdiction which I would have considered *sua sponte*. On 9 April 2013 Governor Pat McCrory signed into law Session Law 2013-23, titled, in part, "An Act to Provide Limited Immunity From Prosecution for (1) Certain Drug-Related Offenses Committed by an Individual Who Seeks Medical Assistance for a Person Experiencing a Drug-Related Overdose and (2) Certain Drug-Related Offenses Committed by an Individual Experiencing a Drug-Related Overdose and In Need of Medical Assistance." 2013 N.C. Sess. Laws 72, 72–73 (codified as amended at N.C.G.S. §§ 90-96.2 & 90-106.2) (2019). Passed with overwhelming majorities in the state House and Senate, *see* https://www.ncleg.gov/BillLookUp/2013/S20, the

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consist of either an admission by defendant or testimony elicited by defendant. However, that fact has no bearing upon the proper resolution of the sufficiency of the evidence issue in this case. Although an admission by defendant or one of her witnesses might be given greater weight than other evidence during the course of a jury's deliberations, the source from which a particular item of evidence originates is irrelevant to a proper sufficiency of the evidence determination, which focuses upon whether there is any evidence of any kind tending to support a finding of a defendant's guilt rather than upon the form that the evidence takes. *See, e.g.*, *State v. Lowery*, 309 N.C. 763, 766, 309 S.E.2d 232, 236 (1983) (stating that "[t]he trial court in considering a motion to dismiss is concerned only with the sufficiency of the evidence to carry the case to the jury; it is not concerned with the weight of the evidence" (citing *State v. McNeil*, 280 N.C. 159, 162, 185 S.E.2d 156, 157 (1971))). Similarly, the existence of questions about the reliability of the field test results that the jury was allowed, without objection, to hear in this case goes to the admissibility of that evidence rather than to whether that evidence is relevant in determining whether the evidence sufficed to support defendant's conviction.

bill was referred to as the "Good Samaritan Law/Naloxone Access Law" and went into effect immediately. S.L. 2013-23, § 4, 2013 N.C. Sess. Laws at 73.

In Section 1, the law amended Article 5 of Chapter 90 of the General Statutes to add a new section titled "Drug-related overdose treatment; limited immunity." S.L. 2013-23, § 1, 2013 N.C. Sess. Laws at 72. The statute provided that:

> A person who experiences a drug-related overdose and is in need of medical assistance shall not be prosecuted for . . . (iii) a felony violation of G.S. 90-95(a)(3) possession of less than one gram of heroin . . . if the evidence for prosecution under those sections was obtained as a result of the drug-related overdose and need for medical assistance.

Id.

This law was in effect on 17 November 2014 when police received a 911 call that there was an overdose at a Days Inn in Archdale. Under the terms of that statute,[1] neither Shelley Osborne nor anyone who, in good faith, was seeking medical assistance for her that day could be prosecuted for possession of less than one gram of heroin. I concur that, to the extent we are only examining the sufficiency of the evidence here, without regard to the question of the admissibility of any of the evidence, all of the evidence contained in the record taken in the light most favorable to the State was sufficient to prove that the substance possessed by Shelley Osborne was heroin. And I concur that the case should be remanded to the Court of Appeals for consideration of defendant's remaining challenge to the trial court's judgment, which was the argument that, "[i]n the alternative, the trial court plainly erred by admitting testimony identifying the substance as heroin, by allowing an officer to conduct a field test in front of the jury, and by admitting testimony that the result of the field test indicated heroin." The Court of Appeals should also address on remand the question of the application of N.C.G.S. § 90-96.2 to this case.

North Carolina's Good Samaritan/Naloxone Access Law was passed at a time when state public health officials had reported a 300 percent increase in the number of overdose deaths in North Carolina in just over a decade, from 297 in 1999 to 1,140 in 2011. *See* Injury and

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1. N.C.G.S. § 90-96.2 was further amended in 2015; the new version applies to offenses committed on or after 1 August 2015. Act of June 10, 2015, S.L. 2015-94, §§ 1, 4, 2015 N.C. Sess. Laws 191, 191-92, 194.

Violence Prevention Branch, North Carolina Division of Public Health, *Prescription & Drug Overdoses*, (2013), http://injuryfreenc.ncdhhs.gov/About/PoisoningOverdoseFactSheet2013.pdf. The General Assembly made the decision that encouraging individuals suffering from an overdose, and those Good Samaritans who might be with them, to seek medical help to save lives was more important than prosecuting those individuals for possession of less than one gram of heroin.[2]

Ultimately, the question I would start with in deciding this case is whether the Good Samaritan/Naloxone Access Law's immunity is waived if not affirmatively asserted, or whether, like subject matter jurisdiction, it can be raised at any time. *Cf. State v. Sturdivant*, 304 N.C. 293, 307–08, 283 S.E.2d 719, 729–30 (1981) (noting that an argument that the trial court lacked subject matter jurisdiction may be raised at any time after a verdict); *Willowmere Cmty. Ass'n v. City of Charlotte*, 370 N.C. 553, 561, 809 S.E.2d 558, 563–64 (2018) (holding that since standing is a necessary prerequisite to a court's subject matter jurisdiction, it can be challenged at "any stage of the proceedings, even after judgment" (quoting *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006))). The court always has the obligation to inquire into and be certain of its jurisdiction. *See generally Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85–86 (1986) ("Every court necessarily has the inherent judicial power to inquire into, hear and determine questions of its own jurisdiction, whether of law or fact, the decision of which is necessary to determine the questions of its jurisdiction." (quoting *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964))); *see also* N.C.G.S. § 1A-1, Rule 12(h)(3) ("Whenever it appears by suggestion of the parties or *otherwise* that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." (emphasis added)); *Catawba Cty. v. Loggins*, 370 N.C. 83, 100, 804 S.E.2d 474, 486 (2017) (Martin, C.J., concurring in the result only) ("Courts always have jurisdiction to determine subject-matter jurisdiction, but they do not always have—in fact, they usually do not have—the power to determine other matters unless asked to do so by a party."). In *Loggins*, the Court explained that where the legislature has established the court's jurisdiction by state statute, subject

2. The original statute also provided that "[n]othing in this section shall be construed to bar the admissibility of any evidence obtained in connection with the investigation and prosecution of other crimes committed by a person who otherwise qualified for limited immunity under this section." S.L. 2013-23, § 1 (d), 2013 N.C. Sess. Laws at 72. In this case, defendant was also convicted of two counts of misdemeanor child abuse based on the fact that her two children under the age of sixteen were in the hotel room at the time she overdosed. The statute does not provide immunity from prosecution for those offenses and they are not at issue here.

to certain limitations, the court has no jurisdiction to exceed those limits, stating:

> Jurisdiction is "[t]he legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it." The court must have personal jurisdiction and, relevant here, subject matter jurisdiction "or '[j]urisdiction over the nature of the case and the type of relief sought,' in order to decide a case." "The legislature, within constitutional limitations, can fix and circumscribe the jurisdiction of the courts of this State." "Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction."

370 N.C. at 88, 804 S.E.2d at 478 (alterations in original) (first quoting *T.R.P.*, 360 N.C. at 590, 636 S.E.2d at 789–90; then quoting *T.R.P.* at 590, 636 S.E.2d at 790; then quoting *Bullington v. Angel*, 220 N.C. 18, 20, 16 S.E.2d 411, 412 (1941); then quoting *Eudy v. Eudy*, 288 N.C. 71, 75, 215 S.E.2d 782, 785 (1975), *overruled on other grounds by Quick v. Quick*, 305 N.C. 446, 457–58, 290 S.E.2d 653, 661 (1982)). In an analogous situation, where the issue was whether the court had jurisdiction to prosecute the defendant because of a factual dispute over where the crime occurred, this Court acknowledged that when a defendant challenges the jurisdiction of the court,

> the defendant is contesting the very power of this State to try him. We are of the view that a question as basic as jurisdiction is not an "independent, distinct, substantive matter of exemption, immunity or defense" and ought not to be regarded as an affirmative defense on which the defendant must bear the burden of proof. Rather, jurisdiction is a matter which, *when contested*, should be proven by the prosecution as a prerequisite to the authority of the court to enter judgment.

State v. Batdorf, 293 N.C. 486, 493, 238 S.E.2d 497, 502 (1977) (quoting *State v. Davis*, 214 N.C. 787, 793, 1 S.E.2d 104, 108 (1939)); *see also State v. Covington*, 267 N.C. 292, 295–96, 148 S.E.2d 138, 141–42 (1966) (holding that where lack of jurisdiction appears on the face of the record, this Court, *ex mero motu*, arrests the judgement).

Thus, it is appropriate for the Court of Appeals on remand to address whether the Good Samaritan/Naloxone Law is a limit on the court's jurisdiction to prosecute defendant in this case, by directing that a person who experiences a drug-related overdose and is in need of medical assistance "shall not be prosecuted" for possession of less than one gram of cocaine, or, more generally, if not purely jurisdictional, whether it is an issue that can be waived.

Certainly the first place to begin is the language of the statute itself. If unambiguous, "there is no room for judicial construction." *Lee v. Gore*, 365 N.C. 227, 230, 717 S.E.2d 356, 358 (2011) (citing *Walker v. Bd. of Trs. Of N.C. Local Gov'tal Emps.' Ret. Sys.*, 348 N.C. 63, 65–66, 499 S.E.2d 429, 430–31 (1998)); *see also State v. Ellison*, 366 N.C. 439, 443, 738 S.E.2d 161, 164 (2013) (applying opium trafficking statute's clear and unambiguous language that prohibits trafficking in mixtures containing opium derivatives); *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990) (noting that legislative purpose is first determined from the plain words of the statute). The law uses the term "shall not" which is mandatory, not permissive. *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979) (citing Black's Law Dictionary 1541 (4th rev. ed. 1968)) ("As used in statutes, the word 'shall' is generally imperative or mandatory."). If a person in defendant's circumstances "shall not" be prosecuted, there is no room for discretion to prosecute them.

It is also instructive that the statute does not say "it shall be a defense to the crime of possession of less than one gram of heroin that . . . ." The legislature is aware of the various defenses available in criminal law, and, indeed, has passed statutes requiring a defendant to give notice before trial if they intend to assert certain defenses. *See* N.C.G.S. § 15A-905(c); *see also State v. Rankin*, 371 N.C. 885, 893, 821 S.E.2d 787, 794 (2018) ("If the General Assembly wanted to enable a trash collector to be criminally charged for doing his or her job and forced to demonstrate his or her innocence by proving an affirmative defense at trial, it could have indicated as much in the statute."). "It is always presumed that the legislature acted with care and deliberation and with full knowledge of prior and existing law." *State v. Benton*, 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1970) (citations omitted). The fact that the statute at issue in this case is not framed as a defense to a criminal prosecution but rather a grant of immunity is apparent from the plain language of the statute.

The goal of statutory construction is to ensure that the purpose of the legislature is accomplished. *State ex rel. Hunt v. N.C. Reinsurance Facil.*, 302 N.C. 274, 288, 275 S.E.2d 399, 405 (1981) (citing

In re Dillingham, 257 N.C. 684, 694, 127 S.E.2d 584, 591 (1962)). This Court has observed that "[c]ourts also ascertain legislative intent from the policy objectives behind a statute's passage 'and the consequences which would follow from a construction one way or another.' " *Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991) (quoting *Campbell v. Church*, 298 N.C. 476, 484, 259 S.E.2d 558, 564 (1979)). The legislature's intent in passing N.C.G.S. § 90-96.2 was to ensure that victims of drug overdoses, and those who may be with them or come across them, do not refrain from seeking medical attention out of fear of criminal prosecution. In light of the opioid overdose epidemic in this state, the legislature enacted a policy to sacrifice prosecutions for possession of small amounts of drugs in order to save lives. Treating section N.C.G.S. 90-96.2(c) as anything other than a jurisdictional requirement that must be established by the State would severely undercut that policy.

As a Pennsylvania intermediate appellate court addressing that state's version of an overdose immunity statute noted:

> Moreover, the Legislature intended for prosecutors and police to refrain from filing charges when sorting through the aftermath of the unfortunately all-too-common overdose. The statute discourages the authorities from commencing the criminal justice process, *i.e.* by placing a limitation upon the charging power, to provide more incentive for reporters to call. . . . It would significantly undercut the statute's goal to conclude, as the Commonwealth urges, that the Act merely provides a defense, thereby requiring an overdose victim or a reporter to litigate the issue of immunity. We find that the statute clearly contemplates that a large number of these cases will never reach the courtroom halls; hence, the prohibition against charging a person.

Commonwealth v. Markun, 185 A.3d 1026, 1035–36 (Pa. Super. Ct. 2018). Pennsylvania's statute contains conspicuous differences from the original N.C.G.S. § 90-96.2 and explicitly places a burden on the defendant to establish certain criteria in order to receive its particular protections, nevertheless the Pennsylvania court concluded that the statute confers immunity, similar to sovereign immunity, that is not waived if raised for the first time on appeal, and creates a duty of the prosecution not to bring charges if the Act applies to the defendant's circumstances. *Id.* at 1031–40. The application of this immunity in North Carolina's Good Samaritan/Naloxone Access law is not something that was tacitly

waived by defendant here, but rather the State was required to prove that the immunity did not apply in order to proceed with prosecution for this particular offense.

Beyond the question of whether the limited immunity conferred by this statute is intended to be immunity from prosecution or a defense to a prosecution, there further remains the question of whether the law actually applies to Ms. Osborne. There is no dispute in the record that law enforcement personnel were called to provide aid to an overdose victim. Arriving first, Officer Flinchem found defendant unconscious, unresponsive, and turning blue, apparently from a heroin overdose. After Officer Flinchem insured that it was safe for EMS to enter, EMS entered the room and was able to revive defendant, who confirmed that she had ingested heroin. Officer Flinchem and two other officers who also responded to the call found drug paraphernalia and a "little piece of heroin."

The evidence for prosecution was obtained as a result of the need for medical assistance. Defendant was indicted, tried and convicted of a felony violation of N.C.G.S. § 90-95(a)(3), one of the statutes referenced in the Good Samaritan/Naloxone Access Law. What arguably is unclear is whether the amount of heroin at issue was less than one gram, as the only evidence in the record concerning the amount is that it was a "little piece of heroin." Given the language and intent behind N.C.G.S. § 90-96.2(c), the State in these circumstances bears the burden of establishing that the amount was one gram or more. Although the weight of the substance is not an element of the offense of possession, the immunity statute means that the weight of the substance needs to be known where all the other elements of immunity are present. That is the only way to effectuate the intent of the legislature that people who call police or medical personnel for treatment because they are experiencing a drug-related overdose shall not be prosecuted for possessing less than one gram of the drug.

STATE OF NORTH CAROLINA
v.
JEFFREY ROBERT PARISI

No. 65A17-2

Filed 16 August 2019

Arrest—driving while impaired—probable cause for arrest—de novo review

The unchallenged evidence found by the district and superior courts was sufficient as a matter of law to support defendant's arrest for impaired driving. Defendant admitted that he had consumed three beers before driving; there was a moderate odor of alcohol about him; his eyes were red and glassy; and defendant passed but performed imperfectly on the field sobriety tests. Whether an officer had probable cause to arrest a defendant for impaired driving contains a factual component, and the proper resolution of the issue requires the application of legal principles and constitutes a conclusion of law subject to de novo review.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 817 S.E.2d 228 (N.C. Ct. App. 2018), reversing and remanding orders entered on 13 January 2016 by Judge Michael D. Duncan in Superior Court, Wilkes County, and on 11 March 2016 by Judge Robert J. Crumpton in District Court, Wilkes County. Heard in the Supreme Court on 4 April 2019.

Joshua H. Stein, *Attorney General*, *by John W. Congleton*, *Assistant Attorney General*, *for the State.*

Glenn Gerding, *Appellate Defender*, *by Michele A. Goldman*, *Assistant Appellate Defender*, *for defendant-appellant.*

ERVIN, Justice.

The issue before the Court in this case is whether the trial courts properly determined that a motion to suppress filed by defendant Jeffrey Robert Parisi should be allowed on the grounds that the investigating officer lacked probable cause to place defendant under arrest for driving while impaired. After careful consideration of the record in light of the applicable law, we hold that the trial courts' findings of fact failed to support their legal conclusion that the investigating officer lacked the

probable cause needed to place defendant under arrest for impaired driving. As a result, we affirm the Court of Appeals' decision to reverse the trial courts' suppression orders and remand this case to the trial courts for further proceedings.

At approximately 11:30 p.m. on 1 April 2014, Officer Greg Anderson of the Wilkesboro Police Department was operating a checkpoint on Old 421 Road. At that time, Officer Anderson observed defendant drive up to the checkpoint and heard what he believed to be an argument among the vehicle's occupants. Upon approaching the driver's side window and shining his flashlight into the vehicle, Officer Anderson observed an open box of beer on the passenger's side floorboard. However, Officer Anderson did not observe any open container of alcohol in the vehicle. In addition, Officer Anderson detected an odor of alcohol and noticed that defendant's eyes were glassy and watery. At that point, Officer Anderson asked defendant to pull to the side of the road and step out of the vehicle. After defendant complied with this instruction, Officer Anderson confirmed that a moderate odor of alcohol emanated from defendant's person rather than from the interior of the vehicle. When Officer Anderson asked defendant if he had consumed any alcohol, defendant replied that he had drunk three beers earlier in the evening.

At that point, Officer Anderson requested that defendant submit to several field sobriety tests. First, Officer Anderson administered the horizontal gaze nystagmus test to defendant. In the course of administering the horizontal gaze nystagmus test, Officer Anderson observed that defendant exhibited six clues indicating impairment. Secondly, Officer Anderson had defendant perform a walk and turn test, during which defendant was required to take nine heel-to-toe steps down a line, turn around, and take nine similar steps in the opposite direction. In performing the walk and turn test, defendant missed the fourth and fifth steps while walking in the first direction and the third and fourth steps while returning. In Officer Anderson's view, these missed steps, taken collectively, constituted an additional clue indicating impairment. Finally, Officer Anderson administered the one leg stand test to defendant. As defendant performed this test, Officer Anderson noticed that he used his arms for balance and swayed, which Officer Anderson treated as tantamount to two clues indicating impairment. At that point, Officer Anderson formed an opinion that defendant had consumed a sufficient amount of alcohol to appreciably impair his mental and physical faculties.

Subsequently, Officer Anderson issued a citation charging defendant with driving while subject to an impairing substance in violation of N.C.G.S. § 20-138.1. The charge against defendant came on for trial

before Judge Robert J. Crumpton at the 17 June 2015 criminal session of the District Court, Wilkes County. Prior to trial, defendant made a motion to suppress the evidence obtained as a result of his arrest on the grounds that Officer Anderson lacked the necessary probable cause to take him into custody. On 23 September 2015, Judge Crumpton entered a Preliminary Order of Dismissal in which he determined that defendant's suppression motion should be granted.[1] On 23 September 2015, the State noted an appeal from Judge Crumpton's preliminary order to the Superior Court, Wilkes County.

The State's appeal came on for hearing before Judge Michael D. Duncan at the 9 November 2015 criminal session of the Superior Court, Wilkes County. On 13 January 2016, Judge Duncan entered an Order Granting Motion to Suppress and Motion to Dismiss in which he granted defendant's suppression motion and ordered that the charge that had been lodged against defendant be dismissed. On 11 March 2016, Judge Crumpton entered a Final Order Granting Motion to Suppress and Motion to Dismiss[2] in which he granted defendant's motion to suppress the evidence obtained as a result of his arrest and ordered "that the charge against [d]efendant be dismissed." On the same date, the State noted an appeal from Judge Crumpton's final order to the Superior Court, Wilkes County. On 6 April 2016, Judge Duncan entered an Order of Dismissal Affirmation affirming Judge Crumpton's "final order suppressing the arrest of the defendant and dismissing the charge of driving while impaired." The State noted an appeal to the Court of Appeals from Judge Duncan's order affirming Judge Crumpton's final order granting defendant's suppression motion and dismissing the driving while impaired charge that had been lodged against defendant.

In seeking relief from the orders entered by Judge Crumpton and Judge Duncan before the Court of Appeals, the State argued that the trial courts had erred by finding that Officer Anderson lacked probable cause to arrest defendant for driving while impaired and ordering that the driving while impaired charge that had been lodged against defendant be dismissed. On 7 February 2017, the Court of Appeals filed an opinion dismissing the State's appeal from Judge Crumpton's order granting defendant's suppression motion on the grounds that the State

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1. Judge Crumpton's preliminary order did not dismiss the driving while impaired charge that had been lodged against defendant.

2. Judge Duncan "[g]rant[ed defendant's m]otion to [s]uppress and [m]otion to [d]ismiss" even though defendant had never moved that the case be dismissed and even though Judge Crumpton did not order that the driving while impaired charge that had been lodged against defendant be dismissed.

had no right to appeal the final order granting defendant's suppression motion, vacating the trial court orders requiring that the driving while impaired charge that had been lodged against defendant be dismissed, and remanding this case to the Superior Court for further remand to the District Court for further proceedings. *State v. Parisi*, 796 S.E.2d 524, 529 (N.C. Ct. App. 2017), *disc. review denied*, 369 N.C. 751, 799 S.E.2d 873 (2017).

On 28 July 2017, the State filed a petition requesting the Court of Appeals to issue a writ of certiorari authorizing review of Judge Duncan's Order Granting Motion to Suppress and Motion to Dismiss and Judge Crumpton's Final Order Granting Motion to Suppress and Motion to Dismiss. *State v. Parisi*, 817 S.E.2d 228, 229 (N.C. Ct. App. 2018). On 16 August 2017, the Court of Appeals granted the State's certiorari petition. *Id.*, 817 S.E.2d at 229. In seeking relief from the trial courts' orders before the Court of Appeals on this occasion, the State argued that Judge Crumpton and Judge Duncan had erred by granting defendant's suppression motion on the grounds that, in the State's view, Officer Anderson had probable cause to arrest defendant for impaired driving.

In a divided opinion reversing the trial courts' orders and remanding this case to the trial courts for further proceedings, the Court of Appeals majority determined that the facts at issue in this case resembled those at issue in *State v. Townsend*, 236 N.C. App. 456, 762 S.E.2d 898 (2014), in which the Court of Appeals had held that an officer had probable cause to arrest a defendant for impaired driving given that the defendant, who had been stopped at a checkpoint, "had bloodshot eyes and a moderate odor of alcohol about his breath," exhibited multiple clues indicating impairment during the performance of three field sobriety tests, and produced positive results on two alco-sensor tests. *Parisi*, 817 S.E.2d at 230 (citing *Townsend*, 236 N.C. App. at 465, 762 S.E.2d at 905. Although the Court of Appeals noted that "no alco-sensor test [had been] administered in the instant case, defendant himself volunteered the statement that he had been drinking earlier in the evening." *Parisi*, 817 S.E.2d at 230. In addition, the Court of Appeals pointed out that, "while the odor of alcohol, standing alone, is not evidence of impairment, the '[f]act that a motorist has been drinking, when considered in connection with . . . other conduct indicating an impairment of physical or mental faculties, is sufficient prima facie to show a violation of [N.C.]G.S. [§] 20-138.1.' " *Parisi*, 817 S.E.2d at 230–31 (quoting *Atkins v. Moye*, 277 N.C. 179, 185, 176 S.E.2d 789, 794 (1970)). On the other hand, the Court of Appeals was not persuaded by the trial courts' reliance upon the Court of Appeals' own unpublished opinion in *State v. Sewell*, 239 N.C. App. 132, 768 S.E.2d

650 (2015), given that "it is not binding upon the courts of this State" and is "easily distinguished from the instant case." *Id.*, 817 S.E.2d at 231 (citing *Sewell*, 239 N.C. App. 132, 768 S.E.2d 650). As a result, the Court of Appeals concluded that "the facts, as supported by the evidence and as found by the district and superior courts, supported a conclusion that Officer Anderson had probable cause to stop and cite defendant for driving while impaired," so that "the trial court erred in granting defendant's motion to suppress the stop." *Id.*, 817 S.E.2d at 231.

In dissenting from the Court of Appeals' decision, Judge Robert N. Hunter, Jr., expressed the belief that the uncontested facts supported the legal conclusion that Officer Anderson lacked the probable cause necessary to support his decision to place defendant under arrest. *Id.*, 817 S.E.2d at 231–32. More specifically, the dissenting judge asserted that the trial courts' findings in this case, while "analogous to *some* of the findings of fact in *Townsend*," differed from those findings in certain critical ways. *Id.*, 817 S.E.2d at 231. For example, the dissenting judge pointed out that, in this case, Officer Anderson "did not administer an alco-sensor test" and that the trial courts made no "findings [about] *exactly when* [d]efendant drank in the night." *Id.*, 817 S.E.2d at 232. In addition, unlike the situation at issue in *Townsend*, "the trial courts found no facts about Officer Anderson's experience" and merely stated that Officer Anderson "found clues of impairment" rather than making specific findings concerning the number of clues indicating impairment that the officer detected in administering the horizontal gaze nystagmus test. *Id.*, 817 S.E.2d at 232. The dissenting judge further noted that the "trial courts found that [d]efendant did not slur his speech, did not drive unlawfully or 'bad[ly,]' or appear 'unsteady' on his feet." *Id.*, 817 S.E.2d at 232. As a result, the dissenting judge concluded that the "uncontested findings of fact support the trial court's conclusions that Officer Anderson lacked probable cause to arrest [d]efendant" for driving while impaired. *Id.*, 817 S.E.2d at 232. Defendant noted an appeal to this Court based upon the dissenting judge's opinion.

In seeking to persuade us to overturn the Court of Appeals' decision, defendant begins by asserting that the Court of Appeals had erroneously "reweighed the evidence" instead of "determining whether the competent, unchallenged factual findings supported the trial courts' legal conclusions." According to defendant, the Court of Appeals' "misapplication of the standard of review" led it to reach a different conclusion than the trial courts despite the fact that "the trial courts' competent factual findings supported their legal conclusions" and even though "there was no identified error of law committed by the trial courts in reaching

their conclusions." According to defendant, this Court's decision in *State v. Nicholson* establishes that "the *de novo* portion of an appellate court's review of an order granting or denying a motion to suppress relates to the assessment of whether the trial court's factual findings support its legal conclusions and whether the trial court employed the correct legal standard," citing *State v. Nicholson*, 371 N.C. 284, 288, 813 S.E.2d 840, 843 (2018). Although the Court of Appeals "acknowledged the correct standard of review," defendant contends that it "applied a non-deferential sufficiency test," with this alleged error being reflected in its statement that, "[w]here the State presented sufficient evidence that a law enforcement officer had probable cause to stop defendant, the trial court erred in granting defendant's motion to suppress the stop," citing *Parisi*, 817 S.E.2d at 299.

In addition, defendant contends that the Court of Appeals erroneously relied upon *Atkins*, 277 N.C. at 184, 176 S.E.2d at 793, and *State v. Hewitt*, 263 N.C. 759, 140 S.E.2d 241 (1965), in addressing the validity of the State's challenge to the trial courts' suppression orders. Although "*Atkins* and *Hewitt* assessed whether evidence, viewed in a light most favorable to the proponent, warranted an issue being put to the jury," defendant points out that a trial judge is required "to make credibility determinations and to weigh evidence" in determining whether to grant or deny a suppression motion and that an appellate court is obligated "to address . . . whether the trial court's competent factual findings supported its legal conclusions." The dissenting judge, in defendant's view, correctly applied the applicable standard of review by focusing upon the issue of whether trial courts' findings of fact supported its conclusions. (citing *Parisi*, 817 S.E.2d at 232).

Moreover, defendant claims that the Court of Appeals erred by overturning the trial courts' "unchallenged and supported factual determination" concerning whether defendant's performance during the administration of the field sobriety tests indicated impairment. In defendant's view, "[t]he trial courts implicitly found that [defendant's] imperfect but passing performance on the field sobriety tests alone did not indicate impairment," effectively rejecting Officer Anderson's testimony to the contrary. In support of this assertion, defendant relies upon our decision in *State v. Bartlett*, 368 N.C. 309, 311–12, 776 S.E.2d 672, 673–74 (2015), in which the testimony of the defendant's expert witness directly contradicted the testimony of the arresting officer's testimony that the defendant's performance on a variety of field sobriety tests indicated that the defendant was appreciably impaired. In addressing the validity of the State's challenge to the validity of a suppression order entered by

one Superior Court judge following a hearing held before another, this Court stated that

> Expert opinion testimony is evidence, and the two expert opinions in this case differed from one another on a fact that is essential to the probable cause determination—defendant's apparent degree of impairment. Thus, a finding of fact, whether written or oral, was required to resolve this conflict.

Id. at 312, 776 S.E.2d at 674. According to defendant, Officer Anderson's testimony that defendant's performance on the field sobriety tests indicated impairment was not binding upon the trial court, which "was charged with deciding the credibility of and weight to be given to [Officer] Anderson's opinion testimony." Defendant asserts that, rather than finding that defendant was appreciably impaired, the trial court concluded that Officer Anderson lacked probable cause and that this determination "implicitly incorporat[es] a factual finding that [Officer] Anderson's opinion was not supported by his observations and testing of [defendant]."

In defendant's view, the trial courts both determined that

> [t]he fact[s] and circumstances known to [Officer] Anderson as a result of his observations and testing of [d]efendant are insufficient, under the totality of the circumstances, to form an opinion in the mind of a reasonable and prudent man/officer that there was probable cause to believe [d]efendant had committed the offense of driving while impaired.[3]

After acknowledging that the trial courts had labeled their respective assessments of Officer Anderson's testimony as conclusions of law rather than as findings of fact, defendant contends that these conclusions were, "in effect," factual findings "and should be treated accordingly," citing *State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 352, 358 S.E.2d 339, 346 (1987). In view of the fact that Officer Anderson merely testified that, in his opinion, defendant was appreciably impaired rather than expressing an opinion concerning the "ultimate issue of whether probable cause existed" and the fact that the issue of whether defendant was driving was not contested, defendant argues that the trial

3. This language, which appears in the District Court's 23 September 2015 "Preliminary Order of Dismissal," is virtually identical to the corresponding language in the Superior Court's 13 January 2016 order.

court "necessarily rejected" Officer Anderson's testimony concerning the extent to which defendant was appreciably impaired, quoting *Bartlett* at 312, 776 S.E.2d at 674 (stating that defendant's apparent impairment "is essential to the probable cause determination"). In reversing the trial courts, defendant argues that "the Court of Appeals majority necessarily gave weight and credit to [Officer] Anderson's opinion testimony on impairment that both of the trial courts had rejected."

Furthermore, defendant contends that the Court of Appeals erred by referencing Officer Anderson's testimony that defendant "demonstrated six 'clues' indicating impairment" in light of the fact that neither trial court made a finding concerning the number of clues indicating impairment that Officer Anderson observed in their findings of fact. In defendant's view, the Court of Appeals "adopted without question [Officer] Anderson's testimony about the number and significance of [Horizontal Gaze Nystagmus] clues," erroneously "engaging in its own fact finding," and "rejecting the trial courts' unchallenged and amply supported factual findings as to whether [defendant] appeared appreciably impaired."

Finally, defendant contends that "[t]he trial courts' unchallenged and supported findings amply supported the courts' legal conclusion that [Officer] Anderson lacked probable cause to arrest [defendant] for driving while impaired." In support of this contention, defendant points to the trial courts' findings that defendant was steady on his feet, cooperative, respectful, able to listen, able to follow instructions and answer questions, and exhibited no signs of bad driving or slurred speech. According to defendant, his own "slightly imperfect, but passing performance on the walk-and-turn and one-leg-stand field sobriety tests," in conjunction with the clues indicating impairment that Officer Anderson had noted while administering the horizontal gaze nystagmus test, provided the only evidence of defendant's impairment. According to defendant, this "minimal evidence" of impairment, when compared to the "substantial evidence" contained in the record tending to show that defendant was not impaired, establishes that the State had failed to show that the challenged suppression orders were not supported by the trial courts' "competent and unchallenged factual findings."

Defendant notes that "[p]robable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty," quoting *State v. Streeter*, 283 N.C. 203, 207, 195 S.E.2d 502, 505 (1973). According to defendant, "mere alcohol consumption and minimal impairment" did not suffice to establish defendant's guilt of driving while impaired, quoting *State v. Harrington*, 78 N.C. App. 39, 45, 336 S.E.2d 852, 855 (1985).

According to defendant, the Court of Appeals' reliance upon its own opinion in *Townsend* was misplaced given "the limited role that precedent plays in a totality-of-the-circumstances test," citing *State v. Williams*, 366 N.C. 110, 118, 726 S.E.2d 161, 168, 201 (2012), and that *Townsend* involved an appeal from the denial, rather than the allowance, of a motion to suppress. On the contrary, defendant insists that other recent Court of Appeals' opinions are more factually and procedurally instructive for purposes of deciding this case, citing *State v. Overocker*, 236 N.C. App. 423, 762 S.E.2d 921 (2014); and then, *State v. Lindsey*, 249 N.C. App. 416, 791 S.E.2d 496 (2016); and then, *State v. Sewell*, 239 N.C. App. 132, 768 S.E.2d 650 (2015)). In defendant's view, *Overocker* should guide our analysis in this case given the "deference" that the Court of Appeals afforded to the trial court's suppression order by declining to "weigh the evidence and assess its credibility in a manner different from that of the trial court," quoting *Overocker*, 236 N.C. App. at 433–34, 762 S.E.2d at 928. As a result, since "the Court of Appeals abandoned the restraint required by the standard of review and demonstrated in its decisions in *Townsend*, *Overocker*, *Lindsey*, and *Sewell*," its decision in this case should be reversed.

In urging us to uphold the Court of Appeals' decision in this case, the State argues that the Court of Appeals' determination that the probable cause necessary to support defendant's arrest was present in this case did not rest solely upon the trial courts' findings that Officer Anderson detected an odor of alcohol emanating from defendant. Instead, the State contends that the Court of Appeals' decision rested upon findings of fact about

> [d]efendant driving the vehicle, a disturbance inside the vehicle as it approached the checkpoint, an odor of alcohol coming from the vehicle, an open box of alcoholic beverages in the vehicle, a moderate odor of alcohol coming from defendant's person, an admission by defendant of drinking three [ ] beers previously in the evening, defendant missing steps on the walk and turn test, defendant swaying and using his arms for balance on the one leg stand test and Officer Anderson observing multiple additional clues of impairment during the Horizontal Gaze Nystagmus test.

Although the State acknowledges that this Court has held that an odor of alcohol, "standing alone, is not evidence that [a driver] is under the influence of an intoxicant," citing *Atkins*, 277 N.C. at 185, 176 S.E.2d at 793, the State also notes that "the '[f]act that a motorist has been

drinking, when considered in connection with faulty driving . . . or other conduct indicating an impairment of physical or mental faculties, is sufficient prima facie to show a violation of [N.C.]G.S. § 20–138.1,' " quoting *Atkins*, at 185, 176 S.E.2d at 794. In addition to the presence of a moderate odor of alcohol, the trial courts found the existence of multiple signs of impairment in this case, including the fact that defendant admitted to having consumed three beers, that defendant missed steps on the walk and turn test, that defendant swayed during the one leg stand test, and that defendant displayed multiple clues indicating impairment while performing the horizontal gaze nystagmus test.

The State contends that the Court of Appeals properly applied this Court's decisions in *Atkins* and *Hewitt* in conducting a *de novo* review of the trial courts' conclusions of law. In the State's view, the Court of Appeals' reliance upon *Townsend* was appropriate given that, "in this case[,] there existed almost all of the same facts and circumstances that the Court of Appeals found sufficient to support a finding of probable cause in *Townsend*," citing *Townsend*, 236 N.C. App. 456, 762 S.E.2d 898. On the other hand, the State asserts that the trial courts' reliance upon the Court of Appeals' unpublished decision in *Sewell* was "misplaced" given that opinion's unpublished status and the existence of material factual distinctions between the two cases, citing *Sewell*, 239 N.C. App. 132, 768 S.E.2d 650.

The State challenges the validity of defendant's assertion that the trial courts failed to find Officer Anderson's testimony credible. According to the State, the trial courts' findings of fact were "completely consistent with Officer Anderson's testimony and observations." For that reason, the State contends that the Court of Appeals correctly held that the trial courts' uncontested findings of fact failed to support their legal conclusion that Officer Anderson lacked probable cause to arrest defendant for impaired driving.

Finally, the State argues that the Court of Appeals applied the correct standard of review in overturning the trial courts' orders. Instead of utilizing a sufficiency of the evidence standard, the State asserts that the Court of Appeals "expressly cited the correct standard of review in its opinion." According to the State, the Court of Appeals properly cited *Atkins* and *Hewitt* in determining whether the trial courts' legal conclusions were both supported by the findings of fact and legally correct. The State argues that, in conducting *de novo* review, an appellate court must analyze a trial court's probable cause determination in light of the totality of the circumstances and that determining whether the trial court had applied the proper legal principles to the relevant facts would

be impossible if appellate courts were precluded from considering all of the circumstances upon which the trial court relied in coming to its legal conclusion. For that reason, the State contends that the Court of Appeals correctly analyzed the validity of the trial courts' probable cause determination using a *de novo* standard of review that considered the totality of the circumstances reflected in the trial courts' findings of fact. As a result, the State urges this Court to affirm the Court of Appeals' decision.

As we have stated on many occasions, this Court reviews a trial court's order granting or denying a defendant's suppression motion by determining "whether the trial court's 'underlying findings of fact are supported by competent evidence . . . and whether those factual findings in turn support the [trial court's] ultimate conclusions of law.' " *State v. Bullock*, 370 N.C. 256, 258, 805 S.E.2d 671, 674 (2017) (alterations in original) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)); *see also*, *e.g.*, *State v. Biber*, 365 N.C. 162, 167–68, 712 S.E.2d 874, 878 (2011) (citing *State v. Brooks*, 337 N.C. 132, 140–41, 446 S.E.2d 579, 585 (1994)). In accordance with the applicable standard of review, the trial court's findings of fact "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994); *see also Cooke*, 306 N.C. at 134, 291 S.E.2d at 619; *State v. Saldierna*, 371 N.C. 407. 421, 817 S.E.2d 174, 183 (N.C. 2018), *cert. denied*, 139 S. Ct. 1279, 203 L. Ed. 2d 290 (2019). On the other hand, however, "[c]onclusions of law are reviewed de novo and are subject to full review," *Biber*, 365 N.C. at 168, 712 S.E.2d at 878 (citing *State v. McCollum*, 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993) (citation omitted)), with an appellate court being allowed to "consider[ ] the matter anew and freely substitute[ ] its own judgment' for that of the lower tribunal." *Id.* at 168, 712 S.E.2d at 878 (quoting *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008)). After carefully reviewing the trial courts' suppression orders, we hold that the trial courts' factual findings fail to support their legal conclusion that Officer Anderson lacked probable cause to arrest defendant for driving while impaired in violation of N.C.G.S. § 20-138.1.

As the parties agree, the ultimate issue raised by defendant's suppression motion is whether Officer Anderson had probable cause to place defendant under arrest for driving while subject to an impairing substance in violation of N.C.G.S. § 20-38.1. Section 20-138.1 provides, in pertinent part, that "[a] person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State . . . [w]hile under the influence of an impairing substance." N.C.G.S. § 20-138.1(a)(1). "[A] person is under

the influence of intoxicating liquor or narcotic drugs, within the meaning and intent of the statute, when he has drunk a sufficient quantity of intoxicating beverages or taken a sufficient amount of narcotic drugs to cause him to lose the normal control of his bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of those faculties." *State v. Carroll*, 226 N.C. 237, 241, 37 S.E.2d 688, 691 (1946). According to well-established federal and state law, probable cause is defined as "those facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information which are sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *State v. Williams*, 314 N.C. 337, 343, 333 S.E.2d 708, 713 (1985) (citing, first, *Beck v. Ohio*, 379 U.S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964); then, *State v. Zuniga*, 312 N.C. 251, 322 S.E.2d 140 (1984)). "Whether probable cause exists to justify an arrest depends on the 'totality of the circumstances' present in each case." *State v. Sanders*, 327 N.C. 319, 339, 395 S.E.2d 412, 425 (1990) (citations omitted). Thus, Officer Anderson had probable cause to arrest defendant for impaired driving in the event that a prudent officer in his position would reasonably have believed defendant's mental or physical faculties to have been appreciably impaired as the result of the consumption of an intoxicant.

"The fact that a motorist has been drinking, when considered in connection with faulty driving such as following an irregular course on the highway or other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show [the offense of impaired driving]." *Hewitt*, 263 N.C. at 764, 140 S.E.2d at 244 (citing *State v. Gurley*, 257 N.C. 270, 125 S.E.2d 445 (1962)). In *Atkins*, for example, we held that evidence tending to show that a broken pint container had been found in the driver's vehicle, that an odor of alcohol could be detected on both the driver's breath and in his vehicle, and that the driver had failed to take any action to avoid a collision with another vehicle sufficed to support a conclusion that plaintiff's faculties had been appreciably impaired by the consumption of an alcoholic beverage. *Atkins*, 365 N.C. at 185, 176 S.E.2d at 794; *see State v. Rich*, 351 N.C. 386, 399, 527 S.E.2d 299, 306 (2000). The Court of Appeals has reached similar results in numerous decisions, including *Townsend*, 236 N.C. App. at 465, 762 S.E.2d at 905 (upholding the denial of a defendant's suppression motion based upon the fact that the defendant had bloodshot eyes, emitted an odor of alcohol, exhibited clues indicating intoxication on three field sobriety tests, and produced positive results on two alco-sensor tests); *Steinkrause v. Tatum*, 201 N.C. App. 289, 295, 689 S.E.2d 379, 383 (2009), (holding that probable cause to believe that a driver was guilty of impaired

driving existed in light of fact that an odor of alcohol was detected on the driver's person and the driver was involved in a one-vehicle accident), *aff'd per curiam*, 364 N.C. 419, 700 S.E.2d 222 (2010); *State v. Tappe*, 139 N.C. App. 33, 38, 533 S.E.2d 262, 265 (2000) (holding that the probable cause needed to support the defendant's arrest existed when an officer detected a strong odor of alcohol on the defendant's breath, when the defendant's eyes were glassy and watery, and when the vehicle being operated by the defendant crossed the center line of the street or highway upon which it was travelling); and *Rock v. Hiatt*, 103 N.C. App. 578, 584–85, 406 S.E.2d 638, 642–43 (1991) (holding that an officer had reasonable grounds to believe that an individual was guilty of impaired driving based upon the fact that the officer observed the driver's vehicle leave a hotel parking lot at an excessive rate of speed at the approximate time at which the hotel's lounge closed, detected a strong odor of an intoxicating beverage on the driver's breath after pulling him over, and noticed that the driver's speech was slurred, his eyes were glassy, and he was swaying unsteadily on his feet). As a result, Officer Anderson would have had probable cause to place defendant under arrest for driving while impaired in the event that, based upon an analysis of the totality of the circumstances, he reasonably believed that defendant had consumed alcoholic beverages and that defendant had driven in a faulty manner or provided other indicia of impairment.

In his preliminary order, Judge Crumpton found as fact that

> 1. Defendant was driving a motor vehicle in Wilkesboro on April 1, 2014, when he entered a checking station being worked by Wilkesboro Police Department.
>
> 2. [Officer] Anderson approached the driver after he entered the checkpoint.
>
> 3. [Officer] Anderson did not observe any unlawful or bad driving by the defendant.
>
> 4. [Officer] Anderson asked to see [d]efendant's driver's license and [d]efendant provided the license to him.
>
> 5. [Officer] Anderson noticed [d]efendant's eyes appeared glassy.
>
> 6. [Officer] Anderson noticed an open container of alcohol in the passenger area of the motor vehicle.
>
> 7. [Officer] Anderson asked [d]efendant to exit the vehicle, which [d]efendant did.

> 8. [Officer] Anderson inquired if [d]efendant had anything to drink, and [d]efendant stated that he had drunk three beers earlier in the evening.
>
> 9. [Officer] Anderson administered the walk-and-turn field sobriety test.
>
> 10. Defendant missed one step on the way down and one step on the way back while performing the test.
>
> 11. [Officer] Anderson administered the one-leg stand field sobriety test.
>
> 12. Defendant swayed and used his arms for balance during the performance of the test.
>
> 13. [Officer] Anderson did not observe any other indicators of impairment during his encounter with [d]efendant, including any evidence from [d]efendant's speech.
>
> 14. [Officer] Anderson formed the opinion that [d]efendant has consumed a sufficient amount of impairing substance so as to appreciably impair [d]efendant's physical and/or mental faculties.
>
> 15. [Officer] Anderson formed the opinion that the impairing substance was alcohol.
>
> 16. [Officer] Anderson placed [d]efendant under arrest.

After making many of the same factual findings, Judge Duncan made a number of additional findings on appeal that were included in Judge Crumpton's final order, including the fact that Officer Anderson observed a "disturbance" between the defendant and other occupants of the vehicle as he approached it; that, although Officer Anderson noticed an open box of alcoholic beverages in the passenger-side floorboard, he did not observe any open containers of alcoholic beverages in the vehicle; that Officer Anderson observed an odor of alcohol emanating from the vehicle and a moderate odor of alcohol emanating from defendant's person; that defendant's eyes appeared to be red; and that Officer Anderson found clues indicating impairment while administering the horizontal gaze nystagmus test.

Although the findings of fact made in the trial courts' orders have adequate evidentiary support, they do not support the trial courts' conclusions that Officer Anderson lacked the probable cause needed to

justify defendant's arrest. As the Court of Appeals correctly noted, the trial courts' findings reflect that "Officer Anderson was presented with the odor of alcohol, defendant's own admission of drinking, and multiple indicators on field sobriety tests demonstrating impairment." *Parisi*, 817 S.E.2d at 230–31. In view of the unchallenged findings that defendant had been driving, that defendant admitted having consumed three beers, that defendant's eyes were red and glassy, that a moderate odor of alcohol emanated from defendant's person, and that defendant exhibited multiple indicia of impairment while performing various sobriety tests, we have no hesitation in concluding that the Court of Appeals correctly determined that the trial courts' findings established that Officer Anderson had probable cause to arrest defendant for impaired driving. *See State v. Harris*, 279 N.C. 307, 311, 182 S.E.2d 364, 367 (1971) (citing 5 Am. Jur.2d Arrest § 44 (1962)). As a result, we hold that the Court of Appeals did not err by reversing the trial courts' suppression orders.

In seeking to persuade us to reach a different result, defendant argues that the Court of Appeals' decision to reverse the trial courts' suppression orders relied upon the erroneous use of a "non-deferential sufficiency test," with this contention resting upon the majority's statement, in the introductory portion of its opinion, that, "[w]here the State presented sufficient evidence that a law enforcement officer had probable cause to stop defendant, the trial court erred in granting defendant's motion to suppress the stop." *Parisi*, 817 S.E.2d at 229. Although the language upon which defendant relies in support of this contention could have been more artfully drafted, we do not believe that it enunciates the standard of review that the Court of Appeals utilized in reviewing the State's challenge to the trial courts' suppression orders. On the contrary, the Court Appeals correctly stated the applicable standard of review at the very beginning, *Parisi*, 817 S.E.2d at 230 (stating that "[o]ur review of a trial court's denial of a motion to suppress is 'strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law' " (quoting *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619 (1982), and that " [t]he trial court's conclusions of law . . . are fully reviewable on appeal," (quoting *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000))), and in the conclusion of its opinion, *Parisi*, 817 S.E.2d at 231 (stating that "it seems clear that the facts, as supported by the evidence and as found by the district and superior courts, supported a conclusion that Officer Anderson had probable cause to stop and cite defendant for driving while impaired"), and

analyzed the relevant factual findings in accordance with the applicable standard of review. As a result, we are unable to agree with defendant that the Court of Appeals failed to apply the applicable statute of review.

In addition, defendant argues that the Court of Appeals misapplied the applicable standard of review as well. In defendant's view, the trial courts "implicitly found" that defendant was not appreciably impaired and that this "unchallenged and supported factual determination" should be deemed binding for purposes of appellate review, citing *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674. In essence, defendant argues that, by determining that Officer Anderson lacked probable cause to place defendant under arrest, the trial courts implicitly rejected Officer Anderson's opinion that defendant was appreciably impaired; that, by making this determination, the trial courts effectively found as a fact that Officer Anderson lacked probable cause to place defendant under arrest; and that the Court of Appeals erred by failing to defer to this implicit finding given that it had the requisite evidentiary support.

As we understand it, defendant's argument rests upon the assumption that the trial courts implicitly found that defendant's mental and physical faculties were not appreciably impaired and a contention that this implicit finding is binding upon the appellate courts in the event that it has sufficient evidentiary support. To be sure, this Court has held that "only a material conflict in the evidence—one that potentially affects the outcome of the suppression motion—must be resolved by explicit factual findings that show the basis for the trial court's ruling," *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674 (citing, first *State v. Salinas*, 366 N.C. 119, 123–24, 729 S.E.2d 63, 66 (2012); then, *State v. Ladd*, 308 N.C. 272, 278, 302 S.E.2d 164, 168 (1983)), and that, "[w]hen there is no conflict in the evidence, the trial court's findings can be inferred from its decision," *id.* at 312, 776 S.E.2d at 674 (citing *State v. Munsey*, 342 N.C. 882, 885, 467 S.E.2d 425, 427 (1996)). However, this principle does not justify a decision in defendant's favor in the present instance.

First, and perhaps most importantly, the record evidence in this case was not, at least in our opinion, in conflict in the manner contemplated by the Court in the decisions cited in the preceding paragraph. Instead, as we have already noted, the evidence contained in the present record, which consisted of testimony from Officer Anderson concerning his observations of defendant's condition and his performance on certain field sobriety tests, showed that defendant had a moderate odor of alcohol about his person, that defendant's eyes were red and glassy, that defendant had admitted having consumed three beers earlier that evening, and that defendant exhibited a number of clues indicating

impairment while performing the walk-and-turn test, one-leg stand test, and the horizontal gaze nystagmus test.[4] As we have already noted, these facts, all of which are reflected in the trial courts' findings, establish, as a matter of law, that defendant had consumed alcohol on the evening in question and that his faculties were appreciably impaired, albeit not completely obliterated, on the evening in question. As a result, rather than having made an implicit factual finding that defendant was not appreciably impaired, the trial courts made explicit findings of fact establishing that the appreciable impairment needed to support defendant's arrest in this case did, in fact, exist before incorrectly concluding as a matter of law that no probable cause for defendant's arrest existed.

Secondly, this Court has clearly stated that "[f]indings of fact are statements of what happened in space and time," *State ex rel. Utilities Comm'n v. Eddleman*, 320 N.C. 344, 351, 358 S.E.2d 339, 346 (1987), while conclusions of law "state[ ] the legal basis upon which [a] defendant's liability may be predicated under the applicable statutes," *Coble v. Coble*, 300 N.C. 708, 713, 268 S.E.2d 185, 189 (1980) (holding that the trial court's "finding of fact" that the plaintiff needed financial assistance for the support of her children and that the defendant was capable of providing such assistance was, in actuality, a conclusion of law). *See also State v. McFarland*, 234 N.C. App. 274, 284, 758 S.E.2d 457, 465 (2014) (holding that "a conclusion of law requires 'the exercise of judgment' in making a determination, 'or the application of legal principles' to the facts found") (quoting *Sheffer v. Rardin*, 208 N.C. App. 620, 624, 704 S.E.2d 32, 35 (2010)); *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (noting that "a determination which requires the exercise of judgment or the application of legal principles is more appropriately a conclusion of law"). Although the issue of whether an officer had probable cause to support a defendant's arrest for impaired driving exists certainly contains a factual component, the proper resolution of that issue inherently "requires the exercise of judgment or the application of legal principles," *In re Helms*, 127 N.C. App. at 510, 491 S.E.2d at 675, and constitutes a conclusion of law subject to *de novo* review rather than a finding of fact which cannot be disturbed on appeal without a determination that none of the evidence contained in the record supports that decision.

According to defendant, we are precluded from reaching exactly this result by our decision in *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674.

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4. Interestingly, the trial courts, in finding that Officer Anderson had not "observe[d] any other indicators of impairment" aside from these sobriety test results, essentially acknowledged that these test results constituted "indications of impairment."

Defendant's argument, however, rests upon a misreading of that decision. To be sure, we held in *Bartlett* that a material evidentiary conflict "must be resolved by explicit factual findings that show the basis for the trial court's ruling." *Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674. However, the material evidentiary conflict that existed in *Bartlett*, which involved differing expert opinions concerning the extent, if any, to which a defendant's performance on certain field sobriety tests indicated impairment, simply does not exist in this case. *Id.* at 312, 776 S.E.2d at 674. Although *Bartlett* does make reference to "a fact that is essential to the probable cause determination—defendant's apparent degree of impairment," *id.* at 312, 776 S.E.2d at 674, the language in question refers to necessity for the trial court to resolve the factual conflict that existed between the testimony of the two witnesses rather than to a determination that the extent to which probable cause exists to support the arrest of a particular person is a factual, rather than a legal, question. As a result, while the actual observations made by arresting officers and the extent to which a person suspected of driving while impaired exhibits indicia of impairment involve questions of fact that must be resolved by findings that are subject to a sufficiency of the evidence review on appeal, the extent, if any, to which these factual determinations do or do not support a finding that an officer had the probable cause needed to make a particular arrest is a conclusion of law subject to *de novo* review.

Thus, for the reasons set forth above, we hold that the unchallenged facts found by the trial courts, including those relating to defendant's red and glassy eyes, the presence of a moderate odor of alcohol emanating from defendant's person, defendant's admission to having consumed three beers prior to driving, and defendant's performance on the field sobriety tests that were administered to him by Officer Anderson suffice, as a matter of law, to support Officer Anderson's decision to place defendant under arrest for impaired driving. As a result, we affirm the decision of the Court of Appeals.

AFFIRMED.

STATE v. TERRELL

[372 N.C. 657 (2019)]

STATE OF NORTH CAROLINA
v.
JAMES HOWARD TERRELL, JR.

No. 55A18

Filed 16 August 2019

Search and Seizure—thumb drive—multiple files—one opened—expectation of privacy in remaining files

A detective's search of a thumb drive was not authorized under the private-search doctrine in a prosecution for multiple counts of sexual exploitation of a minor. Defendant's girlfriend found an image of her granddaughter on defendant's thumb drive while looking for something else. She took the thumb drive to the sheriff's department, and a detective, while looking for the image the grandmother had reported, found other images that he believed might be child pornography. He then applied for a search warrant for the thumb drive and other property of defendant. The mere opening of a thumb drive and the viewing of one file does not automatically remove Fourth Amendment protections from the entirety of the contents. Digital storage devices organize information essentially by means of containers within containers. The detective here did not have a virtual certainty that nothing else of significance was in the thumb drive and that its contents would not tell him anything more that he had already been told.

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

Justice NEWBY dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 810 S.E.2d 719 (N.C. Ct. App. 2018), reversing in part an order on defendant's motion to suppress and remanding for additional proceedings following an appeal from judgments entered on 17 November 2016 by Judge Beecher R. Gray in Superior Court, Onslow County. On 20 September 2018, the Supreme Court allowed the State's petition for discretionary review of additional issues. Heard in the Supreme Court on 5 March 2019.

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

Glenn Gerding, *Appellate Defender*, *by Michele A. Goldman*, *Assistant Appellate Defender*, *for defendant-appellee.*

EARLS, Justice.

Here we are asked to decide whether a law enforcement officer's warrantless search of defendant's USB drive, following a prior search of the USB drive by a private individual, was permissible under the "private-search doctrine." The Court of Appeals concluded that the warrantless search violated defendant's Fourth Amendment rights and remanded to the trial court for a determination of whether there was probable cause for the issuance of a search warrant without the evidence obtained from the unlawful search. *State v. Terrell*, 810 S.E.2d 719 (N.C. Ct. App. 2018). We affirm.

Background

In February 2013, defendant, James H. Terrell, Jr., returned from overseas work as a contractor in the Philippines and resumed living with his long-time girlfriend, Jessica Jones, in her home.[1] Defendant and Ms. Jones had been in a relationship for over ten years and had two children together. Ms. Jones also had an older daughter from an earlier relationship, Cindy, who had a daughter, Sandy.

On 13 January 2014, while defendant was at work, Ms. Jones began searching for a photograph of defendant's housekeeper in the Philippines in order "to put a face to the person[ ]" of whom defendant had spoken. Ms. Jones located and opened defendant's briefcase, in which she found paperwork and three USB "thumb drives," one of which was purple. After plugging the purple USB thumb drive (the thumb drive) into a shared computer, Ms. Jones "opened it" and began clicking through "folders and sub-folders." Ms. Jones later stated at the suppression hearing that she observed "images of adult women and . . . children" that "were not inappropriate," images of the housekeeper in the Philippines, and images of a "childhood friend" of defendant's. Ms. Jones testified: "I honestly do not recall any images of [defendant] and I. And in those pictures there are no images of him. There are just pictures of women and the young ladies I just spoke of." According to Ms. Jones, "the pictures were all in one folder and then the other folders were like movies because [defendant] likes military movies," and she did not "think the

1. Like the Court of Appeals, we use pseudonyms in reference to Ms. Jones, Cindy, and Sandy.

folders had a title. It was just a thumb -- it's the title of the thumbdrive, purple rain." As Ms. Jones "got past" the images of defendant's childhood friend, she saw an image of her granddaughter, Sandy, who was nine years old at the time, sleeping in a bed "and . . . exposed from the waist up." Upon seeing the image of Sandy, Ms. Jones became upset and ceased her search of the thumb drive.

That evening, after Ms. Jones had spoken with her daughter, Cindy, and "let[ ] her know what [she] had discovered," together they took the thumb drive to the Onslow County Sheriff's Department. Ms. Jones and Cindy met with Detective Lucinda Hernandez, reported what Ms. Jones had discovered on the thumb drive, and left the thumb drive with Detective Hernandez. Detective Hernandez "did not view the purple flash drive," but "accepted [it] and logged it into the Crime Scene Investigation (CSI) Unit of the Onslow County Sheriff's Department."

On the following day, Ms. Jones and Cindy met with Detective Eric Bailey at the Sheriff's Department and explained what they had discovered on the thumb drive. After meeting with Ms. Jones and Cindy, Detective Bailey "went down to the CSI department . . . to verify the information." Detective Bailey, with the assistance of a member of the CSI Unit, plugged in the thumb drive and went "through checking it to try to find the image that [Ms. Jones] stated that was on there"—"a nude or partially nude photograph of her granddaughter." Detective Bailey stated: "As I was scrolling through, of course, there was a lot of photos in there so I'm clicking trying to find exactly where this image is located at. I observed several -- multiple images of adult females and also [defendant] together clothed, nude, partially nude." As he was trying to locate the image of Sandy, Detective Bailey discovered what he believed might be child pornography; specifically, he "observed other young females, prepubescent females, unclothed, also some that were clothed." Eventually, Detective Bailey "[s]tarted to observe other photographs of women overseas, and then finally happened upon the photograph with the granddaughter." At that point, Detective Bailey ceased his search of the thumb drive and left it with the CSI Unit.

Detective Bailey applied for a search warrant on 5 February 2014 to search the thumb drive and other property of defendant "for contraband images of child pornography and evidence of additional victims and crimes committed in this case." In his affidavit attached to this initial search warrant application, Bailey did not state that he had already searched the thumb drive or include any information he obtained from that search. Bailey instead relied on information from Ms. Jones, including her allegation that she had discovered the image of Sandy on

defendant's thumb drive, as well as allegations that Ms. Jones's other daughter had at some point previously told Ms. Jones that defendant "touched me down there" and that later a floppy disk containing child pornography had been discovered in defendant's truck. A magistrate issued the warrant but, according to Bailey, he had to apply for another search warrant because he "received a call from the [State Bureau of Investigation] stating that they wanted additional information on the search warrant." Accordingly, Detective Bailey applied for another search warrant on 5 May 2014, which was issued by a magistrate on the same day. In the affidavit supporting this second warrant application, Bailey included information from his search of the thumb drive, stating that he saw "several partially nude photographs of" Sandy and "severally fully nude photographs of an unknown child standing beside and [sic] adult female in various sexual positions."

Pursuant to the second warrant, an SBI agent conducted a thorough "forensic examination" of the thumb drive, which was titled "purple rain" and contained various folders and subfolders. The SBI agent discovered the image of Sandy in a folder named "red bone" and he uncovered twelve additional incriminating images located in a different folder named "Cabaniia." Ten of those twelve images had been deleted and archived and would not have been ordinarily viewable without a "forensic tool." Defendant was indicted for four counts of second-degree sexual exploitation of a minor, one count of possessing a photographic image from peeping, and twelve counts of third-degree sexual exploitation of a minor.

Defendant filed a pretrial motion to suppress "any and all evidence obtained as a result of" Detective Bailey's search of his thumb drive, arguing that Bailey "conducted a warrantless search of property in which the Defendant had a ligitimate [sic] expectation of privacy," that the 5 May 2014 search warrant was based on evidence unlawfully obtained from that search, and that in the absence of that tainted evidence the search warrant was unsupported by probable cause. At the suppression hearing, after receiving testimony from Ms. Jones and Detective Bailey and considering the arguments of the parties, the trial court orally denied defendant's motion. In a written order dated on 29 November 2016, the trial court found, in pertinent part:

> 2. . . . [Ms. Jones's] stated purpose for looking in defendant's briefcase was to put a face to someone that defendant had talked about. Ms. [Jones's] entry into defendant's briefcase and the contents therein were

solely at her own volition and not connected with or at the suggestion of any law enforcement person or organization.

3. [Ms. Jones] inserted the purple flash drive into a shared Apple computer and discovered, among other visual representations, a picture of her granddaughter, [Sandy], who appeared to be asleep and who was nude from the waist up with breasts displayed. After consulting with her daughter, the mother of [Sandy], Ms. [Jones] and her daughter, on January 13, 2014, took the purple flash drive to the Onslow County Sheriff's Department.

. . . .

5. On January 14, 2014, [Ms. Jones] again appeared at the Onslow County Sheriff's Department to meet with Detective Eric Bailey concerning the purple flash drive and the contents that she had seen on that flash drive. Detective Bailey discussed with Ms. [Jones] the visual representations she had discovered on the purple flash drive.

6. Following his discussion with [Ms. Jones], Detective Bailey went to the CSI Unit to confirm on the purple flash drive what he had been told by [Ms. Jones]. . . . The CSI technician placed the purple flash drive into CSI's computer and selected the folder that had been identified by [Ms. Jones] as containing the picture of her granddaughter [Sandy]. This viewing in the CSI Unit confirmed what [Ms. Jones] had told Detective Bailey that she had discovered on the flash drive. In addition to the picture of [Sandy] Detective Bailey saw photographs of other nude or partially nude prepubescent females posing in sexual positions.

7. The images observed by Detective Bailey corroborated the information provided to him by [Ms. Jones]. Based upon that corroboration and [Ms. Jones's] statements, Detective Bailey then obtained a search warrant in order to conduct a complete and thorough forensic examination of the purple flash drive.

8. Detective Bailey's initial search and examination of the purple flash drive in the CSI Unit did not exceed

> the scope of the private, prior search done by [Ms. Jones], but could have been more thorough.

Based on these findings, the trial court concluded, in relevant part:

> 2. [Ms. Jones's] viewing of the purple flash drive did not violate the Fourth Amendment because she was a private party not acting under the authority of the State of North Carolina. Her viewing of the purple flash drive effectively frustrated Defendant's expectation of privacy as to the contents of the purple flash drive, and thus the later viewing by Detective Bailey at her request and upon presentation of the flash drive to [law enforcement] did not violate Defendant's rights under the Fourth Amendment.
>
> 3. None of the Defendant's rights under the Constitution or laws of the United States of America or of the Constitution or laws of the State of North Carolina were violated during the seizure and search of the purple flash drive in this case.

Accordingly, the trial court denied defendant's motion to suppress.

At trial, at the close of all evidence, the State elected not to proceed on three charges of second-degree sexual exploitation of a minor and dismissed those counts. The jury convicted defendant of the remaining fourteen counts and the trial court sentenced him to twelve consecutive terms of five to fifteen months each, plus a concurrent term of twenty to eighty-four months for the second-degree sexual exploitation charge. The court imposed a suspended sentence for the secret peeping conviction. Defendant appealed the trial court's denial of his motion to suppress.

At the Court of Appeals, defendant first argued that the trial court erred in concluding that Jones's viewing of the thumb drive effectively frustrated his expectation of privacy in the device's entire contents, thereby permitting Detective Bailey to subsequently conduct a warrantless search of all the thumb drive's digital data. *State v. Terrell*, 810 S.E.2d at 727. The Court of Appeals majority agreed, noting that North Carolina courts had not previously considered the "private-search doctrine" in the context of electronic storage devices. *Id.* at 728; *see also id.* at 727 (explaining that under the "private-search doctrine," "[o]nce an individual's privacy interest in particular information has been frustrated by a private actor, who then reveals that information to police,

the police may use that information, even if obtained without a warrant" (citing *United States v. Jacobsen*, 466 U.S. 109, 117 (1984))).

The majority distinguished the Court of Appeals' prior decision in *State v. Robinson*, in which the court concluded that police could permissibly view an entire videotape after a private searcher viewed only portions of that videotape because "the police do not exceed the scope of a prior private search when they examine the same materials . . . [ ] more thoroughly than did the private parties." *Id.* at 728 (first alteration in original) (quoting *State v. Robinson*, 187 N.C. App. 795, 798, 653 S.E.2d 889, 892 (2007)). The majority rejected the State's contention that the thumb drive was a similar "container" that, once opened, frustrated any expectation of privacy in the device's entire contents. *Id.* at 728–29. According to the majority, "electronic storage devices are unlike videotapes, and a search of digital data on a thumb drive is unlike viewing one continuous stream of video footage on a videotape. . . . One thumb drive may store thousands of videos, and it may store vastly more and different types of private information than one videotape." *Id.* at 728. In reaching this conclusion, the majority noted that it was "guided by the substantial privacy concerns implicated in searches of digital data that the United States Supreme Court expressed in *Riley v. California*." *Id.* at 729 (citing *Riley*, 134 S. Ct. 2473, 2485 (2014)).

Turning to the search at issue, the majority stated that under the private-search doctrine as set forth in *United States v. Jacobsen*, "a follow-up police search must be tested by the degree to which that officer had 'virtual certainty' the privately searched item contained 'nothing else of significance' other than the now non-private information, and that his inspection of that item 'would not tell him anything more than' what the private searcher already told him." *Id.* at 731 (quoting *Jacobsen*, 466 U.S. at 119). The majority concluded that while "the trial court should have made detailed findings on the exact scope of both Jones's and Detective Bailey's searches of the thumb drive's contents," the "findings on the precise scope of both searches are immaterial in this particular case, in light of the other findings establishing that *Jacobsen*'s virtual-certainty requirement was not satisfied and, therefore, Detective Bailey's search was unauthorized under the private-search doctrine." *Id.* at 731–32 (citation omitted). Accordingly, the majority held that "Detective Bailey's warrantless thumb drive search [was not] authorized under the private-search doctrine, nor was he able to use the evidence he obtained during that search to support his warrant application." *Id.* at 734.

Next, defendant argued that without the information Detective Bailey acquired from the warrantless search, the warrant application

failed to establish probable cause. *Id.* at 734. The majority noted that "because the trial court determined that the evidence acquired by Detective Bailey's warrantless search was lawful under the private-search doctrine, the trial court never determined whether striking that information from his application would still supply probable cause to issue the search warrant." *Id.* at 735. The majority determined that under *State v. McKinney*, "remand to the trial court [is] more appropriate than unilateral appellate court determination of the warrant's validity[.]" *Id.* at 735 (alterations in original) (quoting *McKinney*, 361 N.C. 53, 64, 637 S.E.2d 868, 875 (2006)). Accordingly, the majority reversed the trial court's denial of defendant's motion to suppress and remanded "to the trial court to determine, in the first instance, whether probable cause existed to issue the search warrant after excising from Detective Bailey's warrant application the tainted evidence arising from his unlawful search." *Id.* at 735.

In a separate opinion, one member of the panel dissented in part. *Id.* at 736 (Stroud, J., concurring in part and dissenting in part). The dissenting judge "generally agree[d] with the majority's analysis of the private search doctrine and determination that a thumb drive is not a single container" but opined that "the majority's analysis overlooks the fact that Detective Bailey attempted to limit his initial search to find the image reported by Ms. Jones." *Id.* at 738. According to the dissenting judge, "Detective Bailey was 'substantially certain' the drive would contain the 'granddaughter image,' " and he "sought to replicate Ms. Jones's private search but since she did not understand the organization of the drive, he could not go directly to the particular image he was seeking." *Id.* at 739–40. The dissenting judge would have found no error in the convictions stemming from "[t]he granddaughter image and two seen photos Detective Bailey found while searching for the granddaughter image" because they "fall within the scope of the private search doctrine, and they too were properly not suppressed by the trial court." *Id.* at 740. Additionally, the dissenting judge determined that "the granddaughter image and the two seen images would support probable cause for the other ten deleted images" but "concur[red] with the majority to remand to the trial court to determine probable cause for issuance of the search warrant for the ten deleted images." *Id.* at 740.

The State appealed on the basis of the dissent pursuant to N.C.G.S. § 7A-30(2). The State also filed a petition for discretionary review of additional issues on 13 March 2018, which we allowed in part on 20 September 2018.

Standard of Review

We review a trial court's ruling on a motion to suppress to determine "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Biber*, 365 N.C. 162, 167–68, 712 S.E.2d 874, 878 (2011) (citing *State v. Brooks*, 337 N.C. 132, 140–41, 446 S.E.2d 579, 585 (1994)). We review the trial court's conclusions of law de novo. *Id.* at 168, 712 S.E.2d at 878 (citing *State v. McCollum*, 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993), *cert. denied*, 512 U.S. 1254 (1994), *convictions vacated and case dismissed with prejudice*, *State v. McCollum*, No. 83CRS15506-07, 2014 WL 4345428 (N.C. Super. Ct. Robeson County, Sept. 2, 2014)). We review decisions of the Court of Appeals for errors of law. *State v. Romano*, 369 N.C. 678, 685, 800 S.E.2d 644, 649 (2017) (citing *Brooks*, 337 N.C. at 149, 446 S.E.2d at 590).

Analysis

The State argues that the Court of Appeals, in concluding that Detective Bailey's search of the thumb drive constituted an unreasonable search under the Fourth Amendment, erred by applying an unnecessarily restrictive rule that is inconsistent with the private-search doctrine as set forth in *Jacobsen*. We disagree.

"The United States and North Carolina Constitutions both protect against unreasonable searches and seizures of private property." *State v. Lowe*, 369 N.C. 360, 364, 794 S.E.2d 282, 285 (2016) (first citing U.S. Const. amend. IV; and then citing N.C. Const. art. I, § 20). "A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *Jacobsen*, 466 U.S. at 113. Because the Fourth Amendment "proscrib[es] only governmental action[,] it is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.' " *Id.* (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)). Searches conducted by governmental officials in the absence of a judicial warrant "are presumptively unreasonable, though the Court has recognized a few limited exceptions to this general rule." *United States v. Karo*, 468 U.S. 705, 717 (1984) (citations omitted). When seeking "to admit evidence discovered by way of a warrantless search in a criminal prosecution," the State bears the burden of establishing that the search falls under an exception to the warrant requirement. *State v. Cooke*, 306 N.C. 132, 135, 291 S.E.2d 618, 620 (1982) (first citing *Chimel v. California*, 395 U.S. 752, 762 (1969); and then citing *United States v. Jeffers*, 342

U.S. 48, 51 (1951)). The Supreme Court set forth one such exception in *Jacobsen* involving circumstances in which a warrantless search by government officials may be permissible when conducted in reliance upon an antecedent search by a private individual.

In *Jacobsen* employees at an airport FedEx office opened a damaged package—"an ordinary cardboard box wrapped in brown paper"—to examine the package's contents in compliance with a company policy concerning insurance claims. 466 U.S. at 111. Inside the box employees found "five or six pieces of crumpled newspaper" covering a tube, which was "about 10 inches long" and made of duct tape. *Id.* After cutting open the tube, the employees discovered "a series of four zip-lock plastic bags, the outermost enclosing the other three and the innermost containing about six and a half ounces of white powder." *Id.* Upon finding the white powder, the employees notified the Drug Enforcement Administration (DEA), replaced the plastic bags in the tube, and placed the tube and newspapers back into the box. *Id.* The first DEA agent who arrived "saw that one end of the tube had been slit open; he removed the four plastic bags from the tube and saw the white powder." *Id.* He proceeded to open the series of plastic bags and, using a knife blade, "removed a trace of the white substance," which "[a] field test made on the spot identified . . . as cocaine." *Id.* at 111–12. DEA agents then obtained a warrant to search the location to which the package was addressed and ultimately arrested the recipients. *Id.* at 112. The Supreme Court granted certiorari to address the recipients' arguments "that the warrant was the product of an illegal search and seizure." *Id.* at 112–13.

The Court noted that "[t]he reasonableness of an official invasion of the citizen's privacy must be appraised on the basis of the facts as they existed at the time that invasion occurred." *Id.* at 115. Central to that inquiry in *Jacobsen*, the Court noted, were "[t]he initial invasions of respondents' package," which "did not violate the Fourth Amendment because of their private character." *Id.* The Court stated, "The additional invasions of respondents' privacy by the Government agent must be tested by the degree to which they exceeded the scope of the private search." *Id.* According to the Court, "[t]his standard follows from the analysis applicable when private parties reveal other kinds of private information to the authorities," specifically—"[o]nce frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now nonprivate information." *Id.* at 117. Rather, "[t]he Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated," in which case "the authorities have

not relied on what is in effect a private search, and therefore presumptively violate the Fourth Amendment if they act without a warrant." *Id.* at 117–18.

In *Jacobsen*, the federal agent who first arrived at the scene knew when he saw the package that "it contained nothing of significance" other than a tube with "plastic bags and, ultimately, white powder." *Id.* at 118. According to the Court:

> [T]here was a virtual certainty that nothing else of significance was in the package and that a manual inspection of the tube and its contents would not tell him anything more than he already had been told. . . . Respondents could have no privacy interest in the contents of the package, since it remained unsealed and since the Federal Express employees had just examined the package and had, of their own accord, invited the federal agent to their offices for the express purpose of viewing its contents.

Id. at 119. "Similarly," the Court continued, "the removal of the plastic bags from the tube and the agent's visual inspection of their contents enabled the agent to learn nothing that had not previously been learned during the private search. It infringed no legitimate expectation of privacy and hence was not a 'search' within the meaning of the Fourth Amendment." *Id.* at 120 (footnote omitted). Notably, in responding to the concurring Justice's suggestion that the Court was "sanction[ing] warrantless searches of closed or covered containers or packages whenever probable cause exists as a result of a prior private search," *id.* at 129 (White, J., concurring), the Court stressed that the visibility of the white powder was "far less significant than the facts that the container could no longer support any expectation of privacy, and that it was virtually certain that it contained nothing but contraband. . . . A container which can support a reasonable expectation of privacy may not be searched, even on probable cause, without a warrant." *Id.* at 120 n.17 (majority opinion) (citations omitted).

Here we consider a private search made of a container of a different sort, though one equally protected by the Fourth Amendment. *See United States v. Ross*, 456 U.S. 798, 822–23 (1982) ("[T]he Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view." (citing *Robbins v. California*, 453 U.S. 420, 427 (1981) (plurality opinion))). Indeed, the State does not dispute that defendant's thumb drive and its digital contents were his "effects" and that he possessed a legitimate expectation of privacy

in these effects prior to the search by the grandmother. At issue here is the extent of defendant's expectation of privacy in those effects following that search, specifically—whether the thumb drive, or any part of it, could continue to support a legitimate expectation of privacy.

The State contends that the nature of the thumb drive as a container is such that Ms. Jones's mere "opening" of the thumb drive frustrated defendant's reasonable expectation of privacy in the entirety of its contents, thereby permitting Detective Bailey to conduct a follow-up search of any information stored on the device. According to the State, this position is consistent with a "broader view" of the private search doctrine's permissible scope, referred to by the State as the "container approach." *See*, *e.g.*, *United States v. Runyan*, 275 F.3d 449, 463–65 (5th Cir. 2001) (holding that while police could not permissibly search the defendant's floppy disks, CDs, and ZIP disks previously unopened by private searchers without having substantial certainty of the disks' contents, the private searchers' opening of other disks compromised the defendant's expectation of privacy in those closed containers and police were free to examine their contents, including any files not previously viewed by private searchers); *see also Rann v. Atchison*, 689 F.3d 832, 836–38 (7th Cir. 2012) (adopting *Runyan*'s rationale "that a search of any material on a computer disk is valid if the private party who conducted the initial search had viewed at least one file on the disk" and if police are "substantially certain" that the disk contains contraband (citing *Runyan*, 275 F.3d at 463–65)), *cert. denied*, 568 U.S. 1030 (2012). *But see United States v. Lichtenberger*, 786 F.3d 478, 480, 488 (6th Cir. 2015) (holding that where the private searcher had "clicked on different folders" in the defendant's laptop and was unsure which files she had opened, the follow-up search was not permissible because the officer could not "proceed with 'virtual certainty' that the 'inspection of the [laptop] and its contents would not tell [him] anything more than he already had been told' " (alterations in original) (quoting *Jacobsen*, 466 U.S. at 119)). *See also United States v. Sparks*, 806 F.3d 1323, 1335–36 (11th Cir. 2015) (holding that where a private searcher viewed all of the images and one video contained in an album on the defendant's cell phone, the officer could subsequently view those images and that video, but the officer exceeded the scope of the prior search by viewing a second video in that album that had not previously been watched), *cert. denied*, 136 S. Ct. 2009, *and cert. denied*, 137 S. Ct. 34 (2016); *cf. United States v. Ackerman*, 831 F.3d 1292, 1305–06 (10th Cir. 2016) (holding that where AOL's "hash value matching" screening algorithm identified one of the attachments to the defendant's e-mail as a match for child pornography but AOL never opened the e-mail itself, a government analyst exceeded

the private search by opening the e-mail and viewing the attachments because doing so "could have revealed virtually any kind of noncontraband information to the prying eye"). We conclude that the categorical approach proffered by the State is inconsistent with *Jacobsen*, which contemplates that a follow-up search will "enable[ ] [an officer] to learn nothing that had not previously been learned during the private search," 466 U.S. at 120, and which requires that a "container . . . no longer support any expectation of privacy," *id.* at 120 n.17 (emphasis added).

We cannot agree that the mere opening of a thumb drive and the viewing of as little as one file automatically renders the entirety of the device's contents "now nonprivate information" no longer afforded any protection by the Fourth Amendment. *Id.* at 117. An individual's privacy interest in his or her effects is not a liquid that, taking the shape of its container, wholly evaporates merely upon the container's opening, with no regard for the nature of the effects concealed therein. This is particularly true in the context of digital storage devices, which can retain massive amounts[2] of various types of information and which organize this information essentially by means of containers within containers. *See, e.g.*, Orin S. Kerr, *Searches and Seizures in A Digital World*, 119 Harv. L. Rev. 531, 555 (2005) (stating that "[a] computer is like a container that stores thousands of individual containers"). Unlike rifling through the contents of a cardboard box, a foray into one folder of a digital storage device will often expose nothing about the nature or the amount of digital information that is, or may be, stored elsewhere in the device. As the Court of Appeals majority recognized, "[d]ata stored on a thumb drive may be concealed among an unpredictable number of closed digital file folders, which may be further concealed within unpredictable layers of nested subfolders. A thumb drive search . . . may require navigating through numerous closed file folders and subfolders." *Terrell*, 810 S.E.2d at 728 (majority opinion).[3] Following the mere opening of a thumb drive

2. For instance, Detective Bailey stated in his sworn affidavit for the search warrant that the thumb drive here had a capacity of two gigabytes and that "[o]ne gigabyte, or approximately one thousand (1,000) megabytes, is the approximate equivalent of five hundred thousand (500,000) double spaced pages of text and is estimated to be approximately two hundred and twelve (212) feet thick of paper." We mention this by way of illustration. The trial court did not make a finding on the capacity of the thumb drive, and its actual capacity is not relevant to our analysis of whether Bailey's follow-up search was permissible, which focuses on what Bailey knew (or, in this case, did not know) about the nature and extent of the private search before conducting his follow-up search.

3. The State argues that the Court of Appeals majority reached its decision in erroneous reliance on *Riley v. California*, a case addressing the "search incident to arrest" exception to the warrant requirement, as opposed to the private-search doctrine. 134 S. Ct. 2473. We conclude that the Court of Appeals recognized the different exceptions to the warrant

by a private individual, an officer cannot proceed with "virtual certainty that nothing else of significance" is in the device "and that a manual inspection of the [thumb drive] and its contents would not tell him anything more than he already had been told." *Jacobsen*, 466 U.S. at 119. Rather, there remains the potential for officers to learn any number and all manner of things "that had not previously been learned during the private search." *Id.* at 120. Accordingly, the extent to which an individual's expectation of privacy in the contents of an electronic storage device is frustrated depends upon the extent of the private search and the nature of the device and its contents.

In that regard, the trial court erred in concluding that Jones's "viewing of the purple flash drive effectively frustrated Defendant's expectation of privacy as to the contents of the purple flash drive," because this conclusion is not supported by its findings of fact. The trial court's findings do not establish the precise scope of Ms. Jones's search of the thumb drive and whether Detective Bailey possessed "virtual certainty that nothing else of significance was in the [thumb drive] and that a manual inspection of the [thumb drive] and its contents would not tell him anything more than he already had been told." *Id.* at 119. Nor could the trial court have made such findings, as it is clear that the State failed to carry its burden of presenting competent evidence establishing that Bailey's warrantless search was permissible under the private-search doctrine.

At the suppression hearing, neither Ms. Jones nor Detective Bailey "testified to the exact folder pathway they followed to arrive at the" image of Sandy, "identified which folders or subfolders they opened or reviewed, [or] identified which subfolder of images they scrolled through to arrive at the" image of Sandy. *Terrell*, 810 S.E.2d at 725. Further, Ms. Jones's search of the thumb drive for images of defendant's housekeeper was far from exhaustive. While Ms. Jones clicked through "folders and sub-folders" before finding the image of Sandy, she was not aware that any of "the folders had a title. It was just a thumb -- it's the title of the thumbdrive, purple rain." Ms. Jones thought that "the pictures were all in one folder and then the other folders were like movies." After viewing several non-incriminating images, Ms. Jones ceased her search upon finding the image of Sandy. Ms. Jones did not view any of the incriminating photos that were later discovered by Detective Bailey in an entirely

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requirement at issue in *Riley* and in this case and did not err in looking for guidance to the Court's discussion of electronic data in *Riley*. *See Terrell*, 810 S.E.2d at 729 ("While this is a private-search exception case, not a search-incident-to-arrest exception case, *Riley*'s guidance that the nature of an electronic device greatly increases privacy implications holds just as true . . . .").

separate folder.[4] Had Bailey possessed virtual certainty of the device's contents, presumably he would not have been "scrolling through . . . a lot of photos" in different folders before, according to him, he "finally happened upon the photograph with the granddaughter." It is clear that Ms. Jones's limited search did not frustrate defendant's legitimate expectation of privacy in the *entire* contents of his thumb drive and that Detective Bailey's follow-up search to locate the image of Sandy was not permissible under *Jacobsen* because he did not possess "a virtual certainty that nothing else of significance was in the [thumb drive] and that a manual inspection of the [thumb drive] and its contents would not tell him anything more than he already had been told" by Jones. *Jacobsen*, 466 U.S. at 119; see also id. at 120 n.17 ("A container which can support a reasonable expectation of privacy may not be searched, even on probable cause, without a warrant." (citations omitted)).

The State contends that requiring "virtual certainty" under *Jacobsen* confuses a *sufficient* condition with a *necessary* condition and that an officer can proceed with a follow-up search so long as he acts reasonably in replicating the private search based on the information conveyed to him. *See*, *e.g.*, *Terrell*, 810 S.E.2d at 739–40 (Stroud, J., concurring in part and dissenting in part) ("Detective Bailey sought to replicate Ms. Jones's private search but since she did not understand the organization of the drive, he could not go directly to the particular image he was seeking. . . . Detective Bailey limited his search to a reasonable effort to find exactly what Ms. Bailey reported . . . . [T]he majority's analysis wrongly requires perfection from a private searcher who reports finding contraband and a law enforcement officer who seeks to confirm existence of contraband as reported by a private searcher."). Yet, the requirement that an officer possess "virtual certainty that nothing else of significance" is in a container is central to *Jacobsen* because the private-search doctrine, unlike other exceptions to the Fourth Amendment's warrant requirement, is premised fundamentally on the notion that the follow-up search is not a "search" at all.[5] *Jacobsen*, 466 U.S. at 120 ("It infringed no legitimate

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4. The fact that Detective Bailey, but not Ms. Jones, observed these incriminating photos demonstrates that the record would not support any finding that Detective Bailey simply retraced the private search undertaken by Ms. Jones, particularly given that the incriminating photos other than the one of Sandy were contained in a separate folder.

5. This is true at least under the "*Katz* reasonable-expectation-of-privacy test" for a search, which the Supreme Court explained "has been added to, not substituted for, the common-law trespassory test." *United States v. Jones*, 565 U.S. 400, 409 (2012) (emphases omitted); *see id.* at 404 (stating that the government conducts a search when it "physically occupie[s] private property for the purpose of obtaining information"). The Court in

expectation of privacy and hence was not a 'search' within the meaning of the Fourth Amendment."). If a container continues to support a reasonable expectation of privacy, it is a necessary corollary that an officer cannot proceed with a "search" of that container absent virtual certainty that he will not infringe upon that expectation of privacy.[6] *Id.* at 120 n.17 ("A container which can support a reasonable expectation of privacy may not be searched, even on probable cause, without a warrant." (citations omitted)).

Additionally, the State argues that this result will discourage private parties from coming forward with evidence of criminal activity and echoes the concern of the dissenting judge below of "plac[ing] law enforcement officers in a Catch 22 of being unable to confirm the private searcher's report without a search warrant because of the risk of accidental discovery of an image other than the one reported but being unable to get a search warrant without confirming the report." *Terrell*, 810 S.E.2d at 740. Assuming *arguendo* that it is true, as the State contends, that Detective Bailey possessed *virtual certainty* that the thumb drive contained contraband, it is unclear why such certainty would not translate into an affidavit sufficient to establish probable cause. *See State v. Riggs*, 328 N.C. 213, 219, 400 S.E.2d 429, 433 (1991) ("[P]robable cause requires only a *probability or substantial chance* of criminal activity, not an actual showing of such activity." (alteration in original) (quoting *Illinois v. Gates*, 462 U.S. 213, 244 n.13 (1983)) (emphasis assed)); *State v. Arrington*, 311 N.C. 633, 638, 319 S.E.2d 254, 257–58 (1984) ("The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." (quoting *Gates*, 462 U.S. at 238)).

Finally, the State argues in the alternative that the Court of Appeals changed the private-search doctrine test by declining to follow its prior decisions and erred in not remanding for additional findings on virtual certainty and the scope of the private search. We are not persuaded that the Court of Appeals majority altered the private-search doctrine in

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Jacobsen did not address the trepassory test and, given our holding, we need not address defendant's argument that the private-search doctrine cannot survive in light of *Jones*.

6. For that reason, assuming the existence of the necessary "virtual certainty," flash drives can be the subject of a warrantless search performed pursuant to the private search doctrine.

this State,[7] which is controlled by *Jacobsen*, and for the reasons stated above we agree with the Court of Appeals majority that the evidence and findings make clear "that Detective Bailey's search was not authorized under the private-search doctrine because he did not conduct his search with the requisite level of 'virtual certainty' contemplated by *Jacobsen*." *Terrell*, 810 S.E.2d at 735 (majority opinion).

For the reasons stated herein, we affirm the decision of the Court of Appeals.[8]

AFFIRMED.

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

Justice NEWBY dissenting.

In this case we apply the private-search doctrine to an electronic storage device, a thumb drive.[1] The majority holds that the private-search doctrine cannot apply to a thumb drive because, even though some of the thumb drive has been previously opened, "an officer cannot proceed with 'virtual certainty that nothing else of significance' is in the device," citing *United States v. Jacobsen*, 466 U.S. 109, 119, 104 S Ct. 1652, 1659, 80 L. Ed. 2d 85, 98 (1984). The majority argues the "virtual certainty" language in *Jacobsen* compels its holding. This rigid approach, however, is a significant misapplication of that decision. Instead of "virtual certainty" that nothing else is contained in the thumb drive, the pivotal test in *Jacobsen* requires identifying the private search and evaluating "the

7. The State contends that the decision in *Robinson*, 187 N.C. App. at 798, 653 S.E.2d at 892 (holding that police could search a single videotape "more thoroughly" than the private searcher), was controlling, stating that "[a] videotape is simply the thumb drive of an earlier time." The more obvious parallel to a videotape would be a single video file, which is not what we have before us in this case.

8. Neither party sought review of the decision of the Court of Appeals majority to "remand this matter to the trial court to determine, in the first instance, whether probable cause existed to issue the search warrant after excising from Detective Bailey's warrant application the tainted evidence arising from his unlawful search." *Terrell*, 810 S.E.2d at 735. For that reason, that decision remains undisturbed and we express no opinion concerning its correctness.

1. A thumb drive is a small, usually rectangular device used for storing electronic data. The data is typically contained in individual files (e.g., a photograph, a document, a song, etc.), and the files are usually organized in folders and subfolders. *See Merriam-Webster's Collegiate Dictionary* 485 (11th ed. 2007) (defining a "folder" as "an organizational element of a computer operating system used to group files or other folders together").

degree to which [the additional invasion of defendant's privacy by the government] exceeded the scope of the private search." *Id.* at 115, 104 S. Ct. at 1657, 80 L. Ed. 2d at 95. *Jacobsen* clearly states "[t]he Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated." *Id.* at 117, 104 S. Ct. at 1658–59, 80 L. Ed. 2d at 97.

The private-search doctrine is an exception to the Fourth Amendment warrant requirement for a governmental search because a search conducted with the permission of a private person does not implicate a governmental intrusion; the private person's prior search frustrates any reasonable expectation of privacy. Here a concerned grandmother searched defendant's thumb drive in her home and found a picture of her sleeping, partially nude nine-year-old granddaughter. She then delivered the thumb drive to law enforcement, intending that they verify her finding and pursue criminal charges. Law enforcement did so. This transaction constitutes a textbook application of the private-search doctrine.

There is no dispute, as the trial court found, that the grandmother opened the thumb drive, opened the folder "Bad stuff," and saw various files. Likewise, there is no dispute that the grandmother opened the subfolder "red bone" and its file containing the image of her granddaughter. The only question should be whether the detective's opening of another subfolder, while trying to replicate the grandmother search, unlawfully exceeded the scope of that private search.

The majority holds that the private-search doctrine does not apply to an electronic storage device if the private searcher did not open all of the device's folders, subfolders, and files. It maintains the test is "whether the thumb drive, or any part of it, could continue to support a legitimate expectation of privacy." In other words, if the private searcher did not open every file, there is a possibility defendant's reasonable expectation of privacy to any unopened file has not been frustrated by the private search. Therefore, by simply opening the thumb drive, law enforcement committed an unlawful search. Even though it is indisputable that the grandmother opened the file containing the granddaughter's image, because the thumb drive contained files not searched by her, law enforcement cannot open it. In addition, to reach its result, the majority violates the standard of review by rejecting facts found by the trial court, which are supported by substantial evidence, and substitutes its own fact-finding.

The trial court took the correct approach. That court found the detective only searched the folder ("Bad stuff") identified by the grandmother.

The detective stopped his search when he found the image of the granddaughter. The trial court applied *Jacobsen* as informed by panels of the Fifth and Seventh Circuits, which analyzed facts similar to those presented here and asked the correct question: Did the governmental agent attempt to limit the scope of the search to that described by the private party? The trial court found that the search "did not exceed the scope of the private, prior search done by [the grandmother], but could have been more thorough" and ultimately denied defendant's motion to suppress. Because the trial court correctly applied the private-search doctrine, its decision should be affirmed. The majority's "virtual certainty" test needlessly eliminates the private-search doctrine for electronic storage devices, making it impossible for law enforcement to verify provided information. I respectfully dissent.

I. Facts

Jessica Jones,[2] the grandmother, located in her home and looked through a purple thumb drive (titled "Purple Rain") that belonged to her longtime boyfriend, defendant. She found an unlawful, disturbing photo of her granddaughter. She and her daughter brought the thumb drive to the Sheriff's Office and reported to Detective Hernandez that it contained, along with other images, her granddaughter's image. In laymen's terms, Jones explained her search process. Detective Hernandez completed a "Property/Evidence Status Form" that included a short summary of her conversation with Jones: "9 y/r victim's mom . . . [and Jones] Brought USB that has photographs of 9 y/r shirtless and asleep. Labeled under 'Bad stuff.' " The next morning, Detective Bailey reviewed Detective Hernandez's report and met with Jones to discuss "the visual representations she had discovered on the purple flash drive" before examining the thumb drive to verify Jones's report.[3]

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2. This name is a pseudonym used by the trial court and the Court of Appeals.

3. At the suppression hearing, Jones described her search of the purple thumb drive, saying "when I opened it and the images came up. . . . I saw images of adult women and what I presumed was children, but they were not inappropriate, meaning that they were clothed. They just looked like little young girls." She viewed images of adult females, some naked and some clothed. Jones noted that "the pictures were all in one folder, and she "scrolled down" by "go[ing] into folders and sub-folders." Jones then discovered her granddaughter's image "in bed and she was asleep and she's exposed from the waist up." Jones explained that she "got upset" because she "never in a million years expected to find anything like that" and then ended her search. Detective Bailey testified at the suppression hearing that, while retracing Jones's search, he "observed other young females, prepubescent females, unclothed, also some that were clothed," but when he was able "to verify what [Jones] told [him] she had seen on the flashdrive . . . . [he] completed [his] search." Thus, Detective Bailey discovered the two images of child pornography before finding the granddaughter's image.

In retracing Jones's search through the folder entitled "Bad stuff" and its subfolders, while looking for and before finding the granddaughter's image, Bailey discovered "fully nude photographs of an unknown child standing beside and [sic] adult female in various sexual positions" that Jones had neither observed nor reported. Detective Bailey only searched the folder identified by Jones, "Bad stuff." The "Bad stuff" subfolder titled "red bone" contained the image of the granddaughter; the "Bad stuff" subfolder titled "Cabaniia" contained the two images of the unidentified nude children viewed by Detective Bailey. Detective Bailey sought and obtained a search warrant to forensically examine the thumb drive for any hidden files. Upon executing the warrant, a SBI technician extracted ten additional images of child pornography, which had previously been deleted from the subfolder titled "Cabaniia." Defendant faced charges for the photograph of the granddaughter as well as for possessing the two images of the children as observed by Detective Bailey and the ten images discovered by the SBI technician.

Defendant moved to suppress all evidence obtained by and through Detective Bailey upon his viewing of the thumb drive Jones brought to the police. During the suppression hearing, defense counsel identified the issue as, *inter alia*, "to what extent did Detective Bailey's subsequent search without a search warrant exceed the scope of the search done by the private citizen." Counsel argued that, because Detective Bailey discovered "entirely different type images," his action "without a search warrant clearly exceeds the scope of the search done by a private individual, in this case, [Jones]." Because Detective Bailey happened upon the additional images while retracing Jones's search for the granddaughter's image, defendant argued those images could not serve as a basis for probable cause for the warrant.

Following a hearing on the motion to suppress, the trial court made its ruling:

> I've read through the case law handed up, read the case law in North Carolina, it appears to me that this -- in exercising my discretion, it appears that there was a private party who went into this flashdrive and, by doing so, I believe the Court says it frustrated the defendant's reasonable expectation of privacy as to the contents of that flashdrive.
>
> Therefore, thereafter, when the police officer went into that same thumbdrive . . . to confirm what has been stated to him, he found additional matters and he did so

> in a manner that was, perhaps, more thoroughly than the initial examination by [Jones]. He ran into more images than what [Jones] ran into.
>
> Given all of this, in exercising my discretion, the motion to suppress will be denied.

The trial court's written order included findings regarding the relationship between defendant and Jones and a description of the private search conducted here:

> 2. On January 13, 2014, [Jones] was in her home; defendant was not present. [Jones] looked inside of a briefcase belonging to the defendant, which stayed in her home in a usual and customary manner. On this date, defendant's briefcase was in [Jones's] den. Inside the briefcase, [Jones] found, among other items, a USB flash drive, sometimes referred to as a thumb drive. The flash drive in issue here was purple in color. [Jones's] stated purpose for looking in defendant's briefcase was to put a face to someone that defendant had talked about. [Jones's] entry into defendant's briefcase and the contents therein were solely at her own volition and not connected with or at the suggestion of any law enforcement person or organization.
>
> 3. [Jones] inserted the purple flash drive into a shared Apple computer and discovered, among other visual representations, a picture of her granddaughter, [name redacted] who appeared to be asleep and who was nude from the waist up with breasts displayed. After consulting with her daughter, the mother of [the child], [Jones] and her daughter, on January 13, 2014, took the purple flash drive to the Onslow County Sheriff's Department.

Next, the trial court made findings regarding Jones's delivery of the purple flash drive to law enforcement.

> 4. On January 13, 2014, [Jones] met with Detective Lucinda Hernandez to discuss what she had found on the purple flash drive. Detective Hernandez accepted the purple flash drive and logged it into the Crime Scene Investigation (CSI) Unit of the Onslow County Sheriff's Department. Detective Hernandez did not view the purple flash drive.

> 5. On January 14, 2014, [Jones] again appeared at the Onslow County Sheriff's Department to meet with Detective Eric Bailey concerning the purple flash drive and the contents that she had seen on that flash drive. Detective Bailey discussed with [Jones] the visual representations she had discovered on the purple flash drive.

The trial court found that law enforcement retraced Jones's private search through the folder identified by Jones as containing the granddaughter's image and saw additional incriminating and corroborating photographs. Ultimately, Detective Bailey confirmed what Jones told him about the thumb drive:

> 6. Following his discussion with [Jones], Detective Bailey went to the CSI Unit to confirm on the purple flash drive what he had been told by [Jones]. Detective Bailey did not remove the purple flash drive from the CSI Unit where it was being held securely as a matter of evidence. The CSI technician placed the purple flash drive into CSI's computer *and selected the folder* [*Bad stuff*] *that has been identified by* [*Jones*] *as containing the picture of her granddaughter* [name redacted]. This viewing in the CSI Unit confirmed what [Jones] had told Detective Bailey that she had discovered on the flash drive. In addition to the picture of [the granddaughter] Detective Bailey saw photographs of other nude or partially nude prepubescent females posing in sexual positions.
>
> 7. The images observed by Detective Bailey corroborated the information provided to him by [Jones]. Based upon that corroboration and [Jones's] statements, Detective Bailey then obtained a search warrant in order to conduct a complete and thorough forensic examination of the purple flash drive.

(Emphasis added.) The trial court found as fact that "8. Detective Bailey's initial search and examination of the purple flash drive in the CSI Unit did not exceed the scope of the private, prior search done by [Jones], but could have been more thorough."

Having made the preceding findings, the trial court concluded the search was valid under the private-search doctrine:

> 2. [Jones's] viewing of the purple flash drive did not violate the Fourth Amendment because she was a private party . . . . Her viewing of the purple flash drive effectively frustrated Defendant's expectation of privacy as to the contents of the purple flash drive, and thus the later viewing by Detective Bailey at her request and upon presentation of the flash drive to [law enforcement] did not violate Defendant's rights under the Fourth Amendment.
>
> 3. None of the Defendant's [constitutional] rights . . . were violated during the seizure and search of the purple flash drive in this case.

The trial court thus denied defendant's motion to suppress, and the State introduced into evidence thirteen images all retrieved from the "Bad stuff" folder. Regarding the granddaughter's image, the jury convicted defendant of one count of possessing a photographic image from peeping and one count of second-degree sexual exploitation of a minor. The jury also convicted defendant of twelve counts of third-degree sexual exploitation of a minor based on the twelve other images. Defendant appealed.

In a divided opinion, the Court of Appeals first determined that the private-search doctrine did not apply to Detective Bailey's search because the thumb drive was not a "single container" and there was not "virtual certainty" that the thumb drive contained only contraband or material reported by Jones. *State v. Terrell*, 810 S.E.2d 719, 726 (N.C. Ct. App. 2018). The Court of Appeals acknowledged that the private-search doctrine would typically require factual findings as to the specific scope of Jones's and Bailey's searches, *id.* at 734, like those made by the trial court here. But, because Jones did not report the exact file path for the granddaughter's image, Bailey could not be virtually certain that he would find nothing else of significance during his search. *Id.* After concluding that "*Jacobsen*'s virtual-certainty requirement was not satisfied," the Court of Appeals opined that "the precise scope of both searches [was] immaterial," *id.* at 732; therefore, the court did not remand for further factual findings on that issue, *id.* at 735. The Court of Appeals did, however, remand for a determination of whether the search warrant application would still supply "probable cause to issue the search warrant to forensically examine the thumb drive." *Id.* at 736.

The dissent maintained that the scope of the subsequent search was not only material but determinative of the legal issue here. *Id.* at 740 (Stroud, J., concurring in part and dissenting in part). Even though the

dissent did not view the thumb drive as a "single container" now fully opened by Jones's private search, the search did not violate the Fourth Amendment because Detective Bailey limited his search to efforts to find an image he was substantially certain was on the thumb drive and stopped his search when he found it. *Id.* at 739. Thus, "[e]ven if all of the other images are excluded from consideration, the granddaughter's image along with the other information in the warrant application and affidavit could support a finding of probable cause to issue the search warrant." *Id.* at 738.

II. Issue Presented

At this Court, the majority now affirms the Court of Appeals's "virtual certainty" approach. This unrealistic standard essentially holds the private-search doctrine cannot be applied here because, with electronic storage devices, there is never a "virtual certainty" that a government searcher will not discover other unopened material. To reach this sweeping conclusion, the majority misapplies *Jacobsen*, ignores the precise facts leading to the discovery of the different photos, blurs the distinction between electronic storage devices and electronic computer-type devices, and refuses to follow the accepted standard of review by substituting its own findings of fact. It holds that the private-search doctrine does not apply if "the thumb drive, or any part of it, could continue to support a legitimate expectation of privacy." According to the majority, whether the governmental search included a privately opened file is immaterial as long as other unopened files exist.

The correct question, however, is what files and folders were opened, not whether some remained unopened. The Court should ask to what extent Detective Bailey's subsequent search without a search warrant exceeded the scope of the private search. The trial court seems to say that, by having opened the purple thumb drive, defendant's expectation of privacy was thwarted as to all of its files. This broad application, however, is unnecessary to resolve the precise issue presented by this case. There is no evidence that Detective Bailey looked in any folder other than the one identified by Jones as labeled "Bad stuff." Thus, this case presents the issue of whether defendant's reasonable expectation of privacy was lost as to some, or all, of the files contained in the folder "Bad stuff" previously opened and reviewed by Jones. Each of the three separate groups of images, all located in the folder "Bad stuff," require an analysis under the private-search doctrine:

1) the granddaughter's image, located in the subfolder "red bone," which was clearly opened by Jones and Detective Bailey;

2) the unidentified nude children, discovered by Detective Bailey in the subfolder "Cabaniia," while attempting to retrace Jones's search, but before finding the granddaughter's image; and

3) the ten images located in the subfolder "Cabaniia" discovered by the SBI technician pursuant to the search warrant.

The correct approach of *Jacobsen* requires identifying the initial private search and evaluating "the degree to which [the additional invasion of defendant's privacy] exceeded the scope of the private search." *Jacobsen*, 466 U.S. at 115, 104 S. Ct. at 1657, 80 L. Ed. 2d at 95.

III. Proper Appellate Review of the Trial Court Order

"The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. . . . Conclusions of law are reviewed de novo and are subject to full review." *State v. Biber*, 365 N.C. 162, 167–68, 712 S.E.2d 874, 878 (2011) (citations omitted). Here the trial court order meets this standard. Competent evidence supports the trial court's findings of fact, and those findings of fact support its conclusions of law and its ultimate denial of defendant's motion to suppress. Most significantly, the trial court made the following findings of fact which are supported by the evidence:

> 6. . . . . The CSI technician placed the purple flash drive into CSI's computer *and selected the folder that has been identified by [Jones] as containing the picture of her granddaughter* [name redacted]. This viewing in the CSI Unit confirmed what [Jones] had told Detective Bailey that she had discovered on the flash drive. In addition to the picture of [the granddaughter] Detective Bailey saw photographs of other nude or partially nude prepubescent females posing in sexual positions.
>
> . . . .
>
> 8. Detective Bailey's initial search and examination of the purple flash drive in the CSI Unit did not exceed the scope of the private, prior search done by [Jones], but could have been more thorough.

(Emphasis added.) Based on these findings, the trial court concluded:

> 2. . . . . [Jones's] viewing of the purple flash drive effectively frustrated Defendant's expectation of privacy as to the contents of the purple flash drive, and thus the

> later viewing by Detective Bailey at her request and upon presentation of the flash drive to [law enforcement] did not violate Defendant's rights under the Fourth Amendment.

IV. Law & Analogous Cases

The Fourth Amendment, applied to the states through the Fourteenth Amendment, protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by the government. U.S. Const. amend. IV. Nonetheless,

> [l]ong-established precedent holds that the Fourth Amendment does not apply to private searches. *See Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S. Ct. 574, 65 L. Ed. 1048 (1921). When a private party provides police with evidence obtained in the course of a private search, the police need not "stop her or avert their eyes." *Coolidge v. New Hampshire*, 403 U.S. 443, 489, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). Rather, the question becomes whether the police subsequently exceed the scope of the private search. *See United States v. Jacobsen*, 466 U.S. 109, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984).

Rann v. Atchison, 689 F.3d 832, 836 (7th Cir. 2012). "The reasonableness of an official invasion of the citizen's privacy must be appraised on the basis of the facts as they existed at the time that invasion occurred." *Jacobsen*, 466 U.S. at 115, 104 S. Ct. at 1657, 80 L. Ed. 2d at 95.

In *Jacobsen* employees of a private shipping carrier notified federal Drug Enforcement Administration (DEA) agents that they had opened a damaged package in accord with company policy, cut open a tube inside the package, and discovered a white powdery substance in the innermost of a series of four plastic bags that had been concealed therein. *Id.* at 111, 104 S. Ct. at 1655, 80 L. Ed. 2d at 92–93. The employees of the private shipping carrier reassembled the package, replacing the plastic bags in the tube and returning the tube back to the cardboard box. *Id.* at 111, 104 S. Ct. at 1655, 80 L. Ed. 2d at 93. When the first federal agent arrived, he retraced the private search, removing the tube from the box and the plastic bags from the tube, and observed the white powdery substance. *Id.* at 111–12, 104 S. Ct. at 1655, 80 L. Ed. 2d at 93. The agent then continued the search, opening all the bags and removing a trace of the powder for chemical testing. *Id.* at 111, 104 S. Ct. at 1655, 80 L. Ed. 2d at 92. The field chemical tests revealed the substance was cocaine, and federal agents obtained and executed a warrant to search the location

to which the package was addressed. *Id.* at 111–12, 104 S. Ct. at 1655, 80 L. Ed. 2d at 93.

The Court in *Jacobsen* first set out the Fourth Amendment protections against unreasonable searches and seizures, defining an impermissible search as "occur[ring] when there is some meaningful interference with an individual's possessory interests in that property" if that interference is unreasonable and conducted by the government. *Id.* at 113, 104 S. Ct. at 1656, 80 L. Ed. 2d at 94. Thus, the protection "is wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.' " *Id.* at 113–14, 104 S. Ct. at 1656, 80 L. Ed. 2d at 94 (quoting *Walter v. United States*, 447 U.S. 649, 662, 100 S. Ct. 2395, 2404, 65 L. Ed. 2d 410, 421 (1980) (Blackmun, J., dissenting)).

Regardless of "[w]hether those [employees'] invasions [of respondents' package] were accidental or deliberate, and whether they were reasonable or unreasonable, they did not violate the Fourth Amendment because of their private character." *Id.* at 115, 104 S. Ct. at 1657, 80 L. Ed. 2d at 95 (footnote omitted); *see id.* at 117, 104 S. Ct. at 1658, 80 L. Ed. 2d at 96 ("[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities . . . ." (quoting *United States v. Miller*, 425 U.S. 435, 443, 96 S. Ct. 1619, 1624, 48 L. Ed. 2d 71, 79 (1976))). "Once frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now nonprivate information . . . ." *Id.* at 117, 104 S. Ct. at 1658, 80 L. Ed. 2d at 96. The Court identified the standard by which to assess the subsequent government action: "The additional invasions of respondents' privacy by the [DEA] agent must be tested by the degree to which they exceeded the scope of the private search." *Id.* at 115, 104 S. Ct. at 1657, 80 L. Ed. 2d at 95 (citing *Walter*, 447 U.S. 649, 100 S. Ct. 2395, 65 L. Ed. 2d 410). Notably, *Jacobsen* did not involve the search of a digital storage device but rather "an ordinary cardboard box." *Id.* at 111, 104 S. Ct. at 1655, 80 L. Ed. 2d at 93. The Court noted that it was indisputable that the government could use the employees' testimony about what they observed when they opened the package.

> If that is the case, it hardly infringed respondents' privacy for the agents to reexamine the contents of the open package by brushing aside a crumpled newspaper and picking up the tube. The advantage the Government gained thereby was merely avoiding the risk of a flaw in the

> employees' recollection, rather than in further infringing respondents' privacy. Protecting the risk of misdescription hardly enhances any legitimate privacy interest, and is not protected by the Fourth Amendment.

Id. at 118–19, 104 S. Ct. at 1659, 80 L. Ed. 2d at 97–98.

The Fifth Circuit in *United States v. Runyan*, 275 F.3d 449 (5th Cir. 2001), applied *Jacobsen* in the context of a private search of digital storage devices similar to the thumb drive at issue here. In that case Runyan was convicted on child pornography charges after his former wife and several of her friends collected various digital media storage devices from his home and turned them over to the police. *Id.* at 453, 455. The Fifth Circuit analogized digital media storage devices to physical containers. That court determined that "police exceed the scope of a prior private search when they examine a closed container that was not opened by the private searchers unless the police are already substantially certain of what is inside that container based on the statements of the private searchers, their replication of the private search, and their expertise." *Id.* at 463. Thus, even an unopened container may fall within the scope of the private search if a "defendant's expectation of privacy in the contents of the container has already been frustrated because the contents were rendered obvious by the private search." *Id.* at 463–64 (noting that "this rule discourages police from going on 'fishing expeditions' by opening closed containers").

Because the police could be substantially certain, based on conversations with Runyan's former wife and her friends, about the contents of the privately searched disks, police did not exceed the scope of the private search when they searched those specific disks, even if they searched the same disks more thoroughly. *Id.* at 465. The police only exceeded the scope of the private search when they searched *different* disks, those that Runyan's former wife and her friends had not previously "opened" or, in other words, viewed at least one file therein. *Id.* at 463–64.

Similarly, the Seventh Circuit in *Rann* considered the merits of "whether the police's viewing of [certain images stored on digital devices] constituted a significant expansion of a private search such that a warrant was required to permit police to view the images," *Rann*, 689 F.3d at 835, and applied *Runyan* to similar facts:

> S.R. testified that she knew [the defendant] Rann had taken pornographic pictures of her and brought the police a memory card that contained those pictures. S.R.'s

> mother also brought the police a zip drive containing pornographic pictures of her daughter. Both women brought evidence supporting S.R.'s allegations to the police; it is entirely reasonable to conclude that they knew that the digital media devices contained that evidence. The contrary conclusion—that S.R. and her mother brought digital media devices to the police that they knew had no relevance to S.R.'s allegations—defies logic.

Id. at 838; *see id.* at 837–38 (Given the lower court's assessment that, because S.R. "turned exactly one memory card over to the police, and her mother gave the police exactly one zip drive," the appellate court stated that it could not "imagine more conclusive evidence that S.R. and her mother knew exactly what the memory card and the zip drive contained."). Accordingly, "even if the police more thoroughly searched the digital media devices . . . *and viewed images that* [*the prior search*] . . . *had not viewed*," the police search did not exceed the scope of the prior search because "the police were 'substantially certain' the devices contained child pornography" as alleged by the private searchers. *Id.* at 838 (emphasis added) (applying *Runyan*, 275 F.3d at 463).

Thus, in the digital storage context, the question remains "whether the police subsequently exceed the scope of the private search." *Id.* at 836 (citing *Jacobsen*, 466 U.S. at 109, 104 S. Ct. at 1652, 80 L. Ed. 2d at 85); *accord Runyan*, 275 F.3d at 463–64. When the police are substantially certain the devices contain the contraband as alleged by the private searchers, police do not exceed the scope of the private search when they examine the same materials more thoroughly or when they search additional items within the same container previously opened by a private party. *Rann*, 689 F.3d at 838; *Runyan*, 275 F.3d at 461–63.

V. Analysis

The analysis the Fifth and Seventh Circuits apply is correct. Using the container analogy as instructed by *Runyan* and *Rann*, defendant left in Jones's home a digital "box of folders" that she could open and examine. When she did so, defendant's expectation of privacy became frustrated; she had possession of and gained access to the entire contents of the thumb drive. Its contents, specifically, various photos of defendant with adult females and the image of her nine-year-old partially nude granddaughter located in the "Bad stuff" folder, became obvious to Jones, the private searcher.

When she turned over the thumb drive to law enforcement, she did so without limitation and authorized them to look for her granddaughter's

image. Nonetheless, she gave a layman's description of her search process and identified the location of her granddaughter's image as "[l]abled under 'Bad stuff.' " Thereafter, police in good faith attempted to replicate the grandmother's search.

Detective Bailey's follow-up search to verify Jones's discovery can be a more thorough review of the same privately searched materials or can uncover more items from the same container Jones previously opened. *See Runyan*, 275 F.3d at 464–65. Like in *Runyan* and *Rann*, even if Jones did not open every picture file it contained, Detective Bailey could be substantially certain, based on conversations with her, what the privately searched thumb drive contained. As found by the trial court, he did not exceed the scope of the private search when he searched the one and only thumb drive he received and confined that search within the "Bad stuff" folder as identified by Jones, even if Detective Bailey's search was more thorough than Jones's search. *Runyan*, 275 F.3d at 465.

In addressing each group of images separately, it is clear that none should be suppressed. When Jones opened the purple thumb drive, she went to the folder labeled "Bad stuff." Though she could not recall the names of the subfolders that contained the images she saw, she found her granddaughter's image in one of these subfolders (ultimately identified as "red bone"). Clearly, Jones's search thwarted defendant's reasonable expectation of privacy as to that subfolder, and the private-search doctrine allowed the detective to enter that subfolder. Entering the "Bad stuff" folder and the "red bone" subfolder mirrored the precise scope of the private search. "The agent's viewing of what a private party had freely made available for his inspection did not violate the Fourth Amendment." *Jacobsen*, 466 U.S. at 119–20, 104 S. Ct. at 1660, 80 L. Ed. 2d at 98 (citing *Coolidge*, 403 U.S. at 487–90, 91 S. Ct. at 2048–50, 29 L. Ed. 2d at 595–96; *Burdeau*, 256 U.S. at 475–76, 41 S. Ct. at 576, 65 L. Ed. at 1051).

As Detective Bailey tried to replicate Jones's search, he entered a subfolder in "Bad stuff" titled "Cabaniia," within which he found the photos of the unidentified nude children. It is unclear if Jones actually opened the "Cabaniia" subfolder. In evaluating Detective Bailey's search, the question is "the degree to which [he] exceeded the scope of the private search." *Jacobsen*, 466 U.S. at 115, 104 S. Ct. at 1657, 80 L. Ed. 2d at 95. By entering the folder "Bad stuff," Jones frustrated defendant's reasonable expectation of privacy as to any file it contained. The trial court found that in discovering the two additional photos depicting child pornography, Detective Bailey's search "did not exceed the scope of the private, prior search done by [Jones], but could have been more

thorough." A more thorough search does not remove the search from the private-search doctrine. A forensic search, authorized by a search warrant substantiated by Jones's statements to Detective Bailey, revealed the final ten photos.

The majority holds that there can be no lawful governmental search under the private search doctrine as long as "the thumb drive, or any part of it, could continue to support a legitimate expectation of privacy." Thus, it refuses to address the precise steps taken by Detective Bailey to replicate the search done by Jones or to address each category of evidence separately. It does not even mention that the search was limited to the "Bad stuff" folder. It finds this approach unnecessary as it concludes there must be "virtual certainty" the thumb drive contains nothing else besides the illegal photo. Regardless of whether Jones opened the purple thumb drive and the folder "Bad stuff," unless she also testified she opened each of the other folders and files and reviewed their contents, the majority concludes the private-search doctrine is inapplicable, even as to the precise photo identified by Jones.

The majority wrongly asks whether any folders or files in the thumb drive were unopened by Jones. By its approach, if any of the subfolders or files remained unopened, then Detective Bailey's opening of the thumb drive was an unconstitutional search because he could not be virtually certain that nothing else of significance was on the thumb drive. The majority assumes, without a factual basis, that Detective Bailey engaged in an extensive search of "the *entire* contents of" the thumb drive without any direction from Jones, opining that Detective Bailey had been " 'scrolling through . . . a lot of photos' in different folders before, according to him, he 'finally happened upon the photograph with the granddaughter.' " The trial court found facts to the contrary.

The record indicates that here the grandmother identified the one folder, within which law enforcement could locate the granddaughter's image. According to the finder of fact, Detective Bailey reported that he "selected the *folder* [*Bad stuff*] *that had been identified by* [*Jones*] as containing the picture of her granddaughter [name redacted]." (Emphasis added.) This Court does not have the thumb drive before us for inspection. Based on the facts presented to the trial court, which did have the thumb drive, however, there is no indication that Jones did not sufficiently understand the features of the thumb drive to be able to direct Detective Bailey to "the pictures [that] were all in one folder." Competent evidence presented to the trial court certainly supports the trial court's finding that Detective Bailey's efforts to verify Jones's allegations fell within the scope of her initial search. Under the majority's

circular approach, law enforcement cannot conduct a subsequent search to verify the reported image within the "Bad stuff" folder—for risk of inadvertently seeing other subfolders and files—at least not without the probable cause supplied by verifying its contents.

The analysis of the opinions of both the Court of Appeals majority and this Court are influenced by *Riley v. California*, 573 U.S. 373, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014), in which the Supreme Court of the United States declined to extend the search-incident-to-arrest exception to police searches of digital data on cell phones. The court below determined that *Riley* "guides our decision in how best to apply a doctrine originating from the search of a container limited by physical realities to a search for digital data on an electronic storage device that is not." *Terrell*, 810 S.E.2d at 729 (majority opinion) (citations omitted). The Court of Appeals concluded that a thumb drive's "potential to hold vastly more and distinct types of private [electronic] information" renders the container analogy inapplicable for Fourth Amendment purposes. *Id.* at 728–29 (citing *Riley*, 573 U.S. at 386, 134 S. Ct. at 2485, 189 L. Ed. 2d at 442–43); *see also Riley*, 573 U.S. at 393, 134 S. Ct. at 2488–89, 189 L. Ed. 2d at 446 ("Modern cell phones . . . implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse."). *Riley* simply does not apply here. The cell phone in that case was not a finite container like the thumb drive here, whose contents had been previously viewed by a third party; therefore, the owner's expectation of privacy was not frustrated as to any aspect of the cell phone.

VI. Conclusion

While computers and cell phones may conceivably open the door to seemingly unlimited mounds of information, those devices are not implicated here. The purple thumb drive was a storage device with limited space. Moreover, Detective Bailey did not engage in a "fishing expedition" but retraced Jones's search within the thumb drive's folder, "Bad stuff." Rather than remedying a constitutional violation, the majority's opinion here only frustrates concerned citizens' attempts to report criminal activity against children and prevents law enforcement from verifying the allegations.

Under our time-honored standard of review, the trial court appropriately denied the motion to suppress. It found facts supported by the evidence and correctly applied the law. Its order should be upheld. I respectfully dissent.

STATE v. ANTHONY

[372 N.C. 689 (2019)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Pitt County
	)	
ANTWAN ANTHONY	)	

No. 324A16

ORDER

Upon consideration of defendant's "Motion to Provide Full Transcript to Defendant," pursuant to N.C.G.S. § 15A-1453(b), this Court assigns the motion to Superior Court, Pitt County, for its initial consideration.

By Order of the Court in Conference, this 14th day of August, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of August, 2019.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. DUFF

[372 N.C. 690 (2019)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Guilford County
	)	
JOHN CHRISTIAN DUFF	)	

No. 134PA19

ORDER

Defendant's petition for discretionary review is allowed for the limited purpose of remanding to the Court of Appeals to reconsider its holding in light of *State v. Morgan*, ___ N.C. ___, ___ S.E.2d ___ (2019) (150A18) (holding the revocation of probation after probation term expires pursuant to N.C.G.S. § 15A-1344(f)(3) requires the court to make an express finding of "good cause shown and stated").

By Order of the Court in Conference, this 14th day of August, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of August, 2019.

AMY FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. KILLETTE

[372 N.C. 691 (2019)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Johnston County
	)	
VAN BUREN KILLETTE, SR.	)	

No. 379PA18

ORDER

Defendant's petition for discretionary review is allowed for the limited purpose of remanding to the Court of Appeals to reconsider its holding in light of *State v. Ledbetter*, 814 S.E.2d 39, 43 (N.C. 2018) (holding "the Court of Appeals ha[s] both the jurisdiction and the discretionary authority to issue" writs of certiorari "[a]bsent specific statutory language limiting the Court of Appeals' jurisdiction"), and *State v. Stubbs*, 368 N.C. 40, 42–44 (2015) (holding that the Court of Appeals had jurisdiction to issue a writ of certiorari absent any contravening statutory limiting language).

By Order of the Court in Conference, this 14th day of August, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of August, 2019.

AMY FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Rowan County
	)	
DONNA HELMS LEDBETTER	)	

No. 402PA15-3

ORDER

Upon consideration, defendant's petition for discretionary review is denied. Nonetheless, this Court disavows the language in the last paragraph of the Court of Appeals's decision in *State v. Ledbetter*, 819 S.E.2d 591, 595 (N.C. Ct. App. 2018), to the extent it may be interpreted as contrary to this Court's decision in *State v. Ledbetter*, 814 S.E.2d 39, 43 (N.C. 2018) ("Rule 21 does not prevent the Court of Appeals from issuing writs of certiorari or have any bearing upon the decision as to whether a writ of certiorari should be issued. Therefore, the Court of Appeals should exercise its discretion to determine whether it should grant or deny defendant's petition for writ of certiorari."). *See also State v. Stubbs*, 368 N.C. 40, 44, 770 S.E.2d 74, 76 (2015) ("[W]hile Rule 21 might appear at first glance to limit the jurisdiction of the Court of Appeals, the Rules cannot take away jurisdiction given to that court by the General Assembly in accordance with the North Carolina Constitution.").

By Order of the Court in Conference, this 14th day of August, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of August, 2019.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

STATE v. WILLIAMS

[372 N.C. 693 (2019)]

STATE OF NORTH CAROLINA	)	
v.	)	MECKLENBURG COUNTY
MONTREZ BENJAMIN WILLIAMS	)	

No. 233PA12-2

ORDER

Defendant's motion for appropriate relief in this matter is remanded to the Superior Court in Mecklenburg County for an evidentiary hearing pursuant to N.C.G.S. § 15A-1418(b)–(c). Accordingly, the time periods for perfecting or proceeding with the appeal are tolled, and the order of the trial division with regard to the motion must be transmitted to the appellate division so that the appeal can proceed or an appropriate order terminating it can be entered. Additionally, defendant's motion to hold resentencing appeal in abeyance is allowed.

By order of this Court in Conference, this 14th day of August, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of August, 2019.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/M.C. Hackney
Assistant Clerk

WINSTON AFFORDABLE HOUSING, L.L.C, D/B/A WINSTON SUMMIT APARTMENTS, Plaintiff	)	
v.	)	Forsyth County
DEBORAH ROBERTS, Defendant	)	

No. 267P19

ORDER

The Court, acting on its own motion and for the purpose of resolving the issues raised by the filings that the parties have made in this case on 9 July 2019, orders as follows:

1. Plaintiff's motion for clarification of the Court's order allowing defendant's motion for a temporary stay is decided as follows: The order granting plaintiff's motion for a temporary stay remains in full force and effect, with all parties being ordered to comply with it. This order should not be understood to do anything more than ensure that the status quo as it existed prior to the execution of the writ of possession that occurred on 9 July 2019, including defendant's right to remain in possession of the apartment in question subject to all of the requirements set out in prior orders concerning the payment of rent, is maintained. This order should not be understood as creating any sort of a new tenancy necessitating commencement of a new summary ejection proceeding.

2. Except as is addressed in Decretal Paragraph No. 1 of this order, plaintiff's Motion for Reconsideration, Vacation, or Modification of Order is denied.

3. Defendant's request for an award of additional relief against plaintiff is denied.

4. Contemporaneously with the entry of this order, an amended order granting defendant's motion for a temporary stay for the sole purpose of reflecting Justice Davis' recusal in this case shall be entered.

By order of the Court in conference, this the 10th day of July, 2019.

Davis, J., recused

s/Sam J. Ervin, IV
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 10th day of July, 2019.

s/Amy Funderburk

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

YIGZAW v. ASRES

[372 N.C. 696 (2019)]

ASKALEMARIAM YIGZAW	)	
	)	
v.	)	Davidson County
	)	
ALEHEGN ASRES	)	

No. 198PA19

ORDER

The petition for writ of certiorari filed by plaintiff Askalemariam Yigzaw in this case on 30 May 2019 is decided as follows: plaintiff's petition is allowed for the limited purpose of reversing the Court of Appeals' 13 May 2019 order dismissing plaintiff's appeal from Order-Child Support entered by Chief District Judge Wayne L. Michael in this case in the District Court, Davidson County, on 31 July 2018 and remanding this case to the Court of Appeals for further proceedings not inconsistent with this order.

By order of the Court in conference, this the 14th day of August, 2019.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 16th day of August, 2019.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

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

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

14 AUGUST 2019

010P19	State v. Brodie Lee Hamilton	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-1365) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
017P13-3	State v. Ca'Sey R. Tyler	Def's Pro Se Motion for PDR (COAP19-105)	Denied **06/13/2019** **Ervin, J. recused**
022P19-3	State v. Jennifer Jimenez/April Myers	1. Def's Pro Se Motion to Recall Order for Arrest; Failure to Appear; Strike Called and Failed; and to Set Aside Bond Forfeiture 2. Def's Pro Se Motion to Recall Order for Arrest; Failure to Appear; Strike Called and Failed; and to Set Aside Bond Forfeiture	1. Dismissed 2. Dismissed
036P19	State v. Timothy John Clark	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1356)	Denied **Ervin, J., recused**
041P19-2	Jonathan Brunson v. North Carolina Innocence Inquiry Commission and the State of North Carolina	Plt's Pro Se Motion for Petition for Rehearing of PDR Under N.C.G.S. § 7A-31 (COA18-659)	Dismissed
044P19-2	Jonathan E. Brunson v. North Carolina Department of Public Safety, North Carolina Prisoner Legal Services, Inc., and the State of North Carolina	Plt's Pro Se Motion for Petition for Rehearing of PDR	Dismissed
055P19	Ashley D. Carney v. Wake County Sheriff's Office	1. Plt's Pro Se PDR Prior to a Decision of the COA 2. Plt's Pro Se Motion for Timely Filing of PDR	1. Dismissed 2. Denied
063P19	State v. Michael Christopher Weaver	Def's PDR Under N.C.G.S. § 7A-31 (COA18-740)	Denied
065A19	In the Matter of A.R.A., P.Z.A., Z.K.A.	Respondent-Father's Motion to Withdraw Appeal	Allowed **07/01/2019**

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

14 AUGUST 2019

068P19-2	State v. Eric Christopher Orr	Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COA18-424)	Denied
074P98-6	State v. William T. Barnes	1. Def's Pro Se Petition for Writ of Mandamus 2. Def's Pro Se Motion in the Alternative to Appoint Counsel	1. Denied **07/01/2019** 2. Dismissed as moot **07/01/2019**
075P19	State v. Adam Warren Conley	1. State's Motion for Temporary Stay (COA18-305) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S § 7A-31	1. Allowed **03/06/2019** 2. Allowed 3. Allowed
080P19	State v. Jerry Lee Adams, Jr.	Def's Pro Se Motion for PDR Under N.C.G.S § 7A-31 (COA17-601)	Denied
082A14-2	State v. Sethy Tony Seam	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-202) 2. Def's Motion to Amend PDR	1. Allowed 2. Allowed **Ervin, J., recused** **Davis, J., recused**
085P19	State v. Adam Joshua Sanders	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-476) 2. Def's Petition in the Alternative for Writ of Certiorari to Review Decision of the COA 3. Def's Motion in the Alternative to Remand Case for Evidentiary Hearing 4. State's Motion to Dismiss Petitions	1. Denied 2. Denied 3. Denied 4. Dismissed as moot
086P19	State v. Travis Kingsberry	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA18-226) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Petition for Writ of Certiorari to Review Decision of the COA 4. State's Motion to Dismiss PDR 5. State's Motion to Dismiss Appeal	1. --- 2. --- 3. Denied 4. Allowed 5. Allowed

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

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091P14-6	State v. Salim Abdu Gould	Def's Pro Se Motion for Habeas Corpus Arbitration-Mediation	Denied **07/24/2019** **Davis, J. recused**
094P19	State v. James A. Cox	1. State's Motion for Temporary Stay (COA18-692) 2. State's Petition for Writ of Supersedeas 3. State's PDR 4. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **03/22/2019** 2. Allowed 3. Allowed 4. Denied
098P19	State v. Curtis O'Neil Logan	Def's PDR Under N.C.G.S. § 7A-31 (COA18-723)	Denied
101P19	Rene Robinson, Individually, and as Administratrix of the Estate of Velvet Foote v. GGNSC Holdings, LLC d/b/a Golden Living Center, a/k/a Sava Senior Center, LLC d/b/a McGregor Downs Health and Rehabilitation Center, and Neil Kurtz	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-706)	Denied
106P19	In the Matter of P.R.T.	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA18-730)	Denied
107P16-2	State v. Soyer Lewis Moll	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Onslow County 2. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot **Ervin, J. recused**
107P19	In the Matter of the Appeal of Aaron's, Inc.	From the decision of the Sampson County Board of Equalization and Review concerning the valuation of certain personal property for tax year 2016 Taxpayer's PDR Under N.C.G.S § 7A-31 (COA18-607)	Denied

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

14 AUGUST 2019

108P19	Nanny's Korner Day Care Center, Inc. v. North Carolina Department of Health and Human Services, Division of Child Development and Early Education	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA18-679) 2. Plt's PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Denied **Ervin, J., recused** **Davis, J., recused**
122PA18	Zloop, Inc. v. Parker Poe Adams & Bernstein LLP, et al.	Plt's Motion to Stay All Proceedings in the Present Matter	Allowed **07/05/2019**
122PA18	Zloop, Inc. v. Parker Poe Adams & Bernstein LLP, et al.	Plt's Motion to Dismiss Appeal with Prejudice	Allowed **07/25/2019**
124P19	Donna J. Preston, Administrator of the Estate of William M. Preston v. Assadollah Movahead, M.D., Deepak Joshi, M.D., and Pitt County Memorial Hospital, Incorporated, d/b/a Vidant Medical Center	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-674)	Allowed
125PA18	In the Matter of E.D.	Def's Petition for Writ of Mandamus	Denied **06/24/2019** **Davis, J. recused**
131P01-17	State v. Anthony Dove	Def's Pro Se Motion for Evidentiary Hearing	Dismissed **Ervin, J. recused** **Davis, J. recused**
131P16-12	Somchai Noonsab v. State	1. Petitioner's Pro Se Motion for Verified Complaint 2. Petitioner's Pro Se Motion for Arrest of Judgment 3. Petitioner's Pro Se Motion to Dismiss 4. Petitioner's Pro Se Motion for Order for Release	1. Dismissed **07/11/2019** 2. Dismissed **07/11/2019** 3. Dismissed **07/11/2019** 4. Denied **07/11/2019**

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

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132PA18-2	Beth Desmond v. The News and Observer Publishing Company, McClatchy Newspapers, Inc., and Mandy Locke	1. Defs' (The News and Observer Publishing Company, and Mandy Locke) Notice of Appeal Based Upon a Constitutional Question (COA18-411) 2. Defs' (The News and Observer Publishing Company, and Mandy Locke) PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Dismiss Appeal 4. Professor William Van Alystyne's Motion for Leave to File Amicus Brief 5. The Reporter Committee for Freedom of Press, et al.'s Motion for Leave to File Amicus Brief 6. Def's (Mandy Locke) Motion for Additional Time for Oral Argument	1. Dismissed **03/27/2019** 2. Allowed **03/27/2019** 3. Allowed **03/27/2019** 4. Allowed **03/27/2019** 5. Allowed **03/27/2019** 6. Denied
132P19	Eric Denney, and wife Christine Denney v. Wardson Construction, Inc., and Healthy Home Insulation, LLC	Def's (Wardson Construction, Inc.) PDR Under N.C.G.S. § 7A-31 (COA18-667)	Denied **Davis, J. recused**
134A18	Regency Centers Acquisition, LLC v. Crescent Acquisitions, LLC	1. Plt's Motion to Hold Case in Advance of Settlement 2. Plt's Motion to Dismiss Appeal with Prejudice	1. Allowed **08/10/2019** 2. Allowed **08/02/2019**
134PA19	State v. John Christian Duff	1. Def's Motion for Temporary Stay (COA18-874) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/15/2019** Dissolved **08/14/2019** 2. Denied 3. Special Order
136P16-2	State v. Maurice Parker	1. Def's Pro Se Motion for Notice of Appeal (COAP19-81) 2. Def's Pro Se Motion for PDR 3. Def's Pro Se Motion for PDR 4. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Cumberland County	1. Dismissed *ex mero motu* 2. Dismissed 3. Dismissed 4. Dismissed

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

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142PA17-2	State v. Terance Germaine Malachi	1. Def's Motion for Temporary Stay (COA16-752-2) 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Constitutional Question 4. Def's PDR Under N.C.G.S. § 7A-31 5. State's Motion to Dismiss Appeal	1. Denied **03/26/2019** 2. Denied 3. --- 4. Denied 5. Allowed
142PA18	DTH Media Corporation, Capital Broadcasting Company, Inc., the Charlotte Observer Publishing Company and the Durham Herald Company v. Carol L. Folt, in her official capacity as Chancellor of the University of North Carolina at Chapel Hill, and Gavin Young, in his official capacity as Senior Director of Public Records for the University of North Carolina at Chapel Hill	Motion of Amici Curiae Victim Rights Organizations for Leave to Participate in Oral Argument	Denied
142P19	State v. Radhwan Al-Hamood	Def's PDR Under N.C.G.S. § 7A-31 (COA18-682)	Denied **Davis, J. recused**

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

14 AUGUST 2019

144P19	The Estate of Robert Eugene Tipton, Jr., by and through his Ancillary Administrator, Deborah Dunklin Tipton and Deborah Dunklin Tipton, Individually v. Delta Sigma Phi Fraternity, Inc., Michael Qubein, Individually and as an Agent for Delta Sigma Phi Fraternity, Marshall Jefferson, Individually and as an Agent for Delta Sigma Phi Fraternity, High Point University, Nido Qubein, Individually and as President of High Point University	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-581)	Denied **Davis, J. recused**
145P19	In the Matter of M.F.B., L.B., III, M.W.E.B.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA18-848)	Denied **Davis, J., recused**
146P19	Trisha Wright, Administratrix of the Estate of Christopher Wright, Deceased Employee v. Alltech Wiring & Controls, Employer, Builders Mutual Insurance Company, Carrier	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-833) Denied	
147PA18	Chambers v. Moses H. Cone Memorial Hospital, et al.	Def's Motion to File Amended Brief	Allowed **07/12/2019**
147P19	State v. Malon Kysheef Griffin	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-681) 2. State's Motion to Deem Response to PDR Timely Filed	1. Denied 2. Denied
154P19	Jonathan E. Brunson v. The Office of the Governor of North Carolina, et al.	Plt's Pro Se PDR Under N.C.G.S. § 7A-31 (COA18-836)	Denied

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

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155P17-4	State v. Joe Robert Reynolds	1. Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA18-445) 2. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA 3. Def's Pro Se Motion to Supplement Petition with Affidavit of Facts 4. Def's Pro Se Motion to Withdraw	1. Denied 2. --- 3. Dismissed as moot 4. Allowed
155P19	Jonathan Brunson v. Office of the Twelfth Judiciary	Plt's Pro Se PDR Under N.C.G.S. § 7A-31 (COA18-838)	Denied
161P19	Elizabeth Ball, Employee v. Bayada Home Health Care, Employer, Arch Insurance Group, Inc., Carrier (Gallagher Bassett Services, Inc., Third-Party Administrator)	1. Defs' Motion for Temporary Stay (COA18-918) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **05/01/2019** Dissolved **08/14/2019** 2. Denied 3. Denied **Davis, J., recuse**d
164P15-2	State v. Charles Gilbert Gillespie	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA 2. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Rowan County 3. Def's Pro Se Motion to Appoint Counsel	1. Denied **06/26/2019** 2. Denied **06/26/2019** 3. Dismissed as moot **06/26/2019** **Davis, J. recused**
168A19	Cardiorentis AG v. Iqvia Ltd. and Iqvia RDS, Inc.	1. Plt's Petition in the Alternative for Writ of Certiorari to Review Order of Business Court 2. Plt's Motion to Admit Catherine E. Stetson Pro Hac Vice 3. Plt's Motion to Admit Kyle Druding Pro Hac Vice 4. Defs' Motion to Supplement Record on Appeal	1. Go with case 2. Allowed **06/25/2019** 3. Allowed **06/25/2019** 4. Allowed

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

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169P19	State v. Brian Keith Hughes	1. State's Motion for Temporary Stay (COA18-967) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **05/03/2019** Dissolved **08/14/2019** 2. Denied 3. Denied
170A19	State v. Melvin Lamar Fields	1. State's Motion for Temporary Stay (COA18-673) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent 4. State's PDR as to Additional Issues	1. Allowed **05/06/2019** 2. Allowed 3. --- 4. Allowed
171P19	State v. Lamarquis Letron Smallwood	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA18-578)	Denied
172A19	In the Matter of J.H., Z.R., A.R., and D.R.	Respondent-Mother's Motion to Amend Record on Appeal	Allowed **07/08/2019**
183P19-2	State v. Coriante Pierce	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP19-265)	Dismissed
184P18	N.C. Department of Environmental Quality, Division of Waste Management v. TRK Development, LLC	Respondent's PDR Under N.C.G.S. § 7A-31 (COA17-882)	Denied **Davis, J. recused**
185P19	James Bryan Sluder v. Marilyn W. Sluder	Def's PDR Under N.C.G.S. § 7A-31 (COA18-920)	Denied **Davis, J. recused**
186P19	State v. Michael Caldwell Angram	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-993) 2. Def's Petition for Writ of Certiorari to Review Decision of the COA	1. Denied 2. Denied
190P19	Flor Johnson v. Capree Ricketts	1. Def's Pro Se Motion for PDR (COA19-239) 2. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA	1. Denied 2. Dismissed

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

14 AUGUST 2019

192P19	Betty Burden Jackson, Nancy Burden Elliott, James Burden, Rebecca Burton Bell, Darren Burton, Clarence Burton, Jr., and John Burden, Plaintiffs v. Don Johnson Forestry, Inc. and East Carolina Timber, LLC, Defendants and Nellie Burden Ward, Albert R. Burden, Levy Burden, Clarence L. Burden, and Brenda B. Miller, Other Grandchildren Defendants and East Carolina Timber, LLC, Third Party/ Counterclaim Plaintiff v. Estate of William F. Bazemore by and through its Executors, Nellie Ward and Tarsha Dudley, and Estate of Florida Bazemore by and through its Administrator, Maria Jones, Third-Party/ Counterclaim Defendants	Plts' PDR Under N.C.G.S. § 7A-31 (COA18-354-2)	Denied
193P19	Slok, LLC v. Courtside Condominium Owners Association, Inc.	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA18-736) 2. Def's Motion to Dismiss PDR 3. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot 3. Dismissed as moot
194P19-3	State v. David Ezell Simpson	1. Def's Pro Se Petition for Writ of Mandamus 2. Def's Pro Se Motion to Amend Petition for Writ of Mandamus	1. Dismissed without prejudice 2. Allowed

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

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195A19	State v. Chad Cameron Copley	1. State's Application for Temporary Stay (COA18-895) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **05/23/2019** 2. Allowed **06/13/2019** 3. ---
196A19	State v. David Leroy Carver	1. State's Motion for Temporary Stay (COA18-935) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **05/28/2019** 2. Allowed **06/17/2019** 3. ---
198PA19	Askalemariam Yigzaw v. Alehegn Asres	Plt's Petition for Writ of Certiorari to Review Order of the COA (COA19-12)	Special Order
199P19	State v. Bennie Lee Graham	1. Def's Pro Se Motion for En Banc Review (COA18-1) 2. Def's Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed 2. Denied
201A19	State v. David Alan Keller	1. Def's Motion for Temporary Stay (COA17-1318) 2. Def's Petition for Writ of Supersedeas 3. Def's Notice of Appeal Based Upon a Dissent	1. Allowed **06/04/2019** 2. Allowed 3. ---
202P19	State v. Dwayne Rayshon Degraffenried	Def's Pro Se Motion for PDR (COAP19-256)	Dismissed
204P19	State v. Alexander DeJesus aka Alexander Sigaru-Argueta	Def's PDR Under N.C.G.S. § 7A-31 (COA18-750)	Denied
205P19	In the Matter of W.A.B., B.F.B., A.G.B., E.H.B., R.A.B., M.A.B.	Respondent-Father's PDR Under N.C.G.S. § 7A-31 (COA18-953)	Denied
206A19	State v. Ben Lee Capps	1. State's Motion for Temporary Stay (COA18-386) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **06/05/2019** 2. Allowed **06/26/2019** 3. ---

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207P19	State v. Mark Edwin Jones	Def's PDR Under N.C.G.S. § 7A-31 (COA18-508)	Denied
210P19	Diondra N. Pittman v. James E. Pittman, Jr. and Adrian N. Flemings	Def's (James E. Pittman, Jr.) Pro Se Motion for Notice of Appeal	Dismissed
213P19	Cumberland County ex rel. State of Alabama O.B.O. Alisha Lee v. Clifford Lee	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-754)	Denied
217P18-2	State v. Edwin Christopher Lawing	Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County	Dismissed
223P19	State v. James E. White	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
224P19	In re James Allen Hill	Petitioner's Pro Se Petition for Writ of Mandamus	Denied **06/27/2019**
225P10-2	State v. Jesus Espinoza-Valenzuela	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
225P19	State v. Dale Erwin Foat	Def's Pro Se Motion for Relief Upon Appeal (COAP19-294)	Dismissed
226P19	Timothy Morris McCoy v. North Carolina Department of Revenue	Petitioner's Pro Se Motion for Appeal Against Final Decision	Dismissed
227P18	State v. Carl Ray Poore, Jr.	1. State's Motion for Temporary Stay (COA17-1387) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **07/23/2018** Dissolved **08/14/2019** 2. Denied 3. Denied

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228P19	State v. Timothy Calvin Denton	1. State's Motion for Temporary Stay (COA18-742) 2. State's Petition for Writ of Supersedeas	1. Allowed **06/14/2019** 2.
231A19	In the Matter of K.K. A minor child	Appellant-Father's Motion to Extend the time to File the Record on Appeal	Allow extension of time up to & including 17 June 2019 **06/18/2019**
233PA12-2	State v. Montrez Benjamin Williams	1. Def's Motion for Appropriate Relief 2. Def's Motion to Hold Resentencing Appeal in Abeyance	1. Special Order 2. Special Order
234P19	Corey France v. North Carolina Department of Public Safety	1. Plt's Pro Se Motion for Leave for Joinder of Appeals (COA19-294, 295) 2. Plt's Pro Se Motion for PDR	1. Dismissed 2. Dismissed **Davis, J. recused**
235P19	State v. Hector Trevino, III	Def's PDR Under N.C.G.S. § 7A-31 (COA18-741)	Denied
238P19	State v. Matthew Garret McMahan	1. State's Motion for Temporary Stay (COA18-672) 2. State's Petition for Writ of Supersedeas	1. Allowed **06/24/2019** 2.
239P19	State v. Tyrone Churell Davis	Def's PDR Under N.C.G.S. § 7A-31 (COA18-1017)	Denied
240P19	State v. Daniel Yair Marino	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-1135) 2. Def's Conditional Petition for Writ of Certiorari to Review Decision of the COA	1. Dismissed 2. Dismissed
244P19	In the Matter of M.T.-L.Y.	1. Petitioner's Motion for Temporary Stay (COA18-826) 2. Petitioner's Petition for Writ of Supersedeas 3. Petitioner's PDR Under N.C.G.S. § 7A-31 4. Guardian *Ad Litem's* PDR Under N.C.G.S. § 7A-31	1. Allowed **06/25/2019** Dissolved **08/14/2019** 2. Denied 3. Denied 4. Denied

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246P19	Walston v. Duke University	Defendant Attorney Carl Newman's Motion to Withdraw as Counsel of Record	Allowed **07/17/2019**
247P16-7	State v. Jonathan Eugene Brunson	Def's Pro Se Motion for Petition for Rehearing of PDR	Dismissed
247P19	State v. Dante Lorenzo Ross	Def's PDR Under N.C.G.S. § 7A-31 (COA18-652)	Denied
248A18	Sykes v. Blue Cross & Blue Shield of North Carolina (Sykes II)	Plt's Petition for Rehearing	Denied
248P19	State v. Tamora C. Williams	1. Def's Motion for Temporary Stay (COA18-994) 2. Def's Petition for Writ of Supersedeas	1. Allowed **06/25/2019** 2.
250P17-2	State v. Justin Lee Perry	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP19-355)	Denied **07/24/2019** **Davis, J., recused**
251PA18	Sykes, et al. v. Health Network Solutions, Inc., et al.	Plts' Petition for Rehearing	Denied
251P19	D. Cameron Murchison, Jr. and Joan H. Murchison, his wife v. Regional Surgical Specialists and Christopher Edwards, M.D.	Plt's PDR Under N.C.G.S. § 7A-31 (COA18-297)	Denied **Ervin, J. recused**
252P19	State v. Frank Thomas Bennett	Def's Pro Se Motion for Arrest of Judgment	Denied **07/02/2019**
253P19	State v. Justin Michael Tyson	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **06/27/2019**
253P19-2	State v. Justin Michael Tyson	Def's Pro Se Motion for Court to Overturn its Denial of Petition for Writ of Habeas Corpus	Denied **07/12/2019**
255P18	State v. Edward Earl Jones	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-114) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Petition for Writ of Certiorari to Review Order of the COA 4. State's Motion to Dismiss Appeal	1. — 2. Denied 3. Dismissed 4. Allowed

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256P19	In the Matter of the Estate of Thalia Dukes, by her son, Tony C. Thomas v. Lawrence S. Craige	Plt's Pro Se Motion for North Carolina Supreme Court to Assume Jurisdiction	Dismissed
257P16-3	Federal National Mortgage Association a/k/a Fannie Mae v. William Gerald Price	Def's Pro Se Motion to Appeal (COA18-775)	Dismissed **Davis, J. recused**
260P19	State v. Brandon Leon Wilson	Def's *Pro Se* Motion for Judicial Review	Denied **07/17/2019**
262P19	State v. Dora Parker Bullock	1. Def's Pro Se Motion for Notice of Appeal (COA19-503) 2. State's Motion to Dismiss Appeal	1. --- 2. Allowed
263PA18	State v. Cedric Theodis Hobbs, Jr.	1. Amicus Curiae's Motion to Admit Robert S. Chang Pro Hac Vice 2. Amicus Curiae's Motion to Admit Taki V. Flevaris Pro Hac Vice 3. Amicus Curiae's Amended Motion to Admit Robert S. Chang Pro Hac Vice 4. Amicus Curiae's Amended Motion to Admit Taki V. Flevaris Pro Hac Vice	1. Dismissed as moot **07/10/2019** 2. Dismissed as moot **07/10/2019** 3. Allowed **07/10/2019** 4. Allowed **07/10/2019**
263PA18	State v. Cedric Theodis Hobbs, Jr.	1. Amicus Curiae's (Coalition of State and National Criminal Justice and Civil Rights Advocates) Motion for Leave to Participate in Oral Argument 2. Amicus Curiae's (Fred T. Korematsu Center for Law and Equality) Motion for Leave to Participate in Oral Argument	1. Denied 2. Denied
263PA18	State v. Cedric Theodis Hobbs, Jr.	Def's Motion to Supplement Record on Appeal	Allowed
264P19	State v. Matthew Joseph Schmieder	1. Def's PDR Under N.C.G.S. § 7A-31 (COA18-1027) 2. Def's Motion to Deem PDR Timely Filed 3. Def's Motion in the Alternative to Treat the PDR as a Petition for Writ of Certiorari	1. Dismissed 2. Denied 3. Denied

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265P19	State v. Darrin M. Sanders	Def's Pro Se Motion for PDR (COAP19-357)	Denied
266P19	State v. Ontrel Latre Gilchrist	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA18-479)	Denied
267P19	Winston Affordable Housing, L.L.C. d/b/a Winston Summit Apartments v. Deborah Roberts	1. Def's Motion for Temporary Stay (COA18-553) 2. Def's Petition for Writ of Supersedeas 3. Plt's Motion for Clarification as to Effect of 9 July 2019 Order Allowing the Motion for Temporary Stay 4. Plt's Motion for Reconsideration, Vacation, or Modification of Order	1. Allowed **07/08/2019** 2. 3. Special Order **07/10/2019** 4. Special Order **07/10/2019** **Davis, J. recused**
271P19	State v. Robert B. Williams	Def's Pro Se Motion for Notice of Appeal of a Writ of Habeas Corpus in State Court	Denied **07/10/2019**
275P19	Elizabeth M.T. O'Nan, and Individual v. Nationwide Insurance Company, a Corporation; Servpro Industries, Inc., a Corporation; Servpro of Marion, a Corporation, aka Servpro of Asheville East, aka Servpro of Asheville West, aka Servpro of McDowell and Rutherford Counties, aka J.L. Kuder Enterprises, a Corporation; John Kuder, an Individual; Linda Kuder, an Individual; Spencer Gates, an Individual; Debra Whittemore, and Individual; Jennifer Robinson, an Individual; and Lisa Tilley, an Individual	1. Plt's Pro Se Motion for Temporary Stay (COA18-990) 2. Plt's Pro Se Petition for Writ of Supersedeas 3. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question 4. Plt's Pro Se PDR Under N.C.G.S. § 7A-31 5. Defs' (Servpro of Marion, et al.) Motion to Dismiss Appeal	1. Allowed **07/18/2019** Dissolved **08/14/2019** 2. Denied 3. Dismissed *ex mero motu* 4. Denied 5. Dismissed as moot

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277P18-4	State v. Gabriel Adrian Ferrari	Def's Pro Se Motion to Strike the Court Order to Dismiss as Illegal and Non-Constitutional in Violation of Defendant's Constitutional Rights, TN. Law and U.S. Federal Rules, by Court in Conference March 27, 2019	Dismissed
279A19	Global Textile Alliance, Inc. v. TDI Worldwide, LLC, et al.	Plt's Motion to Admit Stanley E. Woodward, Jr. Pro Hac Vice	Allowed **08/07/2019**
291P19	State v. Harvey Lee Stevens, Jr.	1. Def's Motion for Temporary Stay (COA17-584) 2. Def's Petition for Writ of Supersedeas	1. Allowed **08/01/2019** 2.
293A19	State v. Adam Richard Carey	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas	1. Allowed **08/05/2019** 2.
294P19	State v. Leo Kearney	Def's Pro Se Motion for Extension of Time to File Federal Habeas Corpus Petition	Dismissed **08/02/2019**
309P15-7	State v. Reginald Underwood Fullard	Def's Pro Se Motion for Objection Entry to Motion to Dismissed by Order of Court Conference of 9 May 2019	Dismissed
310P19	State v. Luis Guillermo Neira	1. Def's Motion for Temporary Stay (COA19-653; COAP19-380) 2. Def's Petition for Writ of Supersedeas 3. Def's Petition for Writ of Certiorari to Review Order of the COA 4. Def's Motion to Adjudicate Petitions and Motions Without Undue Delay 5. Def's Motion to Issue a Brief Precedential Published Order but Not a Full Opinion on the Issues 6. Def's Motion to Seal All Motions and Petitions Filed Before this Court 7. Def's Motion to Seal All Motions and Petitions Filed Before the COA 8. Def's Motion to Allow Defendant to Proceed Using the Pseudonym "John Doe" or "L.G.N." at this Court 9. Def's Motion to Allow Defendant to Proceed Using the Pseudonym "John Doe" or "L.G.N." at the COA	1. Denied **08/12/2019** 2. Denied **08/12/2019** 3. Denied **08/12/2019** 4. Dismissed as moot **08/12/2019** 5. Dismissed **08/12/2019** 6. Denied **08/12/2019** 7. Denied **08/12/2019** 8. Denied **08/12/2019** 9. Denied **08/12/2019**

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		10. Def's Motion to Re-caption the Above-Titled Action to "State of North Carolina v John Doe" or "State of North Carolina v. L.G.N." 11. Def's Motion to Re-caption the Titled of the COA Action to "State of North Carolina v John Doe" or "State of North Carolina v. L.G.N." 12. Def's Motion to Bar the COA from Publishing any Documents, Particularly Opinions, Containing the Def's Real Name During the Pendency of His Action Before this Court	10. Denied **08/12/2019** 11. Denied **08/12/2019** 12. Denied **08/12/2019**
316P18-2	Johnny Jermaine McMillan v. Harvey Clay, Superintendent (Now referred to as Warden) of Lumberton Correctional Institution, State of N.C.	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **07/11/2019**
317P16-3	State v. Ronald Thompson Corbett	1. Def's Pro Se Motion for Notice of Petition to Appeal (COA18-327) 2. Def's Pro Se Motion to Make Appeal Private and Sealed	1. Dismissed *ex mero motu* 2. Dismissed as moot **Davis, J. recused**
319P18	Dale Thomas Winkler; and DJ's Heating Service v. North Carolina State Board of Plumbing, Heating & Fire Sprinkler Contractors	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA17-873) 2. Def's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed
324A16	State v. Antwan Anthony (DEATH)	Def's Motion to Provide Full Transcript to Defendant	Special Order
327P18	DavFam, LLC v. Arthur E. Davis, III	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA18-43)	Denied **Davis, J. recused**

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332P18	State v. Michael Stanley Mazur and Anne-Marie Mazur	1. Def's (Anne-Marie Mazur) Motion for Temporary Stay (COA17-736)	1. Allowed **10/05/2018** Dissolved **08/14/2019**
		2. Def's (Anne-Marie Mazur) Petition for Writ of Supersedeas	2. Denied
		3. Def's (Anne-Marie Mazur) Notice of Appeal Based Upon a Constitutional Question	3. ---
		4. Def's (Anne-Marie Mazur) PDR Under N.C.G.S. § 7A-31	4. Denied
		5. State's Motion to Dismiss Appeal	5. Allowed
		6. Def's (Michael Stanley Mazur) Motion for Temporary Stay (COA17-736)	6. Allowed **10/08/2018** Dissolved **08/14/2019**
		7. Def's (Michael Stanley Mazur) Petition for Writ of Supersedeas	7. Denied
		8. Def's (Michael Stanley Mazur) PDR Under N.C.G.S. § 7A-31	8. Denied
341P18	State v. Olivia Chisholm	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA18-23)	Denied
343P18	Mario Seguro-Suarez, by and through his Guardian *Ad Litem*, Edward G. Connette v. Key Risk Insurance Company, Joseph J. Abriola, Sharon Sosebee, Suzanne McAuliffe, Cheryl Gless, Robert E. Hill, and Carolina Investigative Services, Inc.	1. Defs' (Key Risk Insurance Company, Joseph J. Abriola, Sharon Sosebee, Suzanne McAuliffe, and Cheryl Gless) PDR Under N.C.G.S. § 7A-31 (COA17-697)	1. ---
		2. Defs' (Key Risk Insurance Company, Joseph J. Abriola, Sharon Sosebee, Suzanne McAuliffe, and Cheryl Gless) Motion to Withdraw PDR	2. Allowed **07/12/2019** **Davis, J. recused**
349P09-3	State v. Jeffrey Robinson	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP19-222)	Denied **06/25/2019**
362P17-3	James Cornell Howard v. Wayne County Clerk of Court	Def's Pro Se Petition for Writ of Mandamus	Denied **Davis, J. recused**

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378P18-4	State v. Napier Sandford Fuller	1. Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COAP18-623) 2. Def's Pro Se Motion for Emergency Stay	1. Denied **06/21/2019** 2. Denied **06/21/2019**
379P18	State v. Van Buren Killette, Sr.	Def's PDR Under N.C.G.S. § 7A-31 (COA18-26)	Special Order
392P18	State v. Kevin Deshaun Dixon	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1333)	Denied **Davis, J. recused**
398P18	Town of Pinebluff v. Moore County, Catherine Graham in her capacity as a County Commissioner, Nick Picerno in his capacity as a County Commissioner, Otis Ritter in his capacity as a County Commissioner, Randy Saunders in his capacity as a County Commissioner, and Jerry Daeke in his capacity as a County Commissioner	Defs' PDR Under N.C.G.S. § 7A-31 (COA17-286)	Allowed
399P18	State v. Joshua A. Bice	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1188)	Denied
402PA15-3	State v. Donna Helms Ledbetter	1. Def's PDR Under N.C.G.S. § 7A-31 (COA15-414-3) 2. Def's Motion for Temporary Stay 3. Def's Petition for Writ of Supersedeas 4. State's Motion to Dismiss PDR	1. Special Order 2. Allowed **10/15/2018** Dissolved **08/14/2019** 3. Denied 4. Dismissed as moot
406PA18	State v. Cory Dion Bennett	1. Amicus Curiae's (Coalition of State and National Criminal Justice and Civil Rights Advocates) Motion for Leave to Participate in Oral Argument 2. Amicus Curiae's (Korematsu Center) Motion for Leave to Participate in Oral Argument	1. Denied 2. Denied

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414P18	State v. Owen P. Williams	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-620) 2. State's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed as moot
420P18	State v. Temon Tavoi McNeil	1. State's Motion for Temporary Stay (COA18-175) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **11/28/2018** Dissolved **08/14/2019** 2. Denied 3. Denied
449P11-22	Charles Everette Hinton v. State of North Carolina, et al.	1. Plt's Pro Se Motion for En Banc Judicial Writ of Sequestration 2. Plt's Pro Se Motion for En Banc Ex Parte Replevin at Common-Law Action 3. Plt's Pro Se Motion for Independent Judicial Writ for Certiorari	1. Dismissed 2. Dismissed 3. Dismissed **Ervin, J. recused**
432P18	Jian Shen v. Charles Hugh McGowan, III	Def's PDR Under N.C.G.S. § 7A-31 (COA18-263)	Denied
433P18	Rebecca B. Everett and Simon J. Everett, Co-Administrators of the Estate of Simon T. Everett v. Duke Energy Carolinas, LLC; and FDB, LLC	1. Def's (Duke Energy Carolinas, LLC) PDR Under N.C.G.S. § 7A-31 (COA18-159) 2. Def's (FDB, LLC) PDR Under N.C.G.S. § 7A-31 3. Plts' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied 3. Dismissed as moot
434PA18	PHG Asheville, LLC v. City of Asheville	Respondent's Motion to Supplement the Record on Appeal	Allowed
437PA18	Chavez et al. v. Carmichael	1. United States of America's Motion for Leave to File Amicus Brief 2. United States of America's Motion to Amend Certificate of Service 3. Amicus Curiae's Motion to Admit Joshua S. Press Pro Hac Vice 4. Amicus Curiae's (United States of America) Motion to Participate at Oral Argument	1. Allowed **07/31/2019** 2. Allowed **08/02/2019** 3. Allowed **08/02/2019** 4. Denied
451P18	State v. Kendrick Louis Robinson	Def's PDR Under N.C.G.S. § 7A-31 (COA17-1262)	Denied **Davis, J. recused**

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453P18	State v. Barbara Jean Myers-McNeil	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA17-1404) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Deem Response Timely Filed 4. Def's Motion for Temporary Stay 5. Def's Petition for Writ of Supersedeas 6. Def's Motion to File an Amended PDR 7. Def's Amended PDR under N.C.G.S. § 7A-31 8. Def's Petition in the Alternative for Writ of Certiorari to Review Decision of the COA	1. Dismissed *ex mero motu* 2. Dismissed as moot 3. Allowed 4. Allowed **04/17/2019** Dissolved **08/14/2019** 5. Denied 6. Allowed 7. Denied 8. Dismissed as moot
455A18	John Tyler Routten v. Kelly Georgene Routten	1. Def's Pro Se Notice of Appeal Based Upon A Constitutional Question (COA17-1360) 2. Def's Pro Se PDR Under N.C.G.S § 7A-31 3. Plt's Notice of Appeal Based Upon a Dissent	1. Dismissed *ex mero motu* 2. Denied 3. ---
499P04-3	Andre M. Spates v. State of North Carolina, et al.	Petitioner's Pro Se Petition for Writ of Mandamus	Denied
504P04-3	State v. Marion Beasley, Sr.	1. Def's Pro Se Motion for Appeal (COAP19-167) 2. Def's Pro Se Motion for Declaratory Judgment	1. Dismissed 2. Dismissed
548A04-2	State v. Vincent Lamont Harris	1. State's Motion for Temporary Stay (COA18-952) 2. State's Petition for Writ of Supersedeas	1. Allowed **07/17/2019** 2.
580P05-16	State v. David Lee Smith	Def's Pro Se Motion for PDR	Dismissed **Ervin, J., recused**

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597P01-6	State v. Maechel Shawn Patterson	1. Def's Pro Se Motion for Amended Notice of Appeal (COAP17-245) 2. Def's Pro Se Motion for PDR 3. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA	1. Dismissed 2. Denied 3. Dismissed **Ervin, J. recused**

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Beaufort County
	)	
ORLANDO COOPER	)	

No. 90P19

ORDER

The State's petition for discretionary review is decided as follows: The Court allows the State's petition for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decision in *State v. Grady* (No. 179A14-3) (16 August 2019), including determining what, if any, additional proceedings should be utilized in order to properly decide the questions that will be before it on remand.

By order of the Court in conference, this the 4th day of September, 2019.

s/Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of September, 2019.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk
Clerk, Supreme Court of
North Carolina

STATE v. DRAVIS

[372 N.C. 721 (2019)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Wake County
	)	
FRED DRAVIS	)	

No. 305P18

ORDER

The State's petition for discretionary review is decided as follows: The Court allows the State's petition for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decision in *State v. Grady* (No. 179A14-3) (16 August 2019), including determining what, if any, additional proceedings should be utilized in order to properly decide the questions that will be before it on remand.

By order of the Court in conference, this the 4th day of September, 2019.

Davis, J., recused.

s/Earls, J.

For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of September, 2019.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk
Clerk, Supreme Court of
North Carolina

STATE OF NORTH CAROLINA	)	
	)	
v.	)	FORSYTH COUNTY
	)	
AARON LEE GORDON	)	

No. 312P18

ORDER

The State's petition for discretionary review is decided as follows: The Court allows the State's petition for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decision in *State v. Grady* (No. 179A14-3) (16 August 2019), including determining what, if any, additional proceedings should be utilized in order to properly decide the questions that will be before it on remand.

By order of the Court in conference, this the 4th day of September, 2019.

s/Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of September, 2019.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk
Clerk, Supreme Court of
North Carolina

STATE v. GRIFFIN

[372 N.C. 723 (2019)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Craven County
	)	
THOMAS EARL GRIFFIN	)	

No. 270A18

ORDER

The State's notice of appeal is decided as follows: The Court, on its own motion, dismisses the State's notice of appeal and remands this case to the Court of Appeals for further consideration in light of this Court's decision in *State v. Grady* (No. 179A14-3) (16 August 2019), including determining what, if any, additional proceedings should be utilized in order to properly decide the questions that will be before it on remand.

By order of the Court in conference, this the 4th day of September, 2019.

Davis, J., recused.

s/Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of September, 2019.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk
Clerk, Supreme Court of
North Carolina

STATE v. SPRINGLE

[372 N.C. 724 (2019)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Carteret County
	)	
ROBERT HUGHES SPRINGLE	)	

No. 329P18

ORDER

Defendant's alternative petition for writ of certiorari to review order of the Court of Appeals is decided as follows: The Court allows defendant's petition for the limited purpose of remanding this case to the Court of Appeals for further consideration in light of this Court's decision in *State v. Grady* (No. 179A14-3) (16 August 2019).

By order of the Court in conference, this the 4th day of September, 2019.

s/Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of September, 2019.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk
Clerk, Supreme Court of
North Carolina

STATE v. WESTBROOK

[372 N.C. 725 (2019)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Forsyth County
	)	
AARON KENARD WESTBROOK	)	

No. 301A18

ORDER

The State's notice of appeal is decided as follows: The Court, on its own motion, dismisses the State's notice of appeal and remands this case to the Court of Appeals for further consideration in light of this Court's decision in *State v. Grady* (No. 179A14-3) (16 August 2019).

By order of the Court in conference, this the 4th day of September, 2019.

Davis, J., recused.

s/Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of September, 2019.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk
Clerk, Supreme Court of
North Carolina

STATE v. WHITE

[372 N.C. 726 (2019)]

STATE OF NORTH CAROLINA	)	
	)	
v.	)	Durham County
	)	
MICHELLE SMITH WHITE	)	

No. 302A18

ORDER

The State's notice of appeal is decided as follows: The Court, on its own motion, dismisses the State's notice of appeal and remands this case to the Court of Appeals for further consideration in light of this Court's decision in *State v. Grady* (No. 179A14-3) (16 August 2019), including determining what, if any, additional proceedings should be utilized in order to properly decide the questions that will be before it on remand.

By order of the Court in conference, this the 4th day of September, 2019.

Davis, J., recused.

s/Earls, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 6th day of September, 2019.

AMY FUNDERBURK
Clerk, Supreme Court of
North Carolina

s/Amy Funderburk
Clerk, Supreme Court of
North Carolina

DISPOSITION OF PETITIONS (SPECIAL CONFERENCE)

4 SEPTEMBER 2019

090P19	State v. Orlando Cooper	1. State's Motion for Temporary Stay (COA18-637)	1. Allowed **03/20/2019** Dissolved **09/04/2019**
		2. State's Petition for Writ of Supersedeas	2. Dismissed as moot
		3. State's PDR Under N.C.G.S. § 7A-31	3. Special Order
270A18	State v. Thomas Earl Griffin	1. State's Motion for Temporary Stay (COA17-386)	1. Allowed **08/24/2018** Dissolved **09/04/2019**
		2. State's Petition for Writ of Supersedeas	2. Dismissed as moot
		3. State's Notice of Appeal Based Upon a Dissent	3. Special Order
		4. State's PDR as to Additional Issues	4. Dismissed as moot
		5. State's Motion to Take Judicial Notice of Public Records	5. Dismissed as moot
		6. Def's Motion to Amend Response to PDR	6. Dismissed as moot
			Davis, J., recused
301A18	State v. Aaron Kenard Westbrook	1. State's Motion for Temporary Stay (COA18-32)	1. Allowed **09/13/2018** Dissolved **09/04/2019**
		2. State's Petition for Writ of Supersedeas	2. Allowed **09/13/2018** Dissolved **09/04/2019**
		3. State's Notice of Appeal Based Upon a Dissent	3. Special Order
		4. Def's Motion to Dismiss State's Appeal	4. Dismissed as moot
		5. Def's Motion to Stay Briefing Schedule Until Resolution of the Motion to Dismiss	5. Allowed **11/08/2018**
			Davis, J., recused

DISPOSITION OF PETITIONS (SPECIAL CONFERENCE)

4 SEPTEMBER 2019

302A18	State v. Michelle Smith White	1. State's Motion for Temporary Stay (COA18-39) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent 4. Defendant's Motion to Dismiss State's Appeal 5. Def's Motion to Stay Briefing Schedule Until Resolution of the Motion to Dismiss	1. Allowed **09/13/2018** Dissolved **09/04/2019** 2. Allowed **09/13/2018** Dissolved **09/04/2019** 3. Special Order 4. Dismissed as moot 5. Allowed **11/08/2018** **Davis, J., recused**
305P18	State v. Fred Dravis	1. State's Motion for Temporary Stay (COA18-76) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Amend Response to State's PDR	1. Allowed **09/13/2018** Dissolved **09/04/2019** 2. Dismissed as moot 3. Special Order 4. Dismissed as moot **Davis, J., recused**
312P18	State v. Aaron Lee Gordon	1. State's Motion for Temporary Stay (COA17-1077) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Amend Response to PDR	1. Allowed **09/21/2018** Dissolved **09/04/2019** 2. Dismissed as moot 3. Special Order 4. Dismissed as moot

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

4 SEPTEMBER 2019

329P18	State v. Robert Hughes Springle	1. Def's PDR Under N.C.G.S. § 7A-31 (COA17-652)	1. Dismissed as moot
		2. Def's Petition in the Alternative for Writ of Certiorari to Review Order of Superior Court, Carteret County	2. Dismissed as moot
		3. Def's Petition in the Alternative for Writ of Certiorari to Review Order of the COA	3. Special Order
		4. Def's Motion to Amend PDR and Alternative Petition for Writ of Certiorari	4. Dismissed as moot

ORDER AMENDING THE GENERAL RULES OF PRACTICE FOR THE SUPERIOR AND DISTRICT COURTS

Pursuant to section 7A-34 of the General Statutes of North Carolina, the Court hereby amends Rule 26 of the General Rules of Practice for the Superior and District Courts.

* * *

~~Rule 26. Secure Leave Periods for Attorneys~~

~~(A) **Purpose, Authorization.** In order to secure for the parties to actions and proceedings pending in the Superior and District Courts, and to the public at large, the heightened level of professionalism that an attorney is able to provide when the attorney enjoys periods of time that are free from the urgent demands of professional responsibility and to enhance the overall quality of the attorney's personal and family life, any attorney may from time to time designate and enjoy one or more secure leave periods each year as provided in this Rule.~~

~~(B) **Length, Number.** A secure leave period shall consist of one or more complete calendar weeks. During any calendar year, an attorney's secure leave periods pursuant to this Rule and to Rule 33A of the Rules of Appellate Procedure shall not exceed, in the aggregate, three calendar weeks.~~

~~(C) **Designation, Effect.** To designate a secure leave period an attorney shall file a written designation containing the information required by subsection (D), with the official specified in subsection (E), and within the time provided in subsection (F). Upon such filing, the secure leave period so designated shall be deemed allowed without further action of the court, and the attorney shall not be required to appear at any trial, hearing, in-court or out-of-court deposition, or other proceeding in the Superior or District Courts during that secure leave period.~~

~~(D) **Content of Designation**. The designation shall contain the following information:~~

- ~~(1) the attorney's name, address, telephone number and state bar number,~~
- ~~(2) the date of the Monday on which the secure leave period is to begin and of the Friday on which it is to end,~~
- ~~(3) the dates of all other secure leave periods during the current calendar year that have previously been designated by the attorney pursuant to this Rule and to Rule 33A of the Rules of Appellate Procedure,~~

(4) a statement that the secure leave period is not being designated for the purpose of delaying, hindering or interfering with the timely disposition of any matter in any pending action or proceeding, and

(5) a statement that no action or proceeding in which the attorney has entered an appearance has been scheduled, peremptorily set or noticed for trial, hearing, deposition or other proceeding during the designated secure leave period.

(E) **Where to File Designation.** The designation shall be filed as follows:

(1) if the attorney has entered an appearance in any criminal action, in the office of the District Attorney for each prosecutorial district in which any such case or proceeding is pending;

(2) if the attorney has entered an appearance in any civil action, either

(a) in the office of the trial court administrator for each superior court district and district court district in which any such case is pending or,

(b) if there is no trial court administrator for a superior court district, in the office of the Senior Resident Superior Court Judge for that district,

(c) if there is no trial court administrator for a district court district, in the office of the Chief District Court Judge for that district;

(3) if the attorney has entered an appearance in any special proceeding or estate proceeding, in the office of the Clerk of Superior Court of the county in which any such matter is pending;

(4) if the attorney has entered an appearance in any juvenile proceeding, with the juvenile case calendaring clerk in the office of the Clerk of Superior Court of the county in which any such proceeding is pending.

(F) **When to File Designation.** To be effective, the designation shall be filed:

(1) no later than ninety (90) days before the beginning of the secure leave period, and

~~(2) before any trial, hearing, deposition or other matter has been regularly scheduled, peremptorily set or noticed for a time during the designated secure leave period.~~

~~(G) **Procedure When Court Proceeding Scheduled Despite Designation**. If, after a designation of a secure leave period has been filed pursuant to this rule, any trial, hearing, in-court deposition or other in-court proceeding is scheduled or peremptorily set for a time during the secure leave period, the attorney shall file with the official by whom the matter was calendared or set, and serve on all parties, a copy of the designation with a certificate of service attached. Any party may, within ten days after service of the copy of the designation and certificate of service, file a written objection with that official and serve a copy on all parties. The only ground for objection shall be that the designation was not in fact filed in compliance with this Rule. If no objection is filed, that official shall reschedule the matter for a time that is not within the attorney's secure leave period. If an objection is filed, the court shall determine whether the designation was filed in compliance with this Rule. If the court finds that the designation was filed as provided in this Rule, it shall reschedule the matter for a time that is not within the attorney's secure leave period. If the court finds the designation was not so filed, it shall enter any scheduling, calendaring or other order that it finds to be in the interests of justice.~~

~~(H) **Procedure When Deposition Scheduled Despite Designation.** If, after a designation of a secure leave period has been filed pursuant to this Rule, any deposition is noticed for a time during the secure leave period, the attorney may serve on the party that noticed the deposition a copy of the designation with a certificate of service attached, and that party shall reschedule the deposition for a time that is not within the attorney's secure leave period. Any dispute over whether the secure leave period was properly designated pursuant to this Rule shall be resolved pursuant to the portions of the Rules of Civil Procedure, G.S. 1A-1, that govern discovery.~~

~~(I) Nothing in this Rule shall limit the inherent power of the Superior and District Courts to reschedule a case to allow an attorney to enjoy a leave during a period that has not been designated pursuant to this Rule, but there shall be no entitlement to any such leave.~~

Rule 26. Secure-Leave Periods for Attorneys

(a) **Definition; Entitlement.** A "secure-leave period" is one complete calendar week that is designated by an attorney during which the superior courts and the district courts may not hold a proceeding in any case in which that attorney is an attorney of record. An attorney is

entitled to enjoy a secure-leave period that has been designated according to this rule.

(b) **Allowance.**

(1) Within a calendar year, an attorney may enjoy three different secure leave periods for any purpose. A secure-leave period that spans across calendar years counts against the attorney's allowance for the first calendar year.

(2) Within the twenty-four weeks after the birth or adoption of an attorney's child, that attorney may enjoy twelve additional secure-leave periods for the purpose of caring for the child.

(c) **Form of Designation.** An attorney must designate his or her secure leave periods in writing.

(d) **Content of Designation.** An attorney's designation of a secure-leave period must contain the following information:

(1) the attorney's name, address, e-mail, telephone number, and state bar number;

(2) the date of the Sunday on which the secure-leave period is to begin and the date of the Saturday on which it is to end;

(3) the allowance that the secure-leave period will count against, with reference to either subsection (b)(1) or (b)(2) of this rule;

(4) the dates of any previously designated secure-leave periods that count against that allowance;

(5) a statement that the secure-leave period is not being designated for the purpose of interfering with the timely disposition of any proceeding;

(6) a statement that the attorney has taken adequate measures to protect the interests of the attorney's clients during the secure leave period; and

(7) the attorney's signature and the date on which the attorney submits the designation.

(e) **Where to Submit Designation.**

(1) **In Criminal Actions.** The attorney must submit his or her designation of a secure-leave period to the office of the district attorney for each prosecutorial district in which the attorney's criminal actions are pending.

(2) **In Civil Actions.** The attorney must submit his or her designation of a secure-leave period to the office of the senior resident superior court judge for each superior court district and to the office of the chief district court judge for each district court district in which the attorney's civil actions are pending.

(3) **In Special Proceedings and Estate Proceedings.** The attorney must submit his or her designation of a secure-leave period to the office of the clerk of the superior court of the county in which the attorney's special proceedings or estate proceedings are pending.

(4) **In Juvenile Proceedings.** The attorney must submit his or her designation of a secure-leave period to the juvenile case calendaring clerk in the office of the clerk of the superior court of the county in which the attorney's juvenile proceedings are pending.

(f) **When to Submit Designation.** An attorney must submit his or her designation of a secure-leave period:

(1) at least ninety days before the secure-leave period begins; and

(2) before a proceeding in any of the attorney's cases is scheduled for a time that conflicts with the secure-leave period.

But because of the uncertainty of a child's birth or adoption date, the superior court or district court scheduling authority must make reasonable exception to these requirements so that an attorney may enjoy leave with the child.

(g) **Depositions.** A party may not notice a deposition for a time that conflicts with a secure-leave period that another party's attorney has designated according to this rule.

(h) **Other Leave**. Nothing in this rule limits the inherent power of the superior courts or the district courts to allow an attorney to enjoy leave that has not been designated according to this rule.

* * *

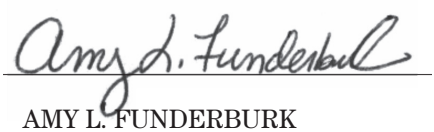
This amendment to the General Rules of Practice for the Superior and District Courts is effective for secure-leave periods designated on or after 11 September 2019.

This amendment shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 4th day of September, 2019.

For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of September, 2019.



AMY L. FUNDERBURK
Clerk of the Supreme Court

ORDER AMENDING THE RULES OF APPELLATE PROCEDURE

Pursuant to Article IV, Section 13(2), of the Constitution of North Carolina, the Court hereby amends the North Carolina Rules of Appellate Procedure. This order affects Rule 3.1 and Rule 33.1.

* * *

Rule 3.1. Review in Cases Governed by Subchapter I of the Juvenile Code

(a) **Scope.** This rule applies in appeals filed under N.C.G.S. § 7B-1001 and in cases certified for review by the appellate courts in which the right to appeal under this statute has been lost.

(b) **Filing the Notice of Appeal.** Any party entitled to an appeal under N.C.G.S. § 7B-1001(a) and (a1) may take appeal by filing notice of appeal with the clerk of superior court and serving copies of the notice on all other parties in the time and manner set out in N.C.G.S. § 7B-1001(b) and (c).

(c) **Expediting the Delivery of the Transcript.** The clerk of superior court must complete the Expedited Juvenile Appeals Form within one business day after the notice of appeal is filed. The court reporting manager of the Administrative Office of the Courts must assign a transcriptionist for the appeal within five business days after the clerk completes the form.

The transcriptionist must produce the transcript of the entire proceedings at the State's expense if there is an order that establishes the indigency of the appellant. Otherwise, the appellant has ten days after the transcriptionist is assigned to contract for the transcription of the entire proceedings. In either situation, the transcriptionist must deliver electronically the transcript to each party to the appeal within forty days after receiving the assignment.

(d) **Expediting the Filing of the Record on Appeal.** The parties may settle the record on appeal by agreement at any time before the record on appeal is settled by any other procedure described in this subsection.

Absent agreement, the appellant must serve a proposed record on appeal on each party to the appeal within fifteen days after delivery of the transcript. Within ten days after having been served with the proposed record on appeal, the appellee may serve on each party to the appeal:

(1) a notice of approval of the proposed record on appeal;

(2) specific objections or amendments to the proposed record on appeal; or

(3) a proposed alternative record on appeal.

If the appellee serves a notice of approval, then this notice settles the record on appeal. If the appellee serves specific objections or amendments, or a proposed alternative record on appeal, then the provisions of Rule 11(c) apply. If the appellee fails to serve a notice of approval, specific objections or amendments, or a proposed alternative record on appeal, then the expiration of the ten-day period to serve one of these documents settles the record on appeal.

The appellant must file the record on appeal within five business days after the record is settled.

(e) **No-Merit Briefs.** When counsel for the appellant concludes that there is no issue of merit on which to base an argument for relief, counsel may file a no merit brief. The appellant then may file a pro se brief within thirty days after the date of the filing of counsel's no-merit brief.

In the no-merit brief, counsel must identify any issues in the record on appeal that arguably support the appeal and must state why those issues lack merit or would not alter the ultimate result. Counsel must provide the appellant with a copy of the no-merit brief, the transcript, the printed record on appeal, and any supplements or exhibits that have been filed with the appellate court. Counsel must inform the appellant in writing that the appellant may file a pro se brief and that the pro se brief is due within thirty days after the date of the filing of the no-merit brief. Counsel must attach evidence of this communication to the no-merit brief.

(f) **Word-Count Limitations Applicable to Briefs.** Briefs filed in the Supreme Court or in the Court of Appeals must comply with the word-count limitations found in Rule 28(j).

(g) **Motions for Extensions of Time.** Motions for extensions of time to produce and deliver the transcript, to file the record on appeal, and to file briefs are disfavored and will be allowed by the appellate courts only in extraordinary circumstances.

(h) **Duty of Trial Counsel.** Trial counsel for the appellant has a duty to assist appellate counsel with the preparation and service of appellant's proposed record on appeal.

(i) **Electronic Filing Required.** Unless granted an exception for good cause, counsel must file all documents electronically.

* * *

Rule 33.1. Secure-Leave Periods for Attorneys

(a) **Definition; ~~Authorization~~Entitlement**. A "secure-leave period" is ~~a period of time~~one complete calendar week that is designated by an attorney ~~in~~during which the appellate courts will not hold oral argument in any case in which that attorney is ~~listed as~~ an attorney of record. ~~An attorney may designate secure-leave periods as provided in this rule~~An attorney is entitled to enjoy a secure-leave period that has been designated according to this rule.

~~(b) **Length; Number.** A secure-leave period shall consist of one complete calendar week. During a calendar year, an attorney may designate three different weeks as secure-leave periods.~~

(b) **Allowance.**

(1) Within a calendar year, an attorney may enjoy three different secure leave periods for any purpose.

(2) Within the twenty-four weeks after the birth or adoption of an attorney's child, that attorney may enjoy twelve additional secure-leave periods for the purpose of caring for the child.

(c) **How to Submit Designation.** An attorney ~~shall designate~~must submit his or her ~~secure-leave periods on~~designation of a secure-leave period using the electronic filing site of the appellate courts at https://www.ncappellatecourts.org.

(d) **When to ~~Designate~~Submit Designation.** ~~An attorney shall designate a secure-leave period at least ninety days before it begins.~~An attorney must submit his or her designation of a secure-leave period:

(1) at least ninety days before the secure-leave period begins; and

(2) before oral argument in any of the attorney's cases is scheduled for a time that conflicts with the secure-leave period.

But because of the uncertainty of a child's birth or adoption date, the Supreme Court and the Court of Appeals will make reasonable exception to these requirements so that an attorney may enjoy leave with the child.

* * *

The amendment to Rule 3.1 of the North Carolina Rules of Appellate Procedure becomes effective on 11 September 2019. The amendment to

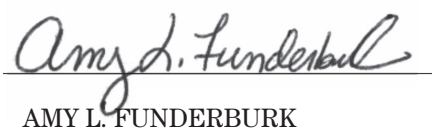
Rule 33.1 of the North Carolina Rules of Appellate Procedure is effective for secure-leave periods designated on or after 11 September 2019.

These amendments shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 4th day of September, 2019.

For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of September, 2019.



AMY L. FUNDERBURK
Clerk of the Supreme Court

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