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GENERAL RULES OF PRACTICE; STATE BAR RULES AND REGULATIONS; ANNUAL MEMBERSHIP FEES; DISCIPLINE AND DISABILITY OF ATTORNEYS; PROCEDURES FOR ADMINISTRATIVE COMMITTEE; CERTIFICATION STANDARDS FOR IMMIGRATION LAW SPECIALTY; PROFESSIONAL CORPORATIONS AND LLCS PRACTICING LAW; REGISTRATION OF INTERSTATE AND INTERNATIONAL LAW FIRMS; PREPAID LEGAL SERVICES PLANS; BOARD OF LAW EXAMINERS

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

NOVEMBER 30, 2020

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 25 SEPTEMBER 2020

ORDERS

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Grounds for termination—neglect—sufficiency of findings—void permanency planning hearings and orders—There was insufficient evidence to terminate a father's parental rights on the grounds of neglect where nearly all of the trial court's findings of fact related directly to permanency planning and review hearings that were legally void because no juvenile petition was ever filed (pursuant to N.C.G.S. § 7B-402(a) and 403(a)). There was no evidence that the father had neglected the child (who had never been in his custody) or that he would neglect her if she were in his care; rather, the evidence showed that the father was successfully caring for three other minor children. Findings related to the father's history of marijuana use and the loss of his job and housing were also insufficient to support the conclusion that the father was likely to neglect the child in the future. **In re E.B., 310.**

Grounds for termination—willful abandonment—lack of contact and show of affection—The trial court's findings in a proceeding to terminate a mother's parental rights were supported by evidence and in turn supported the court's conclusion that the mother willfully abandoned her child. Although the mother was incarcerated during the determinative six-month period, she was not barred by court order from contacting her son and took no steps to communicate with him through several possible relatives, nor did she show any affection or concern toward him. **In re L.M.M., 346.**

Grounds for termination—willful abandonment—sufficiency of findings—void permanency planning hearings and orders—There was insufficient evidence to terminate a father's parental rights on the grounds of willful abandonment where nearly all of the trial court's findings of fact related directly to permanency planning and review hearings that were legally void because no juvenile petition was ever filed (pursuant to N.C.G.S. § 7B-402(a) and 403(a)). The father's failure to attend these hearings and comply with the resulting void orders could not support termination of his parental rights; furthermore, the father made ongoing efforts before and throughout the determinative time period to obtain custody of his child—even though the trial court and the county department of social services lacked the authority to keep the child out of his custody. **In re E.B., 310.**

Grounds—willful abandonment—findings of fact—conclusions of law—The trial court properly terminated a father's parental rights to his two children on the ground of willful abandonment (N.C.G.S. § 7B-1111(a)(7)) where for two and a half years, including the six months before the termination petition was filed, the father made only one attempt to see his children and did not provide them any emotional,

material, or financial support. Clear, cogent, and convincing evidence supported enough of the findings of fact to support termination, and the trial court properly considered the father's conduct outside the determinative six-month window when evaluating his credibility and intentions. Importantly, the father's single attempt to visit his children did not undermine the court's ultimate finding and conclusion that he willfully abandoned his children. **In re J.D.C.H., 335.**

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No-merit brief—pro se arguments—neglect—The trial court's termination of a mother's parental rights on the grounds of neglect was affirmed where counsel filed a no-merit brief and the mother filed a pro se brief. The Supreme Court addressed the mother's pro se arguments, concluding that her challenge to the children's initial removal was foreclosed by an earlier appellate decision in the matter; her allegations of corruption, misconduct, and bias had no support in the record; and her argument that she did nothing wrong and that children cannot be removed just because they have witnessed domestic violence lacked any legal or factual basis. The termination order was based on clear, cogent, and convincing evidence and based on proper legal grounds. **In re J.A.M., 325.**

SCHEDULE FOR HEARING APPEALS DURING 2020

NORTH CAROLINA SUPREME COURT

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

January 6, 7, 8
February 3, 4
March 9, 10, 11, 12
April 6, 7, 20
May 4, 5, 6, 7
August 31
September 1, 2, 3
October 12, 13, 14, 15

THE ESTATE OF ANTHONY LAWRENCE SAVINO
v.
THE CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY, A NORTH CAROLINA HOSPITAL AUTHORITY, D/B/A CAROLINAS HEALTHCARE SYSTEM AND CMC-NORTHEAST

No. 18PA19

Filed 25 September 2020

1. Damages and Remedies—pain and suffering—evidentiary burden—medical malpractice

In a medical malpractice action against a hospital that treated plaintiff for chest pain, the trial court properly denied the hospital's motion for a directed verdict on pain and suffering damages because plaintiff sufficiently proved those damages where a cardiologist testified that plaintiff "more likely than not" suffered further chest pain at home before dying of a heart attack. Although there was no direct evidence to supplement this testimony and other evidence at trial contradicted it, plaintiff did not need direct evidence to prove damages and, under the applicable standard of review, any contradictory evidence had to be disregarded on appeal.

2. Medical Malpractice—pleading—administrative and medical negligence—arising from same facts—not separate claims

In a medical malpractice case where a hospital was found liable for plaintiff's death, the hospital was not entitled to a new trial on grounds that plaintiff's estate failed to plead administrative negligence as a separate claim from medical negligence in its complaint. An amendment to N.C.G.S. § 90-21.11—which broadened the definition of "medical malpractice action" to include breaches of administrative duties to patients that arise from the same set of facts as traditional, clinical malpractice claims—did not create a new cause of action but simply reclassified administrative negligence claims as medical malpractice actions instead of as general negligence cases. Thus, plaintiff was not required to plead administrative negligence as a separate claim and, instead, properly pleaded it as one of multiple theories underlying an overarching medical negligence claim.

3. Medical Malpractice—contributory negligence—not a defense—reckless conduct by hospital

In a medical malpractice case against a hospital that treated plaintiff for chest pain, where plaintiff—who did not report to hospital staff that emergency medical services had given him medication in the ambulance—died of a heart attack shortly after returning to his

home, the trial court properly granted plaintiff's motion for a directed verdict on the hospital's contributory negligence claim. The jury's unchallenged finding that the hospital's conduct in providing medical care to plaintiff was "in reckless disregard of the rights and safety of others" legally wiped out any contributory negligence defense.

Justice NEWBY dissenting.

On discretionary review pursuant to N.C.G.S. § 7A-31 of the unanimous decision of the Court of Appeals, 262 N.C. App. 526, 822 S.E.2d 565 (2018), reversing in part, and vacating in part, a judgment entered 8 December 2016 and orders entered 19 January 2017 by Judge Julia Lynn Gullett in Superior Court, Cabarrus County. On 9 May 2019 the Supreme Court allowed both plaintiff's petition for discretionary review and defendant's conditional petition for discretionary review. Heard in the Supreme Court on 7 January 2020.

Zaytoun Ballew & Taylor, PLLC, by Matthew D. Ballew, Robert E. Zaytoun and John R. Taylor; and Brown Moore & Associates, PLLC, by R. Kent Brown, Jon R. Moore, Paige L. Pahlke, for plaintiff.

Bradley Arant Boult Cummings, LLP, by Robert R. Marcus, Brian Rowlson and Jonathan Schulz; and Horack Talley Pharr & Lowndes, PA, by Kimberly Sullivan, for defendant.

Patterson Harkavy, LLP, by Burton Craige, Trisha S. Pande, and Narendra K. Ghosh, for North Carolina Advocates for Justice, amicus curiae.

HUDSON, Justice.

Pursuant to plaintiff's petition for discretionary review, we address whether the Court of Appeals erred by reversing the trial court's denial of defendant's motion for a directed verdict on pain and suffering damages. We also allowed review of plaintiff's additional issue per North Carolina Rule of Appellate Procedure 15(d): whether the Court of Appeals erred in holding that plaintiff failed to properly plead administrative negligence under N.C.G.S. § 90-21.11(2)(b). In addition, we allowed defendant's conditional petition for discretionary review of two issues: (1) whether defendant was entitled to a new trial because it was prejudiced by the intertwining of plaintiff's evidence and the trial court's instruction

to the jury on medical negligence and administrative negligence; and (2) whether the trial court erred by granting plaintiff's motion for a directed verdict on contributory negligence.

We modify and affirm in part, and reverse in part, the decision of the Court of Appeals because we conclude that (1) the trial court did not err by denying defendant's motion for a directed verdict on pain and suffering damages; (2) plaintiff was not required to plead a claim for administrative negligence separate from medical negligence; (3) defendant is not entitled to a new trial; and (4) the trial court did not err by granting plaintiff's motion for a directed verdict on contributory negligence.

Factual and Procedural Background

Just after 1:30 p.m. on 30 April 2012, Cabarrus County EMS was dispatched to the residence of Anthony Lawrence Savino. When EMS arrived, Mr. Savino was complaining of chest pain that was radiating down both of his arms and causing tingling and numbness. EMS checked his blood pressure and other vital signs in his residence before taking him into the ambulance. In the ambulance, EMS personnel performed an electrocardiogram which showed a normal sinus rhythm; this indicated that Mr. Savino was not currently having a heart attack. EMS gave him an I.V., four baby aspirin, and sublingual nitroglycerin, and notified CMC-Northeast that they were bringing him in as a chest pain patient.

On the way to the hospital, EMT Kimberly Allred prepared a document called an "EMS snapshot," which provides a quick summary of the care that EMS provided to a patient; the snapshot is usually left with the intake nurse at the hospital. In the snapshot, EMT Allred included Mr. Savino's demographics, vitals, and a description of the care provided to Mr. Savino en route to the hospital, including the medications he was given. Plaintiff alleges that this snapshot and the information it contained was never given nor communicated to his treating physician.

A few hours after arriving in the emergency room, Mr. Savino was discharged. Later that evening, his wife found him unresponsive in their home after he suffered a heart attack. Mr. Savino could not be resuscitated by EMS and was pronounced dead on the scene.

On 23 April 2014, Mr. Savino's Estate (plaintiff) filed a Complaint for Medical Negligence (the 2014 Complaint) against The Charlotte-Mecklenburg Hospital Authority, Carolinas Healthcare System, CMC-Northeast, the attending emergency physician, and the attending physician's practice. Defendants responded by filing an answer to the complaint. Then, on 2 January 2016, plaintiff filed a motion for leave to

amend the 2014 Complaint in light of documents produced by defendant and depositions taken after the production of the documents. Plaintiff asserted that the 2014 Complaint provided defendants with sufficient notice of its negligence allegations and that plaintiff was seeking to file an Amended Complaint "out of an abundance of caution." But on 12 January 2016, plaintiff withdrew the motion for leave to amend the complaint. On 19 January 2016, plaintiff filed a notice of voluntary dismissal of all claims against all parties, but without prejudice to re-file against defendants.

Plaintiff filed another "Complaint for Medical Negligence," (the 2016 Complaint) naming only The Charlotte-Mecklenburg Hospital Authority, Carolinas Healthcare System, and CMC-Northeast (collectively, "defendant"), on 1 February 2016. Defendant filed its answer on 5 April 2016.

During a hearing on pre-trial motions, plaintiff and defendant disputed whether the case involved two *theories* of medical negligence or two separate *claims* of medical and administrative negligence. Plaintiff argued that the 2016 Complaint contained both allegations that defendant did not meet the standard of care in "the delivery and provision of medical care" and allegations that defendant "failed to comply with its corporate duty or administrative duty." Plaintiff argued that both of these theories were part of the same medical negligence claim under N.C.G.S. § 90-21.11(2) (2011). Defendant argued, however, that only the first theory of medical negligence was alleged in the 2016 Complaint and then proceeded to object throughout the trial that plaintiff had not pled a separate administrative negligence claim.

The case was tried to the jury from 24 October 2016 through 15 November 2016. Plaintiff's theory of negligence at trial rested on the "hand-off" between EMS and CMC-Northeast which resulted in neither the EMS snapshot, nor the information contained within it—including Mr. Savino's chief complaint of chest pain and the fact that he was treated with aspirin and nitroglycerin—being given or communicated to his treating physician.

At the close of plaintiff's evidence, defendant moved for a directed verdict on two grounds: (1) the evidence was insufficient to support plaintiff's medical negligence claims; and (2) plaintiff failed to properly plead its claim that defendant was negligent in its monitoring and supervision.[1] The trial court denied the motion. Defendant renewed the

1. In the alternative, defendant argued that even if plaintiff had properly pled the negligent monitoring and supervision claim, that claim was time-barred because that allegation was not in the original 2014 Complaint.

motion for a directed verdict at the close of all evidence, and the trial court again denied it.

On 15 November 2016, the jury returned verdicts finding that decedent's death was caused by defendant's (1) negligence; and (2) negligent performance of administrative duties. The jury awarded plaintiff $6,130,000 in total damages: $680,000 in economic damages and $5,500,000 in non-economic damages. The trial court entered judgment in these amounts. Following the entry of judgment, the trial court entered another order determining that plaintiff was entitled to recover (1) $15,571.53 from defendant in costs; and (2) $417,847.15 in pre- and post-judgment interest.

On 16 December 2016, defendant filed a motion for either judgment notwithstanding the verdict (JNOV) or for a new trial. The trial court denied the motions in orders filed on 19 January 2017. Defendant appealed.

The Court of Appeals reversed in part and vacated in part the orders of the trial court; it also granted a new trial in part. *Estate of Savino v. Charlotte-Mecklenburg Hosp. Auth.*, 262 N.C. App. 526, 822 S.E.2d 565 (2018). First, the Court of Appeals held that the testimony of plaintiff's expert was insufficient to support the jury's award for pain and suffering. *Id.* at 557, 822 S.E.2d at 586. As a result—and because the jury's verdict did not allow the court to determine which portion of the non-economic damages consisted of the pain and suffering damages—the Court of Appeals remanded for a new trial on non-economic damages. Second, the Court of Appeals held that plaintiff did not sufficiently plead "administrative negligence." *Id.* at 534, 822 S.E.2d at 572. Specifically, it concluded that the allegations in the 2016 Complaint "were not sufficient to put defendant on notice of a claim of administrative negligence" and thus, "the trial court erred in allowing plaintiff to proceed on an administrative negligence theory in the medical malpractice action." *Id.* at 541, 822 S.E.2d at 576. However, the Court of Appeals held that the jury's verdict was not tainted by plaintiff being allowed to proceed on the administrative negligence theory, and thus that no new trial was required on this issue. *Id.* at 549–50, 822 S.E.2d at 581. Finally, the Court of Appeals held that the trial court did not err in granting a directed verdict to plaintiff on the issue of contributory negligence because Mr. Savino did not have "an affirmative duty to report that EMS gave him medication in the ambulance." *Id.* at 558–559, 822 S.E.2d at 586.

For the reasons discussed herein, we modify and affirm in part, and reverse in part, the decision of the Court of Appeals.

Analysis

On the issues presented by plaintiff, we conclude that (1) the Court of Appeals erred by reversing the trial court's denial of defendant's motion for a directed verdict on pain and suffering damages; and (2) plaintiff properly pled a medical negligence claim, but did not allege a separate claim for administrative negligence. On the issues presented by defendant, we conclude that (1) defendant is not entitled to a new trial; and (2) the trial court did not err by granting plaintiff's motion for a directed verdict on contributory negligence.

I. Standard of Review

The standard of review for a motion for directed verdict and a motion for judgment notwithstanding the verdict (JNOV) is the same. *Green v. Freeman*, 367 N.C. 136, 140, 749 S.E.2d 262, 267 (2013) (citing *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 323, 411 S.E.2d 133, 138 (1991)). Accordingly, we must determine "whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Id.* at 140, 749 S.E.2d at 267 (quoting *Davis*, 330 N.C. at 322, 411 S.E.2d at 138). "If 'there is evidence to support each element of the nonmoving party's cause of action, then the motion for directed verdict and any subsequent motion for [JNOV] should be denied.' " *Id.* at 140–41, 749 S.E.2d at 267 (quoting *Abels v. Renfro Corp.*, 335 N.C. 209, 215, 436 S.E.2d 822, 825 (1993)). Because the question of whether a party is entitled to a motion for directed verdict or JNOV is one of law, our review is de novo. *Id.* at 141,749 S.E.2d at 267 (citing *N.C. Farm Bureau Mut. Ins. Co. v. Cully's Motorcross Park, Inc.*, 366 N.C. 505, 512, 742 S.E.2d 781, 786 (2013); *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 720, 693 S.E.2d 640, 643 (2009)).

II. Pain and Suffering Damages

[1] First, we address the single issue raised in plaintiff's petition for discretionary review: the Court of Appeals' reversal of the trial court order denying defendant's motion for a directed verdict on pain and suffering damages. Because we conclude that plaintiff's expert's testimony presented sufficient evidence of pain and suffering, we hold the trial court did not err, and we reverse the Court of Appeals.

The legal standard for proof of damages is well-established. "Damages must be proved to a reasonable level of certainty, and may not be based on pure conjecture." *DiDonato v. Wortman*, 320 N.C. 423, 431, 358 S.E.2d 489, 493 (1987) (citing *Norwood v. Carter*, 242 N.C. 152, 156, 87 S.E.2d 2, 5 (1955)).

At trial, plaintiff offered testimony from several experts. Dr. Selwyn, an expert cardiologist, testified about Mr. Savino's pain and suffering earlier in the day of 30 April 2012 prior to his death as follows: "[H]e presented with a fairly typical picture of chest pain radiating to the stomach, up into the neck, to the hands, which went away with nitroglycerin." Dr. Selwyn then testified that Mr. Savino "more likely than not . . . would have got chest pain again" before his death.

This expert opinion, based on an analysis of decedent's symptoms and medical records, is precisely the kind of opinion that triers of fact rely on to help them "understand the evidence or to determine a fact in issue." N.C.R.E. 702(a) (2019). This review of decedent's symptoms was not "based on pure conjecture" but provided evidence of decedent's pain and suffering "to a reasonable level of certainty" for the jury to consider. *DiDonato*, 320 N.C. at 431, 358 S.E.2d at 493.

Although the Court of Appeals acknowledged that "testimony that something 'is more likely than not' is generally sufficient proof that something occurred," it concluded that such testimony was not sufficient here. *Savino*, 262 N.C. App. at 557, 822 S.E.2d at 585. This conclusion was in error. Although the Court of Appeals correctly noted that "it [wa]s not [its] job to reweigh the evidence," it nonetheless proceeded to reweigh the evidence by concluding that the testimony of plaintiff's expert "standing alone" was insufficient to prove damages because (1) there was "ample other evidence . . . that plaintiff may not have experienced any further chest pain"; and (2) plaintiff's expert "testified that there was 'no direct evidence' of chest pain following decedent's discharge from the emergency department." *Id.*

The Court of Appeals' reasoning was erroneous for two reasons. First, its weighing of plaintiff's expert's testimony against other evidence that decedent may not have experienced further chest pain contradicts our well-established standard of review of trial court decisions on directed verdicts, which requires appellate courts to disregard contradictory evidence. *See Bowen v. Gardner*, 275 N.C. 363, 366, 168 S.E.2d 47, 49 (1969) (requiring the movant's contradictory evidence to be disregarded when considering a motion for nonsuit); *see also Northern Nat. Life Ins. Co. v. Lacy J. Miller Mach. Co., Inc.*, 311 N.C. 62, 69, 316 S.E.2d 256, 261 (1984) ("A verdict may never be directed when there is conflicting evidence on contested issues of fact.").

Second, the Court of Appeals erred in apparently requiring plaintiff's expert to present "direct evidence" of chest pain. *Savino*, 262 N.C. App. at 557, 822 S.E.2d at 585. The evidentiary standard for damages requires

only proof "to a reasonable level of certainty." *DiDonato*, 320 N.C. at 431, 358 S.E.2d at 493 (citing *Norwood*, 242 N.C. at 156, 87 S.E.2d at 5). Competent opinion testimony, like Dr. Selwyn's, that "more likely than not" Mr. Savino would have experienced pain before his death, satisfies that standard. Furthermore, direct evidence is not required because circumstantial evidence can satisfy the reasonable probability standard. *See Snow v. Duke Power Co.*, 297 N.C. 591, 597, 256 S.E.2d 227, 231–32 (1979) ("[C]ircumstantial evidence [may be] sufficient to take the case out of the realm of conjecture and into the field of legitimate inference from established facts.").

Accordingly, we conclude that the trial court did not err in denying defendant's motion for a directed verdict on plaintiff's pain and suffering damages. As a result, we reverse the Court of Appeals' holding on this issue, and we reverse its decision to remand this case to the trial court for a new trial on non-economic damages.

III. Administrative Negligence

[2] Next, we consider defendant's argument that administrative negligence constituted a separate claim that plaintiff failed to properly plead.

Defendant contends that plaintiff was required to plead administrative negligence as a separate claim from medical negligence because in a 2011 amendment to N.C.G.S. § 90-21.11, "the legislature created a distinct cause of action for administrative negligence that must be separately and specifically pled." Defendant argues that because plaintiff "failed to plead a claim for administrative negligence," it was error for the trial court to deny defendant's motion for JNOV. Because we conclude that the 2011 amendment to N.C.G.S. § 90-21.11 did not create a new cause of action or a new pleading requirement for a medical negligence claim like this one, we do not agree that plaintiff was required to plead a separate claim for administrative negligence here. We further conclude that plaintiff did properly plead breaches of administrative duties as a theory underlying the overall claim of medical negligence.

In 2011, the General Assembly amended N.C.G.S. § 90-21.11 to broaden the definition of "medical malpractice action" to include breaches of "administrative or corporate duties to the patient" that arise from the same set of facts as a traditional "professional services" medical malpractice claim. Act of July 25, 2011, S.L. 2011-400 § 5, 2011 N.C. Sess. Laws, 1712, 1714. Specifically, the amendment added the following subsection to the definition of "Medical malpractice action" in N.C.G.S. § 90-21.11(2):

> (b) A civil action against a hospital, a nursing home licensed under Chapter 131E of the General Statutes, or an adult care home licensed under Chapter 131D of the General Statutes for damages for personal injury or death, when the civil action (i) alleges a breach of administrative or corporate duties to the patient, including, but not limited to, allegations of negligent credentialing or negligent monitoring and supervision and (ii) arises from the same facts or circumstances as a claim under sub-subdivision a. of this subdivision.

It appears from contemporaneous committee reports and session laws, as well as subsequent analysis by the UNC School of Government, that the purpose of this specific part of a more comprehensive medical liability reform bill was to require that lawsuits which seek recovery for negligence in operating a hospital, nursing home, or adult care home, be treated as "medical malpractice" claims rather than ordinary negligence claims. *See* UNC School of Government, *Bill Summaries: S33 (2011-2012 Session)*, *Summary date: Apr 19 2011*, Legislative Reporting Service, https://lrs.sog.unc.edu/bill-summaries-lookup/S/33/2011-2012%20Session/S33 ("Adds a section amending GS 90-21.11 to clarify definitions for health care provider and medical malpractice action; applies to causes of action arising on or after October 1, 2011."); Act of July 25, 2011, S.L. 2011-400 § 5 (providing the overall context of the reform legislation); Ann M. Anderson, *Rule 9(j) of the Rules of Civil Procedure: Special Pleading in Medical Malpractice Claims*, North Carolina Superior Court Judges' Benchbook (March 2014) (discussing how the amendment recategorizes some administrative negligence claims arising out of the same facts and circumstances as a medical negligence claim). Prior to this amendment, such administrative or corporate negligence claims were often treated as ordinary negligence claims. Anderson, at 4 (citing *Estate of Ray v. Forgy*, 227 N.C. App. 24, 31, 744 S.E.2d 468, 472 (2013) (claim against hospital for failure to monitor and oversee credentialing of physician treated as ordinary negligence); *Estate of Waters v. Jarman*, 144 N.C. App. 98, 103, 547 S.E.2d 142, 145 (2011) (common law corporate negligence claim against a hospital treated as ordinary negligence)). Since the 2011 amendment, claims of administrative negligence against hospitals, nursing homes, or adult care homes that arise from the same facts and circumstances as a claim for furnishing or failing to furnish professional health services have been classified as medical malpractice suits, and thus are required to adhere to the much more detailed requirements of North Carolina

Civil Procedure Rule 9(j) than claims for ordinary negligence.[2] Thus, we agree with the Court of Appeals that the legislature did not "intend[] to create a new cause of action by the 2011 amendment, but rather intended to re-classify administrative negligence claims against a hospital as a medical malpractice action so that they must meet the pleading requirements of a medical malpractice action rather than under a general negligence theory." *Savino*, 262 N.C. App. at 536, 822 S.E.2d at 573.

Therefore, to the extent that defendant's arguments presuppose that plaintiff was required to separately allege a claim for administrative negligence, we do not agree. Plaintiff brought suit against defendant alleging medical negligence, and the 2011 amendment to N.C.G.S. § 90-21.11 had no effect on medical negligence claims like plaintiff's.

In general, a complaint is required to contain "[a] short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief." N.C. R. Civ. P. 8. (2019). We have interpreted this language as establishing a "notice pleading" standard. *U.S. Bank Nat'l Ass'n v. Pinkey*, 369 N.C. 723, 728, 800 S.E.2d 412, 416 (2017). Accordingly, "the complaint 'is adequate if it gives sufficient notice of the claim asserted "to enable the [defendant] to answer and prepare for trial . . . and to show the type of case brought." ' " *Id.* at 728, 800 S.E.2d at 416 (quoting *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 165 (1970)). "While the concept of notice pleading is liberal in nature, a complaint must nonetheless state enough to give the substantive elements of a legally recognized claim . . . ." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 205, 367 S.E.2d 609, 612 (1988) (citing *Stanback v. Stanback*, 297 N.C. 181, 204, 254 S.E.2d 611, 626 (1979)).

The action began with plaintiff's filing of the 2016 Complaint after it voluntarily dismissed its 2014 Complaint. In the 2016 Complaint, titled "Complaint for Medical Negligence," plaintiff alleged that defendant was negligent in its failure to

> a. [T]imely and adequately assess, diagnose, monitor, and treat the conditions of Plaintiff's Decedent so as to render appropriate medical diagnosis and treatment of his symptoms;

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2. Claims of administrative negligence against hospitals, nursing homes, or adult care homes that *do not* arise from the same facts and circumstances as a claim for furnishing or failing to furnish professional health services may still be subject to the common law requirements of ordinary negligence.

b. [P]roperly advise Plaintiff's Decedent of additional medical and pharmaceutical courses that were appropriate and should have been considered, utilized, and employed to treat Plaintiff's Decedent's medical condition prior to discharge;

c. [T]imely obtain, utilize and employ proper, complete and thorough diagnostic procedures in the delivery of appropriate medical care to Plaintiff's Decedent;

d. [E]xercise due care, caution and circumspection in the diagnosis of the problems presented by Plaintiff's Decedent;

e. [E]xercise due care, caution and circumspection in the delivery of medical and nursing care to Plaintiff's Decedent;

f. [A]dequately evaluate Plaintiff's Decedent response/lack of response to treatment and report findings;

g. [F]ollow accepted standards of medical care in the delivery of care to Plaintiff's Decedent;

h. [U]se their best judgment in the care and treatment of Plaintiff's Decedent;

i. [E]xercise reasonable care and diligence in the application of his/her/their knowledge and skill to Plaintiff's Decedent care;

j. [R]ecognize, appreciate and/or react to the medical status of Plaintiff's Decedent and to initiate timely and appropriate intervention, including but not limited to medical testing, physical examination and/or appropriate medical consultation;

k. . . .

l. [P]rovide health care in accordance with the standards of practice among members of the same health care professions with similar training and experience situated in the same or similar communities at the time the health care was rendered to Plaintiff's Decedent.

These alleged acts of negligence in the 2016 Complaint all relate to the "performance of medical . . . or other health care" by "health care

provider[s]" working in CMC-Northeast. N.C.G.S. § 90-21.11(2)(a) (2011). As a result, the allegations state a claim for medical negligence.

As part of its case to prove medical negligence, plaintiff presented evidence at trial on the applicable standard of care. This evidence included documents defendant had previously submitted as part of an application to gain accreditation as a Chest Pain Center. Plaintiff also offered expert testimony that the policies and protocols within the Chest Pain Center application documents were consistent with the standard of care applicable to Mr. Savino's clinical care in defendant's emergency department. To the extent plaintiff argued that the hospital violated the applicable standard of care by failing to implement or follow appropriate health care policies and protocols as outlined in these documents, we agree with the Court of Appeals that this argument was directly relevant to the medical negligence claim. *Savino*, 262 N.C. App. at 554, 822 S.E.2d at 583 ("[E]vidence of the defendant's policies and protocols, or its purported policies and protocols, is certainly relevant and properly considered alongside expert testimony to establish the standard of care for medical negligence.").

Furthermore, the complaint provided defendant with sufficient notice of the fact that plaintiff intended to use the policies and protocols from the Chest Pain Center application documents as part of its claim for medical negligence. Specifically, plaintiff alleged in the 2016 Complaint that defendant had submitted an application for "accreditation as a Chest Pain Center and was approved for such accreditation at the time of the events complained of." The complaint also included allegations that as part of the Chest Pain Center application, defendant attested that "it employed certain protocols, clinical practice guidelines, and procedures in the care of patients presenting with chest pain complaints" replicating "the existing standards of practice for medical providers and hospitals in the same care profession with similar training and experience situated in similar communities with similar resources at the time of the events giving rise to this cause of action." Plaintiff then alleged that defendant failed to "[p]rovide health care in accordance with the standards of practice among members of the same health care professions with similar training and experience situated in the same or similar communities at the time the health care was rendered to Plaintiff's Decedent." These allegations were "sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief." N.C. R. Civ. P. 8(a)(1).

We agree with the Court of Appeals that plaintiff did not plead a separate claim for administrative negligence.[3] *See* 262 N.C. App. at 534, 822 S.E.2d at 572. But plaintiff was not required to do so. Rather, plaintiff used multiple theories, including some administrative failures, to argue a single cause of action: medical negligence. Therefore, the trial court did not err by denying defendant's motion for JNOV and defendant is not entitled to a new trial.[4] We modify and affirm the decision of the Court of Appeals as to this issue.

IV. Contributory Negligence

[3] Finally, we address the issue of contributory negligence raised in defendant's conditional petition for discretional review. We conclude that the trial court did not err in granting plaintiff's motion for a directed verdict on defendant's claim of contributory negligence.

As we have previously explained, "gross negligence is a higher degree of negligence than ordinary negligence, and [ ] wilful and wanton and reckless conduct is still a higher degree of negligence or a greater degree of negligence than the negligence of gross negligence, so much so that in the wilful, wanton, and reckless conduct, the matter of contributory negligence, which might otherwise be interposed as a defense, is wiped out." *Crow v. Ballard*, 263 N.C. 475, 477, 139 S.E.2d 624, 626 (1965).

Here, the jury found that defendant's conduct in providing medical care to Mr. Savino was "in reckless disregard of the rights and safety of others." Defendant did not challenge this finding. Accordingly, defendant's "reckless conduct . . . wipe[s] out" any alleged defense of contributory negligence. *Crow*, 263 N.C. at 477, 139 S.E.2d at 626.

Conclusion

We modify and affirm in part, and reverse in part, the decision of the Court of Appeals because we conclude that (1) the trial court did

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3. Because we conclude that plaintiff was not required to plead a separate administrative negligence claim under N.C.G.S. § 90-21.11(2), we need not address defendant's argument that such a claim was time-barred.

4. We do not address the Court of Appeals' holding about the effect of the intertwining of medical and administrative negligence because we conclude the trial court did not err in denying defendant's motion for JNOV, and therefore do not reach the issue of prejudice. However, we do note that section (2)(b) requires that to be classified as medical malpractice, alleged administrative shortcomings must arise from the same facts or circumstances underpinning the medical negligence.

not err by denying defendant's motion for a directed verdict on pain and suffering damages; (2) plaintiff was not required to plead a separate claim for administrative negligence; (3) defendant is not entitled to a new trial; and (4) the trial court did not err by granting plaintiff's motion for a directed verdict on contributory negligence. Because we reverse the Court of Appeals, and thereby uphold the trial court, on the issue of damages for pain and suffering we need not remand to the trial court for a new trial on non-economic damages.

MODIFIED AND AFFIRMED IN PART; REVERSED IN PART.

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

Justice NEWBY dissenting.

This medical malpractice action involved a three-and-a-half-week trial. During trial, plaintiff pursued two negligence claims, one for medical negligence and one for administrative negligence. The trial court allowed evidence of and gave jury instructions on both distinct claims of negligence. Both claims were explicitly presented to the jury on the jury verdict form. The administrative negligence claim was neither pled nor properly presented to the jury. Because the trial court admitted a significant amount of extraneous evidence and comingled the jury instructions on medical negligence and administrative negligence, and because the jury clearly found that defendant was guilty of administrative negligence, defendant was prejudiced by the process and should be granted a new trial.

To avoid having to concede that the administrative negligence claim was not properly pled here, the majority judicially restructures medical negligence claims, asserting that administrative negligence is merely a theory underlying medical care negligence. It holds that a plaintiff need not plead a separate claim for administrative negligence. The majority altogether ignores the relevant statutory text and the intent of the General Assembly. In amending the medical malpractice statute in 2011, the General Assembly did not intend to combine these two distinct types of negligence but simply meant to subject both medical care and administrative negligence claims to the same heightened pleading requirement. The majority allows all the evidence relating to the administrative negligence claim to be considered by the jury to determine if medical care negligence occurred here. Because evidence of administrative

negligence and the corresponding jury instructions irredeemably tainted the jury verdict, a new trial is warranted.[1] I respectfully dissent.

Defendant in this case does not dispute that plaintiff properly pled a claim for medical care negligence. In defendant's view, the only claim for medical care negligence actually pled and pursued at trial was whether the admitting nurse failed to relay to the doctor that decedent received nitroglycerin from the EMTs, and, if so, whether that failure to relay the information violated the applicable standard of care. Ultimately, because the doctor allegedly did not know that the decedent had received nitroglycerin and his lab work was normal, the decedent was released but died later that evening.

On 23 April 2014, plaintiff filed an initial "Complaint for Medical Negligence" (2014 Complaint). On 6 January 2016, plaintiff moved for leave to amend the 2014 complaint. In the motion, plaintiff contemplated adding a claim for administrative negligence, citing, *inter alia*, defendant's failure to train, monitor, and supervise employees as well as failure to implement or enforce protocol, policies, and procedures. Nonetheless, plaintiff withdrew the motion and, on 19 January 2016, filed a notice of voluntary dismissal without prejudice to refile against defendant only. Thereafter, on 1 February 2016, plaintiff refiled a "Complaint for Medical Negligence" against defendant (2016 Complaint). In the 2016 Complaint, plaintiff did not include the administrative negligence allegations it asserted in its earlier motion; it simply added a few factual allegations about defendant's status as a Chest Pain Center and its application for accreditation.[2]

Before trial, defendant objected to the administrative negligence claim being presented, noting that the complaint alleged only medical care negligence. The trial court denied defendant's motion in limine to exclude evidence related to administrative negligence.

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1. Because I would conclude that a new trial is warranted, both issues of pain and suffering and contributory negligence would be dependent on the evidence presented at that new trial. Therefore, I do not address those issues in this dissenting opinion.

2. The majority states that it need not address defendant's arguments that such a claim was time barred since under its reasoning, plaintiff did not need to plead a separate claim for administrative negligence. In its analysis, however, the majority relies on the 2016 Complaint, which cites evidence of Chest Pain Management Center protocols and procedures, which plaintiff presented for the first time in the 2016 Complaint. Even if administrative negligence were merely a theory underlying medical negligence, as the majority proposes, it seems the statute of limitations would be implicated to bar that theory since the theory and the allegations were raised for the first time in the 2016 Complaint.

The case proceeded to trial, which occurred over a three-and-a-half-week period. Plaintiff presented evidence of defendant's alleged medical care negligence, highlighting the nurse's purported failure to communicate that the decedent had received nitroglycerin in the ambulance. Plaintiff also presented a significant amount of evidence related to defendant's alleged administrative negligence. This evidence focused on defendant's failure to properly train medical providers and to implement certain policies, procedures, and protocols that, in plaintiff's view, would have ensured that the proper information was communicated to the ER Physician. In doing so, plaintiff introduced evidence about the credentials required for defendant to become a licensed Chest Pain Center, the application requirements and what the hospital had submitted in its application, and the policies to be implemented. On several occasions, plaintiff highlighted defendant's failure to implement and ensure that the hospital was abiding by Chest Pain Center protocols stated in the application. Plaintiff presented this as amounting to negligence in the application process. Moreover, plaintiff's evidence reiterated that hospital employees were unaware of the risk stratification protocol set forth in the Chest Pain Center application. Under part of plaintiff's theory at trial, had defendant implemented and abided by these protocols, defendant could have saved the decedent's life.

Numerous times during the proceeding, defendant objected that administrative negligence was not properly before the jury since it was not pled in the original 2014 Complaint, nor could it be considered based on the 2016 Complaint because it was time barred. The trial court denied defendant's motions.

During the jury charge conference, defendant objected to the jury instructions, arguing that they improperly presented claims for administrative negligence and comingled administrative negligence with medical care negligence. Nonetheless, the trial court instructed the jury that it could find defendant liable if it found, *inter alia*, that any of the contentions below were true:

> With respect to the first issue in this case, the plaintiff contends and the defendant denies that the defendant was negligent in one or more of the following ways. The first contention is that the hospital did not use its best judgment in the treatment and care of its patient in that the defendant did not adequately *implement* [emphasis added] and/or follow protocols, processes, procedures and/or policies for the evaluation and management of

> chest pain patients in the emergency room on April 30th of 2012, in accordance with the standard of care.
>
> . . . .
>
> The third contention is that the hospital did not use reasonable care and diligence in the application of its knowledge and skill to its patient's care in that Carolinas Healthcare System did not adequately *implement* [emphasis added] and/or follow the protocols, processes, procedures and/or policies for the evaluation and management of chest pain patients in the emergency room or emergency department on April 30th of 2012.
>
> . . . .
>
> The fifth contention is that the hospital did not provide health care in accordance with the standards of practice among similar health care providers situated in the same or similar communities under the same or similar circumstances at the time the health care was rendered, and that the defendant did not adequately *implement* [emphasis added] and/or follow the protocols, processes, procedures and/or policies in place in the emergency department on April 30th of 2012.

Despite the trial court's failure to separate administrative negligence from medical negligence in its instructions, the jury verdict sheet recognized medical and administrative negligence as two separate issues, first asking the jury whether decedent's "death [was] caused by the negligence of defendant," and then asking whether decedent's "death [was] caused by the defendant's negligent performance of administrative duties." On 15 November 2016, the jury returned its verdict finding defendant liable for both administrative and medical negligence. The jury awarded $680,000 in economic damages and $5,500,000 in non-economic damages, amounting to a single sum of $6,130,000 in total damages.

Defendant moved for judgment notwithstanding the verdict or for a new trial. In its motion, defendant argued in part that the trial court erroneously comingled the jury instructions on administrative and medical negligence, which ultimately confused the jury and unfairly prejudiced defendant. The trial court denied defendant's motion.

The determinative issue should be whether plaintiff properly pled a claim for administrative negligence, which should be answered in the negative. Based on this answer, the question then becomes what

the appropriate remedy is when, in the course of an almost four week trial, evidence of an improperly pled claim is admitted, the jury charge is inaccurate because it comingles both negligence claims, and the jury verdict sheet is wrong because it asks in part whether defendant was liable for administrative negligence. In short, this Court should ask whether the comingling and intertwining of administrative negligence throughout the trial impacted the jury verdict so as to prejudice defendant and entitle defendant to a new trial. Because administrative and medical negligence were inextricably intertwined in the evidence and instructions here, defendant was prejudiced and there should be a new trial untainted by the evidence of administrative negligence and the accompanying improper jury instruction.

In its analysis, the majority fails to follow the intent of the legislature in amending the statute in 2011. Instead, the majority collapses administrative and medical care negligence into a single negligence claim. This reasoning turns on its head the intent of the General Assembly, which was not to combine the two types of negligence, but to require the same heightened pleading standard for an administrative negligence claim that previously existed for a medical care negligence claim.

Prior to 2011, a claimant with an allegation of medical negligence in the rendering of care for medical services and an allegation of medical negligence arising from administrative negligence had two separate pleading standards. While medical care negligence was subject to the heightened pleading requirements of Rule 9(j) of the North Carolina Rules of Civil Procedure, a claim for medical administrative negligence was subject to the ordinary, non-heightened pleading requirements. Thus, prior to 2011, a medical malpractice action was defined only as a medical care negligence claim, i.e., "a civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider." N.C.G.S. § 90-21.11 (2009).

In 2011, however, while keeping a separate claim for medical care negligence, the North Carolina General Assembly changed the definition of "medical malpractice" to also include a claim for administrative negligence. *See* Act of July 25, 2011, S.L. 2011-400 § 5, 2011 N.C. Sess. Laws, 1712, 1714. The legislature did not intend to combine or blend medical and administrative negligence claims into one claim but simply meant to subject claims of both types of negligence to the same stringent 9(j) pleading standard. Thus, under the current statute, a claim of medical malpractice can arise from medical care or administrative responsibilities:

> a. A civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider.
>
> b. A civil action against a hospital, a [licensed] nursing home . . . , or a[licensed] adult care home . . . for damages for personal injury or death, when the civil action (i) alleges a breach of administrative or corporate duties to the patient, including, but not limited to, allegations of negligent credentialing or negligent monitoring and supervision and (ii) arises from the same facts or circumstances as a claim under sub-subdivision a. of this subdivision.

N.C.G.S. § 90-21.11(2) (2019).

Consistent with the way the legislature framed both separate claims as recognized in section 90-21.11(2), case law has recognized that there are "two kinds of [corporate hospital negligence] claims: (1) those relating to negligence in clinical care provided by the hospital directly to the patient, and (2) those relating to the negligence in the administration or management of the hospital." *Estate of Ray ex rel. Ray v. Forgy*, 227 N.C. App. 24, 29, 744 S.E.2d 468, 471 (2013) (quoting *Estate of Waters v. Jarman*, 144 N.C. App. 98, 101, 547 S.E.2d 142, 144, *disc. rev. denied*, 354 N.C. 68, 533 S.E.2d 213 (2001)).

Plaintiff failed to plead administrative negligence in its 2014 Complaint and its 2016 Complaint, despite plaintiff's seeming intent to add a claim for administrative negligence when it filed its motion to amend on 6 January 2016. Notably, because medical and administrative negligence are two separate claims, they must be pled separately and proved independently. Because plaintiff failed to plead administrative negligence here, evidence of administrative negligence should not have been admitted at trial and the jury should not have been instructed on the claim.

Because administrative negligence was not properly pled, the question becomes whether evidence of the improperly considered administrative negligence claim, and the corresponding instructions from the trial court, tainted the jury verdict in a way that prejudiced defendant, warranting a new trial. Here a new trial is warranted because it appears the jury based its decision to find defendant liable for medical care negligence on the improperly admitted evidence pertaining to administrative negligence. Further, the instructions blended the two claims.

Error in the jury instructions or uncertainty in the jury verdict warrants a new trial in several situations. When it is unclear "upon what theory or under which part of the [jury] charge the verdict was based, and therefore error in any one of the instructions . . . may have influenced the jury," defendant is entitled to a new trial. *Morrow v. Southern Ry. Co.*, 147 N.C. 623, 629, 61 S.E. 621, 623 (1908). Also, when a "trial judge inadvertently omit[s] . . . sufficiently definite instructions to guide the [jury] to an intelligent determination of the question," a new trial is warranted. *Kee v. Dillingham*, 229 N.C. 262, 266, 49 S.E.2d 510, 512 (1948); *see also Robertson v. Stanley*, 285 N.C. 561, 569, 206 S.E.2d 190, 196 (1974) (stating that where issues are "inextricably interwoven" within the case, suggesting that the jury awarded damages on an improper ground, a new trial on all issues should be granted); *Hoaglin v. Western Union Telegraph Co.*, 161 N.C. 390, 398–99, 77 S.E. 417, 421 (1913) ("If we could separate the two [jury instructions], because we knew with certainty that the jury were not influenced by the error, we would do so, but it is impossible, as the correct and incorrect instructions have together passed into the verdict which is indivisible. A new trial is the only remedy for the error.").

Therefore, when an appellate court is reviewing a claim

> [o]n appeal, this Court considers a jury charge contextually and in its entirety. The charge will be held to be sufficient if "it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed . . . ." The party asserting error bears the burden of showing that the jury was misled or that the verdict was affected by an omitted instruction. "Under such a standard of review, it is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury."

Boykin v. Kim, 174 N.C. App 278, 286, 620 S.E.2d 707, 713 (2005) (first citing and then quoting *Jones v. Satterfield Dev. Co.*, 16 N.C. App. 80, 86–87, 191 S.E.2d 435, 439, 440, *cert. denied*, 282 N.C. 304, 192 S.E.2d 194 (1972); then citing and then quoting *Robinson v. Seaboard Sys. R.R.*, 87 N.C. App. 512, 524, 361 S.E.2d 909, 917, *disc. rev. denied*, 321 N.C. 474, 364 S.E.2d 924 (1988)).

Defendant submits that the medical negligence claim properly before this Court asked whether the admitting nurse failed to communicate that decedent received nitroglycerin in the ambulance, and if so,

whether that failure to communicate this information constituted a violation of the applicable standard of care. The administrative negligence claim presented at trial, however, focused on whether proper procedural safeguards were designed and implemented to prevent this type of communication failure.

The trial court admitted evidence of the admitting nurse's failure to communicate the applicable information, which would relate to plaintiff's properly pled medical negligence claim. The trial court also allowed into evidence testimony and exhibits related to plaintiff's administrative negligence claim, however. At trial, plaintiff introduced a significant amount of evidence about the credentials required for defendant to become a licensed Chest Pain Center, the application requirements, and the policies to be set forth by the hospital in compliance with the Chest Pain Center application requirements. Plaintiff's evidence highlighted defendant's failure to ensure that the hospital was implementing Chest Pain Center protocols and the representations defendant made in its application. Moreover, testimony about individuals who were unaware of the risk stratification protocol stated in the Chest Pain Center application documents was repeated multiple times throughout trial.

Despite the differences in these claims, the evidence at trial was not separated in a way that the jury could discern which evidence pertained to defendant's alleged liability for medical negligence and which evidence pertained to defendant's alleged liability for administrative negligence. Therefore, the jury was led to believe that it could find decedent's death was caused by either or both medical and administrative negligence, regardless of which evidence supported which claim. Certainly plaintiff's closing argument asserted both kinds of negligence.

Moreover, the jury instructions failed to distinguish between the two different types of negligence. Despite asking the jury on the verdict sheet to separately answer whether defendant was liable for medical negligence and administrative negligence, the trial court's instructions wholly failed to distinguish between the two types of negligence. Instead, the jury instructions inextricably comingled medical and administrative negligence so the jury likely believed it could find defendant liable for medical negligence based on evidence of administrative negligence. Thus, the evidence related to administrative negligence and the trial court's failure to separate out the claims in the instructions together created a Gordian Knot, rendering it impossible to determine on which evidence or instruction the jury found defendant liable. Given the uncertainty about the premise of the jury's verdict, defendant has met its burden to show that the improper evidence and resulting comingled

instructions likely misled the jury. Under our precedent, certainly it was unclear "upon what theory or under which part of the [jury] charge the verdict was based," meaning defendant is entitled to a new trial. *Morrow*, 147 N.C. at 629, 61 S.E. at 623.

The majority ignores the question of whether plaintiff properly pled administrative negligence. Instead of asking whether evidence related to administrative negligence tainted the verdict, the majority asserts that plaintiff need not plead a separate claim for administrative negligence because all of plaintiff's evidence about defendant's breach of administrative duties amounted to "a theory underlying the overall claim of medical negligence." It appears that the majority would not require a plaintiff to precisely plead either medical or administrative negligence; under the majority's rationale, so long as a party pursuing a medical malpractice claim meets 9(j) pleading requirements generally and states that it is pursuing a medical malpractice claim, that party can present evidence of either or both medical or administrative negligence under its claim by asserting that the evidence relates to a "theory," not a separate claim.

In doing so, the majority ignores that the legislature chose to separate medical and administrative negligence claims when re-categorizing administrative negligence as a type of medical malpractice subject to heightened pleading requirements. *See* N.C.G.S. § 90-21.11 (stating that a medical malpractice action can be based on *either* type of negligence, one being medical negligence and the other being administrative negligence). The legislature chose to require separate 9(j) certification and other heightened requirements for both medical and administrative negligence. Further, the majority's decision to allow a plaintiff to proceed on either type of negligence without distinction undermines the concept of notice pleading.

Notably, it is not the Court's job to redefine medical negligence. Through its holding, the majority nonetheless acts as the legislature, ignores the express language of our General Statutes, and relegates a clearly defined cause of action for administrative negligence into only a theory supporting a claim of medical negligence. This rationale conflicts with the express language of N.C.G.S. § 90-21.11(2). It is certainly unclear how the majority would treat a separate claim for administrative negligence.

Because administrative negligence was not properly pled, it was improper to allow evidence of it and to include it in the jury instructions and verdict sheet. Administrative negligence should not have been

a part of the jury's decision on whether to find defendant liable for medical negligence. The jury instructions failed to separate the claims for administrative and medical negligence, and the evidence at trial failed to distinguish between the claims. Therefore, because the issues are "inextricably interwoven" here, *Robertson*, 285 N.C. at 569, 206 S.E.2d at 196, defendant is entitled to a new trial excluding evidence or instruction on administrative negligence. I respectfully dissent.

IN THE MATTER OF E.B.

No. 429A19

Filed 25 September 2020

1. Termination of Parental Rights—grounds for termination—willful abandonment—sufficiency of findings—void permanency planning hearings and orders

There was insufficient evidence to terminate a father's parental rights on the grounds of willful abandonment where nearly all of the trial court's findings of fact related directly to permanency planning and review hearings that were legally void because no juvenile petition was ever filed (pursuant to N.C.G.S. § 7B-402(a) and 403(a)). The father's failure to attend these hearings and comply with the resulting void orders could not support termination of his parental rights; furthermore, the father made ongoing efforts before and throughout the determinative time period to obtain custody of his child—even though the trial court and the county department of social services lacked the authority to keep the child out of his custody.

2. Termination of Parental Rights—grounds for termination—neglect—sufficiency of findings—void permanency planning hearings and orders

There was insufficient evidence to terminate a father's parental rights on the grounds of neglect where nearly all of the trial court's findings of fact related directly to permanency planning and review hearings that were legally void because no juvenile petition was ever filed (pursuant to N.C.G.S. § 7B-402(a) and 403(a)). There was no evidence that the father had neglected the child (who had never been in his custody) or that he would neglect her if she were in his care; rather, the evidence showed that the father was successfully caring for three other minor children. Findings related to the

father's history of marijuana use and the loss of his job and housing were also insufficient to support the conclusion that the father was likely to neglect the child in the future.

3. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—sufficiency of findings—no removal

There was insufficient evidence to terminate a father's parental rights on the grounds of failure to make reasonable progress where no petition was ever filed to adjudicate the child abused, dependent, or neglected and no trial court with appropriate jurisdiction ever entered an order removing the child from the father's custody. The Supreme Court rejected the argument that the father's voluntary out-of-home family services agreement identified the "conditions" that "led to the removal" of the child and that his failure to comply with the agreement constituted grounds for termination under N.C.G.S. § 7B-1111(a)(2).

Justice NEWBY concurring in result only.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 834 S.E.2d 169 (N.C. Ct. App. 2019), affirming an order terminating respondent-father's parental rights entered on 30 November 2018 by Judge Kevin Eddinger, in District Court, Rowan County. Heard in the Supreme Court on 17 June 2020.

Jane R. Thompson for petitioner-appellee Rowan County Department of Social Services.

Jeffrey L. Miller, for respondent-appellant father.

EARLS, Justice.

Respondent-father appeals from the Court of Appeals' affirmance of the trial court's order terminating parental rights to his minor child, E.B. (Ella).[1] Between 12 May 2016 and 25 January 2018, the trial court conducted six permanency planning and review hearings and entered six orders imposing numerous conditions that respondent was required to satisfy prior to obtaining custody of Ella. However, as petitioners

1. We will refer to E.B. throughout the remainder of this opinion by the pseudonym "Ella" for ease of reading and to protect the privacy of the juvenile.

conceded before the Court of Appeals, the trial court lacked jurisdiction to conduct the permanency planning and review hearings under N.C.G.S. § 7B-200 because the Rowan County Department of Social Services (DSS) "failed to file a proper juvenile petition consistent with the requirements of N.C.[G.S.] §§ 7B-402(a) and 403(a), and thus no juvenile abuse, neglect, or dependency action was ever commenced." *In re E.B.*, 834 S.E.2d 169, 172 (N.C. Ct. App. 2019). Indeed, Ella was never adjudicated to be an abused, neglected or dependent child. Her father indicated his desire to have custody of her and to care for her from the day he learned of her birth.

On 30 November 2018, the trial court entered an order terminating respondent's parental rights on the grounds of neglect, failure to make reasonable progress, and willful abandonment. The Court of Appeals affirmed the trial court's termination order on the willful abandonment ground. *Id.* at 175. Judge Hampson dissented. Judge Hampson would have held that because the facts supporting the grounds for termination as adjudicated by the trial court were "inextricably intertwined" with the concededly invalid permanency planning and review hearings, the trial court failed to prove grounds for termination by "clear, cogent, and convincing evidence." *Id.* (Hampson, J., dissenting).

We substantially agree with Judge Hampson and hold today that petitioners have failed to prove by clear, cogent, and convincing evidence that respondent willfully abandoned his child. We also hold that petitioners have failed to prove that any other ground existed to terminate respondent's parental rights. Accordingly, we reverse.

Standard of Review

"A trial court is authorized to order the termination of parental rights based on an adjudication of one or more statutory grounds." *In re J.A.E.W.*, 846 S.E.2d 268, 271 (N.C. 2020). "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) (2019)." *Id.*

The trial court found three separate grounds for terminating respondent's parental rights: (1) neglect, pursuant to N.C.G.S. § 7B-1111(a)(1); (2) failure to make reasonable progress, pursuant to N.C.G.S. § 7B-1111(a)(2); and (3) willful abandonment, pursuant to N.C.G.S. § 7B-1111(a)(7). 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

conclusion of law." *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984). We review the trial court's conclusions of law *de novo*. *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019).

Background

Ella was born on 18 February 2016. The next day, Ella's mother relinquished her parental rights, placing Ella in nonsecure custody with DSS. By relinquishing her parental rights, Ella's mother agreed to the "transfer of legal and physical custody of the minor to the agency for the purposes of adoption." N.C.G.S. § 48-3-703(a)(5) (2019). As an exercise of that custodial authority, DSS placed Ella in foster care.

Ella's mother informed DSS that she believed respondent was Ella's biological father. Sometime thereafter, DSS informed respondent that he had been named by Ella's mother as the putative biological father of a newborn. When DSS contacted respondent, he reported that he was "excited" to be Ella's father. He agreed to submit to a paternity test. Even before paternity was confirmed, respondent expressed his desire to be a parent to Ella. However, until respondent was confirmed as Ella's biological parent, DSS possessed sole legal custody of Ella. *See* N.C.G.S. § 48-3-601, -705.

On 23 March 2016, before the results of the paternity tests were known, respondent voluntarily entered into an out-of-home family services agreement with DSS. Respondent stated that he wanted to do "whatever [DSS said] was necessary." Because he was working and had his own home, he believed the reunification process "would just go over smoothly and my daughter would be released." On 19 April 2016, a paternity test confirmed that respondent was Ella's biological father.

Between 12 May 2016 and 25 January 2018, the trial court conducted six permanency planning and review hearings. After each hearing, the court entered an order imposing numerous requirements on respondent before he could be reunified with Ella. These requirements incorporated the recommendations DSS made in the out-of-home family services agreement. After the first five hearings, the trial court concluded that Ella's "primary permanent plan shall be reunification with [respondent], with a secondary plan of guardianship to a relative or a court approved caretaker." After the final hearing, the trial court changed the primary plan to "adoption, with a secondary plan of reunification."

DSS never filed a petition seeking to have the trial court adjudicate Ella an abused, neglected, or dependent juvenile pursuant to N.C.G.S. §§ 7B-402(a) and - 403(a). Thus, the trial court lacked subject-matter

jurisdiction to conduct permanency planning and review hearings, and its orders lacked the force of law. *See In re T.R.P.*, 360 N.C. 588, 593, 636 S.E.2d 787, 792 (2006) ("A trial court's subject matter jurisdiction over all stages of a juvenile case is established when the action is initiated with the filing of a properly verified petition.").

When Ella was born, respondent was helping to raise three of his own juvenile children. Within months, respondent became his children's sole caregiver. Still, as soon as he learned about Ella, respondent expressed his desire to eventually take Ella into his custody and care. Respondent immediately began visitation with Ella. He brought her age-appropriate snacks, cleaned her, and bonded healthily with his daughter. After DSS raised concerns about his living situation, respondent relocated to a new apartment. He submitted to three drug screens, two of which were negative and one inconclusive. He completed parenting classes to improve his ability to care for an infant.

Respondent also named his sister, who lived in California, as a potential relative placement option, although he was initially reluctant to request that DSS place Ella with her because she lived so far away. In April 2016, respondent asked DSS to initiate an Interstate Compact on the Placement of Children (ICPC) review process, and respondent's sister agreed to serve as Ella's guardian. After the North Carolina ICPC office misplaced the initial request, causing a months-long delay, respondent's sister called DSS to request an expedited home study to facilitate quicker ICPC approval. She visited with Ella on three occasions during her trips to North Carolina. Anticipating that she would promptly begin caring for Ella, respondent's sister purchased a crib; when the ICPC process was delayed, respondent's sister removed the crib and replaced it with a "princess bed." Ultimately, respondent's sister became a licensed foster parent and was assessed and approved to assume custody of Ella through the ICPC review process. In order to meet the ICPC's requirements, respondent's sister completed parenting courses, became CPR certified, and moved her entire family out of their home into one that would be safer for Ella because it did not have a pool. The ICPC report noted that respondent's sister possessed "considerable insight into the effects that separation and loss can have on children from her own experiences" in the foster care system.

Although respondent never disclaimed his intent to eventually assume custody of Ella, he also struggled to fully address the issues that he and DSS had identified in the voluntary out-of-home family services agreement. Respondent did not complete the recommended domestic

violence or substance abuse counseling. Respondent refused to consent to ongoing drug screens, and his social media history suggested that he may have been continuing to use marijuana. He was assaulted by three men who broke into his home while his children were present, causing him to be hospitalized for a dislocated jaw and stab wounds. He was evicted and lost his job. DSS reported that his home was cluttered and dirty. He had extended periods of inconsistent visitation with Ella, which respondent attributed to his lack of a driver's license, his injuries, and a death in the family. Eventually, respondent informed DSS that he was not interested in continuing to engage in parenting services and that he only wanted to maintain visitation with Ella. It is undisputed that respondent did not fully comply with all of the terms of the trial court's orders.

Respondent's final in-person visit with Ella occurred on 5 September 2017. On 22 January 2018, respondent moved to California. Respondent did not inform DSS of his impending move and did not immediately provide them with an address where he could be reached. On 10 April 2018, DSS filed a petition to terminate respondent's parental rights, alleging grounds of neglect, failure to make reasonable progress, willful abandonment, and failure to pay child support. Respondent did not communicate with Ella following his move to California until after DSS initiated termination proceedings.

Analysis

We begin by noting that DSS's and the trial court's actions repeatedly infringed upon respondent's constitutional parental rights. "[T]he government may take a child away from his or her natural parent only upon a showing that the parent is unfit to have custody or where the parent's conduct is inconsistent with his or her constitutionally protected status." *Adams v. Tessener*, 354 N.C. 57, 62, 550 S.E.2d 499, 503 (2001) (citations omitted). Immediately upon learning that he was Ella's biological father, respondent expressed his intent to parent Ella, an intent that he never disavowed. Until DSS filed a petition to terminate respondent's parental rights, DSS did not seek a judicial order establishing that respondent was "unfit to have custody" of Ella or that his "conduct [was] inconsistent with his . . . constitutionally protected status" as a parent. *Id.* Thus, as a biological father who had "seize[d] the opportunity to become involved as a parent in his child's life," *Owenby v. Young*, 357 N.C. 142, 146, 579 S.E.2d 264, 267 (2003), respondent enjoyed a constitutionally protected right to the "custody, care, and nurture" of his child. *Petersen v. Rogers*, 337 N.C. 397, 402, 445 S.E.2d 901, 904 (1994). The constitutional parental right is, of course, not absolute. *See, e.g.*, *In*

re C.B.C., 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019). It is, however, a " 'fundamental liberty interest' which warrants due process protection." *In re Montgomery*, 311 N.C. 101, 106, 316 S.E.2d 246, 250 (1984) (quoting *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982)).

The trial court substantially interfered with respondent's "constitutionally protected paramount right" to the "custody, care, and control" of his child. *Owenby v. Young*, 357 N.C. at 148, 579 S.E.2d at 268. On 17 May 2017, respondent, through counsel, informed the trial court that he "loves his daughter [Ella] and desires for her to be placed with him, or, alternatively . . . if the child is not placed with Respondent Father, he respectfully requests the child to be placed with his sister . . . immediately." At that point in time, neither the trial court nor DSS possessed the legal authority to thwart respondent's wishes. If DSS had concerns about releasing Ella into respondent's custody, the way to address those concerns was by filing a petition to adjudicate Ella an abused, neglected, or dependent child, or by filling a petition to terminate respondent's parental rights. *See* N.C.G.S. § 7B-200, -904, -906.1. DSS's failure to file such a petition deprived the trial court of the legal authority to demand that respondent demonstrate his parenting abilities to the trial court's own satisfaction prior to taking Ella into his own custody, care, and control. It also deprived the trial court of the legal authority to dictate when, where, and how frequently respondent would be permitted to interact with his child. These requirements and restrictions had no binding legal effect, but the trial court treated them as preconditions respondent needed to satisfy, and parameters he needed to comply with, in order to exercise his constitutional parental rights.

The trial court ultimately concluded that the conditions imposed upon respondent's relationship with Ella served Ella's best interests, and its decision to reject respondent's demand to assume custody of his child or have her placed with his sister flowed from a commitment to ensuring a safe, nurturing, and loving environment for Ella. However, the trial court did not have the authority to act on its own views of what served Ella's best interests without first finding grounds to displace respondent's constitutional parental rights to make such decisions. *See Owenby v. Young*, 357 N.C. at 144, 579 S.E.2d at 266 (The "Due Process Clause of the Fourteenth Amendment ensures that the government does not impermissibly infringe upon a natural parent's paramount right to custody solely to obtain a better result for the child"); *see also Troxel v. Granville*, 530 U.S. 57, 73–74 (2000) ("[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a

'better' decision could be made.").[2] Until the trial court entered an order granting custody of Ella to DSS and taking custody away from her father on some legally cognizable ground, DSS and the trial court's desire to further Ella's best interests, however well-intentioned, provided no justification for interfering with respondent's exercise of his constitutional prerogatives as Ella's parent.

Notwithstanding its prior lack of jurisdiction to conduct permanency planning and review hearings, the trial court did possess jurisdiction over DSS's petition to terminate respondent's parental rights under N.C.G.S. § 7B-1101. A court's jurisdiction to adjudicate a termination petition does not depend on the existence of an underlying abuse, neglect, and dependency proceeding. N.C.G.S. § 7B-1101 ("The court shall have exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in, is found in, or is in the legal or actual custody of a county department of social services or licensed child-placing agency in the district at the time of filing of the petition or motion."). DSS had standing to seek termination of respondent's parental rights because Ella's mother had relinquished her own parental rights and transferred legal custody of Ella to the agency. N.C.G.S. § 7B-1103(a)(4).

Still, the trial court's errors in conducting unauthorized permanency planning and review hearings are significant in examining its subsequent order terminating respondent's parental rights. Because the trial court acted without subject matter jurisdiction during the permanency planning process, the hearings it conducted and orders it entered were "void ab initio." *In re T.R.P.*, 360 N.C. 588, 588, 636 S.E.2d 787, 789 (2006). A trial court cannot determine a party's rights based on facts established in or arising from a legally void judicial proceeding. *See Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 90, 92 S.E.2d 673, 678 (1956) ("A void judgment is, in legal effect, no judgment. No rights are acquired or divested by it. It neither binds nor bars any one, and all proceedings founded upon it are worthless.").

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2. Restrictions on the State's authority to interfere with a fit parent's exercise of their parental rights are not merely technical requirements. In the child welfare context, these statutory and constitutional protections help mitigate the risk that parents will lose custody of their children if public officials disagree with their approach to childrearing or because of racial, religious, gender, sexual orientation, or other biases. In cases such as this one, the potential for these biases, whether explicit or unconscious, to interfere with the proper disposition of a custody dispute underscores the importance of according due respect to a parent's constitutional and statutory rights. *See, e.g.*, *Santosky v. Kramer*, 455 U.S. 745, 762–63 (1982) (explaining that "[b]ecause parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias").

If the trial court made findings sufficient to prove grounds for termination based on facts that were independent from the invalid permanency planning and review hearings, then the mere fact that those invalid proceedings occurred would not preclude the trial court from also concluding that termination was warranted. However, facts inextricably intertwined with a legally void proceeding are necessarily insufficient to prove grounds for termination by clear, cogent, and convincing evidence. Reviewing the record against this backdrop and evidentiary standard, we hold that the trial court failed to find sufficient facts independent from the legally void permanency planning and review hearings to prove any of the three alleged grounds for terminating respondent's parental rights.

a. Willful Abandonment

[1] The Court of Appeals affirmed the trial court's termination order by concluding that DSS had supplied sufficient evidence to prove willful abandonment. Accordingly, we address this ground first.

N.C.G.S. § 7B-1111(a)(7) provides for termination of parental rights where "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion." "[A]lthough the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions, the determinative period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." *In re N.D.A.*, 373 N.C. 71, 77, 833 S.E.2d 768, 773 (2019) (internal quotations omitted). "[W]hether a biological parent has a willful intent to abandon his child is a question of fact to be determined from the evidence." *Id.* (quoting *In re Adoption of Searle*, 82 N.C. App. 273, 276, 346 S.E.2d 511, 514 (1986)). At the adjudicatory stage, the petitioner bears the burden of proving willful abandonment by clear, cogent, and convincing evidence. *In re N.D.A.*, 373 N.C. at 74, 833 S.E.2d at 771.

To establish willful abandonment, the trial court must find evidence of conduct that is more serious than inconsistent attention to parental duties or less than ideal parenting practices. The trial court must instead find evidence that the parent deliberately eschewed his or her parental responsibilities in their entirety. *See In re Young*, 346 N.C. 244, 251, 485 S.E.2d 612, 617 (1997). Abandonment requires "purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims to the child." *In re A.G.D.*, 374 N.C. 317, 319, 841 S.E.2d 238, 240 (2020) (cleaned up).

Almost all of the trial court's findings of fact in this case directly relate to the legally void permanency planning and review hearings, focusing mostly on respondent's alleged failures to comply with all of the conditions imposed by the trial court's orders. The Court of Appeals appropriately jettisons these facts, but then relies almost exclusively upon respondent's failure to attend permanency planning hearings and scheduled visitations with Ella, mostly after his relocation to California, in finding that respondent willfully abandoned his child.[3] *In re E.B.*, 834 S.E.2d 169, 174–75 (N.C. Ct. App. 2019).

Respondent's decision to relocate to California must be assessed in the context of his ongoing efforts to take custody of Ella and bring her to California or to place Ella in the custody of his sister who lived in that state. As respondent stated at trial, his plan "was always for reunification. Once I had my daughter back home with me, I had plans to move to California and . . . she was supposed to come with us." In light of this express intent, respondent's actions do not "manifest a willful determination" to abandon his parental duties. When respondent relocated, his sister was awaiting approval under the ICPC to take custody of Ella.[4] Respondent had already informed DSS that he intended "to allow [his] sister to handle the situation," which the trial court recognized "refer[ed] to Ella's care and placement." In this context, respondent's actions indicated an intent to let his sister complete the ICPC process and assume custody of Ella, not an intent to abandon Ella to DSS. The Court of Appeals has previously held, and we agree, that conduct that is "subject

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3. The Court of Appeals also cited respondent's failure to personally attend a single child support hearing in January 2018. While failure to pay appropriate child support may be a ground for termination that is independent of an invalid underlying juvenile proceeding, the trial court did not find sufficient evidence proving that ground in the instant case. Further, a single missed child support hearing is, standing alone, insufficient to prove willful abandonment. *See Pratt v. Bishop*, 257 N.C. 486, 501–02, 126 S.E.2d 597, 608 (1962).

4. Because the ICPC review of respondent's sister was not completed until after DSS had filed the termination petition, DSS possessed legal authority to refuse to transfer Ella into respondent's sister's custody. We do not today reach the question of whether, after the trial court found grounds to terminate respondent's parental rights at the adjudicatory stage, the trial court's decision to terminate rather than permit respondent to transfer custody to his sister was an appropriate exercise of its discretion at the dispositional stage. N.C.G.S. § 7B-1110. However, we note that some of the trial court's apparent reasons for disregarding respondent's wish to place Ella in his sister's custody may not be sufficient, standing alone, to justify a refusal to place a child with a parent's desired relative. In particular, the trial court's findings that she possessed "negative attitudes" and made "negative posts on social media . . . towards the DSS and [petitioners]," her frustrations with the delayed ICPC process, and the fact that she authored a blog with a title that contained a sexual innuendo may not have been legally relevant in determining whether placement with respondent's sister was in Ella's best interests.

to other explanations"—in this case, the explanation that respondent had long planned to relocate to California with Ella, based on his belief that he would be able to take Ella with him or place her with his sister—"do[es] not inherently suggest a willful intent to abandon." *In re S.R.G.*, 195 N.C. App. 79, 86, 671 S.E.2d 47, 52 (2009).

Respondent's actions before the "determinative" six-month window are also relevant in interpreting whether his conduct during the window signified willful abandonment. *See In re K.N.K.*, 374 N.C. 50, 55, 839 S.E.2d 735, 739 (2020) (relying on evidence of a parent's "actions both prior to and during the determinative six-month period [to] support a reasonable inference of willfulness for purposes of N.C.G.S. § 7B-1111(a)(7)"). Respondent's ongoing efforts to obtain custody of Ella both before and during the determinative six-month window are simply inconsistent with a finding that he willfully intended to forgo all parental claims and responsibilities.

Other findings that the trial court relies upon cannot support willful abandonment because they are the direct result of the trial court's own interference with respondent's parental rights. The fact that respondent stopped attending permanency planning and review hearings and the fact that he communicated inconsistently with DSS after his move to California both arise directly from the trial court's legally invalid proceedings. Any purported obligation respondent had to attend the trial court's hearings and communicate regularly with DSS was created by proceedings that the trial court lacked subject-matter jurisdiction to conduct. Similarly, respondent's failure to attend visitations with Ella is inextricably intertwined with the fact that the trial court impermissibly precluded him from interacting with Ella in the time and manner that he saw fit, as was his right as her parent. The trial court lacked authority to control respondent's access to his child, and respondent's failure to comport with the trial court's restrictions is insufficient to prove willful abandonment. Further, it is relevant that respondent ceased visitation during the determinative six-month period immediately after a breakdown in his relationship with petitioners, in that there was another possible cause for respondent's inconsistent visitation apart from a willful intent to abandon his child. *Cf. In re Young*, 346 N.C. at 252, 485 S.E.2d at 617 (1997) (considering finding of "the probable hostile relationship between respondent and petitioner's family members who cared for [respondent's child]" relevant in willful abandonment analysis). Respondent's actions, viewed in their appropriate context, do not clear the high threshold necessary to support a finding of willful abandonment. *See id.* at 251, 485 S.E.2d at 617 ("Abandonment 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.") (emphasis added) (citations omitted).

The Court of Appeals makes an unpersuasive distinction between respondent's "failures to comply with *the terms* of the void Permanency Planning Orders" and his alleged "failure *to attend* those proceedings [which] is nevertheless illustrative of Respondent-Father having willfully determined to forgo his parental duties." *In re E.B.*, 834 S.E.2d at 174 n.5. Regardless, respondent's failure to personally appear at the trial court's hearings did not forfeit his ongoing claim that he should be reunified with his child. Nor did it withdraw his request to place Ella with his sister. In these circumstances, and given that respondent never disavowed his intent to assume custody of Ella or place her with his sister, his failure to attend permanency planning and review hearings is insufficient to prove a willful intent to abandon his child.

Petitioners' reliance on *In re A.L.*, 245 N.C. App. 55, 781 S.E.2d 860 (2016), is similarly misplaced. While the mere existence of legally void proceedings does not preclude a trial court from subsequently entering an order terminating parental rights, a trial court may only terminate a parent's rights when the petitioners have proven grounds for termination based on facts that are independent from the circumstances created by the legally void underlying proceedings. We hold that in this case, petitioners have failed to meet their burden to prove willful abandonment by clear, cogent, and convincing evidence that is not inextricably intertwined with the legally void permanency planning and review hearings.

Because petitioners need only prove a single ground for termination under N.C.G.S. § 7B-1111, we address the other two grounds the trial court found in terminating respondent's parental rights.[5]

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5. This case is not appropriate for remand for further factual findings because our responsibility under all three grounds for removal is to determine first, whether the evidence in the case supports the trial court's findings of fact, and then second, whether those findings support the trial court's conclusions of law. *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984). Where, as here, we conclude that the record evidence cannot support the necessary findings, there is no justification for a remand for further factual findings. Reversal is also appropriate because there are no material factual disputes relevant to this Court's holding that the evidence does not support termination on any of the grounds alleged by petitioners. *Cf*, *IMT, Inc. v. City of Lumberton*, 366 N.C. 456, 463, 738 S.E.2d 156, 160 (2013) (appropriate to resolve the substantive claim rather than remand the case where the facts are undisputed).

b. Neglect

[2] A trial court may terminate the parental rights of a parent who "has abused or neglected the juvenile." N.C.G.S § 7B-1111(a)(1) (2019). A neglected juvenile is statutorily defined, in pertinent part, as a juvenile "whose parent, guardian, custodian, or caretaker does not provide proper care, supervision, or discipline; . . . or who lives in an environment injurious to the juvenile's welfare." N.C.G.S. § 7B-101(15) (2019). When, as in this case, the juvenile "has been separated from the parent for a long period of time, there must be a showing of past neglect and a likelihood of future neglect by the parent." *In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167 (2016).

Petitioners have failed to prove either that respondent previously neglected Ella or that there is a likelihood that he will neglect her in the future. Respondent has never had physical custody of Ella, and she has never been adjudicated a neglected child. Since shortly after Ella's birth, respondent has continuously been the sole caretaker for his three other minor children, none of whom have been adjudicated neglected. While these facts are not necessarily dispositive, together they impose upon the petitioners a burden that they have failed to carry. *See In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984) (holding that even a prior adjudication of neglect is not enough, on its own, to prove neglect in a termination proceeding).

The trial court's relevant findings of fact pertaining to this ground all relate to evidence developed during the legally invalid permanency planning and review hearings and flow from the assessments, recommendations and requirements imposed as part of that process. There is no evidence that respondent *actually* neglected Ella, and no basis to infer that he would have done so if Ella had been in his care, especially given that respondent was, at that same time, successfully caring for three other minor children.

The record was also devoid of any facts supporting a conclusion that respondent was likely to neglect Ella in the future. The only relevant findings pertaining to likelihood of future neglect are that "[t]he history of [respondent] since [Ella] was born suggests that marijuana use, unstable housing, changing employment and conflicts raised by his lifestyle will continue to be issues for him," that respondent "is not in a position to care for [Ella] due to his lack of responsible decision making, substance abuse issues, parenting struggles, and lack of overall stability," and that those issues are "barriers to a safe reunification with" Ella. From these facts, the trial court draws its conclusion

that respondent "has not corrected the risk factors within his life that would allow him to appropriately and successfully parent [Ella], pursuant to N.C.G.S. § 7B-1111(a)(1)."

These findings are insufficient to support the conclusion that respondent is likely to neglect Ella in the future. *Cf. In re K.N.*, 373 N.C. 274, 282, 837 S.E.2d 861, 867 (insufficient evidence to prove likelihood of future neglect where juvenile had previously been adjudicated neglected and removed from home, parent was incarcerated, and evidence indicated parent had not fully complied with legally valid case plan). The trial court fails to analyze how these facts[6] connect with the specific determinative question of respondent's future likelihood of neglecting Ella. *Id.* at 283, 837 S.E.2d at 867–68 (holding that the "extent to which a parent's incarceration or violation of the terms and conditions of probation support a finding of neglect *depends upon an analysis of the relevant facts and circumstances*") (emphasis added). Further, the trial court fails to examine the "considerable change in conditions" in respondent's life that "had occurred by the time of the termination proceeding." *In re Young*, 346 N.C. at 250, 485 S.E.2d at 616. Notably, in addition to respondent's progress addressing at least some of the "risk factors" he had previously identified to DSS, respondent had also identified his sister as an appropriate alternative guardian for Ella.

Because petitioners have failed to prove that respondent previously neglected Ella and that he was likely to neglect Ella again in the future, Section 7B-1111(a)(1) does not support termination of respondent's parental rights.

c. Failure to Make Reasonable Progress

[3] A trial court may terminate the parental rights of a parent who "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) (2019). Here, there must be a "nexus between the components of the court-approved case plan with which [respondent] failed to comply and the conditions which led to [the juvenile's]

6. Some of the facts relied upon by the trial court are contested (for example, respondent denies marijuana use during the relevant time period), some are subjective value judgments (the assertion of "conflicts raised by his lifestyle"), and some are circumstances that respondent shares with many other parents nationwide who will never neglect their children ("unstable housing" and "changing employment"). Hence, their probative value is questionable in any event.

removal from the parental home." *In re B.O.A.*, 372 N.C. 372, 385, 831 S.E.2d 305, 314 (2019). A parent is required to make "reasonable progress . . . in correcting *those conditions which led to the removal of the juvenile*." N.C.G.S.§ 7B-1111(a)(2) (2019). Petitioners essentially contend that respondent's voluntary out-of-home family services agreement both identifies the "conditions" which "led to the removal" of Ella from his home (e.g., DSS's refusal to allow respondent to assume custody of Ella) and the benchmark against which the trial court could evaluate his "progress." They argue that respondent's failure to make reasonable progress towards addressing the risk factors outlined in his voluntary out-of-home family services agreement provides sufficient factual evidence to terminate his parental rights.

We reject the argument that failure to comply with a voluntary out-of-home family services agreement constitutes grounds for termination under § 7B-1111(a)(2). It is settled law that "removal" as used within § 7B-1111(a)(2) only occurs when a court acting with appropriate jurisdiction enters an order placing a child into the custody of someone other than the child's parents. *In re J.S.*, 374 N.C. 811, 845 S.E.2d 66, 71 (2020) ("[A]n adjudication under N.C.G.S. § 7B-1111(a)(2) requires that a child be left in foster care or placement outside the home *pursuant to a court order* for more than a year at the time the petition to terminate parental rights is filed.") (emphasis added) (cleaned up); *see also In re Pierce*, 356 N.C. 68, 73, 565 S.E.2d 81, 85 (2002) (determining that a child was removed within the meaning of § 7B-1111(a)(2) "when the trial court awarded custody of the child to DSS, and she was placed in foster care"). As the Court of Appeals has correctly held, permitting this ground to apply to voluntary separations would unnecessarily subject parents to the risk of termination even when their "reasons" for transferring custody of their child do not "implicate the child welfare concerns of the State." *In re A.C.F.*, 176 N.C. App. at 525, 626 S.E.2d at 733. Further, such a broad interpretation of § 7B–1111(a)(2) may cause parents to avoid voluntarily seeking out much-needed assistance from DSS for fear of permanently losing their parental rights. Because DSS never filed a petition to adjudicate Ella abused, dependent, or neglected, no legally valid order ever "removed" Ella from respondent's custody. Therefore, Section 7B-1111(a)(2) does not support termination of respondent's parental rights.

Conclusion

Petitioners bear the burden of proving that grounds exist for terminating respondent's parental rights, based on facts that arise independently from the legally void permanency planning proceedings. As we

hold that petitioners have failed to meet this burden, we reverse the Court of Appeals decision.

REVERSED.

Justice NEWBY concurring in result only.

I agree with the majority that because no abuse, neglect, or dependency petition was filed, the trial court lacked jurisdiction to conduct the initial permanency planning and review hearings here, and that the trial court's findings that were not based on the void orders and proceedings are insufficient to support the termination of respondent's parental rights. Accordingly, the matter should be remanded to the trial court. In its analysis, the majority improperly finds facts in this case, which is a job reserved for the trial court, and addresses issues unnecessary to resolve this matter, rendering much of the discussion dicta. Thus, I concur in the result only.

IN THE MATTER OF J.A.M.

No. 7PA17-3

Filed 25 September 2020

Termination of Parental Rights—no-merit brief—pro se arguments—neglect

The trial court's termination of a mother's parental rights on the grounds of neglect was affirmed where counsel filed a no-merit brief and the mother filed a pro se brief. The Supreme Court addressed the mother's pro se arguments, concluding that her challenge to the children's initial removal was foreclosed by an earlier appellate decision in the matter; her allegations of corruption, misconduct, and bias had no support in the record; and her argument that she did nothing wrong and that children cannot be removed just because they have witnessed domestic violence lacked any legal or factual basis. The termination order was based on clear, cogent, and convincing evidence and based on proper legal grounds.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 20 May 2019 by Judge Elizabeth T. Trosch in District Court, Mecklenburg County. This matter was calendared for argument in the

Supreme Court on 29 July 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Marc S. Gentile, Associate County Attorney, for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services Division.

Matthew D. Wunsche, GAL Appellate Counsel, for appellee Guardian ad Litem.

Richard Croutharmel for respondent-appellant mother.

HUDSON, Justice.

Respondent appeals from an order entered by Judge Elizabeth T. Trosch in District Court, Mecklenburg County, on 20 May 2019 terminating her parental rights in J.A.M., a girl born in January 2016.[1] Respondent's counsel has filed a no-merit brief pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure, and respondent has filed her own written arguments as permitted by that rule. Because we conclude that the issues raised by respondent and her counsel are meritless, we affirm.

On 29 February 2016, soon after J.A.M.'s birth, the Mecklenburg County Department of Social Services, Youth and Family Services Division (YFS), filed a juvenile petition alleging that the infant child was neglected due to the serious domestic violence histories of both parents. With regard to respondent, the juvenile petition alleged that she "had a child receive life[-]threatening injuries while in her care in the past and [had] her rights terminated to six other children." The juvenile petition further noted that "[b]oth parents refused to sign a Safety Assessment, stating that [respondent] does not trust anyone with YFS."

In a prior decision in this case, we summarized respondent's history with YFS in Mecklenburg County as follows:

> Respondent[ ] has a significant history of involvement with YFS extending back to 2007 relating to children

1. The trial court previously terminated the parental rights of J.A.M.'s father, who is not a party to this appeal. The testimony presented in this case was incorrect to the extent that it states that the father's parental rights in J.A.M. were terminated on 31 March 2016. The father's parental rights were actually terminated on 14 November 2016.

born prior to J.A.M. . . . [R]espondent[ ] has a long history of violent relationships with the fathers of her previous six children, during which her children "not only witnessed domestic violence, but were caught in the middle of physical altercations." Furthermore, during this period, she repeatedly declined services from YFS and "continued to deny, minimize and avoid talking about incidences of violence." All of this resulted in her three oldest children first entering the custody of YFS on 24 February 2010.

The most serious incident occurred in June 2012 when respondent[ ] was in a relationship with E.G. Sr., the father of her child E.G. Jr., a relationship that—like prior relationships between respondent[ ] and other men—had a component of domestic violence. Respondent[ ] had recently represented to the court that "her relationship with E.G. Sr. was over" and stated that she "realized that the relationship with E.G. Sr. was bad for her children"; however, she quickly invited E.G. Sr. back into her home. Following another domestic violence incident between respondent[ ] and E.G. Sr., E.G. Jr. "was placed in an incredibly unsafe situation sleeping on the sofa with E.G. Sr." for the night, which resulted in E.G. Jr. suffering severe, life-threatening injuries, including multiple skull fractures, at the hands of E.G. Sr. The next morning, respondent[ ] "observed E.G. Jr.'s swollen head, his failure to respond, and his failure to open his eyes or move his limbs," but she did not dial 911 for over two hours. Following this incident, respondent[ ]'s children re-entered the custody of YFS. Afterwards, she refused to acknowledge E.G. Jr.'s "significant special needs" that resulted from his injuries, maintaining that "there was nothing wrong with him" and "stating that he did not need all the services that were being recommended for him." Respondent[ ] proceeded to have another child with E.G. Sr. when he was out on bond for charges of felony child abuse.

In response to respondent[ ]'s failure to protect E.G. Jr., as well as her other children, her parental rights to the six children she had at the time were terminated in an order filed on 21 April 2014 by Judge [Louis A.] Trosch. The 2014 termination order was based largely on the court's finding that she had "not taken any steps to change

> the pattern of domestic violence and lack of stability for the children since 2007."

In re J.A.M. (*J.A.M. II*), 372 N.C. 1, 2–3, 822 S.E.2d 693, 695 (2019) (cleaned up).

Judge Louis A. Trosch[2] held a hearing on YFS's juvenile petition on 30 March 2016 and entered an order the same day adjudicating J.A.M. a neglected juvenile and ordering that reunification efforts with respondent were not required based on the trial court's previous termination of her parental rights in J.A.M.'s six siblings. As part of the adjudication and disposition order, the trial court maintained J.A.M. in YFS custody and awarded respondent one hour of supervised visitation semiweekly.

Respondent appealed the 30 March 2016 adjudication and disposition order. While her appeal was pending, the trial court continued to conduct permanency planning hearings. In an order entered on 12 April 2016, Judge Louis Trosch suspended respondent's visitation with J.A.M., reaffirmed that efforts for reunification with respondent were not required, and ordered YFS to file for termination of respondent's parental rights within sixty days. YFS filed a motion to terminate respondent's parental rights in J.A.M. on 10 May 2016 (TPR motion). The TPR motion was held in abeyance pending the outcome of respondent's appeal from the initial adjudication and disposition order.[3]

In an opinion filed on 20 December 2016, the North Carolina Court of Appeals reversed the adjudication and disposition order holding that the evidence and the trial court's findings of fact did not support the trial court's adjudication of neglect. *In re J.A.M.*, 251 N.C. App. 114, 120, 795 S.E.2d 262, 266 (2016), *rev'd per curiam*, *In re J.A.M.* (*J.A.M. I*), 370 N.C. 464, 809 S.E.2d 579 (2018). YFS and the guardian *ad litem* (GAL) filed a joint petition for discretionary review in this Court on 6 January 2017, which we allowed by order entered on 8 June 2017.

On 11 January 2017, following the Court of Appeals' decision reversing the trial court's order adjudicating J.A.M. to be a neglected juvenile, respondent filed a motion to reinstate her supervised visitation privileges. Judge Elizabeth Trosch granted the motion, awarding respondent

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2. Judge Louis A. Trosch and Judge Elizabeth T. Trosch are both district court judges in Mecklenburg County. Because both judges entered orders in this matter, they are referred to by their first and last names.

3 On 2 September 2016, YFS filed a motion to terminate the parental rights of J.A.M.'s father. The trial court held a hearing on the motion on 31 October 2016 and terminated the father's parental rights in an order entered on 14 November 2016.

one hour of supervised visitation with J.A.M. biweekly and authorizing YFS to expand respondent's supervised visitation privileges.

After we granted discretionary review in *J.A.M. I*, Judge Elizabeth Trosch again suspended respondent's visitation in a permanency planning hearing order entered on 22 August 2017 finding that respondent

> has begun to visit with the juvenile but has engaged in no other service[s] related to domestic violence, mental health, parenting or substance abuse. [Respondent] is currently pregnant and refuses to provide any information related to the father of that child. [Respondent] has chosen to take no action since the Court of Appeals decision to demonstrate she understands the impact that domestic violence has on a child . . . and has shown no evidence of changed behavior.

Respondent appealed the trial court's order, but the Court of Appeals dismissed her appeal, holding that the trial court's order was interlocutory, and denied her petition for writ of certiorari. *In re J.M.*, 259 N.C. App. 250, 812 S.E.2d 413 (2018) (unpublished).

On discretionary review in *J.A.M. I*, this Court reversed the Court of Appeals' decision reversing the 30 March 2016 adjudication and disposition order and remanded "for reconsideration and for proper application of the standard of review." 370 N.C. at 467, 809 S.E.2d at 581. On remand, a divided panel of the Court of Appeals affirmed the trial court's order. *In re J.A.M.*, 259 N.C. App. 810, 817, 816 S.E.2d 901, 905 (2018), *aff'd*, 372 N.C. 1, 822 S.E.2d 693 (2019). Respondent appealed to this Court.

In *J.A.M. II*, we affirmed the Court of Appeals' decision in an opinion filed on 1 February 2019. 372 N.C. at 11, 822 S.E.2d at 700. We held the trial court's findings of fact supported the trial court's conclusion that J.A.M. was a neglected juvenile based on the substantial risk of harm she faced in respondent's care.

> Combined with the lengthy record from her past cases, the findings that respondent[ ] believed she did not need any services from YFS, had opted not to directly confront her romantic partner's prior domestic violence history, and continued to minimize the role her own prior decisions played in the harm her older children had suffered all support a conclusion that respondent[ ] had not made sufficient progress in recognizing domestic violence warning signs, in accurately assessing poor decisions

> from the past, or in identifying helpful resources. It was proper for the trial court to then reach the conclusion that respondent[ ] had not developed the skills necessary to avoid placing J.A.M. in a living situation in which she would suffer harm.

Id. at 10–11, 822 S.E.2d at 699.

Following our decision in *J.A.M. II*, YFS provided notice of a hearing on the TPR motion. Respondent filed a motion for Judge Elizabeth Trosch's recusal on the ground that she had conducted multiple permanency planning hearings in the case since January 2017 and had maintained a primary permanent plan of adoption for J.A.M. based on her assessment of the child's best interests.[4] Inasmuch as Judge Elizabeth Trosch had "already formed an opinion that termination [of respondent's parental rights was] in the child's best interest[s]," respondent argued that her recusal was required by the Due Process Clause of the Fourteenth Amendment as well as Canon 3C(1) of the North Carolina Code of Judicial Conduct. Judge Elizabeth Trosch denied respondent's motion to recuse in a written order entered on 14 March 2019, finding as follows:

> 4. The practice in Mecklenburg County and others across this state is that the same judge will hear matters regarding the same family. It is known colloquially as "one judge-one family." Thus, it is common practice for the same judge to hear both an underlying juvenile court matter with a family and then also hear a Termination of Parental Rights (TPR) proceeding involving that same family.
>
> 5. This one judge-one family practice has not been found by the appellate courts to be inappropriate or to prejudice litigants or to violate the Constitutional rights of the litigants.
>
> 6. A juvenile court judge hearing a TPR proceeding is presumed to set aside any incompetent evidence and to decide the matter solely based upon the record evidence presented during the proceeding.

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4. Respondent also erroneously claimed that Judge Elizabeth Trosch entered the 2014 order terminating her parental rights to her six older children and thus "has independent knowledge about an allegation [made] by YFS" in the TPR motion. The record actually shows that Judge Louis Trosch entered the prior termination order.

7. [Respondent] has not demonstrated that she will be prejudiced by the undersigned remaining as the judge of record.

Judge Elizabeth Trosch heard the TPR motion on 8 April 2019. Respondent was represented by counsel but did not attend the hearing. Counsel for respondent offered no evidence but cross-examined YFS's witness, objected to the introduction of the GAL's report at disposition, and made closing arguments at each stage of the hearing.

Judge Elizabeth Trosch entered an "Order Terminating Parental Rights of Respondent Mother" (termination order) on 20 May 2019. In adjudicating grounds for termination under N.C.G.S. 7B-1111(a)(1), Judge Elizabeth Trosch concluded that respondent had previously neglected J.A.M. "and there remains a high probability of the repetition of neglect." *See* N.C.G.S. 7B-1111(a)(1) (2019). Judge Elizabeth Trosch also adjudicated grounds for terminating respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(9) in that "respondent . . . had her parental rights to six other children terminated involuntarily by a court of competent jurisdiction and she further lacks the ability or willingness to establish a safe home" for J.A.M. *See* N.C.G.S. 7B-1111(a)(9). Upon written findings addressing the dispositional factors in N.C.G.S. § 7B-1110(a), Judge Elizabeth Trosch further concluded that terminating respondent's parental rights is in J.A.M.'s best interests. *See* N.C.G.S. § 7B-1110(a) (2019). Respondent filed a notice of appeal from the termination order.

Counsel for respondent has filed a no-merit brief on her behalf pursuant to N.C. R. App. P. 3.1(e). Counsel has advised respondent of her right to file *pro se* written arguments on her own behalf and provided her with the documents necessary to do so. Respondent has submitted *pro se* arguments to this Court, which we consider below.

Respondent first denies neglecting J.A.M. and claims that YFS "has been using [her] past to take [her children] away and to keep them from [her]." Respondent asserts that "it is an illegal and an unconstitutional practice for [YFS] to remove children because they witness domestic violence" and that YFS violated her rights under the Fourteenth Amendment by removing J.A.M. from her care without probable cause.

As respondent's arguments challenge J.A.M.'s initial removal by YFS and her adjudication as a neglected juvenile on 30 March 2016, we conclude that her arguments are foreclosed by our decision affirming the trial court's adjudication and disposition order in *J.A.M. II*, 372 N.C. at 11,

822 S.E.2d at 700. Our decision in *J.A.M. II* constitutes "the law of the case" and is binding as to the issues decided therein. *Shores v. Rabon*, 253 N.C. 428, 429, 117 S.E.2d 1, 2 (1960) (per curiam). Accordingly, we overrule respondent's arguments insofar as they concern the trial court's prior adjudication of neglect.

Respondent next accuses YFS and the "Trosch Judges" of bias, alleging that YFS relied on perjured testimony and fraudulent documents to prevail in the proceedings against her. She notes that YFS failed to report at the termination hearing that she is successfully raising her eighth child in South Carolina without incident. Respondent states that she refused to cooperate with YFS because YFS rewards its social workers with financial bonuses and promotions if they successfully terminate a parent's parental rights. She refused to identify the father of her eighth child in order to keep the child out of YFS custody. Respondent declined to sign a case plan because "a case plan is essentially a plea of guilty" and she "did nothing wrong."

Respondent's allegations of corruption, misconduct, and bias find no support in the record. Respondent points to no evidence that YFS employees committed perjury or tendered forged documents to the trial court, or that they received bonuses or promotions for terminating respondent's parental rights in her children. Nor does respondent show that YFS withheld evidence favorable to respondent from the trial court, let alone that YFS had an affirmative duty to present such evidence. We note that respondent was afforded the opportunity to present evidence at the termination hearing and chose not to do so.

Respondent also fails to show any circumstances giving rise to a reasonable perception of judicial bias against her. As Judge Elizabeth Trosch pointed out, it is the practice in North Carolina for one judge to preside over a juvenile case throughout the life of the case. This is known as the "one judge, one family" policy. *See In re M.A.I.B.K.*, 184 N.C. App. 218, 225–26, 645 S.E.2d 881, 886 (2007). Rather than showing a bias, this practice reflects a central policy of the state. As shown on the North Carolina Judicial Branch's website, a "major goal of family court is to consolidate and assign a family's legal issues before a single district court judge or team of judges." *Family Court*, North Carolina Judicial Branch, https://www.nccourts.gov/courts/family-court (last visited Sept. 4, 2020). These judges are experienced in family law matters and receive specialized training so that family courts can produce "more timely, consistent, and thoughtful outcomes." *Id.*

Accordingly, the mere fact that Judge Elizabeth Trosch presided at earlier permanency planning hearings and determined that a permanent plan of adoption was in J.A.M.'s best interests did not require her to recuse herself from the termination hearing. *See, e.g.*, *In re Z.V.A.*, 373 N.C. 207, 215, 835 S.E.2d 425, 431 (2019) ("If the bias alleged here were to be deemed to exist . . . and ultimately to require recusal, then the illogical consequence would follow that a district court would not ever be able to preside over a termination hearing after it had previously set the permanent plan for a juvenile as a plan that would imply or be compatible with termination . . . ."); *In re Faircloth*, 153 N.C. App. 565, 570-71, 571 S.E.2d 65, 69 (2002) ("[K]nowledge of evidentiary facts gained by a trial judge from an earlier proceeding does not require disqualification. Furthermore, we reject any contention that [the judge] should be disqualified because he earlier adjudicated the four children abused and neglected." (citations omitted)).

Finally, we find respondent's insistence that she "did nothing wrong" and her insistence that "it is an illegal and an unconstitutional practice for [YFS] to remove children because they witness domestic violence" to be consistent with Judge Elizabeth Trosch's finding that respondent made no meaningful effort or progress toward resolving the substantial risk posed to J.A.M. by respondent's lengthy history of relationships involving domestic violence. *See generally In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 241 (2006) (upholding "the [trial] court's conclusion that [the child's] exposure to domestic violence rendered him a neglected juvenile"). Moreover, the evidence and Judge Elizabeth Trosch's findings show that respondent refused to engage in "services to ameliorate the substantial risk of domestic violence" or to maintain contact with YFS even at the cost of having no contact with J.A.M. since mid-2017. Respondent's arguments thus have no legal or factual basis.

We also independently review issues identified by respondent's counsel in a no-merit brief filed pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. *See In re L.E.M.*, 372 N.C. 396, 402, 831 S.E.2d 341, 345 (2019). Counsel has identified three issues that could arguably support an appeal, while also explaining why he believes those issues lack merit. The issues presented by counsel are (1) whether Judge Elizabeth Trosch erred by denying respondent's motion for Judge Elizabeth Trosch to recuse herself; (2) whether the termination order contained sufficient findings based on clear, cogent, and convincing evidence to establish the existence of statutory grounds for terminating respondent's parental rights; and (3) whether Judge Elizabeth Trosch

abused her discretion by concluding that it was in J.A.M.'s best interests that respondent's parental rights be terminated.

Having carefully considered the issues identified in the no-merit brief in light of the entire record, we conclude that (1) Judge Elizabeth Trosch did not err in denying respondent's motion for Judge Elizabeth Trosch to recuse herself; (2) the termination order contains sufficient findings based on clear, cogent, and convincing evidence to establish the existence of a statutory ground of neglect under N.C.G.S. § 7B-1111(a)(1) for terminating respondent's parental rights, *see* N.C.G.S. § 7B-1109(f) (2019);[5] and (3) Judge Elizabeth Trosch did not abuse her discretion by concluding that it was in J.A.M.'s best interests that respondent's parental rights be terminated. Accordingly, we affirm the trial court's termination order.

AFFIRMED.

5. Because we determine that the termination order contains sufficient findings based on clear, cogent, and convincing evidence to establish the existence of a statutory ground of neglect under N.C.G.S. § 7B-1111(a)(1), we do not address whether additional grounds for termination exist under subsection (a)(9). *See In re E.H.P.*, 372 N.C. 388, 395, 831 S.E.2d 49, 53-54 (2019) ("[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 P.L.P.*, 173 N.C. App. 1, 8, 618 S.E.2d 241, 246 (2005))).

IN RE J.D.C.H.

[375 N.C. 335 (2020)]

IN THE MATTER OF J.D.C.H., J.L.C.H.

No. 401A19

Filed 25 September 2020

Termination of Parental Rights—grounds—willful abandonment—findings of fact—conclusions of law

The trial court properly terminated a father's parental rights to his two children on the ground of willful abandonment (N.C.G.S. § 7B-1111(a)(7)) where for two and a half years, including the six months before the termination petition was filed, the father made only one attempt to see his children and did not provide them any emotional, material, or financial support. Clear, cogent, and convincing evidence supported enough of the findings of fact to support termination, and the trial court properly considered the father's conduct outside the determinative six-month window when evaluating his credibility and intentions. Importantly, the father's single attempt to visit his children did not undermine the court's ultimate finding and conclusion that he willfully abandoned his children.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 27 June 2019 by Judge Wayne S. Boyette in District Court, Nash County. This matter was calendared for argument in the Supreme Court on 29 July 2020 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.

No brief for appellee Guardian ad Litem.

Richard Croutharmel for respondent-appellant father.

HUDSON, Justice.

Respondent appeals from the trial court's order terminating his parental rights to J.D.C.H. (Jed) and J.L.C.H. (Joel)[1] on the ground of willful abandonment. We affirm.

1. Pseudonyms are used to protect the identity of the juveniles and for ease of reading.

I. Factual Background and Procedural History

Petitioner and respondent were involved in an on-again, off-again relationship from 2010 through 2014 but never married. Joel was born in July 2011, and Jed was born in May 2015. The parents ended their romantic involvement in 2014, shortly after petitioner found out she was pregnant with Jed. Respondent is also the father of three other children with different women.

Respondent was initially involved in helping provide care for Joel after his birth. He regularly called to check on Joel and was a "good dad" when he was around. After Jed was born, however, respondent's involvement became more sporadic. In the year after Jed's birth, respondent saw the children on only a few occasions. He continued to call to check on the children, but his contact became progressively less frequent, and he last spoke with the children in September 2016. Jed never had an overnight visit with respondent.

In July 2016, respondent had a four-hour unsupervised visit with the children at their paternal grandmother's home. At that visit, petitioner and respondent agreed that respondent could see the children every other weekend if he would pay petitioner $200.00 per month in child support. However, respondent never paid any child support and did not ask to see the children after that visit. At the time of the termination hearing on 30 May 2019, respondent had not seen the children since the July 2016 visit.

Petitioner met her now husband, Mr. H., and they married in December 2016. In March 2017, petitioner contacted respondent about changing the children's last names to also include that of Mr. H., and respondent consented to the name change. Respondent signed the paperwork but did not show up at the courthouse to bring his identification card, despite petitioner telling respondent that she would bring Joel to the courthouse with her so that petitioner could visit with him. Petitioner nonetheless was able to effectuate the name changes despite respondent's absence.

Respondent was incarcerated from October 2018 to 14 December 2018. The day he was released, respondent called petitioner and asked to see the children and stated that he wanted to resume his relationship with them. Petitioner denied respondent's request to see the children.

On 31 December 2018, petitioner filed petitions to terminate respondent's parental rights in both children, alleging the grounds of willful failure to pay a reasonable portion of the cost of the children's care and

willful abandonment. N.C.G.S. § 7B-1111(a)(3), (7) (2019). Respondent filed a pro se, handwritten response to the petitions on 27 February 2019, and his attorney filed an answer to the petitions on 16 April 2019. At the 30 May 2019 termination hearing, the cases were consolidated for hearing and petitioner voluntarily dismissed the ground of willful failure to pay a reasonable portion of the cost of the children's care. On 27 June 2019, the trial court entered an order concluding that grounds existed to terminate respondent's parental rights based on willful abandonment and that termination was in the children's best interests. Accordingly, the trial court terminated respondent's parental rights. Respondent appealed.

II. Analysis

Our Juvenile Code provides for a two-stage process for terminating parental rights. N.C.G.S. §§ 7B-1109, -1110 (2019). 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 N.C.G.S. § 7B-1111(a). N.C.G.S. § 7B-1109(f). "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).

"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 C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019) (quoting *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984)). "Unchallenged findings are deemed to be supported by the evidence and are 'binding on appeal.' " *In re K.N.K.*, 374 N.C. 50, 53, 839 S.E.2d 735, 738 (2020) (quoting *In re Z.L.W.*, 372 N.C. 432, 437, 831 S.E.2d 62, 65 (2019)). "Moreover, we review only those [challenged] findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58–59 (2019) (citation omitted). "The trial court's conclusions of law are reviewable de novo on appeal." *In re C.B.C.*, 373 N.C. at 19, 832 S.E.2d at 695 (citation omitted).

Respondent contends that the trial court erred by terminating his parental rights on the ground of willful abandonment. Specifically, he challenges several of the trial court's findings of fact and argues that the

findings and record evidence do not support the conclusion that he willfully abandoned the children. We disagree.

A trial court may terminate a parent's parental rights when "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion." N.C.G.S. § 7B-1111(a)(7). "Abandonment 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. at 251, 485 S.E.2d at 617 (citation omitted). "[I]f a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wil[l]fully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *Pratt v. Bisho*p, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962) (citation omitted). "The willfulness of a parent's actions is a question of fact for the trial court." *In re K.N.K.*, 374 N.C. at 53, 839 S.E.2d at 738 (citing *Pratt*, 257 N.C. at 501, 126 S.E.2d at 608). "[A]lthough the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions, the 'determinative' period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." *In re N.D.A.*, 373 N.C. 71, 77, 833 S.E.2d 768, 773 (2019) (citation omitted).

Here, the determinative six-month period is from 30 June 2018 to 31 December 2018. In support of its conclusion that grounds existed to terminate respondent's parental rights based on willful abandonment, the trial court made the following relevant findings of fact:

> 22. The last face to face contact and visit the Respondent had with either Juvenile was on July 23, 2016, and lasted approximately four (4) hours. The Respondent has not been in the presence of either Juvenile for over two and one-half (2½) years and has not made any serious or sincere effort to participate in either Juvenile's life during those two and one-half (2½) years.
>
> 23. The last communication of any kind the Respondent had with the Petitioner to inquire about the welfare of the Juveniles was on September 22, 2016, with the exception of one text, Facebook message, or email request to visit in December of 2018, which was rebuffed by the Petitioner.
>
> 24. Since September 22, 2016, the Respondent has failed to communicate with the Juveniles, with the exception of the abovesaid request to visit in December of 2018, has

not sent any letters to the Juveniles, has failed to call the Juveniles, has failed to provide any emotional, material or financial support to the Juveniles and has failed in any manner to perform his duties as a parent to the Juveniles. The Court does not consider any attempts by the Respondent's mother inquiring as to the welfare of the Juveniles as attributable to the Respondent himself for the purposes of this action.

25. The Respondent has failed to provide any consistent financial or material support for the use and benefit of the Juveniles since their birth.

26. The Respondent, as a natural father of both Juveniles, has willfully abandoned the Juveniles for at least six (6) consecutive months immediately preceding the filing of these Petitions for Termination of Parental Rights pursuant to the provisions of [N.C.G.S.] § 7B-1111(7).

27. The Respondent contends that his failure to visit with both Juveniles, to have any contact with them, or to attempt to have any contact with them was due to his lack of finances, lack of transportation, lack of his maturity level, and resistance of the Petitioner. The [trial c]ourt finds, however, by clear, cogent and convincing evidence that the actions and omissions of the Respondent constitute conduct by him manifesting a willful intent to forego all parental duties and obligations and to relinquish all his parental claims to both Juveniles.

28. The Respondent has not been prohibited from contacting the Juveniles due to sickness, incarceration, or any other valid reason.

29. The Respondent's actions and/or omissions and failures to act for the two and one-half (2½) years prior to the filing of the Petitions, are wholly inconsistent with his stated desire to maintain custody or a relationship with the Juveniles.

30. The Respondent's actions and/or omissions and failures to act for the two and one-half (2½) years prior to the filing of the Petitions, constitute willful neglect and a refusal to perform the natural and legal obligations of parental care and support.

31. For the two and one-half (2½) years prior to the filing of the Petitions, the Respondent withheld from the Juveniles his presence, his love, and his care; and further, willfully neglected to provide support and maintenance to the Petitioner for the use and benefit of the Juveniles.

32. The Respondent testified he loved both Juveniles. While the [trial c]ourt does not doubt the Respondent's love for the Juveniles, the [trial c]ourt finds that the welfare and best interest of the Juveniles are paramount to the parental love felt by the Respondent and that because of the Respondent's demonstrated neglect of his parental duties and obligations the Respondents' feelings of parental love must yield to the welfare and best interest of the Juveniles.

33. The [trial c]ourt specifically finds that from July of 2016 until the filing o[f] the Petition the Respondent willfully abandoned both Juveniles and withdrew and withheld from them his support and love, and failed to take reasonable efforts to force contact with the Juveniles.

34. The Respondent failed to take legal action, whether with an attorney or on his own, to force contact with the Juveniles. The Respondent never attempted to force contact with the Juveniles in any manner, even though the Respondent earned a decent wage working at various places of employment where he was paid between $300.00 and $450.00 per week "in cash" and supported other children by other women. Further, the Respondent testified that he opened a checking account and purchased a camper for the mother of another of his biological children during a time when he contributed no financial support to the Petitioner for the use and benefit of the Juveniles.

35. The Respondent demonstrated through his testimony that, although he had the ability and intelligence to understand his parental obligations to the Juveniles, he willfully failed to fulfill those parental obligations, stating "I wasn't being responsible."

36. Even after he was served with the Petitions in these cases, the Respondent failed to demonstrate through his actions, other than filing the *pro se* response, a desire to support the Juveniles financially and emotionally, and failed to take any action to force contact with them.

37. The Petitioner testified that the main reason for initiating the Termination of Parental Rights was that the Petitioner did not want the Respondent to obtain custody of the minor children in the event of her death.

38. The paternal grandmother testified that she attempted to contact the Petitioner regarding the welfare of the children in the 2 ½ years prior to filing the Petition and the paternal grandmother further testified that she had a contact telephone number during this time and that she was certain that the Respondent Father also had access and knowledge of the Petitioner's telephone number during this time period.

39. Termination of the Respondent's parental rights is in the best interest and welfare of both Juveniles.

40. The best interests of the Juveniles will be served by granting the Petitioner the relief requested in her Petitions to Terminate Parental Rights filed in 18 JT 64 and 18 JT 65.

41. In making its decision, the [trial c]ourt has considered both the conduct of the Respondent in the six (6) months immediately preceding the filing of the Petitions in this matter and the conduct of the Respondent from the date of the filing of the Petitions to the date of the hearing.

A. Challenged Findings of Fact

On appeal, respondent challenges several of the trial court's findings of fact as unsupported or irrelevant. He first challenges as unsupported by the evidence the last sentence of finding of fact 22, which states that he "has not made any serious or sincere effort to participate in either Juvenile's life" over the past two and one-half years. Respondent argues that his December 2018 phone call to petitioner asking to visit with the children was "a sincere effort at reestablishing his relationship with his children[,]" which was made during the relevant period. Although respondent's request to see the children when he phoned petitioner may have been sincere, we find no error in the trial court's finding that this one unsuccessful attempt to set up visitation in over two years did not demonstrate a "serious or sincere effort" by respondent to reestablish his relationship with the children.

Respondent next challenges finding of fact 23. First, he contends that the finding mischaracterizes the nature of his contact with petitioner in December 2018. Respondent argues that both he and petitioner

testified that the contact was made by telephone. We agree that the evidence showed respondent's contact with petitioner in December 2018 was by telephone. Therefore, to the extent the finding of fact indicates that the contact was through text, email, or social media, that portion of the finding is unsupported by the evidence, and we will disregard that portion. *See In re B.C.B.*, 374 N.C. 32, 35, 839 S.E.2d 748, 751 (2020) (stating that the findings of fact must be supported by clear, cogent, and convincing evidence). However, any inaccuracy as to the means of contact has no bearing on the substance of this finding—that is, that respondent contacted petitioner only once during the determinative period. Respondent also argues that finding of fact 23 fails to acknowledge his second attempt to contact petitioner through social media in January 2019. However, because this contact fell outside the relevant period for adjudicating the ground of willful abandonment, any possible error in the trial court's failure to address this point in its findings is harmless. *See In re K.N.K.*, 374 N.C. at 56, 839 S.E.2d at 740 ("[A]ny error in these findings is harmless and had no impact on the court's adjudication because they occurred . . . after the petition was filed and well outside the determinative time period.").

Respondent next contends finding of fact 26, which states that respondent willfully abandoned the children within the meaning of N.C.G.S. § 7B-1111(a)(7), is actually a conclusion of law because it requires the application of legal principles and "decides ultimate issues in the case." We agree that finding of fact 26 is not an evidentiary finding of fact, but we determine that it is an ultimate finding. "[A]n 'ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact' and should 'be distinguished from the findings of primary, evidentiary, or circumstantial facts.' " *In re N.D.A.*, 373 N.C. at 76, 833 S.E.2d at 772–73 (quoting *Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 491, 81 L. Ed. 755, 762 (1937)); *see also In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) ("Ultimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts." (citation omitted)). Regardless of how this finding is classified, "that classification decision does not alter the fact that the trial court's determination concerning the extent to which a parent's parental rights in a child are subject to termination on the basis of a particular ground must have sufficient support in the trial court's factual findings." *In re N.D.A.*, 373 N.C. at 76–77, 833 S.E.2d at 773. As a result, we address respondent's challenge in our discussion regarding whether the trial court erred by concluding that respondent's parental rights were subject to termination based on willful abandonment.

Respondent next "denies" findings of fact 27, 30, 31, and 33. His challenge to these findings rests solely on his one phone call to petitioner two weeks before the petitions were filed. Respondent concedes that had petitioner "filed her TPR petitions before that telephone call, [he] would have no argument here." He argues, however, that because that one telephone call "came first," was "unprompted," and showed his "attempt to reestablish his relationship with his children," he did not "abandon[ ] *all* parental duties and claims to his children" nor "willfully neglect[ ] to provide support and maintenance to Petitioner." (Emphasis in original.) We are not persuaded by this argument. One attempted contact during the six-month determinative period does not preclude a finding that respondent withheld his love and affection from the children and willfully abandoned them. *See Pratt*, 257 N.C. at 502–03, 126 S.E.2d at 609 (rejecting the respondent-father's argument that his one visit during the determinative six-month period refuted a finding of willful abandonment); *see also In re B.S.O.*, 234 N.C. App. 706, 713, 760 S.E.2d 59, 65 (2014) (affirming a termination order based on willful abandonment where the father made only one phone call to the children and their mother during the determinative six-month period).

Respondent next "denies as irrelevant" finding of fact 36 on the basis that it refers to his conduct outside of the determinative six-month period. Respondent argues that a "trial court has no authority to consider a parent's post-TPR petition actions when determining whether to terminate parental rights under [N.C.G.S.] § 7B-1111(a)(7)." We do not agree. The trial court's finding regarding respondent's actions after the termination petition was filed is not "irrelevant" because the trial court "may consider a parent's conduct outside the six-month window *in evaluating a parent's credibility and intentions*." *In re C.B.C.*, 373 N.C. at 22–23, 832 S.E.2d at 697 (emphasis in original) (quoting *In re D.M.O.*, 250 N.C. App. 570, 573, 794 S.E.2d 858, 861 (2016)). Thus, the trial court could consider respondent's conduct after the filing of the termination petition to determine the sincerity and intent of his conduct during the relevant six-month period. Respondent has not challenged the evidentiary support for this finding and it is thus binding on appeal.

Respondent similarly "denies as irrelevant" the portion of finding of fact 41 that indicates the trial court considered both his conduct during the determinative six-month period and his conduct after the filing of the termination petition in reaching its decision. For the reasons we rejected respondent's challenge to finding of fact 36, we also reject this argument.

Finally, respondent challenges findings of fact 32, 39, and 40. Finding of fact 32 states that "[w]hile the [trial c]ourt does not doubt the Respondent's love for the Juveniles, . . . [Respondent's] feelings of parental love must yield to the welfare and best interest of the Juveniles." In findings of fact 39 and 40, the trial court found that termination of respondent's parental rights was in the children's best interests. Respondent argues that the "trial court cannot consider best interests until Petitioner first establishes at least one . . . ground [for termination], which she failed to do." However, because the trial court found that petitioner proved by clear, cogent, and convincing evidence that at least one ground to terminate respondent's parental rights existed—that respondent willfully abandoned the children—the trial court was therefore required to make dispositional findings about whether termination was in the children's best interests. *In re D.L.W.*, 368 N.C. at 842, 788 S.E.2d at 167; N.C.G.S. § 7B-1110. In any event, these findings were not necessary to support the trial court's adjudication of the ground of willful abandonment, and since respondent does not challenge the trial court's dispositional determination, we need not address them. *See In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58–59 (stating that in reviewing a trial court's adjudication of grounds for termination, we review only those findings necessary to support the trial court's conclusion that grounds existed).

B. Grounds to Terminate Parental Rights

Respondent next contends that the evidence and the trial court's findings of fact do not support its conclusion that he willfully abandoned the children. Respondent acknowledges his admission at the hearing "that he had not been a good father before [the] 14 December 2018 telephone call to Petitioner" but argues that his actions did not amount to willful abandonment as defined in N.C.G.S. § 7B-1111(a)(7). We disagree.

The trial court's findings of fact demonstrate that except for respondent's one unsuccessful phone call requesting to see the children, he made no other attempt to contact petitioner or to reestablish a relationship with the children during the six-month determinative period or for nearly two years preceding that period. The trial court found that respondent did not send any letters to the children, did not call the children, and did not provide any emotional, material, or financial support to the children. The trial court also found that respondent "demonstrated through his testimony that, although he had the ability and intelligence to understand his parental obligations to the [children], he willfully failed to fulfill those parental obligations, stating 'I wasn't being responsible.' "

Respondent acknowledges that he had no other contact with petitioner during the relevant six-month period but claims that his single phone call is sufficient to demonstrate that he did not intend to forgo all parental duties and did not willfully abandon the children. For a parent's actions to constitute willful abandonment, however, "it is not necessary that a parent absent himself continuously from the child for the specified six months, nor even that he cease to feel any concern for its interest." *Pratt*, 257 N.C. at 503, 126 S.E.2d at 609. "[I]f a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wil[l]fully 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 (citation omitted).

The trial court's findings of fact demonstrate that respondent willfully withheld his love, care, and affection from the children and that his conduct during the determinative six-month period constituted willful abandonment. Respondent's one unsuccessful request to visit the children during the six-months immediately preceding the filing of the termination petition does not undermine the trial court's ultimate finding and conclusion that respondent willfully abandoned the children. *See Pratt*, 257 N.C. at 502, 126 S.E.2d at 609; *see also In re B.S.O.*, 234 N.C. App. at 713, 760 S.E.2d at 65 ("In light of respondent-father's single phone call to respondent-mother and his children during the six months immediately preceding [the filing of the termination petition], the [trial] court did not err in finding that he willfully abandoned the children."); *In re Apa*, 59 N.C. App. 322, 324, 296 S.E.2d 811, 813 (1982) (affirming termination where "except for an abandoned attempt to negotiate visitation and support, [the respondent-father] 'made no other significant attempts to establish a relationship with [the child] or obtain rights of visitation with [the child]' "). Accordingly, we hold the trial court did not err by terminating respondent's parental rights pursuant to N.C.G.S. § 7B-1111(a)(7).

III. Conclusion

Respondent challenges several of the trial court's findings of fact and its conclusion of law that respondent willfully abandoned Joel and Jed. Except for a portion of finding of fact 23, we conclude that the trial court's findings of fact are supported by clear, cogent, and convincing evidence, and we further hold that the findings of fact support the trial court's conclusion that respondent willfully abandoned the children. Respondent did not challenge the trial court's dispositional determination that termination was in the children's best interests. Therefore, we affirm the trial court's order terminating respondent's parental rights.

AFFIRMED.

IN RE L.M.M.

[375 N.C. 346 (2020)]

IN THE MATTER OF L.M.M.

No. 21A20

Filed 25 September 2020

Termination of Parental Rights—grounds for termination—willful abandonment—lack of contact and show of affection

The trial court's findings in a proceeding to terminate a mother's parental rights were supported by evidence and in turn supported the court's conclusion that the mother willfully abandoned her child. Although the mother was incarcerated during the determinative six-month period, she was not barred by court order from contacting her son and took no steps to communicate with him through several possible relatives, nor did she show any affection or concern toward him.

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 27 September 2019 by Judge David V. Byrd in District Court, Wilkes County. This matter was calendared in the Supreme Court on 27 August 2020 but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Vannoy, Colvard, Triplett & Vannoy, P.L.L.C., by Daniel S. Johnson, for petitioner-appellee.

Robert W. Ewing for respondent-appellant.

DAVIS, Justice.

In this case, we consider whether the trial court erred by terminating the parental rights of respondent-mother to her son "Larry."[1] Because we conclude that the evidence and the trial court's findings of fact support the conclusion that respondent willfully abandoned Larry within the meaning of N.C.G.S. § 7B-1111(a)(7), we affirm.

1. A pseudonym is used throughout this opinion to protect the identity of the juvenile.

Factual and Procedural Background

Larry was born in November 2016 and spent the first year of his life in respondent's care and custody. Petitioner is respondent's second cousin and a lifelong resident of Wilkes County, North Carolina. Petitioner attended the same church as respondent and saw respondent with Larry each week during services. Petitioner also spent time with Larry at her grandmother's house in Hays, North Carolina, when respondent was living nearby.

Petitioner lost touch with respondent at some point in 2017. In November 2017, petitioner contacted respondent on Facebook and learned that she had moved to Asheville with Larry. Respondent told petitioner that she was unemployed, out of money, and alternating between staying at a friend's house and sleeping in her car. Respondent confessed that she was unable to take care of Larry and asked petitioner to keep him for "a few months" until respondent "got back on her feet."

After conferring with her then-husband,[2] petitioner agreed to take Larry on the condition that respondent permanently sign over her parental rights regarding him to petitioner. Respondent initially reiterated her desire for a temporary arrangement but ultimately agreed to surrender Larry to petitioner on a permanent basis.

On 8 November 2017,[3] petitioner drove to the Greyhound bus station in Asheville to take Larry from respondent. At petitioner's request, respondent signed a document that purported to give petitioner permanent parental rights to Larry. A family friend notarized the document in the parties' presence. Petitioner then brought Larry back to live with her. A few weeks later, respondent contacted petitioner on Facebook to check on Larry and asked for a picture of him. Respondent also asked for money. Petitioner sent respondent a photograph of Larry but refused to wire her any money.

Respondent also phoned petitioner to ask if she would pay respondent's cell phone bill. Petitioner's mother paid respondent's phone bill for a brief period of time so that petitioner and respondent would be able to contact each other.

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2. Petitioner testified that she and her husband separated on 24 November 2017 and later divorced on 13 August 2019.

3. Although the trial court's order lists the date as 17 November 2017, the hearing testimony reflects a date of 8 November 2017.

After respondent sent her a second request for money on 21 November 2017, petitioner blocked respondent on Facebook. Petitioner maintained the same phone number thereafter but did not hear from respondent or make any attempt to contact her after 21 November 2017. Respondent was incarcerated during 2018 and remained in custody at the time of the termination hearing.

On 18 January 2019, after initiating adoption proceedings, petitioner filed a petition to terminate respondent's parental rights to Larry. Respondent filed a response in opposition to the petition. The trial court held a hearing on 14 August 2019 and entered an order terminating respondent's parental rights to Larry on 27 September 2019. Respondent gave timely notice of appeal from the order.[4]

Analysis

Our Juvenile Code provides for a two-step process for the termination of parental rights—an adjudicatory stage and a dispositional stage. N.C.G.S. §§ 7B-1109, -1110 (2019). 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 subsection 7B-1111(a). N.C.G.S. § 7B-1109(e), (f). If the trial court finds the existence of one or more grounds to terminate the respondent's parental rights, the matter proceeds to the dispositional stage where the court must determine whether terminating the parent's rights is in the juvenile's best interests. N.C.G.S. § 7B-1110(a).

Respondent does not contest the trial court's dispositional determination that it was in Larry's best interests to terminate her parental rights. Accordingly, the sole issue before us is whether the trial court correctly determined that one or more grounds existed to terminate her parental rights under N.C.G.S. § 7B-1111.

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). "Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). We review the trial court's conclusions of law de novo. *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019).

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4. Although the trial court's order also terminated the parental rights of Larry's father, he is not a party to this appeal.

The trial court concluded that petitioner had established three statutory grounds for terminating respondent's parental rights, including that respondent had "willfully abandoned" Larry pursuant to N.C.G.S. § 7B-1111(a)(7). It is well established that an adjudication of any single ground for termination under N.C.G.S. § 7B-1111(a) will suffice to support a trial court's order terminating parental rights. *See, e.g.*, *In re C.B.C.*, 373 N.C. at 23, 832 S.E.2d at 697. Therefore, if we uphold any one of the three statutory grounds adjudicated by the trial court, we need not review the remaining grounds. *Id.*; *In re E.H.P.*, 372 N.C. 388, 395, 831 S.E.2d 49, 53 (2019).

Subsection 7B-1111(a)(7) allows for the termination of parental rights where the 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). The determinative time period in this case is the six-month period between 18 July 2018 and 18 January 2019, the date petitioner filed her petition. We have held that "the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions" during the six months at issue. *In re C.B.C.*, 373 N.C. at 22, 832 S.E.2d at 697 (emphasis removed) (citation omitted).

As used in N.C.G.S. § 7B-1111(a)(7), abandonment requires a "purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims to the child." *In re A.G.D.*, 374 N.C. 317, 319, 841 S.E.2d 238, 240 (2020) (cleaned up). The willful intent element "is an integral part of abandonment" and is determined according to the evidence before the trial court. *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962). This Court has repeatedly held that "if a parent withholds that parent's presence, love, care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child." *In re A.L.S.*, 374 N.C. 515, 519, 843 S.E.2d 89, 92 (2020) (cleaned up).

In her brief, respondent challenges several of the trial court's findings of fact as unsupported by clear, cogent, and convincing evidence and disputes the trial court's conclusion of law that respondent willfully abandoned Larry. We address her contentions in turn.

I. Findings of Fact

In addition to recounting the circumstances of how Larry came into petitioner's care in November 2017, the trial court made the following

pertinent findings of fact regarding its adjudication of willful abandonment under N.C.G.S. § 7B-1111(a)(7):

> 13. Apart from the Facebook messenger text [in November 2017], the Respondent-Mother has had no other contact with the Petitioner regarding the minor child. She has sent some requests for money to the Petitioner. The Petitioner's mother paid a cell phone bill for the Respondent-Mother so the Respondent-Mother could be contacted if needed.
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> . . . .
>
> 15. Neither parent has provided any financial support for the minor child.
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> . . . .
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> 17. Each of the Respondents are currently incarcerated . . . . The Respondent-Mother has a projected release date in December 2019.
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> 18. Neither parent has provided any type of gifts, cards, or other customary tokens of affection for the minor child since he has been in the custody of the Petitioner. Neither parent has ever taken any action as would have been available to them while in custody.
>
> 19. During the six months immediately preceding the filing of the petition to terminate their parental rights, neither Respondent had any contact with the minor child. During the six months immediately preceding the filing of the petition, neither respondent provided any financial support for the minor child.
>
> 20. Neither Respondent has performed any of the natural and legal obligations of support and maintenance for the minor child since he has been in the custody of the Petitioner. . . .
>
> . . . .
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> 22. Although the Petitioner blocked the Respondent-Mother on Facebook, she did not block her access by phone and Respondent-Mother also could communicate with her family members.

Respondent initially contests the portion of Finding of Fact 13 providing that she contacted petitioner about Larry on Facebook on just one

occasion in November 2017, contending that she in fact contacted petitioner several times that month. In her testimony, petitioner described two instances in November 2017 when respondent sent her Facebook messages about Larry. In the first message, respondent asked how Larry was doing and—after petitioner declined her request for money—requested a picture of him. Upon receiving the picture, respondent sent petitioner a message saying, "Sweet, little baby," and "Love y'all." On 21 November 2017, the day after her second request for money, respondent sent petitioner a message asking whether Larry "had a good birthday[.]" When petitioner replied in the affirmative, respondent sent a message saying "good." Although petitioner also received "a couple [of phone] calls" from respondent during this period, she testified that one of the calls concerned "a cell phone bill [respondent] wanted paid," and that she could not recall the subject of the second call. To the extent that Finding of Fact 13 undercounts the number of messages respondent sent to petitioner about Larry in November 2017, we conclude the discrepancy is harmless because the messages were exchanged "well outside the determinative [six-month] time period." *In re K.N.K.*, 374 N.C. 50, 56, 839 S.E.2d 735, 740 (2020).

Respondent next challenges the portions of Finding of Fact 18 stating that she failed to provide "tokens of affection" or take other "available" actions to show Larry affection while she was incarcerated. She contends that petitioner offered no evidence "on the issue of whether [respondent] could obtain gifts or other customary tokens of affection [for Larry] while she was in prison."

The trial court's finding is supported by testimony detailing the communications between respondent and petitioner. Petitioner's testimony supports the finding that respondent did not contact petitioner about Larry after 21 November 2017 and never provided Larry with any sign of her affection after placing him in petitioner's care. The evidence presented at the adjudicatory stage of the hearing does not reveal precisely when in 2018 respondent became incarcerated. However, the fact that respondent never exhibited affection to Larry after November 2017 necessarily supports a finding that she did not do so during her incarceration.

We have made clear that "[a]lthough a parent's options for showing affection while incarcerated are greatly limited, a parent *will not be excused from showing interest in [the] child's welfare by whatever means available*." *In re C.B.C.*, 373 N.C. at 19–20, 832 S.E.2d at 695; *see also In re E.H.P.*, 372 N.C. at 394, 831 S.E.2d at 53 ("[T]he 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).”). Contrary to respondent’s characterization of Finding of Fact 18, the trial court did not find that she had the ability to send Larry “gifts, cards, or other customary tokens of affection” while incarcerated. Rather, the court found that respondent had not taken “*any action* [emphasis added] as would have been available to [her]” while incarcerated so as to demonstrate interest in or affection toward Larry.

The evidence before the trial court showed that respondent was in possession of petitioner’s phone number and had other shared relatives in Wilkes County through whom respondent could have attempted to communicate with Larry, including respondent’s own mother as well as petitioner’s mother and grandmother. Petitioner testified that she spoke to respondent’s mother “regularly” and had “never been advised” of any attempt by respondent to contact her about Larry. Based on this evidence, the trial court reasonably inferred that respondent had some means available to display familial affection for Larry despite the circumstance of her incarceration. *See In re A.G.D.*, 374 N.C. 317, 327, 841 S.E.2d 238, 244 (2020) (“Although the fact that he was incarcerated and subject to an order prohibiting him from directly contacting the children created obvious obstacles to respondent-father’s ability to show love, affection, and parental concern for the children, it did not render such a showing completely impossible.”).

II. Conclusions of Law

Respondent also argues that the trial court’s findings that she did not contact Larry or provide financial support for the child during the determinative six-month period—even if accurate—do not support the court’s conclusion that she *willfully* abandoned the child. Respondent contends that the trial court’s findings fail to account for petitioner’s unwillingness to allow her to have contact with Larry after November 2017. She further asserts that the court heard no evidence that she had the ability to provide financial support for Larry while she was incarcerated. Respondent argues that the evidence showed “[her] lack of contact and financial support was **not** a willful act on her part.”

This Court previously addressed a similar willful abandonment issue involving an incarcerated parent in *In re A.G.D.* In that case, we reviewed an adjudication of willful abandonment that was made where the evidence showed that the respondent-father was incarcerated, divorced from the children’s mother, and subject to a court order “granting the mother sole legal and physical custody of the children, with respondent-father being ordered to have no contact with them in the

absence of a further order of the court." 374 N.C. at 318, 841 S.E.2d at 239. Despite the obvious impediments faced by the respondent-father, we held that the trial court's findings nevertheless demonstrated his willful abandonment of the children:

> A careful review of the termination orders reveals that the trial court did not conclude that respondent-father's parental rights in the children were subject to termination on the grounds of abandonment solely because he had failed to make direct contact with them in violation of the custody and visitation order. On the contrary, the trial court specifically noted that respondent-father was "not excused from showing an interest in his children's welfare" because of his incarceration and found as a fact that, among other things, the only attempt that respondent-father had made to contact the children had occurred when he communicated with petitioner-mother about eighteen months after his last "meaningful" contact with them. In other words, the trial court found that respondent-father had, with one exception, done nothing to maintain contact with the mother, with whom the children lived and who would know how they were doing[.]

Id. at 324, 841 S.E.2d at 242–43. Based on our determination that "the trial court's findings of fact reflect that respondent-father failed to do anything whatsoever to express love, affection, and parental concern for the children during the relevant six-month period," we affirmed the order terminating his parental rights pursuant to N.C.G.S. § 7B-1111(a)(7). *Id.* at 327, 841 S.E.2d at 244.

Here, as in *In re A.G.D.*, respondent's complete failure to show any interest in Larry after November 2017—particularly during the six months between 18 July 2018 and 18 January 2019—supports the trial court's conclusion that she acted willfully in abandoning the child. Unlike the respondent-father in *In re A.G.D.*, respondent was not subject to a court order that overrode her custodial rights as Larry's mother or otherwise barred her from contacting her child. Although petitioner blocked respondent on Facebook, respondent was not precluded from contacting petitioner by phone or contacting other relatives, including her own mother, in order to convey her concern and affection for Larry. *See In re A.L.S.*, 374 N.C. at 522, 843 S.E.2d at 94 (holding that the "[r]espondent-mother's failure to even attempt any form of contact or communication with [the child] gives rise to an inference that she acted willfully in abdicating her parental role, notwithstanding any personal

animus between her and [the child's custodians]"); *In re A.G.D.*, 374 N.C. at 325, 841 S.E.2d at 243 (noting that the "respondent-father had the legal right and practical ability to contact the mother directly or through intermediaries for the purpose of inquiring about the children's welfare and asking that she convey his best wishes to them.").

Respondent also cites the evidence that she initially asked petitioner to accept a temporary caretaking role for Larry in November 2017—thereby resisting petitioner's demand that she "[s]ign him over to [petitioner] permanently"—as proof that she did not willfully abandon the child. The trial court's findings account for the fact that respondent "initially wanted a temporary" arrangement for Larry "but later agreed for the Petitioner to have the child permanently." Although the court was free to consider the circumstances under which respondent placed Larry in petitioner's care, those circumstances represented respondent's intentions in November 2017 rather than during the six-month period relevant to an adjudication under N.C.G.S. § 7B-1111(a)(7). *See In re K.N.K.*, 374 N.C. at 56, 839 S.E.2d at 740. The weight to be assigned to respondent's conduct during this earlier period was a matter left to the trial court's discretion as fact-finder. *See In re C.B.C.*, 373 N.C. at 23, 832 S.E.2d at 697 ("[W]hile the court may consider respondent's prior efforts in seeking a relationship with [the child] . . . , respondent's prior actions will not preclude a finding that he willfully abandoned [the child] pursuant to N.C.G.S. § 7B-1111(a)(7) if he did nothing to maintain or establish a relationship with [her] during the determinative six-month period.").

Finally, while we agree with respondent that the trial court received no evidence of her ability to support Larry financially, there is no indication that the court based its adjudication on this lack of financial support. *See generally Pratt*, 257 N.C. at 501–02, 126 S.E.2d at 608 ("[A] mere failure of the parent of a minor child in the custody of a third person to contribute to its support does not in and of itself constitute abandonment. Explanations could be made which would be inconsistent with a wil[l]ful intent to abandon."); *see also In re K.N.K.*, 374 N.C. at 54 n.3, 839 S.E.2d at 738 n.3 (concluding the trial court "would have reached the same conclusion about respondent's willful abandonment of" the child even without the finding that he contributed nothing toward her support and maintenance). Although the court found that "[n]either parent has provided any financial support for the minor child[,]" the significance of this finding is to exclude the possibility that respondent demonstrated her concern for Larry financially—rather than through the personal contact and displays of affection contemplated in cases such as *In re A.D.G.*

Because the evidence and the trial court's findings show respondent undertook no action "whatsoever to express love, affection, and parental concern for the child[ ] during the relevant six-month period," we hold that the trial court did not err by determining that grounds existed under N.C.G.S. § 7B-1111(a)(7) to terminate respondent's parental rights. In light of our holding, we need not review the trial court's two additional grounds for termination. *In re C.B.C.*, 373 N.C. at 23, 832 S.E.2d at 697.

Conclusion

For the reasons stated above, we affirm the trial court's 27 September 2019 order terminating respondent's parental rights.

AFFIRMED.

Justice EARLS, dissenting.

In order to terminate respondent-mother Cathy's parental rights to her son Larry under N.C.G.S. § 7B-1111(a)(7), the trial court needed to find by clear, cogent, and convincing evidence that the parent "willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion." At trial, the burden was not on Cathy to prove that she did not willfully abandon Larry; the burden was on the petitioner, Karen, to prove that Cathy did. *See In re Ballard*, 311 N.C. 708, 716, 319 S.E.2d 227, 232 (1984). The trial court's findings make clear that Karen has failed to meet this burden. The trial court also concluded that Karen proved two other grounds to terminate Cathy's parental rights, neglect and prior termination of the parent's rights as to other children, while rejecting a fourth alleged ground of incapability that will continue for the foreseeable future. Because the evidence was not sufficient to show neglect, and no factual findings were made concerning Cathy's ability or willingness to establish a safe home, I would reverse the trial court's order and remand for further factual findings on the question of whether the evidence in this case was sufficient to conclude that Cathy was unable or unwilling to establish a safe home.

Larry was born on 18 November 2016 and lived with Cathy for almost a year. On 8 November 2017, Cathy asked Karen to temporarily care for Larry. In addition to the pleadings, the only other evidence before the trial court at the adjudicatory stage of the hearing in this private termination proceeding was Karen's testimony. Karen's testimony regarding Cathy's request highlights that, faced with homelessness and no income, Cathy concluded that Larry needed better care than she was

able to provide to her child at that moment in her life. Karen testified to the discussion she had with Cathy, explaining:

> When she asked me if I wanted to do it just until she got back on her feet, I sent back that I could not do that, it would not be fair. She then said, "Well, how about I do this temporarily, and then if I'm not back on my feet in this amount of time, you'll then have full rights." And I then again declined that.

Karen then testified that:

> I printed some online [sic] because I needed to know—I did not want anything to be said that I may have took him while she might have been under the influence or that I may have paid for him or just stole him or anything like that. So yes, I did find some things online. A notary went with me. My mom's friend went with us and notarized everything that was signed. And she was also read— it was dark, so my mom read it out to her, and she signed it.

The paper signed by Cathy that evening was not made a part of the record. The trial court's finding states only that Cathy "later agreed for the Petitioner to have the child permanently." However, Karen's testimony on that point is not at all clear. In addition to the statement above, Karen's only other testimony is that:

> Q. You asked [Cathy] if she would be willing to relinquish her parental rights?
>
> A. Sign him over to me permanently is exactly what I said.
>
> Q. What did [Cathy] tell you?
>
> A. When I sent that, she was actually away from the phone. One of her friends responded and said that she was not there, but they would let her know. So then about an hour after, she responded and said, "Could I give a temporary order, and then if I don't have everything finished or if I don't have everything back in line within a certain amount of time, you would then take rights to him?" And I said, "I'm sorry, you know, I would need full rights when I picked him up."
>
> Q. What did [Cathy] tell you?

> A. She then agreed. She said that was what was best for him and that she could not provide for him and that— I'm trying to think back. I'm so sorry. I'm nervous. She then said that the only thing she wanted is she wanted him to know about her.

Whatever Cathy might have understood from a text message about what "sign him over to me permanently" meant, and whatever the piece of paper she signed actually stated, the trial court's ultimate conclusion concerning the events of 17 November 2017[1] was *not* that they evidenced willful abandonment or neglect on Cathy's part. Instead, the trial court found that Cathy's decision was a reasonable childcare arrangement sought out under difficult circumstances. The trial court explained:

> I agree with the argument that the mother placing the child with the Petitioner, that was, in my view, an appropriate childcare arrangement that she reached out and made. I know [respondent-father "Greg"]—there's no evidence that he directly entered into that. *However, the Court will rule that that ground has not been met for either.*

[emphasis added].

Karen testified that she and Cathy had telephone conversations and exchanged further Facebook messages over the next few weeks. Karen stated that at some time in "the latter part of 2018" she became aware that Cathy was incarcerated, and that Cathy would be incarcerated for all of 2019 up to the date of the hearing on 14 August 2019. Karen also admitted that she blocked Cathy from being able to message her on Facebook:

> Q. Do you try to— is [Cathy] blocked from you?
>
> A. I can still see her things. I actually have every one that we every (sic) sent on my phone.
>
> Q. But you haven't blocked her from sending you messages on Facebook?
>
> A. Yeah, I blocked her. I did. That was after I got the request for Moneygram and when I had— there was no other— but my number, she's not blocked from that. She can always reach out to me by phone.

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1. There is a discrepancy between the trial testimony about when this occurred and the trial court's finding of fact. The finding of fact states this occurred on November 17, 2017.

Q. Cell phone?

A. Yes. She's not blocked from anything except for Facebook. And that was only because, when I make posts about him, I didn't want her to be able to see pictures of him or things that we do in our lives. But my phone is still available.

The termination petition was filed on 18 January 2019 and the summons was addressed to Cathy at the N.C. Correctional Institute for Women in Raleigh. Thus, Karen needed to present clear and cogent evidence that Cathy "willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition" during the six-month period between 18 July 2018 and 18 January 2019. Cathy was incarcerated during the "determinative period" preceding the termination proceeding. "A parent's incarceration may be relevant to the determination of whether parental rights should be terminated, but our precedents are quite clear—and remain in full force—that incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision." *In re K.N.*, 373 N.C. 274, 282, 837 S.E.2d 861, 867 (2020) (cleaned up). Accordingly, the burden was on Karen to prove that, "upon an analysis of the relevant facts and circumstances," Cathy willfully abandoned Larry. *Id.* at 283, 837 S.E.2d at 867–68.

The evidence the trial court relies upon does not support such a finding. Karen's testimony, supplemented by no other evidence besides the pleadings, simply does not prove that Cathy willfully abandoned Larry. All the Court could know based on Karen's testimony is that Karen did not hear from Cathy during the determinative period and that, for some unspecified part of that time, Cathy was incarcerated. Karen's testimony does not prove whether or not Cathy took steps to maintain a connection with her child given the opportunities available to her during her incarceration.

In the circumstances of this case, absent any other indications of Cathy's intent to abandon her son, the mere lack of *actual* contact by an incarcerated parent whose location was known to the petitioner is not the same thing as evidence that the parent did not *attempt* to make contact, as this exchange illustrates:

Q. Have you yourself had tried to contact her at all?

A. No, sir.

Q. And are you aware that she's tried to contact, if not you, other people in your family to get a hold of you?

A. No, sir.

Q. Okay.

A. And I did speak to her mom regularly, and I've never been advised of that at all.

This testimony proves *either* that Cathy did not make any attempt to contact Karen in order to maintain a connection with Larry, *or* that she attempted to contact Karen but was unsuccessful in her efforts. The former would be evidence that could prove willful abandonment but the latter, standing alone as it was in this case, could not. The absence of evidence is not the same thing as clear, cogent, and convincing evidence to prove a fact. *See In re Moore*, 306 N.C. 394, 403–04, 293 S.E.2d 127, 132 (1982) ("G.S. 7A-289.30(e) provides, *inter alia*, that in an adjudicatory hearing on a petition to terminate parental rights the court shall find the facts and 'all findings of fact shall be based on clear, cogent, and convincing evidence.' ") Here, based on Karen's evidence, the trial court *could not know what Cathy did or did not do while in custody during the determinative six-month period.* The testimony only established that if Cathy did make the efforts the majority identifies as necessary for an incarcerated parent to make to demonstrate a lack of willful abandonment, namely "showing interest in [the] child's welfare by whatever means available," those efforts were unsuccessful.

At the dispositional stage of the hearing, after the trial court had found grounds to terminate Cathy's parental rights, Cathy testified that she attempted to contact Karen whenever she had access to Wi-Fi. Cathy attempted to contact Karen by Facebook Messenger, but Karen informed Cathy that she was blocking Cathy on Facebook because she had obtained custody of Larry and, as Karen testified, she "didn't want her to be able to see pictures of him or things that we do in our lives," or as Cathy testified, "[Karen] didn't want no drama or nothing to be said." Cathy also testified that she attempted to contact Karen and Larry by text messaging. Cathy testified that she wrote her mother, aunt, and grandmother in an attempt to contact Larry, to find out how he was doing, and to obtain pictures of him. Cathy testified that she also sent birthday, Christmas, and Easter cards to Larry through her mother, cards that she believed had been given to Karen.

This evidence was not presented at the adjudication stage. It is true that even it if had been presented, the trial court was free to make its own determination that Cathy's testimony was not credible. The fundamental point is that without evidence of what Cathy did or did not

do, especially while she was in custody, the trial court could not merely assume that Cathy willfully abandoned her son.

Karen's testimony did not "prove" what Cathy did or did not do. The burden to prove willful abandonment requires evidence of the parent's intent. In this context, "abandonment imports any wil[l]ful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child." *In re K.R.C.*, 374 N.C. 849, 860, 845 S.E.2d 56, 63 (N.C. 2020) (quoting *Pratt v. Bishop*, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962)). The trial court's factual findings do not support the legal conclusion that Cathy willfully abandoned her son, only that she was unable to get in touch with her son's caregiver while she was incarcerated. Under N.C.G.S. § 7B-1111(a)(7), that is a crucial distinction.

The allocation of the burden to petitioners to affirmatively prove by clear, cogent, and convincing evidence that termination is warranted is no mere technicality. Until termination was ordered, respondent enjoyed a "constitutionally protected paramount right" to the "custody, care, and control" of her child. *Owenby v. Young*, 357 N.C. 142, 148, 579 S.E.2d 264, 268 (2003). Because there are "few forms of state action [that] are both so severe and so irreversible" as terminating parental rights, the United States Supreme Court has long held that petitioners must carry the "elevated burden of proof" that termination is warranted by clear and convincing evidence. *Santosky v. Kramer*, 455 U.S. 745, 759 (1982). Cases like this one "involving the State's authority to sever permanently a parent-child bond demands the close consideration the Court has long required when a family association so undeniably important is at stake." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116–17 (1996). The judiciary must be "mindful of the gravity of the sanction imposed on" a mother when her parental rights are terminated and accord all due respect to the substantive and procedural protections the law affords to even imperfect parents. *Id.* Before undertaking action that is "irretrievably destructive of the most fundamental family relationship," *id.* at 121, the trial court must find facts proving *respondent's* alleged lack of efforts to maintain a connection with her child, not simply facts attesting to *the petitioner's* experience and perception of her interactions with respondent.

Likewise, the factual findings in this case are insufficient to support the conclusion that Larry was a neglected child. It is well established that "[a] finding of neglect sufficient to terminate parental rights must be based on evidence showing neglect at the time of the termination proceeding." *In re Young*, 346 N.C. 244, 248, 485 S.E.2d 612, 615 (1997) (citing *In re Ballard*, 311 N.C. 708, 716, 319 S.E.2d 227, 232 (1984)).

Moreover, a juvenile cannot be adjudicated as neglected solely based upon previous Department of Social Services involvement relating to other children. *See In re J.A.M.*, 372 N.C. 1, 9, 822 S.E.2d 693, 698. (2019). To support a conclusion that a juvenile does not receive proper care, the findings of fact must show current circumstances that present a risk to the juvenile. Where the child is not presently in the parent's custody, the trial court must make findings of fact that the parent previously neglected the child in order to reach the conclusion that the child is a neglected juvenile under N.C.G.S. § 7B-1111(a)(1). *See In re D.L.W.*, 368 N.C. 835, 843, 788 S.E.2d 162, 167 (2016) (citing *In re Ballard*, 311 N.C. 708, 713–15, 319 S.E.2d 227, 231–32 (1984)).

In this case, as the trial court observed, Cathy recognized when she was unable to provide for Larry and sought an appropriate alternative childcare arrangement, placing Larry with Karen. Karen's testimony was that Larry was healthy; there was no evidence that he suffered malnutrition, adverse health conditions or other issues while he was in Cathy's care. The evidence in this case does not establish past neglect. A trial court should not imply that a parent has neglected her child simply because she recognizes the difficulties attendant in her own circumstances and seeks to ameliorate their harmful consequences. To find neglect in this case treats the mother who takes definitive action to further her child's interests in desperate circumstances no differently from the mother who does not or cannot. The respondent's protective actions do not support the inference that she neglected her child under N.C.G.S. § 7B-1111(a)(1).

The trial court's error with regard to the third ground, prior termination of the parent's rights as to other children under N.C.G.S. § 7B-1111(a)(9), is readily apparent from the trial transcript and the trial court's order. The statute provides that the court may terminate the parental rights upon a finding that "[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). Here, the court made the first requisite finding for this ground—that respondent's parental rights had been terminated "with respect to another child"—but completely omitted any consideration of the second requisite finding that respondent lacked the ability or willingness to establish a safe home. It seems possible that counsel inadvertently misled the trial court on this point when stating at trial, "Well, I'll be brief. You know, it's kind of cliche. It is what it is as far as the respondents being involuntarily terminated before. It just is a fact, so

that technically is a ground good enough to get us past adjudication." Further, the trial court's conclusion of law in its order terminating parental rights on this ground states only that "[t]he parental rights of both Respondents have been terminated involuntarily by a Court of competent jurisdiction [N.C.G.S. § 7B-1111(a)(9)]." Therefore, where the trial court was operating under a clear misunderstanding of the applicable law on this question and the evidence was insufficient to support other grounds for termination, the case should be remanded for further findings on the question of whether the evidence was sufficient to show that Cathy lacked the present ability or willingness to establish a safe home. It may be that the evidence produced at trial was clear, cogent, and convincing that Cathy does not have the will or the ability to provide a safe home for Larry. However, those are findings that, in these circumstances, should be made in the first instance by the trial court.

For the above stated reasons, I respectfully dissent.

IN THE MATTER OF S.J.B.

No. 409A19

Filed 25 September 2020

Termination of Parental Rights—best interests of child—statutory factors—relevance of additional considerations

The trial court's conclusion that terminating a mother's parental rights to her daughter was in the daughter's best interest was supported by unchallenged findings of fact which addressed the factors in N.C.G.S. § 7B-1110(a), including the child's relationship with her mother, grandmother, and brother. The trial court did not err by excluding findings of fact on other issues where there were no conflicts in the evidence for the court to resolve.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from order entered on 24 July 2019 by Judge Andrea F. Dray in District Court, Buncombe County. This matter was calendared for argument in the Supreme Court on 29 July 2020 but was determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Hanna Frost Honeycutt for petitioner-appellee Buncombe County Department of Health and Human Services.

Jackson M. Pitts for Guardian ad Litem.

David A. Perez for respondent-appellant mother.

BEASLEY, Chief Justice.

Respondent, the mother of S.J.B. (Susan)[1], appeals from the trial court's 24 July 2019 order terminating her parental rights. The issue before the Court is whether the trial court abused its discretion in finding and concluding that it was in Susan's best interest to terminate respondent's parental rights. We hold the trial court did not abuse its discretion and affirm the trial court's order.

On 24 October 2017, the Buncombe County Department of Social Services (DSS) received a child protective services report alleging neglect. After a two-month investigation, DSS filed a petition alleging Susan was a neglected and dependent juvenile. DSS alleged respondent: (1) was suffering from untreated mental health conditions that kept her from being able to get out of bed; (2) was resistant to receiving treatment for her mental health issues; (3) refused a higher level of mental health treatment for Susan's half-brother, Eric, because she did not want people coming into her home; (4) took Eric off of his prescribed mental health medication, which led to behavioral issues at school; (5) neglected Eric's dental needs; (6) had a history of substance abuse; (7) was on probation for driving while impaired; (8) refused to work with DSS to create a full case plan; (9) refused to submit to hair follicle tests for illicit substances; (10) refused to allow Eric and Susan to submit to a hair follicle test to determine if they had been exposed to illegal substances; (11) failed to submit to a Comprehensive Clinical Assessment (CCA); (12) was impaired during an unannounced home visit; (13) had illicit drugs and drug paraphernalia in her home; and (14) had been arrested and charged with felony possession of heroin, possession of a Schedule IV controlled substance, possession of drug paraphernalia, and child abuse.

DSS obtained non-secure custody of Susan and Eric and placed them in foster care, but Eric was ultimately returned to his father's

1. Pseudonyms are used throughout the opinion for ease of reading and to protect the juvenile's identity.

custody.[2] Respondent's mother was approved as a placement for Susan on 20 February 2018. In early March 2018, DSS received reports alleging drug use by Susan's grandmother while Susan was residing in the home. On 13 March 2018 Susan's grandmother admitted that, if tested at that time, she would test positive for multiple illicit substances, and multiple people had smoked crack cocaine in the home while Susan was asleep in her bedroom. Based on these statements, DSS removed Susan from her grandmother's home and placed her with her original foster parents.

After a hearing on 4 April 2018, the trial court entered an order on 10 May 2018 adjudicating Susan to be a neglected and dependent juvenile. The court continued custody of Susan with DSS and granted respondent supervised visitation with Susan for one hour each week. The court also ordered respondent to, in part: (1) complete a CCA and follow all recommendations; (2) engage in medication management; (3) complete random drug screens within twenty-four hours of request; (4) engage in a parenting program and exhibit appropriate discipline and parenting during visits with Susan; (5) obtain stable housing; (6) address pending criminal charges and accumulate no additional charges; and (7) complete "SOAR Court" intake and engage in treatment if deemed appropriate.

After a 5 June 2018 hearing, the trial court entered an initial permanency planning and review order on 23 July 2018. The court found respondent had not made any efforts to complete a CCA or to address her mental health needs. She had submitted to an initial hair follicle drug screen but did not complete her last requested drug screen and had not engaged in any programs to assist her in her sobriety. Respondent still had pending criminal charges, had not been cooperative with DSS, and was homeless and unwilling to utilize shelters. The court continued custody of Susan with DSS and set Susan's primary permanent plan as reunification, with a secondary permanent plan of adoption.

The trial court conducted a subsequent permanency planning and review hearing on 28 September 2018 and entered its order from that hearing on 24 October 2018. The court found respondent completed a CCA on 17 July 2018 but had not followed through with most of the recommendations from the assessment. She continued to refuse to complete requested drug screens and did not report substance abuse as an issue when she completed her CCA. Respondent was consistent with

2. Susan and Eric have different biological fathers. The identity of Susan's father is unknown.

attending visitations but struggled with exhibiting appropriate behavior during them. She had been living with Susan's grandmother and had obtained a job. The court continued Susan's primary and secondary permanent plans as reunification and adoption and ordered DSS to complete any steps necessary to finalize the plans.

A third permanency planning and review hearing was set for 9 January 2019, but in early January 2019, respondent overdosed on Fentanyl and entered an inpatient treatment detox and rehabilitation program after she was released from the hospital. The trial court continued the hearing until February by order entered 10 January 2019 because respondent was in inpatient treatment. Respondent, however, failed to complete the program and was discharged. In its order from the continued hearing, the trial court set the primary permanent plan for Susan as adoption and the secondary permanent plan as reunification.

Subsequently, DSS filed a petition to terminate parental rights on 28 January 2019, alleging grounds as to respondent of neglect, willful failure to correct the conditions that led to Susan's removal from her home, and failure to pay a reasonable portion of the cost of Susan's care while Susan was in DSS custody. *See* N.C.G.S. § 7B-1111(a)(1)–(3) (2019). After a hearing on 12 July 2019, the trial court entered an order terminating respondent's parental rights on 24 July 2019.[3] The court concluded all three grounds alleged by DSS existed to terminate respondent's parental rights and that termination of her parental rights was in Susan's best interests. Respondent appealed the trial court's order terminating her parental rights, arguing that the trial court abused its discretion in concluding that terminating respondent's rights was in Susan's best interest. We disagree.

Termination of parental rights proceedings consist of two stages: adjudication and disposition. N.C.G.S. §§ 7B-1109, -1110 (2019); *In re Montgomery*, 311 N.C. 101, 110, 316 S.E.2d 246, 252 (1984). At the adjudicatory stage, the petitioner must prove by "clear, cogent, and convincing evidence" that one or more grounds for termination exist under section 7B-1111(a) of our General Statutes. N.C.G.S. § 7B-1109(e), (f) (2019). If the petitioner proves at least one ground for termination during the adjudicatory stage, "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

3. The order also terminated the parental rights of Susan's unknown father.

S.E.2d 612, 614–15 (1997); N.C.G.S. § 7B-1110)). In making the best interest determination,

> the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (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.

N.C.G.S. § 7B-1110. "We review this decision on an abuse of discretion standard[.]" *In re L.M.T.*, 367 N.C. 165, 171, 752 S.E.2d 453, 457 (2013). "An '[a]buse 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.' " *In re T.L.H.*, 368 N.C. 101, 107, 772 S.E.2d 451, 455 (2015) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

The trial court made the following findings of fact addressing each of the factors in section 7B-1110(a):

> 2. The minor child is five years old.
>
> 3. The minor child has been placed in her current foster home since June 1, 2018.
>
> 4. The minor child is strongly bonded with [her] foster parents and identifies them as her parents. The relationship is stable, predictable and loving.
>
> 5. The minor child is strongly bonded with the other children in the home.
>
> 6. The minor child has a half sibling in Florida. The foster parents have made two trips with the minor child to visit her half sibling and facilitate weekly face time communication.

> 7. The foster parents have a strong relationship with the maternal grandmother. They have invited her to extracurricular events for the minor child.
>
> 8. The foster parents have expressed their desire to adopt the minor child.
>
> 9. The minor child has an inconsistent and diminishing bond with the respondent mother. The minor child has expressed worries about returning to the care of respondent mother.
>
> . . .
>
> 11. The maternal grandmother previously had placement of the minor child, but the minor child was removed from the maternal grandmother's home after another member of the maternal grandmother's household was abusing drugs. The [c]ourt in the underlying juvenile case has not reconsidered placement in the maternal grandmother's household. The maternal grandmother has not attended court previous to this hearing to request placement.
>
> 12. The likelihood of adoption is high.
>
> 13. The minor child's permanent plan is adoption and, therefore, the parental rights of the respondent mother . . . must be terminated in order to accomplish that plan.
>
> 14. The only barrier to adoption is termination of parental rights.

Respondent does not challenge these findings, and they are thus binding on appeal. *In re E.H.P.*, 372 N.C. 388, 395, 831 S.E.2d 49, 54 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991) (holding that unchallenged findings of fact made at the adjudicatory stage are binding on appeal)).

Instead, respondent argues that the trial court did not make several findings of fact regarding evidence at the hearing she believes the court should have considered in determining Susan's best interests. She contends the court should have made findings regarding: (1) her future plan to enter a residential twelve-month drug rehabilitation program; (2) the potential for Susan to reside with her after she completed three to six months of the rehabilitation program; (3) Susan's relationship with her half-brother, Eric, and whether that relationship would continue if she were adopted; and (4) Susan's bond with her maternal grandmother and

her potential placement with her grandmother. She further argues the trial court's lack of dispositional findings regarding these circumstances show that it failed to properly weigh the competing goals of preserving Susan's ties to her biological family and achieving permanence for Susan through severing those ties in favor of adoption. *See In re A.U.D.*, 373 N.C. 3, 11–12, 832 S.E.2d 698, 703–04 (2019). These arguments are misplaced.

Respondent does not identify any conflict in the evidence that would require the trial court to make specific findings addressing the factual basis for her arguments. We have held,

> [a]lthough the trial court must consider all of the factors in N.C.G.S. § 7B-1110(a), it "is only required to make written findings regarding those factors that are relevant." "A factor is relevant if there is conflicting evidence concerning the factor, such that it is placed in issue by virtue of the evidence presented before the district court."

In re C.J.C., 374 N.C. 42, 48, 839 S.E.2d 742, 747 (2020) (quoting *In re A.R.A.*, 373 N.C. 190, 199, 835 S.E.2d 417, 424 (2019)); *see also In re S.D.C.*, 373 N.C. 285, 290, 837 S.E.2d 854, 858 (2020) (holding the same when considering any "relevant consideration" pursuant to N.C.G.S. § 7B-1110(a)(6)).

Respondent testified she had "looked into" attending a year-long drug rehabilitation program that may have allowed Susan to live with her after three to six months of participation in the program. Respondent's mere intention to participate in a drug rehabilitation program, however, had very limited relevance to Susan's best interests, particularly given that respondent's rights were terminated, in part, because of respondent's history of relapse and failure to complete drug rehabilitation programs.

Respondent's argument that the trial court did not make findings regarding Susan's bond with her maternal grandmother and her potential placement with her grandmother is likewise without merit. It was uncontested that Susan had a bond with her grandmother, and her grandmother believed that bond to be strong. The grandmother also testified she was in a different emotional position than when Susan was removed from her care, was able to set boundaries, had cut ties with the sister whose cocaine use led to Susan's removal from her care, and was financially able to take care of Susan. Nevertheless, the trial court found that while the foster parents have a strong relationship with the grandmother, the grandmother had not previously appeared in court to request that Susan be placed with her.

Likewise, the trial court considered Susan's relationship with Eric. It was also uncontested that Susan had a bond with her half-brother. The court found that Susan's foster parents had taken two trips to Florida to allow Susan to spend time with Eric and continued weekly face time communication.

The trial court's unchallenged findings show it considered Susan's bond with Eric and her maternal grandmother and her maternal grandmother's potential as a possible placement option for Susan in making its best interest determination. Thus, while Susan's foster parents could potentially cease contact with Susan's grandmother and half-brother after the adoption is complete, it is the province of the trial court to weigh the evidence before it and "this Court lacks the authority to reweigh the evidence that was before the trial court." *In re A.U.D.*, 373 N.C. at 12, 832 S.E.2d at 704. Thus, we hold the trial court made sufficient dispositional findings regarding Susan's bond with her maternal grandmother and half-brother in light of the evidence before it.

The trial court's dispositional findings show it considered the relevant statutory criteria of N.C.G.S. § 7B-1110(a) and that the court weighed the competing goals of preserving Susan's ties to her biological family and achieving permanence for Susan through adoption. This Court is satisfied with the trial court's conclusion that termination of respondent's rights was in Susan's best interest. Therefore, we affirm the trial court's order terminating her parental rights.

AFFIRMED.

IN RE Z.K.

[375 N.C. 370 (2020)]

IN THE MATTER OF Z.K.

No. 476A19

Filed 25 September 2020

Termination of Parental Rights—no-merit brief—neglect, willful failure to make reasonable progress, and dependency—substance abuse and domestic violence

The trial court's termination of a mother's parental rights on the grounds of neglect, willful failure to make reasonable progress, and dependency was affirmed where her counsel filed a no-merit brief. The termination order was based on clear, cogent, and convincing evidence and based on proper legal grounds.

Appeal pursuant to N.C.G.S. § 7B-1001(a1)(1) from an order entered on 3 October 2019 by Judge Susan M. Dotson-Smith in District Court, Buncombe County. This matter was calendared for argument in the Supreme Court on 27 August 2020 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 Buncombe County Department of Health and Human Services.

Amanda S. Hawkins for appellee Guardian ad Litem.

Peter Wood for respondent-appellant mother.

EARLS, Justice.

Respondent-mother appeals from the trial court's 3 October 2019 order terminating her parental rights to the minor child Z.K. (Zena).[1] Counsel for respondent-mother has filed a no-merit brief pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. We conclude the issues identified by counsel in respondent-mother's brief are without merit and therefore affirm the trial court's termination order.

On 11 June 2017, the Buncombe County Department of Health and Human Services (DHHS) received a Child Protective Services (CPS)

1. The minor child Z.K. will be referred to throughout this opinion as "Zena," which is a pseudonym used to protect the identity of the juvenile and for ease of reading.

report concerning Zena. The report alleged that while respondent-mother and Zena were visiting respondent-mother's boyfriend M.K., who was then thought to be Zena's father, M.K. assaulted respondent-mother by hitting her in the face and breaking a chain that was around her neck while he was holding Zena. At the time, M.K. was allegedly under the influence of an unknown substance and alcohol. Madison County law enforcement officers responded to a report of a domestic violence incident. One of the officers stated that "a female ran out [of the home] and stated that [M.K.] was inside holding [Zena] like 'a hostage situation,' " and respondent-mother claimed that M.K. had "body-slammed her." Officers observed M.K. acting aggressively and issuing threats and took him into custody. Officers stated that they were familiar with M.K. due to prior incidents of domestic violence and alcohol consumption, and they claimed he was a violent and reckless person and dangerous for Zena to be around. Respondent-mother agreed to enter into a safety plan which included seeking a restraining order against M.K. and pursuing custody of Zena. Respondent-mother initiated proceedings to obtain a domestic violence protective order against M.K., but the matter was discontinued after she failed to appear in court.

On 9 September 2017, DHHS received another CPS report. This report alleged that Zena's maternal grandmother was locked in her bedroom because respondent-mother was acting aggressively and that the maternal grandmother was afraid of respondent-mother. Respondent-mother was banging on the maternal grandmother's door, and Zena was left in the living room unsupervised. Upon investigation of the report, DHHS learned that respondent-mother was involuntarily committed that day and also learned that respondent-mother had tested positive for methamphetamine, fentanyl, and marijuana. Zena was taken to the home of her maternal aunt, who found three baggies in Zena's diaper which appeared to contain drugs.

Zena was placed in a temporary placement on 10 September 2017, but two days later the placement family reported to DHHS that they could no longer provide care for Zena. On 12 September 2017, DHHS filed a juvenile petition alleging that Zena was a neglected and dependent juvenile. DHHS noted in the juvenile petition that respondent-mother had a lengthy CPS history with DHHS regarding her other children. DHHS obtained nonsecure custody of Zena and placed her in foster care.

Following a hearing held on 22 November 2017, Zena was adjudicated a neglected and dependent juvenile in an order entered on 10 January 2018. Respondent-mother was ordered to complete a substance abuse assessment and to follow all recommendations, obtain a comprehensive

clinical assessment and follow all recommendations, continue to engage in individual counseling and follow all recommendations of her counselor, find and maintain safe and suitable housing, and submit to random drug screens. The trial court further noted that M.K. had been excluded as Zena's father by DNA testing and ordered respondent-mother to identify a putative father. Respondent-mother was granted visitation with Zena. The trial court ordered that Zena remain in her current foster home placement.

On 9 February 2018, the trial court entered an initial permanency planning and review order. The trial court established a primary permanent plan of reunification with a secondary permanent plan of guardianship. In a subsequent permanency planning and review order, the trial court changed the primary permanent plan to adoption with a secondary permanent plan of reunification. In compliance with the trial court's adjudication and disposition order, respondent-mother identified a putative father, J.R., and the trial court ordered him to undergo DNA testing. J.R., however, never appeared before the trial court or responded to DHHS's inquiries.

Additionally, D.S., who was respondent-mother's husband when Zena was born, was named Zena's legal father. D.S. took a DNA test which excluded him as Zena's biological father, and he relinquished his parental rights on 26 April 2019. Since paternity was never established, Zena's biological father remained unknown throughout the case.

On 4 December 2018, DHHS filed a petition to terminate respondent-mother's parental rights on the grounds of neglect, willful failure to make reasonable progress, failure to pay support, and dependency. N.C.G.S. § 7B-1111(a)(1)–(3), (6) (2019). On 3 October 2019, the trial court entered an order in which it determined that grounds existed to terminate respondent-mother's parental rights pursuant to N.C.G.S. § 7B-1111(a)(1), (2), and (6) and further concluded that it was in Zena's best interests that respondent-mother's parental rights be terminated. Accordingly, the trial court terminated respondent-mother's parental rights and respondent-mother appealed.

Counsel for respondent-mother has filed a no-merit brief on his client's behalf under Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. Counsel advised respondent-mother of her right to file *pro se* written arguments on her own behalf and provided her with the documents necessary to do so. Respondent-mother has not submitted written arguments to this Court.

We independently review issues identified by counsel in a no-merit brief filed pursuant to Rule 3.1(e). *In re L.E.M.*, 372 N.C. 396, 402, 831 S.E.2d 341, 345 (2019). Respondent-mother's counsel identified the issues that could arguably support an appeal in this case and also explained why, based on a careful review of the record, these issues lacked merit. The trial court's conclusion that there was past neglect and a probability of future neglect was well supported by evidence in the record, including respondent-mother's failure to complete most of the requirements of her case plan. Whether the respondent-mother's failure to comply with her case plan was willful is not relevant to establish this ground for termination. When determining whether a child is neglected, the circumstances and conditions surrounding the child are what matters, not the fault or culpability of the parent. *See In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984).

The other grounds found by the trial court to support termination of respondent-mother's parental rights are also supported by evidence in the record. Respondent-mother's failure to complete her case plan also supports the conclusion that she willfully left her child in foster care or a placement outside the home for over twelve months without making reasonable progress in correcting the circumstances that led to the removal of the child. *See In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93 (2004). Here, there was clear, cogent, and convincing evidence that respondent-mother failed to comply with substance abuse treatment and mental health treatment and to address domestic violence issues, all of which was sufficient to demonstrate her lack of reasonable progress. Finally, the trial court did not abuse its discretion by deciding that termination of respondent-mother's parental rights was in the child's best interests. N.C.G.S. § 7B-1110(a) (2019). All six factors required by the statute were examined by the trial court, and the findings were supported by evidence at the hearing.

Considering the entire record and reviewing the issues identified in the no-merit brief, we conclude that the 3 October 2019 order is supported by clear, cogent, and convincing evidence and is based on proper legal grounds. Accordingly, we affirm the trial court's order terminating respondent-mother's parental rights.

AFFIRMED.

NORTH CAROLINA BOWLING PROPRIETORS ASSOCIATION, INC.	)	
v.	)	From Wake County
ROY A. COOPER, III, IN HIS OFFICIAL CAPACITY AS THE GOVERNOR OF NORTH CAROLINA	)	

No. 314PA20

Filed 25 September 2020

Governor—authority—executive order—restrictions on business activities—superseded—mootness

Where a prior executive order, which restricted business activities of entertainment facilities, was superseded by another order loosening those restrictions and was no longer in effect, the Supreme Court dismissed as moot an appeal challenging the governor's authority to enforce the prior order.

ORDER

Plaintiff has filed a lawsuit questioning the authority of defendant Governor Roy Cooper to enforce section 8(A) of Executive Order 141 against plaintiff, the North Carolina Bowling Proprietors Association, and its 75 member entertainment facilities. *See* Exec. Order 141, § 8(A) (May 20, 2020). The trial court entered an interlocutory order granting a preliminary injunction on 7 July 2020 (preliminary injunction order). Defendant sought a stay of the order and its review, and this Court allowed both the stay and review. Defendant recently issued an executive order that superseded and replaced the provisions of Executive Order 141 challenged in this case. *See* Exec. Order 163, § 6(8) (Sept. 1, 2020). Executive Order 163 allows bowling centers to resume operations under certain specified safety protocols. *See id.* § 6(8)(b)(i)–(xi). Since the challenged restriction in Executive Order 141 is no longer in effect against plaintiff, we dismiss this appeal as moot, vacate the 7 July 2020 preliminary injunction order, and remand to Superior Court, Wake County.

By order of the Court in Conference, this the 25th day of September, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 25th day of September, 2020.

AMY L. FUNDERBURK
Clerk of the Supreme Court
of North Carolina

s/Amy L. Funderburk
~~Assistant~~ Clerk

STATE OF NORTH CAROLINA
v.
QUINTEL MARTINEZ AUGUSTINE

No. 130A03-2

Filed 25 September 2020

Constitutional Law—Racial Justice Act—double jeopardy—ex post facto—review precluded

For the reasons stated in *State v. Robinson*, 375 N.C. 173 (2020) and *State v. Ramseur*, 374 N.C. 658 (2020), the trial court erred by determining that the repeal of the Racial Justice Act (RJA) voided defendant's motion for appropriate relief from his capital sentence, because the retroactive application of the RJA's repeal violated double jeopardy protections and the constitutional prohibition against ex post facto laws. Review of a prior judgment and commitment, which was entered before the RJA was repealed and which sentenced defendant to life imprisonment without parole, was precluded because it was not appealed by the State and therefore constituted a final judgment. Consequently, the Supreme Court remanded the matter to the trial court to reinstate defendant's sentence of life imprisonment without parole.

Justice DAVIS concurring in result.

Justice NEWBY dissenting.

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order dismissing defendant's motion for appropriate relief in which defendant asserted claims under the Racial Justice Act entered on 25 January 2017 by Judge W. Erwin Spainhour in Superior Court, Cumberland County. Heard in the Supreme Court on 26 August 2019.

Joshua H. Stein, Attorney General, by Danielle Marquis Elder and Jonathan P. Babb, Special Deputy Attorneys General, for the State-appellee.

Gretchen M. Engel and James E. Ferguson II for defendant-appellant.

Jeremy M. Falcone, Paul F. Khoury, Robert L. Walker, and Madeline J. Cohen for Former State and Federal Prosecutors, amicus curiae.

Carlos E. Mahoney, Jin Hee Lee, and W. Kerrel Murray for NAACP Legal Defense and Educational Fund, Inc., amicus curiae.

Janet Moore for National Association for Public Defense, amicus curiae.

Burton Craige and Bidish Sarma for North Carolina Advocates for Justice, amicus curiae.

Grady Jessup for North Carolina Association of Black Lawyers, amicus curiae.

Cynthia F. Adcock for North Carolina Council of Churches, amicus curiae.

Lisa A. Bakale-Wise and Irving Joyner for North Carolina State Conference of the NAACP, amicus curiae.

Professors Robert P. Mosteller & John Charles Boger, amicus curiae.

Joseph Blocher for Social Scientists, amicus curiae.

HUDSON, Justice.

Pursuant to defendant's petition for writ of certiorari, we review whether double jeopardy bars review of the judgment entered in this matter. For the reasons stated in *State v. Robinson (Robinson II)*, No. 411A94-6, 2020 WL 4726680 (N.C. Aug. 14, 2020), we hold that it does. We also conclude for the reasons stated in this Court's decision in *State v. Ramseur*, 374 N.C. 658, 843 S.E.2d 106 (2020), that the retroactive application of the 2012 Amended Racial Justice Act (RJA), and the 2013 repeal of the RJA violates the prohibitions against ex post facto laws contained in both (1) the Federal Constitution, and (2) the North Carolina Constitution as interpreted by our prior decision in *State v. Keith*, 63 N.C. 140, 1869 WL 1378 (1869). Accordingly, we vacate the trial court's order and remand for the reinstatement of defendant's sentence of life imprisonment without parole.

Factual and Procedural Background

The jury returned a verdict finding defendant guilty of first-degree murder on 15 October 2002 in the Superior Court, Cumberland County.

On 22 October 2002, he was sentenced to death. Defendant then appealed as of right to this Court from the judgment sentencing him to death under N.C.G.S. § 7A-27(a). On direct appeal, we found no error in defendant's trial and affirmed his conviction and death sentence. *State v. Augustine (Augustine I)*, 359 N.C. 709, 740, 616 S.E.2d 515, 537 (2005).

On 9 August 2010, defendant filed a motion for appropriate relief (MAR) challenging his death sentence under the RJA in the Superior Court, Cumberland County. At the time that defendant filed his MAR, the RJA prohibited any person from being "subject to or given a sentence of death . . . that was sought or obtained on the basis of race." North Carolina Racial Justice Act, S.L. 2009-464, § 1, 2009 N.C. Sess. Laws 1213, 1214 [hereinafter Original RJA] (codified at N.C.G.S. §§ 15A-2010, -2011 (2009)) (repealed 2013). At that time, the RJA allowed defendants to prove that "race was the basis of the decision to seek or impose a death sentence" in their cases if they could present evidence that "race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed." *Id.*, § 1, 2009 N.C. Sess. Laws at 1214. To meet this burden of proof, defendants were allowed to offer statistical evidence. *Id.*

Also in August 2010, Marcus Reymond Robinson filed an MAR pursuant to the RJA in the Superior Court, Cumberland County.[1] Robinson's MAR hearing was held before Judge Gregory A. Weeks from 30 January through 15 February 2012. The trial court received evidence for thirteen days from thirteen witnesses, including: (1) Barbara O'Brien, an associate professor at Michigan University College of Law who conducted an empirical study of peremptory strike decisions in capital cases in North Carolina and concluded that race was a significant factor in those decisions in North Carolina, the former Second Judicial Division, and Cumberland County at the time of Robinson's trial; (2) George Woodworth, a professor emeritus of statistics and of public health at the University of Iowa who concurred with Professor O'Brien's testimony; (3) Samuel R. Sommers, an associate professor of psychology at Tufts University who concurred with the testimonies of Professor O'Brien and Professor Woodworth; (4) Bryan Stevenson, a professor of law at the New York University School of Law and the director of the Equal Justice Initiative in Montgomery, Alabama, who testified that he found dramatic evidence of racial bias in jury selection in capital cases in North Carolina

1. Robinson's appeal is the subject of our decision in *State v. Robinson*, No. 411A94-6, 2020 WL 4726680 (N.C. Aug. 14, 2020).

at the time of Robinson's trial; and (5) the Honorable Louis A. Trosch Jr. a district court judge in Mecklenburg County who was previously a public defender in Cumberland County and has trained judges to recognize implicit bias.

After the MAR hearing, the trial court entered an order on 20 April 2020 granting Robinson's MAR. In the 167-page order, the trial court made extensive findings, including that

> [t]he RJA identifies three different categories of racial disparities a defendant may present in order to meet the "significant factor" standard, any of which, standing alone, is sufficient to establish an RJA violation: evidence that death sentences were sought or imposed more frequently upon defendants of one race than others; evidence that death sentences were sought or imposed more frequently on behalf of victims of one race than others; or evidence that race was a significant factor in decisions to exercise peremptory strikes during jury selection. N.C.[G.S.] § 15A-2011(b)(1)–(3). It is the third category, evidence of discrimination in jury selection, that was the subject of the nearly three week long evidentiary hearing held in this case.
>
> In the first case to advance to an evidentiary hearing under the RJA, Robinson introduced a wealth of evidence showing the persistent, pervasive, and distorting role of race in jury selection throughout North Carolina. The evidence, largely unrebutted by the State, requires relief in his case and should serve as a clear signal of the need for reform in capital jury selection proceedings in the future.

The trial court concluded that Robinson was entitled to relief under the RJA as follows: "The [c]ourt . . . concludes that Robinson is entitled to have his sentence of death vacated, and Robinson is resentenced to life imprisonment without the possibility of parole."

On 15 May 2012, following the trial court's decision in Robinson's case, defendant Augustine, Christina Shea Walters,[2] and Tilmon Charles Golphin[3] each filed a Motion for Grant of Sentencing Relief arguing

2. Walters's appeal is the subject of our opinion in *State v. Walters*, No. 548A00-2 (N.C. Sept. 25, 2020).

3. Golphin's appeal is the subject of our opinion in *State v. Golphin*, No. 441A98-4 (N.C. Sept. 25, 2020).

that the evidence that established that Robinson was entitled to relief under the RJA also entitled them to relief in their cases. The State responded and requested that the trial court either (1) deny relief entirely, or (2) order an evidentiary hearing. On 11 June 2012, the trial court scheduled an evidentiary hearing for 23 July 2012.

On 2 July 2012, the General Assembly amended the RJA. An Act to Amend Death Penalty Procedures, S.L. 2012-136, §§ 3–4, 2012 N.C. Sess. Laws 471, 472 [hereinafter Amended RJA]. In the lead-up to defendant's evidentiary hearing, the General Assembly's amendments to the RJA made changes to (1) the burden of proof that defendants were required to meet in order to obtain relief, and (2) the types of evidence that could be used to satisfy that burden of proof. *Id.* Specifically, the Amended RJA allowed relief only if a defendant could demonstrate that "race was a significant factor in decisions to seek or impose the sentence of death in the *county or prosecutorial district* at the time the death sentence was sought or imposed." Amended RJA, § 3, 2012 N.C. Sess. Laws at 472 (emphasis added). This provision of the Amended RJA was narrower than the Original RJA, which also granted relief if a defendant could demonstrate that "race was a significant factor . . . [in] the *judicial division[ ] or the State* at the time the death sentence was sought or imposed." Original RJA, § 1, 2009 N.C. Sess. Laws at 1214 (emphasis added). Further, the Amended RJA defined the relevant time period as "10 years prior to the commission of the offense to the date that is two years after the imposition of the death sentence." Amended RJA, § 3, 2012 N.C. Sess. Laws at 472–73. In addition, while the Original RJA allowed defendants to satisfy their burden of proof through statistical evidence, the Amended RJA stated that "[s]tatistical evidence alone is insufficient to establish that race was a significant factor." Amended RJA, § 3, 2012 N.C. Sess. Laws at 472. Finally, the Amended RJA repealed N.C.G.S. § 15A-2011(b)[4] and added N.C.G.S. § 15A-2011(d), which provided that

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4. The Original RJA provided that

> [e]vidence relevant to establish a finding that race was a significant factor in decisions to seek or impose the sentence of death in the county, the prosecutorial district, the judicial division, or the State at the time the death sentence was sought or imposed may include statistical evidence or other evidence, including, but not limited to, sworn testimony of attorneys, prosecutors, law enforcement officers, jurors, or other members of the criminal justice system or both, that, irrespective of statutory factors, one or more of the following applies:
>
> (1) Death sentences were sought or imposed significantly more frequently upon persons of one race than upon persons of another race.

> [e]vidence relevant to establish a finding that race was a significant factor in decisions to seek or impose the sentence of death in the county or prosecutorial district at the time the death sentence was sought or imposed may include statistical evidence derived from the county or prosecutorial district where the defendant was sentenced to death, or other evidence, that either (i) the race of the defendant was a significant factor or (ii) race was a significant factor in decisions to exercise peremptory challenges during jury selection.

Amended RJA, § 3, 2012 N.C. Sess. Laws at 472. In *Ramseur*, we held that each of these provisions of the Amended RJA constituted impermissible ex post facto laws that could not be applied retroactively. 374 N.C. at 682, 843 S.E.2d at 121.

On 3 July 2012, defendant Augustine, Walters, and Golphin filed amendments to their motions for sentencing relief pursuant to the Amended RJA. On 6 July 2012, the trial court scheduled the evidentiary hearing for 1 October 2012.

The evidentiary hearing on the amended motions was held on 1 October 2012 through 11 October 2012 before Judge Gregory A. Weeks. On 13 December 2012, the trial court entered an order granting the MARs filed by defendant, Walters, and Golphin. In the opening paragraphs of the order, the trial court emphasized that "race was, in fact, a significant factor in the prosecution's use of peremptory strikes during jury selection, and [the trial court] therefore grants Defendants' motions for appropriate relief pursuant to the RJA, vacates their death sentences, and imposes sentences of life imprisonment without possibility of parole" under the Amended RJA. The lengthy order contained numerous findings of fact, including the following:

> 130. Having considered testimony from Coyler, Russ, and Dickson [Cumberland County prosecutors] in conjunction with all of the foregoing evidence, the [c]ourt concludes that their denials that they took race into account in Cumberland County capital cases are

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> (2) Death sentences were sought or imposed significantly more frequently as punishment for capital offenses against persons of one race than as punishment of capital offenses against persons of another race.
>
> (3) Race was a significant factor in decisions to exercise peremptory challenges during jury selection.

North Carolina Racial Justice Act, S.L. 2009-464, § 1, 2009 N.C. Sess. Laws 1213, 1214.

> unpersuasive and not credible. Their contention that they selected capital juries in a race-neutral fashion does not withstand scrutiny and is severely undercut by all of the evidence to the contrary. The evidence of Coyler's race-conscious "Jury Strikes" notes in *Augustine,* Coyler and Dickson's conduct in the *Burmeister* and *Wright* cases, Russ' use of a prosecutorial "cheat sheet" to respond to *Batson* objections, and the many case examples of disparate treatment by these three prosecutors, together, constitute powerful, substantive evidence that these Cumberland County prosecutors regularly took race into account in capital jury selection and discriminated against African-American citizens.
>
> 131. Finally, this [c]ourt would be remiss were it to fail to acknowledge the difficulties involved in reaching these determinations. Coyler, Russ, and Dickson each represented the State in Cumberland County for over two decades. During that time—as judges testified in this proceeding—these prosecutors gained reputations for good character and integrity. The [c]ourt first notes that its conclusion that unconscious biases likely operated in their strike decisions does not impugn the prosecutors' character. The [c]ourt additionally finds that there is no evidence that any of these prosecutors acted with racial animus towards any minority venire member. To the extent that the actions of these prosecutors were informed by purposeful bias, the [c]ourt finds that such bias falls within the category of "rational bias," and was motivated by the prosecutors' desire to zealously prosecute the defendants, rather than racial animosity.

In the final conclusion of law, the trial court stated that

> [i]n view of the foregoing, the [c]ourt finally concludes based upon a preponderance of the evidence that race was a significant factor in decisions to seek or impose Defendants' death sentences at the time those sentences were sought or imposed. Defendants' judgments were sought or obtained on the basis of race.

As a consequence, the trial court concluded by ordering the following:

> The [c]ourt, having determined that Golphin, Walters, and Augustine are entitled to appropriate relief on their

> RJA jury selection claims, concludes that Defendants are entitled to have their sentences of death vacated, and Golphin, Walters, and Augustine are resentenced to life imprisonment without the possibility of parole.
>
> The [c]ourt reserves ruling on the remaining claims raised in Defendants' RJA motions, including all constitutional claims.

On the same day, the trial court entered a separate Judgment and Commitment, sentencing defendant to life imprisonment without the possibility of parole. The State neither appealed nor otherwise sought review of the separate Judgment. However, the State sought review by this Court of the trial court's decisions granting relief to defendant, Robinson, Walters, and Golphin pursuant to two separate petitions for writ of certiorari. We allowed both petitions.

On 18 December 2015, we issued separate orders addressing the review of the petitions for certiorari. In Robinson's case, this Court vacated the trial court's order granting relief under the RJA and remanded his case to the trial court. *State v. Robinson (Robinson I)*, 368 N.C. 596, 597, 780 S.E.2d 151, 152 (2015). This Court concluded that the trial court erred in granting relief because it abused its discretion by denying the State's third motion to continue the evidentiary hearing on Robinson's MAR. *Id.* at 596, 780 S.E.2d at 151. In a separate order, we vacated the trial court's order granting relief to Augustine, Walters, and Golphin, and remanded the three cases to the trial court as well. *State v. Augustine (Augustine II)*, 368 N.C. 594, 780 S.E.2d 552 (2015). The remand order entered by this Court stated the following:

> After careful review, we conclude that the error recognized in this Court's Order in *State v. Robinson*, [368 N.C. 596, 780 S.E.2d 151 (2015)], infected the trial court's decision, including its use of issue preclusion, in these cases. Accordingly, the trial court's order is vacated. Furthermore, the trial court erred when it joined these three cases for an evidentiary hearing. These cases are therefore remanded to the senior resident superior court judge of Cumberland County for reconsideration of respondents' motions for appropriate relief. *Cf.* Gen. R. Pract. Super. & Dist. Cts. 25(4), 2016 Ann. R. N.C. 22.
>
> We express no opinion on the merits of respondents' motions for appropriate relief at this juncture. On remand, the trial court should address petitioner's constitutional

> and statutory challenges pertaining to the Act. In any new hearings on the merits, the trial court may, in the interest of justice, consider additional statistical studies presented by the parties. The trial court may also, in its discretion, appoint an expert under N.C. R. Evid. 706 to conduct a quantitative and qualitative study, unless such a study has already been commissioned pursuant to this Court's Order in *Robinson*, in which case the trial court may consider that study. If the trial court appoints an expert under Rule 706, the Court hereby orders the Administrative Office of the Courts to make funds available for that purpose.

Augustine II, 368 N.C. at 594, 780 S.E.2d at 552–53.

In June 2013—during the pendency of the State's appeals to this Court in *Robinson I* and *Augustine II*—the General Assembly repealed the RJA.[5] This repeal came after we allowed the State's petition for writ of certiorari in *Robinson I* on 11 April 2013, but before we allowed the State's petition for writ of certiorari in *Augustine II* on 3 October 2013. The repeal applied retroactively to any MAR filed before the repeal's effective date. Act of June 13, 2013, S.L. 2013-154, § 5.(d), 2013 N.C. Sess. Laws 368, 372. However, the repeal's savings clause exempted from the repeal all cases in which there was

> a court order resentencing a petitioner to life imprisonment without parole pursuant to the provisions of Article 101 of Chapter 15A of the General Statutes prior to the effective date of this act *if the order is affirmed upon appellate review and becomes a final Order* issued by a court of competent jurisdiction.

Id. (emphasis added). Conversely, the savings clause specifically made the repeal's retroactivity provision

> applicable in any case where a court resentenced a petitioner to life imprisonment without parole pursuant to the provisions of Article 101 of Chapter 15A of the General Statutes prior to the effective date of this act, *and the Order is vacated upon appellate review* by a court of competent jurisdiction.

Id. (emphasis added).

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5. Act of June 13, 2013, S.L. 2013-154, § 5.(a), 2013 N.C. Sess. Laws. 368, 372.

On remand from our orders in *Robinson I* and *Augustine II*, the trial court held a single hearing for the four defendants' cases; the hearing was not scheduled as an evidentiary hearing, and no evidence was taken. Prior to the hearing, all counsel were notified that the trial court had ordered that the hearing would only involve arguments on the following single question of law:

> Did the enactment into law of Senate Bill 306, Session Law 2013-14, on 19 June 2013, specifically Sections 5. (a), (b) and (d) therein, render void the Motions for Appropriate Relief filed by the defendants Augustine, Walter[s], Golphin and Robinson pursuant to the provisions of Article 101 of the General Statutes of North Carolina?

After the hearing, the trial court dismissed the MARs filed by all defendants concluding that they were voided by the repeal of the RJA. Defendant Augustine filed a petition for writ of certiorari requesting review of the trial court's ruling on 30 May 2017. We allowed the petition on 1 March 2018.

Analysis

For the reasons stated in this Court's decision in *Robinson II*, "the retroactivity provision of the RJA Repeal violates the double jeopardy protections of the North Carolina Constitution." 2020 WL 4726680, at *12. Furthermore, the judgment entered by the trial court sentencing defendant Augustine to life imprisonment without the possibility of parole was and is a final judgment. Therefore, double jeopardy bars further review. *Id.* In addition, for the reasons stated in *Ramseur*, we conclude that the retroactive application of the RJA repeal violates the prohibitions against ex post facto laws contained in both (1) the United States Constitution, and (2) the North Carolina Constitution as interpreted by our prior opinion in *Keith*, 63 N.C. 140, 1869 WL 1378. *Ramseur*, 374 N.C. at 658–83, 843 S.E.2d at 106–22. Accordingly, we vacate the trial court's order ruling that the repeal of the RJA voided defendant's MAR and remand to the Superior Court, Cumberland County, for the reinstatement of defendant's sentence of life imprisonment without parole.

VACATED AND REMANDED.

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

Justice DAVIS concurring in result.

For the reasons stated in Justice Ervin's concurring opinions in *State v. Golphin*, No. 441A98-4 (N.C. Sept. 25, 2020), and *State v. Walters*, No. 548A00-2 (N.C. Sept. 25, 2020), I concur in the result only.

Justice NEWBY dissenting.

For the reasons stated in my dissenting opinions in *State v. Robinson*, No. 411A94-6, 2020 WL 4726680 (N.C. Aug. 14, 2020), and *State v. Ramseur*, 374 N.C. 658, 843 S.E.2d 106 (2020), I respectfully dissent.

STATE OF NORTH CAROLINA
v.
TERRAINE SANCHEZ BYERS

No. 69A06-4

Filed 25 September 2020

Criminal Law—appointment of counsel—post-conviction DNA testing—materiality requirement

In a case of first impression, defendant's pro se motion for post-conviction DNA testing did not entitle him to the appointment of counsel under N.C.G.S. § 15A-269(c) because he failed to meet his burden of showing DNA testing "may be" material to his claim of wrongful conviction. Although the burden of showing materiality is more relaxed under subsection (c) than it is under subsection (a)—requiring a defendant to show DNA testing "is material" to his defense—the legal meaning of "materiality" remains the same under both sections. Thus, where defendant needed to show a reasonable probability that the testing would have resulted in a different verdict, he failed to do so by providing no more than vague and conclusory statements accusing the State of falsifying evidence against him.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 263 N.C. App. 231, 822 S.E.2d 746 (2018), reversing an order entered on 3 August 2017 by Judge W. Robert Bell in

Superior Court, Mecklenburg County. Heard in the Supreme Court on 19 November 2019.

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

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

MORGAN, Justice.

This matter mandates our consideration of the requirements which a pro se defendant who seeks postconviction testing of deoxyribonucleic acid (DNA) evidence derived from biological material must fulfill in order to qualify for appointed counsel to assist such a defendant in an effort to obtain this type of scientific evaluation as provided in section 15A-269 of the General Statutes of North Carolina. While this Court has previously addressed the burden that a defendant must satisfy in order to obtain DNA testing after being found guilty of criminal activity, this case presents to us an issue of first impression with regard to the standard which a defendant must meet for the appointment of an attorney by a trial court under N.C.G.S. § 15A-269 to aid in the defendant's efforts to obtain the postconviction DNA testing. In undertaking the inquiry here, we conclude that defendant Terraine Sanchez Byers has failed to fulfill the requirements which the identified statute has established. Accordingly, this Court reverses the decision rendered below by the Court of Appeals.

I. The Trial Phase

Defendant was convicted of first-degree murder and first-degree burglary on 3 March 2004. These convictions arose from the 22 November 2001 stabbing death of Shanvell Burke, a person with whom defendant had a romantic relationship before Burke ended it. On that autumnal night in Charlotte, North Carolina, Burke was in her apartment watching television with an individual named Reginald Williams. Williams testified at trial that he and Burke heard a loud crash at the back door of the apartment. When Burke went to see what had caused the sound, Williams heard her yell "Terraine, stop." This development prompted Williams to leave the apartment immediately and to find someone to contact law enforcement for assistance. Williams explained in his testimony that he fled from Burke's residence because she had allowed him to hear a recorded telephone message that defendant had left for

Burke in which defendant said that "when he found out who [was dating Burke], he was gonna kill them." Williams also related at trial that Burke had told him that "she was afraid [defendant] was going to do something to hurt her bad." Evidence presented at trial tended to show that local law enforcement officers were already familiar with Burke's home because after she had terminated her romantic relationship with defendant, Burke had called upon law enforcement for help on multiple occasions due to her fear of defendant. On one such occasion, Burke reported that defendant had struck her in the face and on her head while stating that he was going to kill her, and then defendant brandished a knife toward Burke's aunt, who was also present. Another emergency call by Burke to law enforcement involved her account that defendant had thrown bricks at Burke's apartment window.

In response to the emergency call to law enforcement in light of the circumstances which were occurring on 22 November 2001, the Charlotte-Mecklenburg Police Department arrived at Burke's apartment to discover defendant leaving the apartment through a broken window of the door. Defendant, who was described by officers as nervous and profusely sweating, told the officers that Burke was inside her home and had been injured. Defendant attempted to flee, but officers quickly apprehended and arrested him. Defendant had a deep laceration on his left hand.

Upon entering Burke's apartment, officers discovered her body lying in a pool of blood. Burke was already deceased due to the infliction of eleven stab wounds which she had suffered. A knife handle with a broken blade was recovered by investigating officers. One of the officers who responded to the 22 November 2001 emergency call identified Burke based upon his response to an emergency call at her residence eleven days earlier. On a prior date, Burke had reported to the officer that defendant had returned to Burke's apartment to harass her immediately after being released from custody on a domestic violence charge. Several days later, the same officer responded to another call at Burke's apartment at which time Burke again reported harassment by defendant, who Burke said she feared was going to physically assault her.

During the investigation of Burke's death, fingernail scrapings from defendant's hands, a bloodstain from a cushion on Burke's couch, a swab from the handle and a swab from the blade of the broken knife found inside Burke's apartment on the night of 22 November 2001, and various other bloodstains throughout the apartment were analyzed by the Charlotte-Mecklenburg Police Department Crime Laboratory. The DNA obtained from these sources matched either defendant, Burke, or

both of them. Additionally, one of Burke's neighbors testified that she saw defendant near Burke's apartment about 8:00 p.m. on the night that Burke was killed.

Defendant stipulated during trial that the blood found on the shirt that he was wearing at the time of his arrest was Burke's. Defendant offered no evidence at trial. Upon being found guilty by a jury of the offenses of first-degree murder and first-degree burglary, defendant was sentenced to life imprisonment without parole for the murder conviction and a term of 77–102 months in prison for the burglary conviction, which would be served consecutive to the life imprisonment for murder. Upon defendant's appeal, the Court of Appeals upheld the judgments entered upon defendant's convictions and denied defendant's post-trial pro se motion for appropriate relief. *See State v. Byers* (*Byers I*), 175 N.C. App. 280, 623 S.E.2d 357, *disc. rev. denied*, 360 N.C. 485, 631 S.E.2d 135 (2006).

II. Defendant's Request for Postconviction DNA Testing

On 31 July 2017, defendant filed a pro se motion in the trial court for postconviction DNA testing pursuant to N.C.G.S. § 15A-269 in which he asserted that: (1) defendant was on the other side of town waiting for a bus at the time that the attack on Burke occurred; (2) one of the State's witnesses at trial testified that she saw defendant getting on the 9:00 p.m. city bus on the night that Burke was killed; (3) a private investigator swore in an affidavit that defendant could not have arrived at Burke's apartment prior to the 22 November 2001 emergency call; (4) defendant had gone to Burke's apartment on the night of her death, and when he arrived, defendant noticed that the back door was "smashed in"; (5) defendant went inside Burke's apartment to investigate; and (6) defendant was then attacked by a man in a plaid jacket who escaped from the apartment before police officers arrived. In his motion, defendant stated that his struggle with the man in the plaid jacket would explain the presence of defendant's DNA throughout Burke's apartment and asserted that DNA testing of defendant's and Burke's previously untested clothing could reveal the identity of the actual perpetrator, noting that the State's DNA expert witness had reported, but not testified to, the presence of human blood in various locations in Burke's apartment that did not match the blood of either defendant or Burke. Defendant requested that the items of clothing be preserved and that an inventory of the evidence be prepared. Defendant also asked for the appointment of counsel to assist defendant in his postconviction DNA-testing process pursuant to N.C.G.S. § 15A-269(c).

Section 15A-269 of the General Statutes of North Carolina provides, in pertinent part, the following:

> (a) A defendant may make a motion before the trial court that entered the judgment of conviction against the defendant for performance of DNA testing . . . if the biological evidence meets all of the following conditions:
>
> (1) Is material to the defendant's defense.
>
> (2) Is related to the investigation or prosecution that resulted in the judgment.
>
> (3) Meets either of the following conditions:
>
> a. It was not DNA tested previously.
>
> b. It was tested previously, but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.
>
> (b) The court shall grant the motion for DNA testing . . . upon its determination that:
>
> (1) The conditions set forth in subdivisions (1), (2), and (3) of subsection (a) of this section have been met;
>
> (2) If the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant; and
>
> (3) The defendant has signed a sworn affidavit of innocence.
>
> . . . .
>
> (c) . . . [T]he court shall appoint counsel for the person who brings a motion under this section if that person is indigent. If the petitioner has filed pro se, the court shall appoint counsel for the petitioner . . . upon a showing that the DNA testing may be material to the petitioner's claim of wrongful conviction.

N.C.G.S. § 15A-269(a), (b), (c) (2019).

On 3 August 2017, the Superior Court, Mecklenburg County, entered an order denying defendant's motion for postconviction DNA testing on the grounds that "the evidence of his guilt is overwhelming" and that defendant has "failed to show how conducting additional DNA testing is material to his defense." Defendant appealed the trial court's order denying his motion to the Court of Appeals.

III. The Court of Appeals Decision

In the Court of Appeals, defendant argued that the trial court erred by denying his motion (1) before "obtaining and reviewing the statutorily required inventory of evidence" sought to be tested and (2) before appointing counsel to assist defendant upon showing in his motion that he was indigent and "the testing may be material to his defense." *State v. Byers (Byers II)*, 263 N.C. App. 231, 234, 822 S.E.2d 746, 748 (2018). The majority of the Court of Appeals panel reversed the trial court's order denying defendant's motion. *Id.* at 243, 822 S.E.2d at 753. Although the lower appellate court saw no error in the trial court's determination of defendant's motion prior to ordering the requested inventory of evidence, the majority concluded that defendant sufficiently pleaded the materiality of his requested postconviction DNA testing so as to be entitled to the appointment of counsel in order to assist him in obtaining the testing. *Id.*

With regard to the issue of materiality, the majority noted that "[t]he level of materiality required under subsection (a)(1) to support a motion for post-conviction DNA testing has been frequently litigated and has been a high bar for *pro se* litigants." *Id.* at 240, 822 S.E.2d at 751 (citing, *inter alia*, *State v. Lane*, 370 N.C. 508, 809 S.E.2d 568 (2018)). In *Lane*, this Court stated that in order to obtain postconviction DNA *testing*, DNA evidence is considered to be material when

> there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. The determination of materiality must be made in the context of the entire record and hinges upon whether the evidence would have affected the jury's deliberations.

Lane, 370 N.C. at 519, 809 S.E.2d at 575. In applying our guidance in *Lane* to the instant case, the Court of Appeals majority acknowledged the substantial evidence of defendant's guilt but further opined that "[t]he weight of the evidence indicating guilt must be weighed against the probative value of the possible DNA evidence. Our Supreme Court has found DNA [evidence] to be 'highly probative of the identity of the

victim's killer.' " *Byers*, 263 N.C. App. at 242, 822 S.E.2d at 753 (quoting *State v. Daughtry*, 340 N.C. 488, 512, 459 S.E.2d 747, 759 (1995)). In the present case, the lower appellate court's majority then observed the following:

> In enacting N.C.G.S. § 15A-269, our General Assembly created a potential method of relief for wrongly incarcerated individuals. To interpret the materiality standard in such a way as to make that relief unattainable would defeat that legislative purpose. *See Burgess v. Your House of Raleigh*, 326 N.C. 205, 216, 388 S.E.2d 134, 140 (1990) ("[A] statute must be construed, if possible, so as to give effect to every provision, it being presumed that the Legislature did not intend any of the statute's provisions to be surplusage."). A recent dissent in an opinion in [the Court of Appeals] highlighted the position in which our previous interpretation of materiality has placed *pro se* defendants, stating "we are requiring indigent defendants to meet this illusory burden of materiality, with no guidance or examples of what actually constitutes materiality. *Under our case law, therefore, it would be difficult for even an experienced criminal defense attorney to plead these petitions correctly.*" *State v. Sayre*, . . . 803 S.E.2d 699 (2017) (unpublished) (Murphy, J., dissenting)[,] *aff'd per curiam*, [371] N.C. [468], 818 S.E.2d 282 (2018). We hold Defendant in the present case has satisfied this difficult burden.

Id. at 242–43, 822 S.E.2d at 753 (first alteration in original) (second emphasis added). With this reasoning, the Court of Appeals reversed the trial court's order and remanded for the entry of an order appointing counsel to assist defendant in the proceeding in which defendant would attempt to establish the level of materiality required to obtain DNA testing. *Id.* at 243, 822 S.E.2d at 753.

In the view of the dissenting judge on the Court of Appeals panel, defendant did *not* sufficiently establish that he was entitled to the appointment of counsel to assist him in obtaining postconviction DNA testing. *Id.* at 243, 822 S.E.2d at 753 (Arrowood, J., dissenting). The dissenting judge noted that under the pertinent statute, the movant "has the burden of proving by a preponderance of the evidence every fact essential to support the motion for postconviction DNA testing, which includes the facts necessary to establish materiality," *Id.* at 244, 822 S.E.2d at 754 (quoting *Lane*, 370 N.C. at 518, 809 S.E.2d at 574), and then concluded that

> in light of the overwhelming evidence of defendant's guilt and dearth of evidence pointing to a second perpetrator, defendant did not meet his burden to prove by a preponderance of the evidence every fact necessary to establish materiality, and the trial evidence was sufficient to dictate the trial court's ultimate conclusion on materiality, as in *Lane*.

Id. at 248, 822 S.E.2d at 756. Accordingly, the dissenting judge would have held that "the trial court did not err by denying defendant's motion for DNA testing because the allegations in his motion were not sufficient to establish that he was entitled to the appointment of counsel." *Id.* at 243, 822 S.E.2d at 753. In light of this position, the dissenting judge deemed it unnecessary to address the issue of the trial court's ruling before having obtained and reviewed the inventory of evidence. *Id.* at 248, 822 S.E.2d at 756.

On 15 January 2019, the State filed a notice of appeal on the basis of the Court of Appeals dissent, along with a motion for a temporary stay and a petition for writ of supersedeas. We allowed the petition for writ of supersedeas on 16 January 2019. The appeal was heard in the Supreme Court on 19 November 2019.

IV. Analysis

The primary question presented in this appeal dictates that we set forth the threshold level which a pro se defendant must reach through a sufficient allegation of facts so as to establish materiality as required by N.C.G.S. § 15A-269(c) in order *to be appointed counsel* to assist the defendant upon defendant's showing in the pro se motion that the postconviction DNA testing may be material to defendant's claim of wrongful conviction.

The materiality of evidence in a criminal case was addressed by the Supreme Court of the United States in the opinion which it rendered in *Brady v. Maryland*, 373 U.S. 83 (1963). In identifying "where the evidence is material either to guilt or to punishment," the nation's highest tribunal determined that evidence is material if it is "evidence . . . which, if made available [to an accused], would tend to exculpate him or reduce the penalty." *Id.* at 87–88. Citing *Brady*, in *Lane* we expressly (1) recognized "the similarities in the *Brady* materiality standard and the standard contained in N.C.G.S. § 15A-269(b)(2)"; (2) noted that in the context of a defendant's request for postconviction DNA testing, "this Court has explained that 'material' means 'there is a reasonable probability that, had the evidence been disclosed to the defense, the

result of the proceeding would have been different' "; and (3) reaffirmed that "[t]he determination of materiality must be made 'in the context of the entire record' and hinges upon whether the evidence would have affected the jury's deliberations." *Lane*, 370 N.C. at 519, 809 S.E.2d at 575 (citations omitted). This Court has construed the term "reasonable probability" to mean "a probability sufficient to undermine confidence in the outcome." *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (quoting *Wiggins v. Smith*, 539 U.S. 510, 534 (2003)); *see also United States v. Bagley*, 473 U.S. 667, 682 (1985). We have applied this interpretation of the standard of reasonable probability in cases that invoked the evaluation of the materiality of evidence under *Brady*. *See Lane*, 370 N.C. at 519, 809 S.E.2d at 575; *State v. Tirado*, 358 N.C. 551, 599 S.E.2d 515 (2004); *State v. Kilpatrick*, 343 N.C. 466, 471 S.E.2d 624 (1996). The moving party has the burden of proving by a preponderance of the evidence every fact essential to support the motion for postconviction DNA testing, which includes the facts necessary to establish materiality. *Lane*, 370 N.C. at 518, 809 S.E.2d at 574.

Pursuant to N.C.G.S. § 15A-269(a), one of the three necessary criteria that must be satisfied in a defendant's motion before a trial court for postconviction DNA testing is that the biological evidence is material to the defendant's defense. Another requirement of the statute is that the biological evidence was not "DNA tested" previously, or that it was tested previously "but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results." N.C.G.S. § 15A-269(a)(3). In defendant's pro se motion for postconviction DNA testing in the present case, defendant averred that his clothing was not subjected to DNA testing and that a couch cushion and the upper handrail of a stairway were subjected to DNA testing "but retesting the items outside of law enforcement agencies will have a reasonable probability of contradicting prior test results." Defendant also averred the following:

> The ability to conduct the requested DNA testing is material to the Defendant's defense on actual innocence and to show another commit [sic] the crime for which he is wrongly convicted. Also, it shows the victim's blood was never on the defendant which would be consistent with him not being the perpetrator. See Defendant's MAR Argument and exhibits. THE DNA IS NEEDED AND NECESSARY TO PROVE THAT THE D.A. FABRICATED THE BLOOD ON THE DEFENDANT'S CLOTHES.

(Emphasis in original.) Pursuant to N.C.G.S. § 15A-269(b), the trial court shall grant the motion for postconviction DNA testing upon its determination (1) that all of the conditions of N.C.G.S. § 15A-269(a) have been met[1]; (2) that if the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant; and (3) that the defendant has signed a sworn affidavit of innocence.

In applying the pertinent statutory law and case law to the present case, we conclude that defendant has failed to prove by a preponderance of the evidence every fact essential to support his motion for postconviction DNA testing, has failed to establish that the biological evidence is material to his defense, has failed to meet the condition that the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results regarding previous DNA testing of some items, and has failed to demonstrate that there exists a reasonable probability that the verdict would have been more favorable to him if the DNA testing being requested had been conducted on the evidence.

As this Court said in *Lane*, a defendant has the burden as the moving party under N.C.G.S. § 15A-269(a) to prove by a preponderance of the evidence every fact essential to support the motion for postconviction DNA testing, including the facts necessary to establish materiality. In the current case, defendant has fallen short of these requirements. Instead of offering proof of facts which he contends satisfactorily show that he has satisfied the standard for postconviction DNA testing, defendant merely offers conclusory and vague statements without evidentiary foundation, which culminate in an unsupported accusation that the State falsified evidence in order to convict him. This circumstance serves to further reveal the lack of evidence which defendant has identified as being material to his defense in order to comport with N.C.G.S. § 15A-269(a) and the cited case law.

The specific issue which this Court is charged to resolve regarding defendant's qualification for the appointment of counsel in the instant case to assist his efforts, upon defendant's pro se motion filed in the trial court, to obtain postconviction DNA testing, is governed by subsection (c) of N.C.G.S. § 15A-269 and is also premised upon defendant's ability

1. The existence of the only unmentioned condition of N.C.G.S. § 15A-269(a)—that the biological evidence is related to the investigation or prosecution that resulted in the judgment—is not in dispute.

to demonstrate the materiality of the DNA testing, as the language of N.C.G.S. § 15A-269(c) establishes that there must be "a showing that the DNA testing may be material to the petitioner's claim of wrongful conviction." In defendant's capacity as the petitioning party who makes the pro se motion before the trial court under N.C.G.S. § 15A-269(a) for the performance of postconviction DNA testing upon a requirement to meet one of several mandated conditions that the testing *is* material to the defendant's defense, he has the burden to show under N.C.G.S. § 15A-269(c) that the DNA testing *may* be material to defendant's claim of wrongful conviction in order for the trial court to grant defendant's request for the appointment of counsel to assist defendant in the postconviction DNA testing process.

In this case of first impression, we discern that the Legislature's use of the phrase "*is* material to the defendant's defense" in N.C.G.S. § 15A-269(a) and its employment of the terminology in § 15A-269(c) "*may* be material to the petitioner's claim of wrongful conviction"—each with regard to the depiction of the postconviction DNA testing at issue—would appear to relax the standard to be met by a defendant in order to qualify for the appointment of counsel to assist in the attainment of postconviction DNA testing under subsection (c), as compared to an apparent heightened standard for a defendant to meet in order to achieve postconviction DNA testing under subsection (a). To this end, we recognize the soundness of the approach of the Court of Appeals majority in this case as shown in its observation: "In enacting N.C.G.S. § 15A-269, our General Assembly created a potential method of relief for wrongly incarcerated individuals. To interpret the materiality standard in such a way as to make that relief unattainable would defeat that legislative purpose." *Byers*, 263 N.C. App. at 242, 822 S.E.2d at 753. However, the majority of the court below went on to deem this well-founded beginning point of analysis regarding legislative intent to compel it to determine, in light of its description of a defendant's statutory requirement of proof under N.C.G.S. § 15A-269 as "this illusory burden of materiality," to "hold Defendant in the present case has satisfied this difficult burden." *Id.* at 243, 822 S.E. 2d at 753. Contrary to the manner in which the Court of Appeals majority has chosen to couch the statutory burden established in N.C.G.S. § 15A-269 which a defendant must satisfy in order to show the materiality of postconviction DNA testing, we do not subscribe to such a conclusion that disharmony exists in this matter between the legislative intent undergirding N.C.G.S. § 15A-269 and this Court's consistent interpretation of the term "material" for application in N.C.G.S. § § 15A-269(a) and (c).

It is important to note, in light of the higher standard that a defendant must satisfy to show that postconviction DNA testing "*is* material to the defendant's defense" under N.C.G.S. § 15A-269(a) in order to obtain *testing* as compared to the lower standard that a defendant must satisfy to show that postconviction DNA testing "*may* be material to the petitioner's claim of wrongful conviction" under N.C.G.S. § 15A-269(c) in order to obtain *court-appointed counsel*, that the term "material" maintains the same definition in subsections (a) and (c) that this Court has attributed to it in our cited case decisions. The major consequentiality inherent in the term "material" itself is neither heightened in N.C.G.S. § 15A-269(a) nor relaxed in N.C.G.S. § 15A-269(c) by virtue of an alteration in the term's legal meaning; rather, it is the modifying word "is" preceding the term "material" in subsection (a) and the modifying word "may" prior to the term "material" in subsection (c) which create the difference in the levels of proof to be met by a defendant.

In utilizing this Court's construction of the term "material" in our *Lane*, *Tirado*, and *Kilpatrick* decisions—all of which addressed the evaluation of materiality of evidence under the rubric of the approach to the subject by the Supreme Court of the United States as enunciated in *Brady*—we conclude that defendant has not made the prescribed "showing that the DNA testing may be material to the petitioner's claim of wrongful conviction" as required for the appointment of counsel by the trial court under N.C.G.S. § 15A-269(c). Here, in his effort to obtain the appointment of counsel by the trial court, defendant has not sufficiently shown that the postconviction DNA testing may tend to exculpate him because there is not a *reasonable probability* that, had the evidence been disclosed to the defense, the result of the proceeding may have been different, in the context of the entire record and hinging upon whether the evidence may have affected the jury's deliberations, as to petitioner's claim of wrongful conviction. We therefore agree with the analysis employed by the dissenting view in the Court of Appeals in the current case which led to its conclusion that "no reasonable probability exists under the facts of this case that a jury would fail to convict defendant and . . . the trial court did not err by concluding defendant failed to establish materiality." *Byers*, 263 N.C. App. at 248, 822 S.E.2d at 756. This scrutiny was rooted in the dissent's observations, which we find persuasive, that

> . . . in light of the overwhelming evidence of defendant's guilt and dearth of evidence pointing to a second perpetrator, defendant did not meet his burden to prove by a preponderance of the evidence every fact necessary to establish materiality, and the trial evidence was sufficient

> to dictate the trial court's ultimate conclusion on materiality, as in *Lane*.

Id.

Indeed, while this Court has defined the term "material" found in N.C.G.S. § 15A-269(a) to mean that there is a reasonable probability that had the evidence been disclosed to the defense the result of the proceeding would have been different, and is a definition which we find to be appropriate to adopt for the term "material" in N.C.G.S. § 15A-269(c) in order to promote applicability and consistency within the statute, it is the weighty volume of evidence offered against defendant at trial that exacerbates the lack of evidence offered by defendant both at his trial and after his trial which reinforces the inadequacy of defendant's effort to show that postconviction DNA testing is material to his defense; that there is a reasonable probability that had the evidence been disclosed to the defense the result of defendant's trial would have been different; and that DNA testing may be material to the petitioner's claim of wrongful conviction so as to qualify defendant here for the appointment of counsel. At trial, the State introduced evidence which tended to show, *inter alia*, that (1) on the night that Burke died after suffering multiple stab wounds, Williams heard Burke yell "Terraine, stop" after Williams and Burke heard a loud crash at the back door of her apartment as they watched television at the residence, after which Burke went to the area of the noise to determine the cause of it; (2) defendant Terraine Byers and Burke had been involved with each other in a romantic relationship which Burke had ended; (3) Burke had allowed Williams to hear a recorded telephone message that defendant had left for Burke in which defendant threatened to kill the man defendant believed was currently dating Burke; (4) Burke had told Williams that she was afraid that defendant "was going to do something to hurt her bad"; (5) one of Burke's neighbors had seen defendant near Burke's apartment on the night that Burke was killed; (6) upon arriving at Burke's apartment after receiving the emergency call, officers saw defendant, who was nervous and profusely sweating, leaving the apartment through a broken window of the back door; (7) defendant told the officers that Burke was inside the apartment and was injured; (8) defendant attempted to flee, but he was arrested; (9) defendant had a deep laceration on his left hand; (10) upon entering the apartment, officers found Burke lying in a pool of blood; (11) after terminating her romantic relationship with defendant, Burke had called upon law enforcement for help on multiple occasions due to her fear of defendant; (12) an occasion transpired on which defendant struck Burke in the face and on the head while stating that he would kill her and then brandished a knife toward Burke's aunt;

(13) there were several incidents of domestic violence involving defendant and his interaction with Burke; (14) a mixture of DNA from Burke and defendant was determined to exist from defendant's fingernail scrapings; (15) DNA which matched defendant was determined to exist in a bloodstain on an upper handrail of a stairway and in a bloodstain on a couch cushion in Burke's apartment; and (16) DNA which matched Burke was determined to exist in bloodstains obtained from a knife and its blade which had been located inside Burke's apartment. Additionally, defendant stipulated that the blood which covered the shirt that he was wearing at the time of his arrest was Burke's blood. Juxtaposed against the wealth and strength of the evidence introduced by the State was the dearth of evidence from defendant, who did not present any evidence at trial.

The total absence of any production of evidentiary proof by defendant at his trial or in his subsequent motion for postconviction DNA testing under N.C.G.S. § 15A-269 readily leads to the conclusion that defendant has not satisfied his burden of proving by a preponderance of the evidence every fact essential to support his motion for postconviction DNA testing, which includes the facts necessary to establish that the biological evidence is material to his defense as required by subsection (a) of the statute. This deficiency likewise prompts the resulting determination that there is not a reasonable probability that postconviction DNA testing of the biological evidence that was not tested previously, or the biological evidence that was tested previously, will provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results, as also contemplated by N.C.G.S. § 15A-269(a). Similarly, as mentioned in N.C.G.S. § 15A-269(b), there does not exist a reasonable probability that the verdict would have been more favorable to defendant if the DNA testing being requested had been conducted on the evidence or, as addressed by us in cases such as *Lane*, *Tirado*, and *Kilpatrick*, had the evidence been disclosed to the defense. These inadequacies are inextricably intertwined with the parallel insufficient showing by defendant, even under the less stringent standard embodied in N.C.G.S. § 15A-269(c), that the postconviction DNA testing may be material to defendant's claim of wrongful conviction with regard to his ability to obtain the appointment of counsel by the trial court to assist defendant with his pro se request to achieve postconviction DNA testing.

As stated by the Supreme Court of the United States in *Brady* and as applied by this Court to the instant case, while evidence is material when, if made available to an accused, it would tend to exculpate the defendant or to reduce the penalty, defendant here is not in such a position.

In considering whether the evidence for which defendant fails to demonstrate materiality would have affected the jury's deliberations and in assessing the context of the entire record pursuant to the direction provided by the Supreme Court of the United States in *Bagley* and which we embraced in *Allen*, we do not discern that there is a probability sufficient to undermine confidence in the outcome upon our determination that the trial court did not err in finding that the evidence of defendant's guilt "is overwhelming" and in concluding that defendant has "failed to show how conducting additional DNA testing is material to his defense." Similarly, defendant has failed to show in his pro se motion for postconviction DNA testing that such testing may be material to his claim of wrongful conviction in order to qualify for the appointment of counsel by the court.

In *Lane*, we concluded, despite the defendant's contentions that the requested postconviction DNA testing was material to his defense, that the overwhelming evidence of defendant's guilt presented at trial and the dearth of evidence at trial pointing to a second perpetrator, along with the unlikely prospect that DNA testing of the biological evidence at issue would establish that a third party was involved in the crimes charged, together created an insurmountable hurdle to the success of the defendant's materiality argument. 370 N.C. at 520, 809 S.E.2d at 576. We adopt this analysis, as we find it to be directly applicable to the facts and circumstances of the present case in determining defendant's failure to satisfy the reduced burden of proof to qualify for the appointment of counsel to assist defendant's efforts to obtain postconviction DNA testing upon a showing that the DNA testing may be material to defendant's claim of wrongful conviction. Defendant here fails to meet the required condition of N.C.G.S. § 15A-269(a) in his petition that postconviction DNA testing of the biological evidence is material to his defense, and he also fails to satisfy his lesser burden to show under N.C.G.S. § 15A-269(c) that DNA testing may be material to his claim of wrongful conviction. Therefore, pursuant to the operation of the statute, defendant does not satisfy the necessary conditions to obtain the appointment of counsel under N.C.G.S. § 15A-269(c).

V. Conclusion

Based upon the foregoing reasons, we reverse the decision of the Court of Appeals and reinstate the order of the trial court.

REVERSED.

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

STATE v. COLLINGTON

[375 N.C. 401 (2020)]

STATE OF NORTH CAROLINA
v.
JEFFREY TRYON COLLINGTON

No. 290PA15-2

Filed 25 September 2020

Constitutional Law—effective assistance of counsel—appellate counsel—citation of authority—reasonableness

On appeal from a conviction for possession of a firearm by a felon, obtained after a jury was instructed on multiple theories of possession (actual versus acting in concert) but where the verdict sheet did not identify which theory the jury relied on, appellate counsel's failure to cite to a line of cases was not objectively unreasonable where the primary case, *State v. Pakulski*, 319 N.C. 562 (1987), was decided using a different standard of review and therefore had little precedential value. Moreover, appellate counsel did present the relevant argument—that where the jury was presented with multiple theories of guilt, one of which was erroneous, the error had a probable impact on the verdict—albeit by citing different authority. Therefore, counsel's performance was not constitutionally defective.

Justice ERVIN concurring.

Justice NEWBY joins in this concurring opinion.

Justice EARLS dissenting.

Justice DAVIS 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, 259 N.C. App. 127, 814 S.E.2d 874 (2018), affirming an order granting defendant's motion for appropriate relief entered on 3 April 2017 by Judge Mark E. Powell in Superior Court, Transylvania County. Heard in the Supreme Court on 18 November 2019.

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

North Carolina Prisoner Legal Services, *Inc.*, *by Christopher J. Heaney*, *for defendant-appellee.*

BEASLEY, Chief Justice.

In this case, we must determine whether appellate counsel's failure to cite a particular case or line of cases amounted to constitutionally ineffective assistance of counsel. Because the facts present in the line of cases the Court of Appeals would have had appellate counsel cite are distinguishable from those of this case, that precedent does not govern the instant case and appellate counsel's failure to rely thereon is objectively reasonable.

Facts and Procedural History

The State's primary witness, Christopher Hoskins, testified that he went to the recording studio of Dade Sapp to "hang out" on the evening of 1 October 2012. Shortly after his arrival, two men identified by Hoskins as defendant and Clarence Featherstone entered the studio and demanded to speak with someone named "Tony." Defendant asked Hoskins if he was Tony and pointed a gun at Hoskins when Hoskins answered that he was not. Hoskins testified that defendant and Featherstone beat him up, went through his pockets and removed approximately $900 in cash, and left the studio. At trial, Hoskins identified the gun that was reportedly wielded by defendant as belonging to Sapp.

Defendant's testimony differed greatly from that of Hoskins. Defendant testified that he and Featherstone went to the studio that evening but that the purpose of the visit was for Featherstone to purchase oxycodone from Hoskins. An argument ensued over the amount paid for the oxycodone, which resulted in a fistfight between Hoskins, defendant, and Featherstone. Defendant testified the following:

> Sapp had set the whole deal up, and he had tried to cross us all up. He had taken warrants out on us for robbing his studio, when he had set up this whole ordeal. . . . He told the cops that we came in and robbed his studio. But that's not what happened. He set up a drug deal and got half of the pills that were purchased, or at least somewhere near . . . I did admit that I got in a physical altercation after he tried to retaliate for the rest of his money.

Defendant also testified that he never possessed a gun during the altercation. Rather, defendant testified that later in the evening, he and Featherstone met Sapp in a McDonald's parking lot. There, Sapp gave the gun to Featherstone and asked him to hold onto it because according to defendant, Sapp "was scared due to the fact [that] he had gave the detectives and Mr. Hoskins a story about [how] he couldn't locate his

gun." Defendant testified that he did not know what Featherstone did with the gun after the interaction.

Defendant was indicted for robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, possession of a firearm by a felon, and being a habitual felon. The indictment charging defendant with possession of a firearm by a felon stated that defendant "did have in [his] control a black handgun, which is a firearm" and that defendant had previously been convicted of a felony. Without objection by defendant, the trial court instructed the jury that

> [f]or a person to be guilty of a crime it is not necessary that he personally do all of the acts necessary to constitute the crime. If two or more persons join in a common purpose to commit the crime of robbery with a dangerous weapon and/or possession of a firearm by a felon, each of them, if actually or constructively present, is not only guilty of that crime if the other person commits the crime but [is] also guilty of any other crime committed by the other in pursuance of the common purpose to commit robbery with a dangerous weapon and/or possession of a firearm by a felon, or as a natural or probable consequence thereof.
>
> If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant acting either by himself or acting together [with] . . . Featherstone with a common purpose to commit the crime of robbery with a dangerous weapon and/or possession of a firearm by a felon, each of them if actually or constructively present, is guilty of robbery with a dangerous weapon and/or possession of a firearm by [a] felon.

With respect to the specific charge of possession of a firearm by a felon, the trial court instructed the jury on the following:

> The defendant has been charged with possessing a firearm after having been convicted of a felony. For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt.
>
> First, that on April 20, 2006, in the Superior Court Criminal Session of Transylvania County the defendant was convicted by pleading guilty to the felony of possession with the intent to sell and deliver cocaine that was

> committed on October 26, 2005, in violation of the laws of the State of North Carolina.
>
> And second, that thereafter the defendant possessed a firearm.
>
> If you find from the evidence beyond a reasonable doubt that the defendant was convicted of a felony in the Superior Court of Transylvania County, State of North Carolina, on April 10, 2006, and that the defendant thereafter possessed a firearm, it would be your duty to return a verdict of guilty.
>
> If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.

The jury found defendant guilty of possession of a firearm by a felon and being a habitual felon. He was not found guilty of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. The verdict sheet did not indicate whether the jury convicted defendant of possession of a firearm by a felon under a theory of actual possession or under a theory of acting in concert. Defendant was sentenced to 86 to 115 months imprisonment.

Defendant appealed the conviction, contending that the trial court committed plain error by instructing the jury on the acting in concert theory with respect to the charge of possession of a firearm by a felon. Defendant specifically argued that the jury instruction impermissibly allowed the jury to convict him of possession of a firearm by a felon based on testimony that Featherstone received a gun from Sapp in the McDonald's parking lot. In a unanimous, unpublished decision, the Court of Appeals held that defendant had not established that the trial court committed plain error in instructing the jury on the acting in concert theory for the charge of possession of a firearm by a felon. *State v. Collington* (*Collington I*), No. COA14-1244, 2015 WL 4081786, at *4 (N.C. Ct. App. 2015) (unpublished). The Court of Appeals opined that although the jury did not believe that defendant robbed Hoskins, both defendant and Hoskins testified that they engaged in a physical altercation; therefore, the jury reasonably could have believed that defendant was in possession of Sapp's gun at the time. *Id.*

Finally, the Court of Appeals observed that defendant had not presented an argument under *State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (1987), "which held that a trial court commits plain error when it

instructs a jury on disjunctive theories of a crime," one of which was erroneous, and it cannot be discerned from the record the theory upon which the jury relied. *Id.* Noting that "[i]t is not the role of the appellate courts . . . to create an appeal for an appellant," the Court of Appeals concluded that defendant had not sufficiently demonstrated plain error. *Id.* (first quoting *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005); then citing *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012)). Defendant filed a petition for discretionary review, which this Court denied on 24 September 2015.

After the Court of Appeals' decision in *Collington I*, defendant filed a motion for appropriate relief in the trial court alleging ineffective assistance of appellate counsel. Specifically, defendant argued that had his appellate counsel made the proper argument under *Pakulski*, a reasonable probability exists that defendant would have received a new trial on appeal. The trial court denied defendant's motion for appropriate relief on 13 October 2016, stating that "the Court of Appeals found that no plain error was established in the trial . . . even assuming . . . an acting in concert instruction was improper." Defendant petitioned the Court of Appeals for writ of certiorari. The Court of Appeals entered an order allowing the petition for writ of certiorari, vacating the trial court's order denying defendant's motion for appropriate relief, and remanding the case to the trial court to enter an appropriate order. The Court of Appeals reasoned that "the trial court utilized the incorrect legal standard in assessing defendant's ineffective assistance of appellate counsel claim." On remand, the trial court entered an order granting the motion for appropriate relief, vacating defendant's conviction, and awarding defendant a new trial. The State proceeded to file a motion in the Court of Appeals to temporarily stay the trial court's order, a petition for writ of supersedeas, and a petition for writ of certiorari seeking review of the trial court's order. On 2 May 2017, the Court of Appeals allowed the State's motion for a temporary stay. On 17 May 2017, the Court of Appeals allowed the State's petition for writ of certiorari and petition for writ of supersedeas. On 17 April 2018, in a unanimous, published decision, the Court of Appeals affirmed the trial court's order, holding that defendant's appellate counsel was constitutionally ineffective for failing to make arguments under *Pakulski*. *State v. Collington* (*Collington II*), 259 N.C. App. 127, 141, 814 S.E.2d 874, 885 (2018) ("[H]ad appellate counsel proffered the arguments under *Pakulski*, defendant would have secured a new trial upon simply demonstrating that the acting in concert instruction was given in error.") The State petitioned this Court for discretionary review, which we allowed on 5 December 2018.

Discussion

This Court reviews opinions of the Court of Appeals for errors of law. *State v. Brooks*, 337 N.C. 132, 149, 446 S.E.2d 579, 590 (1994). To prove ineffective assistance of counsel, a defendant must satisfy the following two-part test:

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

State v. Braswell, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985) (emphasis omitted) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). The proper standard for effective attorney performance is that of objectively reasonable assistance. *Id.* at 561–62, 324 S.E.2d at 248 ("When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness."). The reviewing court "must indulge a strong presumption that counsel's conduct falls within the broad range of what is reasonable assistance," *State v. Fisher*, 318 N.C. 512, 532, 350 S.E.2d 334, 346 (1986), and "strive to 'eliminate the distorting effects of hindsight,' " *State v. Augustine*, 359 N.C. 709, 719, 616 S.E.2d 515, 524 (2005) (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065).

The Court of Appeals concluded that appellate counsel was ineffective for failing to cite *Pakulski*. We disagree for two reasons. First, the opinion in *Pakulski* employed a standard of review different from the standard of review applicable in the instant case. Second, defendant's appellate counsel did, in fact, make the arguments he should have made, albeit by reference to different authority.

The standard of review for alleged instructional errors depends on whether the defendant preserved the error for appeal by raising an objection in the trial court. N.C. R. App. P. 10(a)(1), (4). Where the defendant fails to preserve the issue, he faces a greater burden on appeal. In *Lawrence*, the defendant was convicted of several offenses, including conspiracy to commit robbery with a dangerous weapon. 365 N.C. at 510, 723 S.E.2d at 329.

> [I]n its charge on conspiracy to commit robbery with a dangerous weapon, the trial court correctly instructed that robbery with a dangerous weapon is the taking of property from a person 'while using a firearm,' but erroneously omitted the element that the weapon must have been used to endanger or threaten the life of the victim.

Id. Because the defendant did not object to the jury instruction at trial, we applied the plain error standard of review. *Id.* at 512, 723 S.E.2d at 330 ("Because the plain error standard of review imposes a heavier burden on the defendant than the harmless error standard, it is to the defendant's advantage to object at trial and thereby preserve the error for harmless error review."). Under the more exacting standard of plain error review, we concluded that despite the acknowledged instructional error, the defendant had not met the burden of proving "that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* at 518, 723 S.E.2d at 334 (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

In this case, the Court of Appeals' decision appears to be based on a misidentification of the standard of review applied in *Pakulski*. The confusion is understandable. Admittedly, our opinion in *Pakulski* lacks clarity. The Court does not explicitly state which standard of review the Court applied. Nor does the Court explicitly state whether the defendant objected to the jury instructions at trial—the fact on which the identity of the applicable standard of review turns.

In *Pakulski*, the trial court instructed the jury on the felony-murder rule based on two predicate felonies, only one of which was legally supported by the evidence. *Pakulski*, 319 N.C. at 564, 356 S.E.2d at 321. The entirety of the discussion relevant to this issue is contained in a single, short section that reads, in relevant part, that

> [w]here the trial judge has submitted the case to the jury on alternative theories, one of which is determined to be erroneous and the other properly submitted, and we cannot discern from the record the theory upon which the jury relied, this Court will not assume that the jury based its verdict on the theory for which it received a proper instruction. Instead, we resolve the ambiguity in favor of the defendant.

Id. at 574, 356 S.E.2d at 326.

Although we failed to explicitly state it in our opinion, it appears that we applied the harmless error standard of review in *Pakulski*. First,

we noted that the State asked the Court to hold that the trial court's error was harmless. *Id.* at 574, 356 S.E.2d at 326 ("The State contends *that error in submitting the breaking or entering felony is harmless* because the jury could have based its verdict solely on the robbery felony." (Emphasis added.)). If we had believed at the time that the State had misidentified the standard of review, it seems reasonable to assume that we would have noted that fact.[1]

This Court's failure to clearly state the standard of review in *Pakulski* has been rectified by subsequent decisions, which have made clear that the *Pakulski* rule applies when the issue is properly preserved on appeal. As such, the distinction between the standard of review to be applied to preserved issues and that which should be applied to unpreserved issues was born not in *Pakulski*, but in the case law that followed. Secondly, in view of the fact that the defendants 'moved to dismiss on the grounds that there was insufficient evidence to permit the court to charge the jury on a theory of felony murder,' *Pakulski*, 319 N.C. at 571, 356 S.E.2d at 325, it is clear that the issue of the sufficiency of the evidence to support an instruction permitting the jury to find the defendants guilty of felony murder on any theory was brought to the trial court's attention in advance of the delivery of the trial court's

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1. In fact, we did note a misidentification of the standard of review applicable to a different issue in *Pakulski*, as follows:

> The State requests that we review this assignment of error under the plain error rule, inasmuch as the omission was not called to the court's attention prior to jury deliberations. However, based on our reading of the record, it appears that defense counsel complied with the spirit of [Rule 10(a)(4)] of the North Carolina Rule of Appellate Procedure], which in pertinent part provides:
>
> > No party may assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection . . . . An exception to the failure to give particular instructions to the jury . . . shall identify the omitted instruction . . . by setting out its substance immediately following the instructions given . . . .
>
> It is clear from the record that the defendant requested an instruction on impeaching a witness with a prior inconsistent statement. Therefore, our review consists of a determination of whether the court erred in failing to give the requested instruction and, if so, whether there is a reasonable possibility that had the error not been committed, a different result would have been reached.

State v. Pakulski, 319 N.C. 562, 574–75, 356 S.E.2d 319, 327 (1987) (second through fifth alterations in original) (quoting N.C. R. App. P. 10(a)(4)).

jury instructions, thereby serving the purpose of the contemporaneous objection now required by N.C. R. App. P. 10(a)(2). In *State v. Maddux*, 371 N.C. 558, 563, 819 S.E.2d 367, 370 (2018), we reaffirmed that the plain error standard applies in cases involving unpreserved jury instruction issues. There, the trial court erroneously instructed the jury that the defendant could be found guilty either through a theory of individual guilt or a theory of aiding and abetting. The defendant did not object to the jury instructions at trial, and the jury convicted the defendant using a general verdict sheet. Thus, the record did not reflect whether the conviction was based on a theory of individual guilt or a theory of aiding and abetting. *Id.* at 562, 819 S.E.2d at 370. We concluded that the defendant had not met his burden of proving plain error, and we rejected defendant's argument that *Pakulski* should govern our decision.

> [D]efendant argues that we cannot uphold his conviction even though there is ample evidence of his individual guilt because we have held that reversible error occurs when a jury is presented with alternative theories of guilt when (1) one of the theories is not supported by the evidence, and (2) it is unclear upon which theory the jury convicted defendant. . . . *This rule, however, is not applicable to plain error cases, such as this one, in which the error complained of is not preserved.* As such, we need not address the substance of this argument.

Id. at 567 n.11, 819 S.E.2d at 373 n.11 (emphasis added).

In *State v. Malachi*, 371 N.C. 719, 821 S.E.2d 407 (2018), we again referred to *Pakulski* as a harmless error case. *See id.* at 733 n.5, 821 S.E.2d at 418 n.5 ("This Court did discuss the *harmless error* issue in *Pakulski*, in which the State sought a finding of non-prejudice on the grounds that 'the jury could have based its verdict solely on the robbery felony.' " (emphasis added) (quoting *Pakulski*, 319 N.C. at 574, 356 S.E.2d at 326)). We also made clear in *Malachi* that *Pakulski* did not create a rule of per se reversible error in all cases involving disjunctive jury instructions. *Id.* at 726, 821 S.E.2d at 413. Thus, neither the plain error standard of review nor the harmless error standard of review will automatically entitle a defendant to a new trial as a matter of law. *See also State v. Boyd*, 366 N.C. 548, 742 S.E.2d 798 (2013) (reversing a decision of the Court of Appeals on the basis of a dissent that concluded that the defendant had failed to establish that the trial court's decision to allow the jury to consider whether the defendant was guilty of second degree kidnaping on the basis of a theory not supported by the evidence did not constitute plain error given the existence of "overwhelming" evidence

tending to support other theories of guilt). Rather, each case must be resolved under the appropriate standard of review.

Confusion over *Pakulski* notwithstanding, this Court's precedent demonstrates that unpreserved issues related to jury instructions are reviewed under a plain error standard, while preserved issues are reviewed under a harmless error standard. *See*, *e.g.*, *State v. Mumma*, 372 N.C. 226, 241, 827 S.E.2d 288, 298 (2019) ("As a result of defendant's failure to object to the delivery of an 'aggressor' instruction to the jury before the trial court, defendant is only entitled to argue that the delivery of the 'aggressor' instruction constituted plain error."); *Malachi*, 371 N.C. at 719, 821 S.E.2d at 407 (holding that the trial court's error was subject to the harmless error standard of review where the defendant lodged an objection at trial); *State v. Juarez*, 369 N.C. 351, 357–58, 794 S.E.2d 293, 299 (2016) ("Because defendant did not object to the instruction as given at trial, we consider whether this instruction constitutes plain error."); *State v. Galaviz-Torres*, 368 N.C. 44, 772 S.E.2d 434 (2015) (applying the plain error standard of review where the defendant's trial counsel did not object to any of the trial court's instructions); *State v. Petersilie*, 334 N.C. 169, 432 S.E.2d 832 (1993) (applying the harmless error standard of review where the trial court, despite the defendant's objection, incorrectly instructed the jury regarding one of two possible theories upon which the defendant could be convicted).

The fundamental purpose of such a rule is to incentivize the parties to make timely objections so that the trial court may resolve the issue in real time. *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (holding that the test for the plain error standard of review places a heavier burden upon the defendant because the defendant could have prevented any error by making a timely objection). However, "[p]lain error review allows appellate courts to alleviate the potential harshness of preservation rules," *Lawrence*, 365 N.C. at 514, 723 S.E.2d at 332, by allowing appellate courts to "take notice of errors for which no objection or exception had been made when 'the errors [were] obvious, or if they otherwise seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings,' " *id.* at 515, 723 S.E.2d at 332 (quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S. Ct. 391, 392 (1936)). This distinction is codified in our Rules of Appellate Procedure and has been supported by decades of this Court's precedent. *See* N.C. R. App. P. 10(a)(4)[2] ("In criminal cases, an issue that was not preserved by objection noted at

2. Since this Court's holding in *Lawrence*, the Rules of Appellate Procedure have been revised such that Rule 10(b)(2) is now codified as Rule 10(a)(4) ("Plain Error").

trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

> The purpose of [Rule 10(a)(4)] is to encourage the parties to inform the trial court of errors in its instructions so that it can correct the instructions and cure any potential errors before the jury deliberates on the case and thereby eliminate the need for a new trial. Indeed, even when the "plain error" rule is applied, "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court."

Lawrence, 365 N.C. at 517, 723 S.E.2d at 333 (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S. Ct. 1730, 1736, 52 L. Ed. 2d 203, 212 (1977)). Considering the extensive precedent of this Court and the important interests promoted by clear rules related to issue preservation, we see no reason to create a subset of cases in which an unpreserved issue relating to jury instructions qualifies for harmless error review.

Here, defendant did not object at trial to the trial court's jury instructions. The issue, therefore, was not properly preserved for appeal and could be reviewed only for plain error. Because today the standard of review applied in *Pakulski* applies only to preserved issues, it would have had little precedential value in the instant case, and appellate counsel's failure to cite it was not objectively unreasonable.

Furthermore, appellate counsel's arguments were appropriate for plain error review. Appellate counsel argued that the trial court committed plain error by instructing the jury that defendant would be guilty if he had acted in concert to commit the offense of possession of a firearm by a felon. Quoting *Lawrence*, appellate counsel argued that "the plain error prejudice standard is not insufficiency of the evidence, but is whether 'the error had a probable impact on the jury verdict.' " Appellate counsel argued that the error did in fact have a probable impact on the jury's verdict by demonstrating the probability that the jury found defendant guilty merely for accompanying Featherstone when Featherstone acquired the firearm from Sapp. Ultimately, appellate counsel argued that the jury was presented with multiple theories of guilt, one of which was erroneous, and that the error "had a probable impact on the jury's finding that the defendant was guilty." *See Lawrence*, 365 N.C. at 518,

723 S.E.2d at 334. This was the appropriate argument and employed the correct standard of review.

It is important to note that the underlying issue of whether the trial court committed reversible error is not before this Court. The issue brought before the Court is whether defendant's appellate counsel was ineffective for failing to cite to the *Pakulski* line of cases. We make no determination as to whether the trial court erred by instructing the jury on the acting in concert theory of guilt for the possession of a firearm by a felon charge, as that is not the issue before us. Our task today is merely to determine whether appellate counsel was constitutionally ineffective. Even assuming *arguendo* that the trial court committed plain error, we cannot fault appellate counsel for the Court of Appeals' failure to so hold.

Accordingly, we hold that defendant failed to prove that his appellate counsel's conduct "fell below an objective standard of reasonableness." *Braswell*, 312 N.C. at 561–62, 324 S.E.2d at 248.[3] We reverse the decision of the Court of Appeals to the contrary.

REVERSED.

Justice ERVIN, concurring.

I agree with the Court's interpretation of our earlier decision in *State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (1987), and the Court's determination that defendant has failed to demonstrate that the representation that he received from his appellate counsel "fell below an objective standard of reasonableness," *State v. Braswell*, 312 N.C. 553, 561–62, 324 S.E.2d 241, 248 (1985) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984)), in spite of the fact that defendant's appellate counsel did not cite *Pakulski* when defendant's appeal was initially decided by the Court of Appeals and join the Court's opinion for that reason. I am, however, concerned that the Court's opinion can be read to suggest that a defendant cannot, regardless of the state of the evidentiary record, be convicted of possession of a firearm by a felon based upon the theory of acting in concert and write

3. Because defendant fails to demonstrate the deficiency of appellate counsel's performance we need not and do not address the prejudice prong of the ineffective assistance of counsel analysis. *See State v. Braswell*, 312 N.C. 553, 563, 324 S.E.2d 241, 248 (1985); *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2069 (1984) ("[T]here is no reason for a court deciding an ineffective assistance claim to . . . address both components of the inquiry if the defendant makes an insufficient showing on one.").

separately in an attempt to make sure that our decision does not create any unnecessary confusion with respect to this issue.

In his initial appeal to the Court of Appeals, defendant contended that the trial court committed plain error by instructing the jury that it could convict defendant of possession of a firearm by a felon on the basis of the acting in concert doctrine. More specifically, defendant asserted that the trial court had committed plain error by "allow[ing] the jury to find [defendant] guilty of possession of a firearm by a convicted felon for Featherstone's possession of the Glock pistol which [defendant] testified Sapp handed to Featherstone at the McDonald's later that night after whatever had occurred at the recording studio." In its initial, unpublished decision in this case, the Court of Appeals determined that, in light of defendant's concession that there was sufficient evidence to permit the jury to find defendant guilty of possession of a firearm by a convicted felon on the basis of actual or constructive possession, "[d]efendant has not established plain error in the present case, even assuming *arguendo* that the trial court erred by instructing the jury on an acting in concert theory for the charge of possession of a firearm by a convicted felon," *State v. Collington*, No. COA14-1244, 2015 WL 4081786, at *8 (July 7, 2015) (*Collington I*) (citing *State v. Diaz*, 155 N.C. App. 307, 314, 575 S.E.2d 523, 528 (2002)), while noting that "[d]efendant ha[d] not presented [that Court] with any arguments under *State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987)." *Id.* at *9.

In the aftermath of the Court of Appeals' decision, defendant filed a motion for appropriate relief in which he alleged that he had received ineffective assistance of counsel on appeal. Defendant argued that, "[a]s a general rule, the acting in concert theory is not applicable to possession offenses," citing *Diaz*, 155 N.C. App. at 314–15, 575 S.E.2d at 528–29 (2002) (stating that "[t]he acting in concert theory is not generally applicable to possession offenses, as it tends to become confused with other theories of guilt"), and *State v. Baize*, 71 N.C. App. 521, 530, 323 S.E.2d 36, 42 (1984) (stating that "[w]e have found no acting in concert case in which the State was allowed to leap, in one single bound, the double hurdles of constructive presence *and* constructive possession"). In defendant's view, while "acting in concert may be instructed properly in cases charging possession of contraband," citing *State v. Diaz*, 317 N.C. 545, 552, 346 S.E.2d 488, 493 (1986), "[f]irearms . . . are not contraband *per se*" and, since "possession of a firearm by a felon [includes] an element personal to defendant–his or her status as a convicted felon–that only the defendant can satisfy," "acting in concert is not a valid theory for the possession of a firearm by a felon charge." As a result, defendant

argued that, "[l]ike *Pakulski*, the present case involves a situation where both valid and invalid instructions were presented to the jury"; that it was impossible to determine whether the jury convicted defendant of possession of a firearm by a felon based upon the theory of actual or constructive possession or the theory of acting in concert; and that, "had [appellate] counsel made an argument pursuant to *Pakulski*, the remedy would have been a new trial." As a result, defendant contended that he was entitled to a new trial.

On 13 October 2016, the trial court entered an order denying defendant's motion for appropriate relief on the grounds "that no actual prejudice ha[d] been shown by the failure of the [d]efendant's appellate counsel to argue *Pakulski*, and that failure now to consider said argument [would] not result in a fundamental miscarriage of justice." On 13 December 2016, defendant filed a petition seeking the issuance of a writ of certiorari in the Court of Appeals authorizing review of the trial court's denial of defendant's motion for appropriate relief. On 29 December 2016, the Court of Appeals entered an order providing, among other things, that it had not held in *Collington I* "that defendant's claim of plain error was meritless irrespective of whether his appellate counsel raised any arguments under [*Pakulski*]" and ordering that this case be remanded "to the trial court to enter an appropriate . . . order pursuant to N.C.G.S. § 15A-1420(c)(7). On 3 April 2017, the trial court entered an order granting defendant's motion for appropriate relief and awarding defendant a new trial in which it concluded, in pertinent part, that:

> (2) The jury was incorrectly instructed on the theory of acting in concert but correctly instructed on actual and constructive possession.
>
> (3) With no way to determine the jury's rationale for its guilty verdict, [d]efendant would have been entitled to a new trial if appellate counsel had made the proper argument pursuant to *Pakulski* on appeal.
>
> (4) A reasonable attorney would have been aware of *Pakulski*, its application to [d]efendant's case, and the remedy of a new trial that it would provide.
>
> (5) Appellate counsel's performance fell below an objective standard of professional reasonableness. While appellate counsel did argue that the instruction on acting in concert was invalid, he did not complete the argument by arguing that because disjunctive jury

> instructions were given, one of which was improper, and there was no finding as to the jury's chosen theory, there was plain error under *Pakulski* and [d]efendant is entitled to a new trial.
>
> (6) But for appellate counsel's error, there is a reasonable probability that the Court of Appeals would have found plain error and granted [d]efendant a new trial.
>
> (7) Defendant received ineffective assistance of counsel in violation of the Sixth Amendment.

On 17 May 2017, the Court of Appeals allowed the State's request for certiorari review of the trial court's order.

In seeking relief from the trial court's order before the Court of Appeals, the State argued that an acting in concert instruction "has never been held to be improper" in cases like this one and that, even if the delivery of the acting in concert instruction in this case was erroneous, the failure of defendant's appellate counsel to advance an argument in reliance upon *Pakulski* did not constitute deficient performance for purposes of the test enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In affirming the trial court's order, the Court of Appeals noted that, in *Collington I*, it had been "left to determine" merely "whether '[t]he jury reasonably could have believed that [d]efendant was in [actual or constructive] possession of' a gun from the evidence presented, regardless of the impropriety of the acting in concert instruction." *State v. Collington*, 259 N.C. App. 127, 138, 814 S.E.2d 874, 884 (2018) (*Collington II*) (first and third alteration in original). The Court of Appeals stated that, "had appellate counsel proffered the arguments under *Pakulski* [in *Collington I*], defendant would have secured a new trial upon simply demonstrating that the acting in concert instruction was given in error—plain error would be shown irrespective of the evidence admitted at trial in support of defendant's actual or constructive possession of a firearm." *Id.* at 141, 814 S.E.2d at 885. However, the Court of Appeals pointed out that "[a]ppellate counsel simply argued [in *Collington I*] that the theory of acting in concert is inapplicable to the crime of possession of a firearm by a felon, without proffering any supporting authority as to why such an error would require a new trial." *Id.* at 141, 814 S.E.2d at 886. Had defendant's "appellate counsel . . . argued [in *Collington I*] that plain error was established pursuant to *Pakulski*, . . . [the Court of Appeals] would have, under the direction of *Pakulski*, been required to examine . . . whether the jury instruction on acting in concert was in fact improper." *Id.* at 143, 814 S.E.2d at

887. In addition, the Court of Appeals held that, "given the persuasiveness of defendant's argument that acting in concert is not an appropriate theory upon which to base a conviction of possession of a firearm by a felon, there is a reasonable probability that, had appellate counsel cited *Pakulski* [in *Collington I*], [the Court of Appeals] would have concluded [in that case] that defendant was entitled to a new trial." *Id.* As a result, the record seems to reflect that the substantive premise upon which defendant's ineffective assistance of counsel on appeal claim rested and upon which both the trial court and the Court of Appeals relied in granting defendant's motion for appropriate relief was a determination that defendant could not have been properly convicted of possession of a firearm by a felon on the basis of an acting in concert theory regardless of the state of the evidentiary record.

Although the manner in which the Court has chosen to decide this case rests upon what appears to me to be a correct analysis of the applicable legal principles, I am concerned that certain statements contained in our opinion may create unnecessary confusion in the substantive criminal law of North Carolina. In order to obtain relief on the basis of ineffective assistance of appellate counsel in light of the theory alleged in defendant's motion for appropriate relief, a reviewing court would have to determine that the trial court erred by instructing the jury that it could convict defendant of possession of a firearm by a felon and that the delivery of this instruction constituted plain error. *State v. Robbins*, 528 U.S. 259, 285, 120 S. Ct. 746, 764, 145 L. Ed. 2d 756, 780 (2000). Although the Court states that "the underlying issue of whether the trial court committed reversible error is not before this Court"; that "[t]he issue brought before the Court is whether defendant's appellate counsel was ineffective for failing to cite to the *Pakulski* line of cases"; and that "[w]e make no determination as to whether the trial court erred by instructing the jury on the acting in concert theory of guilt for the possession of a firearm by a felon charge," both the State and defendant presented arguments to this Court concerning the extent, if any, to which a defendant could lawfully be convicted of possession of a firearm by a felon in the briefs that they submitted for our consideration in this case. For that reason, the issue of whether defendant could have lawfully been convicted of possession of a firearm by a felon on the basis of an acting in concert theory does seem to me to be before us in this case.

Admittedly, neither this Court nor the Court of Appeals has directly held that a defendant can be convicted of possession of a firearm by a felon on the basis of an acting in concert theory. However, given that the Court of Appeals described defendant's argument that "acting in

concert is not an appropriate theory upon which to base a conviction of possession of a firearm" as "persuasive[ ]," *Collington II*, 259 N.C. App. at 143, 814 S.E.2d at 887, I think that it is important to note that both this Court, *see Diaz*, 317 N.C. at 552, 346 S.E.2d at 493 (holding that the record contained sufficient evidence "to support the jury's conclusion that defendant acted in concert with the traffickers to possess or transport in excess of 10,000 pounds of marijuana"), and the Court of Appeals, *see Diaz*, 155 N.C. App. at 314–15, 575 S.E.2d at 528–29 (holding that the trial court did not err by instructing the jury that it could convict defendant of possession of cocaine with the intent to sell or deliver on the basis of an acting in concert theory given that "there was evidence that the defendant had constructive possession *and* was acting in concert"); *State v. Garcia*, 111 N.C. App. 636, 640–41, 433 S.E.2d 187, 189 (1993) (holding that "[t]he evidence was sufficient for the trial court, when considering it in a light most favorable to the State, to find that defendant acted in concert with [another individual] to possess the cocaine"); *State v. Cotton*, 102 N.C. App. 93, 98, 401 S.E.2d 376, 379 (1991) (holding that "the trial court did not err in instructing on acting in concert for the [possession of cocaine with the intent to sell or deliver] offense"), have upheld controlled substance possession convictions on the basis of an acting in concert theory.[1] In addition, this Court held in *State v. Lovelace*, 272 N.C. 496, 498–99, 158 S.E.2d 624, 625 (1968), that the defendant had been properly convicted of possession of implements of housebreaking, with the items in question being a large screwdriver and a hammer, on the basis of evidence tending to show that the defendant and another man "were acting together" and "were attempting to use [the tools] to force entry into the restaurant" even though "the tools were only seen in the hands of [the other man]," suggesting that the doctrine of acting in concert is available to show a defendant's guilt of possessory offenses other than those involving contraband. *See also State v. Golphin*, 352 N.C. 364, 456–58, 533 S.E.2d 168, 228–29 (2000) (finding no error in the trial court's decision to instruct the jury that it could find that the defendant was guilty of possession of a stolen vehicle on the basis of an acting in concert theory in the course of also allowing

1. Although the Court of Appeals awarded appellate relief to the defendants in *State v. Autry*, 101 N.C. App. 245, 254, 399 S.E.2d 357, 363 (1991); *State v. James*, 81 N.C. App. 91, 96–97, 344 S.E.2d 77, 81 (1986); and *Baize*, 71 N.C. App. at 530, 323 S.E.2d at 42, based upon an erroneous use of the acting in concert doctrine, those decisions rested upon a determination that the record before the Court did not contain sufficient information to prove that the individuals in question had engaged in concerted action rather than upon a determination that the doctrine of acting in concert had no application to possessory offenses.

the jury to convict the defendant of robbery with a dangerous weapon and first-degree murder in reliance upon the doctrine of acting in concert).

In apparent recognition of the general availability of the acting in concert doctrine in possession-related cases, defendant argues that "applying acting in concert to possession of a firearm by a felon impermissibly exceeds the plain statutory language that bans possession of a firearm only by a person with a felony conviction," citing *State v. Camp*, 286 N.C. 148, 151, 209 S.E.2d 754, 756 (1974) (stating that "where a statute is intelligible without any additional words, no additional words may be supplied") (citations omitted); N.C.G.S. § 14-415.1(a) (2019) (providing that "[i]t shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm"). However, the same statutory language from N.C.G.S. § 14-415.1(a) upon which defendant relies in support of this argument also appears, in essence, in the criminal statutes relating to the unlawful possession of controlled substances, N.C.G.S. § 90-95(a)(1) and (a)(2) (2019) (providing that "it is unlawful for any person" to "possess" or "possess with intent to . . . sell or deliver" "a controlled substance"); the possession of implements of housebreaking, N.C.G.S. § 14-55 (making it unlawful to "be found having in his possession, without lawful excuse, any picklock, key, bit, or other implement of housebreaking"); and the possession of a stolen motor vehicle, N.C.G.S. § 14-71.2 (providing that "[a]ny person . . . who has in his possession any vehicle which he knows or has reason to believe has been stolen or unlawfully taken" "shall be punished as a Class H felon"). For that reason, I am not persuaded, contrary to the suggestion made in the Court of Appeals' opinion, that the doctrine of acting in concert is not available in cases in which a defendant is charged with possession of a firearm by a felon as long as the State has presented sufficient evidence that the defendant has been previously convicted of a felony and has, acting in concert with another, had a firearm in his possession. Furthermore, I trust that the Court's statement that "[w]e make no determination as to whether the trial court erred by instructing the jury on the acting in concert theory of guilt for the possession of a firearm by a felon charge" will not be understood to cast doubt upon the potential applicability of the doctrine of acting in concert to cases in which a defendant is charged with possession of a firearm by a felon and will be understood to be doing nothing more than expressing the Court's decision to refrain from deciding whether the acting in concert doctrine has any application in this case as a matter of fact.

Justice NEWBY joins in this concurring opinion.

Justice EARLS dissenting.

Mr. Collington's appellate counsel failed to make an argument on appeal that would have entitled him to relief. There is no record evidence to suggest that the oversight was a matter of strategy or consistent with the law as it existed at the time. The Court of Appeals, in two separate opinions, stated that this failure resulted in Mr. Collington's inability to obtain relief on appeal. The majority, however, holds that this was not ineffective assistance of counsel. I disagree, and therefore respectfully dissent.

On 3 April 2017, the Superior Court, Transylvania County, granted Mr. Collington's motion for appropriate relief (MAR), vacating his conviction and ordering a new trial. The Court of Appeals affirmed the trial court's order in a unanimous, published opinion filed on 17 April 2018. *State v. Collington* (*Collington II*), 259 N.C. App. 127, 814 S.E.2d 874 (2018). We allowed the State's petition for discretionary review on 5 December 2018.[1] Given the procedural posture and that neither party has contested the trial court's findings of fact, those facts are binding on appeal. *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

The trial court made the following findings of fact, from which it concluded that Mr. Collington's appellate counsel had rendered ineffective assistance:

> (1) Defendant Jeffrey Tryon Collington went to trial on charges of possession of firearm by a felon, conspiracy to commit robbery with a dangerous weapon, and robbery with a dangerous weapon. On 5 February 2014, a jury

1. Review of non-capital motions for appropriate relief by this Court is presumably limited to extreme situations. *Compare* N.C.G.S. § 15A-1422(f) (2019) ("Decisions of the Court of Appeals on motions for appropriate relief that embrace matter set forth in G.S. 15A-1415(b) are final and not subject to further review by appeal, certification, writ, motion, or otherwise."); N.C.G.S. § 7A-28 (2019) (same); N.C. R. App. P. 15(a) (prohibiting the filing of a petition for discretionary review of proceedings on motions for appropriate relief); N.C. R. App. P. 21(e) (stating that "the Supreme Court will not entertain . . . petitions for further discretionary review" in non-capital cases of motions for appropriate relief "determined by the Court of Appeals"); *with State v. Todd*, 369 N.C. 707, 710, 799 S.E.2d 834, 837 (2017) (holding that this Court may "exercise its rarely used general supervisory authority" to review otherwise-final Court of Appeals determinations on motions for appropriate relief). It is striking that we should engage such rarely used constitutional authority in a case such as this, where there was no dissent in the Court of Appeals and even the majority suggests that the Court of Appeals' interpretation of our precedent was reasonable. Until recently, the Court of Appeals' interpretation was also the interpretation of this Court. *See State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990) (applying our decision in *Pakulski* in a case involving plain error review).

found Defendant not guilty of the robbery and conspiracy charges, and guilty of possession of a firearm by a felon. He was sentenced as a habitual felon to a consolidated sentence of 86–115 months.

(2) On the possession of a firearm by a felon charge, the jury was instructed that it could find Defendant guilty under the theories of actual possession, constructive possession, or acting in concert. The verdict sheets did not indicate under which theory the jury convicted Defendant.

(3) On 22 December 2014, appellate counsel filed a brief arguing that 1) the Superior[ ] Court's jury instruction that Defendant would be guilty if he had acted in concert to commit the crime of possession of a firearm by a felon was plain error and 2) [t]he Superior Court's jury instruction that 'If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant . . . acting together with Clarence Featherstone with a common purpose to commit the crime of . . . possession of a firearm by felon, each of them if actually or constructively present, is guilty of possession of a firearm by felon,' was plain error.

(4) Appellate counsel failed to argue that under *State v. Pakulski*, when disjunctive jury instructions are paired with an improper jury instruction, and there is no finding as to the jury's chosen theory, the defendant is entitled to a new trial. *State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (1987).

(5) On 7 July 2015, the Court of Appeals ruled that assuming the acting in concert instruction was improper, that alone does not rise to the level of plain error. As appellate counsel did not raise a *Pakulski* argument, the Court of Appeals was not able to consider it.

(6) Defendant, through appellate counsel, filed a Petition for Discretionary Review to the North Carolina Supreme Court, and it was denied on 24 September 2015.

(7) On 30 March 2016, Defendant filed a Motion for Appropriate Relief on the grounds that he received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution

> because his appellate counsel failed to raise the *Pakulski* argument on appeal that plain error was committed because the trial court instructed the jury on disjunctive theories of a crime, one of which was improper, and the record does not show upon which theory the jury relied. Defendant's MAR was denied on 13 October 2016.
>
> (8) Defendant filed a petition for Writ of Certiorari in the North Carolina Court of Appeals on 13 December 2016. On 29 December 2016, the Court of Appeals issued an order vacating the 13 October 2016 order on Defendant's MAR and remanding the case to the trial court to enter an appropriate dispositional order.

When evaluating whether a defendant received effective assistance of counsel, we conduct a *Strickland* analysis. *State v. McNeill*, 371 N.C. 198, 218, 813 S.E.2d 797, 812 (2018); *see Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). The first step of the analysis is "whether counsel's representation 'fell below an objective standard of reasonableness.' " *Padilla v. Kentucky*, 559 U.S. 356, 366, 130 S. Ct. 1473, 1482 (2010) (quoting *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064). "[E]ven an isolated error of counsel" may violate the Sixth Amendment right to effective assistance of counsel "if that error is sufficiently egregious and prejudicial." *Murray v. Carrier*, 477 U.S. 478, 496, 106 S. Ct. 2639, 2649 (1986). Where appellate counsel "ha[s] researched the question, but ha[s] determined that the claim [is] unlikely to succeed," *Smith v. Murray*, 477 U.S. 527, 531–32, 106 S. Ct. 2661, 2665 (1986), and therefore does not pursue the claim on appeal, counsel has not rendered ineffective assistance, *id.* at 535–36, 106 S. Ct. at 2667. The important question, however, is whether the decision not to pursue a claim was the result of reasoned judgment or merely an error. *See Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983) ("Neither *Anders* nor any other decision of this Court suggests, however, that the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, *as a matter of professional judgment*, decides not to present those points." (Second emphasis added.)). Where "counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them," the first prong of the *Strickland* test has been met. *Smith v. Robbins*, 528 U.S. 259, 285, 120 S. Ct. 746, 764 (2000).

The majority provides two reasons for reversing the decision of the Court of Appeals, stating (1) that "defendant's appellate counsel did, in fact, make the arguments he should have made, albeit by reference

to different authority" and (2) that "the opinion in *Pakulski* employed a standard of review different from the standard of review applicable in the instant case." Both statements are inaccurate. First, the majority mischaracterizes the failure of appellate counsel and, in doing so, ignores both the trial court's findings of fact and the statements of the Court of Appeals. Second, the majority misidentifies the standard of review employed in *Pakulski* and, as a result, misstates *Pakulski*'s applicability to this case.[2]

I.

Mr. Collington's appellate counsel provided ineffective assistance by failing to properly identify the error in the jury instruction. The majority states that "[t]he Court of Appeals concluded that appellate counsel was ineffective for failing to cite *Pakulski*." This is incorrect. The trial court's finding on this fact is instructive. It stated the following:

> (4) Appellate counsel failed to argue that under *State v. Pakulski*, when disjunctive jury instructions are paired with an improper jury instruction, and there is no finding as to the jury's chosen theory, the defendant is entitled to a new trial. *State v. Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (1987).

The Court of Appeals decision below is similarly instructive. In describing the argument of Mr. Collington's appellate counsel, the Court of Appeals stated the following:

> Defendant appealed his conviction of possession of a firearm by a felon to this Court, arguing "that the trial court committed plain error by providing the jury with an instruction on acting in concert with respect to the charge of possession of a firearm by a felon." [*State v. Collington* (*Collington I*), No. COA-14-1244, 2015 WL 4081786, at] *7

2. The majority goes to great lengths to explain the importance of distinguishing between plain error review, applied to unpreserved instructional error in criminal cases, and harmless error review, applied to preserved instructional error. The majority even goes so far as to invoke "the extensive precedent of this Court" distinguishing preserved error from unpreserved error to justify its decision. There is no question that, as the majority notes, "unpreserved issues related to jury instructions are reviewed under a plain error standard, while preserved issues are reviewed under a harmless error standard." The difference between the two types of review is not at issue in this case. The rule stated by this Court in *State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987) is one of plain error review. As a result, in arguing for *Pakulski*'s applicability to this case, this dissent does not suggest that harmless error review should apply to unpreserved issues.

> [(N.C. Ct. App. 2015) (unpublished)]. Defendant specifically argued "that this instruction impermissibly allowed the jury to convict Defendant of possession of a firearm by a felon based on [his brother]—also a convicted felon—reportedly receiving the gun from Mr. Sapp in a McDonald's parking lot on the evening of 1 October 2012." *Id.*

Collington II, 259 N.C. App. at 130, 814 S.E.2d at 879.

While this may seem like a minor point, it is actually very important in the context of this case. The majority attempts to recast the argument that appellate counsel actually made, writing that "appellate counsel argued that the jury was presented with multiple theories of guilt, one of which was erroneous, and that the error 'had a probable impact on the jury's finding that the defendant was guilty.' " This statement is wrong when measured against the trial court's findings of fact and the Court of Appeals decision below. But more importantly, it obfuscates the import of appellate counsel's error. The problem with the jury instruction was not only that the trial court submitted an erroneous instruction to the jury. The instructional error was that an erroneous instruction was paired with a non-erroneous instruction, which allowed the jury to return a guilty verdict in an array of circumstances wider than the law permits.[3] That instructional error is what appellate counsel failed to identify and argue to the Court of Appeals in *Collington I*.

As a result, the majority is incorrect when it states that "defendant's appellate counsel did, in fact, make the arguments he should have made, albeit by reference to different authority." As the Court of Appeals stated, "defendant's appellate counsel did not . . . argue that because it could not be determined from the record whether the jury relied upon the improper or the proper instruction, plain error was established." *Collington II*, 259 N.C. App. at 138, 814 S.E.2d at 883. As the trial court's findings of fact note, "[a]ppellate counsel failed to argue that . . . when disjunctive jury instructions are paired with an improper jury instruction, and there is no finding as to the jury's chosen theory, the defendant is entitled to a new trial."

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3. It is, of course, the inability of an appellate court to determine where in that array of circumstances a jury has situated its verdict when "we cannot discern from the record the theory upon which the jury relied" which leads to *Pakulski*'s rule that "we resolve the ambiguity in favor of the defendant." *Pakulski*, 319 N.C. at 574, 356 S.E.2d at 326. The important point, though, is that the problem of appellate review and attendant remedy presented in *Pakulski* is distinct from the identification of the error. The former is, in the majority's view, implicated by the relevant standard of review. The latter, however, is not.

Appellate counsel instead argued, as the trial court notes in its findings of fact, that "the Superior[ ] Court's jury instruction that Defendant would be guilty if he had acted in concert to commit the crime of possession of a firearm by a felon was plain error." The effect of counsel's mistake is apparent in the first Court of Appeals opinion. *See Collington I*, 2015 WL 4081786, at *1–4. Had counsel made the appropriate argument, the Court of Appeals would have first considered the full extent of the instructional error and would have second considered whether the trial court's error "had a probable impact on the jury's finding that the defendant was guilty." *See State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). However, because counsel failed to accurately describe the error, arguing only that a theory of guilt presented to the jury was erroneous, the Court of Appeals instead conducted a sufficiency of the evidence analysis. *See Collington I*, 2015 WL 4081786, at *4 (concluding that there was not plain error because "[t]he jury reasonably could have believed that Defendant was in possession of Mr. Sapp's gun" after noting that defendant conceded in his brief that the evidence was legally sufficient to convict on a proper instruction and discounting any evidence put on by defendant at trial). If counsel had appropriately framed the argument, the Court of Appeals would have reached a different result. The Court of Appeals itself noted this fact, as follows:

> Finally, Defendant has not presented this Court with any arguments under *State v. Pakulski*, 319 N.C. 562, 574, 356 S.E.2d 319, 326 (1987), which held that a trial court commits plain error when it instructs a jury on disjunctive theories of a crime, where one of the theories is improper, and "we cannot discern from the record the theory upon which the jury relied[.]" "It is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). Therefore, Defendant has not met his "burden" of establishing that the trial court committed plain error in the present case. *See Lawrence*, 365 N.C. at 516, 723 S.E.2d at 333.

Id. (alteration in original). Given this failure by appellate counsel, the majority's discussion of whether plain error or harmless error review applies is beside the point. Regardless of the appropriate standard of review, appellate counsel failed to correctly identify the error and pursue it on appeal. The record contains no evidence that this mistake resulted from reasoned judgment or that it was a strategic decision. As a result, Mr. Collington received ineffective assistance of appellate counsel, and

there is no basis for this Court to overturn the decisions to the contrary by both the trial court and the Court of Appeals.

II.

The majority is also wrong to assert that *Pakulski* does not apply to this case. The majority describes the analysis of the Court of Appeals as a "misidentification of the standard of review applied in *Pakulski*." However, it is the majority which incorrectly identifies *Pakulski*'s standard of review. In reality, *Pakulski* applied the plain error standard of review and *Pakulski* is applicable to Mr. Collington's case.

The majority writes that "it appears that we applied the harmless error standard of review in *Pakulski*" because the opinion uses the word "harmless" once when describing one of the State's arguments. It is more instructive, I think, to look at the briefs actually filed in that case, as well as the transcripts of the trial court proceedings, which reveal (1) that the instructional error was not preserved and (2) that both the State and defense counsel argued in their briefs that the appropriate standard of review was plain error.

The record in *Pakulski* makes clear that the error in that case was unpreserved, as neither defense counsel objected to any instruction proposed at the charge conference. Instead, defense counsel requested additional instructions and did not object when the felony murder instruction was discussed. The following is the transcript of the trial proceedings in *Pakulski* as they relate to this question. Mr. Buchanan is the prosecutor, Mr. Moody is Pakulski's defense attorney, and Mr. McLean is the attorney for Pakulski's co-defendant:

> COURT: Well– All right. I'm waiting on that bill. I don't have it before me. Now, let's talk about the precharge conference. I think we'd better do it before the arguments. On the murder charge what– First, what does the State say how the case ought to be submitted to the jury?
>
> MR. BUCHANAN: May it please Your Honor, the State is of the opinion that the evidence would support possibly 4 verdicts in the murder case of guilty of murder in the first degree in the perpetration of a felony; two, guilty of first degree murder with malice and premeditation and deliberation; or thirdly, guilty of murder in the perpetration of a felony and with malice and premeditation and deliberation; not guilty.

COURT: Well, it can't be–

MR. BUCHANAN: You asked me.

COURT: Let me ask: Do you think that there was premeditation?

MR. BUCHANAN: Yes, Your Honor, the State does feel that there is sufficient evidence to support such a charge.

COURT: Because of the evidence that Pakulski said that he was going to kill–

MR. BUCHANAN: Yes, Your Honor.

COURT: The evidence also shows that he wasn't looking for him at that time and it was just a chance that he happened to see him.

MR. BUCHANAN: Yes, Your Honor. The State certainly concedes that.

COURT: Let me look at this other bill I didn't have.

(The court examined a document.)

COURT: Well, I think I'll submit it only on the theory of murder in the perpetration of a felony.

MR. BUCHANAN: Yes, Your Honor.

MR. MOODY: Your Honor, might we inquire what would be the underlying felony?

COURT: Well, I think there are two, but actually the felony would be breaking and entering and robbery. I think robbery is of the– Well, they are just so interlocking that–

MR. MOODY: Yes, sir.

COURT: I may submit the breaking and entering. I don't know. Well, I probably will. Now, on the– Well, let me say this before we go any further. Let me give you this. If you'll come up here, let me show you how I'd like you to make the form for the verdict sheet.

. . .

COURT: Anything else you gentlemen want to say about any particular thing concerning the charge? I'll give them

the routine charge on each of those alleged offenses, and if you like I want to inquire now if you want me to instruct the jury concerning the defendants not testifying.

MR. MOODY: Yes, sir. The defendant Pakulski would request that instruction, just a standard instruction on that–

COURT: All right.

MR. MOODY: –as well as an instruction on reasonable doubt and the effect of the immunity granted to Mr. Chambers.

COURT: Yes, sir, I'll do all that. What about you? Do you want me to instruct them on the defendant's failure to testify?

MR. MCLEAN: Yes, sir. I would ask the Court– I believe it's 101.30.

COURT: I don't know what you are talking about.

MR. MCLEAN: It's the effect of the defendant's decision not to testify. That's that pattern instruction.

COURT: Well, I don't have that with me.

MR. MCLEAN: I've got it here, Your Honor. I'll present it to you.

COURT: Well, I don't need it.

MR. MCLEAN: Okay. And also I would ask that the Court instruct–this is called in pattern of jury instruction 105.20, but let me tell you what it's about. It's about prior inconsistent statements. We would ask that this instruction be given based on Mr. Chambers prior–

COURT: Excuse me just a minute. Let me get it down.

MR. MCLEAN: Yes, sir.

COURT: And the accomplice charge would be part of that. All right, now.

MR. MCLEAN: And along that same thing since we've asked for that charge, we were asking in addition or I am to charge impeachment by prior inconsistent statement under–

> COURT: Well, let me see what you've got on that. I know about what I would tell them.
>
> MR. MCLEAN: Yes, sir. It may be the same thing. I'm just wanting to–
>
> COURT: Well, I don't know. I don't have any set–
>
> (Mr. McLean handed the Court a document.)
>
> COURT: Okay. All right.
>
> MR. MCLEAN: And the other that mister–
>
> COURT: If I overlook that, call it to my attention. I don't think I will.
>
> MR. MCLEAN: Yes, sir. Of course, the standard burden of proof and those types of charges we would ask.
>
> COURT: All right, Okay. Does that cover it?
>
> MR. MOODY: Yes, sir, Your Honor. [The discussion continues on other matters.]

Transcript of Record at 1242–48, *Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (No. 256PA85) [hereinafter *Pakulski* Transcript].

Defense counsel also did not object to the instruction when it was given. After closing arguments, the trial court instructed counsel that it would ask if there were any objections to the jury charge after the instructions were given and that any objections would be included in the record at that point. *Pakulski* Transcript at 1339. Defense counsel agreed. *Id.* After giving the instructions to the jury, the trial court asked whether counsel had any objections, and counsel replied that they did not. *Id.* at 1365. The next morning, after the jury left the courtroom to begin their deliberations, the State approached the bench and had a discussion with the trial court, the contents of which were not recorded. *Id.* at 1366. The trial court then stated the following: "Let the record show further that at the conclusion of the charge the defendants make a general objection to the charge." *Id.*[4]

4. The record in *Pakulski* shows that defense counsel did not object to the felony-murder jury instruction at the charge conference, before the instructions were given, or after the instructions were given. The majority points to a line in the *Pakulski* opinion indicating that defense counsel moved to dismiss on the grounds of insufficient evidence to charge the jury on a theory of felony murder. *See Pakulski*, 319 N.C. at 571, 356 S.E.2d at 325. The majority suggests that this was sufficient to preserve an exception to the jury instruction because it "serv[ed] the purpose of the contemporaneous objection

This Court in *Pakulski* ruled that the felony-murder instruction given to the jury was erroneous and warranted reversal. *Pakulski*, 319 N.C. at 574, 356 S.E.2d at 326. The record very clearly indicates that defense counsel in *Pakulski* never objected to the jury instruction at trial that we subsequently ruled was in error.[5] As the majority notes, "unpreserved issues related to jury instructions are reviewed under a plain error standard." This makes *Pakulski* a plain error case. *See State v. Tucker*, 317 N.C. 532, 536, 346 S.E.2d 417, 420 (1986) ("Since defendant failed to object to these instructions at trial, we consequently must consider whether they rise to the level of plain error . . . ."); *see also* N.C. R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").[6] The majority is wrong to assert that the Court in *Pakulski* applied the harmless error standard of review.

It does not aid the majority that *Pakulski* is paired with the words "harmless error" in a scant reference thirty-one years[7] after *Pakulski* was issued. In *State v. Maddux*, we stated in a footnote that *Pakulski* did

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now required by N.C. R. App. P. 10(a)(2)." I note that the preservation requirements for exceptions to jury instructions remain substantially unchanged from those in existence at the time *Pakulski* was decided. *Compare* N.C. R. App. P. 10(b)(2), 312 N.C. 814 (1984) (repealed 1989) *with* N.C. R. App. P. 10(a)(2). Indeed, the requirements in effect at the time that *Pakulski* was decided were more onerous, requiring that "an exception to instructions given the jury shall identify the portion in question by setting it within brackets" or making other clear reference in the record on appeal.

5. The trial transcript does indicate that the defendant made a general motion to dismiss at the close of the State's evidence, and another at the close of all evidence. *Pakulski* Transcript at 725, 1249. Both motions were denied. *Id.* at 728, 1249.

6. In fact, the parties in *Pakulski* did "specifically and distinctly contend[]" that "the judicial action questioned . . . amount[ed] to plain error." *See* N.C. R. App. P. 10(a)(4). Both defense counsel and the State argued in their briefs that the appropriate standard for our decision was plain error. Brief for Defendant-Appellant Pakulski at 34, *Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (No. 256PA85) ("On the facts of this case, the instructions on felony murder based on breaking or entering were plainly erroneous."); Brief for State-Appellee at 22, *Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (No. 256PA85) ("Thus, [the trial court's] jury charge appears reviewable only for plain error. See State v. Odom, 307 N.C. 355, 300 S.E. 2d 375 (1983).").

7. The long-standing nature of our decision in *Pakulski*, along with the fact that it seems to have been consistently applied as a plain error case for thirty-one years after its issuance, suggest that the majority's concern about "creat[ing] a subset of cases in which an unpreserved issue relating to jury instructions qualifies for harmless error review" is unfounded.

not apply to the defendant's case because it "is not applicable to plain error cases." 371 N.C. 558, 567 n.11, 819 S.E.2d 367, 373 n.11 (2018). Two months later in *State v. Malachi*, in another footnote, we stated that "[t]his Court did discuss the harmless error issue in *Pakulski*." 371 N.C. 719, 732 n.5, 821 S.E.2d 407, 417 n.5 (2018). These passing references do not, as the majority claims, clarify that *Pakulski* is a harmless error case. Indeed, those two passing references are simply wrong. *See State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990) (applying *Pakulski* where it does not appear that the defendant objected to the jury instruction at trial); *see generally Pakulski*, 319 N.C. 562, 356 S.E.2d 319 (containing no indication that the defendant specifically objected to any jury instruction). Given that the actual record in *Pakulski* clearly shows that *Pakulski* is a plain error case, the majority should not read it otherwise.[8]

Thus, *Pakulski* is a plain error case, and Mr. Collington is entitled to relief.[9] At trial, according to the trial court's findings of fact, Mr. Collington's jury was instructed with respect to the possession of a firearm by a felon charge "that it could find Defendant guilty under the theories of actual possession, constructive possession, or acting in concert." The jury found him guilty of possession of a firearm by a felon and the "verdict sheets did not indicate under which theory the jury convicted Defendant."

In *Pakulski*, we held:

> Where the trial judge has submitted the case to the jury on alternative theories, one of which is determined to be erroneous and the other properly submitted, and we cannot discern from the record the theory upon which the jury relied, this Court will not assume that the jury based its verdict on the theory for which it received a proper

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8. The majority seems concerned that acknowledging that *Pakulski* is a plain error case, thereby applying its rule to cases of unpreserved error, would apply too lenient a standard of review and undermine "the important interests promoted by clear rules related to issue preservation." Honoring *Pakulski*'s promise would do no such thing. Instead, it would prevent appellate courts from keeping defendants in prison on an impermissible theory of guilt when "we cannot discern from the record the theory upon which the jury relied." *Pakulski*, 319 N.C. at 574, 356 S.E.2d at 326. Thus, the rule in *Pakulski* is designed to address precisely the type of "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done" to which the plain error rule is directed. *See State v. Lawrence*, 365 N.C. 506, 516–17, 723 S.E.2d 326, 333 (2012) (emphasis in original) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

9. As discussed in Part I of this dissent, Mr. Collington is entitled to relief even if *Pakulski* were a harmless error case.

> instruction. Instead, we resolve the ambiguity in favor of the defendant.

319 N.C. at 574, 356 S.E.2d at 326. It does not matter if "the jury could have based its verdict solely" on the permissible theory if "the verdict form does not reflect the theory upon which the jury based its finding of guilty." *Id.* Mr. Collington's appellate counsel did not make that argument. For that reason, his appellate counsel was deficient. *See Robbins*, 528 U.S. at 285, 120 S. Ct. at 764 (stating that appellate counsel is deficient where "counsel unreasonably failed to discover nonfrivolous issues and to file a merits brief raising them").

The deficiency is particularly egregious in this case because of the facts. The only evidence presented at trial that Mr. Collington possessed a firearm, either actually or constructively, came from the testimony of Christopher Hoskins. Mr. Hoskins testified that Mr. Collington held a gun while Mr. Collington was robbing him. However, while the jury found Mr. Collington guilty of possession of a firearm by a felon, the jury found him not guilty of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. It seems more likely, then, that the jury found Mr. Collington guilty of possession of a firearm based on his own testimony. During trial, Mr. Collington testified that his brother, Clarence Featherstone, received a gun from Dade Sapp later in the evening. This supports the conclusion that the jury based its verdict on the acting in concert theory rather than on actual or constructive possession.

Mr. Collington's appellate counsel had an obligation to present the argument to the Court of Appeals which would have allowed that court to ensure that Mr. Collington was not convicted of possession of a firearm based on someone else's possession. Because Mr. Collington's counsel did not meet that obligation, Mr. Collington clearly received ineffective assistance of appellate counsel and is entitled to a new trial. I respectfully dissent.

Justice DAVIS joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
TILMON CHARLES GOLPHIN

No. 441A98-4

Filed 25 September 2020

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order dismissing defendant's motion for appropriate relief entered on 25 January 2017 by Judge W. Erwin Spainhour in Superior Court, Cumberland County. Heard in the Supreme Court on 27 August 2019.

Joshua H. Stein, Attorney General, by Danielle Marquis Elder, Special Deputy Attorney General, and Jonathan P. Babb, Special Deputy Attorney General, for the State-appellee.

Jay H. Ferguson and Kenneth J. Rose for defendant-appellant.

Jeremy M. Falcone, Paul F. Khoury, Robert L. Walker, and Madeline J. Cohen for Former State and Federal Prosecutors, amici curiae.

Carlos E. Mahoney, Jin Hee Lee, and W. Kerrel Murray for NAACP Legal Defense and Educational Fund, Inc., amicus curiae.

Janet Moore for National Association for Public Defense, amicus curiae.

James E. Williams, Jr., Burton Craige, and Bidish Sarma for North Carolina Advocates for Justice, amicus curiae.

Grady Jessup for North Carolina Association of Black Lawyers, amicus curiae.

Cynthia F. Adcock for North Carolina Council of Churches, amicus curiae.

Lisa A. Bakale-Wise and Irving Joyner for North Carolina State Conference of the NAACP, amicus curiae.

Professors Robert P. Mosteller and John Charles Boger, amici curiae.

Joseph Blocher, for Social Scientists, amici curiae.

PER CURIAM.

For the reasons stated in *State v. Robinson*, No. 411A94-6, 2020 WL 4726680 (N.C. Aug. 14, 2020), the decision of the trial court is vacated and this case is remanded to the Superior Court, Cumberland County, for the reinstatement of defendant's sentence of life imprisonment without parole.

VACATED AND REMANDED.

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

Justice ERVIN concurring in the result.

If the Court were addressing for the first time the issue of whether the trial court's order should be reversed and the sentence of life imprisonment imposed upon defendant by Judge Weeks reinstated on double jeopardy and related grounds, I would dissent from that decision and hold, for the reasons stated in my dissenting opinion in *State v. Robinson*, No. 41194-6, 2020WL 4726680 (N.C. Aug. 14, 2020), that the trial court's order should be reversed and this case remanded to the Superior Court, Cumberland County, for a new Racial Justice Act proceeding in accordance with this Court's decision in *State v. Ramseur*, 374 N.C. 658, 843 S.E.2d 106 (2020), and our 2015 order in this case. The decision of the majority in *Robinson* is, however, the law of North Carolina to which I am now bound. For this reason, I concur in the result reached by the Court in this case.

Justice DAVIS joins in this concurring opinion.

Justice NEWBY dissenting.

For the reasons stated in my dissenting opinions in *State v. Robinson*, No. 411A94-6, 2020 WL 4726680 (N.C. Aug. 14, 2020), and *State v. Ramseur*, 374 N.C. 658, 843 S.E.2d 106 (2020), I respectfully dissent.

STATE v. GREENFIELD

[375 N.C. 434 (2020)]

STATE OF NORTH CAROLINA
v.
TYLER DEION GREENFIELD

No. 11A19

Filed 25 September 2020

1. Assault—deadly weapon with intent to kill inflicting serious injury—jury instruction—self-defense—transferred intent—prejudice

Where defendant—who fired gunshots killing a man and injuring a woman—was convicted of first-degree felony murder and assault with a deadly weapon with intent to kill inflicting serious injury, the trial court erred by declining to give defendant's proposed jury instruction for the assault charge, which stated that any self-defense justification defendant had for shooting the man would have transferred to his unintentional shooting of the woman. Defendant presented sufficient evidence to require this instruction where he testified that the man shot him first and he, fearing for his life, shot back while trying to aim only at the man. Further, because perfect self-defense can be a defense to an underlying felony (in this case, the assault charge) for felony murder, thereby defeating both charges, the trial court's failure to give the self-defense instruction amounted to prejudicial error.

2. Homicide—first-degree murder—felony murder—premeditation and deliberation—second-degree murder conviction—improper

On appeal from defendant's convictions for first-degree felony murder, assault with a deadly weapon with intent to kill inflicting serious injury (the underlying felony), and second-degree murder, the Court of Appeals erred by failing to remand all three charges for a new trial where, instead, it remanded for a new trial on the assault charge, vacated the felony murder charge, and remanded for entry of judgment convicting defendant of second-degree murder. Because the trial court erred by failing to instruct the jury on self-defense for the assault charge, its decision to have the jury continue deliberations on first-degree murder based on premeditation and deliberation after accepting a partial verdict on first-degree murder under the felony murder rule could have resulted in an improper conclusion by the jury that defendant was guilty of second-degree murder.

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, 262 N.C. App. 631, 822 S.E.2d 477 (2018), vacating judgments entered on 23 February 2017 by Judge Phyllis M. Gorham in Superior Court, New Hanover County, and remanding for a new trial for the assault with a deadly weapon with intent to kill inflicting serious injury charge and for the entry of a judgment convicting defendant of second-degree murder. On 11 June 2019, the Supreme Court allowed the State's petition for discretionary review. Heard in the Supreme Court on 9 March 2020.

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

Glenn Gerding, *Appellate Defender*, *by Kathryn L. VandenBerg*, *Assistant Appellate Defender*, *for defendant-appellant.*

HUDSON, Justice.

Here, we review (1) whether the trial court erred by failing to give defendant's proposed jury instructions on self-defense and transferred intent with regard to the charge of assault with a deadly weapon with intent to kill inflicting serious injury against Beth,[1] and (2) whether the trial court's error prejudiced defendant. Because we conclude that defendant was prejudiced by the trial court's failure to give his proposed jury instructions on self-defense and transferred intent in connection with the assault charge, we affirm the decision of the Court of Appeals. However, because we conclude that the proper remedy for this prejudicial error is to remand the case for a new trial on all charges, we affirm in part and reverse in part the decision of the Court of Appeals.

Factual and Procedural Background

On 31 October 2016, a New Hanover County grand jury returned a superseding indictment charging defendant with (1) first-degree murder; (2) attempted first-degree murder; (3) attempted robbery with a

1. We use the pseudonyms "Beth" and "Jon" to refer to the victims in this case, just as the Court of Appeals did in its opinion. *State v. Greenfield*, 262 N.C. App. 631, 634 n.1, 822 S.E.2d 477, 479 n.1 (2018).

dangerous weapon; and (4) assault with a deadly weapon with intent to kill inflicting serious injury.[2] Defendant's trial began on 6 February 2017.

At trial, the evidence showed that on 2 February 2015, defendant arrived with a friend at Jon and Beth's apartment to purchase marijuana from Jon. Subsequent events in the apartment are disputed. However, by the time defendant and his friend left the apartment, Jon was dead and both Beth and defendant had been shot.

Defendant testified that upon arrival he asked to use the bathroom. Defendant testified that he did not notice a safe in Jon's bedroom or the fact that Beth was asleep as he passed through the bedroom on the way to the bathroom. After using the bathroom, defendant returned to the living room where Jon and defendant's friend were talking. While they were talking, defendant picked up a gun that he found on a coffee table. Defendant testified that he picked the gun up off the coffee table because he thought it "looked like something off a movie" and "it looked cool."

According to defendant, Jon noticed that defendant picked up the gun from the coffee table and "started amping at [him]." Specifically, Jon stood up from where he was seated and started acting "crazy" and "aggressive," asking defendant if he was planning to rob him. Then Beth came out of the bedroom holding a gun up to defendant as if "she just had every intention on shooting [defendant]." Defendant testified that he was "scared" and thought that he was "about to die." Defendant pointed the gun that he picked up from the coffee table at Beth after she pointed her gun at him. Defendant then pointed the gun at Jon because he thought he had "to be as tough as possible to get out of th[e] situation." Defendant shouted "[p]ut the gun down or I'm gonna shoot him in the head." Defendant testified that he only made this threat to get Beth to put the gun down so that he could get out of the apartment.

Eventually, Beth put the gun down on the table and defendant tried to run out of the apartment. As he tried to leave, defendant saw Jon pull a gun from behind his back and then defendant felt himself get shot in the side. When he got shot, defendant "felt like [he] was going to die" and thought "it was all over" for him.

Defendant testified that after he was shot, he "just started shooting" and pulled the trigger "as many times as [he could] until [he] got to the door." Defendant stated that he was not aiming at anyone in particular,

2. In this opinion we will refer to this as "the assault" or "the assault charge."

and he was "just . . . shooting and running." However, defendant also testified that he aimed in Jon's direction "as best as [he] could," and that while running he "intentionally" shot at Jon.

At trial, Beth testified for the State. Her account of events inside the apartment diverged from defendant's testimony. Specifically, Beth testified that: Jon's voice got "shaky" after defendant asked to use the bathroom; she did not actually hear defendant use the bathroom; she would have been able to hear defendant use the bathroom from where she was in her and Jon's bedroom; and defendant's path to the bathroom led him right past the safe in the bedroom.

According to Beth, when defendant returned to the living room, she heard his voice become "more aggressive" and Jon's voice become "more shaky and more scared." Beth said that she heard defendant aggressively ask Jon where the guns, money, and drugs were, and then she grabbed a gun located in the bedroom. As she grabbed the gun, a third person that Beth did not recognize entered the apartment carrying a black bag, found Beth in the bedroom, and called out that Beth had a gun. Beth testified that defendant told her to bring the gun into the living room or he would shoot Jon in the face. Beth entered the living room with her gun pointed down to the ground and placed it on the coffee table.

Beth then stepped between Jon and defendant. Jon attempted to push her away from him as he made a move for the gun that she had just placed on the coffee table. She closed her eyes and turned away as shots came at her from defendant's direction. Beth testified that she felt a pain on the left side of her head and that she saw defendant pointing his gun at her as she was closing her eyes. Beth lost consciousness after she was shot. When she regained consciousness, she saw defendant and the third person running out of the apartment. After attempting to get help from a neighbor, Beth called 9-1-1 and reported that she and Jon were shot during an attempted robbery.

Prior to trial, defendant gave notice to the State that he was planning to offer the affirmative defense of self-defense at trial pursuant to N.C.G.S. § 15A-905(c). At the charge conference, defendant asked the trial court to give an instruction on self-defense for all charges and specifically requested an instruction on "the doctrine of transferred intent as [it] relates to self-defense." Defendant wanted the instruction to "capture the idea that an individual . . . lawfully acting in self-defense who accidentally injures another is entitled to the transference of his intent

from his original actions to an innocent bystander." Up until the charge conference, defendant had been referring to the jury instruction as an "accident" instruction, but later explained that he had always intended to request an instruction on self-defense.

Defendant's proposed instruction provided as follows:

> If a defendant, in acting in the lawful exercise of self-defense, injures an innocent bystander while lawfully defending himself, he is excused from criminal liability for any unintentional harm caused to innocent bystanders by his actions in his lawful exercise of self-defense.

The trial court ruled that it would not give defendant's proposed instruction to the jury. Instead, the trial court gave the pattern instruction defining "accident," which provided in pertinent part that

> [a]n injury is accidental if it is unintentional, occurs during the course of lawful conduct, and does not involve culpable negligence. . . . When the defendant asserts the victim's injury was the result of an accident, he is, in effect, denying the existence of those facts which the State must prove beyond a reasonable doubt in order to convict him.

The trial court also gave the following general instruction on transferred intent:

> If the defendant intended to harm one person but instead harmed a different person, the legal effect would be the same as if the defendant had harmed the intended victim.

The trial court also gave a self-defense instruction for first-degree murder under the theory of premeditation and deliberation and its lesser included offenses, but did not give a self-defense instruction for first-degree murder under the felony murder rule or for any underlying felonies, including the assault charge.

The jury ultimately found defendant guilty of first-degree murder based on the felony murder rule with the assault charge as the underlying felony. The jury also found defendant guilty of second-degree murder, but the trial court set that verdict aside. The jury found defendant not guilty of attempted first-degree murder and attempted robbery with a deadly weapon. Defendant appealed.

The Court of Appeals held in pertinent part that the trial court erred by not instructing the jury on self-defense with regard to the assault

charge. *State v. Greenfield*, 262 N.C. App. 631, 642, 822 S.E.2d 477, 485 (2018). Specifically, the Court of Appeals reasoned that based on the evidence at trial, "[d]efendant was entitled to a self-defense instruction on the homicide of Jon and the assault of Beth, but only if the jury determined that those crimes were committed with shots *intended* for Jon." *Id.* at 639, 822 S.E.2d at 483. The Court of Appeals determined that defendant was not entitled to a self-defense instruction for any shots intended for Beth because "[defendant] testified that he did not intend to hit Beth, but that he was only shooting at Jon. Defendant also testified that he was only in imminent fear of being killed by Jon. He testified that Beth had already put down her gun before he returned fire." *Id.* at 639, 822 S.E.2d at 483–84.

The court concluded that the trial court's failure to give a self-defense instruction for the assault of Beth was prejudicial error, reasoning that it did

> not know if the jury determined that the shot that struck Beth was meant for Jon, which may have been legally justified under self-defense, or if it was meant for Beth. . . . And based on transferred intent, he should have been acquitted if the jury believed he was firing at Jon in self-defense.

Id. at 642, 822 S.E.2d at 485.

In addition to remanding the case for a new trial on the assault charge, the Court of Appeals vacated the judgment convicting defendant of first-degree murder under the felony murder rule. *Id.* at 643, 822 S.E.2d at 486. The Court of Appeals then remanded the case for the entry of a judgment convicting defendant of second-degree murder, concluding that even though the trial court arrested judgment on that conviction, there was no reversible error as to that verdict because the jury was instructed on self-defense for that charge. *Id.* at 643, 822 S.E.2d at 485–86.

The dissenting judge agreed with the majority's decision to grant a new trial on the assault charge but would have granted a new trial to defendant on all charges because "it [was] not possible to separate the [assault] conviction from the tangled mess of theories and charges." *Id.* at 643, 822 S.E.2d at 486 (Stroud, J., dissenting).

Defendant appealed on the basis of the dissenting opinion. We also allowed the State's petition for discretionary review. Accordingly, we

now analyze (1) whether the Court of Appeals erred by concluding that defendant was prejudiced by the trial court's failure to give his proposed self-defense and transferred-intent instructions on the assault charge; and (2) whether the Court of Appeals erred by failing to order a new trial on all charges. Because we conclude that the failure to give the proposed instructions prejudiced defendant and that he should receive a new trial on all charges, we affirm in part and reverse in part the decision of the Court of Appeals.

Analysis

I. Standard of Review

"This Court reviews the decision of the Court of Appeals to determine whether it contains any errors of law." *State v. Golder*, 374 N.C. 238, 244, 839 S.E.2d 782, 787 (2020) (quoting *State v. Melton*, 371 N.C. 750, 756, 821 S.E.2d 424, 428 (2018)); *see* N.C. R. App. P. 16(a). "To resolve whether a defendant is entitled to a requested instruction, we review de novo whether each element of the defense is supported by the evidence, when taken in the light most favorable to defendant." *State v. Mercer*, 373 N.C. 459, 462, 838 S.E.2d 359, 362 (2020) (quoting *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988)). Further, "[w]hether a jury instruction correctly explains the law is reviewable de novo." *Piazza v. Kirkbride*, 372 N.C. 137, 187, 827 S.E.2d 479, 510 (2019).

II. Defendant's Proposed Instructions

[1] We conclude that defendant presented sufficient evidence to require a self-defense instruction on the assault charge for any shot intended for Jon.[3] Accordingly, the trial court erred by not instructing the jury according to defendant's proposed self-defense and transferred-intent instructions.

"[W]here competent evidence of *self-defense* is presented at trial, the defendant is entitled to an instruction on this defense, as it is a substantial and essential feature of the case, and the trial judge must give the instruction even absent any specific request by the defendant." *State v. Morgan*, 315 N.C. 626, 643, 340 S.E.2d 84, 95 (1986) (citations omitted).

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3. Because this conclusion is sufficient to demonstrate the trial court's error, we do not reach the issue of whether defendant was entitled to a self-defense instruction for any shots he intended for Beth.

Perfect self-defense requires that at the time of defendant's use of force

> (1) it appeared to defendant and he believed it to be necessary to kill [or use force against] the [victim] in order to save himself from death or great bodily harm; and
>
> (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
>
> (3) defendant was not the aggressor in bringing on the affray, i.e., he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
>
> (4) defendant did not use excessive force, i.e., did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

State v. Harvey, 372 N.C. 304, 307–08, 828 S.E.2d 481, 483–84 (2019) (quoting *State v. Bush*, 307 N.C. 152, 158–59, 297 S.E.2d 563, 568 (1982)). "In determining whether there was any evidence of self-defense presented, the evidence must be interpreted in the light most favorable to defendant." *State v. Webster*, 324 N.C. 385, 391, 378 S.E.2d 748, 752 (1989) (citing *State v. Gappins*, 320 N.C. 64, 71, 357 S.E.2d 654, 659 (1987)).

According to the doctrine of transferred intent, a defendant "is guilty or innocent exactly as though the fatal act had caused the death of the person intended to be killed. The intent is transferred to the person whose death has been caused." *State v. Dalton*, 178 N.C. 779, 781, 101 S.E. 548, 549 (1919) (citation omitted). In the self-defense context specifically, we have stated that

> [i]f the killing of the person intended to be hit would, under all the circumstances, have been excusable or justifiable on the theory of self-defense, then the unintended killing of a bystander by a random shot fired in the proper and prudent exercise of such self-defense is also excusable or justifiable.

Id. at 782, 101 S.E. at 549 (citation omitted).

Here, the evidence presented at trial, when interpreted in the light most favorable to defendant, was sufficient to entitle him to a jury instruction on perfect self-defense for any shot that he intended for Jon.

Specifically, defendant testified that (1) he only picked up the gun from Jon's coffee table because he thought "it looked cool" and "like something off a movie"; (2) when Jon noticed that defendant was holding the gun, Jon got "aggressive" and "crazy"; (3) defendant did not point his gun at anyone until Beth emerged from the bedroom pointing a gun at him; (4) defendant was scared and thought he was about to die when Beth pointed the gun at him, and he thought she had "every intention on shooting [him]"; (5) after Beth put her gun down, defendant ran for the door to exit the apartment; (6) as defendant was leaving, he saw Jon pull a gun and defendant felt a shot to his side; (7) defendant thought that he was going to die; and (8) acting out of fear, defendant resorted to "just shooting and running" while attempting to aim at Jon "as best as [he] could."

Defendant's testimony, taken in the light most favorable to him, entitled him to a jury instruction on perfect self-defense. Defendant's testimony, if believed, would show that (1) he subjectively believed that he was going to die if he did not return fire at Jon; (2) such belief was reasonable given the circumstances; (3) defendant was not the aggressor in that he only picked up the gun because he thought "it looked cool," defendant raised the gun only after Beth pointed a gun at him, and defendant only fired at Jon after Jon shot defendant while he was trying to escape; and (4) defendant did not use excessive force by returning fire at the person he reasonably believed had just shot him.

Further, defendant was entitled to a jury instruction on self-defense through the doctrine of transferred intent for the assault charge based on any injury to Beth. Defendant testified that he "intentionally" shot at Jon after having been shot in the side and thinking that he was about to die. From this testimony, the jury could find that Beth was struck by a bullet intended for Jon that defendant shot in self-defense. Accordingly, in the light most favorable to defendant, he was entitled to have the trial court instruct the jury on self-defense according to his proposed instruction for the assault charge, and the trial court erred by failing to do so.

III. Prejudice

An error is prejudicial when "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." N.C.G.S. § 15A-1443(a) (2019).

Although perfect self-defense is not a direct defense to felony murder, it "may be a defense to the underlying felony, which would thereby defeat the felony murder charge." *State v. Juarez*, 369 N.C. 351, 354, 794 S.E.2d 293, 297 (2016) (citing *State v. Richardson*, 341 N.C. 658, 668–69,

462 S.E.2d 492, 499 (1995)). Here, the trial court failed to give any self-defense instruction for the assault charge, which we have already concluded was error because defendant's testimony supported such an instruction. We further conclude that such error was prejudicial because it impaired defendant's ability to present his defense to felony murder, and we see a reasonable possibility that had the jury been given a self-defense instruction, a different result would have been reached at trial.

We also conclude that defendant was prejudiced by the trial court's failure to give his specific, proposed instructions on self-defense and transferred intent for the assault charge. Defendant proposed the following instruction:

> If a defendant, in acting in the lawful exercise of self-defense, injures an innocent bystander while lawfully defending himself, he is excused from criminal liability for any unintentional harm caused to innocent bystanders by his actions in his lawful exercise of self-defense.

This instruction, if given, would have properly informed the jury that if it determined that defendant intentionally shot at Jon in self-defense and unintentionally shot Beth while exercising that right of self-defense, then his self-defense justification for shooting at Jon would have transferred along with the bullet that unintentionally struck Beth. Further, because perfect self-defense can serve as a defense to the underlying felony for felony murder, and thereby defeat the felony murder charge, there is a "reasonable possibility" that if the trial court had given defendant's proposed self-defense and transferred-intent instructions, the jury would have acquitted him of both the assault charge and the felony murder charge for which the assault served as the underlying felony.

The State's argument that defendant was not prejudiced by the trial court's failure to give defendant's proposed self-defense and transferred-intent instructions is not persuasive.

First, the State argues that the trial court's general instruction on transferred intent adequately informed the jury that it could acquit defendant if it determined that defendant unintentionally shot Beth while aiming for Jon in self-defense. But the transferred-intent instruction only informed the jury that defendant's intent to harm would transfer; it did not inform the jury that defendant's lawful exercise of self-defense could transfer. It also seems unlikely that the jury would have understood by this general instruction that defendant's self-defense justification would have transferred to any bullet that unintentionally struck Beth when the trial court gave no self-defense instruction at all for the assault charge.

Second, the State argues that defendant could not have been prejudiced by the trial court's failure to give his proposed instructions because defendant invited any error here by requesting the "accident" instruction that *was* given to the jury on the assault charge. *See* N.C.G.S. § 15A-1443(c) ("A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct."). But defendant's success in obtaining an instruction on the accident defense does not preclude his claim that he was prejudiced by the trial court's failure to also give separate, requested instructions on self-defense and transferred intent.[4] This is especially clear because defendant clarified at the charge conference that he had always been requesting self-defense and transferred-intent instructions, and that he had been using the term "accident" somewhat inartfully to refer to those instructions. When defendant made this clarification, the trial court agreed that the issue had always been about self-defense.

Finally, the State argues that defendant cannot demonstrate prejudice resulting from the trial court's failure to give his proposed instructions because the jury's verdict finding defendant guilty of second-degree murder shows that it did not believe that defendant acted in perfect self-defense. However, as explained below, we conclude that the second-degree murder verdict sheds no light on the jury's deliberations concerning defendant's self-defense claim.

Accordingly, we conclude that defendant was prejudiced by the trial court's failure to give defendant's proposed instructions on self-defense and transferred intent for the assault charge.

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4. There is a clear distinction between a pure accident defense and a self-defense via transferred-intent defense: a pure accident defense negates the elements of assault, whereas a self-defense instruction provides a justification for actions that would otherwise satisfy the elements of the offense. *See* N.C.P.I.—Crim. 307.10 (2019) ("When the defendant asserts that the victim's death was the result of an accident he is, in effect, *denying the existence of those facts which the State must prove* beyond a reasonable doubt in order to convict him." (emphasis added)); *State v. Riddick*, 340 N.C. 338, 341, 457 S.E.2d 728, 730 (1995) (quoting N.C.P.I.—Crim. 307.10 (1986)); *State v. Holland*, 193 N.C. 713, 718, 138 S.E. 8, 10–11 (1927) ("The first law of nature is that of self-defense. The law of this state and elsewhere recognizes this primary impulse and inherent right. One being without fault, in defense of his person, in the exercise of ordinary firmness, has a right to invoke this law and kill his assailant, if he has reasonable ground for believing or apprehending that he is about to suffer death or great or enormous bodily harm at his hands. . . . but there must be reasonable ground for the belief or apprehension—an honest and well-founded belief or apprehension at the time *the homicide is committed*." (emphasis added) (citations omitted)).

IV. Remand Order

[2] We conclude that the Court of Appeals erred by remanding this case for the entry of a judgment convicting defendant of second-degree murder. Instead, we remand this case for a new trial on all charges.

The trial court accepted the jury's verdicts finding defendant (1) guilty of first-degree murder under the felony murder rule based upon assault; (2) not guilty of attempted first-degree murder; (3) not guilty of attempted robbery with a deadly weapon; and (4) guilty of assault with a deadly weapon with intent to kill inflicting serious injury. Then, after noticing that the jury failed to mark the verdict sheet under the premeditation and deliberation theory of first-degree murder, the trial court called the members of the jury back into the courtroom and instructed them to continue deliberations on the theory of premeditation and deliberation in the following manner:

> Under Count 1 of the verdict form, there were two first-degree murder charges listed. It appears that you marked one for the first-degree murder under the felony murder rule but nothing was checked under first-degree murder with premeditation and deliberation.
>
> So what I'm going to have y'all do is go back into the jury room and make a decision about the first-degree murder with premeditation and deliberation, because nothing was checked as to that count; do you understand?

Later the trial court provided the following instruction:

> Out of an abundance of caution, I want to make sure you understand that, of course, there were two theories in the first-degree murder. You made a decision under the first theory, felony murder rule. The second theory is first-degree murder with premeditation and deliberation. So there's first-degree murder, second-degree murder, voluntar[y] manslaughter, or not guilty. That's the decision you have to make on that second one. You have those four options; do you understand that?

After hearing this instruction, the jury asked the trial court the following:

> [W]hy [does] it matter[ ] that we address both theories since it's for the same count? Why is there and/or instead of an and in the charge sheet?

In response to the jury's question, the trial court gave the following instruction:

> Ladies and gentlemen, as I instructed you if you read the instructions, the defendant is charged with first-degree murder. The State presented two theories of first-degree murder to you that required different elements to be proven. First-degree murder under the felony murder rule is one way first-degree murder can be proven, the second way is first-degree murder with premeditation and deliberation. So both theories of first-degree murder were presented to you; therefore, you have to—to look at both theories as they're set out in the charge conference and in the charge instructions and on the verdict sheet and make a decision about both theories in this case.

Following this instruction, one juror asked whether the jury's decision on the two theories had to be "congruent" or "together in order to say first-degree felony murder." The trial court responded that the jury "ha[s] to make a decision about both. They have to be consistent."

After the jury finished its second round of deliberations, it returned verdicts finding defendant (1) guilty of first-degree murder under the felony murder rule based upon assault; (2) guilty of second-degree murder; (3) not guilty of attempted first-degree murder; (4) not guilty of attempted robbery with a deadly weapon; and (5) guilty of assault with a deadly weapon with intent to kill inflicting serious injury.

We conclude that the trial court's failure to give any instruction on self-defense pertaining to the assault charge prevented the jury from performing its fundamental task of considering all of the substantial and essential features of the case, which prejudiced defendant.[5] Specifically, the trial court instructed the jury that it had to redeliberate on first-degree murder under the theory of premeditation and deliberation, and the trial court informed the jury that it only had "four options," which were to find defendant guilty of "first-degree murder, second-degree murder, voluntar[y] manslaughter, or not guilty." In so limiting the jury's options, the trial court denied it the ability to fully and properly consider whether defendant was guilty of first-degree murder under the felony murder rule.

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5. *See State v. Sargeant*, 206 N.C. App. 1, 14, 696 S.E.2d 786, 795 (2010) (holding that the trial court "intru[ded] into the province of the jury" when it accepted partial verdicts and sent the jury back to deliberate with incomplete instructions on aspects of first-degree murder).

Further, when asked whether the jury's verdict on first-degree murder under the felony murder rule and its verdict on first-degree murder under the theory of premeditation and deliberation needed to be "congruent," the trial court instructed the jury that the two findings needed to be "consistent." Under that instruction, the jury could have improperly found defendant guilty of second-degree murder because it thought, for example, that although there was no evidence that defendant intended to shoot Jon with premeditation and deliberation—it needed to at least convict him of second-degree murder in order to render a verdict that was "consistent" with the guilty verdict that the trial court had already accepted. Under such a line of reasoning, the jury would not have engaged at all with defendant's claim of perfect self-defense. Moreover, such a decision by the jury would not have been based upon a proper consideration of the elements of the crime of second-degree murder.

The trial court's decision to have the jury continue deliberations on first-degree murder under the theory of premeditation and deliberation after accepting a partial verdict on first-degree murder under the felony murder rule could have resulted in an improper conclusion by the jury that defendant was guilty of second-degree murder. Therefore, we reverse the decision of the Court of Appeals to remand this case for the entry of a judgment convicting defendant of second-degree murder. Instead, we remand for a new trial on all charges.

Conclusion

We conclude that the trial court erred by failing to give defendant's proposed instructions on self-defense and transferred intent for the assault charge, that such error prejudiced defendant, and that the trial court's decision to take a partial verdict on the first-degree murder charge could have resulted in an improper finding by the jury that defendant was guilty of second-degree murder. Accordingly, we affirm in part, reverse in part, and remand this case to the trial court for a new trial on all charges.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

Justice NEWBY dissenting.

A criminal defendant is entitled to a fair trial, free from prejudicial error. Here the trial court gave adequate instructions, enabling defendant to present his defense theory to the jury. Defendant argued that he was aiming at Jon and shot Beth by accident. He asserted that his shooting Jon was justified as self-defense, and thus his shooting Beth

was also justified. By its verdict it is clear that the jury considered and rejected defendant's argument. Because the instructions given to the jury allowed the jury to fully consider defendant's defense, his conviction should be upheld. I respectfully dissent.

Following a three-week trial, during which both defendant and the surviving victim testified, the jury heard differing accounts of a drug deal gone wrong that undisputedly resulted in the death of Jon and the serious injury of Beth. While previously having given various accounts, by the time defendant testified he claimed that he shot Jon in self-defense and that Beth was "just in his area" when he was shooting at Jon. It is undisputed that the first person to pick up a gun was defendant and that he was the only one holding a gun when the violent affray began. Likewise, Jon's cell phone undisputedly captured defendant's threats and demands at the time he was holding the gun.

The jury heard evidence that defendant was the initial aggressor and that his actions were intentional, including that he intentionally shot Beth. Defendant entered the home to purchase drugs, picked up a gun and held it in close proximity to Jon, threatened Jon, and threatened to take Jon's life to convince Beth to put her gun down. A recording on Jon's cell phone captured the exchange that occurred after defendant picked up the gun, including defendant's voice demanding "the money" from Jon, threatening to "shoot [Jon] in the head," and demanding that Beth "[b]ring the gun here[, p]ut it down." Beth complied and stood in front of Jon. Beth saw defendant still pointing his gun at her as she closed her eyes.

Beth did not see the gun fire the shots, but she heard two to three shots, smelled gun powder, and felt the bullet strike her. Beth "felt pain on the left side of [her] head" and felt the bullets penetrating her as she went unconscious. When she regained consciousness, she saw her "hair floating around" her and on her arms and felt a pain on the left side of her head. She then saw defendant running out of the home. Following his flight and during the investigation, defendant gave different explanations about how the drug deal at Jon's house had gone wrong and how defendant got shot. Defendant's rendition of the facts varied as to who fired first and who got shot first. By the time defendant testified, he claimed he shot Jon in self-defense and that Beth was "just in his area" when he was shooting at Jon.

At the charge conference, defendant asked for jury instructions on self-defense and transferred intent. He wanted to present to the jury the argument that if he was justified in shooting Jon in self-defense, he

was also justified in shooting Beth accidently. The trial court gave a self-defense instruction and an instruction on accident as well as a general transferred-intent instruction, but did not give the specific transferred-intent instruction requested. Nonetheless, with the jury instructions given, defendant was able to make the jury argument he desired.

Defendant's defense theory was that he fired every shot in self-defense to ward off Jon's aggression and that any shots that hit Beth did so by accident or unintentionally. Defense counsel clearly recapped defendant's theory in his closing argument as follows:

> [Defendant] was acting in self-defense when he pulled the trigger and those bullets came out of the gun firing at [Jon] so he would not die, then it's going to be not guilty the whole way down. Similar principles. Not exactly self-defense but very similar in their nature and application.
>
> . . . .
>
> [I]f you believe [defendant's] story that he wasn't there to rob anybody and that he acted in self-defense, really you don't have any choice in this case, you have to cut this kid loose.
>
> . . . .
>
> [F]or accident . . . . if you guys determine that his shooting at [Jon] was the lawful exercise of self-defense, then the bullets that came out of that gun were done lawfully, and that it would be considered an accident as the definition of the law, not that it was an actual accident, but otherwise lawful conduct is covered under this defense of accident.
>
> It's important this concept is clear, that if you believe that when he pointed that gun—when [defendant] pointed that gun at [Jon], that he did so lawful—that he did so in self-defense, that the fact that those bullets may have hit an innocent bystander, or [Beth], that his belief that he was acting in reasonable—that he was acting in self-defense would be covered under the accident instruction, that lawfully shooting at someone in self-defense covers unintended victims. That's the law, and it's important that you understand it.

The jury found defendant guilty of murder under the felony murder rule, with the underlying felony being the assault on Beth, and of

second-degree murder. The jury verdict could have two meanings, both of which show that the jury rejected defendant's defense. The jury could have believed that defendant intended to shoot Beth. The jury also could have believed that defendant intended to shoot Jon, and hit Beth by accident, but that defendant did not shoot Jon in self-defense.

> It is a well-established principle in this jurisdiction that in reviewing jury instructions for error, they must be considered and reviewed in their entirety. Where the trial court adequately instructs the jury as to the law on every material aspect of the case arising from the evidence and applies the law fairly to variant factual situations presented by the evidence, the charge is sufficient.

Murrow v. Daniels, 321 N.C. 494, 497, 364 S.E.2d 392, 395 (1988) (citing *Gregory v. Lynch*, 271 N.C. 198, 203, 155 S.E.2d 488, 492 (1967); then citing *King v. Powell*, 252 N.C. 506, 114 S.E.2d 265 (1960)). Here the jury received instructions that adequately instructed as to the law and on every material aspect of the case arising from the evidence, including defendant's defense theory. Any alleged deficiency in the jury instructions would be harmless.

The trial court instructed the jury on the homicide charges lodged against defendant for the fatal shooting of Jon: first-degree murder based upon malice, premeditation and deliberation, or the felony murder rule; second-degree murder; and voluntary manslaughter. As instructed, first-degree murder and second-degree murder both involve an intentional and unlawful killing with malice. The trial court defined malice to mean "not only hatred, ill will or spite, as it is ordinarily understood, but also . . . a condition of mind which prompts a person to intentionally take the life of another or to intentionally inflict serious bodily harm that proximately results in another person's death without just cause, excuse, or justification." As the trial court instructed,

> to find the defendant guilty of second-degree murder, the State must prove beyond a reasonable doubt that the defendant unlawfully, intentionally and with malice wounded the victim with a deadly weapon proximately causing the victim's death. The State must also prove that the defendant did not act in self-defense, or if the defendant did act in self-defense, the State must prove that the defendant was the aggressor in provoking the fight with intent to kill or inflict serious bodily harm.

Voluntary manslaughter, the last homicide option given to the jury, is an unlawful killing that is still intentional but does not require malice or premeditation and deliberation and instead applies when "the defendant acts in the heat of passion based upon adequate provocation." As stated in the jury instruction, a conviction on voluntary manslaughter may indicate that the jury found that defendant killed in self-defense "but use[d] excessive force under the circumstances or was the aggressor without murderous intent in provoking the fight in which the killing took place." The trial court specifically instructed the jury that "if the State proves beyond a reasonable doubt that the defendant, though otherwise acting in self-defense, was the aggressor, though the defendant had no murderous intent when the defendant entered the fight, the defendant would be guilty of voluntary manslaughter."

Based on defendant's testimony that he shot Jon in self-defense, the trial court instructed the jury on self-defense as to all homicide charges that involved his intent towards Jon as follows:

> The defendant would be excused . . . if, first, the defendant believed it was necessary to kill the victim in order to save the defendant from death or great bodily harm.
>
> And second, the circumstances as they appeared to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary fitness.
>
> In determining the reasonableness of the defendant's belief, you should consider the circumstances as you find them to have existed from the evidence . . . .

The trial court specifically instructed that "[t]he defendant would not be guilty of any murder or manslaughter if the defendant acted in self-defense and if the defendant was not the aggressor in provoking the fight and did not use excessive force under the circumstances."

The trial court then described in detail the definition of "aggressor" for the jury, stating that in order for the jury

> to find the defendant guilty of first-degree murder or second-degree murder, the [S]tate must prove beyond a reasonable doubt, among other things, that the defendant did not act in self-defense or, failing in this, that the defendant was the aggressor with the intent to kill or to inflict serious bodily harm upon the deceased.

The trial court reiterated that, "[i]f the State fails to prove the defendant did not act in self-defense or was the aggressor[,] . . . you may not convict the defendant of either first-degree or second-degree murder." The trial court repeated the jury's option to choose not guilty on all intentional homicide charges if defendant acted in self-defense and was not the aggressor. Defendant still could be convicted of voluntary manslaughter if he, though otherwise acting in self-defense, was the aggressor.

The jury, however, found defendant guilty of second-degree murder, indicating that defendant unlawfully killed Jon with malice and did not act in self-defense. Otherwise, if the jury believed that defendant acted in self-defense, the jury would have chosen not guilty of any murder or voluntary manslaughter.

The jury also found defendant guilty of murder under the felony murder rule. To convict a defendant of first-degree murder on the theory of felony murder, the jury must find, *inter alia*, that the defendant killed the victim while committing or attempting to commit a felony; here the underlying felony was the independent assault on Beth, which the jury found to be assault with a deadly weapon with intent to kill inflicting serious injury. To find defendant guilty of this assault, the jury was instructed that defendant must have "assaulted the victim by intentionally and without justification or excuse shooting [Beth] in the head and arm." This type of assault requires "the specific intent to kill" and includes an attempt to kill the victim by an intentional shot. Within the felony murder rule instruction, the trial court informed the jury that the required intent "may be inferred by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw." Of the assault options, the jury convicted defendant of assault with a deadly weapon with intent to kill inflicting serious injury of Beth even though the jury could have chosen an assault that does not require a specific intent to kill, such as assault with a deadly weapon inflicting serious injury. Since Beth was undisputedly unarmed at the time of the shooting, defendant has no viable self-defense claim against Beth. This assault conviction becomes the underlying basis for murder under the felony murder rule.

Given defendant's testimony that he accidently shot Beth when shooting at Jon because she was "just in his area," at defendant's request, the jury received an "accident" defense instruction on the assault charge. This instruction stated that "[a]n injury is accidental if it is unintentional, occurs during the course of lawful conduct, and does not involve culpable negligence." The accident instruction required the jury to consider whether defendant *unintentionally* shot Beth. As summarized in

defense counsel's jury argument, defendant's theory that he intended to shoot Jon in self-defense and that Beth was simply collateral damage is practically speaking the same argument regardless of whether that claim is categorized as accidently arising out of self-defense or simply an accident.

As the trial court instructed, the State bore the burden to prove "beyond a reasonable doubt that the victim's injury was not accidental." If it did not satisfy that burden of proof, "it would be [the jury's] duty to return a verdict of not guilty." If the jury believed that defendant *unintentionally* shot Beth, it would have found defendant *not* guilty of the intentional assault against Beth, as urged to do by defense counsel during closing argument. The jury was not convinced by the "accident" defense and instead convicted defendant of assault with the specific intent to kill Beth. That verdict indicates that they believed defendant intended to shoot Beth or that defendant's shooting of Jon was unjustified. If the jury believed defendant's theory it would have found him not guilty of all homicide charges and every assault charge. The jury, by finding defendant guilty of both a homicide offense against Jon and the assault against Beth, simply did not believe defendant's theory.

Nonetheless, the majority concludes that the trial court committed prejudicial error when it failed to provide the jury with additional self-defense and transferred-intent instructions for the assault on Beth, and it determines that the jury could have reached a different outcome if given those instructions. In the majority's view, in that different outcome, "perfect self-defense can serve as a defense to the underlying felony for felony murder, and thereby defeat the felony murder charge" and provide "a 'reasonable possibility' that if the trial court had given defendant's proposed self-defense and transferred-intent instructions, the jury would have acquitted him of both the assault charge and the felony murder charge for which the assault served as the underlying felony." In other words, the jury could have concluded that defendant shot Jon in self-defense and that defendant unintentionally shot Beth while defending himself. This argument is essentially the same argument that defendant presented to the jury at trial, which the jury rejected.

Because it appears that defendant was the aggressor, it appears he may not have been entitled to the self-defense instruction at all. The evidence indicates that defendant undisputedly made threats to kill Jon and, when the violence began, defendant was the only one actually holding a gun. Nonetheless, having received the self-defense instruction, the jury rejected defendant's self-defense argument.

The law limits self-defense protection for aggressors, or those who create the deadly situation by their own doing. If a defendant "by his own wrongful act produces a condition of things wherein it becomes necessary for his own safety that he should take life or do serious bodily harm, . . . the law wisely imputes to him his own wrong, and its consequences to the extent that they may and should be considered in determining the grade of offense which but for such acts would never have been occasioned." *State v. Crisp*, 170 N.C. 785, 792, 87 S.E. 511, 515 (1916) (quoting *Reed v. State*, 11 Tex. App. 509, 518 (1882)).

While defendant's testimony was the only substantiation of his claim of self-defense, his testimony at the same time negated that claim. Defendant went into Jon and Beth's home and picked up a gun which caused Jon to ask defendant if defendant was robbing him. Defendant never answered Jon's question and instead threatened to kill Jon. Beth pointed a gun at defendant. Defendant disarmed Beth by threat against Jon. It is undisputed that defendant was the only one holding a gun once Beth disarmed herself. It is only thereafter that the facts come into dispute. Based on defendant's own testimony and the testimony of the surviving victim, the jury heard evidence that defendant was the aggressor and did not act in self-defense. Defendant, based on his testimony, nonetheless received the benefit of the self-defense instruction, and the jury considered defendant's intent toward Jon for every crime. The jury instructions sufficiently captured defendant's essential defense theory, which allowed defense counsel to make his argument to the jury.[1]

The jury considered and discredited the essence of defendant's self-defense theory when it convicted him of second-degree murder instead of voluntary manslaughter. The jury simply decided that defendant intended to harm both victims and was not justified in doing so. Thus, the shot fired at Jon was not "in the proper and prudent exercise of such self-defense" and not "excusable or justifiable." *State v. Dalton*, 178 N.C. 779, 782, 101 S.E. 548, 549 (1919) (quoting 13 R. C. L. tit. Homicide, § 50, 745–46). Any random shot that unintentionally killed an innocent bystander was likewise not "excusable or justifiable." *Id.*

1. Even if the shots fired at Jon unintentionally struck Beth, the trial court's general transferred-intent instruction covers shots defendant fired with either criminal intent towards Jon or shots justified in self-defense. *See State v. Dalton*, 178 N.C. 779, 781–82, 101 S.E. 548, 549 (1919); *id.* at 782, 101 S.E. at 549 (The defendant "is guilty *or innocent* exactly as though the fatal act had caused the death of the person intended to be killed. The intent is transferred to the person whose death has been caused." (quoting 13 R. C. L. tit. Homicide, § 50, 745–46) (emphasis added)). Thus, by definition, transferred intent encapsulates a theory of justification like self-defense as well.

The jury's outcome is supported by the evidence presented and, based on the jury's decisions, additional instructions would not have resulted in a different outcome.

As demonstrated by the verdict, the jury simply was not convinced by defendant's testimony that he only intended to shoot Jon and that he shot Jon in self-defense. The jury's guilty verdict on second-degree murder shows that the jury did not find his self-defense claim credible. Similarly, the jury's finding that defendant assaulted Beth with the intent to kill reflects its view that defendant intended to shoot Beth or that defendant's shooting of Jon was unjustified. The jury considered and rejected defendant's defense. His conviction should be upheld. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
ANTON THURMAN McALLISTER

No. 221A19

Filed 25 September 2020

Constitutional Law—effective assistance of counsel—admission of client's guilt—implied—Harbison error

An implied admission of guilt—just like an express admission—can constitute error under *State v. Harbison*, 315 N.C. 175 (1985), which held that a criminal defendant suffers a per se violation of his constitutional right to effective assistance of counsel when counsel concedes the defendant's guilt to the jury without his prior consent. Therefore, defense counsel's implied admission during closing arguments that defendant was guilty of assault on a female implicated *Harbison*. Counsel's statements implying defendant's guilt were problematic because counsel vouched for the accuracy of defendant's admissions that were in a videotaped statement to the police, gave his personal opinion that there was no justification for defendant's use of force against the victim, and asked the jury to find defendant not guilty of every charged offense except for assault on a female. The matter was remanded for an evidentiary hearing to determine whether defendant knowingly consented in advance to his counsel's implied admission of guilt (and thus whether *Harbison* error existed).

Justice NEWBY dissenting.

Justice ERVIN 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, 265 N.C. App. 309, 827 S.E.2d 538 (2019), finding no error in a judgment entered on 22 August 2016 by Judge Richard S. Gottlieb in Superior Court, Forsyth County. This matter was calendared for argument in the Supreme Court on 4 May 2020 but determined on the record and briefs without oral argument pursuant to Rule 30(f) of the North Carolina Rules of Appellate Procedure.

Joshua H. Stein, Attorney General, by Adren L. Harris, Special Deputy Attorney General, for the State-appellee.

Joseph P. Lattimore for defendant-appellant.

DAVIS, Justice.

This Court held in *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985), that a criminal defendant suffers a per se violation of his constitutional right to effective assistance of counsel when his counsel concedes the defendant's guilt to the jury without his prior consent. In this case, we consider whether *Harbison* error exists when defense counsel impliedly—rather than expressly—admits the defendant's guilt to a charged offense. Based on our determination that the rationale underlying *Harbison* applies equally in such circumstances, we reverse the decision of the Court of Appeals and remand with instructions.

Factual and Procedural Background

In January 2015, defendant met a woman named Stephanie Leonard during a group session at Insight, a drug treatment facility in Winston-Salem. Within a week of their introduction, defendant and Leonard began an intimate personal relationship and moved into an apartment together that was paid for by Leonard's mother.

On 16 February 2015, Leonard's mother took Leonard grocery shopping and also gave her $75 to purchase various other items she needed. After returning home at approximately 5:00 p.m., Leonard and defendant consumed a bottle of wine over several hours. Around 9:00 p.m., they decided to walk to a nearby BP gas station to purchase cigarettes. As they approached the gas station, Leonard told defendant that she

wanted to go to a store to purchase another bottle of wine and started walking away from the gas station. Defendant proceeded to curse and yell at Leonard because he realized that she was in possession of additional money and had not informed him of this fact. In an effort to placate defendant, Leonard gave him $20, at which point he struck her in the face and caused her to fall to the ground and lose her wallet. The two of them continued to argue as defendant began hitting her repeatedly in the face because she could not locate her wallet. He then grabbed Leonard by the arm and started pulling her back toward their apartment. Christopher Jackson, the cashier working at the gas station during the altercation, called for assistance from law enforcement officers after he saw that a man had "jerked" a woman outside the store and heard "the sound like of [sic] somebody hitting somebody."

Upon returning to the apartment, defendant shoved Leonard through the doorway and told her to be quiet. After unsuccessfully searching for Leonard's wallet inside the apartment, defendant resumed hitting her. Believing that Leonard was hiding the money on her person, defendant removed her clothes. Leonard later described being dragged and repeatedly struck by defendant, which resulted in her bleeding from her face.

After initially telling defendant that she did not know what had happened to her wallet, Leonard subsequently stated that the wallet might be in the kitchen. As they made their way to the kitchen, Leonard attempted to escape the apartment but was caught by defendant. Defendant then dragged her into the living room at which point he got on top of her and resumed hitting her. He then placed his hand over Leonard's mouth and nose and attempted to suffocate her, at which point Leonard began to fight back by hitting defendant in the face and biting his fingers. Leonard's fingers also went into defendant's mouth, and he bit them. Defendant then attempted to suffocate Leonard with a pillow until she made her body go limp to make him believe that she had lost consciousness.

Shortly thereafter, defendant forced Leonard, whose face and hands were covered in blood, to enter the bathroom. The two of them climbed into the bathtub where defendant washed the blood off of Leonard's body. Upon exiting the bathroom, defendant and Leonard got into bed, and they engaged in sexual intercourse.

On the following day, law enforcement officers from the Winston-Salem Police Department arrived at the apartment to investigate the events that had occurred the previous evening. One of the officers observed injuries to Leonard's hands and face, which he photographed.

He also took pictures of numerous blood stains found throughout the apartment. Later that evening, officers located defendant, who agreed to be taken to the police station for a non-custodial interview concerning an investigation involving a missing moped that was unrelated to his altercation with Leonard.

During the interview, which was videotaped and later played for the jury at defendant's trial, he was asked a number of questions about the incident that had occurred the previous night involving Leonard. Defendant stated that when he and Leonard were outside the gas station, he got "kinda mad" at her for wanting to go to another store because he was cold and wanted to go home. When asked why they never actually entered the gas station, defendant responded that he had become "pissed off" at Leonard for not appropriately communicating with him, which eventually led to him pushing her to the ground. He acknowledged that "[he] was wrong for pushing her." Defendant stated that upon their return to the apartment, Leonard communicated her desire to go back out again to buy wine, which prompted the two of them to begin arguing.

Defendant told officers that he and Leonard then got into a "tussle" during which Leonard "retaliate[ed]" in a "rough" manner. Defendant admitted that he "backhanded her" in the face at one point but that he did not mean to hurt her. Defendant stated that for approximately ten minutes there was "a lot of grabbing and tussling," and that afterwards, the two went into the bathroom to clean Leonard up because she was "spitting blood" as a result of the altercation.

When asked if Leonard had been injured in any way during the incident, defendant responded that the following morning he observed that her bottom lip was swollen from when he had "smacked her in the lip." Defendant added that Leonard had bitten his hand when he "grabbed her in the mouth" and that around this same time he had likewise bitten her hand. Later in the interview, defendant denied having forced Leonard to engage in sexual intercourse but stated the following: "[I]f I smacked [her] ass up, then I smacked [her]; I can take the rap for that." Following the interview, defendant was arrested and taken into custody.

Defendant was indicted on charges of (1) habitual misdemeanor assault—based on the underlying offense of assault on a female,[1] (2)

1. "A person commits the offense of habitual misdemeanor assault if that person violates any of the provisions of G.S. 14-33 and causes physical injury, or G.S. 14-34, and has two or more prior convictions for either misdemeanor or felony assault, with the earlier of the two prior convictions occurring no more than 15 years prior to the date of the current violation." N.C.G.S. § 14-33.2 (2019).

assault by strangulation, (3) second-degree sexual offense, and (4) second-degree rape. The case came on for trial in Superior Court, Forsyth County, on 15 August 2016.

Prior to opening statements, the State informed the trial court of a potential *Harbison*-related issue regarding defendant's statements to law enforcement officers during his interview, and the following conversation ensued:

> [THE STATE]: The only other thing I would mention, and this would—just in anticipation opening [sic] statement, the defendant did make some admissions in his statement to law enforcement. I don't know if any of that is something that defense counsel is going to address in opening but if so we probably need to have an inquiry regarding—
>
> THE COURT: *Harbison*.
>
> [THE STATE]: Right—admissions prior to.
>
> The trial court then engaged in the following exchange with defense counsel:
>
> THE COURT: Does the defense have any *Harbison* issues?
>
> [DEFENSE COUNSEL]: Not immediately, Your Honor. That's not something I was expecting yet.
>
> THE COURT: Are you expecting to make any comments in your opening with regard to admissions?
>
> [DEFENSE COUNSEL]: Well, Judge, we have a lot to say about how and why he was interrogated which may brush up against—
>
> THE COURT: Well, can you get more specific than that. Because I want to make sure your client understands that the State has the burden to prove each and every element of each claim and if you're going to step into an admission during opening then I need to make sure that he understands that and he's authorized you to do that.
>
> [DEFENSE COUNSEL]: Not in opening, I can stipulate to that.
>
> THE COURT: Well—okay. Let's rereview that when we get back from lunch. . . .

No other discussion of any *Harbison*-related issues occurred on the record during the remainder of the trial. The State presented testimony from Leonard, Leonard's mother, Jackson, four law enforcement officers and two detectives with the Winston-Salem Police Department, two forensic services technicians from the Winston-Salem Police Department and the forensics services squad supervisor, a nurse and a physician's assistant from the Forsyth Medical Center emergency department who treated Leonard's physical injuries, and a nurse from the Forsyth Medical Center who performed a sexual assault examination on Leonard. Defendant did not present any evidence at trial.

During his closing argument, defense counsel referred to defendant's 17 February 2015 videotaped interview with law enforcement officers, which had been entered into evidence by the State and played for the jury during the State's case in chief. Specifically, defense counsel stated the following:

> Now, the [State] went to great length to use the defendant's statements. These are his words, what he said. Well, let's start with the conditions under which he gave those statements. 9:00 at night, surrounded by cops, pulled off the street to make a voluntary statement. He goes in. He starts talking to them about the moped, which was all a ruse as we know, and indicates he's had a few beers but they ask him "you want to talk? Sure I'll talk. I want to help you out any way I can," is what he kept saying. You heard him admit that things got physical. You heard him admit that he did wrong, God knows he did. They got in some sort of scuffle or a tussle or whatever they want to call it, she got hurt, he felt bad, and he expressed that to detectives. Now, they run with his one admission and say "well, then everything Ms. Leonard—everything else Ms. Leonard said must be true." Because he was being honest, they weren't honest with him.

Later in his closing argument, defense counsel stated to the jurors that "you may dislike Mr. McAllister for injuring Ms. Leonard, that may bother you to your core but he, without a lawyer and in front of two detectives, admitted what he did and only what he did. He didn't rape this girl." Defense counsel concluded his closing argument by stating the following:

> I asked you at the beginning [to] make the State prove their case, make them. Have they? Anything but conjecture and

> possibility? All I ask is that you put away any feelings you have about the violence that occurred, look at the evidence and think hard. Can you convict this man of rape and sexual offense, assault by strangulation based on what they showed you? You can't. Please find him not guilty.

On 22 August 2016, the jury returned a verdict finding defendant guilty of assault on a female and not guilty of all other charged offenses. The trial court entered judgment on one count of habitual misdemeanor assault[2] and sentenced defendant to a term of fifteen to twenty-seven months imprisonment.

Defendant failed to give notice of appeal following his conviction. On 11 August 2017, however, he filed a petition for writ of certiorari to the Court of Appeals, which was allowed. At the Court of Appeals, defendant argued that his defense counsel improperly conceded his guilt to the assault on a female charge during closing arguments, thereby resulting in a denial of his constitutional right to effective assistance of counsel pursuant to this Court's decision in *Harbison*.

In a divided opinion, the Court of Appeals majority held that defendant was not denied his right to effective assistance of counsel. *State v. McAllister*, 265 N.C. App. 309, 827 S.E.2d 538 (2019). The majority concluded that where "counsel admits an element of the offense, but does not admit defendant's guilt of the offense, counsel's statements do not violate *Harbison* to show a violation of the defendant's Sixth Amendment rights." *Id.* at 317, 827 S.E.2d at 544.

Judge Arrowood dissented, expressing his belief that defendant had shown a per se violation of his right to effective assistance of counsel when defense counsel elected "to highlight specific evidence that defendant physically injured the alleged victim and argued to the jury that defendant honestly admitted to police what he did." *Id.* at 323, 827 S.E.2d at 547 (Arrowood, J., dissenting). Judge Arrowood further stated his view that "[c]onsidering defense counsel's argument in full, it is evident defense counsel acknowledged defendant's guilt on the assault on a female charge in an attempt to cast doubt on the evidence of the more serious charges." *Id.* On 11 June 2019, defendant filed a notice of appeal based upon the dissent with this Court.[3]

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2. Defendant stipulated prior to trial to the existence of two prior assault convictions

3. Defendant also filed a petition for discretionary review in which he sought review of an additional issue, which was denied by the Court..

Analysis

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court held that "the right to counsel is the right to the effective assistance of counsel," *id.* at 686 (citation omitted), and announced that in certain contexts "[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice," *id.* at 692. In *Harbison*, this Court held that defense counsel's admission of his client's guilt to a charged offense during an argument to the jury—without the client's prior consent—was one such example of an act so likely to be prejudicial that it results in per se reversible error. *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507–08.

In the present appeal, defendant contends that this is precisely what occurred at his trial in that his defense counsel impliedly conceded his guilt to the charge of assault on a female without his prior consent. In order to analyze his argument, we deem it instructive to review in some detail both the *Harbison* decision and other cases from this Court applying the principles set out therein to situations in which a defendant's attorney was alleged to have conceded his client's guilt to a charged offense during his argument to the jury.

In *Harbison*, the defendant was charged with the murder of his ex-girlfriend's boyfriend and the assault of his ex-girlfriend after shooting and severely injuring her. *Harbison*, 315 N.C. at 177, 337 S.E.2d at 505–06. The defendant's theory at trial was that he acted in self-defense in shooting the victims, but during closing arguments, his defense counsel stated the following:

> Ladies and Gentlemen of the Jury, I know some of you and have had dealings with some of you. I know that you want to leave here with a clear conscious [sic] and I want to leave here also with a clear conscious [sic]. I have my opinion as to what happened on that April night, and I don't feel that [the defendant] should be found innocent. I think he should do some time to think about what he has done. I think you should find him guilty of manslaughter and not first[-] degree [murder].

Id. at 177–78, 337 S.E.2d at 506 (first and second alterations in original). On appeal, the defendant asserted that defense counsel's admission of his guilt and request that the jury find him guilty of manslaughter constituted ineffective assistance of counsel in violation of his Sixth Amendment rights. *Id.* at 178, 337 S.E.2d at 506.

In addressing the defendant's argument, we noted that "[a]lthough this Court still adheres to the application of the *Strickland* test in claims of ineffective assistance of counsel, there exist 'circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.' " *Id.* at 179, 337 S.E.2d at 507 (quoting *United States v. Cronic*, 466 U.S. 648, 658 (1984)). We proceeded to hold that "when counsel to the surprise of his client admits his client's guilt, the harm is so likely and so apparent that the issue of prejudice need not be addressed." *Id.* at 180, 337 S.E.2d at 507.

Our ruling was based largely on the principle that a defendant has an absolute right to plead not guilty—a decision that must be made knowingly and voluntarily by the defendant himself and only after he is made aware of the attendant consequences of doing so. *Id.* We stated that "[w]hen counsel admits his client's guilt without first obtaining the client's consent, . . . [t]he practical effect is the same as if counsel had entered a plea of guilty without the client's consent" and denied his client the right to have his guilt determined by a jury. *Id.* Accordingly, we concluded that "ineffective assistance of counsel, per se in violation of the Sixth Amendment, has been established in every criminal case in which the defendant's counsel admits the defendant's guilt to the jury without the defendant's consent." *Id.* at 180, 337 S.E.2d at 507–08. As a result, we awarded the defendant a new trial. *Id.* at 180–81, 337 S.E.2d at 508.

We reached a similar result in *State v. Matthews*, 358 N.C. 102, 591 S.E.2d 535 (2004). In *Matthews*, the defendant was indicted for, among other things, first-degree murder. During closing arguments, defense counsel stated the following:

> You have a possible verdict of guilty of second-degree murder. And then the third possibility is not guilty. I've been practicing law twenty-four years and I've been in this position many times. And this is probably the first time I've come up in front of the jury and said *you ought not to even consider that last possibility*.
>
> And I'm not up here and I'm not telling you that that's a possibility. I'm not saying you should find Mr. Matthews not guilty. That's very unusual. And it kind of cuts against the grain of a defense lawyer. But I'm telling you in this case you ought not to find him not guilty because he is guilty of something.

Id. at 106, 591 S.E.2d at 539. Defense counsel later stated that "[w]hen you look at the evidence . . . you're going to find that he's guilty of second-degree murder." *Id.*

In determining that these statements constituted a per se violation of the defendant's constitutional right to effective assistance of counsel, we held that "[b]ecause the record does not indicate defendant *knew* his attorney was going to concede his guilt to second-degree murder, we must conclude defendant's attorney made this concession without defendant's consent, in violation of *Harbison*." *Id.* at 109, 591 S.E.2d at 540. We therefore concluded that the defendant was entitled to a new trial. *Id.* at 109, 591 S.E.2d at 540–41.

The defendant in *State v. Fisher*, 318 N.C. 512, 350 S.E.2d 334 (1986), was indicted for first-degree murder after stabbing the victim. During closing arguments, defense counsel—during the course of describing the elements of various homicide offenses—stated that "[s]econd[-] degree [murder] is the unlawful killing of a human being with no premeditation and no deliberation but with malice, illwill. You heard [the defendant] testify, there was malice there . . . ." *Id.* at 533, 350 S.E.2d at 346. Defense counsel went on to inform the jury that the verdict sheet would enable it to find defendant not guilty, despite the defendant's presence at the scene of the killing. *Id.*

On appeal from his conviction for first-degree murder, the defendant asserted that he had suffered a violation of his constitutional rights under *Harbison* due to the fact that his defense counsel admitted to the jury that the killing was done with malice. *Id.* at 532, 350 S.E.2d at 346. We held that the case was "factually distinguishable from *Harbison* in that the defendant's counsel never clearly admitted guilt" but rather simply "stated there was malice [and] . . . told the jury that they could find the defendant not guilty." *Id.* at 532–33, 350 S.E.2d at 346.

In *State v. Thomas*, 329 N.C. 423, 407 S.E.2d 141 (1991), the defendant was convicted of first-degree murder and first-degree sexual offense. On appeal, he argued that he suffered from ineffective assistance of counsel because his defense counsel conceded that he participated in the charged sexual act without his permission. During closing arguments, defense counsel stated the following:

> Don't let me mislead you to think that I in any way condone what occurred in the relationship in respect to the sexual assault. . . .
>
> Again, let me tell you that I don't in any way condone what [the defendant] did in that respect . . . .

> In fact, it is illegal to do exactly what Dr. Hudson described to you was done in this case, that is, to insert the telephone receiver into her vagina after she was dead. . . . It is the crime of . . . desecrating the body of the person that is dead.

Id. at 441, 407 S.E.2d at 153.

We held that those statements were not an admission of the defendant's guilt as to the sexual offense charge because, "[u]nlike defense counsel in *Harbison*, who admitted his client's guilt and asked the jury to return a verdict of guilty of manslaughter . . . defense counsel here did not admit defendant's guilt to first-degree sexual offense or to any lesser included offense." *Id.* at 442, 407 S.E.2d at 153. We observed that defense counsel had merely informed the jury that the act alleged would only constitute the offense of desecrating a corpse—a crime with which the defendant was not charged. *Id.* at 442, 407 S.E.2d at 153–54.

In *State v. Greene*, 332 N.C. 565, 422 S.E.2d 730 (1992), the defendant was charged with first-degree murder after slapping a child in the head and ultimately killing him. The defendant testified at trial and admitted to slapping the victim but also stated that he did not mean to harm him. *Id.* at 570, 422 S.E.2d at 732. One of the State's witnesses testified that the defendant had told him that he had hit and kicked the child. *Id.* at 573, 422 S.E.2d at 734. During closing argument, defense counsel stated the following:

> [The defendant] didn't have anything to do with me being here. Don't use what I've said and done against him. Wouldn't be right. I've done my best. I've plowed the field. And in my opinion, you probably won't turn him free—find him not guilty. And you very easily, I can see, that that slap was negligent and harder than it ought to have been and at that time, it was reckless disregard, and the judge will charge you on that at the end of those four [sic]— involuntary manslaughter. I don't say you should find that, but I concede—sitting on this jury—but I contend, ladies and gentlemen, there's no premeditation and deliberation.

Id. at 570, 422 S.E.2d at 733.

Upon the conclusion of defense counsel's closing argument, the prosecutor approached the bench and expressed his concern that defense counsel's closing argument may have been improper on the grounds that it constituted an admission of guilt without the defendant's

consent. *Id.* The trial court then asked the defendant if he wanted to give his counsel another opportunity to argue that he was innocent of all charges, and the defendant answered affirmatively. *Id.* at 571, 422 S.E.2d at 733. Defense counsel then addressed the jury as follows:

> Now, again, coming to the close, the defendant contends there is no evidence to find him guilty of first[-]degree murder—that is, got to find all six or five—no premeditation, nobody—nothing showing he even, for a blink of a minute, thought about killing somebody. No deliberation going through his mind. Now is the time to kill him. No malice. No hatred. No deliberately, like a baseball bat as they illustrated in other things. No malice. In fact, all love before and after. All love.
>
> As to voluntary manslaughter, no intent down there. No intent to murder. No reckless disregard of life. Again, all love except the blows and the reflex motion, and it was too hard.
>
> But we don't contend—he didn't know it was going to be too hard. I argue and contend that he didn't know it was going to be too hard. He didn't know what he was doing.
>
> Most of us, up before this, didn't know that a slap on the face could kill anybody. I mean, even a young child. Busted his lip, he may.
>
> Now, it's been some people with nursing training and all, I'm sure. Those are not supposed to be a lot of training, but even involuntary manslaughter.
>
> We contend that [the defendant] ought to leave here a free man. . . .

Id. The defendant was found guilty of first-degree murder.

The defendant argued on appeal that defense counsel—without his consent—had represented to the jury that it should find him guilty of involuntary manslaughter in violation of *Harbison*. In rejecting his argument, we noted that although counsel told the jury that it could find that the "slap was negligent," that it was "harder than it ought to have been," and that "it was reckless disregard," he ultimately stated "I don't say you should find that." *Id.* at 571–72, 422 S.E.2d 733. We explained that there was no per se constitutional violation because "the argument was that the defendant was innocent of all charges but if he were to be

found guilty of any of the charges it should be involuntary manslaughter because the evidence came closer to proving that crime than any of the other crimes charged." *Id.* at 572, 422 S.E.2d at 733–34. Accordingly, we held that "[t]his is not the equivalent of asking the jury to find the defendant guilty of involuntary manslaughter and the rule of *Harbison* does not apply." *Id.* at 572, 422 S.E.2d at 734. We further stated that "[w]e do not find anything . . . that approaches an admission of guilt" because "[t]he clear and unequivocal argument was that the defendant was innocent of all charges." *Id.*

In *State v. Harvell*, 334 N.C. 356, 432 S.E.2d 125 (1993), the defendant was indicted for first-degree murder and convicted of that offense. He contended on appeal that his defense counsel had improperly told the jury that it should find him guilty of voluntary manslaughter. *Id.* at 361, 432 S.E.2d at 127. During closing arguments, defense counsel argued that the defendant was not guilty of first-degree or second-degree murder and then stated the following: "I submit to you that based upon the evidence presented in terms of a criminal offense, that the one that most closely—or the one that is most closely kind [sic] to this is the offense of voluntary manslaughter, that being there was provocation." *Id.* We held that defense counsel's statements did not constitute *Harbison* error because "defendant's counsel never conceded that the defendant was guilty of any crime" and did not say anything that was "the equivalent of admitting that the defendant was guilty." *Id.* at 361, 432 S.E.2d at 128. Instead, counsel simply stated that if the evidence did tend to show that the defendant had committed a crime, then that crime was voluntary manslaughter. *Id.*

The defendant in *State v. Hinson*, 341 N.C. 66, 459 S.E.2d 261 (1995), was convicted of first-degree murder. He argued on appeal that his defense counsel had conceded his guilt during closing argument by referring to "Mr. Brown"—an individual who had testified that he was with the defendant when the killing took place and had taken a plea deal in exchange for his testimony—as being responsible for the murder, thereby implicating the defendant in the crime. *Id.* at 78, 459 S.E.2d at 268. Specifically, defense counsel stated the following:

> Mr. Brown, when you [sic] going to stand up and take responsibility, Mr. Brown? Mr. Brown wasn't a tool. He was the engine. He was the engine that made everything possible. He is the tool without which [the defendant] could not . . . even have gotten out of his yard. But Mr. Brown's going to be home for Christmas apparently.

Id. at 77–78, 459 S.E.2d at 268 (first alteration in original). We held that this case was "wholly distinguishable from *Harbison*" because "nowhere in the record did defense counsel concede that [the] defendant himself committed any crime whatsoever" and that, to the contrary, he maintained throughout the trial that Mr. Brown—rather than the defendant—had killed the victim. *Id.* at 78, 459 S.E.2d at 268.

In *State v. Wiley*, 355 N.C. 592, 565 S.E.2d 22 (2002), the defendant was convicted of first-degree murder and argued on appeal that *Harbison* error had occurred during his defense counsel's opening statement when counsel stated that the defendant was at the scene of the crime and that physical evidence linked him to the scene. *Id.* at 618, 565 S.E.2d at 41. In her opening statement, defense counsel asserted that the identity of the killer and the credibility of the witnesses were the chief issues in the trial. *Id.* Later in her remarks, defense counsel stated the following:

> [DEFENSE COUNSEL:] You will only hear one person testify who was present or anywhere near present at the time that happened, and that person is Alicia Doster. She was fourteen at the time it happened. She was a runaway who stole her mother's car and went to stay in an abandoned house in the neighborhood. It was a house where many of the young kids stayed and hung out. . . .
>
> There's evidence that there was smoking and drinking and some drug use going on at that house. Now, she'll tell you that three people were involved and, you know, that's not disputed. Three people were apparently involved in that. The first one is Alicia Doster, and she has made a deal with the State of North Carolina to testify in this case. . . .
>
> Now, the second person who you'll hear about is [the defendant], and he's sitting in this courtroom today . . . .
>
> Now, there is one [more] person who you won't see here, you won't hear from him, you won't see him, you won't hear anything from him at all, and that is Justin Pallas. And he's not present in the courtroom and he won't offer any testimony at all.
>
> . . . .

> [DEFENSE COUNSEL]: He was present at the time that all of this happened, and Miss Doster will certainly testify to that. . . .
>
> . . . .
>
> You will hear and see plenty of physical evidence, as well. *Not much of this physical evidence will put [the defendant] at the scene of the crime* or at the scene where the automobile was disposed of. There will be no fingerprints on the car that belonged to [the defendant]. You will hear that six cigarette butts were found in the car. Three of those belonged to two different males who were not identified. Don't know who put those cigarettes in the car or when. Don't know whose they were.
>
> . . . .
>
> . . . Nothing else was found in the scene—at the scene that belonged to [the defendant]. None of [the defendant's] fingerprints were found on the alleged murder weapon.

Id. at 618–19, 565 S.E.2d at 41–42 (first and third alterations in original) (emphasis added).

In rejecting the defendant's argument based on *Harbison*, we noted that "[a]dmitting a fact is not equivalent to an admission of guilt." *Id.* at 620, 565 S.E.2d at 42 (citing *State v. Strickland*, 346 N.C. 443, 454, 488 S.E.2d 194, 200 (1997)). We further determined that "[a]lthough it is arguable that defense counsel signaled [that] some physical evidence would be presented linking defendant to [the victim's] car, counsel made it clear that such evidence was of dubious validity because its origin was unknown." *Id.* at 619, 565 S.E.2d at 42. Accordingly, we held that "[p]laced in context, [defense counsel's] statements hardly constitute an admission." *Id.*

In *State v. Roache*, 358 N.C. 243, 595 S.E.2d 381 (2004), the defendant was convicted of five counts of first-degree murder. On appeal, he argued that a *Harbison* violation had occurred because during opening statements, his counsel recounted how the defendant had shot another man in the head during the same crime spree that included the killings for which he was on trial. *Id.* at 278, 595 S.E.2d at 404–05. We held that defense counsel's statement was not a per se violation of the defendant's right to effective assistance of counsel. *Id.* at 284, 595 S.E.2d at 408. We noted that "[t]he act in *Harbison* that this Court found merited a new

trial was counsel's admission of legal guilt as to the crime for which the defendant had been indicted and for which the defendant was being tried." *Id.* at 283, 595 S.E.2d at 408. As such, because the shooting referenced by defense counsel in the opening statement "was not at issue in this trial . . . this defendant was not harmed in the same manner as the defendant in *Harbison*." *Id.*

The defendant in *State v. Gainey*, 355 N.C. 73, 558 S.E.2d 463 (2002), was indicted for first-degree murder, first-degree kidnapping, and robbery with a dangerous weapon. While making his opening statement and closing argument to the jury, defense counsel noted the defendant's involvement in the events surrounding the death of the victim and argued that "if he's guilty of anything, he's guilty of accessory after the fact. He's guilty of possession of a stolen vehicle." *Id.* at 93, 558 S.E.2d at 476. On appeal following a conviction on all charges, the defendant argued that he was denied the right to effective assistance of counsel because his defense counsel conceded his guilt without first receiving his express permission to do so. *Id.* at 92, 558 S.E.2d at 476. We held that defense counsel's statements did not rise to the level of *Harbison* error. *Id.* at 93, 558 S.E.2d at 476.

> [A]rgument that the defendant is innocent of all charges, but if he is found guilty of any of the charges it should be of a lesser crime because the evidence came closer to proving that crime than any of the greater crimes charged, is not an admission that the defendant is guilty of anything, and the rule of *Harbison* does not apply.
>
> . . . .
>
> In the present case, defense counsel never conceded that defendant was guilty of any crime. Counsel merely noted defendant's involvement in the events surrounding the death of the victim, arguing that "if he's guilty of anything, he's guilty of accessory after the fact. He's guilty of possession of a stolen vehicle." This was hardly the equivalent of admitting that defendant was guilty of the crime of murder. Defendant has taken defense counsel's statements out of context to form the basis of his claim, and he fails to note the consistent theory of the defense that defendant was not guilty.

Id. at 92–93, 558 S.E.2d at 476.

In *State v. Campbell*, 359 N.C. 644, 617 S.E.2d 1 (2005), the defendant was convicted of first-degree murder, and on appeal he raised a *Harbison* claim after his defense counsel conceded his guilt to the lesser-included offense of second-degree murder without his prior consent. *Id.* at 694, 617 S.E.2d at 32. During closing arguments, defense counsel stated the following:

> And what I'm telling you folks right now, that right there is enough for you to have reasonable doubt. The fact that you have one expert who is saying [sic] can't form the specific intent to either rob or kill and the [S]tate's own expert comes in and says, I can't rule it out 100 percent, there's your reasonable doubt right there. That's all you need. That's the key to this case. That's all you need. You weigh the evidence out. You make that determination. But right there is all the reasonable doubt you would need in this case.
>
> . . . .
>
> Again, I submit to you, as I think I said earlier, not every homicide is a first[-]degree murder case, and there's plenty of second[-]degree murder cases out there that are a whole lot bloodier and a whole lot more gory and a whole lot more horrific than first[-]degree murder cases. *The only difference is a second[-]degree murder case lacks that specific intent element, and I submit to you that's where we're at in this case, folks.* There is so much going on, there is so much going on in this case. There is plenty of hooks for you to hang your hat on and find reasonable doubt in this case.

Id. at 694–95, 617 S.E.2d at 32. We held that the above-quoted statement was "distinguishable from that made by the *Harbison* attorney and does not amount to ineffective assistance" because defense counsel was not conceding guilt, but rather "was arguing to the jury that[ ] without specific intent, the most serious crime for which defendant could be convicted would be second-degree murder." *Id.* at 696, 617 S.E.2d at 33.

Finally, the defendant in *State v. Goss*, 361 N.C. 610, 651 S.E.2d 867 (2007), was convicted of first-degree murder. The sole issue for resolution at trial was whether he was guilty of first-degree or second-degree murder. During closing arguments, defense counsel stated that "[defendant's] statement alone guarantees he'll serve a substantial amount of

time in prison and face the terrible consequences of a *first[-]degree* murder conviction." *Id.* at 622, 651 S.E.2d at 875 (first alteration in original). At the end of the closing argument, defense counsel asked the jury to "return the verdict that the evidence supports, *guilty of second[-]degree murder*." *Id.* at 625, 651 S.E.2d at 876.

The defendant asserted on appeal that his defense counsel's reference to first-degree murder in the initial statement quoted above constituted a concession of his guilt of that crime in violation of *Harbison*. *Id.* at 622–23, 651 S.E.2d at 875. We held that there was no error under *Harbison* because "the only issue even contested at defendant's trial was whether he had committed first-degree or second-degree murder, and trial counsel's entire closing argument was directed toward undercutting the first two theories of first-degree murder advanced by the State." *Id.* at 625, 651 S.E.2d at 876. With regard to defense counsel's assertion that the defendant was guaranteed to suffer the consequences of a *first-degree* murder conviction, we noted that "it appears that [defense counsel's] reference to first-degree murder was accidental and went unnoticed," and we stated that this Court would not "interpret *Harbison* to allow a defendant to seize upon a *lapsus linguae* uttered by trial counsel in order to be awarded a new trial." *Id.*

* * *

Having reviewed this Court's case law applying *Harbison* in the context of concessions of guilt alleged to have been made by defense counsel during closing argument, we must now apply those principles to the present case. Defendant's argument under *Harbison* relates to his attorney's statements to the jury during closing argument that were relevant to the offense of assault on a female—the only one of the four charges for which he was convicted. "The elements of an assault on a female are (1) an assault (2) upon a female person (3) by a male person (4) who is at least eighteen years old." *State v. Wortham*, 318 N.C. 669, 671, 351 S.E.2d 294, 296 (1987) (citing N.C.G.S. § 14-33(b)(2)). The trial court instructed the jury that in order to convict defendant of assault on a female, the State was required to prove that (1) defendant "intentionally assaulted the alleged victim by hitting her"; (2) that "the alleged victim was a female person"; and (3) that the "defendant was a male person at least 18 years of age."

Based on our review of the trial transcript, it is readily apparent that the goal of defense counsel in his closing argument was to rebut the State's evidence in support of the rape, sexual offense, and assault by strangulation charges—offenses that carried penalties significantly

greater than that for the crime of assault on a female. During his closing argument, defense counsel never expressly mentioned the charge of assault on a female but repeatedly addressed the other three charges against defendant. At the conclusion of the closing argument, he asked the jury to find defendant not guilty of the charges of "rape[,] sexual offense, [and] assault by strangulation." Once again, no mention was made by him of the assault on a female charge.

Thus, this is not a case like *Matthews* or *Harbison* itself in which the defendant's attorney expressly asked the jury to find him guilty of a specific charged offense. We agree with defendant, however, that a *Harbison* violation is not limited to such instances and that *Harbison* should instead be applied more broadly so as to also encompass situations in which defense counsel impliedly concedes his client's guilt without prior authorization.

The Court of Appeals reached a similar conclusion in *State v. Spencer*, 218 N.C. App. 267, 720 S.E.2d 901 (2012). In *Spencer*, the defendant was convicted of eluding arrest with a motor vehicle, assault with a deadly weapon on a government official, and resisting a public officer. *Id.* at 267, 720 S.E.2d at 902. The defendant argued on appeal that his defense counsel had conceded his guilt to the charges of resisting a public officer and eluding arrest by making certain admissions to the jury without obtaining his prior consent. *Id.* at 275, 720 S.E.2d at 906. During closing arguments, counsel stated that the defendant "chose to get behind the wheel after drinking, and he chose to run from the police" and that the law enforcement officer "was already out of the way and he just kept on going, kept running from the police." *Id.* The Court of Appeals determined that defense counsel's "statements cannot be construed in any other light than admitting the defendant's guilt." *Id.* at 276, 720 S.E.2d at 906.

We believe that defense counsel's statements here similarly amounted to an implied admission of defendant's guilt of the crime of assault on a female. During the closing argument, counsel stated the following with regard to defendant's videotaped interview: "You heard him admit that things got physical. You heard him admit that he did wrong. God knows he did." Shortly thereafter, he stated with regard to defendant's videotaped interview that defendant was "being honest" with law enforcement officers about his altercation with Leonard. Later in the closing argument, defense counsel stated the following: "Jury, what I'm asking you to do is you may dislike Mr. McAllister for injuring Ms. Leonard, that may bother you to your core but he, without a lawyer and

in front of two detectives, admitted what he did and only what he did." At the conclusion of the closing argument, he stated the following:

> I asked you at the beginning [to] make the State prove their case, make them. Have they? Anything but conjecture and possibility? All I ask is that you put away any feelings you have about the violence that occurred, look at the evidence and think hard. Can you convict this man of rape and sexual offense, assault by strangulation based on what they showed you? You can't. Please find him not guilty.

The above-quoted statements are problematic for several reasons. First, defense counsel attested to the accuracy of the admissions made by defendant in his videotaped statement by informing the jurors that defendant was "being honest." During that interview, defendant admitted—among other things—that he (1) pushed Leonard to the ground outside of the gas station; (2) "backhanded" her in the face; (3) "smacked her in the lip"; (4) "grabbed her in the mouth" and also bit her hand; and (5) "smacked [her] ass up" and that he "can take the rap for that." By representing to the jury that defendant was "being honest" when he made those statements during the interview, defense counsel vouched for their truth, and, as such, there was no reason for the jury to question the validity of any of defendant's admissions.

Second, defendant's attorney not only reminded the jury that defendant had admitted he "did wrong" during the altercation in which Leonard got "hurt," but defense counsel then proceeded to also state his own personal opinion that "God knows he did [wrong]"—thereby implying that there was no justification for defendant's use of force against Leonard. Shortly thereafter, he acknowledged that the jurors might "dislike [defendant] for injuring Ms. Leonard" and that defendant's actions "may bother you to your core." He also referred to the "violence" that had occurred during the altercation.

Finally, at the very end of his closing argument, defense counsel asked the jury to find defendant not guilty of every offense for which he had been charged except for the assault on a female offense. By virtue of defense counsel overtly seeking a not guilty verdict as to the three more serious charges against defendant, yet conspicuously omitting mention of the assault on a female charge—indeed, by not expressly mentioning that charge at all during the entire closing argument—the only logical inference in the eyes of the jury would have been that defense counsel was implicitly conceding defendant's guilt as to that charge.

This Court's post-*Harbison* case law has suggested that a per se violation of a defendant's right to effective assistance of counsel can occur where defense counsel's statements are the functional equivalent of an outright admission of the defendant's guilt as to a charged offense. *See Strickland*, 346 N.C. at 454, 488 S.E.2d at 200 ("Defense counsel's statements were not the equivalent of asking the jury to find defendant guilty of any charge, and therefore, *Harbison* does not control."); *Harvell*, 334 N.C. at 361, 432 S.E.2d at 128 (holding that there was no *Harbison* error where defense counsel's statements were "not the equivalent of admitting that the defendant was guilty of any crime"); *Greene*, 332 N.C. at 572, 422 S.E.2d at 734 ("This is not the equivalent of asking the jury to find the defendant guilty[,] . . . and the rule of *Harbison* does not apply."). Today, we expressly hold that such an implied admission of guilt can, in fact, constitute *Harbison* error.

The Court of Appeals majority applied an overly strict interpretation of *Harbison* here by confining its analysis to (1) whether defense counsel had expressly conceded defendant's guilt of the assault on a female charge; or (2) whether counsel's statements "checked the box" as to each element of the offense.[4] We believe, however, that such an approach reflects too cramped of a construction of *Harbison*. Although an overt admission of the defendant's guilt by counsel is the clearest type of *Harbison* error, it is not the exclusive manner in which a per se violation of the defendant's right to effective assistance of counsel can occur. In cases where—as here—defense counsel's statements to the jury cannot logically be interpreted as anything other than an implied concession of guilt to a charged offense, *Harbison* error exists unless the defendant has previously consented to such a trial strategy. In such cases, the defendant is prejudiced in the same manner and to the same degree as if the admission of guilt had been overtly made. Thus, our decision in this case is faithful to the rationale underlying *Harbison*.

We recognize that on the facts of this case, such a trial strategy may well have been in defendant's best interests given his acquittal of the three most serious charges against him. But that does not change the fact that under *Harbison* and its progeny defense counsel was required to obtain the informed consent of defendant before embarking on such a strategy that implicitly acknowledged to the jury his guilt of a separately charged offense.

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4. For example, the Court of Appeals majority noted that defense counsel did not concede that the age requirement for the offense of assault on a female had been satisfied. However, the age of defendant was not in dispute.

Finally, we emphasize that a finding of *Harbison* error based on an implied concession of guilt should be a rare occurrence. However, the unique circumstances contained in the record before us make this the unusual case in which such a finding is appropriate.

In reaching a different result, the dissent falls into the trap of conflating the *Harbison* issue with the entirely separate issue of whether defense counsel's strategy was effective in terms of obtaining an acquittal on the more serious offenses with which defendant was charged. In so doing, the dissent misses the point. As noted above, the relevant question under *Harbison* is *not* whether conceding defendant's guilt as to the least serious offense was a sound trial strategy. Rather, our inquiry must focus on whether defense counsel admitted defendant's guilt to a charged offense without first obtaining his consent.

The dissent fails in its attempt to characterize defense counsel's statements as a request for the jury to find defendant not guilty of the assault on a female charge. This failure is hardly surprising given that defense counsel—among other things—affirmed the veracity of defendant's statements in his videotaped interview in which he admitted to having engaged in assaultive conduct toward Leonard and then conceded that defendant had acted wrongfully. The unmistakable message sent by defense counsel to the jury was that defendant was, in fact, guilty of the assault on a female charge—a message that was magnified by defense counsel's failure to ask for a not guilty verdict as to that charge as he did for the other three charges. The dissent's interpretation of defense counsel's closing argument is based on a tortured construction of the words used by defendant's attorney—words that could not rationally have been understood by the jury as anything other than a concession of defendant's guilt as to this charge.

Finally, the dissent makes the assertion that as a result of our decision today defense attorneys will be hesitant to engage in the strategy of acknowledging that their client engaged in some form of moral wrongdoing in the hope of both enhancing their own credibility and personalizing the defendant in the eyes of the jury. This reluctance will exist, the dissent predicts, due to a fear that their representation will be deemed to be constitutionally deficient if they employ such an approach. The dissent's concern is misguided, however, as nothing in our decision today precludes such a strategy. But if that tactic includes either an explicit or implicit admission of the defendant's guilt of a charged offense, then prior consent from the defendant must be obtained. It is the defendant—not his attorney—whose liberty is placed at risk as a result of such a strategic decision.

* * *

Having determined that defense counsel impliedly conceded defendant's guilt of the offense of assault on a female, the only remaining issue is whether he did so without defendant's prior consent. The record reflects that before trial, the State advised the trial court of the potential for a *Harbison* issue in light of the statements contained in defendant's videotaped interview. In response, the trial court made a brief inquiry to defense counsel as to whether his opening statement was likely to trigger any *Harbison*-related concerns, noting that defendant's consent would be required before any admissions of guilt could be made to the jury. After defense counsel replied that he would not be making any such admissions during his opening statement, the trial court stated its intention to revisit the issue following the lunch recess. The record does not reveal any further discussion taking place during the remainder of the trial as to the possibility of *Harbison*-related issues arising.

This Court has stated "that an on-the-record exchange between the trial court and the defendant is the preferred method of determining whether the defendant knowingly and voluntarily consented to an admission of guilt during closing argument," but we have also "declined to define such a colloquy as the sole measurement of consent." *State v. Thompson*, 359 N.C. 77, 119–20, 604 S.E.2d 850, 879 (2004) (citing *State v. McDowell*, 329 N.C. 363, 386–87, 407 S.E.2d 200, 213 (1991)). Moreover, we have made clear that the absence of any indication in the record of defendant's consent to his counsel's admissions will not—by itself—lead us to "presume defendant's lack of consent." *State v. Boyd*, 343 N.C. 699, 722, 473 S.E.2d 327, 339 (1996); *see State v. House*, 340 N.C. 187, 196, 456 S.E.2d 292, 297 (1995) ("This Court will not presume from a silent record that defense counsel argued defendant's guilt without defendant's consent.").

As a result, we believe that the appropriate remedy is to remand this case to the Superior Court, Forsyth County, for an evidentiary hearing to be held as soon as practicable for the sole purpose of determining whether defendant knowingly consented in advance to his attorney's admission of guilt to the assault on a female charge. *See State v. Morganherring*, 350 N.C. 701, 713, 517 S.E.2d 622, 630 (1999); *see also State v. Thomas*, 327 N.C. 630, 631, 397 S.E.2d 79, 80 (1990). Following the evidentiary hearing, the trial court shall expeditiously make findings of fact and conclusions of law and enter an order. The trial court shall then certify the order, the findings of fact and conclusions of law, and the transcript of the hearing to this Court. *See Thomas*, 327 N.C. at 631, 397 S.E.2d at 80.

Conclusion

We reverse the decision of the Court of Appeals and remand with instructions as set forth above.

REVERSED AND REMANDED.

Justice NEWBY dissenting.

A criminal defense attorney may concede that a defendant has engaged in bad behavior without admitting that the defendant has committed one of the crimes charged. Indeed, it may be in the defendant's best interests for his attorney to do so. Admitting to the jury that a defendant has behaved poorly can enhance defense counsel's credibility and help the jury better understand what is really at issue in a case. The majority's decision today limits defense counsel's ability to pursue this common strategy and starts the Court down a slippery slope with no obvious stopping point. The majority, content to refrain from considering whether defense counsel's statements actually harmed defendant, leaps beyond our precedent and says we must assume the statements were prejudicial. Such an assumption should be reserved for the rare, blatant case in which defense counsel makes an explicit admission of guilt or uses words that constitute the functional equivalent of such an explicit admission. That sort of admission did not occur in this case. Instead, defendant's counsel merely noted that defendant did wrong, but ultimately urged the jury to find him not guilty of all charges. A successful ineffective assistance of counsel claim based on facts like those at issue here requires proof of prejudice in accordance with the *Strickland* standard. I respectfully dissent.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to effective assistance of counsel. In *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), the Supreme Court of the United States held that a defendant's right to effective assistance of counsel is violated when the defense counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and when those errors deprived the defendant of a fair trial. The Court left open the possibility, though, that in some cases a defense counsel's error is so egregious that prejudice to the defendant may be presumed. *Id.* at 692, 104 S. Ct. at 2067.

In *State v. Harbison*, 315 N.C. 175, 180, 337 S.E.2d 504, 507 (1985), this Court, recognizing a defendant's right to plead not guilty, explained

that prejudice to a defendant may be presumed when defense counsel concedes a defendant's guilt to the jury without the defendant's consent. When defense counsel does so, "the harm [to the defendant] is so likely and so apparent that the issue of prejudice need not be addressed." *Id.* In *Harbison*, this Court presumed prejudice to the defendant because defense counsel explicitly recommended that the jury find the defendant guilty of one of the crimes charged. *Id.* at 177–78, 337 S.E.2d at 506.

The central issue in this case is whether defense counsel's statements were so likely to harm defendant that the issue of prejudice need not even be addressed. *Id.* at 180, 337 S.E.2d at 507. According to this Court's precedent, such a result only occurs if defense counsel explicitly, or through the functional equivalent of an explicit statement, admits the defendant's guilt of a charged offense. *State v. Strickland*, 346 N.C. 443, 454, 488 S.E.2d 194, 200 (1997) (holding that *Harbison* did not control because "[d]efense counsel's statements were not the equivalent of asking the jury to find defendant guilty of any charge").

Defense counsel's statements in this case do not rise to that level of egregiousness. In fact, defense counsel's overall strategy in closing argument appears sound.[1] Defendant faced multiple serious charges, including charges of rape, sexual offense, and assault by strangulation, with indisputable facts that he had in fact injured the victim. Thus, the challenge to defense counsel was to help the jury appreciate its legal duty while at the same time personalize his client. During closing argument, defense counsel noted the following to the jury: "You heard [defendant] admit that things got physical. You heard him admit that he did wrong. God knows he did." Defense counsel also noted that the jury "may dislike [defendant] for injuring Ms. Leonard." Finally, at the end of his argument, he told the jury the following:

> I asked you at the beginning [to] make the State prove their case, make them. Have they? Anything but conjecture and possibility? All I ask is that you put away any feelings you have about the violence that occurred, look at the evidence and think hard. Can you convict this man

1. The majority asserts that emphasizing the soundness of defense counsel's strategy misses the point. Certainly it is true that defense counsel may not directly admit a defendant's guilt to the jury without the defendant's consent, no matter how good of a strategy it may be. But in this case defense counsel clearly did not admit defendant's guilt in that manner. The question then is whether counsel's statements were still so egregious that harm to defendant may be presumed without further inquiry. In cases like this one when a *Harbison* violation is not obvious, the *Strickland* analysis applies and the soundness of defense counsel's trial approach matters

> of rape and sexual offense, assault by strangulation based on what they showed you? You can't. Please find him not guilty.

The majority holds that through these statements defense counsel impliedly admitted defendant's guilt to the charge of assault on a female. That decision contradicts both the language in which defense counsel's argument is couched and this Court's repeated application of *Harbison*.

This Court has rejected almost every challenge brought under *Harbiso*n, because rarely are defense counsel's statements so egregious that harm to the defendant can simply be assumed without any further inquiry. The only instances in which we have held that such a violation occurred have been when defense counsel specifically and explicitly urged the jury to find the defendant guilty of a crime. *See Harbison*, 315 N.C. at 177–78, 337 S.E.2d at 506 (addressing statements made by defense counsel telling the jury that "I don't feel that [the defendant] should be found innocent. I think he should do some time to think about what he has done. I think you should find him guilty of manslaughter and not first[-]degree [murder]"); *State v. Matthews*, 358 N.C. 102, 106, 591 S.E.2d 535, 539 (2004) (addressing a statement made by defense counsel telling the jury that "you ought not to find him not guilty because he is guilty of something").

But in cases in which defense counsel merely admits that the defendant committed a moral wrong, or only concedes the existence of an element of an offense, no *Harbison* violation has occurred. In *State v. Fisher*, 318 N.C. 512, 350 S.E.2d 334 (1986), the defendant was on trial for first-degree murder. Defense counsel admitted to the jury that the defendant acted with malice, an element of second-degree murder. *Id.* at 533, 350 S.E.2d at 346. Nevertheless, this Court held that there was no per se violation of the right to effective assistance of counsel under *Harbison* because the defense counsel never admitted guilt but instead only admitted an element of a crime while ultimately maintaining the defendant's innocence. *Id.* at 532–33, 350 S.E.2d at 346.

In *State v. Thomas*, 329 N.C. 423, 441, 407 S.E.2d 141, 153 (1991), defense counsel expressed to the jury multiple times that he did not condone the defendant's behavior and even described the defendant's actions as a sexual assault. This Court held that there was no *Harbison* violation because defense counsel did not specifically admit that the defendant committed one of the crimes charged—first-degree murder or first-degree sexual offense. *Id.* at 442, 407 S.E.2d at 153–54.

Finally, in *State v. Greene*, 332 N.C. 565, 573, 422 S.E.2d 730, 734 (1992), the defendant was on trial for first-degree murder after slapping a child and killing him. Defense counsel first conceded that the jury would likely find that the defendant acted with reckless disregard for the victim's life, but he later asserted that the defendant did not actually act in that manner. *Id.* at 570–71, 422 S.E.2d at 733. This Court held that there was no *Harbison* violation because even though defense counsel said that the jury may find reckless disregard by the defendant, defense counsel did not ultimately argue that the jury should do so. *Id.* at 571–72, 422 S.E.2d at 733–34.

In this case defense counsel did not claim that defendant should be found guilty of assault on a female. Nor did his statements functionally constitute a request that the jury should so find. Defense counsel did state that he thought defendant "did wrong" by engaging in a physical altercation with Leonard. But to say an accused person did something wrong is not the functional equivalent of saying that the person committed one of the crimes charged. And, looking at his statements more comprehensively, defense counsel did not insinuate that defendant committed one of the crimes charged. Shortly before stating that defendant "did wrong," defense counsel explained that the case simply involved "two people in a new relationship that got drunk and got in a fight and an argument, it's as basic as that."

Indeed, defense counsel was pursuing a reasonable and effective strategy of jury persuasion. Defendant was charged with several serious offenses. In such cases it is often in a defendant's best interests for his counsel to concede to the jury that the defendant has behaved poorly. Doing so can enhance defense counsel's credibility and enable counsel to direct the jury's attention not to the question of whether the defendant has done anything morally wrong, but whether the defendant has committed one of the charged crimes. In this case that strategy appears to have been effective: the jury acquitted defendant of all of the most serious charged offenses. So, viewed in context, defense counsel's statements of defendant's wrongdoing and of defendant's injuring Leonard simply conceded the undisputed facts—that defendant's conduct was far from perfect and that defendant was, along with Leonard herself, involved in activity that resulted in Leonard's injuries. Those concessions did not admit defendant's guilt of any of the charges.

Further, defense counsel did not admit defendant's guilt of assault on a female simply by failing to emphasize defendant's innocence of that crime during the closing argument. At the end of his closing argument,

defense counsel specifically expressed that the jury could not return a guilty verdict on the charges of rape, sexual offense, or assault by strangulation. The majority decides that the omission of the assault on a female charge from that list is glaring and obvious and would cause a jury to believe that defense counsel thought the jury should return a guilty verdict on that charge. That analysis is purely speculative and fails to take the statement in context and in accordance with the manner in which it is couched. First, it is reasonable to suspect that an attorney may omit one item from a list of charges simply by accident. And it is quite possible that the jury did not even notice the omission. Second, defense counsel at the end of his closing argument appears to have urged the jury to return a verdict of not guilty, without excepting any of the charges from that request. Naturally understood, defense counsel's statements during closing argument urged not-guilty verdicts across the board. And, in any event, it was not unreasonable for defense counsel to especially emphasize the importance of returning not-guilty verdicts on the most serious offenses charged.

The majority also emphasizes that defense counsel told the jury that defendant had been "honest" to police, in reference to a conversation in which defendant told police about various acts of physical violence he committed against Leonard. First, this statement comports with what appears to have been defense counsel's overall theory of the case—that defendant and Leonard got in a fight, that defendant committed a moral wrong, but that defendant is innocent of the crimes charged. And, again, this Court has held that even admissions by defense counsel of elements of offenses do not amount to admissions of the defendant's guilt and so are not per se reversible error under *Harbison*. *See*, *e.g.*, *Fisher*, 318 N.C. at 532–33, 350 S.E.2d at 346. In fact, one wonders what the majority believes defense counsel should have said about defendant's statements to police. Because this statement by defense counsel was not *Harbison* error, we cannot say that this is the sort of case in which no inquiry into prejudice is required.

Ultimately, of course, the majority holds that it is the *combination* of all of these decisions or mishaps by defense counsel that constituted an assertion to the jury that defendant is guilty of assault on a female. However, all of that together is still not enough to prove a *Harbison* violation. The point of our holding in *Harbison* is that in the rare case a defense counsel's statements are so egregious that harm to the defendant is near certain and it would be a waste of judicial resources to determine whether the defendant was actually prejudiced. *See Harbison*, 315 N.C. at 179, 337 S.E.2d at 507 (quoting *United States v. Cronic*, 466 U.S. 648,

658, 104 S. Ct. 2039, 2046 (1984)) ("Although this Court still adheres to the application of the *Strickland* test in claims of ineffective assistance of counsel, there exist 'circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.' "). So, the question is not whether defense counsel's actions could have led the jury to believe that defendant was guilty of assault on a female; the question is whether defense counsel's statements were so serious, because they were the functional equivalent of a direct and explicit admission of defendant's guilt, that significant harm to defendant is self-evident. Never have we found a *Harbison* error on facts as tenuous as those on which the majority rests its holding today.

Defense attorneys have a limited collection of tools at their disposal when in front of juries. One of these is to admit obvious mistakes made by the defendant. Doing so enhances the defense counsel's credibility, personalizes the defendant, and helps focus the jury's attention on the legal questions it must answer. Before today defense counsel could leverage their experience and discretion to pursue such a strategy as long as they did not admit the defendant's guilt without his consent. Today the majority substantially removes this tool from defense attorneys. Moving forward, defense counsel will hesitate to pursue this reasonable strategy out of fear that their representation will be ruled constitutionally deficient. Here, defense counsel's statements, viewed in their context and their entirety, do not admit defendant's guilt of any of the offenses with which he was charged. The majority wrongly holds that *Harbison* error occurred and thus presumes without further consideration that the fundamental fairness of defendant's trial was impaired. That conclusion is simply inconsistent with this Court's jurisprudence and excuses defendant from making a showing of prejudice in accordance with *Strickland* when he should be required to do so. The decision of the Court of Appeals should be affirmed.

I respectfully dissent.

Justice ERVIN joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
CHRISTINA SHEA WALTERS

No. 548A00-2

Filed 25 September 2020

On writ of certiorari pursuant to N.C.G.S. § 7A-32(b) to review an order dismissing defendant's motion for appropriate relief filed pursuant to the Racial Justice Act entered on 25 January 2017 by Judge W. Erwin Spainhour in Superior Court, Cumberland County. Heard in the Supreme Court on 26 August 2019.

Joshua H. Stein, Attorney General, by Danielle Marquis Elder, Senior Deputy Attorney General, and Jonathan P. Babb, Special Deputy Attorney General, for the State-appellee.

Shelagh R. Kenney and Malcolm Ray Hunter Jr. for defendant-appellant.

James E. Coleman Jr. for Charles Becton, Charles Daye, Valerie Johnson, Irving L. Joyner, Floyd B. McKissick Jr., Cressie H. Thigpen Jr., and Fred J. Williams, amici curiae.

Jeremy M. Falcone, Paul F. Khoury, Robert L. Walker, and Madeline J. Cohen for Former State and Federal Prosecutors, amicus curiae.

Carlos E. Mahoney, Jin Hee Lee, and W. Kerrel Murray for NAACP Legal Defense and Educational Fund, Inc., amicus curiae.

Janet Moore for National Association for Public Defense, amicus curiae.

James E. Williams Jr., Burton Craige, and Bidish Sarma for North Carolina Advocates for Justice, amicus curiae.

Grady Jessup for North Carolina Association of Black Lawyers, amicus curiae.

Cynthia F. Adcock for North Carolina Council of Churches, amicus curiae.

Lisa A. Bakale-Wise and Irving Joyner for North Carolina State Conference of the NAACP, amicus curiae.

Professors Robert P. Mosteller & John Charles Boger, amici curiae.

Robert P. Mosteller for Retired Members of the North Carolina Judiciary, amici curiae.

Joseph Blocher for Social Scientists, amici curiae.

PER CURIAM.

For the reasons stated in *State v. Robinson*, No. 411A94-6, 2020 WL 4726680 (N.C. Aug. 14, 2020), the decision of the trial court is vacated and this case is remanded to the Superior Court, Cumberland County, for the reinstatement of defendant's sentence of life imprisonment without parole.

VACATED AND REMANDED.

Justice ERVIN concurring in the result.

If the Court were addressing for the first time the issue of whether the trial court's order should be reversed and the sentence of life imprisonment imposed upon defendant by Judge Spainhour reinstated on double jeopardy and related grounds, I would dissent from that decision and hold, for the reasons stated in my dissenting opinion in *State v. Robinson*, No. 41194-6, 2020WL 4726680 (N.C. Aug. 14, 2020), that the trial court's order should be reversed and this case remanded to the Superior Court, Cumberland County, for a new Racial Justice Act proceeding in accordance with this Court's decision in *State v. Ramseur*, 374 N.C. 658, 843 S.E.2d 106 (2020), and our 2015 order in this case. The decision of the majority in *Robinson* is, however, the law of North Carolina to which I am now bound. For this reason, I concur in the result reached by the Court in this case.

Justice DAVIS joins in this concurring opinion.

Justice NEWBY dissenting.

For the reasons stated in my dissenting opinions in *State v. Robinson*, No. 411A94-6, 2020 WL 4726680 (N.C. Aug. 14, 2020), and *State v. Ramseur*, 374 N.C. 658, 843 S.E.2d 106 (2020), I respectfully dissent.

STATE v. JOHNSON

[375 N.C. 487 (2020)]

STATE OF NORTH CAROLINA	)
	)
v.	)
	)
JEREMY JOHNSON	)

No. 197P20

SPECIAL ORDER

Defendant's petition for a writ of supersedeas is allowed. Defendant's petition for discretionary review is allowed for the limited purpose of remanding this matter to the Court of Appeals for reconsideration of the trial court's 14 November 2018 Order denying defendant's motion to dismiss and motion to suppress evidence based on the claim that the officer's decision to initially seize defendant violated his rights under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and the parallel provisions of the North Carolina Constitution. Defendant's motion to amend his petition for discretionary review is dismissed as moot.

The remand for reconsideration of the trial court's 14 November 2018 Order is necessary because the Court of Appeals opinion concluded that there was no violation of defendant's right to equal protection under the law because the law enforcement officer had "the reasonable suspicion necessary for the subsequent stop of defendant" under the Fourth Amendment. *See State v. Johnson*, 840 S.E.2d 539 (N.C. Ct. App. 2020) (unpublished). We remand to the Court of Appeals for an examination of defendant's equal protection claims under the state and federal constitutions separate from its analysis of his Fourth Amendment claims.

By order of the Court in Conference, this the 23rd day of September, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 25th day of September, 2020.

AMY L. FUNDERBURK
Clerk of the Supreme Court

s/Amy L. Funderburk
~~Assistant~~ Clerk

STATE OF NORTH CAROLINA	)	
	)	
v.	)	From Catawba County
	)	
JOHNNY WARREN SPEIGHT	)	

No. 161P20

SPECIAL ORDER

"[N]o petition for discretionary review may be filed in any post-conviction proceeding under Article 89 of Chapter 15A of the General Statutes." N.C. R. App. P. 15(a). Accordingly, we construe defendant's *pro se* petition for discretionary review as a petition for writ of certiorari. Defendant's *pro se* motion to proceed *in forma pauperis* is allowed and defendant's *pro se* motion to appoint counsel is dismissed as moot. Defendant's petition for writ of certiorari is allowed for the following limited purpose:

Defendant, in his *pro se* petition, asserts that he relied upon the promise of the prosecuting attorney that his sentence was to run concurrently with another sentence then-currently being served in another state and he provides a document which, on its face, appears to indicate that the prosecuting attorney had the same understanding. This promise, if honored by the sentencing court, would have been contrary to the law of this state. If defendant relied on such a promise in deciding to plead guilty, then defendant may be entitled to withdraw his guilty plea and face trial or negotiate a different plea agreement. *See State v. Wall*, 348 N.C. 671, 676, 502 S.E.2d 585, 588 (1998).

As a result, the 30 October 2019 order of the Superior Court, Catawba County, denying defendant's motion for appropriate relief is vacated and the case is remanded to that court for an evidentiary hearing and reconsideration of defendant's claim. *See State v. McHone*, 348 N.C. 254, 258, 499 S.E.2d 761, 763 (1998).

By Order of the Court in Conference, this the 23rd day of September, 2020.

s/Davis, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 25th day of September, 2020.

AMY FUNDERBURK
Clerk of the Supreme Court

s/Amy Funderburk
~~Assistant~~ Clerk

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

25 SEPTEMBER 2020

16P20	State of North Carolina, *ex rel.* Roy Cooper, Attorney General v. Kinston Charter Academy, a North Carolina Non-Profit Corporation; Ozie L. Hall, Jr., Individually and as Chief Executive Officer of Kinston Charter Academy; and Demyra McDonald Hall, Individually and as Board Chair of Kinston Charter Academy	1. Plts' PDR Under N.C.G.S. § 7A-31 2. Def's (Ozie L. Hall, Jr.) Pro Se Conditional PDR Under N.C.G.S. § 7A-31 3. Def's (Kinston Charter Academy) Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed 2. Allowed 3. Allowed **Davis, J., recused**
27A20	In the Matter of K.D.C. and A.N.C.	Guardian *ad Litem*'s Motion to Deem Brief Timely Filed	Allowed
69A06-4	State v. Terraine Sanchez Byers	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent 4. State's Motion to Amend Record on Appeal	1. Allowed **01/15/2019** 2. Allowed **01/16/2019** 3. --- 4. Dismissed as moot **Ervin, J., recused**
79P20	State v. Quavis Jerome Clyde	1. Def's Notice of Appeal Based Upon a Constitutional Question 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
86A02-2	State v. Bryan Christopher Bell	1. Def's Motion to Hold in Abeyance the Time in which to File Petition for Writ of Certiorari 2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Onslow County 3. State's Motion to Hold Defendant's Petition for Writ of Certiorari Prematurely Filed in Violation of this Court's Order Dated 25 January 2013 4. Def's Motion for Leave to File Reply in Support of Petition for Writ of Certiorari	1. Special Order **01/24/2013** 2. 3. Special Order **04/29/2020** 4. Denied **08/13/2020**

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

25 SEPTEMBER 2020

109P17-7	In re Olander R. Bynum	Petitioner's Pro Se Motion to Dismiss Appeal and Remand for 400 Dollar Damage Payment	Dismissed
128A20	James Rickenbaugh and Mary Rickenbaugh, Husband and Wife, individually and on behalf of all others similarly situated v. Power Home Solar, LLC, a Delaware Limited Liability Company	1. Def's Motion to Admit Esperanza Segarra Pro Hac Vice 2. Def's Motion to Admit David A. Sullivan Pro Hac Vice	1. Allowed **09/04/2020** 2. Allowed **09/04/2020**
140P20	State v. David Jedediah Nyeplu	Def's PDR Under N.C.G.S. § 7A-31	Denied
142P20	State v. Brock Allen Clark	Def's PDR Under N.C.G.S. § 7A-31	Denied
156P20	State v. David Warren Taylor	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **04/07/2020** 2. Allowed 3. Allowed
158P20	State v. Michael Addib Nazzal	1. Def's PDR Under N.C.G.S. § 7A-31 2. State's PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied
161P20	State v. Johnny Warren Speight	1. Def's Pro Se Motion for PDR Under N.C.G.S. § 7A-31 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Special Order 2. Special Order 3. Special Order
165P20	State v. Myleick Shawn Patterson	1. Def's Pro Se Motion for PDR 2. Def's Pro Se Motion for Appropriate Relief 3. Def's Pro Se Motion to Appoint Counsel	1. Denied 2. Dismissed without prejudice 3. Dismissed as moot
169P20-2	State v. Fernando Hernandez	Def's Pro Se Motion to Dismiss Charges	Dismissed

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

25 SEPTEMBER 2020

180A17-2	Kim and Barry Lippard v. Larry Holleman and Alan Hix	1. Plts' Notice of Appeal Based Upon a Dissent 2. Plts' Notice of Appeal Based Upon a Constitutional Question 3. Plts' PDR as to Additional Issues 4. Defs' Motion to Dismiss Notice of Appeal Based Upon a Dissent 5. Defs' Motion to Dismiss Notice of Appeal Based Upon a Constitutional Question 6. Defs' Motion to Admit Seth James Kraus Pro Hac Vice	1. --- 2. --- 3. Denied 4. Allowed 5. Allowed 6. Allowed
182A20	Ernest Nichols v. Administrative Office of the Courts, 7th Judicial District, Edgecombe County	Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question	Dismissed *ex mero motu*
186P17-4	State v. Lenwood Lee Paige	1. Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed **Hudson, J., recused**
197P20	State v. Jeremy Johnson	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31 4. Def's Motion to Amend PDR	1. Allowed **05/11/2020** 2. Special Order 3. Special Order 4. Dismissed as moot
224A20	In re D.A.A.R. and S.A.L.R.	Guardian *ad Litem*'s Motion to Strike Section II and Section III of Respondent-Mother's Reply Brief	Denied **09/22/2020**
226P20	Molly Schwarz v. St. Jude Medical, Inc., St. Jude Medical S.C., Inc., Duke University, Duke University Health Systems, Inc., Eric Delissio, Thomas Weber, M.D., and Ted Cole	1. Plt's Notice of Appeal Based Upon a Constitutional Question 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' (St. Jude Medical, Inc., et al) Motion to Dismiss Appeal 4. Plt's Motion to Amend Notice of Appeal and PDR	1. --- 2. Denied 3. Allowed 4. Dismissed as moot

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

25 SEPTEMBER 2020

229P20	State v. Dwight Scott McClure	1. Def's PDR Under N.C.G.S. § 7A-31 2. State's Motion to Deem Response to PDR Timely Filed	1. Denied 2. Allowed
233A19	In the Matter of A.B.C.	Respondent-Mother's Petition for Rehearing	Denied **09/21/2020**
239P20	State v. Dwight Edward White	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Cabarrus County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
256P20	State v. Perry L. Pitts	1. Def's Notice of Appeal Based Upon a Constitutional Question 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
263PA18-2	State v. Cedric Theodis Hobbs, Jr.	Def's Motion for Supplemental Briefing	Allowed **08/26/2020**
272P20	State v. Raul Zamudio Perez	1. Def's Petition for Writ of Certiorari to Review Order of the COA 2. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Cabarrus County	1. Denied 2. Denied

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

25 SEPTEMBER 2020

273P20	Ronald Hoag and Holly Hoag; Jeremy Gonzalez and Kristen Gonzalez; William Harrell and Kathryn Harrell; Eric Finical and Sally Finical; James Lawless and Lisa Lawless; Sandra Hardee; Diane Semer; Joe McDowell and Lynell McDowell; Scott Pritchard and Donna Pritchard; Vincent Fischer and Patricia Fischer; Michael Bowman and Josie Bowman; John Lowe and Nelda Lowe; Beech Cove Subdivision Homeowner's Association, Inc.; Holly Ridge Homeowner's Association; and Moss Bend Homeowner's Association, Inc. v. County of Pitt; Bill Clark Homes of Greenville, LLC; and Umberto G. Fontana	1. Plts' (Ronald Hoag, Holly Hoag, William Harrell, Kathryn Harrell, Eric Finical, Sally Finical, James Lawless, Lisa Lawless and Diane Semer) PDR Under N.C.G.S. § 7A-31 2. Plts' (Ronald Hoag, Holly Hoag, William Harrell, Kathryn Harrell, Eric Finical, Sally Finical, James Lawless, Lisa Lawless and Diane Semer) Motion to Accept PDR's Filing as Timely	1. Denied 2. Dismissed as moot **Davis, J., recused**
274P15-8	State v. Robert K. Stewart	Def's Pro Se Motion for Motion of Recusal Be Heard En Banc	Dismissed
292A20	State v. Donald Eugene Hilton	1. Def's Notice of Appeal Based Upon a Dissent 2. Def's PDR as to Additional Issues 3. State's PDR Under N.C.G.S. § 7A-31	1. --- 2. Allowed 3. Allowed
307P20	Marisa Mucha v. Logan Wagner	1. Def's Notice of Appeal Based Upon a Constitutional Question 2. Def's PDR Under N.C.G.S. § 7A-31	1. Retained 2. Allowed
310P20	State v. Eric Leonard Spinks	Def's PDR Under N.C.G.S. § 7A-31	Denied
312P20	State v. John Lewis Jackson, Jr.	Def's PDR Under N.C.G.S. § 7A-31	Denied

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

25 SEPTEMBER 2020

315P20	State v. Vinson Pernell Lindsey	Def's Pro Se Motion for Declaration in Support of Racial Injustice by Guilford Court and Counsel	Dismissed
318P20	State v. Eric Pittman	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **08/21/2020**
322A20	In the Matter of B.S.	Respondent-Father's Motion to Deem Appellant's Brief Timely Filed	Allowed **08/25/2020**
326P20	Robert E. Monroe, as Administrator of the Estate of Naka Hamilton v. Rex Hospital, Inc. d/b/a Rex Hospital, Rex Healthcare, UNC Rex Hospital, UNC Rex Healthcare, UNC Rex Hematology Oncology Associates, and Henry Cromartie, III, M.D.	Def's (Henry Cromartie, III, M.D.) Motion for Madeleine M. Pfefferle to Withdraw as Counsel	Allowed **08/21/2020**
333P20	Caymus Construction Company, Inc., and Kevin Thomas Quick v. John J. Janowiak and Kathleen L. Janowiak	Def's PDR Under N.C.G.S. § 7A-31	Denied
337A20	Loretta Nobel v. Foxmoor Group, LLC, Mark Griffis, David Robertson	1. Plt's Notice of Appeal Based Upon a Dissent 2. Def's (David Robertson) PDR Under N.C.G.S. § 7A-31 3. Plt's Motion to Stay Briefing Schedule and Set Briefing Deadlines	1. --- 2. Denied 3. Allowed **08/20/2020**
340A20	In the Matter of M.V.	1. Respondent-Father's Motion to Amend Certificate of Service to Record on Appeal 2. Respondent-Father's Motion to Withdraw Appeal 3. Respondent-Father's Motion to Waive Costs	1. Dismissed as moot **08/24/2020** 2. Allowed **08/24/2020** 3. Allowed **08/24/2020**

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

25 SEPTEMBER 2020

341P20	State v. Tymik Daijon Lasenburg	1. Def's Petition for Writ of Certiorari to Review Order of the COA	1.
		2. Def's Petition for Writ of Certiorari to Review Decision of District Court, Wake County	2.
		3. Def's Petition for Writ of Habeas Corpus	3. Denied **07/28/2020**
		4. Def's Petition for Writ of Mandamus (or Prohibition)	4.
		5. Def's Motion to Submit Treatises	5.
		6. Def's Motion for Temporary Stay	6. Denied **08/18/2020**
		7. Def's Petition for Writ of Supersedeas	7.
		8. Def's Motion to Suspend Appellate Rules	8.
		9. Def's Motion for Leave of Court to Submit Transcript and Recording	9.
		10. Def's Motion to Amend Certificates of Service	10.
		11. Def's Motion to Submit Compact Disc	11.
		12. Def's Motion to Substitute Motion to Suspend the Rules	12.
		13. Def's Petition for Writ of Habeas Corpus	13. Denied **09/15/2020**
		14. Def's Motion to Remove Filing From Electronic Document Library	14.
		15. Def's Motion to Submit Certified Transcript	15.
343A19	In the Matter of J.D.	1. State's Motion for Leave to View Exhibits Filed Under Seal	1. Allowed **08/17/2020**
		2. Def's Motion to Seal Oral Argument Recording	2. Allowed **08/17/2020**
345P20	State v. David Brandon Lee	1. Def's Notice of Appeal Based Upon a Constitutional Question	1. ---
		2. Def's PDR Under N.C.G.S. § 7A-31	2. Denied
		3. State's Motion to Dismiss Appeal	3. Allowed
346P19	State v. Lamont Edgerton	Def's PDR Under N.C.G.S. § 7A-31	Denied

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

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356A19	In the Matter of K.M.W. and K.L.W.	1. Respondent-Mother's Motion Requesting Oral Argument 2. Petitioner's Motion to Continue Oral Argument 3. Petitioner's Motion in the Alternative to Decide the Case Without Oral Argument	1. Allowed **09/11/2020** 2. Denied **09/11/2020** 3. Denied **09/11/2020**
357P20	In the Matter of Calvin Taylor	Plt's Pro Se Motion for Prompt Execution of Requested Order	Dismissed
360A09	State v. Hasson Jamaal Bacote	Def's Motion to Allow Counsel to Withdraw	Allowed **08/31/2020**
361P20	Rachel E. Williams v. Enterprise Holdings, Inc., EAN Services, LLC, EAN Holdings, LLC, Enterprise Leasing Company Southeast, LLC	1. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question 2. Plt's Pro Se PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal 4. Plt's Pro Se Motion for Extension of Time to File Response 5. Plt's Pro Se Motion for Extension of Time to Respond to Motion to Dismiss 6. Plt's Pro Se Motion for Court Acceptance of Documents Under Seal	1. 2. 3. 4. Allowed **08/28/2020** 5. Allowed for 14 days up to and including 7 October 2020 **09/22/2020** 6. Allowed **09/22/2020** **Ervin, J., recused**
362P20	Curtis Lambert v. Town of Sylva	1. Plt's Notice of Appeal Based Upon a Constitutional Question 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Plt's Motion for Leave to File Amended Notice of Appeal (Constitutional Question) and PDR Under N.C.G.S. § 7A-31 4. Plt's Amended Notice of Appeal Based Upon a Constitutional Question 5. Plt's Amended PDR Under N.C.G.S. § 7A-31 6. Def's Motion to Dismiss Appeal	1. 2. 3. Allowed **08/14/2020** 4. 5. 6.

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

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365P20	State v. Richard Lee Deyton	1. Def's Pro Se Motion for PDR Under N.C.G.S. § 7A-31 2. Def's Pro Se Motion for Remand for Evidentiary Hearing and Resentencing 3. Def's Pro Se Motion to Appoint Counsel 4. Def's Pro Se Motion for Immediate Release	1. Dismissed **08/17/2020** 2. Dismissed **08/17/2020** 3. Dismissed **08/17/2020** 4. Dismissed **08/17/2020**
368A20	Reynolds American Inc. v. Third Motion Equities Master Fund LTD, Magnetar Capital Master Fund, LTD, Spectrum Opportunities Master Fund LTD, Magnetar Fundamental Strategies Master Funds LTD, Magnetar MSW Master Fund LTD, Mason Capital Master Fund, L.P., BlueMountain Credit Alternatives Master Fund L.P., BlueMountain Foinaven Master Fund L.P., BlueMountain Guadalupe Peak Fund L.P., BlueMountain Summit Trading L.P., BlueMountain Montenvers Master Fund SCA SICAV-SIF, and Barry W. Blank Trust and Anton S. Kawalsky, trustee for the benefit of Anton S. Kawalsky Trust UA 9/17/2015, Canyon Blue Credit Investment Fund L.P., the Canyon Value Realization Master Fund, L.P., Canyon Value Realization Fund, L.P., Amundi Absolute Return Canyon Fund P.L.C., CanyonSL Value Fund, L.P., Permal Canyon IO LTD, Canyon Value Realization Mac 18 LTD	1. Defs' (Mason and BlueMountain) Motion to Admit Lawrence M. Rolnick Pro Hac Vice 2. Defs' (Mason and BlueMountain) Motion to Admit Jennifer A. Randolph Pro Hac Vice 3. Defs' (Mason and BlueMountain) Motion to Admit Sheila A. Sadighi Pro Hac Vice	1. Allowed **09/18/2020** 2. Allowed **09/18/2020** 3. Allowed **09/18/2020**

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374P19	North Carolina Farm Bureau Mutual Insurance Company, Inc. v. William Thomas Dana, Jr., Individually and as Administrator of the Estate of Pamela Marguerite Dana	1. Plt's PDR Under N.C.G.S. § 7A-31 2. North Carolina Association of Defense Attorneys' Conditional Motion for Leave to File Amicus Brief	1. Allowed 2. Allowed **Davis, J., recused**
377P20	State v. Andrew Ellis	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **09/04/2020**
381P20	State v. Archie Lynn McNeill	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas	1. Allowed **09/03/2020** 2.
385P20	State v. Mitchell Andrew Tucker	1. State's Motion for Temporary Stay 2. State's Petition for Writ of Supersedeas	1. Allowed **09/04/2020** 2.
386P20	North Carolina State Conference of the NAACP, et al. v. North Carolina State Board of Elections, et al.	1. Plts' PDR Prior to a Determination by the COA 2. Plts' Motion to Suspend the Rules to Allow Expedited Review	1. Denied **09/11/2020** 2. Dismissed **09/11/2020**
387P13-2	State v. James Gregory Armistead	Def's Pro Se Motion for PDR	Dismissed **Ervin, J., recused**
387P18-2	State v. Jashawn A. Summers	1. Def's Pro Se Motion for Order to Dismiss/Averment of Judgment 2. Def's Pro Se Motion to Dismiss All Charges	1. Dismissed **08/28/2020** 2. Dismissed **08/28/2020**
393P20	In the Matter of L.N.H.	1. Guardian *ad Litem*'s Motion to Withdraw and Substitute Counsel 2. Respondent-Mother's Motion for Extension of Time to File Response	1. Allowed **09/17/2020** 2. Denied **09/21/2020**
397P20	State v. Billy Russell Land	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas	1. Allowed **09/16/2020**
416P15-3	State v. Nijel Ramsey Lee	Def's Pro Se Motion for PDR Under N.C.G.S. § 7A-31	Denied **08/20/2020**

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424P19	State v. Randy Allen McDonald	Def's PDR Under N.C.G.S. § 7A-31	Denied
436PA13-4	Lake, et al v. State Health Plan for Teachers, et al.	1. Amicus Curiae's (AARP and AARP Foundation) Motion to Admit Ali Naini Pro Hac Vice 2. Amicus Curiae's (AARP and AARP Foundation) Motion to Reconsider Motion for Limited Admission Pro Hac Vice for Attorney Ali Naini 3. Amicus Curiae's (AARP and AARP Foundation) Motion to Amend Original Motion for Limited Admission Pro Hac Vice for Attorney Ali Naini 4. Amicus Curiae's (AARP and AARP Foundation) Motion for Limited Admission Pro Hac Vice for Attorney Ali Naini 5. AARP and AARP Foundation's Motion for Leave to File Amicus Brief	1. Dismissed without prejudice **09/09/2020** 2. Allowed **09/22/2020** 3. Allowed **09/22/2020** 4. Allowed **09/22/2020** 5. Allowed **Ervin, J., recused** **Newby, J., recused**
441A98-4	State v. Tilmon Charles Golphin	1. Def's Petition for Writ of Certiorari to Review Order of Superior Court, Cumberland County 2. Def's Motion to Address Double Jeopardy as a Threshold Issue Prior to Consideration of the Other Issues Raised in the Petition for Writ of Certiorari 3. Motion by North Carolina Advocates for Justice for Leave to File Amicus Curiae Brief 4. Def's Motion to Amend Petition for Writ of Certiorari 5. Motion of North Carolina Association of Black Lawyers to File Brief as Amicus Curiae 6. Motion of North Carolina State Conference of the NAACP for Leave to File Brief as Amicus Curiae 7. Motion for Leave to File Brief of Amici Curiae Social Scientists in Support of Petitioner	1. Allowed **03/01/2018** 2. Dismissed as moot 3. Allowed **03/01/2018** 4. Allowed nunc pro tunc to **1 March 2018** 5. Allowed **07/13/2018** 6. Allowed **07/13/2018** 7. Allowed **07/13/2018**

		8. Motion of National Association for Public Defense for Leave to File Brief as Amicus Curiae	8. Allowed **07/13/2018**
		9. Motion of Professors John Charles Boger & Robert P. Mosteller for Leave to File Brief as Amici Curiae	9. Allowed **07/17/2018**
		10. Amicus Curiae Motion for Admission of Attorney Jin Hee Lee, Pro Hac Vice	10. Allowed **07/18/2018**
		11. Amicus Curiae Motion for Admission of Attorney W. Kerrel Murray, Pro Hac Vice	11. Allowed **07/18/2018**
		12. Motion of NAACP Legal Defense and Educational Fund, Inc. to Not Require the Payment of Additional Pro Hac Vice Fees	12. Denied **07/18/2018**
		13. Motion of North Carolina Council of Churches for Leave to File Amicus Curiae Brief	13. Allowed **07/17/2018**
		14. Motion by North Carolina Advocates for Justice for Leave to File Amicus Curiae Brief	14. Allowed **07/17/2018**
		15. Motion of Former State and Federal Prosecutors for Leave to File Amicus Brief in Support of Defendant Appellant	15. Allowed **07/17/2018**
		16. Motion of the NAACP Legal Defense and Educational Defense Fund, Inc., for Permission to File an Amicus Curiae Brief	16. Allowed **07/17/2018**
		17. Proposed Amici Curiae Motion for Admission of Attorney Paul F. Khoury, Pro Hac Vice	17. Allowed **07/20/2018**
		18. Proposed Amici Curiae Motion for Admission of Attorney Robert L. Walker, Pro Hac Vice	18. Allowed **07/20/2018**
		19. Proposed Amici Curiae Motion for Admission of Attorney Madeline J. Cohen, Pro Hac Vice	19. Allowed **07/20/2018**
		20. Motion of Amici Curiae Former State and Federal Prosecutors Not to Require the Payment of Additional Pro Hac Vice Fees	20. Denied **07/20/2018**
		21. Motion for Withdrawal and Substitution of Counsel for Amici Curiae Former State and Federal Prosecutors	21. Allowed **03/14/2019** **Beasley, C.J., recused**

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

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449P11-25	Charles Everette Hinton v. State of North Carolina, et al.	1. Petitioner's Pro Se Motion for Objections to Orders; Demand for Trial and Trial by Jury	1. Dismissed
		2. Petitioner's Pro Se Petition for Writ of Mandamus	2. Dismissed
		3. Petitioner's Pro Se Motion to Proceed In Forma Pauperis	3. Allowed
		4. Petitioner's Pro Se Motion to Appoint Counsel	4. Dismissed as moot
			Ervin, J., recused
463A19	Sea Watch at Kure Beach Homeowners' Association, Inc. v. Thomas Fiorentino and Wife, Leah Fiorentino	1. Defs' Notice of Appeal Based Upon a Dissent	1. ---
		2. Defs' PDR Under N.C.G.S. § 7A-31 as to Additional Issues	2. Denied
		3. Plt's Motion to Dismiss Appeal	3. Allowed
		4. Defs' Motion for Extension of Time to File Response	4. Allowed up to and including 9 January 2020 **01/02/2020**

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 5 of the General Rules of Practice for the Superior and District Courts.

* * *

Rule 5. ~~Form~~Filing of Pleadings and Other Documents

(a) **Electronic Filing**. Electronic filing is available only in (i) cases that are either designated "complex business" or assigned to a Business Court judge under Rule 2.1 of these rules and (ii) cases subject to the North Carolina eFiling Pilot Project. The procedure for filing documents electronically in those cases is governed by the North Carolina Business Court Rules and by the Supplemental Rules of Practice and Procedure for the North Carolina eFiling Pilot Project, respectively. In all other cases, only paper filing is available.

~~(a)~~(b)**Paper Filing.** ~~If feasible, each paper presented to the court for filing shall~~Documents filed with the court in paper should be ~~flat and~~ unfolded~~, without manuscript cover,~~ and firmly bound with no manuscript cover.

~~All papers presented to the court for filing shall~~ They must be letter size (8 ½" x 11"), ~~with the exception of~~except for wills and exhibits. The ~~Clerk of Superior Court~~clerk of superior court ~~shall~~may require a party to refile ~~any paper which~~a document that does not conform to ~~this size~~these requirements. ~~This subsection of this rule shall become effective on July 1, 1982. Prior to that date either letter or legal size papers will be accepted.~~

~~(b) All papers filed in~~In civil actions, special proceedings, and estates, documents filed with the court in paper ~~shall~~must include a cover sheet that summarizes~~as the first page of the filing a cover sheet summarizing~~ the critical elements of the ~~filing~~document in a format that the Administrative Office of the Courts prescribes~~prescribed by the Administrative Office of the Courts~~. The ~~Clerk of Superior Court shall~~ clerk of superior court may not reject the filing of ~~any paper~~a document that does not include ~~the required~~a cover sheet. Instead, the clerk ~~shall~~ must file the ~~paper~~document, notify the ~~filing~~ party of the omission, and grant the ~~filing~~ party ~~a reasonable time not to exceed five (5) days within which~~no more than five days to file the ~~required~~ cover sheet. ~~Until such time as the party files the required cover sheet, the court shall take no further action other than dismissal in the case.~~Other than dismissing the

case, the court should not act on the document before the cover sheet is filed.

Comment

The North Carolina Judicial Branch will implement a statewide electronic-filing and case management system beginning in 2021. The system will be made available across the state in phases over a five-year period.

Subsection (a) of Rule 5 of the General Rules of Practice lists those contexts in which electronic filing already exists and serves as a placeholder until the new electronic-filing and case-management system is available. As the new system is implemented, litigants should expect the General Rules of Practice, the North Carolina Business Court Rules, and the Supplemental Rules of Practice and Procedure for the North Carolina eFiling Pilot Project to undergo change.

* * *

This amendment to the General Rules of Practice for the Superior and District Courts becomes effective on 1 October 2020.

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 23rd day of September, 2020.

Mark A. Davis
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 23rd day of September, 2020.

AMY L. FUNDERBURK
Clerk of the Supreme Court

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

The following amendments to the Rules and Regulations and to the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meetings on April 17, 2020, and July 24, 2020.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar, as particularly set forth in the following sections of the North Carolina Administrative Code, be amended as shown in the listed attachments (additions are underlined, deletions are interlined):

- **Attachment 1: 27 N.C.A.C. 1A, Section .0200, Membership – Annual Membership Fees**
- **Attachment 2: 27 N.C.A.C. 1B, Section .0100, Discipline and Disability of Attorneys**
- **Attachment 3: 27 N.C.A.C. 1D, Section .0900, Procedures for Administrative Committee**
- **Attachment 4: 27 N.C.A.C. 1D, Section .2600, Certification Standards for the Immigration Law Specialty Committee**
- **Attachment 5: 27 N.C.A.C. 1E, Section .0100, Regulations for Professional Corporations and Professional Limited Liability Companies Practicing Law**
- **Attachment 6: 27 N.C.A.C. 1E, Section .0200, Registration of Interstate and International Law Firms**
- **Attachment 7: 27 N.C.A.C. 1E, Section .0300, Rules Concerning Prepaid Legal Services Plans**

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at regularly called meetings on April 17, 2020, and July 24, 2020.

Given over my hand and the Seal of the North Carolina State Bar, this the 14th day of September, 2020.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendments to the Rules and Regulations of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 25th day of September, 2020.

s/Cheri Beasley
Cheri Beasley, Chief Justice

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

This the 25th day of September, 2020.

s/Davis, J.
For the Court

ATTACHMENT 1

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

Submitted to the North Carolina Supreme Court on September 11, 2020

27 NCAC 01A .0200 PROCEDURES FOR THE ADMINISTRATIVE COMMITTEE

.0203 ANNUAL MEMBERSHIP FEES; WHEN DUE

a) Amount and Due Date
The annual membership fee shall be in the amount determined by the Council as provided by law and shall be due and payable to the secretary of the North Carolina State Bar on January 1 of each year. The annual membership fee shall be delinquent if not paid by the last day of June of each year. For calendar year 2020 only, the annual membership fee shall be delinquent if not paid by August 31, 2020.

(b) Late Fee
Any attorney who fails to pay the entire annual membership fee in the amount determined by the Council as provided by law and the annual Client Security Fund assessment approved by the North Carolina Supreme Court by the last day of June of each year shall also pay a late fee of $30. For calendar year 2020 only, any attorney who fails to pay the entire annual membership fee in the amount determined by the Council as provided by law and the annual Client Security Fund assessment approved by the North Carolina Supreme Court by August, 31, 2020 shall also pay a late fee of $30.

(c) Waiver of All or Part of Dues
No part of the annual membership fee or Client Security Fund assessment shall be prorated or apportioned to fractional parts of the year, and no part of the membership fee or Client Security Fund assessment shall be waived or rebated for any reason with the following exceptions:

(1) A person licensed to practice law in North Carolina for the first time by examination shall not be liable for dues or the Client Security Fund assessment during the year in which the person is admitted;

(2) A person licensed to practice law in North Carolina serving in the armed forces, whether in a legal or nonlegal capacity, will be exempt from payment of dues and Client Security Fund

assessment for any year in which the member is on active duty in the military service;

(3) A person licensed to practice law in North Carolina who files a petition for inactive status on or before December 31 of a given year shall not be liable for the membership fee or the Client Security Fund assessment for the following year if the petition is granted. A petition shall be deemed timely if it is postmarked on or before December 31.

ATTACHMENT 2

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

Submitted to the North Carolina Supreme Court on September 11, 2020

27 NCAC 01B .0113 PROCEEDINGS BEFORE THE GRIEVANCE COMMITTEE

(a) Probable Cause - The Grievance Committee or any of its panels acting as the Grievance Committee with respect to grievances referred to it by the chairperson of the Grievance Committee will determine whether there is probable cause to believe that a respondent is guilty of misconduct justifying disciplinary action. In its discretion, the Grievance Committee or a panel thereof may find probable cause regardless of whether the respondent has been served with a written letter of notice. The respondent may waive the necessity of a finding of probable cause with the consent of the counsel and the chairperson of the Grievance Committee. A decision of a panel of the committee may not be appealed to the Grievance Committee as a whole or to another panel (except as provided in 27 N.C.A.C. 1A, .0701(a)(3)).

(b) Oaths and Affirmations - The chairperson of the Grievance Committee will have the power to administer oaths and affirmations.

(c) Record of Grievance Committee's Determination - The chairperson will keep a record of the Grievance Committee's determination concerning each grievance and file the record with the secretary.

(d) Subpoenas - The chairperson will have the power to subpoena witnesses, to compel their attendance, and compel the production of books, papers, and other documents deemed necessary or material to any preliminary hearing. The chairperson may designate the secretary to issue such subpoenas.

(e) Closed Meetings - The counsel and deputy counsel, the witness under examination, interpreters when needed, and, if deemed necessary, a stenographer or operator of a recording device may be present while the committee is in session and deliberating, but no persons other than members may be present while the committee is voting.

(f) Disclosure of Matters Before the Grievance Committee - The results of any deliberation by the Grievance Committee will be disclosed to the counsel and the secretary for use in the performance of their duties.

Otherwise, a member of the committee, the staff of the North Carolina State Bar, any interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the committee only when so directed by the committee or a court of record.

(g) Quorum Requirement - At any preliminary hearing held by the Grievance Committee, a quorum of one-half of the members will be required to conduct any business. Affirmative vote of a majority of members present will be necessary to find that probable cause exists. The chairperson will not be counted for quorum purposes and will be eligible to vote regarding the disposition of any grievance only in case of a tie among the regular voting members.

(h) Results of Grievance Committee Deliberations - If probable cause is found and the committee determines that a hearing is necessary, the chairperson will direct the counsel to prepare and file a complaint against the respondent. If the committee finds probable cause but determines that no hearing is necessary, it will direct the counsel to prepare for the chairperson's signature an admonition, reprimand, or censure. If no probable cause is found, the grievance will be dismissed or dismissed with a letter of warning or a letter of caution.

(i) Letters of Caution - If no probable cause is found but it is determined by the Grievance Committee that the conduct of the respondent is unprofessional or not in accord with accepted professional practice, the committee may issue a letter of caution to the respondent recommending that the respondent be more professional in his or her practice in one or more ways which are to be specifically identified.

(j) Letters of Warning

(1) If no probable cause is found but it is determined by the Grievance Committee that the conduct of the respondent is an unintentional, minor, or technical violation of the Rules of Professional Conduct, the committee may issue a letter of warning to the respondent. The letter of warning will advise the respondent that he or she may be subject to discipline if such conduct is continued or repeated. The letter will specify in one or more ways the conduct or practice for which the respondent is being warned. The letter of warning will not constitute discipline of the respondent.

(2) A copy of the letter of warning will be maintained in the office of the counsel for three years. If relevant, a copy of the letter of

warning may be offered into evidence in any proceeding filed against the respondent before the commission within three years after the letter of warning is issued to the respondent. In every case filed against the respondent before the commission within three years after the letter of warning is issued to the respondent, the letter of warning may be introduced into evidence as an aggravating factor concerning the issue of what disciplinary sanction should be imposed. A copy of the letter of warning may be disclosed to the Grievance Committee if another grievance is filed against the respondent within three years after the letter of warning is issued to the respondent.

(3) (A) If valid service upon the respondent has previously been accomplished by certified mail, personal service, publication, or acceptance of service by the respondent or the respondent's counsel, a copy of the letter of warning may be served upon the respondent by mailing a copy of the letter of warning to the respondent's last known address on file with the State Bar. Service shall be deemed complete upon deposit of the letter of warning in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(B) If valid service upon the respondent has not previously been accomplished by certified mail, personal service, publication, or acceptance of service by the respondent or the respondent's counsel, a copy of the letter of warning shall be served upon the respondent by certified mail or personal service. If diligent efforts to serve the respondent by certified mail and by personal service are unsuccessful, the letter of warning shall be deemed served by mailing a copy of the letter of warning to the respondent's last known address on file with the State Bar. Service shall be deemed complete upon deposit of the letter of warning in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service. ~~A copy of the letter of warning will be served upon the respondent in person or by certified mail. A respondent who cannot, with due diligence, be served by certified mail or personal service shall be deemed served by the mailing of a copy of the letter of warning to the respondent's last known address on file with the NC State Bar. Service shall be deemed complete upon deposit of the letter of warning in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.~~ Within 15 days after

service, the respondent may refuse the letter of warning and request a hearing before the commission to determine whether the respondent violated ~~a violation of~~ the Rules of Professional Conduct ~~has occurred~~. Such refusal and request will be in writing, addressed to the Grievance Committee, and served on the secretary by certified mail, return receipt requested. The refusal will state that the letter of warning is refused. If the respondent does not serve a refusal and request ~~are not served~~ within 15 days after service upon the respondent of the letter of warning, the letter of warning will be deemed accepted by the respondent. An extension of time may be granted by the chairperson of the Grievance Committee for good cause shown.

(4) In cases in which the respondent refuses the letter of warning, the counsel will prepare and file a complaint against the respondent at the commission.

(k) Admonitions, Reprimands, and Censures

(1) If probable cause is found but it is determined by the Grievance Committee that a complaint and hearing are not warranted, the committee shall issue an admonition in cases in which the respondent has committed a minor violation of the Rules of Professional Conduct, a reprimand in cases in which the respondent's conduct has violated one or more provisions of the Rules of Professional Conduct and caused harm or potential harm to a client, the administration of justice, the profession, or members of the public, or a censure in cases in which the respondent has violated one or more provisions of the Rules of Professional Conduct and the harm or potential harm caused by the respondent is significant and protection of the public requires more serious discipline. To determine whether more serious discipline is necessary to protect the public or whether the violation is minor and less serious discipline is sufficient to protect the public, the committee shall consider the factors delineated in subparagraphs (2) and (3) below.

(2) Factors that shall be considered in determining whether protection of the public requires a censure include, but are not limited to, the following:

(A) prior discipline for the same or similar conduct;

(B) prior notification by the North Carolina State Bar of the wrongfulness of the conduct;

(C) refusal to acknowledge wrongful nature of conduct;

(D) lack of indication of reformation;

(E) likelihood of repetition of misconduct;

(F) uncooperative attitude toward disciplinary process;

(G) pattern of similar conduct;

(H) violation of the Rules of Professional Conduct in more than one unrelated matter;

(I) lack of efforts to rectify consequences of conduct;

(J) imposition of lesser discipline would fail to acknowledge the seriousness of the misconduct and would send the wrong message to members of the Bar and the public regarding the conduct expected of members of the Bar;

(K) notification contemporaneous with the conduct at issue of the wrongful nature of the conduct and failure to take remedial action.

(3) Factors that shall be considered in determining whether the violation of the Rules is minor and warrants issuance of an admonition include, but are not limited to, the following:

(A) lack of prior discipline for same or similar conduct;

(B) recognition of wrongful nature of conduct;

(C) indication of reformation;

(D) indication that repetition of misconduct not likely;

(E) isolated incident;

(F) violation of the Rules of Professional Conduct in only one matter;

(G) lack of harm or potential harm to client, administration of justice, profession, or members of the public;

(H) efforts to rectify consequences of conduct;

(I) inexperience in the practice of law;

(J) imposition of admonition appropriately acknowledges the minor nature of the violation(s) of the Revised Rules of Professional Conduct;

(K) notification contemporaneous with the conduct at issue of the wrongful nature of the conduct resulting in efforts to take remedial action;

(L) personal or emotional problems contributing to the conduct at issue;

(M) successful participation in and completion of contract

with Lawyer's Assistance Program where mental health or substance abuse issues contributed to the conduct at issue.

(l) Procedures for Admonitions, ~~and~~ Reprimands, and Censures

(1) A record of any admonition, reprimand, or censure issued by the Grievance Committee will be maintained in the office of the secretary.

(2) (A) If valid service upon the respondent has previously been accomplished by certified mail, personal service, publication, or acceptance of service by the respondent or the respondent's counsel, a copy of the admonition, reprimand, or censure may be served upon the respondent by mailing a copy of the admonition, reprimand, or censure to the respondent's last known address on file with the State Bar. Service shall be deemed complete upon deposit of the admonition, reprimand, or censure in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(B) If valid service upon the respondent has not previously been accomplished by certified mail, personal service, publication, or acceptance of service by the respondent or the respondent's counsel, ~~A~~ a copy of the admonition, reprimand, or censure shall ~~will~~ be served upon the respondent ~~in person or~~ by certified mail or personal service. If diligent efforts to serve the respondent by certified mail and by personal service are unsuccessful, the respondent shall be served ~~A respondent who cannot, with due diligence, be served by certified mail or personal service shall be deemed served~~ by ~~the~~ mailing ~~of~~ a copy of the admonition, reprimand, or censure to the respondent's last known address on file with the ~~NC~~ State Bar. Service shall be deemed complete upon deposit of the admonition, reprimand, or censure in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(3) Within 15 days after service the respondent may refuse the admonition, reprimand, or censure and request a hearing before the commission. Such refusal and request will be in writing, addressed to the Grievance Committee, and served upon the secretary by certified mail, return receipt requested. The refusal will state that the admonition, reprimand, or censure is refused.

(4) If a refusal and request are not served upon the secretary within 15 days after service upon the respondent of the admonition, reprimand, or censure, the admonition, reprimand, or censure will be deemed accepted by the respondent. An extension of time may be granted by the chairperson of the Grievance Committee for good cause shown. A censure that is deemed accepted by the respondent must be filed as provided by Rule .0127(a)(3) of this subchapter.

(5) In cases in which the respondent refuses an admonition, reprimand, or censure, the counsel will prepare and file a complaint against the respondent at the commission.

(m) Disciplinary Hearing Commission Complaints - Formal complaints will be issued in the name of the North Carolina State Bar as plaintiff and signed by the chairperson of the Grievance Committee. Amendments to complaints may be signed by the counsel alone, with the approval of the chairperson of the Grievance Committee.

ATTACHMENT 3

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

Submitted to the North Carolina Supreme Court on September 11, 2020

27 NCAC 01D .0902 REINSTATEMENT FROM INACTIVE STATUS

(a) Eligibility to Apply for Reinstatement

Any member who has been transferred to inactive status may petition the council for an order reinstating the member as an active member of the North Carolina State Bar.

(b) Definition of "Year"

As used in this rule, a year is a 365 day period of time unless a calendar year is specified.

(c) Requirements for Reinstatement

(1) Completion of Petition.
The member must provide the information requested on a petition form prescribed by the council and must sign the petition under oath.

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

(3) Character and Fitness to Practice.
The member must have the moral qualifications, competency and learning in the law required for admission to practice law in the state of North Carolina, and must show that the member's resumption of the practice of law within this state will be neither detrimental to the integrity and standing of the Bar or the administration of justice nor subversive of the public interest.

(4) Additional CLE Requirements.
If more than 1 year has elapsed between the date of the entry of the order transferring the member to inactive status and the date that the petition is filed, the member must complete 12 hours of approved CLE for each year that the member was inactive up to a maximum of 7 years. The CLE hours must be completed within 2 years prior to filing the petition. For each 12-hour increment, ~~6 hours may be taken online and~~ 2 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism. If during the period of inactivity the member complied with mandatory CLE requirements of another state where the member is licensed, those CLE credit hours may be applied to the requirements under this provision without regard to whether they were taken during the 2 years prior to filing the petition.

(5) Bar Exam Requirement If Inactive 7 or More Years.
[Effective for all members who are transferred to inactive status on or after March 10, 2011.] If 7 years or more have elapsed between the date of the entry of the order transferring the member to inactive status and the date that the petition is filed, the member must obtain a passing grade on a regularly scheduled North Carolina bar examination. A member subject to this requirement does not have to satisfy the CLE requirements in paragraphs (c)(2) and (c)(4).

(A) Active Licensure in Another State. Each year of active licensure in another state during the period of inactive status shall offset one year of inactive status for the purpose of calculating the 7 years necessary to actuate this provision. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (c)(4) for each year that the member was inactive up to a maximum of 7 years.

(B) Military Service. Each calendar year in which an inactive member served on full-time, active military duty, whether for the entire calendar year or some portion thereof, shall offset one year of inactive status for the purpose of calculating the 7 years necessary to actuate the requirement of this paragraph. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (c)(4) for each year that the member was inactive up to a maximum of 7 years.

(6) Payment of Fees, Assessments and Costs.
The member must pay all of the following:

(A) a ~~$125.00~~ reinstatement fee in an amount determined by the Council;

(B) the membership fee and the Client Security Fund assessment for the year in which the application is filed;

(C) the annual membership fee, if any, of the member's district bar for the year in which the application is filed and any past due annual membership fees for any district bar with which the member was affiliated prior to transferring to inactive status;

(D) all attendee fees owed the Board of Continuing Legal Education for CLE courses taken to satisfy the requirements of paragraphs (c)(2), (4), and (5);

(E) any costs previously assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission; and/or the secretary or council of the North Carolina State Bar; and

(F) all costs incurred by the North Carolina State Bar in investigating and processing the application for reinstatement.

(d) Service of Reinstatement Petition
The petitioner shall serve the petition on the secretary. The secretary shall transmit a copy of the petition to the members of the Administrative Committee and to the counsel.

(e) Investigation by Counsel
The counsel may conduct any necessary investigation regarding the petition and shall advise the members of the Administrative Committee of any findings from such investigation.

(f) Recommendation of Administrative Committee
After any investigation of the petition by the counsel is complete, the Administrative Committee will consider the petition at its next meeting and shall make a recommendation to the council regarding whether the petition should be granted. The chair of the Administrative Committee may appoint a panel composed of at least three members of the committee to consider any petition for reinstatement and, on behalf of the Administrative Committee, to make a recommendation to the council regarding whether the petition should be granted.

(1) Conditions Precedent to Reinstatement. Upon a determination that the petitioner has failed to demonstrate competence

to return to the practice of law, the committee may require the petitioner to complete a specified number of hours of continuing legal education, which shall be in addition to the requirements set forth in Rule .0902(b)(2) and (4) above, as a condition precedent to the committee's recommendation that the petition be granted,

(2) Conditions Subsequent to Reinstatement. Upon a determination that the petitioner is fit to return to the practice of law pursuant to the reasonable management of his or her substance abuse, addiction, or debilitating mental condition, the committee may recommend to the council that the reinstatement petition be granted with reasonable conditions to which the petitioner consents. Such conditions may include, but are not limited to, an evaluation by a mental health professional approved by the Lawyer Assistance Program (LAP), compliance with the treatment recommendations of the mental health professional, periodic submission of progress reports by the mental health professional to LAP, and waiver of confidentiality relative to diagnosis and treatment by the mental health professional.

(3) Failure of Conditions Subsequent to Reinstatement. In the event the petitioner fails to satisfy the conditions of the reinstatement order, the committee shall issue a notice directing the petitioner to show cause, in writing, why the petitioner should not be suspended from the practice of law. Notice shall be served and the right to request a hearing shall be as provided in Rule .0902(f) below. The hearing shall be conducted as provided in Section .1000 of this subchapter provided, however, the burden of proof shall be upon the petitioner to show by clear, cogent, and convincing evidence that he or she has satisfied the conditions of the reinstatement order.

(g) Hearing Upon Denial of Petition for Reinstatement

(1) Notice of Council Action and Request for Hearing
If the council denies a petition for reinstatement, the petitioner shall be notified in writing within 14 days after such action. The notice shall be served upon the petitioner pursuant to Rule 4 of the N.C. Rules of Civil Procedure and may be served by a State Bar investigator or any other person authorized by Rule 4 of the N.C. Rules of Civil Procedure to serve process.

(2) The petitioner shall have 30 days from the date of service of the notice to file a written request for hearing upon the secretary. The request shall be served upon the secretary pursuant to Rule 4 of the N.C. Rules of Civil Procedure.

(3) Hearing Procedure
The procedure for the hearing shall be as provided in Section .1000 of this subchapter.

(h) Reinstatement by Secretary of the State Bar
Notwithstanding paragraph (e) of this rule, an inactive member may petition for reinstatement pursuant to paragraphs (a) and (b) of this rule and may be reinstated by the secretary of the State Bar upon a finding that the inactive member has complied with or fulfilled the conditions for reinstatement set forth in this rule; there are no issues relating to the inactive member's character or fitness; and the inactive member has paid all fees owed to the State Bar including the reinstatement fee. Reinstatement by the secretary is discretionary. If the secretary declines to reinstate a member, the member's petition shall be submitted to the Administrative Committee at its next meeting and the procedure for review of the reinstatement petition shall be as set forth in paragraph (e) of this rule.

(i) Denial of Petition
When a petition for reinstatement is denied by the council in a given calendar year, the member may not petition again until the following calendar year. The reinstatement fee, costs, and any fees paid pursuant to paragraph (c)(7) shall be retained. However, the State Bar membership fee, Client Security Fund assessment, and district bar membership fee assessed for the year in which the application is filed shall be refunded.

27 NCAC 01D .0904 REINSTATEMENT FROM SUSPENSION

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

A member who receives an order of suspension for failure to comply with an obligation of membership may preclude the order from becoming effective and shall not be required to file a formal reinstatement petition or pay the reinstatement fee if the member shows within 30 days after service of the suspension order that the member has done the following:

(1) fulfilled the obligations of membership set forth in the order;

(2) paid the administrative fees associated with the issuance of the suspension order, including the costs of service;

(3) paid any other delinquency shown on the financial records of the State Bar including outstanding judicial district bar dues;

(4) signed and filed CLE annual report forms as required by Rule .1522 of this subchapter;

(5) completed CLE hours as required by Rules .1518 and .1522 of this subchapter; and

(6) filed any IOLTA certification required by Rule .1319 of this subchapter.

(b) Reinstatement More than 30 Days after Service of Suspension Order.
At any time more than 30 days after service of an order of suspension on a member, a member who has been suspended for failure to comply with an obligation of membership may petition the council for an order of reinstatement.

(c) Definition of "Year."
As used in this rule, a year is a 365 day period of time unless a calendar year is specified.

(d) Requirements for Reinstatement

(1) Completion of Petition
The member must provide the information requested on a petition form prescribed by the council and must sign the petition under oath.

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

(3) Additional CLE Requirements
If more than 1 year has elapsed between the effective date of the suspension order and the date upon which the reinstatement petition is filed, the member must complete 12 hours of approved CLE for each year that the member was suspended up to a maximum of 7 years. The CLE must be completed within 2 years prior to filing the petition. For each 12-hour increment, ~~6 hours may be taken online and~~ 2 hours must be earned by attending courses in the areas of professional responsibility and/or professionalism. If during the period of suspension the member complied with mandatory CLE requirements of

another state where the member is licensed, those CLE credit hours may be applied to the requirements under this provision without regard to whether they were taken during the 2 years prior to filing the petition.

(4) Bar Exam Requirement If Suspended 7 or More Years
[Effective for all members who are administratively suspended on or after March 10, 2011.] If 7 years or more have elapsed between the effective date of the suspension order and the date that the petition is filed, the member must obtain a passing grade on a regularly scheduled North Carolina bar examination. A member subject to this requirement does not have to satisfy the CLE requirements in paragraphs (d)(2) and (d)(3).

(A) Active Licensure in Another State. Each year of active licensure in another state during the period of suspension shall offset one year of suspension for the purpose of calculating the 7 years necessary to actuate this provision. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (d)(3) for each year that the member was suspended up to a maximum of 7 years.

(B) Military Service. Each calendar year in which a suspended member served on full-time, active military duty, whether for the entire calendar year or some portion thereof, shall offset one year of suspension for the purpose of calculating the 7 years necessary to actuate the requirement of this paragraph. If the member is not required to pass the bar examination as a consequence of offsetting, the member shall satisfy the CLE requirements set forth in paragraph (d)(3) for each year that the member was suspended up to a maximum of 7 years.

(5) Character and Fitness to Practice
The member must have the moral qualifications, competency and learning in the law required for admission to practice law in the state of North Carolina, and must show that the member's resumption of the practice of law will be neither detrimental to the integrity and standing of the Bar or the administration of justice nor subversive of the public interest.

(6) Payment of Fees, Assessments and Costs
The member must pay all of the following:

(A) a ~~$125.00~~ reinstatement fee in an amount to be determined by the Council or $250.00 reinstatement fee if suspended for failure to comply with CLE requirements;

(B) all membership fees, Client Security Fund assessments, and late fees owed at the time of suspension and owed for the year in which the reinstatement petition is filed;

(C) all district bar annual membership fees owed at the time of suspension and owed for the year in which the reinstatement petition is filed;

(D) all attendee fees, fines and penalties owed the Board of Continuing Legal Education at the time of suspension and attendee fees for CLE courses taken to satisfy the requirements of paragraphs (d)(2) and (3) above;

(E) any costs assessed against the member by the chairperson of the Grievance Committee, the Disciplinary Hearing Commission, and/or the secretary or council of the North Carolina State Bar; and

(F) all costs incurred by the North Carolina State Bar in suspending the member, including the costs of service, and in investigating and processing the application for reinstatement.

(7) Pro Hac Vice Registration Statements
The member must file any overdue pro hac vice registration statement for which the member was responsible.

(8) IOTLA Certification
The member must complete any IOLTA certification required by Rule .1319 of this subchapter.

(9) Wind Down of Law Practice During Suspension
The member must demonstrate that the member fulfilled the obligations of a disbarred or suspended member set forth in Rule .0128 of Subchapter 1B during the 30 day period after the effective date of the order of suspension, or that such obligations do not apply to the member due to the nature of the member's legal employment.

(e) Procedure for Review of Reinstatement Petition.
The procedure for review of the reinstatement petition shall be as set forth in Rule .0902(c)-(f) above.

(f) Reinstatement by Secretary of the State Bar.
At any time during the year after the effective date of a suspension order,

a suspended member may petition for reinstatement pursuant to paragraphs (b) and (c) of this rule and may be reinstated by the secretary of the State Bar upon a finding that the suspended member has complied with or fulfilled the obligations of membership set forth in the order; there are no issues relating to the suspended member's character or fitness; and the suspended member has paid the costs of the suspension and reinstatement procedure including the costs of service and the reinstatement fee. Reinstatement by the secretary is discretionary. If the secretary declines to reinstate a member, the member's petition shall be submitted to the Administrative Committee at its next meeting and the procedure for review of the reinstatement petition shall be as set forth in Rule .0902(c)-(f).

(g) Reinstatement from Disciplinary Suspension.
Notwithstanding the procedure for reinstatement set forth in the preceding paragraphs of this Rule, if an order of reinstatement from disciplinary suspension is granted to a member pursuant to Rule .0129 of Subchapter 1B of these rules, any outstanding order granting inactive status or suspending the same member for failure to fulfill the obligations of membership under this section shall be dissolved and the member shall be reinstated to active status.

(h) Denial of Petition.
When a petition for reinstatement is denied by the council in a given calendar year, the member may not petition again until the following calendar year. The reinstatement fee, costs, and any fees paid pursuant to paragraph (d)(6) shall be retained. However, the State Bar membership fee, Client Security Fund assessment, and district bar membership fee assessed for the year in which the application is filed shall be refunded.

ATTACHMENT 4

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

Submitted to the North Carolina Supreme Court on September 11, 2020

27 NCAC 01D .2605 STANDARDS FOR CERTIFICATION AS A SPECIALIST IN IMMIGRATION LAW

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

(a) Licensure and Practice - An applicant shall be licensed and in good standing to practice law in North Carolina as of the date of application. An applicant shall continue to be licensed and in good standing to practice law in North Carolina during the period of certification.

(b) Substantial Involvement - An applicant shall affirm to the board that the applicant has experience through substantial involvement in the practice of immigration law.

(1) An applicant shall affirm that during the five years immediately preceding the application, the applicant devoted an average of at least 700 hours a year to the practice of immigration law, but not less than 400 hours in any one year. Service as a law professor concentrating in the teaching of immigration law for two semesters may be substituted for one year of experience to meet the five-year requirement.

(2) An applicant shall show substantial involvement in immigration law for the required period by providing such information as may be required by the board regarding the applicant's participation in at least four of the seven categories of activities listed below during the five years immediately preceding the date of application. For the purposes of this section, "representation" means the entry as the attorney of record and/or having primary responsibility of preparation of the case for presentation before the appropriate adjudicatory agency or tribunal.

(A) Family Immigration. Representation of clients before ~~the U.S. Immigration and Naturalization Service and~~ the United

States Citizenship and Immigration Services (USCIS) or the State Department in ~~the filing of petitions and~~ family-based applications, including the Violence Against Women Act (VAWA).

(B) Employment-Related Immigration. Representation of employers ~~and~~/or aliens before ~~at least one of the following: the N.C. Employment Security Commission,~~ the U.S. Department of Labor (DOL), ~~U.S. Immigration and Naturalization Service~~ USCIS, Immigration and Customs Enforcement (ICE) (including I-9 reviews in anticipation of ICE audits), or the ~~U.S.~~ Department of State in employment-related immigration matters and filings ~~or U.S. Information Agency~~.

(C) Naturalization and Citizenship. Representation of clients before ~~the U.S. Immigration and Naturalization Service and judicial courts~~USCIS in naturalization and citizenship matters.

(D) Administrative Hearings and Appeals. Representation of clients before immigration judges in ~~deportation, exclusion~~ removal, bond redetermination, and other administrative matters; and the representation of clients in appeals taken before the Board of Immigration Appeals and the Attorney General, the Administrative Appeals ~~Unit~~ Office, the Board of Alien Labor Certification Appeals and DOL, ~~Regional~~ Commissioners, ~~Commissioner, Attorney General, Department of State Board of Appellate Review, and~~ or the Office of Special Counsel for Immigration Related Unfair Employment Practices (OCAHO).

(E) ~~Administrative Proceedings and Review in Judicial Courts~~ Federal Litigation. Representation of clients ~~in judicial matters such as applications for~~before Article III courts in habeas corpus petitions, mandamus or Administrative Procedures Act complaints ~~and declaratory judgments;~~, criminal prosecution of violations of~~matters involving~~ immigration law;, district court naturalization and denaturalization proceedings, or petitions for review or certiorari~~in judicial courts; and ancillary proceedings in judicial courts~~.

(F) Asylum and Refugee Status. Representation of clients ~~in these matters~~ before USCIS or immigration judges in applications for asylum, withholding of removal, protection under the Convention Against Torture, or adjustment of status for refugees or asylees.

(G) ~~Employer Verification, Sanctions, Document Fraud, Bond and Custody, Rescission, Registry, and Fine Proceedings.~~

~~Representation of clients in these matters.~~ Applications for Temporary or Humanitarian Protection. Representation of clients before USCIS, ICE, immigration judges, or the Department of State in applications for Temporary Protected Status, Deferred Action for Childhood Arrivals (DACA), Nicaraguan Adjustment and Central American Relief Act (NACARA), parole in place, humanitarian parole, deferred action, orders of supervision, U and T visas, or other similar protections and benefits.

(c) Continuing Legal Education - An applicant must earn no less than 48 hours of accredited continuing legal education (CLE) credits in topics relating to immigration law during the four years preceding application. At least 20 of the 48 CLE credit hours must be earned during the first and second year preceding application and at least 20 of the CLE hours must be earned during the third and fourth years preceding application. Of the 48 hours, at least 42 must be in immigration law; the balance may be in the related areas of federal administrative procedure, trial advocacy, evidence, taxation, family law, employment law, and criminal law and procedure.

(d) Peer Review - An applicant must make a satisfactory showing of qualification through peer review. An applicant must provide the names of ten lawyers or judges who are familiar with the competence and qualification of the applicant in the specialty field. Written peer reference forms will be sent by the board or the specialty committee to each of the references. Completed peer reference forms must be received from at least five of the references. All references must be licensed and in good standing to practice in North Carolina. At least four of the completed peer reference forms received by the board must be from lawyers or judges who have substantial practice or judicial experience in immigration law. An applicant consents to the confidential inquiry by the board or the specialty committee of the submitted references and other persons concerning the applicant's competence and qualification.

(1) A reference may not be related by blood or marriage to the applicant nor may the reference be a partner or associate of the applicant at the time of the application.

(2) The references shall be given on standardized forms provided by the board with the application for certification in the specialty field. These forms shall be returned directly to the specialty committee.

(e) Examination - The applicant must pass a written examination designed to test the applicant's knowledge, skills, and proficiency in immigration law. The examination shall be in written form and shall be given annually. The examination shall be administered and graded uniformly by the specialty committee.

ATTACHMENT 5

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

Submitted to the North Carolina Supreme Court on September 11, 2020

27 NCAC 01E .0104 MANAGEMENT AND FINANCIAL MATTERS

(a) "Management" At least one director and one officer of a professional corporation and at least one manager of a professional limited liability company shall be active members in good standing with the North Carolina State Bar.

(b) "Authority Over Professional Matters:" No person affiliated with a professional corporation or a professional limited liability company, other than a licensee, shall exercise any authority whatsoever over the rendering of professional services in North Carolina or in matters of North Carolina law.

(c) "No Income to Disqualified Person" The income of a professional corporation or of a professional limited liability company attributable to the practice of law during the time that a shareholder of the professional corporation or a member of a professional limited liability company is legally disqualified to render professional services in North Carolina or, if the shareholder or member is not licensed in North Carolina, in any other jurisdiction in which the shareholder or member is licensed or after a shareholder or a member becomes a judge, other adjudicatory officer, or the holder of any other office, as specified in Rule .0102(a)(4) or .0102(b)(4) of this subchapter, shall not in any manner accrue to the benefit of such shareholder, or his or her shares, or to such member.

(d) "Stock of a Professional Corporation" A professional corporation may acquire and hold its own stock.

(e) "Acquisition of Shares of Deceased or Disqualified Shareholder" Subject to the provisions of G.S. 55B-7, a professional corporation may make such agreement with its shareholders or its shareholders may make such agreement between themselves as they may deem just for the acquisition of the shares of a deceased or retiring shareholder or a shareholder who becomes disqualified to own shares under the Professional Corporation Act or under these regulations.

(f) "Stock Certificate Legend" There shall be prominently displayed on the face of all certificates of stock in a professional corporation a legend that any transfer of the shares represented by such certificate is subject to the provisions of the Professional Corporation Act and these regulations.

(g) "Transfer of Stock of Professional Corporation" When stock of a professional corporation is transferred to a licensee, the professional corporation shall request that the secretary issue a stock transfer certificate (Form PC?5; see Rule .0106(e) of this subchapter) as required by G.S. 55B-6. The secretary is authorized to issue the certificate which shall be permanently attached to the stub of the transferee's stock certificate in the stock register of the professional corporation. The fee for such certificate shall be two dollars ($2.00) for each transferee listed on the stock transfer certificate.

(h) "Stock Register of Professional Corporation" The stock register of a professional corporation shall be kept at the principal office of the corporation and shall be subject to inspection by the secretary or his or her delegate during business hours at the principal office of the corporation.

27 NCAC 01E .0105 GENERAL AND ADMINISTRATIVE PROVISIONS

(a) "Administration of Regulations" These regulations shall be administered by the secretary, subject to the review and supervision of the council. The council may from time to time appoint such standing or special committees as it may deem proper to deal with any matter affecting the administration of these regulations. It shall be the duty of the secretary to bring to the attention of the council or its appropriate committee any violation of the law or of these regulations.

(b) "Appeal to Council" If the secretary shall decline to execute any certificate required by Rule .0103(a)(2), Rule .0103(b)(2), or Rule .0104(g) of this subchapter, or to renew the same when properly requested, or shall refuse to take any other action requested in writing by a professional corporation or a professional limited liability company, the aggrieved party may request in writing that the council review such action. Upon receipt of such a request, the council shall provide a formal hearing for the aggrieved party through a committee of its members.

(c) "Articles of Amendment, Merger, and Dissolution" A copy of the following documents, duly certified by the secretary of state, shall be filed with the secretary within 10 days after filing with the secretary of state:

(1) all amendments to the articles of incorporation of a professional corporation or to the articles of organization of a professional limited liability company;

(2) all articles of merger to which a professional corporation or a professional limited liability company is a party;

(3) all articles of dissolution dissolving a professional corporation or a professional limited liability company;

(4) any other documents filed with the secretary of state changing the corporate structure of a professional corporation or the organizational structure of a professional limited liability company.

(d) "Filing Fee" Except as otherwise provided in these regulations, all reports or papers required by law or by these regulations to be filed with the secretary shall be accompanied by a filing fee of two dollars ($2.00).

(e) "Accounting for Filing Fees" All fees provided for in these regulations shall be the property of the North Carolina State Bar and shall be deposited by the secretary to its account, and such account shall be separately stated on all financial reports made by the secretary to the council and on all financial reports made by the council.

(f) "Records of State Bar" The secretary shall keep a file for each professional corporation and each professional limited liability company which shall contain the executed articles of incorporation or organization, all amendments thereto, and all other documents relating to the affairs of the corporation or professional limited liability company.

(g) "Additional Information" A professional corporation or a professional limited liability corporation shall furnish to the secretary such information and documents relating to the administration of these regulations as the secretary or the council may reasonably request.

REGISTRATION OF INTERSTATE AND
INTERNATIONAL LAW FIRMS

ATTACHMENT 6

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

Submitted to the North Carolina Supreme Court on September 11, 2020

27 NCAC 01E .0203 REGISTRATION FEE

There shall be submitted with each registration statement and supporting documentation a registration fee of ~~five hundred dollars ($500.00)~~ as an administrative cost ~~which shall be in an amount determined by the Council~~.

ATTACHMENT 7

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

Submitted to the North Carolina Supreme Court on September 11, 2020

27 NCAC 01E ~~.0301 STATE BAR MAY NOT APPROVE OR DISAPPROVE PLANS~~

~~The North Carolina State Bar shall not approve or disapprove any prepaid legal services plan or render any legal opinion regarding any plan. The registration of any plan under these rules shall not be construed to indicate approval or disapproval of the plan.~~

~~.0303~~ .0301 DEFINITIONS ~~OF PREPAID PLAN~~

The following words and phrases when used in this subchapter shall have the meanings given to them in this rule:

1) **Counsel – the counsel of the North Carolina State Bar appointed by the Council of the North Carolina State Bar.**

2) **Plan Owner – the person or entity not authorized to engage in the practice of law that operates or is seeking to operate a plan in accordance with these Rules.**

3) ~~A prepaid legal services plan or a group legal services plan ("a plan") is~~ **Prepaid Legal Services Plan or Plan –** any arrangement by which a person~~, firm or corporation~~ **or entity**, not ~~otherwise~~ authorized to engage in the practice of law, in exchange for any valuable consideration, offers to ~~provide or~~ arranges the provision of specified legal services that are paid for in advance of any immediate need for the specified legal services ("covered services"). In addition to covered services, a plan may ~~provide~~ **arrange the provision of** specified legal services at fees that are less than what a non-member of the plan would normally pay. The North Carolina legal services ~~offered~~ arranged by a plan must be provided by a North Carolina licensed ~~lawyer~~ **attorney** who is not an employee, director, or owner of the plan. A ~~prepaid legal services~~ plan does not include the sale of an identified, limited legal service, such as drafting a will, for a fixed, one-time fee. ~~[This definition is also found in Rule 7.3(d) of the Revised Rules of Professional Conduct.]~~

~~.0311~~ .0302 State Bar Jurisdiction

The North Carolina State Bar retains jurisdiction ~~of~~ **over** North Carolina licensed attorneys who participate in ~~prepaid legal services~~ plans ~~and North Carolina licensed attorneys are~~**, whose conduct is** subject to the rules and regulations of the ~~North Carolina~~ State Bar.

.0303 Role of Authorized Practice Committee

The Authorized Practice Committee ("committee"), as a duly authorized standing committee of the North Carolina State Bar Council, shall oversee the registration of plans in accordance with these rules. The committee shall also establish reasonable deadlines, rules and procedures regarding the initial and annual registrations, amendments to registrations, and the revocation of registrations of plans.

~~.0309~~ .0304 Index of Registered Plans

The North Carolina State Bar shall maintain an index of the ~~prepaid legal services~~ plans registered pursuant to these rules. All documents filed ~~in compliance with this~~ **pursuant to these** rule**s** ~~are considered public documents and~~ shall be available for public inspection during ~~normal~~ **regular** business hours.

~~.0302~~ .0305 Registration Requirement

A ~~prepaid legal services~~ plan ~~("plan") must~~ **shall** be registered with the North Carolina State Bar before ~~its implementation or operation~~ **operating** in North Carolina. **Registration shall be evidenced by a certificate of registration issued by the State Bar.** ~~No licensed North Carolina attorney shall participate in a prepaid legal services plan in this state unless the plan has registered with the North Carolina State Bar and has complied with the rules set forth below. No prepaid legal services plan may operate in North Carolina unless at least one licensed North Carolina attorney has agreed to provide the legal services offered under the plan at all times during the operation of the plan.~~ No ~~prepaid legal services~~ plan may operate in any manner that ~~constitutes~~ **violates the North Carolina statutes regarding** the unauthorized practice of law. ~~No plan may operate until its registration has been accepted by the North Carolina State Bar in accordance with these rules.~~ **No plan may operate in North Carolina unless at least one licensed North Carolina attorney has agreed to provide the legal services arranged by the plan at all times during the operation of the plan. No licensed North Carolina attorney shall participate in a plan in this state unless the plan has registered with the State Bar and has complied with the rules set forth below.**

~~.0308~~ .0306 Registration Fees

The initial and annual registration fees for each ~~prepaid legal services~~ plan shall be ~~$100~~ **determined by the Council and shall be nonrefundable**. ~~The fee is nonrefundable.~~

~~.0304~~ .0307 Registration Procedures

~~To register with the North Carolina State Bar, a prepaid legal services plan must comply with all of the following procedures for initial registration:~~

(a) ~~A prepaid legal services plan seeking to operate in North Carolina must file an~~ **To register a plan, the plan owner shall complete the** initial registration statement form **contained in Rule .0310 and file it** with the secretary of the North Carolina State Bar~~, using a form promulgated by the State Bar, requesting registration~~.

(b) ~~The owner or sponsor of the prepaid legal services plan must fully disclose in its initial registration statement form filed with the secretary at least the following information: the name of the plan, the name of the owner or sponsor of the plan, a principal address for the plan in North Carolina, a designated plan representative to whom communications with the State Bar will be directed, all persons or entities with ownership interest in the plan and the extent of their interests, all terms and conditions of the plan, all services provided under the plan and a schedule of benefits and fees or charges for the plan, a copy of all plan documents, a copy of all plan marketing and advertising materials, a copy of all plan contracts with its customers, a copy of all plan contracts with plan attorneys, and a list of all North Carolina attorneys who have agreed to participate in the plan. Additionally, the owner or sponsor will provide a detailed statement explaining how the plan meets the definition of a prepaid legal services plan in North Carolina. The owner or sponsor of the prepaid legal services plan will certify or acknowledge the veracity of the information contained in the registration statement, an understanding of the rules applicable to prepaid legal services plans, and an understanding of the law on unauthorized practice.~~

(c) ~~The Authorized Practice Committee ("committee"), as a duly authorized standing committee of the North Carolina State Bar Council, shall oversee the registration of prepaid legal services plans in accordance with these rules. The committee shall also establish any deadlines by when registrations~~

~~may be submitted for review and any additional, necessary rules and procedures regarding the initial and annual registrations, and the revocation of registrations, of prepaid legal services plans.~~

~~.0305~~ .0308 Initial Registration Determination

Counsel ~~will~~ **shall** review the plan's initial registration statement ~~to determine whether the registration statement is complete and the plan, as described in the registration statement, meets the definition of a prepaid legal services plan and otherwise satisfies the requirements for registration provided by Rule .0304.~~ If~~, in the opinion of counsel,~~ the plan ~~clearly meets the definition and the registration statement otherwise~~ satisfies the requirements for registration, the secretary ~~will~~ **shall** issue a certificate of registration to the plan~~'s sponsor~~ **owner**. If~~, in the opinion of counsel,~~ the plan does not ~~meet the definition or otherwise fails to~~ satisfy the requirements for registration, counsel ~~will~~ **shall** inform the plan~~'s sponsor~~ **owner** that the ~~registration is not accepted~~ **plan will not be registered** and **shall** explain ~~any~~ **the** deficiencies. Upon notice that the plan~~'s registration has not been accepted~~ **will not be registered**, the plan ~~sponsor~~ **owner** may resubmit ~~an~~ **one** amended ~~plan~~ **initial** registration ~~form~~ **statement** or request a hearing before the committee pursuant to Rule ~~.0313~~ **.0317** below. Counsel ~~will~~ **shall** provide a report to the committee each quarter identifying the plans **that** submitted **initial registration statements** and ~~the registration decisions made by counsel~~ **whether each plan was registered**.

.0309 Registration Does Not Constitute Approval

The registration of any plan under these rules shall not be construed to indicate approval, disapproval, or an endorsement of the plan by the North Carolina State Bar. Any plan that advertises or otherwise represents that it is registered with the State Bar shall include a clear and conspicuous statement within the advertisement or communication that registration with the State Bar does not constitute approval or an endorsement of the plan by the State Bar.

.0310 ~~Advertising of State Bar Approval Prohibited~~ Initial Registration Statement Form

~~Any plan that advertises or otherwise represents that it is registered with the North Carolina State Bar shall include a clear and conspicuous statement within the advertisement or communication that registration with the North Carolina State Bar does not constitute approval of the plan by the State Bar.~~

INITIAL REGISTRATION STATEMENT FORM FOR PREPAID LEGAL SERVICES PLAN

Any person or entity seeking to operate a prepaid legal services plan shall register the plan with the North Carolina State Bar on the initial registration statement form provided by the State Bar. Each plan must be registered prior to its operation in North Carolina.

The plan owner shall complete this form and file it with the secretary of the State Bar. The plan owner must provide complete responses to each of the following items. The plan will not be registered if any item is left incomplete.

1. **Name of Plan:**
    a. **Owner of Plan**
        i. **Name:**
        ii. **Title:**
2. **Principal North Carolina Address for Plan:**
    a. **Address:**
    b. **City:**
    c. **State:**
    d. **Zip Code:**
3. **Contact Information for Plan Representative**
    a. **Name:**
    b. **Address:**
    c. **City:**
    d. **State:**
    e. **Zip Code:**
    f. **Telephone Number:**
    g. **Email Address:**
4. **Is the plan offered by a person or entity not authorized to engage in the practice of law? [Yes] [No]**

5. **Does the plan, in exchange for any valuable consideration, offer to arrange the provision of specified legal services that are paid for in advance of any immediate need for the specified legal service ("covered services")? [Yes] [No]**

6. **Are the legal services the plan offers to arrange provided by North Carolina licensed attorneys who are not employees, directors, or owners of the plan? [Yes] [No]**

    a. **Attach a list of the names, addresses, bar numbers, and telephone numbers of all North Carolina licensed attorneys who have agreed to participate in the plan. This list should be alphabetized by attorney last name.**

7. **Do the covered services the plan offers to arrange extend beyond the sale of an identified, limited legal service, such as drafting a will, for a fixed, one-time fee? [Yes] [No]**

8. **Has the plan owner signing below read and gained an understanding of the administrative rules applicable to prepaid legal services plans as adopted by the State Bar Council? [Yes] [No]**

9. **Does the plan owner signing below agree to comply with the administrative rules applicable to prepaid legal services plans as adopted by the State Bar Council and accept responsibility for the plan's compliance with those administrative rules? [Yes] [No]**

10. **Has the plan owner signing below read and gained an understanding of the law governing the unauthorized practice of law as set out in N.C. Gen. Stat. § 84-2.1, 4, and 5? [Yes] [No]**

11. **Is a check for the initial registration fee made payable to the State Bar enclosed with this statement? [Yes] [No]**

12. **After reading the foregoing form and the list of all North Carolina licensed attorneys who have agreed to participate in the plan in its entirety, does the plan owner signing below certify that all statements made in this form and the list of all North Carolina licensed attorneys who have agreed to participate in the plan are true and correct to the best of his or her knowledge? [Yes] [No]**

_____ _____

Date **Signature of Plan Owner**

_____

Typed Name of Plan Owner

~~.0307~~ .0311 Annual Registration Renewal

After its initial registration, a ~~prepaid legal services~~ plan may continue to operate so long as it ~~is operated as registered and it renews its registration annually on or before January 31 by filing a~~ **timely files the proscribed registration renewal form and its operation is consistent with its registration statement. The plan owner shall file the** registration renewal form **contained in Rule .0312** with the secretary **of the North Carolina State Bar** and pay~~ing~~ the annual registration fee **on or before December 1 of each year**. **If a plan fails to file the registration renewal form and pay the annual registration fee by December 1, counsel may request the committee at its next quarterly meeting to instruct the secretary of the State Bar to serve upon the plan owner a notice to show cause why the plan's registration should not be revoked as provided in Rule .0316.**

.0312 Registration Renewal Form

REGISTRATION RENEWAL FORM FOR PREPAID LEGAL SERVICES PLAN

Each prepaid legal services plan registered to operate in North Carolina shall renew its registration each year. If a plan fails to file the registration renewal form and pay the annual registration fee by December 1, counsel may request the Authorized Practice Committee at its next quarterly meeting to instruct the secretary of the State Bar to serve upon the plan's owner a notice to show cause why the plan's registration should not be revoked.

1. **Current Registration Information**
   a. **Plan Name:**
   b. **Plan Number:**
2. **Is the plan still offered by a person or entity not authorized to engage in the practice of law? [Yes] [No]**
3. **Does the plan, in exchange for any valuable consideration, still offer to arrange the provision of specified**

legal services that are paid for in advance of any immediate need for the specified legal service ("covered services")? [Yes] [No]

4. **Are the legal services the plan offers to arrange still provided by North Carolina licensed attorneys who are not employees, directors, or owners of the plan? [Yes] [No]**

5. **Do the covered services the plan offers to arrange still extend beyond the sale of an identified, limited legal service, such as drafting a will, for a fixed, one-time fee? [Yes] [No]**

6. **Attach a list of the names, addresses, bar numbers, and telephone numbers of all North Carolina licensed attorneys who provide or offer to provide the legal services arranged by the plan. This list should be alphabetized by attorney last name.**

7. **If there have been any amendments to the plan since its initial registration statement or since it renewed its registration last year that are not indicated herein, please attach copies of the registration amendment forms filed with the State Bar and the letter from the State Bar reporting that such forms were registered to this report and indicate in the box provided whether any amendments are attached. [ ]**

8. **Is a check for the non-refundable annual registration fee payable to the State Bar enclosed with this report? [Yes] [No]**

9. **Are there any changes the owner signing below wishes to make to the plan? [Yes] [No]**

    a. **If "No," please skip to item 15. If "Yes," only complete the items below that the plan owner wishes to change. Please note that any desired changes must be indicated here and that the plan owner must complete and file a separate registration amendment form.**

10. **New Name of Plan:**

11. **New Owner of Plan**

    a. **Name:**

    b. **Title:**

12. New Principal North Carolina Address for Plan

a. Address:

b. City:

c. State:

d. Zip Code:

13. New Contact Information for Plan Representative

a. Name:

b. Address:

c. City:

d. State:

e. Zip Code:

f. Telephone Number:

g. Email Address:

14. Does the plan owner signing below understand that the amendments to this plan may not be implemented until the registration amendment form is registered with the State Bar in accordance with 27 N.C.A.C. 1E, §§ .0313 through .0315 of the North Carolina State Bar Regulations for Organizations Practicing Law? [Yes] [No]

15. Does the plan owner signing below certify that the information contained herein is true and correct to the best of his or her knowledge? [Yes] [No]

_____ _____

Date **Signature of Plan Owner**

_____

Typed Name of Plan Owner

~~.0306~~ .0313 ~~Requirement to File~~ Registration Amendments

(a) A plan owner shall file an amendment to its registration statement ("registration amendment") to document any change in the information provided in its initial registration statement or in its last registration renewal form. ~~Amendments to prepaid legal services plans and to other documents required to be filed upon registration of such plans shall be filed in the office of the North Carolina State Bar~~ **A plan owner shall file the registration amendment form**

contained in Rule .0315 with the secretary of the North Carolina State Bar ~~no later than 30 days after the adoption of such amendments~~ **prior to any change that requires the plan owner to file an amendment**. ~~Plan amendments must be submitted in the same manner as the initial registration and may~~ **An amendment to a plan shall** not be implemented until the ~~amended plan~~ **registration amendment** is registered in accordance with Rule ~~.0305~~ **.0314.**

(b) A plan owner shall not be required to file a registration amendment form each time there is a change in licensed North Carolina attorneys who have agreed to provide the legal services arranged by the plan. A plan owner shall provide a current list of licensed North Carolina attorneys who agree to provide the legal services arranged by the plan with each registration renewal form as set forth in Rule .0312.

.0314 Determination of Registration Amendments

Counsel shall review a plan's registration amendment. If counsel determines that the plan will continue to satisfy the requirements for registration, counsel shall inform the plan owner that the plan's registration amendment will be registered. If counsel determines that the plan will not continue to satisfy the requirements for registration, counsel shall inform the plan owner that the registration amendment will not be registered and shall explain the deficiencies. Counsel shall provide a report to the committee each quarter identifying the plans that submitted registration amendments and whether each registration amendment was registered.

.0315 Registration Amendment Form

REGISTRATION AMENDMENT FORM FOR PREPAID LEGAL SERVICES PLAN

A prepaid legal services plan shall file a registration amendment form with the secretary of the North Carolina State Bar no later than 30 days after a change in the information provided by the plan in its initial registration statement or in its last registration renewal form. Changes to the operation of the plan or to the governing documents of the plan that are inconsistent with the information contained in the plan's initial registration statement or in the plan's last registration renewal form may not be implemented until they are registered with the State Bar.

The plan owner shall provide complete responses to items 2 – 5 if he or she would like to amend the plan's current registration information. There is no need to complete items 2 – 5 if they have not changed. The plan owner shall provide complete responses to item 1 and items 6 – 11.

1. **Current Registration Information**
   a. **Plan Name:**
   b. **Plan Number:**
2. **New Name of Plan:**
3. **New Owner of Plan**
   a. **Name:**
   b. **Title:**
4. **New Principal North Carolina Address for Plan**
   a. **Address:**
   b. **City:**
   c. **State:**
   d. **Zip Code:**
5. **New Contact Information for Plan Representative**
   a. **Name:**
   b. **Address:**
   c. **City:**
   d. **State:**
   e. **Zip Code:**
   f. **Telephone Number:**
   g. **Email Address:**
6. **Is the plan still offered by a person or entity not authorized to engage in the practice of law? [Yes] [No]**
7. **Does the plan, in exchange for any valuable consideration, still offer to arrange the provision of specified legal services that are paid for in advance of any immediate need for the specified legal service ("covered services")? [Yes] [No]**
8. **Are the legal services the plan offers to arrange still provided by North Carolina licensed attorneys who are not employees, directors, or owners of the plan? [Yes] [No]**

9. Do the covered services the plan offers to arrange still extend beyond the sale of an identified, limited legal service, such as drafting a will, for a fixed, one-time fee? [Yes] [No]

10. After reading the foregoing form in its entirety, does the plan owner signing below certify that all statements made in this form are true and correct to the best of his or her knowledge? [Yes] [No]

11. Does the plan owner signing below understand that the amendments to this plan may not be implemented until the registration amendment form is registered with the North Carolina State Bar in accordance with 27 N.C.A.C. 1E, §§ .0313 through .0315 of the North Carolina State Bar Regulations for Organizations Practicing Law? [Yes] [No]

_____ _____

Date **Signature of Plan Owner**

_____

Typed Name of Plan Owner

~~.0312~~ .0316 Revocation of Registration

Whenever it appears that a plan**: (1)** no longer meets the definition of a prepaid legal services plan; **(2)** is marketed or operates in a manner that is not consistent with the representations made in the initial ~~or amended registration statement and accompanying documents upon which the State Bar relied in registering the plan~~ **registration statement, the registration amendment form, or with the most recent registration renewal form filed with the North Carolina State Bar**; **(3)** is marketed or operates in a manner that ~~would~~ constitute**s** the unauthorized practice of law; **(4)** is marketed or operates in a manner that violates state or federal laws or regulations, including the rules and regulations of the ~~North Carolina~~ State Bar; or **(5)** has failed to pay the annual registration fee, the committee may instruct the secretary **of the State Bar** to serve upon the plan's ~~sponsor~~ **owner** a notice to show cause why the plan's registration should not be revoked. The notice shall specify the plan's apparent deficiency and allow the plan~~s sponsor~~ **owner** to file **with the secretary** a written response within 30 days of service ~~by sending the same to the secretary~~. If the ~~sponsor~~ **plan owner** fails to file a timely written response, the secretary shall issue an order revoking the plan's registration and shall serve the order upon the plan~~s sponsor~~ **owner**. If a timely written response is filed, the secretary

shall schedule a hearing, in accordance with Rule ~~.0313~~ **.0317** below, before the ~~Authorized Practice Committee at its next regularly scheduled meeting~~ **committee** and shall so notify the plan ~~sponsor~~ **owner**. **The secretary may waive such hearing based upon a stipulation by the plan owner and counsel that the plan's apparent deficiency has been cured.** All notices to show cause and orders required to be served herein ~~may~~ **shall** be served: **(1)** by certified mail ~~to~~ **at** the ~~last~~ address **last** provided ~~for~~ **to the State Bar by** the plan ~~sponsor on its most current registration statement or~~ **owner; (2)** in accordance with **any other provisions of** Rule 4 of the North Carolina Rules of Civil Procedure**;** ~~and~~ **or (3)** ~~may be served~~ by a State Bar investigator or **by** any ~~other~~ person authorized by Rule 4 of the North Carolina Rules of Civil Procedure to serve process. The State Bar ~~will~~ **shall** not ~~renew the annual registration~~ **register the registration renewal form** of any plan ~~that has received~~ **for which the secretary has issued** a notice to show cause under this section, but the plan may continue to operate under the prior registration **statement** until resolution of the show cause notice by the council.

~~.0313~~ .0317 Hearing before the Authorized Practice Committee

~~At any hearing concerning the registration of a prepaid legal services plan, the committee chair~~ **The Chair of the Authorized Practice Committee** ~~will~~ **shall** preside ~~to ensure that the hearing is conducted in accordance with these rules~~ **at any hearing concerning the registration of a prepaid legal services plan**. The ~~committee~~ chair shall cause a record of the proceedings to be made. Strict compliance with the **North Carolina** Rules of Evidence is not required, but **the North Carolina Rules of Evidence** may be used to guide the committee in the conduct of an orderly hearing. ~~The plan sponsor may appear and be heard, be represented by counsel, offer witnesses and documents in support of its position and cross-examine any adverse witnesses.~~ The counsel ~~may appear on behalf of the State Bar and be heard,~~ **shall represent the State Bar** and may offer witnesses and ~~documents~~ **documentary evidence, may cross-examine adverse witnesses, and may argue the State Bar's position. The plan owner may appear and may be represented by counsel, may offer witnesses and documentary evidence, may cross-examine adverse witnesses, and may argue the plan owner's position.** The burden of proof shall be upon the ~~sponsor~~ **plan owner** to establish **that** the plan meets the definition of a prepaid legal services plan, that all registration fees have been paid, and that the plan has operated **and does operate** in a manner consistent with all ~~material~~ **applicable law, with these rules, and with all** representations made in its then current registration statement~~, the law,~~

~~and these rules~~. If the ~~sponsor~~ **plan owner** ~~carries~~ **meets** its burden of proof, the ~~plan's registration shall be accepted or continued~~ **initial registration statement, the registration amendment form, or the registration renewal form in question shall be registered**. If the ~~sponsor~~ **plan owner** fails to ~~carry~~ **meet** its burden of proof, the committee shall recommend to the council that the plan's **initial** registration **statement, registration amendment form, or registration renewal form** be denied or revoked.

~~.0314~~ .0318 Action by the Council

Upon the recommendation of the **Authorized Practice** ~~c~~**C**ommittee, the council may enter an order denying or revoking the registration of ~~the~~ **a** plan. The order shall be effective when entered by the council. A copy of the order shall be served upon the plan~~'s sponsor~~ **owner** as prescribed in Rule ~~.0312~~ **.0316** above.

BOARD OF LAW EXAMINERS

AMENDMENTS TO THE RULES AND REGULATIONS OF THE BOARD OF LAW EXAMINERS APPROVED BY THE NORTH CAROLINA STATE BAR COUNCIL

The following amendments to the rules and regulations of the Board of Law Examiners were approved by the North Carolina State Bar Council at its quarterly meeting on July 24, 2020.

BE IT RESOLVED by the Council of the North Carolina State Bar and the Board of Law Examiners that the Rules and Regulations of the Board of Law Examiners, as particularly set forth in the following sections of the Rules Governing Admission to the Practice of Law, be amended as shown in the listed attachments (additions are underlined, deletions are interlined):

- **Attachment A: Section .0500 – Requirements for Applicants**
- **Attachment B: Section .0600 – Moral Character and General Fitness**
- **Attachment C: Section .1200 – Board Hearings**

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations of the Board of Law Examiners were approved by the Council of the North Carolina State Bar at a regularly called meeting on July 24, 2020.

Given over my hand and the Seal of the North Carolina State Bar, this the 14th day of September, 2020.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendments to the Rules and Regulations of the Board of Law Examiners approved by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 25th day of September, 2020.

s/Cheri Beasley
Cheri Beasley, Chief Justice

BOARD OF LAW EXAMINERS

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

This the 25th day of September, 2020.

s/Davis, J.
For the Court

ATTACHMENT A

AMENDMENTS TO THE RULES OF THE BOARD OF LAW EXAMINERS APPROVED BY THE NORTH CAROLINA STATE BAR

Submitted to the North Carolina Supreme Court on September 11, 2020

SECTION .0500 REQUIREMENTS FOR APPLICANTS

.0502 REQUIREMENTS FOR COMITY APPLICANTS

The Board in its discretion shall determine whether an attorney duly licensed to practice law in any state, or territory of the United States, or the District of Columbia, may be licensed to practice law in the State of North Carolina without written examination, other than the Multistate Professional Responsibility Examination; provided that such attorney's jurisdiction of licensure qualifies as a jurisdiction in comity with North Carolina, in that the conditions required by such state, or territory of the United States or the District of Columbia, for North Carolina attorneys to be licensed to practice law in that jurisdiction without written examination are not considered by the Board to be unduly or materially greater than the conditions required by the State of North Carolina for licensure to practice law without written examination in this State. A list of "approved jurisdictions", as determined by the Board pursuant to this rule, shall be available upon request.

Any attorney at law duly admitted to practice in another state, or territory of the United States, or the District of Columbia, upon written application may, in the discretion of the Board, be licensed to practice law in the State of North Carolina without written examination provided each such applicant shall:

(1) File with the Executive Director, upon such forms as may be supplied by the Board, a typed application ~~in duplicate which will be considered by the Board after at least six (6) months from the date of filing~~. Such application shall require:

(a) That an applicant supply full and complete information in regard to his background, including family, past residences, education, military, employment, credit status, whether he has been a party to any disciplinary or legal proceedings, whether currently mentally or emotionally impaired, references, and the nature of the applicant's practice of law.

(b) That the applicant furnishes the following documentation:

(i) Certificates of Moral Character from four (4) individuals who know the applicant;

(ii) A recent photograph;

(iii) Two (2) sets of clear fingerprints;

(iv) A certification of the Court of Last Resort from the jurisdiction from which the applicant is applying that:

-the applicant is currently licensed in the jurisdiction;

-the date of the applicant's licensure in the jurisdiction;

-the applicant was of good moral character when licensed by the jurisdiction; and

-the jurisdiction allows North Carolina attorneys to be admitted without examination;

(v) Transcripts from the applicant's undergraduate and graduate schools;

(vi) A copy of all applications for admission to the practice of law that the applicant has filed with any state, territory, or the District of Columbia;

(vii) A certificate of admission to the bar of any state, territory, or the District of Columbia;

(viii) A certificate from the proper court or body of every jurisdiction in which the applicant is licensed that he is in good standing, or that the applicant otherwise satisfy the Board that the applicant falls within the exception provided in Rule .0501(7)(b), and not under pending charges of misconduct;

(2) Pay to the Board with each application, a fee of $2,000.00, no part of which may be refunded to (a) an applicant whose application is denied; or (b) an applicant who withdraws, unless the applicant has filed with the Board a written request to withdraw, in which event, the Board in its discretion may refund no more than one-half of the fee to the withdrawing applicant. However, when an application for admission by comity is received from an applicant who, in the opinion of the Executive Director after consideration with the Board Chair, is not eligible for consideration under the Rules, the applicant

shall be so advised by written notice. Upon receipt of such notice, the applicant may elect in writing to withdraw the application, and, provided the written election is received by the Board within twenty (20) days from the date of the Board's written notice to the applicant, receive a refund of all fees paid.

(3) Prove to the satisfaction of the Board that the applicant is duly licensed to practice law in one or more jurisdictions which are on the list of "approved jurisdictions," or should be on such list, as a comity jurisdiction within the language of the first paragraph of this Rule .0502; that the applicant has been, for at least four out of the six years immediately preceding the filing of this application with the Executive Director, actively and substantially engaged in the practice of law pursuant to the license to practice law from one or more jurisdictions relied upon by the applicant; and that the applicant has read the Rules of Professional Conduct promulgated by the North Carolina State Bar. Practice of law for the purposes of this rule when conducted pursuant to a license granted by another jurisdiction shall include the following activities, if performed in a jurisdiction in which the applicant is admitted to practice law, or if performed in a jurisdiction that permits such activity by a licensed attorney not admitted to practice in that jurisdiction:

(a) The practice of law as defined by G.S. 84-2.1; or

(b) Activities which would constitute the practice of law if done for the general public; or

(c) Legal service as house counsel for a person or other entity engaged in business; or

(d) Judicial service, service as a judicial law clerk, or other legal service in a court of record or other legal service with any local or state government or with the federal government; or

(e) Legal service with the United States, a state or federal territory, or any local governmental bodies or agencies, including military service; or

(f) A full time faculty member in a law school approved by the Council of the North Carolina State Bar.

For purposes of this rule, the active practice of law shall not include (a) work that, as undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which any person receiving the unauthorized service was located, or (b) the practice of law in any additional jurisdiction, pursuant to a license to

practice law in that additional jurisdiction, and that additional jurisdiction is not an "approved jurisdiction" as determined by the Board pursuant to this rule.

(4) Be in good standing in each State, territory of the United States, or the District of Columbia in which the applicant is or has been licensed to practice law and not under any charges of misconduct while the application is pending before the Board.

(a) For purposes of this rule, an applicant is "in good standing" in a jurisdiction if:

(i) the applicant is an active member of the bar of the jurisdiction and the jurisdiction issues a certificate attesting to the applicant's good standing therein; or

(ii) the applicant was formerly a member of the bar of the jurisdiction and the jurisdiction certifies the applicant was in good standing at the time that the applicant ceased to be a member; and

(b) if the jurisdiction in which the applicant is inactive or was formerly a member will not certify the applicant'-s good standing solely because of the non-payment of dues, the Board, in its discretion, may waive such certification from that jurisdiction; however, the applicant must not only be in good standing, but also must be an active member of each jurisdiction upon which the applicant relies for admission by comity.

(5) Be of good moral character and have satisfied the requirements of Section .0600 of this Chapter;

(6) Meet the educational requirements of Section .0700 of this Chapter as hereinafter set out if first licensed to practice law after August, 1971;

(7) Not have taken and failed the written North Carolina Bar Examination within five (5) years prior to the date of filing the applicant's comity application;

(8) Have passed the Multistate Professional Responsibility Examination.

ATTACHMENT B

AMENDMENTS TO THE RULES OF THE BOARD OF LAW EXAMINERS APPROVED BY THE NORTH CAROLINA STATE BAR

Submitted to the North Carolina Supreme Court on September 11, 2020

SECTION .0600, MORAL CHARACTER AND GENERAL FITNESS

.0604 BAR CANDIDATE COMMITTEE

Every General Applicant~~applicant~~ and UBE Transfer Applicant not licensed in another jurisdiction shall appear before a bar candidate committee, appointed by the Board Chair, in the judicial district in which the applicant resides, or in such other judicial districts as the Board in its sole discretion may designate to the applicant, to be examined about any matter pertaining to the applicant's moral character and general fitness to practice law. An applicant who has appeared before a hearing Panel may, in the Board's discretion, be excused from making a subsequent appearance before a bar candidate committee. The Board Chair may delegate to the Executive Director the authority to exercise such discretion. The applicant shall give such information as may be required on such forms provided by the Board. A bar candidate committee may require the applicant to make more than one appearance before the committee and to furnish to the committee such information and documents as it may reasonably require pertaining to the moral character and general fitness of the applicant to be licensed to practice law in North Carolina. Each applicant will be advised when to appear before the bar candidate committee. There can be no changes once the initial assignment is made.

ATTACHMENT C

AMENDMENTS TO THE RULES OF THE BOARD OF LAW EXAMINERS APPROVED BY THE NORTH CAROLINA STATE BAR

Submitted to the North Carolina Supreme Court on September 11, 2020

SECTION .1200, BOARD HEARINGS

.1201 NATURE OF HEARINGS

(1) Any ~~All general~~ applicant~~s~~ may be required to appear before the Board or a hearing Panel at a hearing to answer inquiry about any matter under these rules. In the event a hearing for an applicant for admission by examination is not held before the written examination, the applicant shall be permitted to take the written examination.

~~(2) Each comity, military spouse comity, or transfer applicant shall appear before the Board or Panel to satisfy the Board that he or she has met all the requirements of Rule .0502, Rule .0503 or Rule .0504.~~

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