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ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

NOVEMBER 8, 2023

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

THE SUPREME COURT

OF

NORTH CAROLINA

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SUPREME COURT OF NORTH CAROLINA

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ADMINISTRATIVE LAW

Administrative law judge—standard for deciding a contested case—water pollutant permit—In a contested case that arose after the Department of Environmental Quality (DEQ) issued a permit to a construction materials supplier allowing it to discharge mining wastewater into tributaries in Blounts Creek, the administrative law judge (ALJ) properly affirmed the permit's issuance and determined that DEQ had adequately ensured the permit's compliance with the "biological integrity standard" for surface waters under the N.C. Administrative Code. Specifically, the ALJ met the standard found in N.C.G.S. § 150B-34(a) for deciding contested cases by properly: making findings of fact (unchallenged on appeal) based upon the preponderance of the evidence; determining that the biological integrity standard fell within DEQ's "specialized knowledge"; giving "due regard" to DEQ's "demonstrated knowledge and expertise" with respect to the relevant facts; determining that DEQ's interpretation of the biological integrity rules was reasonable

and consistent with the rules' plain language; and applying DEQ's interpretation of the biological integrity rules to the facts surrounding the permit application. **Sound Rivers, Inc. v. N.C. Dep't of Env't Quality, 1.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Custodial interrogation—murder by torture of child victim—defendant's statements at hospital—extent of restraint—In defendant's capital trial for murder by torture of a child victim and related charges, the trial court correctly concluded that defendant was not in custody for purposes of *Miranda* when he made incriminating statements to law enforcement officers at the hospital where he had brought the victim. Defendant had not been restrained to the extent associated with formal arrest where, although he was grabbed by a nurse as he attempted to leave and pushed into a room and told not to leave prior to the arrival of law enforcement, he was subsequently told by officers that he was not under arrest, the door to the room was left open for part of his questioning, and he was not accused of anything or physically restrained in any manner. **State v. Richardson, 101.**

CONTRACTS

Breach of contract—express terms—summary judgment—In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court erred by granting defendants' motion for summary judgment on plaintiffs' breach of contract claim as related to the Asset Purchase Agreement's Independent Milestone Provision, which provided that satisfaction of the criteria of one earnout milestone was not contingent on satisfaction of the criteria of any other milestone. Plaintiffs presented evidence tending to support their assertion that defendants conditioned certain milestones on the completion of others, in breach of the express terms of the contract. **Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc., 250.**

Breach of contract—implied covenant of good faith and fair dealing—contractual gap—In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not err by granting defendants' motion for summary judgment on plaintiffs' breach of contract claims as related to certain sections of the Asset Purchase Agreement that permitted defendants to "reasonably determine" completion of the first and second software development earnout milestones. Because the tasks required for the milestones were not completed, defendants reasonably determined that the milestones had not been met. Where the contract was not silent on the issue, plaintiffs' arguments regarding the implied covenant of good faith and fair dealing were misplaced. **Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc., 250.**

Breach of contract—third-party sales—summary judgment—remand—In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court erred by granting defendants' motion for summary judgment on plaintiffs' breach of contract claim as related to the Asset Purchase Agreement's External Sales Provision, which concerned the sale of licenses to plaintiffs' software by defendants to third parties. Because defendants' Master Services Agreement (MSA) with a third-party pharmaceutical company included the use of the software and could be an "External Sale" under the Asset Purchase Agreement, the issue was remanded to the trial court for

CONTRACTS—Continued

determination of whether the MSA was drafted such that the third-party company was required to pay consideration to acquire and use a license to plaintiffs' software. In addition, the covenant of good faith and fair dealing was inapplicable to this issue. **Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc., 250.**

CRIMINAL LAW

Capital murder prosecution—preservation issues—The preservation issues defendant raised on appeal from his convictions for first-degree murder and related charges and his sentence of death were rejected by the appellate court as having no merit based on precedent. **State v. Richardson, 101.**

Murder—death penalty—not disproportionate or arbitrary—Defendant's sentence of death in a murder prosecution for the killing of a young child was not disproportionate, excessive, or arbitrary where, after defendant was convicted of first-degree murder based on murder by torture and the felony murder rule based upon the felonies of first-degree kidnapping, sexual offense with a child, and felony child abuse inflicting serious bodily injury, and was also convicted of each of those three felonies, the jury found the existence of all three aggravating factors submitted to it, which were supported by the record. **State v. Richardson, 101.**

DISCOVERY

Complex business case—third discovery request—unduly burdensome—remand—In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not err in denying plaintiffs' Third Discovery Request. The trial court complied with Business Court Rule 10.9 and Civil Procedure Rule 26, and the Supreme Court rejected as baseless plaintiffs' argument that the trial court converted an informal and required email request into a motion to compel. However, given the Court's holding on another issue regarding the parties' contract, the question of what further discovery may be appropriate was open for the trial court to consider on remand. **Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc., 250.**

EVIDENCE

Cumulative error—murder by torture of child victim—inflaming jury's passion—prejudice analysis—In defendant's capital trial for murder by torture of a child victim and related charges, where each of defendant's evidentiary challenges were rejected on appeal—including that the State introduced an excessive number of photographs of the victim's injuries, that some photos were needlessly shown during the testimony of more than one witness, and that witnesses were erroneously allowed to testify to their emotional reactions upon seeing the extent of the victim's injuries—there was no cumulative, prejudicial error in the trial court's evidentiary decisions taken as a whole given the overwhelming evidence of defendant's guilt. **State v. Richardson, 101.**

Expert testimony—murder by torture of child victim—bite marks—abuse of discretion analysis—In defendant's capital trial for murder by torture of a child victim, the trial court did not abuse its discretion by allowing the State's expert witness in forensic dentistry to testify regarding numerous bite marks found on the victim's body—which he attributed to an adult human—even though three physicians had already testified with their opinions that certain marks on the victim's body were

human bite marks made within a certain number of days prior to her arrival at the hospital. There was no meaningful dispute that defendant caused the marks on the victim's body since he had been her sole caretaker during the time period in question. **State v. Richardson, 101.**

Expert testimony—murder by torture of child victim—emotional reactions from medical and law enforcement personnel—In defendant's capital trial for multiple charges including murder by torture and felony child abuse inflicting serious bodily injury, the trial court did not err by allowing various medical personnel and law enforcement officers to testify regarding their emotional reactions immediately upon seeing the extent of the victim's injuries after defendant brought her to the hospital. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice where the witnesses' reactions provided context to the jury regarding the severity of the victim's injuries in relation to the types of cases the witnesses usually saw in the course of their work. Moreover, defendant could not demonstrate prejudice given the overwhelming evidence of his guilt and of the victim's numerous severe injuries that she suffered over an extended period while in defendant's sole care. **State v. Richardson, 101.**

Expert testimony—murder by torture—question of whether child victim was tortured—abuse of discretion analysis—In defendant's capital trial for murder by torture of a child victim, the trial court did not abuse its discretion by allowing two expert witnesses to testify (one during the guilt-innocence phase, the other during sentencing) regarding whether the victim was tortured. Where the term "torture" is not a legal term of art, testimony from the first witness (accepted as an expert in pediatrics and child abuse) that the victim's extensive and severe injuries were consistent with torture did not improperly invade the province of the jury and was properly admitted as being based on the expert's training and specialized knowledge. Further, testimony at sentencing from the second witness (accepted as an expert in forensic pediatrics with a specialization in child abuse and maltreatment) was not cumulative or unfairly inflammatory where that expert's opinions—in general with regard to the state of mind of a person who tortures and specifically that the victim's injuries were not accidental—were similarly based on a proper foundation of specialized training and background. **State v. Richardson, 101.**

Mental health records—under seal—in camera review by appellate court—no exculpatory evidence—On appeal after defendant's capital trial for murder by torture of a child victim and related charges, in which the trial court ordered mental health records of the victim's mother to be placed under seal—after allowing some of the records to be released to defendant—the Supreme Court reviewed the sealed records in camera upon defendant's request and determined that they contained no exculpatory or impeaching evidence requiring disclosure. **State v. Richardson, 101.**

Opening the door—cell phone evidence—abuse of discretion analysis—prejudice analysis—In defendant's murder trial that resulted in his conviction for voluntary manslaughter, assuming the State opened the door to evidence found on the victim's cell phone after the crime occurred, the trial court did not abuse its discretion in refusing to allow defense counsel to question witnesses about the cell phone evidence showing the victim with firearms and implicating him in acts of violence. Striking a balance that was fair to the State and defendant, the trial court did allow defense counsel to ask the victim's father whether the detective had shared the contents of the victim's cell phone with him, which invited the jury to doubt the father's testimony that he did not know anything about the victim possessing a firearm. Even if the trial court did abuse its discretion, exclusion of the cell phone evidence did

not prejudice defendant because defendant did not know what was on the victim's cell phone at the time of the shooting, and therefore the evidence did not speak to whether defendant's use of force in self-defense was reasonable under the facts as they appeared to him at the time; further, there was no evidence that the victim possessed a gun when defendant killed him, and substantial evidence—including the gunshot wounds in the back of his head and his back—showed that the victim was attempting to flee when defendant fired his last two shots. **State v. McKoy, 88.**

Photographs—murder by torture—child victim—number, size, and manner of display—In defendant's capital trial for multiple charges including murder by torture, sexual offense with a child, and felony child abuse inflicting serious bodily injury, the trial court did not abuse its discretion by allowing the State to introduce eighty-eight photographs of the child victim's body and injuries—some of them close-ups—by showing them on a large monitor located close to the jury, where the photographs were more probative than prejudicial because they were: relevant to the offenses charged and to defendant's credibility, used to illustrate the respective testimonies of different witnesses, and not needlessly cumulative or excessive given evidence that the victim suffered at least 144 separate injuries over an extended period of time. **State v. Richardson, 101.**

Relevance—murder trial—evidence of other possible perpetrators—not exculpatory—At the joint trial of two defendants for first-degree murder and other offenses arising from a fatal shooting, the trial court did not err in excluding evidence that defendants asserted showed two other people had committed the crimes for which they were on trial. Although the excluded evidence did suggest the possible involvement of other perpetrators, and was therefore relevant for purposes of Evidence Rule 401, it was still inadmissible where it did not also fully exculpate defendants (especially given the direct evidence of defendants' guilt, which included cellular phone data placing them at the crime scene and an eyewitness's identification of defendants both in court and during a pretrial photographic lineup). **State v. Abbitt, 28.**

FRAUD

Dismissal—fraud and fraudulent inducement—failure to meet particularity requirement—broad allegations—In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not err by dismissing plaintiffs' claims for fraud and fraudulent inducement based on representations allegedly made before the execution of the Asset Purchase Agreement and not involving the Non-Binding Letter of Intent. The claims were not pleaded with sufficient particularity to satisfy Civil Procedure Rule 9(b) where the complaint did not specify the time, place, particular content of the alleged representation, or the person who made the alleged representation. **Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc., 250.**

Dismissal—fraud by omission and promissory fraud—failure to state a claim—failure to meet particularity requirement—In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not err by dismissing plaintiffs' claims of fraud by omission and promissory fraud pursuant to Civil Procedure Rules 12(b)(6) and 9(b). In the first place, plaintiffs did not raise those claims in their amended complaint; furthermore, plaintiffs failed to satisfy the particularity requirement of Rule 9(b). **Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc., 250.**

FRAUD—Continued

Dismissal—negligent misrepresentation—failure to meet particularity requirement—In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not err by dismissing plaintiffs' negligent misrepresentation claim for failure to satisfy the heightened pleading standard of Civil Procedure Rule 9(b) where the complaint did not allege the time, place, speaker, or specific contents of the alleged misrepresentation. **Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc., 250.**

Intentional misrepresentation and fraudulent inducement—attempt to amend purchase agreement—amendments not made—In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not err by granting summary judgment in favor of defendants on plaintiffs' claims for intentional misrepresentation and fraudulent inducement based upon statements made by defendants' chief executive officer and senior vice president of IT regarding possible amendments to the Asset Purchase Agreement (APA). Evidence in the record supported defendants' representations that the company was attempting to amend the APA, and failure to reach an agreement on the amendment did not mean that defendants' representations were false at the time they were made. **Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc., 250.**

Intentional misrepresentation and fraudulent inducement—letter of intent—non-binding—In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not err by granting summary judgment in favor of defendants on plaintiffs' claims for intentional misrepresentation and fraudulent inducement based on representations contained in the Non-Binding Letter of Intent (LOI). The LOI, which by its express terms was non-binding and not to be relied upon, could not form the basis of plaintiffs' fraud claims; furthermore, plaintiffs cited no authority in which a court has recognized a claim arising out of representations contained in a letter of intent. **Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc., 250.**

HOMICIDE

Second-degree murder—jury instructions—self-defense—aggressor doctrine—sufficiency of evidence—Defendant was not entitled to a new trial on her second-degree murder charge because the trial court properly instructed the jury on the aggressor doctrine where—considering the evidence in the light most favorable to the State and giving the State the benefit of the doubt wherever the evidence conflicted—the jury could reasonably infer that defendant was acting as an "aggressor" at the time that she allegedly shot the victim in self-defense. Notably, although the victim (defendant's lover) had initiated the confrontation leading up to his death by forcefully entering defendant's apartment against her wishes, the State's evidence suggested that defendant shot him in the back while he was on his way out and already six feet away from her. **State v. Hicks, 52.**

JUDGES

Motion to disqualify—murder trial—judge previously prosecuted defendant's mother—potential witness—appearance of impropriety—In defendant's capital trial for murder by torture of a child and related charges, defendant's motion to disqualify the trial judge (which was assigned to another judge for ruling)

was properly denied where, although the presiding judge had been the prosecutor twenty years earlier at defendant's mother's trial for allegedly hiring someone to kill defendant's father (for which she was acquitted), there was no indication—despite defendant's assertion that the judge was a potential witness with regard to the childhood trauma that defendant experienced as a result of family dysfunction—that the judge had knowledge of any evidence that would be relevant to defendant's defense, nor was there any actual bias or the risk of impartiality based on the judge's interactions with the family in the past. **State v. Richardson, 101.**

JURY

Selection—Batson challenge—prima facie showing—In defendant's capital trial for murder by torture of a child victim and related charges, defendant did not establish a prima facie case of intentional discrimination pursuant to *Batson* after the prosecutor used peremptory challenges early in the jury selection process to dismiss two Black prospective jurors, where certain factors—including the racial identification of defendant, the victim, and primary witnesses—did not support defendant's argument and where the trial court's discretionary decision to exclude a report analyzing historical jury strikes as hearsay was not clearly erroneous. **State v. Richardson, 101.**

Selection—excusal for cause—reservations about death penalty—empathy for drug users—In defendant's capital trial for murder by torture of a child victim and related charges, the trial court did not abuse its discretion or violate defendant's right to a fair and impartial jury by excusing two potential jurors for cause where the court had the opportunity to hear the jurors in person and assess their ability to follow the law. Although the first juror equivocated about whether his religious convictions and conscience would allow him to impose the death penalty, he eventually indicated that his ability to follow the law would be substantially impaired even if he was convinced beyond a reasonable doubt that defendant was guilty and that punishment by death was warranted. Similarly, the second juror dismissed for cause expressed reservations about whether he could impose death as punishment and, given his own past experiences and substance abuse, stated that he would have trouble being objective and impartial as it related to drug use, which was forecast to be an issue in the case. **State v. Richardson, 101.**

Selection—gender discrimination—prima facie showing—In defendant's capital trial for murder by torture of a child victim and related charges, the trial court did not clearly err by determining that defendant had not established a prima facie case of intentional discrimination based on gender after the prosecutor used a peremptory challenge early in the jury selection process to dismiss a Black female prospective juror, where there were twice as many females as males in the potential juror pool and, at the time of defendant's challenge, four of the five jurors already seated were women. Further, a statement by one of the prosecutors indicating a lack of familiarity with the law prohibiting gender-based juror strikes was not, by itself, sufficient to demonstrate intentional discrimination. **State v. Richardson, 101.**

PLEADINGS

Amendments—undue delay and material prejudice—previous extensive revisions, discovery closed, full briefing on motion to dismiss—In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not abuse its

discretion in denying, based on undue delay and material prejudice to defendants, plaintiffs' motion for leave to file a Second Amended Complaint. Plaintiffs had previously amended their complaint with extensive revisions; discovery had closed, with thousands of documents exchanged; and the parties had fully briefed the motion to dismiss plaintiffs' Amended Complaint. **Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc., 250.**

UNFAIR TRADE PRACTICES

Breach of contract and fraud claims—termination of employment—substantial evidence—In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not err by granting summary judgment in favor of defendants on plaintiffs' claims under the Unfair and Deceptive Trade Practices Act (UDTPA). First, plaintiffs' UDTPA claims (aside from the claim regarding plaintiff founder's termination) were simply a repackaging of their breach of contract and fraud claims—essentially alleging that defendants had failed to perform under the terms of the contract, which did not support a finding of the required "substantial aggravating circumstances." In addition, when viewed in the light most favorable to plaintiffs, the record did not contain evidence creating a genuine issue of material fact. As for plaintiffs' other UDTPA claim—that co-founder plaintiff's termination was unfair—plaintiffs failed to overcome the high threshold to surpass the at-will employment presumption. **Value Health Sols., Inc. v. Pharm. Rsch. Assocs., Inc., 250.**

SCHEDULE FOR HEARING APPEALS DURING 2023

NORTH CAROLINA SUPREME COURT

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

January 31
February 1, 2, 7, 8, 9
March 14, 15, 16
April 25, 26, 27
September 12, 13, 14, 19, 20, 21
October 31
November 1, 2, 7, 8, 9

SOUND RIVERS, INC. AND NORTH CAROLINA COASTAL FEDERATION, INC.
v.
N.C. DEPARTMENT OF ENVIRONMENTAL QUALITY, DIVISION OF WATER RESOURCES, MARTIN MARIETTA MATERIALS, INC.

No. 306A20

Filed 1 September 2023

Administrative Law—administrative law judge—standard for deciding a contested case—water pollutant permit

In a contested case that arose after the Department of Environmental Quality (DEQ) issued a permit to a construction materials supplier allowing it to discharge mining wastewater into tributaries in Blounts Creek, the administrative law judge (ALJ) properly affirmed the permit's issuance and determined that DEQ had adequately ensured the permit's compliance with the "biological integrity standard" for surface waters under the N.C. Administrative Code. Specifically, the ALJ met the standard found in N.C.G.S. § 150B-34(a) for deciding contested cases by properly: making findings of fact (unchallenged on appeal) based upon the preponderance of the evidence; determining that the biological integrity standard fell within DEQ's "specialized knowledge"; giving "due regard" to DEQ's "demonstrated knowledge and expertise" with respect to the relevant facts; determining that DEQ's interpretation of the biological integrity rules was reasonable and consistent with the rules' plain language; and applying DEQ's interpretation of the biological integrity rules to the facts surrounding the permit application.

Justice MORGAN concurring.

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

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 271 N.C. App. 674 (2020), affirming in part and reversing in part orders entered on 13 November 2015 by Judge W. Douglas Parsons in Superior Court, Beaufort County, and on 30 October 2017, 4 December 2017, and 20 December 2017 by Judge Joshua W. Willey, Jr. in Superior Court, Carteret County. Heard in the Supreme Court on 27 April 2023.

Southern Environmental Law Center, by Geoffrey R. Gisler, Blakely E. Hildebrand, and Jean Y. Zhuang, for petitioner-appellees.

Joshua H. Stein, Attorney General, by Asher P. Spiller, Assistant Attorney General and Scott A. Conklin, Assistant Attorney General, for respondent-appellant.

Daniel F. E. Smith, Matthew B. Tynan, George W. House, Alexander Elkan, and V. Randall Tinsley, for intervenor-appellant.

BARRINGER, Justice.

I. Background

On 24 July 2013, the North Carolina Department of Environmental Quality, Division of Water Resources (Division) issued a National Pollutant Discharge Elimination System Permit (Permit) to Martin Marietta Materials, Inc. (Martin Marietta). This Permit allowed Martin Marietta to discharge 12 million gallons of mining wastewater per day from Vanceboro Quarry into "tributaries of Blounts Creek." On 30 November 2016, an administrative law judge (ALJ) from the Office of Administrative Hearings affirmed the issuance of the Permit. The ALJ made voluminous findings of fact. *See Sound Rivers, Inc. v. N.C. Dep't of Env't Quality, Div. of Water Res.*, 271 N.C. App. 674, 682 (2020). Sound Rivers, Inc. and North Carolina Coastal Federation, Inc. filed a petition for judicial review with the superior court. The superior court reversed the ALJ's decision because the Division failed to "ensure reasonable compliance with the biological integrity standard." On 2 June 2020, the Court of Appeals reversed the superior court, holding that "the ALJ correctly determined the Permit was properly and validly issued in accord with applicable regulations." *Sound Rivers, Inc.*, 271 N.C. App. at 743. None of the ALJ's findings of fact were challenged on appeal to this Court.[1]

Given the unchallenged, binding findings of fact, the due regard the ALJ gave the factual matters within the Division's demonstrated knowledge and expertise, and the ALJ's plain language analysis of the biological integrity standard, we affirm.

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1. Although several of the ALJ's findings of fact were challenged on appeal to the superior court and Court of Appeals, all findings of fact went unchallenged on appeal to this Court. Thus, we as a reviewing Court, are bound by those findings. *See State v. Biber*, 365 N.C. 162, 168 (2011) (citing *State v. Baker*, 312 N.C. 34, 37 (1984)).

II. Standard of Review

This Court reviews questions of law de novo. *Walker v. Bd. of Trustees of the N. Carolina Local, Governmental Employees' Ret. Sys.*, 348 N.C. 63, 65 (1998). Under de novo review, this Court's responsibility in this case is to review the statutory scheme and determine whether the ALJ and Court of Appeals correctly applied the law. *See id.* We agree with our learned colleague Justice Morgan's concurrence analyzing the missteps of the dissent regarding de novo review. As aptly noted in our concurring colleague's opinion, " 'a reviewing court is not free to weigh the evidence presented to an administrative agency and substitute its evaluation of the evidence for that of the agency.' *In re Appeal of McElwee*, 304 N.C. 68, 75 (1981) (citing *Appeal of AMP Inc.*, 287 N.C. 547, 562 (1975))." "[W]hen, as here, . . . findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal." *State v. Biber*, 365 N.C. 162, 168 (2011) (citing *State v. Baker*, 312 N.C. 34, 37 (1984)).

III. Analysis

Subsection (a) of N.C.G.S. § 150B-34 provides:

> In each contested case the administrative law judge shall make a final decision or order that contains findings of fact and conclusions of law. The administrative law judge shall decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency *with respect to facts and inferences within the specialized knowledge of the agency.*

N.C.G.S. § 150B-34(a) (2021) (emphasis added).

In this matter, "giving due regard to the demonstrated knowledge and expertise of the agency," the ALJ found that the biological integrity standard is within the "demonstrated knowledge and expertise" of the Division, administered by the Division, and within the Division's specialized knowledge "with respect to facts and inferences."[2] N.C.G.S. § 150B-34(a). Petitioners have not challenged these determinations or other related findings setting forth the experience and conduct of the Division's employees.

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2. The concurrence correctly focuses on section 150B-34(a)'s direction to give the agency's "facts and inferences" due regard.

The ALJ decided this case based on the preponderance of the evidence and set forth its findings of fact and conclusions of law in a written order. The factual determinations by the ALJ are numerous, unchallenged, and binding. Thus, this Court cannot disturb them on review. *See State v. Biber*, 365 N.C. at 168.[3]

Specifically, the ALJ found, *inter alia*, that:

> 52. The preponderance of the evidence shows that, in evaluating and determining whether the [ ] Permit reasonably ensures compliance with the biological integrity standard, [the Division] (through its staff) applied its knowledge and expertise, and:
>
> a. identified the Blounts Creek system, meaning Blounts Creek and its tributaries, as the appropriate "aquatic ecosystem";
>
> b. determined that the appropriate "reference conditions" were the existing conditions of the Blounts Creek system before the proposed discharge;
>
> c. studied and assessed the existing, pre-discharge ecological resources of the Blounts Creek system;
>
> d. determined the degree and geographic scope of potential physical and chemical impacts of the proposed discharge;
>
> e. determined the predicted changes to the ecosystem and ecological resources from the proposed discharge to be limited; and
>
> f. concluded that the effects predicted to occur as a result of the permitted discharge would not violate the standard, and, in fact, a violation would not occur unless the impacts to the Blounts Creek aquatic ecosystem were much greater in degree and geographic scope than those predicted to occur.

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3. Our dissenting colleague has delved into the record, reweighed the unchallenged facts of the case, which included determining the credibility of expert testimony. This review is improper. *In re Appeal of McElwe*e, 304 N.C. 68, 75 (1981) (citing *Appeal of AMP Inc.*, 287 N.C. 547, 562 (1975)).

In reviewing whether the Division "failed to conduct a biological integrity analysis by inadequately sampling for 'species composition, diversity, population densities and functional organization' throughout the Blounts Creek aquatic ecosystem," the ALJ further found that:

> 60. The determination and application of 'reference conditions' in a specific context is complex and requires significant expertise and judgment, and should be accorded deference.
>
> 61. [The Division]'s interpretation and application of this term are reasonable, rational, and in accordance with the language and purpose of the biological integrity standard.
>
> 62. To the extent [the Division]'s selection of appropriate 'reference conditions' is considered a factual determination, it is one which falls directly within the agency's expertise and is therefore entitled to "due regard" pursuant to the APA.
>
> 63. The preponderance of the evidence shows that Blounts Creek aquatic ecosystem's existing conditions ('reference conditions') are dynamic, vary over time and geographic locations, and can be affected by many environmental factors.
>
> 64. The preponderance of the evidence shows that [the Division] had sufficient information such that the biological sampling efforts Petitioners sought were unnecessary.
>
> 65. Before issuing the Permit, [the Division] determined that: (a) the proposed discharge likely would not cause significant erosion or sedimentation; (b) pH likely would not exceed 6.9 in the upper Blounts Creek and was unlikely to change significantly in lower Blounts Creek; (c) relative salinity impacts would likely be on the order of 1 ppt and salinities would remain within the variability of the system; (d) shifts in macrobenthic invertebrates would likely be toward an increase in diversity and would be geographically limited to the upper reaches of Blounts Creek; and (e) the proposed discharge is not likely to adversely impact fish communities of the Blounts

> Creek aquatic ecosystem. These determinations by [the Division] are reasonable and supported by the preponderance of the evidence.
>
> 66. [The Division] determined that the likely effects of the permitted discharge are limited in degree, limited in geographic scope, and not deleterious.
>
> 67. The preponderance of the evidence supports [the Division]'s conclusion and shows that the permitted discharge will not have any significant detrimental effect on the Blounts Creek aquatic ecosystem, including the many miles of C and Sw stream segments of other tributaries of Blounts Creek.

Thus, the ALJ acknowledged that, although terms used in the biological integrity definition such as "species composition," "population densities" and "functional organization" are complex and technical, these terms have a plain meaning in the environmental regulatory context. The ALJ then found by a preponderance of the evidence that the Division properly applied its knowledge and expertise to that regulatory language and determined that it had sufficient information such that the biological sampling efforts sought by petitioners were unnecessary. The ALJ further found that the Division thoroughly evaluated compliance with the biological integrity standard before issuing the Permit.

Given the foregoing and other unchallenged findings of fact supporting these determinations, this Court should affirm the ALJ's final decision unless the ALJ's determinations were affected by an error of law.

The legislature has provided in N.C.G.S. § 150B-51(c) in relevant part:

> In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors [of law] . . . the court shall conduct its review of the final decision using the de novo standard of review.

N.C.G.S. § 150B-51(c) (2021).

Petitioners unsuccessfully attempt to frame their argument as one of legal error. Petitioners specifically contend that "[t]he Division failed to conduct the specific analysis required by the biological integrity definition." Yet, they concede that the regulations referencing and defining

biological integrity do not address the specific process for assessing compliance, and they further concede that the regulations list no procedures for sampling and collecting data to assess compliance.

Indeed, as conceded, a specific procedure for assessing compliance with the biological integrity standard is not set forth in the regulations. Rather, the regulations protect surface waters by establishing surface water classifications based on the best usage of surface waters. One such regulation affecting the surface water in this matter requires the "maintenance of biological integrity (including fishing and fish)." 15A N.C. Admin. Code 2B.0211(1) (Supp. Feb. 2023); *see also* 15A N.C. Admin. Code 2B.0220(1) (Supp. Feb. 2023).[4] Biological integrity "means the ability of an aquatic ecosystem to support and maintain a balanced and indigenous community of organisms having species composition, diversity, population densities, and functional organization similar to that of reference conditions." 15A N.C. Admin. Code 2B.0202(13) (Supp. Feb. 2023) (previously located at 15A N.C. Admin. Code 2B.0202(11) (2012)). "Sources of water pollution that preclude [biological integrity] on either a short-term or long-term basis shall be deemed to violate a water quality standard." 15A N.C. Admin. Code 2B.0211(2) (Supp. Feb. 2023); *see also* 15A N.C. Admin. Code 2B.0220(2) (Supp. Feb. 2023). "No permit may be issued when the imposition of conditions cannot reasonably ensure compliance with applicable water quality standards . . . ."[5] 15A N.C. Admin. Code 2H.0112(c) (2022).

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4. While these regulations have been amended since the Division assessed and issued the permit, the relevant parts of these regulations for addressing the arguments on appeal have not changed. *See* 15A N.C. Admin. Code 2B.0211(1), (2) (2012) ("(1) Best Usage of Waters: aquatic life propagation and *maintenance of biological integrity* (including fishing and fish), wildlife, secondary recreation, agriculture and any other usage except for primary recreation or as a source of water supply for drinking, culinary or food processing purposes; (2) . . . Sources of water pollution which *preclude* any of these uses on either a short-term or long-term basis shall be *considered to be violating a water quality standard*." (emphases added)); 15A N.C. Admin. Code 2B.0220(1), (2) (2012) ("(1) Best Usage of Waters: any usage except primary recreation or shellfishing for market purposes; usages include aquatic life propagation and *maintenance of biological integrity* (including fishing, fish and functioning PNAs), wildlife, and secondary recreation; (2) . . . Any source of water pollution which *precludes* any of these uses, including their functioning as PNAs, on either a short-term or long-term basis shall be *considered to be violating a water quality standard*." (emphases added)).

5. The relevant part of subsection (c) of this regulation currently in effect states: "No permit may be issued until the applicant provides sufficient evidence to ensure that the proposed system will comply with all applicable water quality standards and requirements." 15A N.C. Admin. Code 2H.0112(c) (2022).

The language in the regulations above demonstrates that the ALJ's determinations were not affected by an error of law. Rather, the ALJ performed its own plain language analysis, which matched the Division's interpretation. Specifically, the ALJ properly determined that the Division's "interpretation [of the biological integrity rules] is long-standing, is reasonable, and is consistent with and supported by the plain language of the rules."

Using its plain language interpretation, the Division determined that a "permit complies with the biological integrity standard if the permit's terms and conditions reasonably ensure that the permitted discharge will not preclude maintenance of the ability of an aquatic ecosystem to support and maintain a balanced and indigenous community of organisms having species composition, diversity, population densities and functional organization similar to that of reference conditions." The ALJ properly held that the Division complied with its interpretation of the biological integrity standard given the Division's expertise with respect to the facts and its conduct in its review of Martin Marietta's permit application.[6]

IV. Conclusion

We affirm the decision of the Court of Appeals. In this case, the ALJ properly made findings of fact, giving due regard to the demonstrated knowledge and expertise of the Division with respect to the facts, and then properly applied those facts to a correct interpretation of the regulatory plain language. Accordingly, we affirm the final decision by the ALJ as it relates to the biological integrity standard.

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6. The dissent mischaracterizes our holding as the Division simply being entitled to deference. Instead, we reviewed whether the ALJ met the standard found in N.C.G.S. § 150B-34(a) ("The administrative law judge shall decide the case based upon the preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency.").

Nothing in our opinion should be understood to give the Division deference in its interpretation of 15A N.C. Admin. Code 2B.0202(11). The dissent engages in pejorative rhetoric and completely mischaracterizes our opinion before responding. Even a cursory reading of the dissent exposes its blatant misapprehension of our legal analysis as well as our application of the appropriate standard of review. On fourteen (14) separate occasions, the dissent mischaracterizes our analysis as deferring to the agency's legal interpretation. We have not. Constrained by our Constitutional duty to apply the rule of law and to comply with the legal standard of review, we review whether the ALJ's interpretations are consistent with the law. In this review, we determined, consistent with N.C.G.S. § 150B-34, that "the ALJ performed its own plain language analysis, which matched the Division's interpretation."

Martin Marietta raised several additional issues in their conditional petition to this Court. As to both issues raised, we hold that discretionary review was improvidently allowed.

AFFIRMED; DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

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

Justice MORGAN concurring.

I agree with my distinguished colleagues in the majority that the Court of Appeals decision should be affirmed in the lower appellate court's reversal of the trial court's determination that the administrative law judge erred in upholding the North Carolina Department of Environmental Quality's issuance of the discharge permit to Martin Marietta Materials, Inc. based upon the governmental agency's assessment that the biological integrity standard at issue was satisfied. I further agree with the members of the majority, along with my distinguished dissenting colleague, that the proper standard of review to be employed by the courts in this administrative law case is de novo review, as the challenge to the permit by Sound Rivers, Inc. and North Carolina Coastal Federation, Inc. is based upon asserted errors of law such that "the court shall conduct its review of the final decision [in a contested case] using the de novo standard of review." N.C.G.S. § 150B-51(c) (2021). While I agree with the majority's outcome that the final decision of the administrative law judge should be affirmed as to the Department's compliance with the biological integrity standard in issuing the permit and as to the "due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency" pursuant to N.C.G.S. § 150B-34(a), I write separately in order to identify, amplify, and emphasize certain aspects of this matter which merit attention. *See* N.C.G.S. § 150B-34(a) (2021).

The dissent here has admirably and exhaustively recounted facts, circumstances, descriptions, models, studies, results, analyses, concerns, evaluations, assessments, explanations, and opinions which were presented at the hearing, culminating with the dissent's view that the Department erred in its interpretation and application of the biological integrity standard in issuing the discharge permit. However, "a reviewing court is not free to weigh the evidence presented to an

administrative agency and substitute its evaluation of the evidence for that of the agency." *In re Appeal of McElwee*, 304 N.C. 68, 75 (1981) (citing *Appeal of AMP Inc.*, 287 N.C. 547, 562 (1975)). The dissent also refers to the existence of "substantial evidence" in the record that lends support to the dissent's position that the Department incorrectly applied the biological integrity standard in the Department's decision to issue the permit. While the phrase "substantial evidence" is a term of art in administrative law which is embodied in N.C.G.S. § 150B-51(b)(5) and is customarily used when "the whole record standard of review" is employed as described in N.C.G.S. § 150B-51(c), nonetheless the dissent's focus on the quantity of the evidence bearing on the biological integrity standard in the instant case is noteworthy, even though de novo review governs the outcome. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Curlee v. Johnson*, 377 N.C. 97, 101 (2021) (quoting *Ussery v. Branch Banking & Tr. Co.*, 368 N.C. 325, 335 (2015)). In the case of *Thompson v. Wake County Board of Education*, this Court opined:

> The "whole record" test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*. On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.

292 N.C. 406, 410 (1977) (citation omitted). In the present case, to the extent that the dissent has identified an intersection between de novo review of this case and whole record review due to a focus on the existence of substantial evidence in the record, the law is clear that, while a reviewing court could reach a different result based on the evidence than the result reached by an administrative agency if the reviewing court was free to do so, nonetheless if there is substantial evidence to support the agency's decision, then the court must give deference to the specialized knowledge and expertise of the agency, including *facts and inferences* as directed by N.C.G.S. § 150B-34(a), and affirm the agency's determination. Here, although the dissent bemoans the majority's determination to

uphold the administrative law judge's final decision that the Department properly issued the discharge permit, nonetheless the majority has correctly implemented the applicable statutory and appellate law, even in the face of the dissent's disapproval of the agency's inferences regarding its authority to issue the permit in light of the pertinent rules.

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

Justice EARLS dissenting.

Blounts Creek is a beloved recreational watershed located in Beaufort County. Spanning about ten miles in length, Blounts Creek is unique in that it provides both fresh and saltwater habitats for its aquatic life. For approximately five miles, from its source to Herring Run, which is one of the creek's main tributaries, Blounts Creek is classified as fresh and swamp waters. This segment of the creek is known as Upper Blounts Creek. At Herring Run, Blounts Creek turns into a saltwater estuary and eventually flows into Blounts Bay. This segment is known as Lower Blounts Creek. The point at which the fresh and saltwater meet is called a salt wedge.

Precipitation and varying seasonal water flows are some of the primary forces that affect the position of the creek's salt wedge and its salinity. During periods of low precipitation, including during the summer months, the salt wedge moves farther upstream. During the winter, or after heavy rains, the water table rises, the flow from upstream is increased, and the salt wedge is pushed farther downstream.

Blounts Creek's mix of salt and freshwater allows the creek to foster rich and diverse aquatic life that varies season by season depending on water temperature and salinity. Over the course of the year, it is home to fish such as bass, bream, catfish, gar, puppy drum, black drum, spot, croaker, summer flounder, striped bass, speckled sea trout, raccoon perch, winter flounder, alewife, blueback herring, American and hickory shad, white perch, black crappie, eel, and red fin. The seasonal changes of fish species in Blounts Creek make it a rare and popular fishery both for locals whose families have been enjoying the water's abundant resources for generations and for tourists from hundreds of miles away.

Much of Blounts Creek's aquatic life is highly dependent on the maintenance of the creek's salt and freshwater balance and existing water quality. But through a National Pollutant Discharge Elimination

System (NPDES) Permit (the permit), the North Carolina Department of Environmental Quality, Division of Water Resources (the Division) has allowed Martin Marietta to discharge twelve million gallons of wastewater into this fragile ecosystem each day, threatening to transform Blounts Creek into a type of stream system that is "not normally found in North Carolina's coastal plain."

I. **Legal Background**

The Clean Water Act prohibits the release of pollutants into our waterways without the issuance of an NPDES permit. 33 U.S.C. § 1311(a). States can receive authorization to administer the NPDES permit program, and North Carolina has therefore assumed responsibility for issuing NPDES permits through the Division since 1975. Prior to issuing an NPDES permit, the Division must conclude that the permit will "reasonably ensure compliance with applicable water quality standards and regulations." 15A N.C. Admin. Code 2H.0112(c) (2012). As relevant here, surface waters in the state are safeguarded by regulations that classify various bodies of water based on their "best uses" and define certain conditions that must be maintained to protect those best uses. *See*, *e.g.*, 15A N.C. Admin. Code 2B.0211(1) (2012).[1] As a freshwater segment, upper Blounts Creek from its source to Herring Run is assigned a Class C classification.[2] The regulation that sets forth water quality standards for Class C waters lists "maintenance of biological integrity (including fishing and fish)" as one of the best uses of such waters. *Id.* The regulation further provides that Class C waters

> shall be suitable for aquatic life propagation and maintenance of *biological integrity*, wildlife, secondary recreation, and agriculture. Sources of water pollution which preclude any of these uses on either a short-term or long-term basis shall be considered to be violating a water quality standard.

15A N.C. Admin. Code 2B.0211(2) (2012) (emphasis added); *see also* 15A N.C. Admin. Code 2B.220(2) (2012) (incorporating this standard for Class SB waters, which is applicable to lower Blounts Creek from Herring Run to Blounts Bay). Key to this appeal, the regulation requires that the "biological integrity" of Blounts Creek be maintained.

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1. These citations use the 2012 version of the administrative code that was in effect when the Division issued the permit.

2. Upper Blounts Creek has supplemental classifications of Swamp Water and Nutrient Sensitive Water.

Biological integrity means "the ability of an aquatic ecosystem to support and maintain a balanced and indigenous community of organisms having species composition, diversity, population densities and functional organization similar to that of reference conditions." 15A N.C. Admin. Code 2B.0202(11) (2012). The majority appears to reason that because "a specific procedure for assessing compliance with the biological integrity standard is not set forth in the regulations" themselves, the analysis undertaken by the Division here was sufficient to satisfy the biological integrity standard.

There is an insurmountable, tautological flaw in the majority's reasoning, as I understand it. In effect, it appears to me that the majority reasons that because the Division decided that the permit complied with the biological integrity standard, then the biological integrity standard must have been satisfied. But the Division's ultimate conclusion regarding the permit's compliance with the biological integrity standard is not in and of itself a valid basis from which to determine that the standard was applied. Though the terms set forth in the biological integrity standard are not specifically defined by regulation, they indisputably have meaning. It is this Court's duty to ensure that the Division indeed gave meaning to both the terms of the regulation and the regulation itself. It is not proper to simply take the Division at its word that the biological integrity standard has been met without any analysis or evaluation of the Division's legal interpretation.

II. **Standard of Review**

The Division's interpretation of the biological integrity standard is a question of law. We thus review it de novo. De novo review does not blind us to context or demand unquestioned deference to an agency's views. Though an agency's reading of a regulation merits "some deference," it is "not binding." *In re North Carolina Savings & Loan League*, 276 S.E.2d 404, 410 (N.C. 1981). This Court instead weighs the "thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134,140 (1944)). And most relevant here, an agency's interpretation receives no deference if it is "plainly erroneous or inconsistent with the regulation." *Morrell v. Flaherty*, 338 N.C. 230, 238 (1994).

The majority and the concurrence alike fault this opinion for consulting evidence and "delv[ing] into the record." In my view, their approach to the proper scope of review is sparse to the point of being

meaningless. If the Division says that the biological integrity standard means X, the majority seems to argue, our job is done. Any evidence elucidating that reading and the process by which the Division adopted it is, per the majority, beside the point. I disagree for at least four reasons.

First, "[f]acts found under a misapprehension of the law" do not bind a reviewing court. *Matter of Skinner*, 370 N.C. 126, 139, 804 S.E.2d 449, 458 (2017); *see also Helms v. Rea*, 282 N.C. 610, 620, 194 S.E.2d 1, 8 (1973) ("[F]acts found under misapprehension of the law will be set aside on the theory that the evidence should be considered in its true legal light."). So if the ALJ's factual findings sprang from a misreading of the biological integrity standard, this Court must assess them appropriately.

Second, in reviewing an agency's regulatory interpretation, we consider the "thoroughness evident in its consideration" and the "validity of its reasoning." *In re North Carolina Savings & Loan League*, 276 S.E.2d at 410. If there were to be a fly-by-the-seat-of-the-pants reading by the agency—divorced from data and deliberation—it would bear less weight than a well-reasoned, evidence-backed interpretation. *See, e.g.*, *N.C. Acupuncture Licensing Bd. v. N.C. Bd. of Physical Therapy Exam'rs*, 371 N.C. 697, 703 (N.C. 2018) (deferring to an agency's statutory interpretation in large part because it based its reading on an "extensive review" of "substantial studies and other evidence," including "scientific articles, reports, and books"). Despite the concurrence's view, that analysis does not "substitute" our "evaluation of the evidence for that of the agency." Instead, we weigh the agency's legal interpretation in light of the data it consulted and the procedures it employed.

Our review is like that of an engineer examining an architect's plans. Rather than opine on how she would design the building herself, the engineer probes the architect's work to ensure its soundness and reliability. If the math checks out and the structure is stable, the engineer should leave the blueprints undisturbed. But suppose that the architect's plans ignore the applicable building code, treating it as a suggestion rather than a command. Because the architect deviated from those rules—rules designed to create sound and safe buildings—his plans carry much less weight. In that case, the engineer—much like a reviewing court—can question the architect's judgment, not because she would have done things differently herself, but because his failure to follow the code imperils the building's safety and soundness.

The same principle holds true here. The Division's reading of the biological integrity standard renders it hollow in meaning and toothless in practice. By disclaiming any need to measure an ecosystem's "reference

conditions" before granting a permit, the Division—much like the hypothetical architect—treats the standard like a suggestion rather than a command. In effect, the Division ignores the standard's mandate by reading it to impose no mandate at all. And so this Court—much like the hypothetical engineer—can probe the soundness of that judgment, not because we would have made a different choice, but because the Division sidestepped the law and the values it protects.

Third, and similarly, we review an agency's regulatory reading with an eye toward its practical consequences. That approach sounds in deep-seated principles of statutory interpretation and separation of powers. *Cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 143, 147 (2000) (analyzing the consequences of the FDA's statutory interpretation in deciding whether that reading cohered with the statute's purpose and Congress' intent). More basically, it calls us to apply our "common sense." *See id.* at 133. When an agency's legal interpretation heralds far-reaching consequences—consequences that undercut the very purpose of the law it purports to interpret—a court may justifiably harbor doubts about that reading. *See In re Appeal of N.C. Sav. & Loan League*, 302 N.C. at 467-68 (rejecting agency's interpretation of the common bond requirement because adopting it would expand the "scope of eligible membership" to "no bounds," thereby subverting the legislature's intent to craft a limitation).

We applied that principle most recently in *Werthington*. *See Wetherington v. N.C. Dep't of Pub. Safety*, 368 N.C. 583 (N.C. 2015). In that case, a State Trooper gave contradictory statements about how he lost his uniform hat. *See id.* at 586. His boss—Colonel Glover—fired the Trooper for violating the Patrol's truthfulness policy. *See id.* at 590. And as here, an ALJ upheld that decision, finding that Colonel Glover correctly interpreted and applied the law governing the discipline of State employees. *Id.* The problem: The Colonel misread the law and misunderstood when and why he could fire the Trooper. *Id.* In Colonel Glover's view, "any violation of the Patrol's truthfulness policy must result in dismissal." *Id.* at 593-94. On appeal, the Department of Public Safety defended his interpretation. *See id.* at 585. But this Court rejected the agency's reading. *Id.* Properly interpreted, the law obliged the Colonel "to exercise discretion" when disciplining employees. *Id.* at 594. And because Colonel Glover misapprehended his "discretion to consider the full range of potential discipline," his decision "was affected by an error of law." *Id.* at 591 (cleaned up).

That conclusion sprang from statutory language, our precedent, and—most relevant here—the implications of a per se dismissal rule.

See id. at 594-96. An "inflexible standard deprives management of discretion," we noted. *Id.* at 596. And because the Patrol's truthfulness policy swept broadly—covering all potentially misleading statements on all potential topics—the Department's categorical reading of the law on employee dismissal entailed a "potentially expansive scope." *Id.* at 595. All told, the Department's interpretation—and its real-world implications—clashed with the "flexible and equitable" disciplinary standard enshrined in the law, providing reason to question the agency's reading and the ALJ's affirmance of it. *Id.* at 595-96.

The same is true in this case. As *Werthington* made clear, the consequences of adopting an agency's legal interpretation bear on the deference we accord it. To that end, we can—and should—consult evidence about real-world effects. Here, much like the disciplinary policy in *Werthington*, the Division's regulatory reading carries "potentially expansive" consequences. *See id.* If the Division need not measure a biome's "reference conditions" before granting a permit, then the biological integrity standard is nothing but a husk. Judge Hampson made that very point in the decision below, recognizing that the Division's interpretation of the regulation gives it carte blanche to "functionally ignore" it. *See Sound Rivers, Inc. v. N.C. Dep't of Envtl. Quality, Div. of Water Res.*, 271 N.C. App. 674, 748 (2020) (HAMPSON, J., concurring in part and dissenting in part). And if the Division can so easily sidestep the water quality standards it is tasked with administering, the consequences for North Carolina's waterways could be apocalyptic.

For that reason, this Court should consider the sprawling implications of the Division's legal interpretation before endorsing it as a correct statement of the law. Consulting the facts is essential to that inquiry. If the Division properly interpreted the biological integrity standard in granting a permit to Martin Marietta—despite evidence showing that the influx of wastewater will upend Blounts Creek and the habitats it shelters—then this State's water-quality regulations are little more than paper tigers. Before accepting that breathtaking read, this Court should confront the facts and grapple with their implications.

Finally, cases involving a State's environmental resources merit special care because of their far-reaching and irreversible consequences. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 521-23 (2007) (relaxing the standing analysis when a State challenges federal environmental regulations in light of the danger posed by climate change to a State's land, natural ecosystems, and territorial integrity); *In re Maui Elec. Co.*, 150 Haw. 528, 538 n.15 (2022) (interpreting the State constitutional right to a "clean and healthful environment" to entail "a right to a life-sustaining

climate system," and analyzing an agency's statutory authority in view of that right); *In re Hawai'i Elec. Light Co.*, 152 Haw. 352, 359 (2023) (examining an agency's statutory obligations in light of the irreversible risk posed by climate change to the State's resources and environment); *Held v. Montana*, No. CDV-2020-307, *35-46 (Mont. Dis. Ct. 2023) (documenting impact of climate change on Montana's natural resources and detailing the long-term harms to the State and its citizens).

Blounts Creek is a public waterway—it belongs to the People. *See* N.C.G.S. § 143-211 ("Recognizing that the water and air resources of the State belong to the people, the General Assembly affirms the State's ultimate responsibility for the preservation and development of these resources in the best interest of all its citizens and declares the prudent utilization of these resources to be essential to the general welfare."); *see also* N.C. Const. art. XIV, § 5 ("It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions… to control and limit the pollution of our air and water….").

When pollution threatens the viability of a public waterway like the Creek, it threatens the People's stake in it, too. *See State ex rel. Rohrer v. Credle*, 322 N.C. 522, 527 (1988) (affirming that North Carolina's "[n]avigable waters" are "held in trust by the State for the benefit of the public"). That is especially true for fragile ecosystems like Blounts Creek's. As the Division's own environmental analyst made clear, even slight shifts in the Creek's salinity and water flow could overhaul its waters and stamp out the species that occupy them. And the impact of Martin Marietta's approved discharge–again, *twelve million gallons* of wastewater every day—is projected to be anything but slight.

That is especially concerning because environmental destruction is often irreversible. Poisoned waters are not easily healed. And even worse, the harms of pollution ripple across time and space, implicating the interests of current North Carolinians as well as future generations. While those alive today may have enjoyed the Creek's offerings, their children may not—and likely *will* not—have the same opportunity. Given the stakes involved—and the far-reaching consequences of our ruling—I would hesitate before adopting the Division's conclusory reading of law. Before greenlighting the pollution of our waters, we should carefully consider the wisdom and legality of that course. Evidence supplies critical context to the Division's decision and its legal soundness—context we can and should consult when gambling with the People's resources.

III. **Application**

A cursory review of the record reveals that the Division adopted an erroneous interpretation of the biological integrity standard, and thus failed to appropriately apply the standard before approving the permit. Several studies factored into the Division's conclusion that "the proposed discharge will have no likely significant adverse effects to aquatic life," which was the basis for its determination that the permit would comply with the biological integrity standard. These studies included its consultant CZR Incorporated's (CZR) Aquatic Habitat Assessment of the Upper Headwaters of Blounts Creek, a technical memorandum authored by another consultant, Kimley-Horn and Associates (Kimley-Horn), which was revised later and split into two separate reports, known as the water quality analysis technical memorandum and the flood and stability technical memorandum, and a final technical memorandum prepared by CZR that conducted a literature review assessing aquatic life likely to appear in Blounts Creek.

Before turning to the Division's flawed application of the biological integrity standard, it is worth noting that there was substantial evidence presented at trial that the methods employed by all of these studies and the conclusions drawn from them are dubious. Among the studies that the Division relied on was the water quality analysis prepared by Martin Marietta consultant Kimley-Horn, which evaluated both salinity and pH in Blounts Creek. Though the evidence presented at trial pointed out potential errors with respect to both the salinity and pH analyses, concerns with respect to the salinity analysis are particularly glaring.

In conducting its salinity analysis, Kimley-Horn ran a model in which it evaluated the creek's salinity on a single day—April 13, 2012—by "add[ing] . . . discharge to the flow that they estimated on [that day]." Kimley-Horn itself explained that the model "only represents a snapshot in time," and it anticipated conducting additional testing to confirm their results, but it never did so. In any case, the Division relied on this analysis to conclude that the effect of the discharge from the quarry "would be a less than 1 part per thousand change in salinity."

Concerningly, however, the Wildlife Resources Commission—one of the Division's sister agencies with expertise in fisheries—conducted its own sampling and recorded salinity at 5.1 ppt. The Commission explained that "[t]hese data differences show the high variability of salinity that can occur in this system and demonstrate the importance of designing a baseline monitoring plan that captures the variability of critical water quality parameters such as pH and salinity annually as

well as seasonally or during weather events." Similarly, the Division of Marine Fisheries—another sister agency[3]—commented on Kimley-Horn's salinity analysis, explaining that the sampling did not "accurately describe yearly or monthly conditions. These sampling events should have been performed throughout the year over several years to adequately understand the effects of the discharge." Despite the counsel of its sister agencies with relevant expertise, the Division failed to ask Martin Marietta or Kimley-Horn to conduct this additional salinity sampling. No witness testified at trial regarding the nature of Kimley-Horn's model or the adequacy of the methods employed.

Before the permit was issued, Eric Fleek, the Division's own environmental supervisor in its biological assessment branch, raised concerns about the Kimley-Horn salinity analysis. Mr. Fleek warned that:

> Since they are linking all of those non-biological impacts on the salinity, I **ASSUME** there are good requirements in the permit which require them to carefully monitor changes in salinity. I have no clue what's in the permit, but I sure hope that requirement is in there because if the predicted salinity changes are greater than the estimates provided by Martin[ ] Marietta's consultants, then there could indeed be deleterious effects to estuarine biota. Salinity needs to be rigorously monitored for if it is not already.

In other words, Mr. Fleek was concerned that because the salinity analysis hinges entirely on a single day of sampling, if the results were inaccurate or unrepresentative, there could be significant consequences for Blounts Creek's aquatic life. But those tasked with formulating the permit did not follow up with Mr. Fleek or the biological assessment team about what this rigorous monitoring protocol would entail. Consequently, the permit only requires salinity to be monitored in the freshwater portion of the creek, even though Kimley-Horn's modeling analysis measured salinity in the creek's saltwater segment—an entirely different part of Blounts Creek. Further, Mr. Fleek testified that the rigorous monitoring requirements he was referring to included monitoring sites in the saltwater portion of the creek.

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3. Both the Wildlife Resources Commission and the Division of Marine Fisheries have statutory and regulatory authority over fisheries and marine fish, respectively, in the state.

Officials from the Division who played a key role in the permit's issuance had little understanding of Kimley-Horn's model and its potential flaws. Tom Belnick, who formulated the final permit as the supervisor of the NPDES Complex Permitting Unit at the Division, testified that he did not know the error rate of the model employed by Kimley-Horn and admitted that the model was later revealed to be flawed. He also testified that Kimley-Horn's analysis cannot predict what the effect of the discharge would be on salinity levels during any other season or any other day of the year.

Tom Reeder, the director of the Division at the time the permit was issued, was responsible for approving the permit. Mr. Reeder testified that salinity "was the thing that [he] was really interested in," and that he relied on the Kimley-Horn analysis to inform his understanding of how the quarry discharge would affect the creek's salinity levels. But Mr. Reeder testified that, at the time he approved the permit, he was not aware that the Kimley-Horn analysis was based on only one day of sampling or whether there was any follow-up testing performed to confirm the accuracy of Kimley-Horn's conclusion, and that he "[has] no idea what the model is based on." He did not know what time of the year Kimley-Horn collected samples nor did he know the range of salinity that Kimley-Horn observed. He did not even know that one of the samples that Kimley-Horn took generated an inaccurate salinity value.

The Kimley-Horn water quality analysis was not the only study upon which the Division relied in issuing the permit, of course. The Division also relied on two reports prepared by another Martin Marietta consultant, CZR. The first report CZR prepared, which was included in an appendix to Martin Marietta's permit application, is the Aquatic Habitat Assessment of the Upper Headwaters of Blounts Creek. The assessment sampled four locations in the headwaters of Blounts Creek over the course of a single day and "attempt[ed] to measure biotic integrity" with respect to species richness, total fish abundance, and percent tolerant individuals.[4] CZR also spent a single day sampling the benthic macroinvertebrate population as part of this assessment.

Like the Kimley-Horn Report, various weaknesses in CZR's assessment are worth noting. For example, the report did not conduct any aquatic habitat assessment in the saltwater portion of Blounts Creek, even though the aquatic life that requires a saltwater habitat is thought

4. The study did not attempt to evaluate species composition, diversity, functional organization, or population composition.

to be particularly at risk from the twelve million gallons of water that may be discharged into the creek every day under the permit.

In addition, CZR's sampling of the stream's macroinvertebrate population conflicted with an analysis conducted by the Division's own biologists who analyzed the creek's benthic macroinvertebrates. In this internal report, Mr. Fleek explained that "there [was] a wide discrepancy in diversity between all of [CZR's] collections and [the Division's]." This conclusion was particularly concerning given that CZR took its samples during a time of year when "more favorable physical-chemical conditions" should have yielded a "more diverse pool of taxa." That CZR's analysis presented a potentially unduly narrow view of the diversity present in Blounts Creek is problematic because the purpose of the assessment was to predict the effect of the discharge on a representative range of aquatic life. But not only did CZR fail to conduct its analysis in the saltwater segment of the creek to determine the effect of the discharge on biota in that particular habitat, Mr. Fleek explained that CZR's sampling was not even representative of the biota present in the freshwater segment of the creek. What is more, the Division did not raise these discrepancies with Martin Marietta prior to the issuance of the permit, so these issues were never addressed. And Mr. Belnick, who, to repeat, was responsible for drawing up the final permit, never followed up with Mr. Fleek regarding his findings.

Mr. Fleek re-raised his concerns about CZR's macroinvertebrate sampling with Mr. Belnick a few months later, explaining that CZR "[had] real issues with the collection and identification of invertebrates," meaning that CZR "consistently, and drastically, under report[ed] what was present (even though they had better physical-chemical sampling conditions)." Mr. Fleek went on to express that "in [his] opinion, if [the Division is] requiring ongoing biological monitoring, [it] need[s] to require that Martin Marietta retain a certified biological lab because what CZR collected is nowhere close to what [Mr. Fleek] found and their samples would fail [the Division's] standards of field and lab" quality control. Again, Mr. Belnick neither followed up with Mr. Fleek about this concern nor alerted Martin Marietta that the sampling was deficient. In a third email, Mr. Fleek wrote that CZR "will have to get certified to do [macroinvertebrates] or [Martin Marietta] will have to hire someone who knows what they are doing because, frankly, CZR is not up to it currently." Despite Mr. Fleek's repeated warnings that CZR's macroinvertebrate sampling was deficient, the Division forged ahead with issuing the draft permit without addressing these problems.

The Wildlife Resources Commission raised similar concerns about CZR's fish sampling—concerns with which the Division's biologists

agreed. The Commission explained that Martin Marietta, through CZR's aquatic habitat assessment,

> submitted data from a single fish sampling event and determined that there would be no impacts to aquatic species with the project as proposed. We do not believe a one day backpack shocking and fyke net event can describe the ecology of this system. Important species such as striped bass and American eel, a federal species of concern, have recently been sampled in the system by others. Blueback herring may also be present, but due to low population numbers are difficult to find. Our concerns regarding the spawning of anadromous species cannot be addressed with the submitted sampling event due to the absence of egg, larvae, and juvenile sampling. In order to understand the impacts this proposed project may have on wildlife resources, we need multistage aquatic resource data from the site to better represent the extent of existing habitats and how they are utilized.

In short, the Commission called for additional fish sampling data, and biologists with the Division agreed with the recommendation.[5]

Similarly, at trial, Dr. Anthony Overton—an expert on fisheries management, fisheries ecology, larval fish ecology, and fish sampling methods and analysis—testified that a single day of sampling is insufficient to assess the makeup of the creek's aquatic life. He explained, for example, that "[j]ust one day of sampling," as CZR conducted here, "will not capture species composition or diversity" because "[they are] variable. You have species moving in and species moving out with respect to season." Dr. Overton also echoed the concern that CZR's methodology was inadequate to evaluate the biota of Blounts Creek because it was inordinately restricted in area.

As with the macroinvertebrate sampling, the Division never asked Martin Marietta to commission, nor did it ask CZR to conduct, additional

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5. The Division of Water Quality raised similar concerns, cautioning that "1-day of sampling does not provide sufficient information on downstream impacts" and that "sampling for young of year was conducted too early and should have been conducted in June or July." The Division of Marine Fisheries, which recommended that the permit application be entirely denied, also raised these concerns.

fish sampling. CZR's aquatic habitat assessment therefore represents the only fish sampling conducted prior to the issuance of the permit.[6]

To "make up for the inadequate sampling in the CZR report," Mr. Belnick testified that the permit added salinity monitoring at the two permitted water discharge points in the creek known as D1 and D2. But the information provided by these monitoring sites offers little insight into whether the biological integrity of the creek is being maintained. For example, CZR did not take any fish samples at the D2 monitoring point in compiling the report. This means that there is no way to know how changes in salinity are affecting the biological integrity of that area because there is no baseline to which subsequent population samples may be compared. Moreover, both salinity monitoring sites are located in the freshwater segment of Blounts Creek. So not only were no biological samples taken from the estuarine segment of the creek as discussed previously, but there will be no salinity monitoring at the part of the creek where saltwater life depends on the maintenance of a fragile saltwater habitat.

This is particularly concerning given Mr. Fleek's warning regarding the need for rigorous salinity monitoring requirements as quoted earlier. To repeat, Mr. Fleek wrote that he "**ASSUME[S]** there are good monitoring requirements in the permit which require [Martin Marietta] to carefully monitor changes in salinity . . . because if the predicted salinity changes are greater than the estimates provided by Martin[ ]Marietta's consultants, then there could indeed be deleterious effects to estuarine biota." Yet the permit does not provide for salinity monitoring in the saltwater segment of the creek despite Mr. Fleek's insistence that such a monitoring site was highly important. There is no contrary evidence suggesting that limiting monitoring to the D1 and D2 sites is sufficient.

Following the aquatic habitat assessment, CZR prepared a technical memorandum on Martin Marietta's behalf. CZR did not conduct additional sampling in preparing this memo. Rather, it composed a literature review that "discusses what fish are out there and . . . provides tolerance ranges for fish that are likely to inhabit [the] area." The literature review did not provide tolerance ranges for specific saltwater fish that live in Blounts Creek, and no one testified at trial regarding the preparation of the literature review or the process for selecting the various studies it relied on. Dr. Overton testified that an appropriate literature review in this context should rely on studies that have sampled the body of water

6. The biological sampling that the Division's biologists conducted focused exclusively on benthic macroinvertebrates.

at issue. But CZR's review did not rely on any studies about Blounts Creek's aquatic life. Instead, it cited studies conducted in places such as California, Pennsylvania, New Hampshire, and Canada. Further, as discussed in more depth later, it is impossible to measure species composition, species diversity, functional organization, and population density without habitat-specific sampling. A literature review that hypothesizes which fish may be present in Blounts Creek is not a replacement for a study that determines which fish are actually present.

After the second CZR report was submitted, the Wildlife Resources Commission notified the Division that it did "not feel" that its "concerns expressed in [its] previous correspondence [had] been adequately addressed." The Commission explained that, through its own sampling efforts, it recorded the "highest [catch per unit effort] of River Herring in years from the Tar-Pamlico system, . . . demonstrat[ing] the importance of Blounts Creek as potential spawning habitat." But the Division did not follow up on the concerns raised by the Commission, nor did it request to see the data the Commission collected. Moreover, Mr. Belnick did not receive feedback on the Commission's comments from Mr. Fleek or anyone else in the biological assessment branch.

On top of all of the issues raised with the studies that the Division relied on, Mr. Fleek provided Mr. Belnick with a final opinion regarding the permit's likely effects on Blounts Creek. Mr. Fleek explained,

> The biota presently found in the Blounts Creek system is adapted to intermittent flow, low pH, and low dissolved oxygen. The proposed discharge will alter the natural physcio-chemical [sic] parameters of this system by changing the flow regime from intermittent to permanent, and by increasing the pH and dissolved oxygen from low to high. As such, many of the taxa currently found in this system which are adapted to the natural condition will be replaced by taxa that are adapted to more permanent flows, higher pH, and higher dissolved oxygen levels. The taxa that are naturally occurring to this type of stream system will be replaced with taxa that are not typical to this type of system. The discharge will promote the presence of taxa that are more indicative of streams which have permanent flows, higher pH, and higher dissolved oxygen. *These types of streams, and the taxa which inhabit them, are not normally found in North Carolina's coastal plain.*

(emphasis added). Put simply, the discharge is predicted to replace much of the creek's current aquatic life with life that is adapted to live under post-discharge conditions—life that is "not normally found in North Carolina's coastal plain." The consequences of Mr. Fleek's prediction are plain; if the current taxa of the creek are replaced by taxa that are not normally found in North Carolina's coastal plain, then the discharge has eliminated the ability of Blounts Creek "to support and maintain a balanced and indigenous community of organisms having species composition, diversity, population densities and functional organization similar to that of reference conditions[,]" or the creek's biological integrity. 15A N.C. Admin. Code 2B.0202(11). Mr. Belnick testified that he trusted Mr. Fleek's analysis on this point. But Mr. Belnick did not provide this analysis to Mr. Reeder as part of the materials that Mr. Reeder considered in applying the biological integrity standard and approving the permit.

Despite all of the issues and warnings summarized above, which represent only a few examples of the concerns raised about the methodologies employed and the conclusions reached by the CZR and Kimley-Horn reports, the Division issued the permit without requiring additional sampling that would allow it to confirm whether the permit's predicted consequences have been realized. But more importantly to this appeal, none of the testing that the Division relied on answers whether Blounts Creek's biological integrity, as that term has been defined by 15A N.C. Admin. Code 2B.0202(11), will be maintained under the permit.

As explained previously, 15A N.C. Admin. Code 2B.0211 designates "maintenance of biological integrity" as a best usage that must be protected for Class C waters like Blounts Creek. 15A N.C. Admin. Code 2B.0211(1). And "[b]iological integrity means the ability of an aquatic ecosystem to support and maintain a balanced and indigenous community of organisms having species composition, diversity, population densities and functional organization similar to that of reference conditions." 15A N.C. Admin. Code 2B.0202(11). The only way to determine whether the issuance of a permit maintains "the ability of an aquatic ecosystem" to support and maintain certain biological characteristics "similar to that of reference conditions" is to have some understanding of what those specific reference conditions are.

Despite the clear language of the regulation, no one from the Division defined, measured, provided recommendations on, or otherwise specified the reference conditions of Blounts Creek in terms of its species composition, diversity, population densities, and functional organization, or any other ecological metric, including Mr. Reeder who was responsible for applying the biological integrity standard, Mr.

Belnick, the permit's drafter, or Mr. Fleek, the head of the Division's biological assessment branch. In fact, Mr. Reeder testified that he did not "know if there is such a thing" as the biological integrity standard. More troubling still, Mr. Reeder testified that he did not document any reference conditions that he supposedly relied on in determining whether the permit complied with the biological integrity standard.[7] In short, the Division failed to analyze or determine the creek's reference conditions such that the Division will be able to monitor whether those reference conditions are maintained in compliance with the biological integrity standard.

The Division's failure to evaluate biological integrity before issuing the permit is supported by Mr. Fleek's warning discussed previously that "the taxa which [will] inhabit [the new Blounts Creek system] are not normally found in North Carolina's coastal plain." Again, Mr. Reeder was never informed of this conclusion. Additionally, Mr. Fleek was asked to identify "a stream that is currently what Blounts Creek will look like after the discharge[,]" but he could not find one, including in the Division's own database, which provides data from 150-200 sites per year dating back to 1978.

This means that the discharge is predicted to create an entirely different creek that neither resembles Blounts Creek's current composition nor exists anywhere else in this State's coastal plain. But as the State itself recognizes, "[t]he biological integrity standard safeguards our State's biological resources by prohibiting any discharge that would 'preclude' the 'ability' of an ecosystem to support biological conditions that are 'similar' to 'reference conditions.' " Thus, the result predicted by Mr. Fleek would be a plain violation of the Division's own interpretation of the biological integrity standard and the requirement that Blounts Creek's biological integrity be maintained according to its current reference conditions—reference conditions that the Division failed to establish. As a result, the permitted discharge risks deleterious effects on Blounts Creek's current aquatic life as predicted by the Division's biologists, and there will be no way to assess whether this change complies with 15A N.C. Admin. Code 2B.0211 because the Division has refused to collect the data that would show that the creek's biology has been fundamentally altered or eliminated.

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7. This is particularly problematic because Mr. Reeder is no longer the director of the Division. Thus, when the time comes to reopen the permit, there will be no documented reference conditions to use in order to determine the permit's impacts on Blounts Creek's biological integrity.

In sum, despite the opposition of many of its sister agencies with expertise in the area and warnings from its own scientists, the Division issued the permit based on questionable and insufficient research, ignored counsel that the permitted discharge is expected to fundamentally alter the biological makeup of the creek, failed to communicate that risk to the individual responsible for applying the biological integrity standard, and blinded itself from discovering this consequence in the future. Though the Division should be afforded deference in determining how to appropriately quantify Blounts Creek's reference conditions according to the metrics set forth in 15A N.C. Admin. Code 2B.0202(11), the regulation and its terms must be given some reasonable meaning. Indeed, though "the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding. 'The weight of such [an interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning[,] . . . and all those factors which give it power to persuade, if lacking power to control.' " *In re North Carolina Savings & Loan League*, 276 S.E.2d at 410 (quoting *Skidmore*, 323 U.S. at 140). Here, however, the record demonstrates that the Division either entirely ignored the biological integrity standard or applied it in a way that conflicts with any logical interpretation of the standard, including its own.

The majority holds that the Division is entitled to deference in its interpretation of 15A N.C. Admin. Code 2B.0202(11) "[g]iven the Division's expertise and conduct in its review of Martin Marietta's permit application." But because the record shows that the Division failed to employ any standard as it was drafting and approving the permit, there is no interpretation to which this Court can afford the Division deference. Even if the Division did attempt to interpret and apply the standard, as the discussion above shows, the attempt would be wholly inadequate as a legal matter. An agency is entitled to deference when it has "demonstrated knowledge and expertise . . . with respect to facts and inferences within the specialized knowledge of the agency." N.C.G.S. § 150B-34(a) (2021). Deference is not warranted when an agency's interpretation is "plainly erroneous or inconsistent with the regulation." *Morrell*, 338 N.C. at 238. Ignoring a regulation or applying such a butchered and legally unsound interpretation that the regulation's protections are rendered impotent, as here, is not a demonstration of agency knowledge and expertise. It is a demonstration of the dereliction of duty and constitutes plainly erroneous agency conduct.

IV. **Conclusion**

Because the Division's application of the biological integrity standard, or lack thereof, was plainly erroneous, the ALJ's conclusion otherwise constitutes an error of law, which the Superior Court correctly reversed, applying de novo review. N.C.G.S. § 150B-51(b), (c) (2021). I therefore dissent from the majority's conclusion that the ALJ was correct in concluding that the Division properly interpreted the biological integrity standard in issuing the permit.

STATE OF NORTH CAROLINA
v.
SINDY LINA ABBITT AND DANIEL ALBARRAN

No. 334A21

Filed 1 September 2023

Evidence—relevance—murder trial—evidence of other possible perpetrators—not exculpatory

At the joint trial of two defendants for first-degree murder and other offenses arising from a fatal shooting, the trial court did not err in excluding evidence that defendants asserted showed two other people had committed the crimes for which they were on trial. Although the excluded evidence did suggest the possible involvement of other perpetrators, and was therefore relevant for purposes of Evidence Rule 401, it was still inadmissible where it did not also fully exculpate defendants (especially given the direct evidence of defendants' guilt, which included cellular phone data placing them at the crime scene and an eyewitness's identification of defendants both in court and during a pretrial photographic lineup).

Justice EARLS dissenting.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 278 N.C. App. 692 (2021), finding no prejudicial error in defendants' trial, resulting in judgments entered on 13 March 2019 by Judge Lori I. Hamilton in Superior Court, Rowan County. Heard in the Supreme Court on 27 April 2023.

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

Anne Bleyman for defendant-appellant Sindy Lina Abbitt.

M. Gordon Widenhouse, Jr. for defendant-appellant Daniel Albarran.

MORGAN, Justice.

This appeal concerns the admissibility of defendants' proffered evidence which they asserted would tend to show that two other individuals—not defendants—had committed the crimes for which defendants were being tried and that defendants themselves were not involved. We agree with the trial court's determination that the evidence in question did not meet the pertinent relevancy requirements for the admissibility of such evidence. Accordingly, we affirm the portion of the decision of the Court of Appeals at issue before us which upheld the trial court's ruling that defendants' evidence which speculatively imputed blame for the charged offenses to other potential suspects could not be presented to the jury.

I. Background

A. Factual and trial history

In 2016, defendants were charged with first-degree murder, attempted robbery with a dangerous weapon, and assault with a deadly weapon. The two were tried jointly in a non-capital proceeding. The charges brought against defendants arose from crimes that were committed in Salisbury on the night of 24 May 2016. The evidence at trial tended to show the following: Mary Gregory was in the living room of her apartment with her three-year-old grandson Meaco when Lacynda Feimster—Gregory's daughter and Meaco's mother—returned from work. When Feimster entered the apartment, she was accompanied by a Black woman and followed by a Hispanic[1] man. The woman was carrying a black gun with a brown handle. At trial, Gregory testified that neither of the persons with Feimster was known to her. After telling Gregory, "I got this," Feimster entered her bedroom with the woman and closed the door. After Meaco began to cry, Feimster and the

1. This is the term utilized by the parties and witnesses at trial to describe the racial background of the male perpetrator.

woman opened the bedroom door and allowed Meaco to go into the room to join his mother.

As the man sat in the living room with Gregory, he refused to tell Gregory his name or where he lived when she attempted to engage him in conversation. The man took Gregory's cellular telephone away from her when Gregory attempted to call Feimster's teenage daughter to come take Meaco away from the apartment. Gregory described the man as tall, with wavy black hair that was combed or slicked back. She did not mention any facial hair or visible tattoos on the man. Gregory also stated that the man was wearing a long-sleeved jacket, a white T-shirt, and white low-top tennis shoes. He also had on "dirty looking" latex gloves.

Gregory testified at trial that during the time that the criminal perpetrators were in her home, the man opened the front door of the apartment several times, looking outside; he also made several telephone calls, including one in which Gregory heard the man say to an unknown person, "She wants to know how far you are. Where are you? How far away are you?" After the call, the man went to the bedroom in which his female accomplice, Feimster, and Meaco were located. The woman told Gregory to enter the bedroom. Feimster and Meaco were seated on Feimster's bed. The woman briefly left the bedroom. Upon her return, she struck Gregory in the face with the gun, knocking Gregory to the floor and ordering Gregory to "stay down." Gregory described the woman as short, stocky, and dark-skinned, having shoulder-length hair and wearing red tennis shoes. Gregory testified that the woman seemed to be in charge, continually telling the man what to do. The woman told the man to search the bedroom, but upon doing so, the man apparently did not discover the item or items being sought. The man then left the bedroom. Feimster then stated to the woman, "If I had it, I would give it to you. I don't have any money." Gregory also informed the woman that Feimster did not have any money. The woman forced Feimster to the floor. Feimster curled around Meaco "in a fetal position" with the female perpetrator using her knee and her hand to keep Feimster on the floor. The woman said to Feimster, "Bitch, you should have gave [sic] me the mother fucking money," shot Feimster in the head, and ran out of the apartment. Gregory used a telephone to call the emergency telephone number 911 for help, but Feimster died as a result of the gunshot wound. An autopsy showed that Feimster had also suffered blunt force trauma to the head before her death. Gregory received eight stitches to her face and suffered a broken nose. Meaco escaped the incident without sustaining physical injury.

Defendants were identified as suspects in the crimes, including Feimster's killing.[2] Approximately three days after the commission of the offenses, Gregory identified both defendants as the perpetrators with one hundred percent certainty through the usage of photographic line-ups. Gregory identified defendants again during the investigation by law enforcement as well as at trial. On cross-examination of Gregory at trial, counsel for defendant Abbitt asked Gregory if Gregory's granddaughter JaQuela Green had shown Gregory a picture of a woman named Ashley Phillips. Gregory responded that neither JaQuela nor anyone else had shown Gregory such a picture.

At a hearing conducted on 7 March 2019, outside of the presence of the jury, the State announced that it "had filed a motion in limine to [ex]clude the mention of possible guilt[ ] of another"[3] in light of defendants' opening statements and some of the questions posed to Gregory upon cross-examination by defense counsel. The State's motion in limine was premised upon the State's position that for any evidence to be relevant and admissible with regard to the suggestion or insinuated culpability of someone other than defendants of criminal wrongdoing, the evidence of the guilt of another must both "point directly to the guilt of the other party and be inconsistent with the guilt of the defendant[s]." The State contended in its motion that defendants' proffered evidence did not satisfy the second prong of this relevancy test.

In divulging their proffered evidence to the trial court in response to the State's motion in limine, trial counsel for defendants explained that, in defendants' view, the police had failed to conduct a thorough investigation of two other people who should be considered as the perpetrators of the crimes at issue. Through their counsel, defendants represented that, during the investigation by the Salisbury Police Department (SPD) of Feimster's murder, a Black woman named Ashley Phillips was identified by a member of Feimster's family as a potential suspect. In appearing for her interview by officers at the police station, Phillips arrived in a car which matched the description provided by a confidential informant of a vehicle that was present at the apartment complex where Gregory

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2. Given the limited focus of the issue before the Court, we omit a detailed recapitulation of evidence produced at trial regarding the investigation and the charged crimes, as such material pertains to matters outside of the issue presented by defendants' proffered evidence.

3. The trial transcript indicates that the State sought to "*include* mention of possible *guilt* [ ] of another," (emphases added), but the context of the parties' arguments and the trial court's ruling makes clear that either the prosecutor misspoke or the court reporter misheard these remarks.

resided on the day of Feimster's killing.[4] In the car in which Phillips rode to her police station interview, officers discovered a .25 caliber gun—"the same caliber of gun that the shell casing at the scene came from"—and white latex gloves similar to the type of latex gloves that Gregory testified that the male perpetrator was wearing.[5] Although police did not conduct a photographic lineup with Gregory that included a picture of Phillips, when Gregory ultimately was shown a photograph of Phillips, Gregory said, "Well, she does look like her," referring to the woman who had shot Feimster. Defense counsel reasoned that Gregory's identification of defendants could be called into question. Finally, trial counsel for defendant Albarran asserted that under the State's theory of the case, "if one [defendant] is guilty[,] the other [defendant] is guilty. . . . without one, there's not the other," such that "Albarran's defense . . . dovetails on [ ] Abbitt's defense."

Defendants further theorized that the man who accompanied Phillips as the second individual who committed the criminal acts at issue was known as Tim Tim McCain. McCain and Phillips were commonly associated with one another according to defendants, and although the confidential informant did not place Phillips in the area where the crimes occurred at the same time that they were committed, nonetheless McCain could have been the male perpetrator because he was observed in the vicinity of Gregory's apartment with a woman who resembled Phillips near the time of the perpetration of the crimes. Hence, defendants argued that the woman and the man who performed the criminal acts at issue were not the two of them, but instead were the duo of Phillips and McCain.

In addition to its interpretation of the cited legal principles which govern this area of the law, the State relied upon its perceived certainty and consistency of Gregory's identification of defendants as the wrongdoers, contending that "Gregory is very clear about the two individuals she saw inside of her home when this incident occurred."

After listening to the arguments of the parties, reviewing the State's motion, and consulting the case citations on relevancy provided by

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4. Counsel for defendant Abbitt represented that the confidential informant reported that the source saw a Black female arrive at the apartment complex "before the time of the murder" in "a tan Honda . . . . Accord."

5. The record does not reflect the context for the law enforcement officers' discovery of these items; *e.g.*, whether Phillips consented to a search of her vehicle or whether officers obtained a warrant. According to the State, however, Phillips and some of her friends knew through social media outlets that they might be suspects in the crimes and voluntarily went to the police station in order to clear their names.

defendants, the trial court cited *State v. Cotton*, 318 N.C. 663, 667 (1987) for the legal concept that evidence of the guilt of others must be relevant under Rule of Evidence 401 *and* "must tend both to implicate another and be inconsistent with the guilt of the defendant." "[T]aking the evidence in the light most favorable to the State, at this point," the trial court ruled that the proffered evidence "failed to meet that second prong" because it was not "inconsistent with the defendant[s'] guilt" and thus granted the State's motion in limine.

After the trial court's ruling in open court on the State's motion in limine but before the trial court orally announced its findings of fact, defense counsel queried the trial court as to whether, in accord with the allowance of the State's motion in limine, the defense could elicit testimony about items being seized from a car that did not belong to either defendant and about whether the items were tested as part of the investigation of the crimes. This inquiry was harmonious with defendants' position that the SPD conducted a questionable and incomplete investigation into Feimster's murder and related crimes. Specifically, defense counsel for Abbitt asked:

> So without mentioning the other person, are we allowed to elicit testimony such as a car arrived at the police station, and that car had a .25 caliber firearm and latex gloves, and that [ ] Abbitt was not in that vehicle, and that there was DNA swabs taken from that firearm, the firearm was retrieved, it was returned. Are we allowed to ask all of those things because it's part of the investigation as long as we don't bring up [ ] Phillips or ?[6]

The trial court responded that such information would be irrelevant and hence inadmissible with regard to the issue of other potential suspects, based upon the cited application of the second prong of relevancy. Counsel for defendant Abbitt then noted that Officer Young of the SPD had been asked by defendant Albarran's counsel on cross-examination during the previous day's proceedings "about the latex gloves, the holster and the firearm that was seized from that vehicle, so I would ask to at least be able to question about those since the State didn't object at the time."

Defendant Albarran's counsel thereupon stressed the importance of the defense's ability to cross-examine the State's witnesses about items

6. No second name was stated by counsel.

seized during the investigation of Feimster's murder, with particular emphasis on whether such items were tested or analyzed and the reasons for those decisions. Such a presentation was deemed to constitute an essential ingredient of the efforts by defense counsel in showing that the SPD did not conduct a thorough and appropriate search for the actual perpetrators of the crimes and in "impeaching the quality of the investigation." The trial court then ruled:

> I think you can question about the thoroughness of the investigation. I'll allow you to do that, but we're not going to go into whose car was that found in? "Who did it belong to? Why—you know, you—you can always ask: Why didn't you test it? Did you test it? If you didn't, why didn't you test it?" But we're not going to go any further down that road.

The parties and the trial court next discussed whether the results of any testing of the items could be explored with witnesses for the State and whether the defense could present its own evidence on this point. Consistent with its ongoing analysis, the trial court observed that a test result of the gun seized from the Phillips vehicle still would not absolve defendants in light of the second prong of the relevancy rule that the evidence "must tend both to implicate another *and* be inconsistent with the guilt of the defendant." (Emphasis added.) Counsel for defendant Abbitt posited that the confidential informant's report of a Black female in a tan Honda Accord at the apartment complex before the murder, coupled with statements from witnesses in the neighborhood who heard "tires squeal, car doors shut," along with the absence of the tan Honda Accord once SPD officers responded to Gregory's emergency call to the telephone number 911, suggested that there was only one Black woman connected to Feimster's murder, with all of these circumstances fitting Phillips's conceivable criminal involvement. The prosecutor countered that questions regarding testing of the items taken from Phillips's car were the beginning of a "slippery slope" leading toward the issue of alternative suspects. The trial court again set parameters for defendants, instructing defense counsel: "I'm going to let you ask questions about, 'Did you take swabs from the firearm? Did you send them off? Were they tested?' I'll let you ask questions about that, but we're not going to go any further down that road."

A written report from an SPD detective was submitted by defendant Abbitt's counsel as an item of the defense's proffered evidence during the hearing which was conducted on the State's motion in limine. In addressing the matter, the trial court stated the following:

> The informant says that Tim Tim saw they, I assume the informant and somebody else that was with the informant, looking at him, Tim Tim, and recognized him, and he kept walking. But there was an older styled Honda that is very loud and parked up near the mailboxes with a black female inside.
>
> The informant says they didn't get a good look at the female, but they thought she had shortcut hair, had some weight on them and appeared to be possibly light-skinned. The informant says that the female killed the victim at the request of Tim Tim; that Tim Tim couldn't do it because he had been seen by the informant and whoever was with the informant.
>
> The officer asked the informant if several individuals had anything to do with the murder. The informant said he never saw two of the individuals, that he only saw Tim Tim McCain. And he didn't know anything about the—Ashley Phillips, who was one of the persons Detective Sides mentioned. And then he goes on to say that there were people that were beefing including the victim[']s own sister, who was beefing with the victim and had told her sister—I'm not sure who that is.
>
> So I don't know which sister she's—he's referring to, that she wished, apparently, the victim was dead. So this informant is, kind of all over the place. His description of the black female in the vehicle does not seem to match the description of the black female that [ ] Gregory gave. And I don't see that this confidential informant provides any information that would make me reconsider my ruling.

During the evidentiary phase of the trial, the State introduced into evidence cellular telephone data for defendants' devices. Federal Bureau of Investigation Special Agent Michael Sutton, an expert in the field of historical cell site analysis and cellular technology, performed an examination of the data to determine the general location of both of defendants' cellular telephones at various given time periods, along with the number and extent of the contacts between the two cellular telephone numbers of defendants. This technology also enables a cellular telephone's physical location to be approximated based upon the information gathered and stored by cellular towers which provide service to

a cellular telephone when such a device is in the particular tower's area and the cellular telephone registers an incoming or outgoing call or text. Sutton testified that on 24 May 2016, defendants' cellular telephones were both detected by a cellular tower providing service to defendant Abbitt's residence on Adolphus Road from at least 6:09 p.m. to 7:12 p.m. By 7:32 p.m., defendant Albarran's cellular telephone had moved from the Adolphus Road cellular tower service area to the service area of a cellular tower serving the O'Charley's restaurant where Feimster worked. By 10:41 p.m., defendant Abbitt's cellular telephone had moved from the Adolphus Road cellular tower service area to a cellular tower service area that included the Food Lion grocery store where Feimster stopped to make purchases. At 11:02 p.m. and 11:07 p.m., defendant Albarran's cellular telephone was detected by cellular towers which provided service to the O'Charley's and Food Lion sites, as well as Gregory's apartment. By 11:58 p.m., both of defendants' cellular telephones were once again using a cellular tower which provided service to defendant Abbitt's residence. On the following morning of 25 May 2016, both of defendants' cellular telephones were detected by neighboring cellular towers south of Winston-Salem at 10:46 a.m. By 11:07 a.m., both of defendants' cellular telephones were recognized by the same cellular tower south of Lexington. Even though defendants denied knowing one another, there were approximately twelve contacts between defendants Abbitt's and Albarran's cellular telephones from 23 May 2016 through 26 May 2016, albeit none on the 24 May 2016 date of the murder.

Defendants did not present any evidence at trial.

The jury returned guilty verdicts against defendant Abbitt for: (1) first-degree murder on the bases of malice, premeditation, deliberation, and felony murder; (2) attempted robbery with a dangerous weapon; and (3) assault with a deadly weapon. Defendant Albarran was convicted by the jury of (1) first-degree felony murder, (2) attempted robbery with a dangerous weapon, and (3) assault with a deadly weapon. Each defendant appealed.

B. In the Court of Appeals

On appeal to the Court of Appeals, defendants presented arguments on a total of six issues: Each defendant appealed the trial court's refusal to allow the admission of evidence to implicate third parties. Additionally, defendant Albarran asserted that (1) the photographic lineup including his photograph was impermissibly suggestive; (2) the trial court erred by overruling his objections to the State's argument that he had failed to present evidence; and (3) his counsel's closing argument

was flawed. Defendant Abbitt additionally challenged (1) the admission into evidence of her out-of-court denials that she saw the victim Feimster on the day of the murder and (2) the sufficiency of the indictment to support the charge of first-degree murder. The majority of the panel of the Court of Appeals concluded that no prejudicial error was committed by the trial court with regard to any of the arguments advanced by defendants. *State v. Abbitt*, 278 N.C. App. 692, 694 (2021).

In addressing the only issue in defendants' appeal which has been raised for this Court's review—the refusal of the trial court to allow defendants to introduce evidence which defendants contend would tend to show that two other people committed the crimes for which defendants were being tried and that defendants were not involved—the Court of Appeals observed that the admissibility of this type of evidence turns on the relevancy of the evidence. *Id.* at 699. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2021). "Evidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this regard. . . . The evidence must simultaneously implicate another and exculpate the defendant." *State v. Miles*, 222 N.C. App. 593, 607 (2012) (citations and internal quotation marks omitted), *aff'd per curiam*, 366 N.C. 503 (2013). Applying this statutory law and appellate precedent, the majority of the Court of Appeals panel opined:

> Neither [d]efendant proffered evidence tending to *both* implicate another person(s) *and* exculpate either [d]efendant. *Miles*, 222 N.C. App. at 607 . . . (emphasis supplied). The proffered evidence merely inferred another person may have been involved in, or assisted in committing the crimes.
>
> Such inferences, if true, were not inconsistent with direct and eyewitness evidence of either Albarran or Abbitt's guilt. *Id.* Albarran failed to show the trial court's exclusion of the proffered evidence, as not relevant and not admissible, was prejudicial or reversible error.

Abbitt, 278 N.C. App. at 700.

One member of the three-judge panel of the Court of Appeals, however, dissented from this portion of the decision of the lower appellate

court. As to the admission of evidence regarding other potential perpetrators, the dissenting judge agreed with the majority's identification of the applicable test for the relevancy and admissibility of evidence concerning the prospect that another person may have committed the crime(s) for which a defendant is being tried, but reached a different conclusion about the interpretation of the applicable test when adapted to the case at bar:

> Evidence implicating others is relevant and admissible when it simultaneously implicates another and exculpates a defendant. Defendants sought to provide such evidence that implicated another person and exculpated themselves. The proffered evidence "constitute[d] a possible alternative explanation for the victim's unfortunate demise and thereby cast[ ] crucial doubt upon the State's theory of the case." *State v. McElrath*, 322 N.C. 1, 13-14 . . . (1988). The trial court erred in precluding [d]efendants from introducing evidence implicating other suspects.
>
> Further, a "reasonable possibility [exists] that, had the error in question not been committed, a different result would have been reached." *State v. Miles*, 222 N.C. App. [at] 607 . . . (2012) . . . .

Id. at 707–08 (Murphy, J., dissenting in part and concurring in part) (first alteration in original).

On 7 September 2021, defendants filed their notices of appeal pursuant to N.C.G.S. § 7A-30(2) (2021). On the same date, defendant Abbitt also filed a petition pursuant to N.C.G.S. § 7A-31(c) (2021) asking this Court to grant discretionary review of additional issues. The petition for discretionary review was denied on 4 May 2022 by order of the Court. Thus, the only issue presented to this Court for resolution concerns the matter raised in the dissenting opinion of the Court of Appeals with regard to whether the trial court properly excluded proffered evidence that persons other than defendants committed the crimes at issue here.

II. Analysis

The issue to be determined by this Court on the basis of the dissent in the lower appellate court is whether the trial court erred in declining to admit into evidence defendants' proffered evidence which they contend would implicate two alternative people as the perpetrators of the

charged offenses and would exculpate defendants as the two individuals who committed the crimes for which defendants were being tried. We conclude that while the excluded evidence demonstrated the possibility of the involvement of other perpetrators, nonetheless it did not serve to also exculpate defendants as this Court has required for such evidence to be deemed as both relevant and admissible. Accordingly, we affirm the portion of the Court of Appeals decision before us, finding no error in this aspect of defendants' trial.

A. Arguments of defendants

In their arguments before this Court, defendants assert error by the trial court, under both the Rules of Evidence with regard to the admissibility of relevant evidence in criminal trials and under the United States and North Carolina Constitutions in the context of a criminal defendant's right to present a defense under each instrument's Due Process Clause. Defendants' contentions largely mirror the positions which defendants took in the trial court as well as the Court of Appeals: that the State's evidence suggested that two people—a Black woman and a Hispanic man—committed the crimes which included the murder of Feimster; that Phillips, a Black woman, was identified early in the investigation of Feimster's murder as a potential suspect; that evidence from a confidential informant placed a car like Phillips's vehicle, with a Black woman inside of it, at the scene of the crimes near the time of their commission; that a gun of the same caliber that apparently was used in the murder of Feimster was found in Phillips's car, along with latex gloves; that the Hispanic male perpetrator wore dingy latex gloves while in Gregory's apartment; that the confidential informant reported that Tim Tim McCain was near Gregory's apartment and armed with a gun just before Feimster's murder; and that McCain was dressed in a manner similar to the male perpetrator. Defendants assert that this proffered evidence was relevant because it suggested that another male-female pair of wrongdoers had committed the crimes for which defendants were being tried. Defendant Abbitt specifically argues that any "evidence of third-party guilt would have thrown light upon the alleged offenses" and may have "constituted a possible alternative explanation and cast a reasonable doubt on the identity of the perpetrator." Defendants also contend that the trial court applied the wrong standard in making its relevancy ruling, erroneously viewing the evidence in the light most favorable to the State rather than properly viewing it in the light most favorable to defendants.

Ultimately, defendants urge this Court to determine, not only that the trial court erred, but that the error also entitles them to new trials.

B. Statutory and caselaw

In criminal cases, "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970); *see* U.S. Const. Amend. VI; N.C. Const. art. I, §§ 18, 23. Plainly, "the identity of the perpetrator of the crime charged is always a material fact." *State v. Jeter*, 326 N.C. 457, 458 (1990) (citing *State v. Johnson*, 317 N.C. 417, 425 (1986)).

> While the [federal] Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.

Holmes v. South Carolina, 547 U.S. 319, 326 (2006) (citations omitted). In North Carolina, the governing rules of evidence in this legal arena are Rules 401 and 402. We reiterate the significance of these evidentiary rules as we noted earlier in the Court of Appeals' analysis of this case, including the lower appellate court's recognition that relevant evidence is construed to be the type of evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," N.C.G.S. § 8C-1, Rule 401, and hence it is generally admissible. *Id.*, Rule 402 (2021).

Questions of law concerning a trial court's alleged nonconformance with statutory provisions like the codified Rules of Evidence and concerning any alleged violation of a defendant's constitutional rights are reviewed de novo. *State v. Flow*, 384 N.C. 528, 546 (2023). Under de novo review, the reviewing court considers the matter anew and freely substitutes its own judgment for that of the lower court. *See, e.g.*, *Cmty. Success Initiative v. Moore*, 384 N.C. 194, 210 (2023). Appellate courts nonetheless accord great deference to a trial court's ruling on the relevancy of proffered evidence. *See, e.g.*, *State v. Lane*, 365 N.C. 7, 27, *cert. denied*, 565 U.S. 1081 (2011).

Where evidence "is proffered to show that someone other than the defendant committed the crime charged, admission of the evidence must do more than create mere conjecture of another's guilt in order to be relevant." *State v. McNeill*, 326 N.C. 712, 721 (1990). Rather, the proffered

evidence "must (1) point directly to the guilt of some specific person, and (2) be inconsistent with the defendant's guilt." *Id.* (first citing *State v. Brewer*, 325 N.C. 550 (1989), *cert. denied*, 495 U.S. 951 (1990); and then citing *State v. Cotton*, 318 N.C. 663, 667 (1987)). This is so because

> [e]vidence casting doubt on the guilt of the accused and insinuating the guilt of another must be relevant in order to be considered by the jury. Because the relevancy standard in criminal cases is relatively lax, any evidence calculated to throw light upon the crime charged should be admitted by the trial court. However, the general rule remains that the trial court has great discretion on the admission of evidence. Evidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this regard. Rather, it must point directly to the guilt of the other party. *The evidence must simultaneously implicate another and exculpate the defendant.*

Miles, 222 N.C. App. at 607 (extraneity omitted) (emphasis added). Thus, "[e]vidence which tends to show nothing more than *that someone other than the accused had an opportunity to commit the offense, without tending to show that such person actually did commit the offense and that therefore the defendant did not do so*, is too remote to be relevant and should be excluded." *Brewer*, 325 N.C. at 564 (emphasis added) (quoting *State v. Britt*, 42 N.C. App. 637, 641 . . . (1979)).

C. Application of law to the facts of this case

Defendants' proffered evidence regarding Phillips and McCain as alternative suspects in Feimster's murder and related crimes was not "mere conjecture" and, as both the trial court and the State agreed with the defense at trial, appeared to "point directly to the guilt of some specific person." *McNeill*, 326 N.C. at 721. Due to this lack of dispute concerning defendants' satisfaction of the first prong of the relevancy test for the admissibility of their proffered evidence, we focus on the test's second prong in assessing the propriety of the trial court's ruling regarding whether the evidence at issue was "inconsistent with the defendant's guilt." *Id.*

The trial court noted that "the jury has received evidence that there were—there's communication going on on the night while this is all going down with other people that clearly tends to—to indicate there—there

are other people involved with these two that are—are in the apartment. It doesn't exclude the defendant's [sic] guilt . . . ." In reviewing the statement of the confidential informant, the trial court observed that the report of the confidential informant indicated that the informant saw McCain near Gregory's apartment with a gun just before the time of the crimes; that McCain had not committed the murder himself; that a light-skinned Black female with short hair was seen in a Honda near the apartment; that the confidential informant never saw McCain with a Black woman at the apartment complex on the date of the crimes; that the confidential informant did not know anything about Ashley Phillips; that Feimster "was beefing" with her own sister; and that Feimster's sister wished Feimster were dead.

At the time when defendants' proffer of evidence was made, the evidence which had been presented to the jury for consideration tended to show that while only two people—a Black woman who possessed a small firearm[7] and a tall Hispanic man with wavy hair—were inside the apartment with the three family members during the commission of the crimes, one or more other persons were apparently involved in the criminal pair's attempt to obtain either some item which was not discovered in the apartment by the female perpetrator or some money from Feimster, based upon the telephonic and in-person exchanges overheard by Gregory while the unknown man and unknown woman were in the apartment. In addition, Gregory had identified both defendants with complete certainty through the usage of photographic lineups as the two people who entered her apartment on the night that Feimster was killed. Evidence introduced later in the trial tended to indicate that defendants, who denied knowing one another, had numerous cellular telephone contacts with each other in the days immediately surrounding the murder of Feimster. Although there was no evidence adduced at trial that defendants had cellular telephone communication with one another on the date of Feimster's murder, nonetheless the State's evidence tended to show that defendants were together in Gregory's apartment—the scene of the crimes, including Feimster's murder—on the critical date. Cellular telephone data further showed that defendants' cellular telephones were in the same cellular tower areas which provided service for Feimster's cellular telephone as the victim traveled from place to place, including Gregory's home, where Feimster was fatally shot.

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7. The gun used to kill Feimster was described as "very small . . . . small enough to fit in the palm of the female[ ] suspect[']s hand."

Meanwhile, the defense's proffered evidence which was excluded at defendants' trial was that: (1) McCain, a man whose race and ethnicity were not identified in the record, was seen outside of Gregory's apartment with a large gun by a confidential informant just before the crimes at issue were committed, but McCain did not kill Feimster because McCain knew that he had been seen by the confidential informant; (2) an unknown Black woman was seen sitting in a tan Honda Accord at the apartment complex before the crimes were committed; and (3) after the appearance of social media posts which cast suspicion on Phillips as the perpetrator of these criminal offenses, Phillips voluntarily went to the SPD in a car similar to the tan Honda Accord identified by the confidential informant as being situated at the apartment complex before the crimes were committed and from which SPD officers obtained a white latex glove, a Lorcin pistol, and spent .25 caliber shells.

As determined by the trial court and subsequently by the majority of the Court of Appeals panel, while defendants' proffered evidence implicates other suspects which were suggested by defendants, such evidence does not exculpate defendants. Taking the proffered evidence in the light most favorable to defendants, even if Phillips was seated in a car outside of Gregory's apartment during the commission of the crimes at issue in this case, and even if McCain was outside of Gregory's apartment just before the murder of Feimster, none of this excluded evidence, although pertinent, was sufficient to both implicate Phillips and McCain as the criminal perpetrators here *and* exculpate defendants Abbitt and Albarran as required by our relevancy standard.

III. Conclusion

While the evidence proffered by defendants in their response to the State's motion in limine to exclude the mention of possible guilt of other individuals was relevant to the issues presented at trial for the jury's resolution, nonetheless this potential evidence for the jury's consideration was not admissible. Although the proffered evidence tended to point directly to the guilt of the specific persons Ashley Phillips and Tim Tim McCain—hence, making the evidence relevant—such evidence still did not tend to show that Phillips and McCain committed the offenses *and* that defendants Sindy Lina Abbitt and Daniel Real Albarran therefore did not commit the offenses—thus rendering the evidence inadmissible. In order to be both relevant *and* admissible, the evidence at issue here must have simultaneously implicated Phillips and McCain as it exculpated defendants Abbitt and Albarran. This dual requirement does not exist in the present case. The majority of the Court of Appeals panel which decided this case correctly applied the pertinent legal principles

in discerning that defendants' proffered evidence may have insinuated that Phillips and McCain assisted in, or may have been involved in, the perpetration of these crimes, but such evidence was not inconsistent with direct and eyewitness evidence of either defendant's guilt. Consequently, as determined by the Court of Appeals, the trial court's exclusion of defendants' proffered evidence did not constitute prejudicial or reversible error. Therefore, as to the issue on direct appeal based on the dissenting opinion, we affirm the decision of the Court of Appeals.

AFFIRMED.

Justice EARLS dissenting.

Ms. Abbitt and Mr. Albarran should have been permitted to introduce evidence that someone else committed the murder, attempted robbery, and assault that they were accused of committing. "[C]riminal prosecutions must comport with prevailing notions of fundamental fairness." *California v. Trombetta*, 467 U.S. 479, 485 (1984)). Accordingly, the United States Supreme Court has held that "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)). This right is rooted in the Due Process Clause of the Fourteenth Amendment, and in the Compulsory Process and Confrontation Clauses of the Sixth Amendment. *Crane*, 476 U.S. at 690 (citing *Trombetta*, 467 U.S. at 485). "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). But "[t]his right is abridged by evidence rules that 'infring[e] upon a weighty interest of the accused.' " *Holmes*, 547 U.S. at 324 (second alteration in original) (quoting *United States v. Scheffer*, 523 U.S. 303, 308 (1988)). Thus, when the trial court in this case excluded evidence tending to show that two people other than defendants committed the charged offenses, Abbitt and Albarran were denied their constitutional right to a fair trial, *Chambers*, 410 U.S. at 294, and "a meaningful opportunity to present a complete defense," *Holmes*, 547 U.S. at 324 (quoting *Crane*, 476 U.S. at 690).

While "[s]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials," that authority is still subject to constitutional limits. *Id.* (quoting *Scheffer*, 523 U.S. at 308). Namely, state rules of evidence may not be " 'arbitrary' or 'disproportionate to the purposes they are designed to

serve.' " *Id.* (quoting *Scheffer*, 523 U.S. at 308). In North Carolina "[t]he admissibility of evidence of the guilt of one other than the defendant" is governed by the Rules of Evidence, specifically the rule of relevancy. *State v. Israel*, 353 N.C. 211, 217 (2000) (quoting *State v. Cotton*, 318 N.C. 663, 667 (1987)). Under North Carolina Rule of Evidence 401, " '[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (2021). This standard is "relatively lax" and "[r]elevant evidence, as a general matter, is considered to be admissible." *State v. McElrath*, 322 N.C. 1, 13 (1988); *Israel*, 353 N.C. at 219 (stating that the standard of relevance "in criminal cases is particularly easily satisfied" and " '[a]ny evidence calculated to throw light upon the crime charged' should be admitted by the trial court.") (quoting *McElrath*, 322 N.C. at 13)).

To admit evidence implicating someone other than the defendant, this Court has stated that, the evidence "must do more than cast doubt over the defendant's guilt." *Israel*, 353 N.C. at 217. Put another way, the evidence must do "more than create an inference or conjecture" of the other person's guilt and instead "must tend *both* to implicate another *and* be inconsistent with the guilt of the defendant." *Id.* (quoting *Cotton*, 318 N.C. at 667). But this standard must be interpreted consistently with Rule 401 of the North Carolina Rules of Evidence. *See McElrath*, 322 N.C. at 13; *see also Israel*, 353 N.C. at 219. Thus, while the standard to introduce evidence of third-party guilt is more specific than what is stated in Rule 401, it remains a test of relevancy and cannot be used as a high bar to exclude almost all evidence that someone other than the defendant committed the crime. *See Cotton*, 318 N.C. at 667 ("The admissibility of evidence of the guilt of one other than the defendant is governed . . . by the general principle of relevancy.") Properly interpreted, the requirement that the proffered evidence "must tend *both* to implicate another *and* be inconsistent with the guilt of the defendant," *Israel*, 353 N.C. at 217 (quoting *Cotton*, 318 N.C. at 667), simply means that the proffered evidence must tend to show the defendant did not commit the crime because someone other than the defendant was the perpetrator.

In this case, the trial court misapplied our relevancy standard at the outset of its analysis. While evidence offered by the defendant is to be "viewed in the light most favorable to the defendant," *State v. Larrimore*, 340 N.C. 119, 144–45 (1995), the trial court viewed the evidence in the light most favorable to the State. In doing so, the trial

court misinterpreted the relevancy standard as setting a higher bar than what is required. That is, the trial court refused to draw reasonable inferences in favor of Abbitt and Albarran, and instead drew those inferences in favor of the State by making the unsupported assumption that Abbitt and Albarran may have acted together with Ashley Phillips and "Tim Tim" McCain to commit the charged crimes.[1] Likewise, the majority's analysis proceeds to make the same mistake the trial court did. Specifically, the majority's analysis effectively draws reasonable inferences in favor of the State and not the defendants.

Abbitt and Albarran were charged with first-degree murder, attempted robbery with a dangerous weapon, and assault with a deadly weapon. After trial began, the State filed a Motion in Limine to Preclude Mention of Possible Guilt of Another. After hearing arguments on the motion, the trial court determined that the proffered evidence was not inconsistent with the defendant's guilt and prevented the defendants from presenting it. Specifically, defendants wanted to introduce evidence tending to show that Phillips and McCain committed the crimes. The trial court appears to have concluded that the evidence met the first part of the standard, specifically that it went beyond "conjecture," but failed to meet the second part of the test, namely that even if true, it did not rule out defendants as perpetrators of the crime. In these circumstances, accepting this analysis would effectively bar any and all evidence that another individual committed the crime because the court could, in every case, assume there were multiple perpetrators.

This evidence implicating Phillips and McCain included that the glove box of Phillips's car held a .25 caliber gun, which was consistent with the gun that killed the victim, and white latex gloves, which were consistent with gloves worn by the male perpetrator. While DNA swabs were taken from the .25 caliber gun and the latex gloves, these items were never submitted for testing and no testing was completed on them.

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1. While our precedent in *Larrimore*, 340 N.C. at 144–45, does not explicitly state that reviewing the proffered evidence in the light most favorable to defendants requires that reasonable inferences be drawn in their favor, it stands to reason that drawing reasonable inferences in the defendants' favor is part of this analysis. *See Keith v. Health-Pro Home Care Servs., Inc.*, 381 N.C. 442, 455 (2022) ("[I]n determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor.") (quoting *Turner v. Duke Univ.*, 325 N.C. 152, 158 (1989)); *New Hanover Cnty. Bd. of Educ. v. Stein*, 380 N.C. 94, 106–07 (2022) (In evaluating the party's complaint, this Court must "take the allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor.").

A confidential informant also placed a car consistent with the make and model of Phillips's car near the scene of the crime at the time the murder occurred, and Phillips arrived at the police station for questioning in that same vehicle. Phillips was also the first person investigated in connection with this case and the first person identified by the family of the deceased. Indeed, when the victim's mother, Ms. Gregory, saw a photograph of Phillips, she stated "Well, she does look like her," referring to the woman who came into her apartment and shot her daughter. Despite this, the police did not include a picture of Phillips in the photographic lineup it conducted with Gregory.

A confidential informant also placed McCain at the apartment complex where the murder occurred "minutes before the murder." At the time, McCain "was carrying a pistol and trying to conceal his face." The informant also noted that when he saw McCain, McCain was with a Black woman, who the confidential informant implied shot the victim at McCain's request.

During the hearing on the State's motion in limine, the trial court applied the incorrect standard. Rather than take the above evidence in the light most favorable to defendants, the court announced "that [it was] taking the evidence in the light most favorable to the State." In doing so, the trial court found that the proffered evidence did not meet the standard articulated in *State v. Cotton*, 318 N.C. at 667, because it was not inconsistent with Ms. Abbitt's and Mr. Albarran's guilt. But by viewing the proffered evidence in the light most favorable to the State, the trial court started off on the wrong foot, and this error affected the entirety of the court's analysis.

Additionally, *State v. Israel*, is analogous to this case and undermines the majority's holding. In *Israel*, a first-degree murder prosecution, the jury was not permitted to hear certain evidence tending to show that a different person had the opportunity and motive to murder an elderly woman in her apartment. 353 N.C. 211 (2000). There was evidence that the victim was afraid of her former boyfriend and that the man had been seen at the victim's apartment building the week of the murder. *Id.* at 215. This Court explained that the former boyfriend's violent "history with the victim [gave him] a possible motive" and that, because he had been seen "on the surveillance videotape entering and leaving the victim's apartment" within a day of the victim's death, the former boyfriend had the opportunity to kill her. *Id.* at 219.

Similarly, in this case there was evidence that the woman the informant saw at the apartment complex on the night of the murder had been

"beefing" with the victim, which points to motive. The fact that on the night of the murder, a confidential informant saw a woman who may have been Phillips and a man the informant affirmatively identified as McCain at the apartment complex where the murder took place also points to opportunity. Furthermore, the evidence of opportunity in the present case is stronger than that in *Israel*. In *Israel* the victim's estimated time of death was between 10 and 12 December, and the video surveillance showed the former boyfriend at the victim's apartment building on 9 and 11 December. *Id.* at 214. Yet the Court determined that the trial court's exclusion of this evidence was erroneous there because the evidence "tended both to exonerate defendant and implicate another perpetrator." *Id.* at 216.

Additionally, in *Israel* the Court noted that exclusion of this evidence was prejudicial because it could not be "said the error did not affect the outcome of the defendant's trial." *Id.* Here a woman resembling Phillips and a car consistent with the make and model of Phillips's car, along with McCain, were seen in close proximity to the scene of the murder at the time of the murder, and the woman at the scene was said to have been "beefing" with the victim. As seen in *Israel*, this evidence of motive and opportunity is relevant as it tends to implicate Phillips and McCain, and when viewed in the light most favorable to defendants, is inconsistent with their guilt because it tends to show that someone else committed the crime. Furthermore, this case has two characteristics that *Israel* lacked: (1) evidence of items pointing to the modus operandi of the crimes and (2) a positive identification of Phillips by the victim's mother. The evidence pointing to the modus operandi here included a .25 caliber gun and white latex gloves found in Phillips's car, and her car was consistent with the make and model of the vehicle the confidential informant saw near the scene of the crimes. This additional evidence, along with Gregory's initial identification of Phillips, lends credence to the defense's theory of the case and tends to show that someone other than Abbitt and Albarran committed the crimes.

The trial court incorrectly determined that the evidence "may go to the guilt of another person, [but] doesn't exclude the defendants . . . from guilt." In reaching its decision, the trial court reasoned that even though the proffered evidence pointed to another suspect, the jury had received evidence that the perpetrators had been communicating with someone else on the night of the murder. According to the trial court, this scenario indicated that "there may have been other people involved" in the crimes. Specifically, the proffered evidence was not inconsistent with the defendants' guilt because all four suspects: Abbitt, Albarran,

Phillips, and McCain may have committed the crime together. Thus, according to the court, the evidence "doesn't exclude the defendants' . . . from guilt." Yet, as Judge Murphy noted in his dissent at the Court of Appeals, the record lacks evidence linking Abbitt, Albarran, Phillips, and McCain, "by phone or otherwise." *State v. Abbitt*, 278 N.C. App. 692 (2021) (Murphy, J., dissenting in part and concurring in part). According to Gregory's testimony, only two perpetrators were in her home when her daughter was murdered. While she testified that two or three phone calls transpired between the male perpetrator and someone else, she did not testify about who the someone else was. There is no evidence that McCain, Phillips, Abbitt, and Albarran committed this offense together. Thus, the trial court assumed there was a connection between the four, without any evidentiary support, and based on that assumption, excluded potentially exculpatory evidence that someone else may have committed the crimes.

The majority's analysis suggests that because the facts of this case imply the involvement of more than two actors, it is not possible for the proffered evidence to be inconsistent with Ms. Abbitt's and Mr. Albarran's guilt. This is simply not true. As noted above, there is no evidence in the record linking Phillips, McCain, Abbitt, and Albarran together. Drawing all reasonable inferences in defendants' favor, as must be done for these purposes, the evidence implicating Phillips and McCain was inconsistent with Ms. Abbitt's and Mr. Albarran's guilt and should have been introduced at trial.

Defendants also should have had the opportunity to impeach Gregory's testimony. "The primary purpose of impeachment is to reduce or discount the credibility of a witness for the purpose of inducing the jury to give less weight to his testimony in arriving at the ultimate facts in the case." *State v. Bell*, 249 N.C. 379, 381 (1959) (quoting *State v. Nelson*, 200 N.C. 69, 72 (1930)). Namely, because Gregory had initially identified Phillips as resembling the woman who was in her apartment on the night of the murder, this evidence could have called Gregory's recollection of the individuals in the apartment into question. Taken together, the proffered evidence "constitute[d] a possible alternative explanation for the victim's unfortunate demise and thereby cast[ ] crucial doubt upon the State's theory of the case," *State v. McElrath*, 322 N.C. at 13–14, however, the jury never heard this potentially exculpatory evidence.

Excluding this evidence was erroneous and prejudicial to both defendants. "A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt." N.C.G.S. § 15A-1443(b)

(2021). It is the State's burden "to demonstrate, beyond a reasonable doubt, that the error was harmless." *Id.* In this case the State cannot meet that burden because it cannot show that "the trial court's erroneous exclusion of evidence that tended both to exonerate defendant and implicate another perpetrator . . . [did not] infect[ ] the evidence supporting the conviction," and "it cannot be said the error did not affect the outcome of defendant's trial." *Israel*, 353 N.C. at 216 (citing N.C.G.S. § 15A-1443(a) (1999)). In these circumstances, the State cannot show that, after hearing evidence of third-party guilt, the jury would still have convicted Abbitt and Albarran.

Wrongful convictions can occur when relevant and potentially exculpatory evidence is kept from the jury. Although this is but one case, the trial court's decision to exclude this evidence and this Court's affirmance of that decision have broader implications. Between 1989 and 24 August 2023, 3,361 people were exonerated in the United States following wrongful convictions. UCI Newkirk Ctr. for Sci. & Soc'y et al., *The National Registry of Exonerations: Exonerations by State*, https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (last visited Aug. 24, 2023). These wrongful convictions range from robbery to murder and in total amount to 29,950 years lost to wrongful incarceration. *Id.* During this same period, North Carolina exonerated 73 people, 37% of whom experienced a wrongful conviction for murder. *Id.* In total, wrongfully convicted North Carolinians have wasted 935.6 years of their lives behind bars. *Id.*

Our Rules of Evidence serve to protect against wrongful convictions, however, if they are misapplied, these rules can hinder the accuracy of our criminal justice system rather than bolster it.[2] In this case the misapplication of our relevancy standard led to the conviction of two people who may not have been found guilty if the jury had heard the evidence tending to show that Phillips and McCain committed the crimes. On average, each wrongfully convicted North Carolinian has lost 12.82 years of his or her life to incarceration, and in some cases, people have spent 20 years or more in prison for crimes they did not

2. Another example is Rule 404 of the North Carolina Rules of Evidence, which states that "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion." N.C. R. Evid. 404(a). While there are exceptions to this rule, it generally serves to protect the accused from a conviction that is based solely on what the jury thinks of the accused person's character and instead focuses the jury's attention on whether jurors believe the defendant committed the crime for which he or she is on trial for.

commit.[3] *Id.* Wrongful convictions do not serve the interests of justice or of the State or victims of criminal acts.

The United States Constitution grants defendants the right to present a meaningful defense, *Holmes*, 547 U.S. at 324, and the right to a fair trial, *Chambers*, 410 U.S. at 294. Our rule of relevancy related to the admission of evidence of third-party guilt must be in line with these overarching constitutional principles. *See* N.C.G.S., Rule 8C-1, 401 (official cmt. (2021)); *see also McElrath*, 322 N.C. at 13; *Israel*, 353 N.C. at 219 (quoting *McElrath*, 322 N.C. at 13). Under the correct application of the Rules of Evidence and the relevancy standard, Abbitt and Albarran are entitled to a new trial in which they are permitted to introduce evidence of third-party guilt. Because the trial court misapplied the legal standard and improperly excluded the evidence of third-party guilt that Abbitt and Albarran sought to admit, I dissent.

3. For example, Larry Lamb was convicted of murder and sentenced to life in prison in 1993. UCI Newkirk Ctr. for Sci. & Soc'y et al., *Larry Lamb: Other North Carolina Exonerations*, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4240 (last visited on Aug. 24, 2023). He was incarcerated until 2013, when he was exonerated following a new trial, which showed that testimony at Mr. Lamb's original trial had been false. *Id.* Similarly, Willie Womble spent 38.3 years in prison after being convicted of murder in 1976 and was exonerated only after the man who actually committed the crime wrote a letter to the North Carolina Innocence Inquiry Commission which reviewed the case and successfully recommended that a judicial panel vacate Womble's conviction. *Id.* (last visited Aug. 24, 2023).

STATE OF NORTH CAROLINA
v.
WENDY DAWN LAMB HICKS

No. 136PA22

Filed 1 September 2023

Homicide—second-degree murder—jury instructions—self-defense—aggressor doctrine—sufficiency of evidence

Defendant was not entitled to a new trial on her second-degree murder charge because the trial court properly instructed the jury on the aggressor doctrine where—considering the evidence in the light most favorable to the State and giving the State the benefit of the doubt wherever the evidence conflicted—the jury could reasonably infer that defendant was acting as an "aggressor" at the time that she allegedly shot the victim in self-defense. Notably, although the victim (defendant's lover) had initiated the confrontation leading up to his death by forcefully entering defendant's apartment against her wishes, the State's evidence suggested that defendant shot him in the back while he was on his way out and already six feet away from her.

Justice DIETZ concurring.

Justice BERGER joins in this concurring opinion.

Justice MORGAN dissenting.

Justice BARRINGER joins in this dissenting opinion.

Justice BARRINGER dissenting.

Justice MORGAN 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, 283 N.C. App. 74 (2022), reversing a judgment entered on 12 December 2019 by Judge V. Bradford Long in Superior Court, Randolph County, and remanding for a new trial. Heard in the Supreme Court on 25 April 2023.

Joshua H. Stein, Attorney General, by Michael T. Henry, Assistant Attorney General, for the State-appellant.

Marilyn G. Ozer for defendant-appellee.

EARLS, Justice.

Defendant Wendy Dawn Lamb Hicks was convicted of second-degree murder after she shot and killed Caleb Adams in her home. Ms. Hicks and Mr. Adams had a tumultuous relationship, and on the day of the murder, Ms. Hicks had warned Mr. Adams by text message not to come to her residence. He ignored that warning and came anyway, precipitating a confrontation between them that left him dead from two gunshot wounds to his back. At trial, the jury was instructed on self-defense, the defense of habitation, and the aggressor doctrine. Ms. Hicks contends, and the Court of Appeals agreed, that the evidence did not support an instruction on the aggressor doctrine.

In this case we are again confronted with the proper application of North Carolina's "castle doctrine" statute, which establishes that a person in their home, motor vehicle, or workplace is presumed to have held "a reasonable fear of imminent death or serious bodily harm" when using deadly force to repel an unlawful intruder. N.C.G.S. § 14-51.2(b) (2021); *see also State v. Benner*, 380 N.C. 621, 632, 2022-NCSC-28, ¶ 26 ("[W]hile the enactment of N.C.G.S. § 14-51.2 was not 'intended to repeal or limit any other defense that may exist under the common law,' we have held that the enactment of N.C.G.S. § 14-51.3 has supplanted the common law right to perfect self-defense to the extent that it addresses a particular issue . . . ." (quoting N.C.G.S. § 14-51.2(g))); *State v. McLymore*, 380 N.C. 185, 195, 2022-NCSC-12 ¶ 23 ("Commonly known as the 'Stand Your Ground' Law, the Act 'restate[d] the law [of self-defense] in some respects and broaden[ed] it in others.' " (alterations in original) (quoting John Rubin, *The New Law of Self Defense?*, North Carolina Criminal Law: A UNC School of Government Blog (Aug. 17, 2011), https://nccriminallaw.sog.unc.edu/the-new-law-of-self-defense)); *State v. Coley*, 375 N.C. 156, 162 (2020) ("Viewing the evidence at trial in the light most favorable to defendant in order to determine whether the evidence was competent and sufficient to support the jury instructions on self-defense and the defense of habitation, we conclude that defendant was entitled to both instructions.").

As a legal matter, the Court of Appeals held that the statutory presumption entitling a person within their own home to use deadly force *regardless of the character of the assault* against them remains subject to the limitation that a defendant is not entitled to use self-defense if they were the aggressor in the situation. *See State v. Hicks*, 283 N.C.

App. 74, 81, 2022-NCCOA-263 ¶ 22. Ms. Hicks does not argue that this is incorrect. Instead, Ms. Hicks maintains that there was no evidence in the case from which a jury could find that she was the aggressor in these circumstances.[1] Thus, our only task is to determine whether, in the light most favorable to the State, the evidence was sufficient to support a jury finding that Ms. Hicks was the aggressor when she shot and killed Mr. Adams. The Court of Appeals erroneously considered the evidence in the light most favorable to Ms. Hicks and wrongly concluded that the evidence was insufficient. We hold that the evidence was sufficient to give the aggressor doctrine instruction, find no error in the trial court's decision to give the instruction, and therefore reverse the decision of the Court of Appeals.

I. Background

A. Evidence at Trial

Wendy Hicks and Caleb Adams first met in September 2015 through their employment at Dart Container. Within a few weeks, they developed an intimate relationship that lasted until Mr. Adams's death on 13 June 2017. Mr. Adams was married to Dana Adams, and he remained so until his death. Ms. Hicks was also married but divorced her husband in April 2016. Both Ms. Hicks and Mr. Adams maintained intimate relationships with other individuals besides each other and their spouses. Ms. Hicks made efforts to keep her other relationships secret from Mr. Adams.

Ms. Hicks and Mr. Adams's relationship was tumultuous; they had several vehement arguments. They frequently referred to each other in a vulgar manner, as demonstrated in their text messages. Mr. Adams was never violent with his wife, though he used coarse language, which his wife attributed to his picking up truck drivers' "lingo."

In early 2017, Mr. Adams introduced Ms. Hicks to methamphetamine. Mrs. Adams testified that using methamphetamine affected Mr. Adams's emotional state. Specifically, she stated that methamphetamine use caused Mr. Adams to become angry. Mr. Adams stored the methamphetamine at Ms. Hicks's house, and she would at times pick up drugs for him.

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1. At trial, during the charge conference, defense counsel objected to the aggressor instruction on the ground that there was insufficient evidence to demonstrate that Ms. Hicks was the aggressor. In closing argument, defense counsel argued to the jury that if Ms. Hicks was defending her home, believing that Mr. Adams was there to harm her, then "it doesn't matter who the aggressor was."

When Mr. Adams's methamphetamine supplier was arrested, Ms. Hicks introduced Mr. Adams to a new supplier, a man named Doug. Ms. Hicks testified that after a while, she began performing oral sex on Doug at Mr. Adams's instruction to pay for the methamphetamine. At some point, Ms. Hicks began a separate, intimate relationship with Doug, which she tried to keep secret from Mr. Adams.

The relationship between Ms. Hicks and Mr. Adams became even more strained around 23 May 2017, when Ms. Hicks posted a photo to Facebook of her and Mr. Adams kissing, which was seen by Mr. Adams's wife. Mrs. Adams confronted Mr. Adams who denied that he was the man in the picture. Ms. Hicks then started placing anonymous calls to Mrs. Adams. On 8 June 2017, she called Mrs. Adams around 7:00 a.m., blocking the caller ID, and disclosed that Mr. Adams was having an affair and consuming drugs. Ms. Hicks called again later that day at about 2:00 p.m. and asked Mrs. Adams if she knew that Mr. Adams had been involved in a wreck.

During the week of 12 June 2017, Ms. Hicks and Mr. Adams had several arguments, including one about the photo she had posted to Facebook. Ms. Hicks also testified that Mr. Adams was upset and angry because his supplier had raised the price of methamphetamine and he was concerned about owing people money.

On the morning of 12 June 2017, Mr. Adams went to Ms. Hicks's residence, a trailer where she lived with her seventeen-year-old daughter, April. At trial, April testified that she was awakened that morning by her mother and Mr. Adams arguing. According to April, Mr. Adams slung the door to their residence open, causing the door to hit a dog gate. Mr. Adams proceeded to enter the home and scream profanities and threats at Ms. Hicks. April testified she heard Mr. Adams say, "I've never hit a bitch but you're pushing me to hit a bitch. You're ruining my life. You're ruining my family." April testified that because she was afraid, she sent messages to her boyfriend describing the events as they occurred. At some point that morning, Mr. Adams left.

That evening, Mr. Adams texted Ms. Hicks multiple times. Ms. Hicks replied that she would leave his drugs on the nightstand in her bedroom, and around 9:15 p.m., Mr. Adams came and picked up his drugs. Around 11:30 p.m., Ms. Hicks texted Mr. Adams, threatening to send sexually explicit photographs to his wife to expose their affair. Approximately half an hour later, around midnight, Ms. Hicks called Mrs. Adams, identified herself, and told her that she and Mr. Adams were having an affair. She also told Mrs. Adams that Mr. Adams was using recreational drugs. During the conversation, Ms. Hicks told Mrs. Adams that she and Mr.

Adams had been arguing and asked if he was ever a violent person. Ms. Hicks explained that Mr. Adams had threatened her and that she was concerned for her safety. Mrs. Adams was not aware of Mr. Adams's behavior on the morning of 12 June 2017. Mrs. Adams told Ms. Hicks that Mr. Adams had never been violent with her and stressed that Mr. Adams needed assistance with his substance abuse problem. Ms. Hicks said she had a gun, at which point Mrs. Adams told Ms. Hicks to call the police if she felt threatened by Mr. Adams.

Later that evening, an unknown man arrived at Ms. Hicks's residence. He stood in her yard and yelled, "[W]here's Caleb[?]" Ms. Hicks informed the man that Mr. Adams was not at her residence, and the man instructed Ms. Hicks to tell Mr. Adams to "call his people." In response, Ms. Hicks began calling Mr. Adams repeatedly. Mr. Adams's reply text stated, "You'll be lucky if you don't end up in a ditch."

At 5:58 a.m. on 13 June 2017, Mr. Adams texted Ms. Hicks and then called her, telling her he was on the way to her house. At 6:13 a.m., Ms. Hicks texted Doug, "He [on the way] here," and then at 6:14 a.m., she texted Mr. Adams, "No, please don't come here. They looking for you." At 6:28 a.m., she texted Doug, "He here."

The next independently verifiable fact is that two minutes later, at 6:30 a.m., Ms. Hicks called 911 and told the operator that she had shot Mr. Adams. Ms. Hicks is the only living eyewitness to what occurred in the bedroom where Mr. Adams was shot. The only other person in the house at the time, April, remained in her room and could only testify regarding what she heard. April testified that she heard Mr. Adams burst into the home and slam the door, as he had done the previous morning. She also heard Mr. Adams tell her mother he was going to kill her, and she could hear that they were engaged in a physical struggle violent enough to move furniture.

Ms. Hicks gave four accounts of what occurred during those two minutes: two different statements to two deputies who had arrived at the scene; a third statement to two detectives at the sheriff's office; and a last version during her testimony at trial. While her first two accounts were virtually identical to one another, they differed slightly from her third statement and even more so from her trial testimony.

All four times, Ms. Hicks asserted that Mr. Adams arrived angry, came into the house, and then came into her bedroom to obtain her phone. When she refused to give him her phone, Mr. Adams grabbed her gun from the nightstand, which was in its holster. From this point on, her accounts differ.

To the two deputies, Ms. Hicks stated that Mr. Adams tried to grab her in an attempt to get her phone, during which he dropped the gun, and she picked it up and shot him. Her account given to the detectives later that day was similar, except that she omitted that Mr. Adams dropped the gun and she picked it up. She stated to the detectives that after she refused to relinquish her phone, a wrestling match ensued, the gun and the phone switched hands, and then she shot him, but she also stated that she could not remember how she got the gun or how it was removed from the holster.

At trial, Ms. Hicks testified that upon picking up the gun, Mr. Adams took it out of the holster and pointed it at her, and she then threw her phone at him. She said Mr. Adams went through her phone and started to leave with the gun. She testified that she told him to leave the gun there, at which point he came back and threw the gun on the nightstand. Next, she stated she picked up the gun and tried to walk past Mr. Adams, who grabbed her arm and started stomping on her feet. She stated she tried to get away, but Mr. Adams pinned her arm. She then pulled the gun out of the holster and shot him.[2] She stated that upon being shot, Mr. Adams walked past her and dropped face down at the door.

When the police arrived, Mr. Adams was lying on his back on the floor, halfway through the bedroom doorway. A law enforcement officer checked for a pulse and determined that he was dead. By Mr. Adams's leg, the police found a key fitting Ms. Hicks's front door and a "smoke vape" or "vape smoker." Ms. Hicks told an officer at the scene that the key was Mr. Adams's, and that he had used it to enter the trailer.

At trial, a forensic toxicologist testified that the level of methamphetamine in Mr. Adams's blood was 1.5 milligrams per liter and the level of amphetamine was .12 milligrams per liter. The toxicologist further testified to the effects of methamphetamine, including that it can

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2. Specifically, Ms. Hicks testified:

> He grabs my left arm and he — he grabs my left arm. He starts to kick and stomp my feet to try to get my feet out from under me. And I'm pulling and — and tried to get away. And he comes around and pins my arm between us. He still has . . . his other elbow, his other arm, and he's elbowing me in the side of the head. And he hits my — in the jaw and the side of the head, and he's still pushing me. He slams my back into the mirror. . . . And . . . as he's hitting me, I'm — everything just starts to — I'd say black out . . . . And at some point, I don't know when, I get the gun out of the holster. And I did — and I shoot.

cause heightened alertness, aggression, paranoia, violence, and sometimes psychosis.

The pathologist located two gunshot wounds. One entered the left side of Mr. Adams's back and went through his heart. The second shot entered on the right side of Mr. Adams's back and traveled upward. Either wound could have caused his death. There was an absence of stippling (when unburnt gunpowder strikes the skin and causes a superficial injury) or damage to Mr. Adams's clothes, which an expert for the State testified indicates that the gun was shot from more than six inches away. Nothing was broken in the house or bedroom.[3] At the scene, Ms. Hicks did not appear to be injured, and she did not complain of any pain. At the beginning of questioning by the detectives, Ms. Hicks had no bruises. However, after about four hours, the detectives noticed what appeared to be bruises starting to develop. After questioning, Ms. Hicks was photographed. These photographs were presented at trial and displayed what may have been bruises, but they were not clear or conclusive.

B. Procedural History

On 11 July 2017, Ms. Hicks was indicted for the second-degree murder of Mr. Adams. The matter came on for trial by jury in November 2019. At the charge conference, defense counsel objected to an instruction on the aggressor doctrine, arguing that the evidence presented did not allow any inference that Ms. Hicks was the aggressor. In overruling this objection, the trial court explained its reasoning as follows:

> The [c]ourt overrules the Defendant's objection that the aggressor — that Ms. Hicks could not be the aggressor as a matter of law, as I think there's some evidence from which the jury could find that Ms. Hicks obtained the weapon and that Mr. Adams was leaving or that his conclusions could be drawn by the jury and the [c]ourt, therefore, overrules the Defendant's objection to the jury being allowed to consider the exception to the self-defense as to whether or not she, Ms. Hicks, was the aggressor.

3. The front door was broken at one of its hinges. However, Ms. Hicks told the detectives during questioning that this had occurred before Mr. Adams's visits to her house during the week of June 12. Ms. Hicks did not address this in her testimony at trial. April testified that she did not know when it occurred.

The trial court instructed the jury on the elements of second-degree murder, the elements of voluntary manslaughter, the defense of habitation, self-defense, and no duty to retreat.

Regarding whether Ms. Hicks was the aggressor, the court instructed that she would be considered the aggressor if she "voluntarily and without provocation entered the fight, . . . unless Ms. Hicks, thereafter, attempted to abandon the fight and gave notice to the deceased that Ms. Hicks was doing so" or if Ms. Hicks "reasonably believe[d] that she was in imminent danger of death or serious bodily harm, . . . had no reasonable means to retreat, and the use of force likely to cause death or serious bodily harm was the only way to escape the danger." If the jury found Ms. Hicks was the aggressor, the court instructed that "Ms. Hicks is not entitled to the benefit of self-defense."

The jury found Ms. Hicks guilty of second-degree murder. The trial court sentenced her in the mitigated range for a Class B1 offense, prior record level 1, to a minimum of 180 months and a maximum of 228 months in custody. Ms. Hicks timely gave notice of appeal in open court. On appeal, Ms. Hicks argued the trial court erred in instructing the jury on the aggressor doctrine, and the Court of Appeals agreed, holding that Ms. Hicks is entitled to a new trial. *See Hicks*, 283 N.C. App. at 84. By order dated 15 June 2022, this Court allowed the State's petition for discretionary review.

II. Sufficiency of the Evidence

A. Self-Defense and the Aggressor Doctrine

Pursuant to N.C.G.S. § 14-51.3, "a person is justified in the use of deadly force and does not have a duty to retreat" if he or she is in a lawful place and "reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another" or "[u]nder the circumstances permitted pursuant to [N.C.G.S. §] 14-51.2." N.C.G.S. § 14-51.3(a) (2021). Under section 14-51.2, there is a presumption that a home's "lawful occupant . . . held a reasonable fear of imminent death or serious bodily harm to himself or herself or another" in the use of deadly force if the victim "was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home" which the lawful occupant "knew or had reason to believe . . . was occurring or had occurred." N.C.G.S. § 14-51.2(b) (2021).[4] As well,

4. Justice Morgan's dissent reads this provision to create a "compulsory" or "mandatory" presumption that "cannot be disregarded by the jury." The text of the statute, however, makes clear that this presumption is "rebuttable" and "does not apply" in specified cases. N.C.G.S. § 14-51.2(c).

someone "who unlawfully and by force enters or attempts to enter a person's home . . . is presumed to be doing so with the intent to commit an unlawful act involving force or violence." N.C.G.S. § 14-51.2(d) (2021).

However, the defenses pursuant to N.C.G.S. §§ 14-51.2 and 14-51.3 "[are] not available to" someone who "[i]nitially provokes the use of force against himself or herself." N.C.G.S. § 14-51.4 (2021). This is what is commonly known as the "aggressor doctrine." Someone may be considered the aggressor if they "aggressively and willingly enter[ ] into a fight without legal excuse or provocation." *State v. Wynn*, 278 N.C. 513, 519 (1971). Additionally, someone who did not instigate a fight may still be the aggressor if they continue to pursue a fight that the other person is trying to leave. *See State v. Cannon*, 341 N.C. 79, 82 (1995) (stating that evidence that defendant shot the apparently unarmed victim as she was leaving in a car supported a finding that defendant was the aggressor even where the victim initially went to defendant's home and threatened to kill him).

Justifications pursuant to sections 14-51.2 and 14-51.3 may still be available to the initial aggressor if the victim employed force "so serious that the person using defensive force reasonably believes that he or she was in imminent danger of death or serious bodily harm, [they] had no reasonable means to retreat, and the use of force . . . was the only way to escape the danger," N.C.G.S. § 14-51.4(2)(a), or if the initial aggressor "withdraws, in good faith, from physical contact with the person who was provoked, and indicates clearly that he or she desires to withdraw and terminate the use of force, but the person who was provoked continues or resumes the use of force[,]" N.C.G.S. § 14-51.4(2)(b). We have also held that a victim being shot in the back may support an inference that the victim was trying to leave. *See Cannon*, 341 N.C. at 83. For that reason, a victim being shot in the back is a factor that may be considered in evaluating a defendant's self-defense claim. *See State v. Rush*, 340 N.C. 174, 186 (1995).

"A trial court must give the substance of a requested jury instruction if it is 'correct in itself and supported by the evidence.' " *State v. Mercer*, 373 N.C. 459, 462 (2020) (quoting *State v. Locklear*, 363 N.C. 438, 464 (2009)). When the evidence is conflicting, it is for the jury to determine whether the defendant was the aggressor. *State v. Terry*, 329 N.C. 191, 199 (1991); *State v. Benton*, 299 N.C. 16, 19 (1980).

When deciding whether to include the aggressor doctrine in jury instructions, "the relevant issue is simply whether the record contains evidence from which the jury could infer that the defendant was acting as

an 'aggressor' at the time that he or she allegedly acted in self-defense." *State v. Mumma*, 372 N.C. 226, 239 n.2 (2019) (citing *Cannon*, 341 N.C. at 82–83 (stating that "the evidence in this case permits the inference that defendant was the aggressor at the time he shot the victim")). While all evidence is to be considered, "the evidence must be considered in the light most favorable to the State. The State must be given the benefit of every reasonable inference to be drawn from the evidence and any contradictions in the evidence are to be resolved in favor of the State." *State v. Bell*, 338 N.C. 363, 388 (1994) (citing *State v. Sumpter*, 318 N.C. 102, 107–08 (1986)); *cf. Mumma*, 372 N.C. at 239 n.2 (rejecting the defendant's assertion that the evidence is to be viewed in the light most favorable to him). "Contradictions in the evidence are resolved favorably to the [S]tate." *Sumpter*, 318 N.C. at 107 (1986) (citing *State v. Brown*, 310 N.C. 563 (1984); *State v. Thomas*, 296 N.C. 236 (1978)).

When the trial court delivers an aggressor instruction "without supporting evidence, a new trial is required." *State v. Vaughn*, 227 N.C. App. 198, 202 (2013) (cleaned up); *see also State v. Porter*, 340 N.C. 320, 331 (1995) ("Where jury instructions are given without supporting evidence, a new trial is required.").

B. Application to this Case

The trial court properly held that the evidence presented at trial supported an aggressor instruction. In reversing that decision, the Court of Appeals made two legal errors. First, the court treated Ms. Hicks's trial testimony as fact without addressing its inconsistencies with her prior accounts. *See Hicks*, 283 N.C. App. at 81–82. Second, the Court of Appeals ignored other evidence contradicting the version of events Ms. Hicks presented at trial. *See id.* On each score, the Court of Appeals mistook how trial courts should examine the record.

When asked to give an aggressor instruction, a trial court must consider whether a jury could reasonably infer from the evidence that the defendant acted as an aggressor. *See Mumma*, 372 N.C. at 239 n.2; *see also Cannon*, 341 N.C. at 82–83. In answering that question, the court must view the record in the light most favorable to the State, drawing all reasonable inferences in its favor. *Bell*, 338 N.C. at 388. Where, as here, there is conflicting evidence on whether the defendant acted as an aggressor and the jury could reasonably draw the inference either way, the State gets the benefit of the doubt. *See id.; see also Sumpter*, 318 N.C. at 107. Properly viewed, the record contained significant evidence from which the jury could reasonably infer that Ms. Hicks acted as the

aggressor. For that reason, the trial court correctly instructed the jury,[5] and the Court of Appeals erred by holding that Ms. Hicks is entitled a new trial.

In reaching the conclusion that the aggressor doctrine instruction was not warranted, the Court of Appeals closely tracked Ms. Hicks's testimony at trial, not mentioning her differing previous accounts. *See Hicks*, 283 N.C. App. at 81–82. The opinion recites as facts certain key details that are contradicted by Ms. Hicks's previous statements. *See id.* at 82 (stating that Mr. Adams "threw the Defendant's phone back at her . . . [and] continued to have possession of the firearm" and that he "placed the firearm in his pocket and moved towards the bedroom door" but relinquished it when Ms. Hicks demanded); *id.* at 84 (stating that Mr. Adams "extorted her cell phone from her").

The opinion also rests on factual details that were asserted only in Ms. Hicks's account at trial and were absent from her prior accounts. *See id.* at 82 (stating that Mr. Adams "took [the gun] out of its holster, and pointed it at the Defendant," that "he placed the firearm in his pocket" while he was leaving, and that "[w]hen Defendant attempted to leave the bedroom and flee from the altercation, Caleb lunged towards the Defendant and proceeded to kick, push, punch, and shove her"); *id.* at 84 (stating that Mr. Adams "point[ed] a firearm at her[ ] [and] assaulted Defendant without provocation by punching, pushing, kicking, and shoving when she attempted to escape from her bedroom with the firearm").

However, the jury, as instructed, was entitled to disbelieve some or all of Ms. Hicks's testimony at trial. *See*, *e.g.*, *Ward v. Carmona*, 368 N.C. 35, 37–38 (2015) (explaining that as sole judges of the weight of the evidence and the credibility of witnesses, jurors can believe all, part, or none of the testimony). They could have concluded that her statements made to law enforcement officers immediately after the incident were more likely to be true. They could have given greater weight to the physical evidence. Most importantly, contradictions in the evidence are to be resolved in the State's favor. *See Bell*, 338 N.C. at 388.

Beyond the inconsistencies between Ms. Hicks's trial testimony and her prior accounts, other evidence presented at trial challenges her version of events. By crediting Ms. Hicks's account over substantial physical evidence to the contrary, the Court of Appeals failed to view the record in the light most favorable to the State. That was error. Drawing

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5. The trial court's jury instructions explained the law as set out above; Ms. Hicks does not dispute that the jury instructions were a correct statement of the law.

all inferences in the State's favor, a jury examining the evidence could reasonably infer that Ms. Hicks acted as the aggressor in her confrontation with Mr. Adams. For example, the jury could have noticed that, although Ms. Hicks testified to a violent attack, she did not exhibit obvious injuries. Likewise, though Ms. Hicks recounted a ferocious struggle, nothing in the bedroom appeared broken, despite the room's small size. And although Ms. Hicks testified that she shot Mr. Adams while trying to escape his blows, the State offered evidence that he was shot in the back from at least six inches away. Each of those contradictions in the evidence could have given a jury pause, prompting them to doubt Ms. Hicks's account and credit the State's. And in deciding to give an aggressor instruction, the trial court properly resolved those contradictions in the State's favor, affording it the benefit of the doubt as our cases prescribe. *See*, *e.g.*, *Sumpter*, 318 N.C. at 107; *Brown*, 310 N.C. 563; *Thomas*, 296 N.C. 236.

In arguing to the jury, the State emphasized four facts that supported the aggressor instruction: (1) that Mr. Adams was shot in the back; (2) that Mr. Adams had never been physically violent with Ms. Hicks or his wife before this incident, *see* N.C.G.S. § 8C-1, Rule 404(a)(2) (2021); *State v. Bass*, 371 N.C. 535, 544 (2018) (stating that character evidence is admissible to support or rebut an inference that the victim was the aggressor); (3) that the vape found near his body shows Mr. Hicks had likely turned around to leave, getting it out of his pocket because he was going outside; the State argued that "[h]e wanted to start smoking again because he was heading out of the house"; and (4) that he had no intention of harming her because he had "saved her life [just] 48 hours before."

Other evidence in the case further supports the instruction. The jury heard approximately two and a half days of testimony from a witness reading aloud hundreds of pages of text messages between Mr. Adams and Ms. Hicks. This included messages and photographs exchanged in the weeks leading up to the murder. The jury could draw inferences from this couple's interactions that Ms. Hicks sought to provoke Mr. Adams and that she was angry when he seemed to indicate that he wanted to end their relationship.[6]

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6. In the Analysis section of her dissent, Justice Barringer correctly observes that "[t]his Court has long held that speculative evidence is insufficient to sustain a conviction." But there is a difference between "speculative" evidence and circumstantial evidence. We have defined the latter as "proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant." *State v. Adcock*, 310 N.C. 1, 36 (1984). Under our cases, the State may offer circumstantial evidence at trial so long as "a reasonable inference of

Furthermore, the jury could have inferred that Ms. Hicks's fear of Mr. Adams was not genuine from the fact that Ms. Hicks did not call 911 at 5:58 a.m. on the morning of 13 June 2017 when Mr. Adams texted her, and then called her, saying that he was coming to her house. Her subsequent text messages to Mr. Adams telling him not to come to her home that morning, viewed in the light most favorable to the State, arguably were not motivated by her fear of Mr. Adams harming her but rather demonstrated her concern that other individuals may harm him if he showed up there.[7]

In their two-minute interaction in her bedroom, by Ms. Hicks's own account, she was the only one armed at the time the confrontation escalated to physical force. While according to her account Mr. Adams did pick up the gun, resolving conflicts in the light most favorable to the State, the evidence from her initial statements supports the conclusion that he never pulled the gun out of the holster. The jury could, on this evidence, conclude that she was the first one to employ deadly force, and that when she did, she was the only one in possession of a deadly weapon. Finally, by Ms. Hicks's own account, she stopped Mr. Adams from leaving the bedroom, and the physical evidence discloses that Mr. Adams was shot twice in the back from at least six inches away, if not further. Cumulatively, this evidence was sufficient to support an instruction to the jury that Ms. Hicks could not claim self-defense or defense of habitation if she was the aggressor. *See Terry*, 329 N.C. at 199. As the statutory language and our precedents make clear, defense of habitation is not available to an aggressor. *See* N.C.G.S. § 14-51.4(2).[8]

[the] defendant's guilt may be drawn from" it. *State v. Fritsch*, 351 N.C. 373, 379 (2000). If the State's circumstantial evidence clears that bar, it is "for the jury to decide whether the facts, taken singly or in combination, satisfy it beyond a reasonable doubt that the defendant is actually guilty." *Id.* (quoting *State v. Thomas*, 296 N.C. at 244) (cleaned up); *see also State v. Stone*, 323 N.C. 447, 452 (1988) ("Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence."). Here, the State offered jurors "proof of a chain of facts and circumstances" suggesting that Ms. Hicks was the initial aggressor in her confrontation with Mr. Adams. *See Adcock*, 310 N.C. at 36. Because that circumstantial evidence permits a "reasonable inference" of Ms. Hicks' guilt, it was for the jury to consider and weigh it in deciding whether the State met its burden of proof. *See Fritsch*, 351 N.C. at 379.

7. Ms. Hicks's 6:14 a.m. text to Mr. Adams was, "No, please don't come here. They looking for you."

8. Justice Morgan's dissent contends that Ms. Hicks could invoke "the affirmative defense of defense of another" in addition to her personal self-defense claim. Ms. Hicks did not invoke that defense at trial, and we cannot retroactively raise it for her. At any rate, the text of the statutory "aggressor" doctrine applies wholesale to the "justification described in [N.C.]G.S. § 14-51.2" without distinguishing between personal self-defense or defense of others. N.C.G.S. § 14-51.4.

III. Conclusion

It was for the jury to decide which version of the facts was proven beyond a reasonable doubt in this case. Where, as here, there was significant evidence from which a jury reasonably could conclude that Ms. Hicks was the aggressor in the two-minute confrontation with Mr. Adams and that she intentionally shot him in the back as he was leaving her bedroom, not because she was in fear of her life or because she reasonably believed he would harm her or her daughter but out of malice, the trial court properly instructed the jury that if it found that she was the aggressor, the presumption in N.C.G.S. § 14-51.2 is no longer available to her. The Court of Appeals failed to consider the facts in the light most favorable to the State in making this assessment. Therefore, we reverse the decision of the Court of Appeals, hold that the trial court properly instructed the jury on the aggressor doctrine, and remand to the Court of Appeals for consideration of Defendant's argument that the trial court committed plain error in admitting Exhibits 174 and 175 into evidence.

REVERSED.

Justice DIETZ concurring.

The majority effectively holds that the language in N.C.G.S. § 14-51.4 incorporates the common law aggressor doctrine. That section provides, with limited exceptions, that the castle doctrine and the stand your ground law do not apply to one who "[i]nitially provokes the use of force against himself or herself." N.C.G.S. § 14-51.4 (2021). While the common law aggressor doctrine may be consistent with the statutory "initially provokes" language in some situations, I do not believe the two are coextensive.

For example, in this case the trial court instructed the jury that an "aggressor" includes a person who "uses towards one's opponent abusive language which, considering all of the circumstances, is calculated and intended to provoke a fight." This portion of the instruction, taken from the common law, cannot be squared with the statutory castle doctrine, which creates a presumption that deadly force is reasonable whenever the defendant knows or has reason to know that the victim has unlawfully or forcibly entered the defendant's home. N.C.G.S. § 14-51.2(b) (2021).

When this provision of the castle doctrine applies, the disqualifying language in N.C.G.S. § 14-51.4 does not examine what the defendant

did *in response* to that unlawful or forcible entry but instead what the defendant did *to provoke* that unlawful or forcible entry in the first place.

In *State v. McLymore*, 380 N.C. 185 (2022), this Court addressed the question of "whether the General Assembly intended to add to the common law right to perfect self-defense or abrogate it in its entirety" in enacting N.C.G.S. §§ 14-51.2–.4. *McLymore*, 380 N.C. at 190. In holding that the statutory scheme supplanted the common law, we stated that "when a defendant in a criminal case claims perfect self-defense, the applicable provisions of N.C.G.S. § 14-51.3—and, by extension, the disqualifications provided under N.C.G.S. § 14-51.4—govern." *Id.* at 191. The same reasoning applies equally to the castle doctrine in N.C.G.S. § 14-51.2. In other words, *McLymore* made clear that these statutes entirely supplanted the common law. When addressing self-defense under these statutes, there is no common law, there is only the language of the statute.

Nevertheless, at trial, Hicks did not argue that the common law aggressor instruction was inapplicable to the statutory castle doctrine defense found in N.C.G.S. § 14-51.2. Likewise, she did not request an instruction on the "initially provokes" provision in N.C.G.S. § 14-51.4—the only "aggressor" provision that applies to the statutory castle doctrine under *McLymore*, and one that arguably is narrower than the common law doctrine.

Moreover, on appeal to the Court of Appeals, Hicks argued only that the trial court erred under the common law "by instructing on the aggressor doctrine when all of the evidence showed an enraged Caleb Adams burst into the bedroom of Wendy Hicks and assaulted her." In the Court of Appeals briefing, defendant did not raise the castle doctrine issue, or even cite N.C.G.S. § 14-51.2, much less argue that a separate, statutory aggressor instruction (one based on the interplay between N.C.G.S. § 14-51.2 and N.C.G.S. § 14-51.4) was the only suitable instruction on provocation with respect to a castle doctrine claim. The decision not to raise these issues is understandable because, as noted above, Hicks never raised these issues at trial, so they are waived on appeal.

As the multiple separate opinions in this case illustrate, even this Court is struggling to understand how the "aggressor" language from our existing case law (and the pattern jury instructions) can be squared with the various statutory self-defense provisions that now govern. These are complicated and thorny legal issues that call out for clarity. But we are constrained to address only those arguments that were adequately raised and preserved in the case. These complicated legal issues

were not and therefore must wait for another day. As a result, not only does the law suffer, but so does Hicks.

Justice BERGER joins in this concurring opinion.

Justice MORGAN dissenting.

In respectfully dissenting from the opinion of a majority of my learned colleagues, I join the dissenting opinion of my esteemed colleague Justice Barringer as I write separately to register my own dissenting view, while adopting by reference the "Background" segment of her dissenting opinion.

The series of statutory enactments and appellate case decisions which are invoked here collectively illustrates the fallacy in the majority's reasoning. Firstly, the majority faultily conflates the legal concept of a presumption with the legal concept of an inference in construing N.C.G.S. § 14-51.2 in light of the facts in the present case and erroneously relying on this Court's decisions in *State v. Cannon*, 341 N.C. 79 (1995), and *State v. Rush*, 340 N.C. 174 (1995), as governing authorities here. As noted earlier, pursuant to N.C.G.S. § 14-51.2, defendant was presumed, as the lawful occupant of her home, "to have held a reasonable fear of imminent death or serious bodily harm to . . . herself *or another* when using defensive force that is intended or likely to cause death or serious bodily harm" to Mr. Adams if (1) he was "in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered," defendant's home; and (2) defendant "knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred." N.C.G.S. § 14-51.2(b) (2021) (emphasis added). The majority cites *Cannon* for this Court's recognition that where there was evidence "that the victim was shot from the side and from behind, [it] further support[ed] the inference that defendant shot at the victim only after the victim had quit the argument and was trying to leave [to go out the driveway]." 341 N.C. at 83. "An inference is nothing more than a permissible deduction from the evidence, while a presumption is compulsory and cannot be disregarded by the jury." *Henderson County v. Osteen*, 297 N.C. 113, 117 (1979) (quoting *Cogdell v. Wilmington & Weldon R.R. Co.*, 132 N.C. 852, 854 (1903)). "It must be borne in mind that presumptions and inferences differ." *State v. Williams*, 288 N.C. 680, 687 (1975). Unfortunately, the majority fails to recognize the distinction between the two related, yet disproportionate, evidentiary components. A presumption *must* be recognized by a jury to establish a component of

the case and cannot be disregarded; on the other hand, an inference *may* be recognized by a jury to establish a component of the case but can be disregarded. Here, defendant held the statutory presumption accorded to her by N.C.G.S. § 14-51.2, as the lawful occupant of her home, that she was entitled to employ deadly force against Mr. Adams due to a reasonable fear of imminent death or serious bodily harm to herself or her daughter as a result of the decedent's unlawful and forcible entry into defendant's home, of which defendant was aware, after defendant instructed Mr. Adams to stay away from her residence, after he burst into defendant's home and ultimately her bedroom, after he took defendant's firearm from her bedroom nightstand, after Mr. Adams threatened to kill defendant, and after the two physically tussled with one another. In my view, in the face of a mandatory presumption which operated in favor of defendant, the State's evidence constituted a mere permissible deduction by the jury which was insufficient to warrant a jury instruction on the aggressor doctrine.

Secondly, the majority conveniently couches the facts and outcomes of *Cannon* and *Rush* in a manner intended to stretch the applicability of these cases to the present case, but it instead merely serves to stretch credulity. In *Cannon*, the defendant unsuccessfully argued to this Court that "the trial court, over objection, erred by instructing the jury that self-defense was unavailable to defendant if defendant was the aggressor" where the evidence showed that the case "permit[ted] the inference that defendant was the aggressor at the time he shot the victim" because "the evidence also show[ed] that immediately before the victim was shot, she had 'straightened her car up to go out the driveway' and she was about to leave," with "[t]he evidence also reflect[ing] that the victim was shot from the side and from behind, further supporting the inference that defendant shot at the victim only after the victim had quit the argument and was trying to leave." 341 N.C. at 82–83. While the majority strives to utilize *Cannon* to narrow the present case's affirmative defense focus to self-defense—just as it seeks to do in its employment of our decision in *Rush*, where the defendant argued that he acted in self-defense and where "the victim had been shot in the back of the head," 340 N.C. at 186—nonetheless defendant in the present case was entitled to invoke not only the affirmative defense of self-defense but also the affirmative defense of defense of another; namely, her daughter and her daughter's friend, who the trial record shows were in an adjoining room to defendant's bedroom and in whose direction Mr. Adams was moving when defendant shot him in the back. Indeed, in *Cannon* and *Rush*, only two persons were involved in each case—the defendant and the defendant's victim—and in each case only the affirmative defense of self-defense was

available to the defendant as juxtaposed to the aggressor doctrine. In the instant case, however, *four* persons were involved—defendant, Mr. Adams, defendant's daughter, and the daughter's friend—and the affirmative defense of self-defense *plus* the affirmative defense of defense of another were available to defendant. Further, while the majority emphasizes the fact that Mr. Adams was shot in the back like the decedent in *Cannon* and the decedent in *Rush*, such that there is an inference that the individual who was shot was trying to leave, nonetheless the victims in *Cannon* and *Rush* had clearly withdrawn from any further interactions with the respective defendants, whereby in the present case, it was not clear that Mr. Adams had withdrawn from any further perpetuation of violence as he headed in the direction of the room which was occupied by defendant's daughter and the daughter's friend.

Based on these observations and for these reasons, I respectfully dissent.

Justice BARRINGER joins in this dissenting opinion.

Justice BARRINGER dissenting.

I. Background

Wendy Hicks met Caleb Adams while they were both working at Dart Container in Randleman, North Carolina in September 2015. Mr. Adams maintained relationships with several women, despite being married to his wife, Dana Adams. Ms. Hicks and Mr. Adams began a sexual relationship together shortly after meeting. While in the relationship, Mr. Adams introduced Ms. Hicks to methamphetamine. Mr. Adams and Ms. Hicks had several vehement arguments and referred to each other in vulgar terms. These arguments frequently regarded methamphetamine use or money.

After one such argument, Ms. Hicks called Mr. Adams's wife on 8 June 2017 and exposed her relationship with Mr. Adams. On 12 June 2017 and 13 June 2017, Ms. Hicks told Mr. Adams's wife that Mr. Adams had threatened to hurt Ms. Hicks and her children. At approximately 5:58 a.m. on 13 June 2017, Mr. Adams texted Ms. Hicks saying, "You'll be lucky if you don't end up in a ditch" and that he was coming to her house. Ms. Hicks responded by telling Mr. Adams both on the phone and via text not to come to her house. Despite this explicit instruction, Mr. Adams arrived at Ms. Hicks house at approximately 6:28 a.m. on 13 June 2017. Ms. Hicks, Ms. Hicks's daughter, and her daughter's friend were at the house when Mr. Adams arrived.

Mr. Adams entered the house and went into Ms. Hicks's bedroom. Ms. Hicks testified that Mr. Adams took her gun from the nightstand and pointed it at her, demanding her phone. After going through her phone, Mr. Adams threw the gun and phone onto the bed. Ms. Hicks took the gun and phone. Ms. Hicks testified that when she tried to leave the bedroom, Mr. Adams blocked her way and physically attacked her.

Ms. Hicks testified that she "black[ed] out" and shot Mr. Adams twice in the back. Shortly after the shooting, Ms. Hicks called 911, and her daughter began performing CPR on Mr. Adams.

II. Analysis

At issue in this case is the interplay between N.C.G.S. § 14-51.2, commonly known as the castle doctrine, and N.C.G.S. § 14-51.4, commonly known as the aggressor doctrine.[1] Section 14-51.2(b) states that:

> (b) The lawful occupant of a home, motor vehicle, or workplace is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply:
>
> > (1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home, motor vehicle, or workplace, or if that person had removed or was attempting to remove another against that person's will from the home, motor vehicle, or workplace.
> >
> > (2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

N.C.G.S. § 14-51.2(b) (2021).

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1. In his concurrence, Justice Dietz argues that the statutory aggressor doctrine found in N.C.G.S. § 14-51.4 is not before the Court. I disagree. The issue for which this Court allowed review is "whether the Court of Appeals erred by awarding a new trial based on the aggressor instruction." Further, the statutory scheme was argued to this Court without objection from either party.

In the present case, Ms. Hicks was in her own home. After being admonished twice not to enter her home, Mr. Adams did so and attacked Ms. Hicks in her bedroom. The evidence indicates that Mr. Adams had unlawfully and forcibly entered Ms. Hicks's home. Accordingly, Ms. Hicks "is presumed to have held a reasonable fear of imminent death or serious bodily harm to . . . herself or another," N.C.G.S. § 14-51.2(b), and therefore, was "justified in [her] use of deadly force," N.C.G.S. § 14-51.3(a) (2021), unless an exception applies.

The General Statutes of North Carolina provide several exceptions to when this presumption applies. Section 14-51.2 further states that:

> (c) The presumption set forth in subsection (b) of this section shall be rebuttable and does not apply in any of the following circumstances:
>
> . . . .
>
> (5) The person against whom the defensive force is used (i) has discontinued all efforts to unlawfully and forcefully enter the home, motor vehicle, or workplace and (ii) has exited the home, motor vehicle, or workplace.

N.C.G.S. § 14-51.2(c) (2021).

This Court has long held that speculative evidence is insufficient to sustain a criminal conviction. *E.g.*, *State v. Harrelson*, 245 N.C. 604, 607 (1957); *State v. White*, 271 N.C. 391, 395 (1967); *see State v. Taylor*, 362 N.C. 514, 526 (2008); *State ex rel. Utils. Comm'n v. Cooper*, 368 N.C. 216, 222–23 (2015). The evidence is merely speculative that Mr. Adams "discontinued all efforts to unlawfully and forcefully enter the home." *See* N.C.G.S. § 14-51.2(c)(5). Admittedly, he was shot in the back, implying that he was facing the door to the bedroom. However, Mr. Adams was facing the door to an interior room of her home, a home where Ms. Hicks's daughter and her daughter's friend were down the hall. Ms. Hicks retained the right to protect herself and the other people in her home, even when Mr. Adams turned to face away from her.[2] The evidence is insufficient to support the exception found in N.C.G.S. § 14-51.2(c)(5).

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2. In footnote 6, the majority correctly defines circumstantial evidence as the "proof of a chain of facts and circumstances indicating the guilt or innocence of a defendant. Under our cases, the State may offer circumstantial evidence at trial so long as 'a reasonable inference of the defendant's guilt may be drawn from' it." In the present case, Ms. Hicks shot Mr. Adams in the back; however, this does not "suggest[ ] that Ms. Hicks was the initial aggressor in her confrontation with Mr. Adams." *Supra* at 743-44 n.6.

The aggressor doctrine is codified in N.C.G.S. § 14-51.4 which provides that:

> The justification described in G.S. 14-51.2 and G.S. 14-51.3 is not available to a person who used defensive force and who:
>
> . . . .
>
> (2) *Initially provokes the use of force against himself or herself.* However, the person who initially provokes the use of force against himself or herself will be justified in using defensive force if either of the following occur:
>
> a. The force used by the person who was provoked is so serious that the person using defensive force reasonably believes that he or she was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force which is likely to cause death or serious bodily harm to the person who was provoked was the only way to escape the danger.
>
> b. The person who used defensive force withdraws, in good faith, from physical contact with the person who was provoked, and indicates clearly that he or she desires to withdraw and terminate the use of force, but the person who was provoked continues or resumes the use of force.

N.C.G.S. § 14-51.4 (2021) (emphasis added). To justify the trial court providing this instruction to the jury, there must be evidence that Ms. Hicks was the initial aggressor; yet there is no such evidence. When the record "discloses no evidence tending to show that the defendant brought on the difficulty or was the aggressor," giving an instruction on the defendant as an aggressor is reversible error because such instruction would be "partially inapplicable, incomplete and misleading." *State v. Washington*, 234 N.C. 531, 535 (1951). "When there is no evidence that a defendant was the initial aggressor, it is reversible error for the trial

court to instruct the jury on the aggressor doctrine of self-defense." *State v. Juarez*, 369 N.C. 351, 358 (2016). Accordingly, the trial court erred.

III. Conclusion

"[A] person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be" if he or she uses deadly force "[u]nder the circumstances permitted pursuant to [N.C.]G.S. § 14-51.2." N.C.G.S. § 14-51.3(a). Ms. Hicks used deadly force under the circumstances described in section 14-51.2 to defend herself, her daughter, and her daughter's friend. Therefore, her conviction should be overturned. Under the castle doctrine, Ms. Hicks "is presumed to have held a reasonable fear of imminent death or serious bodily harm to . . . herself or another." N.C.G.S. § 14-51.2(b). There was insufficient evidence to support that Ms. Hicks was the initial aggressor, and therefore, the trial court should not have given the aggressor doctrine instruction. Moreover, there was merely speculative evidence introduced to rebut the presumption found in N.C.G.S. § 14-51.2. Thus, I would reverse Ms. Hicks's conviction. Accordingly, I respectfully dissent.

Justice MORGAN joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
JEREMY JOHNSON

No. 197PA20-2

Filed 1 September 2023

Justice EARLS dissenting.

Justice MORGAN joins in this dissenting opinion.

On discretionary review pursuant to N.C.G.S. § 7A-31 of a unanimous, unpublished decision of the Court of Appeals, No. COA19-529-2 (N.C. Ct. App. Dec. 31, 2020) (unpublished), affirming an order entered on 14 November 2018 by Judge A. Graham Shirley in Superior Court, Wake County, denying defendant's motion to dismiss. Heard in the Supreme Court on 27 April 2023.

Joshua H. Stein, Attorney General, by Matthew Tulchin, Special Deputy Attorney General, for the State-appellee.

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

Elizabeth Simpson for Emancipate NC, amicus curiae.

Johanna Jennings and Emily Coward for The Decarceration Project, amicus curiae.

PER CURIAM.

AFFIRMED.

Justices BERGER and DIETZ did not participate in the consideration or decision of this case.

Justice EARLS dissenting.

I. Introduction

In 1999, the General Assembly decided it was important to require the collection of traffic stop data to assess racial discrimination in the same context. Accordingly, it passed N.C.G.S. § 143B-903, which became the first law nationally to require law enforcement to record the race of every person subjected to a traffic stop. An Act to Require the Division of Criminal Statistics to Collect and Maintain Statistics on Traffic Law Enforcement, S.L. 1999-26, § 1, 1999 N.C. Sess. Laws 27 (current version at N.C.G.S. § 143B-903); Frank R. Baumgartner et al., *Suspect Citizens: What 20 Million Traffic Stops Tell Us About Policing and Race* 35 (2018) [hereinafter *Suspect Citizens*]. Supporters and opponents of the law agreed: its purpose was to determine whether police officers discriminated on the basis of race in choosing who to stop for traffic offenses.[1]

1. Section 143B-903 was passed in response to public concern that police punished individuals for "driving while black," *Suspect Citizens*, at 36–38, and at the urging of black Senators who believed the data would "put[ ] the spotlight on something that is occurring in our state. And if it is not occurring, we simply need to say to our law officers we are glad it is not of the magnitude that we think." *Id.* at 41. Representatives opposing the law similarly perceived it as providing information on racial discrimination, arguing the law was unnecessary because "[g]ood management in the patrol ought to be able to tell who's racist." *Id.* at 45; *see also* Senate Judiciary II Committee Meeting Minutes, Feb. 25, 1999 (considering a News and Observer article titled, "Who's being stopped?," stating that black North Carolinians reported "they routinely are stopped under flimsy pretexts and their vehicles searched for drugs far more often than demographics would indicate is fair"); House Judiciary I Committee Meeting Minutes, Mar. 25, 1999 (explaining that while the law "does not accuse any agency of stopping people because of their race, . . . this does mean it is not occurring").

See id. at 36–45. Thus, the required data collected under N.C.G.S. § 143B-903 includes, *inter alia*, "the race or ethnicity" of the driver.

In the 2001–2002 session, Senate Bill 147 broadened the mandate from the State Highway Patrol to almost all law enforcement agencies. S.B. 147, 2001 Sess. (N.C. 2001); *Suspect Citizens*, at 47. In 2009, the North Carolina General Assembly expanded the requirements of N.C.G.S. § 143B-903 by passing an Act to Amend the Law Requiring the Collection of Traffic Law Enforcement Statistics in Order to Prevent Racial Profiling and to Provide for the Care of Minor Children When Present at the Arrest of Certain Adults, S.L. 2009-544, § 1, 2009 N.C. Sess. Laws 1480 (amending an earlier version of N.C.G.S. § 143B-903 which was codified at N.C.G.S. § 114-10.01). These changes specified in part that the data collected include a unique but anonymous ID number representing the officer involved in the traffic stop. *Id.* § 1, 2009 Sess. Laws at 1481.

In this case, defendant Jeremy Johnson draws on data collected pursuant to N.C.G.S. § 143B-903 to support his claim that the officer who decided to approach him as he was sitting in his car did so at least in part because of his race. The questions before this Court are (1) what legal framework applies to selective enforcement claims, and (2) whether evidence that an officer stopped far more black drivers than white drivers allows a selective enforcement claim to proceed. Because I disagree with the Court of Appeals' answers to both of these questions, I dissent from the majority's per curiam opinion affirming the Court of Appeals for lack of prejudicial error.

The United States Constitution and the North Carolina Constitution require equal protection under the law for all people. U.S. Const. amend. XIV; N.C. Const. art. I, § 19. In *Whren v. United States*, the United States Supreme Court explained that the Fourteenth Amendment's Equal Protection Clause "prohibits selective enforcement of the law based on considerations such as race." 517 U.S. 806, 813 (1996); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) (selective enforcement of a facially neutral law against a particular race of persons violates equal protection). In *State v. Ivey*, our Court acknowledged that selective enforcement based on race, in the context of a traffic stop, violates the Equal Protection Clause. 360 N.C. 562, 564 (2006), *abrogated in part on other grounds by State v. Styles*, 362 N.C. 412 (2008). What is more, in *Ivey*, our Court made clear that it would not "tolerate discriminatory application of the law based upon a citizen's race." *Id.* at 564 (providing this

statement in the context of allegations that *Ivey* involved "a case of 'driving while black' "[2]).

Accordingly, through the above referenced Act (S.L. 2009-544), N.C.G.S. § 143B-903, our federal and state constitutions, and our Court's own precedent, this Court and both our federal and state governments have been clear: selective enforcement based on race is a violation of the law. However, by affirming the Court of Appeals opinion in this case, which stated that the data collected under N.C.G.S. § 143B-903 is not sufficient to establish a racially selective enforcement claim, our Court has effectively rendered that fundamental principle meaningless. If litigants are unable to ever prove a selective enforcement claim, our federal and state Equal Protection Clauses, along with the reasoning for the collection of data required by N.C.G.S. § 143B-903, are nothing more than parchment barriers. *See United States v. Jewel*, 947 F. 2d 224, 240 (7th Cir. 1991) (Easterbrook, J., concurring) (stating that if the exclusionary rule is not applied at sentencing "the constitutional ban on unreasonable searches and seizures will become a parchment barrier"); The Federalist No. 48 (James Madison) (arguing that while laws may provide written protections, written guarantees may not always stop the majority from denying rights to minorities).

II. Background

Officer B.A. Kuchen of the Raleigh Police Department arrested Mr. Johnson in the early morning hours of 22 November 2017. According to his testimony, Officer Kuchen was patrolling the Raleigh North Apartments in his car. As he drove through the complex's parking lot, he noticed Mr. Johnson—a black man—sitting inside of a Mustang in a marked parking spot. Officer Kuchen observed Mr. Johnson slide under the steering wheel "as much as [he] could to obscure my view of [his] person inside of that vehicle." A "no trespassing" sign was posted approximately five feet from Mr. Johnson's car. According to Officer

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2. " 'Driving while black' refers to the charge that police stop, question, warn, cite or search African American citizens because of their race." *State v. Ivey*, 360 N.C. 562, 564 (2006) (cleaned up). Furthermore, as documented in the House Judiciary I Committee Meeting Minutes on S.B. 76, Senator Ballance noted that in North Carolina, "in some circumstances, people are being profiled." House Judiciary I Committee Meeting Minutes, Mar. 25, 1999. However, Senator Ballance went on to explain that this issue was not limited to North Carolina and that at the time, there had been two lawsuits in Maryland involving racially motivated traffic stops. *Id.* During the bill's discussion, Senator Ballance also pointed to institutional procedures that encouraged racially motivated traffic stops, noting that troopers in New Jersey had testified to being "coached to make race-based profile stops to increase their criminal arrests." *Id.*

Kuchen, he approached Mr. Johnson "[t]o address the potential of trespassing, being under a no trespassing sign, and the behavior of attempting to obscure himself from me as I drove by."

Officer Kuchen stopped his car in the road and walked toward Mr. Johnson, shining a flashlight. Mr. Johnson began to exit the car. At that point, Officer Kuchen claimed to smell marijuana. He ordered Mr. Johnson to remain in the car, but Mr. Johnson continued to exit his vehicle. Officer Kuchen commanded Mr. Johnson to stop moving and approached to handcuff him. By then, another officer had arrived to assist Officer Kuchen. Mr. Johnson pulled away from the officers and ran ten to fifteen feet before they tackled him to the ground and handcuffed him. In a search incident to arrest, officers found cocaine and marijuana.

Officer Kuchen had recently finished field training. As a new patrol officer, he recognized that his duties were to answer 911 calls and "conduct proactive criminal patrol." The Raleigh North Apartments previously had entered into an agreement with the Raleigh Police Department, requesting help in keeping trespassers off its property. Officer Kuchen was aware of this agreement.

On 5 March 2018, a Wake County grand jury indicted Mr. Johnson for possession of cocaine, possession of marijuana up to one-half ounce, and resisting a public officer. Mr. Johnson moved to suppress the evidence against him and dismiss all charges based in part on the violation of his Equal Protection rights. Mr. Johnson's claim was that Officer Kuchen approached and detained him because of his race.

At the suppression hearing, defendant called Ian Mance, who testified that he used N.C.G.S. § 143B-903 data to examine Officer Kuchen's previous traffic stops. Mance determined Officer Kuchen's ID number with high confidence by cross-referencing information from North Carolina's criminal court database, the Automated Criminal/Infractions System (ACIS), with the N.C.G.S. § 143B-903 data. The State does not argue that Mance's identification of Officer Kuchen was incorrect.

Mance found Officer Kuchen had stopped 299 drivers, 245 of whom were black (about 82%). Subsection 143B-903(a)(15) requires officers to record the geographic location of each traffic stop only by the "city or county in which the stop was made," not by a specific location within a city, so Mance could not have determined where any of these stops occurred. Out of all Raleigh Police Department traffic stops since 2002 (nearly one million stops), 46% were of black drivers. That number, Mance noted, outpaced Raleigh's population of black citizens. According to the 2016 U.S. Census Data, just 28% of Raleigh residents were black.

Mark Taylor, an intern at the Wake County Public Defender's Office, also testified. He explained how he searched the ACIS and discovered that, of the 204 cases listing Officer Kuchen as the complainant, 166 of the people charged were black—a staggering 81.4%.

As Officer Kuchen recounted at trial, he started his field training in May 2017 and split his time between the Raleigh Police Department's southeast and northwest districts. When he rode with a supervisor during his training, Officer Kuchen, explained, he initiated most of the stops. After completing his training, Officer Kuchen began patrolling on his own in October 2017. Although he was assigned to the southeast district, he did not have a specific beat, choosing instead to "float around" the entire district.

After the evidentiary hearing, Judge A. Graham Shirley denied Mr. Johnson's motions. On appeal, the Court of Appeals applied a three-part, burden-shifting framework common to equal protection claims. It concluded that Mr. Johnson had not met his initial burden to show prima facie discrimination because the statistics did not include

> appropriate benchmarks from which we can determine discriminatory effect or purpose. Without knowing the demographics of southeast Raleigh—the district Officer Kuchen was assigned and where this stop occurred—there is no adequate population benchmark from which we can assess the racial composition of individuals and motorists "faced by" Officer Kuchen.

State v. Johnson, No. COA19-529-2, 2020 WL 7974001, at *8 (N.C. Ct. App. Dec. 31, 2020) (unpublished). Therefore, the Court of Appeals affirmed the trial court's denial of Mr. Johnson's motion to suppress. *Id.* at *9.

III. Standard of Review

Constitutional errors are reviewed de novo. *State v. Johnson*, 379 N.C. 629, 634 (2021). When examining a trial court's factual findings, this Court asks whether they are supported by competent evidence. *State v. Cooke*, 306 N.C. 132, 134 (1982).

IV. Legal Framework for Selective Enforcement

The U.S. Constitution "prohibits selective enforcement of the law based on considerations such as race." *Whren*, 517 U.S. at 813 (declaring that a Fourth Amendment challenge of a traffic stop as racially motivated should have been brought under the Equal Protection Clause);

Ivey, 360 N.C. at 564 (citing *Whren* to conclude that "this Court will not tolerate discriminatory application of the law based upon a citizen's race"). This Court has never addressed whether the North Carolina Constitution contains a similar right, but here the majority affirms the Court of Appeals decision finding such a right, and I agree. *See* N.C. Const. art. I, § 19 ("No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.").

To address selective enforcement claims some federal courts apply *United States v. Armstrong*, 517 U.S. 456 (1996), which created an intentionally strenuous discovery standard for selective *prosecution* (not enforcement) claims. *See*, *e.g.*, *Johnson v. Holmes*, 782 F. App'x 269, 276 (4th Cir. 2019) (applying *Armstrong* to a selective enforcement claim); *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1263–65 (10th Cir. 2006) (same); *see also Armstrong*, 517 U.S. at 464 ("[T]he showing necessary to obtain discovery should itself be a significant barrier to the litigation of insubstantial claims."). To earn discovery, *Armstrong* requires a defendant to provide evidence of similarly situated people of other races who the State could have prosecuted but did not. *Id*. at 465–66. The ultimate, post-discovery conclusion relies on "ordinary equal protection standards": the evidence must show a "discriminatory effect and that it was motivated by a discriminatory purpose." *Id*. at 465 (cleaned up).

Other courts adopt *Armstrong*'s approach of requiring a pre-discovery showing of discrimination but find that *Armstrong*'s similarly situated requirement sets too high a bar for selective enforcement claims. *See*, *e.g.*, *United States v. Sellers*, 906 F.3d 848, 855–56 (9th Cir. 2018); *see generally* Alison Siegler and William Admussen, *Discovering Racial Discrimination by the Police*, 115 Nw. U. L. Rev. 987 (2021) (arguing that *Armstrong* sets too high a bar for discovery). These courts

> have suggested that the presumptions of regularity and immunity that usually attach to official prosecutorial decisions do not apply equally in the less formal setting of police arrests. They've reasoned, too, that comparative data about similarly situated individuals may be less readily available for arrests than for prosecutorial decisions, and that other kinds of evidence . . . may be equally if not more probative in the [enforcement] context.

Nieves v. Bartlett, 139 S. Ct. 1715, 1733–34 (2019) (Gorsuch, J., concurring in part and dissenting in part) (concluding that the relevance of

Armstrong to selective enforcement remains an open question). Courts that purportedly do not ease *Armstrong*'s requirements may nevertheless use a lenient understanding of the similarly situated requirement where, as in the present case, a defendant attempts to meet their burden using statistical evidence that a police officer stopped a disproportionately high number of black drivers. *See Johnson*, 782 F. App'x at 282. This is likely because a strict understanding of the similarly situated requirement would effectively bar selective enforcement claims in these cases, given the State "does not (and could not) record the races of specific drivers who could have been stopped but were not." *See id.* But a more lenient understanding of the similarly situated requirement makes it redundant: evidence showing discrimination also supports an inference of similarly situated individuals who were treated differently. *See id.* ("[T]he percentage of white drivers stopped and ticketed by the other officers patrolling the same locations as [the officer who pulled over the defendant] serves as a proxy to show the general racial composition of drivers on the road that [the officer who pulled over the defendant] could have pulled over but did not."). This weighs in favor of abandoning the similarly situated requirement entirely.

Still other courts use the burden-shifting framework employed in other Equal Protection contexts, such as jury selection. *E.g.*, *Commonwealth v. Long*, 485 Mass. 711, 713 (2020) (shifting the burden to the government after defendant makes a prima facie showing of selective enforcement); *United States v. Hare*, 308 F. Supp. 2d 955, 992 (D. Neb. 2004) (same); *see also Batson v. Kentucky*, 476 U.S. 79, 97 (1986) (using a burden-shifting framework for racial discrimination in jury selection). Instead of allowing discovery for a defendant to substantiate their claim, this approach burdens the State with producing evidence to counter the reasonable inference. To challenge a peremptory juror strike, the defendant must first "make a prima facie showing" that the State discriminated on the basis of race. *State v. Taylor*, 362 N.C. 514, 527 (2008). "If the defendant makes the requisite showing, the burden shifts to the state to offer a facially valid, race-neutral explanation . . . ." *Id.* "Finally, the trial court must decide whether the defendant has proved purposeful discrimination." *Id.* This final step requires the court to find both a discriminatory effect and a discriminatory intent.[3] *See id.*

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3. It is important to remember that discrimination may occur through implicit bias, *i.e.*, subconscious racial prejudice or stereotyping. *See*, *e.g.*, *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring) ("A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is 'sullen,' or 'distant,' a characterization that would not have come to his mind if a white juror had

Given how contested this area of law is, the majority's decision to affirm per curiam the Court of Appeals' adoption of the burden-shifting framework while simultaneously making it impossible to establish a prima facie case is an abdication of our responsibility to decide cases pending before us. While there are advantages to using the burden-shifting approach, there are also advantages to using the approach from *Armstrong*. Accordingly, an opinion that clarifies the correct standard for selective enforcement cases in North Carolina is warranted.[4]

The differences between enforcement and prosecution make a compelling case for lowering *Armstrong*'s pre-discovery standard in the context of selective enforcement. What that lower barrier should be is an open question. This Court could follow the Ninth Circuit's example and abandon the requirement that a defendant show that similarly situated individuals of a different race were treated differently. *See Sellers*, 906 F.3d at 855–56. Similarly, the Third Circuit requires only evidence of a discriminatory effect, not evidence of a discriminatory intent or similarly situated individuals. *United States v. Washington*, 869 F.3d 193, 221 (3d Cir. 2017). The Seventh Circuit allows "limited [discovery] that can be conducted in a few weeks," which can be expanded "only if evidence discovered in the initial phase justifies a wider discovery program." *United States v. Davis*, 793 F.3d 712, 723 (7th Cir. 2015). This Court could even adopt its own standard, such as by importing the prima facie standard from the jury selection caselaw. *See*, *e.g.*, *Batson*, 476 U.S. at 97 (requiring prima facie evidence to satisfy the initial burden under the burden-shifting framework).

By failing to engage the above questions, the majority left open the possibility that the Court of Appeals applied the wrong framework. In doing so, the Court abdicated the responsibility it took on when deciding to hear the case: to clarify "legal principles of major significance to

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acted identically."); *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 540 (2015) (describing "unconscious prejudices" as a type of "discriminatory intent"); *Woods v. City of Greensboro*, 855 F.3d 639, 652 (4th Cir. 2017) (holding that bias, if "implicit, is no less intentional" in the context of a statutory racial discrimination claim); *Samaha v. Wash. State Dep't of Transp.*, No. CV-10-175-RMP, 2012 WL 11091843, at *4 (E.D. Wash. 2012) ("Testimony that educates a jury on the concepts of implicit bias and stereotypes is relevant to the issue of whether an employer intentionally discriminated against an employee.").

4. The trial court's order analyzed Mr. Johnson's Equal Protection claim under the selective prosecution approach requiring proof of a similarly situated individual of a different race being treated differently, applying *Chavez v. Ill. State Police*, 251 F.3d 612 (7th Cir. 2001) and *Hubbard v. Holmes*, 2018 U.S. Dist. Lexis 67278 (W.D. Va. 2018).

the jurisprudence of the State." *See* N.C.G.S. § 7A-31(c)(2) (2021). I dissent because I would clarify the correct framework.

V. Prima Facie Standard of Proof

If the Court of Appeals was correct to apply the burden-shifting framework, I would hold that it erred by finding Mr. Johnson's statistical evidence failed to make a prima facie showing of discriminatory effect and intent.

Generally, "[a] 'prima facie case' . . . means no more than evidence sufficient to justify, but not to compel an inference." *Staples v. Carter*, 5 N.C. App. 264, 267 (1969) (quoting *Vance v. Guy*, 224 N.C. 607, 609 (1944)); *see also id.* at 266 (stating that prima facie evidence can be submitted to a jury, "nothing else appearing"); *DeArmon v. B. Mears Corp.*, 312 N.C. 749, 756 (1985) (describing prima facie evidence as permitting but not compelling a conclusion, "nothing else appearing"); *Commonwealth v. Pauley*, 368 Mass. 286, 291–92 (1975) ("The words 'prima facie' mean practically this: That on that evidence alone, nothing else appearing, . . . [the law] permitted, but did not oblige . . . , [a finding]."). "The Supreme Court has explicitly rejected the use of a 'more likely than not' standard in determining whether a prima facie case of discrimination has been established . . . ." *State v. Bennett*, 374 N.C. 579, 598 (2020) (quoting *Johnson v. California*, 545 U.S. 162, 168 (2005)). Therefore, in the context of Equal Protection, evidence establishes prima facie discrimination where "the totality of the relevant facts gives rise to an inference" of discrimination. *See id.* (quoting *Johnson*, 545 U.S. at 168) (stating the quoted rule in the context of discriminatory jury selection); *Long*, 485 Mass. at 717 (stating that prima facie evidence "raises at least a reasonable inference of impermissible discrimination" in the context of selective enforcement).

"[S]tatistical proof normally must present a 'stark' pattern to be accepted as the sole proof of discriminatory intent under the Constitution." *McCleskey v. Kemp*, 481 U.S. 279, 293 (1987). However, statistics cannot be held to such a high standard that defendants cannot ever successfully claim selective enforcement. *Long*, 485 Mass. at 721 (lowering the initial burden to show selective enforcement because "[t]he right of drivers to be free from racial profiling will remain illusory unless and until it is supported by a workable remedy"); *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803) ("[E]very right, when withheld, must have a remedy . . . ."). Accordingly, when statistics permit an inference of discrimination but could be strengthened or weakened by information that only the State can provide, the burden shifts to the

State to explain the statistics. *See United States v. Crowthers*, 456 F.2d 1074, 1078 (4th Cir. 1972) ("We think defendants made a sufficient prima facie showing . . . and that the government, being in possession of the facts . . . , should have come forward with evidence . . . .").

Here, Mr. Johnson's statistical evidence constituted a prima facie showing of racial discrimination by Officer Kuchen. Mr. Johnson offered two benchmarks: (1) that 28% of Raleigh's population was black, and (2) that 46% of the Raleigh Police Department's traffic stops involved black drivers. As the Court of Appeals noted, these numbers are "stark[ly]" different from Officer Kuchen's traffic stops, 82% of which involved black drivers. *Johnson*, 2020 WL 7974001, at *8. Therefore, "nothing else appearing," these statistics "permit" but do "not compel[ ]" an "inference" that Officer Kuchen discriminated on the basis of race in conducting his police duties, including when he approached Mr. Johnson. *See Staples*, 5 N.C. App. at 266–67 (quoting *Vance*, 224 N.C. at 609); *Bennett*, 374 N.C. at 598. They are a textbook example of prima facie evidence.

Moreover, the use of statistics alone to show racial discrimination is not novel and has been used in other contexts. In fact, "[i]n the problem of racial discrimination, statistics often tell much, and Courts listen." *Alabama v. United States*, 304 F.2d 583 (5th Cir.), *aff'd per curiam*, 371 U.S. 37 (1962). One such example is the case of *Hawkins v. Town of Shaw*, where the court used statistics to find black citizens in Shaw, Mississippi, were being disproportionately deprived of municipal services such as paved streets, sewers, streetlights, surface water drainage, water mains, fire hydrants, and traffic control because of their race. 437 F.2d 1286, 1288–89 (5th Cir. 1971)[5]; *see also Alabama*, 304 F.2d 583 (providing statistics showing that although the population of Macon County, Alabama, was 83% black, less than 10% of those meeting the required voting age were registered to vote, and this stood in contrast to whites of the required voting age that were registered to vote at nearly 100% despite being only 17% of the county's total population); *U.S. ex rel. Seals v. Wiman*, 304 F.2d 53, 67 (5th Cir. 1962) (using U.S. Supreme Court precedent to determine that "the presence of no [African-Americans] on the 18-man grand jury which indicted [the defendant], and the 2 [African-Americans] on the venire of the 110 persons from which came the petit jury which convicted [the defendant] and condemned him to death was not a mere fortuitous accident but was the result of systematic exclusion of [African-Americans] from the jury rolls"); *United States*

5. This decision was also affirmed on rehearing in *Hawkins v. Town of Shaw*, 461 F.2d 1171 (5th Cir. 1972).

v. Edwards, 333 F.2d 575, 581 n.3 (5th Cir. 1964) (Brown, J., dissenting) (noting that while African Americans made up 37.3% of the population they only constituted 1% of registered voters); *Bing v. Roadway Exp., Inc.*, 485 F.2d 441 (5th Cir. 1973) (noting that among the almost 300 road drivers hired by the company, not one was African-American); *United States v. Ironworkers Loc.* 86, 443 F.2d 544 (9th Cir. 1971) (noting that of the 3,720 union members, only three were black).

Statistics on the racial composition of the districts Officer Kuchen patrolled might have been additionally useful here.[6] But Mr. Johnson did not need to produce such information to meet his initial burden, for two reasons.

First, it is not clear that such statistics would provide better benchmarks. Were they to show that one district contained a high percentage of black residents and one district contained a low percentage, the court would then need information on which district each of Officer Kuchen's stops occurred in. Because the publicly available data does not contain this information, *see* N.C.G.S. § 143B-903(a)(15) (2021), the burden must shift to the State to provide it. Additionally, the percentage of black residents in Officer Kuchen's districts might be a poor proxy for the percentage of black drivers on the roads. White people are overrepresented among drivers because "having a driver's license, owning a car, and driving regularly are all more common among white Americans than black Americans." *Suspect Citizens*, at 65; *see generally* Mike Dolan Fliss, *Observations on the Measurement of North Carolina Traffic Stop Disparities* (2022). And while the ratio of nonresident drivers to residents may be low for large geographies like a city or county, the police districts in question covered only small portions of Raleigh.[7] *See Raleigh Police Districts*, City of Raleigh (last updated Aug. 21, 2023), https://raleighnc.gov/safety/raleigh-police-districts.

Second, it is not clear that demographic statistics for the districts Officer Kuchen patrolled can be produced; requiring them could therefore deprive selective enforcement victims of a remedy. At oral argument, the parties alluded to the possibility that such statistics could come from census data. But the U.S. Census Bureau does not provide demographic statistics tailored to Raleigh police districts, and the State

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6. The Court of Appeals faulted Mr. Johnson for failing to produce demographic statistics for the southeast district, but Officer Kuchen's traffic stops also occurred in the northwest district.

7. The record does not contain sufficient evidence for a court to determine whether Officer Kuchen's districts contained major thoroughfares.

introduced no evidence on whether such statistics could be constructed out of available census data.[8]

The Court of Appeals failed to consider another benchmark statistic that almost certainly can be produced and might be even more useful than district demographics: the racial breakdown of traffic stops made by other officers who patrolled the same districts as Officer Kuchen. This statistic was demonstrably not available to Mr. Johnson because the publicly available traffic stop data does not include location information below the city level. *See* N.C.G.S. § 143B-903(a)(15). But this statistic was almost certainly available to the State, given it knows which officers are assigned to which districts and records their traffic stop data pursuant to N.C.G.S. § 143B-903. Indeed, N.C.G.S. § 143B-903(d) expressly contemplates the possibility that traffic data may need to be deanonymized "to resolve a claim or defense properly before the court." The burden to provide this benchmark therefore falls on the State, or else defendants like Mr. Johnson would be left without a remedy for selective enforcement. "It is neither novel nor unfair to require the party in possession of the facts to disclose them." *Crowthers*, 456 F.2d at 1078.

By pushing the burden to produce granular benchmark statistics onto defendants, the Court of Appeals did not only err; it also created an incentive for the State to avoid making such data publicly available. "The law should not create or allow such an incentive," *see Johnson*, 782 F. App'x at 281, especially in this context, where the General Assembly has indicated a preference for the public to be able to access police data to assess racial discrimination, *see* N.C.G.S. § 143B-903; *Suspect Citizens*, at 36–45.

The Court of Appeals decision allows the State to avoid selective enforcement claims by withholding relevant data. However, Mr. Johnson's only burden at this stage was to make a prima facie showing

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8. If it is possible to construct demographic statistics for police districts using census data, the State would be better suited to the task, as it likely knows the exact boundaries of each district. The district boundaries appear to be publicly available only as shaded areas on a map. *See Raleigh Police Districts*, City of Raleigh (last updated Aug. 21, 2023) https://raleighnc.gov/safety/raleigh-police-districts. Requiring census-provided population statistics of the area a police officer patrols could also run into issues with the Census Bureau's decision to implement differential privacy on its data products starting in 2020. Differential privacy will lower the accuracy of census and American Community Survey products in the interest of preventing household-level data from being deduced from summary statistics. *See Alabama v. U.S. Dep't of Com.*, 546 F. Supp. 3d 1057, 1064–65 (M.D. Ala. 2021). The accuracy-reduction may be particularly pronounced for minority communities in small geographic areas. Christopher T. Kenny et al., *The Impact of the U.S. Census Disclosure Avoidance System on Redistricting and Voting Rights Analysis* 21 (2021).

of racial discrimination. This is not a high bar to meet, and all that was required was for Mr. Johnson to show that "the totality of the relevant facts gives rise to an inference" of discrimination. *See Bennett*, 374 N.C. at 598 (quoting *Johnson*, 545 U.S. at 168). Mr. Johnson presented a prima facie case of racial discrimination by presenting data (1) that 28% of Raleigh's population was black; (2) that 46% of the Raleigh Police Department's traffic stops involved black drivers; (3) that of the 299 drivers Officer Kuchen had stopped, 245 (about 82%) were black; and (4) that of the 204 cases with Officer Kuchen as the complainant, 166 of the people charged (81.4%) were black. To be clear, a prima facie case is only the first step of this analysis. Officer Kuchen could offer legitimate nondiscriminatory reasons for the actions he took, beyond that he was investigating a trespass, that would lead the fact-finder to conclude that race was not a factor in his decision to investigate Mr. Johnson. But by denying the legitimate force of the statistical evidence here and placing an impossible high hurdle that can never be met, the Court of Appeals opinion prevents any further inquiry whatsoever.

VI. Conclusion

Discrimination based on race by state actors violates our federal and state constitutions, U.S. Const. amend. XIV; N.C. Const. art I, § 19, and contravenes the intent of the General Assembly in passing N.C.G.S. § 143B-903. *See* Senate Judiciary II Committee Meeting Minutes, Feb. 25, 1999 (considering a news article detailing the disparate traffic stops of black North Carolinians); House Judiciary I Committee Meeting Minutes, Mar. 25, 1999 (while the Act "does not accuse any agency of stopping people because of their race . . . this does not mean it is not occurring"). The statistically disproportionate stopping of black North Carolina drivers suggests that how likely a person is to be stopped while driving is more closely related to the race of the driver than the commission of a traffic offense. Accordingly, when a police officer disproportionately stops or searches black drivers, he or she not only violates the law but also delegitimizes the legal system. *See* Juliana Menasce Horowitz et al., *Race in America 2019*, at 34, 41 (2019) (finding that 84% of black Americans agreed that blacks are treated less fairly than whites in dealing with the police and 44% of black Americans reported being unfairly stopped by the police). This remains true regardless of whether those discriminatory stops reveal criminality.

A prima facie showing of discrimination does not condemn Officer Kuchen's actions here, and it does not conclusively establish that his interaction with Mr. Johnson was based on race. Instead, a prima facie showing is the first step in a burden-shifting equal protection analysis

and at subsequent steps Officer Kuchen can still demonstrate that race did not play a role in his stopping of Mr. Johnson. Therefore, assuming that the Court of Appeals was correct to apply the burden-shifting framework, I would hold that Mr. Johnson successfully made a prima facie showing that Officer Kuchen violated his Equal Protection rights by selectively enforcing the law against him because of his race. *See Ivey*, 360 N.C. at 564 (determining that the Equal Protection Clause of the United States Constitution "prohibits selective enforcement of the law based on considerations such as race" (cleaned up)); *Yick Wo*, 118 U.S. at 373 (deciding a case involving the disparate application of the law to Chinese immigrants "with a mind so unequal and oppressive as to amount to a practical denial by the state of . . . equal protection of the laws"). I would also clarify the correct legal standard for selective enforcement claims brought under the North Carolina Constitution and remand Mr. Johnson's case for further evidentiary hearings tailored to that standard.

By affirming the Court of Appeals opinion, the majority turns a blind eye to the documented historical racial disparities in traffic stops by Officer Kuchen, which may or may not ultimately be justified on non-racial grounds, and potentially renders the Equal Protection Clauses of both the United States Constitution and North Carolina Constitution illusory for Mr. Johnson. Moreover, left in place is a precedent that appears to make it legally and factually impossible to establish any prima facie case of racial discrimination because the data such a case requires does not exist.

I respectfully dissent.

Justice MORGAN joins in this dissenting opinion.

STATE OF NORTH CAROLINA
v.
DAVID McKOY

No. 71A22

Filed 1 September 2023

Evidence—opening the door—cell phone evidence—abuse of discretion analysis—prejudice analysis

In defendant's murder trial that resulted in his conviction for voluntary manslaughter, assuming the State opened the door to evidence found on the victim's cell phone after the crime occurred, the trial court did not abuse its discretion in refusing to allow defense counsel to question witnesses about the cell phone evidence showing the victim with firearms and implicating him in acts of violence. Striking a balance that was fair to the State and defendant, the trial court did allow defense counsel to ask the victim's father whether the detective had shared the contents of the victim's cell phone with him, which invited the jury to doubt the father's testimony that he did not know anything about the victim possessing a firearm. Even if the trial court did abuse its discretion, exclusion of the cell phone evidence did not prejudice defendant because defendant did not know what was on the victim's cell phone at the time of the shooting, and therefore the evidence did not speak to whether defendant's use of force in self-defense was reasonable under the facts as they appeared to him at the time; further, there was no evidence that the victim possessed a gun when defendant killed him, and substantial evidence—including the gunshot wounds in the back of his head and his back—showed that the victim was attempting to flee when defendant fired his last two shots.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 281 N.C. App. 602 (2022), affirming a judgment entered on 22 March 2019 by Judge John M. Dunlow in Superior Court, Durham County. Heard in the Supreme Court on 26 April 2023.

Joshua H. Stein, Attorney General, by M. Lynne Weaver, Special Deputy Attorney General, and Ryan Y. Park, Solicitor General, for the State-appellee.

James R. Glover for defendant-appellant.

ALLEN, Justice.

A divided panel of the Court of Appeals upheld defendant's voluntary manslaughter conviction despite defendant's claim that the trial court erred by refusing to allow the jury to consider photographs and text messages found on the victim's cellular phone. We conclude that the trial court did not abuse its discretion and that admitting the photographs and text messages into evidence almost certainly would not have changed the outcome of defendant's trial. Accordingly, we affirm the decision of the Court of Appeals.

I. Background

On 17 January 2017, a grand jury in Durham County returned an indictment charging defendant with the murder of eighteen-year-old Augustus Cornelius Brandon. The case was tried in Superior Court, Durham County, in March 2019. Defendant maintained throughout trial that he shot Brandon in self-defense.

The evidence presented to the jury tended to show the following. Defendant and Brandon had known each other for years. While they were never friends, they had several mutual acquaintances. Defendant believed that Brandon and some of his friends were known "to rob people" and "gang bang and to tote guns." Defendant described a handful of interactions with Brandon that took place not long before Brandon's death. On one occasion, Brandon told a mutual acquaintance in defendant's presence that he would "smack" defendant. On another, Brandon "randomly showed [defendant] a video of [Brandon] shooting a gun." This last incident left defendant feeling "confused and uncomfortable," and he "tried to avoid" Brandon thereafter. Defendant also alleged that one of Brandon's friends "robbed [defendant's friend] at gunpoint for [a] fake [gold] chain."

Defendant decided to purchase a semi-automatic rifle for his own protection. He usually kept the rifle in the trunk or the back seat of his Honda Accord because his mother did not want any firearms in her home.

On the morning of 9 December 2016, defendant was leaving his neighborhood when Brandon drove by him in a gray car. As he passed defendant's vehicle, Brandon turned his head and appeared to notice defendant. Defendant exited his neighborhood with Brandon travelling ahead of him. Brandon then pulled off the road and allowed defendant to pass him before reentering the road behind defendant. Defendant turned onto a side road in an unsuccessful attempt to evade Brandon.

Brandon passed defendant and brought his car to an abrupt stop, forcing defendant to stop as well.

Brandon stepped out of his vehicle and began walking toward defendant. Defendant put his car in reverse gear and saw Brandon run to the rear of Brandon's vehicle and open the trunk. Although he did not see Brandon holding a gun, defendant thought that Brandon had retrieved a firearm. Ducking below the steering wheel, defendant pressed the accelerator, accidentally backing his car into a ditch. Defendant testified that he "thought [Brandon] was going to shoot [him] while [he] was stuck in the ditch."

Brandon returned to his vehicle and drove it closer to defendant's car before again exiting and approaching the passenger's side of defendant's automobile. Defendant retrieved his rifle from the back seat and shot at Brandon through the passenger window. Brandon ran toward the rear of his own car, and defendant got out of his vehicle and crouched behind it "for cover."

The jury heard apparently inconsistent versions of what happened next. According to the testimony of Detective Christin Reimann of the Durham County Sheriff's Office, defendant told her on the day of the shooting that Brandon started running away, at which point defendant fired two more shots and watched Brandon fall. In a subsequent interview with Detective Reimann and again at trial, defendant said he thought that Brandon was trying to reposition himself and flank defendant, not flee the scene. Two motorists who witnessed the final moments of the encounter between defendant and Brandon testified that Brandon was running away from defendant's position when defendant shot him.

After Brandon fell, defendant called 911. Law enforcement officers arrived at the scene, where they found Brandon dead and unarmed. Forensic examination revealed that Brandon had been shot in the back of the head and in the mid-area of the left side of his back. The shot to the back of the head killed Brandon.

The State's witnesses at trial included Brandon's parents, Angela and Darius Clark. Mrs. Clark testified that Brandon was her only son and that he lived in the family home with the couple and their two daughters. Although Mrs. Clark testified that the family did not keep guns at home—she cleaned Brandon's room and never saw one there—she also testified that one of Brandon's friends informed her three days before Brandon's death that Brandon had a firearm. When Mrs. Clark asked Brandon whether he had a gun, he teared up and confessed to having possessed a firearm, though he also claimed that someone had stolen it.

Brandon told his mother that he needed a gun for protection and asked her for help in obtaining another one. Mrs. Clark knew that Brandon was frightened because he did not normally "tear up and cry like that." In her recollection, Brandon was "always a happy, smiling child." Mrs. Clark testified that she was unfamiliar with defendant prior to her son's death. In response to questions from defense counsel, Mrs. Clark admitted that she and Mr. Clark went through the contents of Brandon's cell phone with Detective Reimann. Defense counsel did not ask Mrs. Clark any questions regarding those contents.

Before Mr. Clark took the stand, the State filed a motion in limine urging the trial court to prohibit defense counsel from "ask[ing] about contents of [Brandon's] phone that would potentially show specific acts of conduct of the victim in the past." The State maintained that such evidence was "not admissible unless the defendant had knowledge of it on the date of the alleged offense." The trial court reserved its ruling on the motion, and the State called Mr. Clark to the witness stand.

Like Mrs. Clark, Mr. Clark testified that he had never heard of defendant before Brandon's death. On the morning of 9 December 2016, according to Mr. Clark, Brandon seemed "really happy. He was always a happy guy, lot of fun." Mr. Clark stated that he did not allow guns in the house and that, to the best of his knowledge, Brandon did not have a gun with him or in his car on the morning of 9 December 2016.

Before cross-examining Mr. Clark, defense counsel requested that the jury be excused. Defense counsel notified the trial court that he planned to ask Mr. Clark about the contents of Brandon's cell phone, "which, according to discovery as tendered by the [S]tate, [Mr. Clark] went through with his wife, Ms. Clark, and [Detective Reimann]." Those contents, "according to the discovery," included photographs of Brandon and his friends holding guns and SMS text conversations "of a somewhat violent nature" between Brandon and other people. Noting that defendant was claiming self-defense, the State argued that the photographs and text messages could not have influenced defendant's state of mind on 9 December 2016 because he did not find out about them until later. Defense counsel countered that the State opened the door to the cell phone evidence when Mr. Clark testified that Brandon was "always a happy guy."

The trial court allowed defense counsel to question Mr. Clark outside the jury's presence so that the court could better understand what information defense counsel wished to present. In response to defense counsel's questions, Mr. Clark denied having been shown any photographs or

text messages on Brandon's phone during his meetings with Detective Reimann. In particular, he claimed not to recall seeing any photographs of Brandon holding guns or any text messages in which, as defense counsel put it, Brandon "was setting up times and places to meet up to fight other people."

The trial court ruled that defense counsel could ask Mr. Clark in front of the jury whether he met with Detective Reimann and viewed the contents of Brandon's phone. The court further ruled that "any question relative to the contents of that phone and text messages that may or may not have been contained on that phone [would not be] allowed."

At the conclusion of the evidence, and before the jury's deliberations, the trial court instructed the jury on the elements of first-degree murder, second-degree murder, and voluntary manslaughter. The court explained to the jury that "defendant would not be guilty of any murder or manslaughter if [he] acted in self-defense, *and if [he] did not use excessive force under the circumstances*." (Emphasis added.) The court further explained that, even if the jury did not find defendant guilty of murder, the jury had a duty to convict defendant of voluntary manslaughter if it found beyond a reasonable doubt that defendant "intentionally wounded [Brandon] with a deadly weapon and thereby proximately caused [Brandon's] death, *and that [he] used excessive force*." (Emphasis added.)

On 22 March 2019, the jury found defendant guilty of voluntary manslaughter, and the trial court sentenced defendant to imprisonment for a term of sixty-four to eighty-nine months. Defendant appealed his conviction, arguing that the trial court committed reversible error by excluding the photographs and text messages on Brandon's cell phone.

On 1 February 2022, a divided panel of the Court of Appeals held that defendant received a fair trial free of prejudicial error. *State v. McKoy*, 281 N.C. App. 602 (2022). According to the majority, in deciding which questions defense counsel could or could not ask Mr. Clark regarding Brandon's cell phone, "the [trial] court engaged in the evidentiary balancing test prescribed by Rule 403 of the North Carolina Rules of Evidence." *Id.* at 607. Moreover, in the majority's view, even if the trial court erred in refusing to admit the cell phone evidence, the error "was not sufficiently prejudicial to warrant a new trial." *Id.* at 608. The majority saw no reasonable possibility that the cell phone evidence would have changed the outcome of defendant's trial because (1) "the trial court admitted substantial evidence supporting [d]efendant's theory of self-defense" and (2) "the evidence tended to show that [d]efendant

was honestly in fear for his life, but that the degree of force he used was unreasonable, as . . . Brandon was unarmed and running away from [d]efendant when he was killed." *Id.*

The dissent would have held that the testimony of Brandon's parents opened the door to the cell phone evidence and that the trial court's refusal to admit the evidence entitled defendant to a new trial.

> Defendant was convicted of voluntary manslaughter for imperfect self-defense because the jury found his degree of force was unreasonable. The [cell phone] evidence goes towards [d]efendant's state of mind and reasonableness of fear during the incident. There is a reasonable possibility if this evidence and testimony had not been excluded . . . a different result may have been reached by the jury . . . .

Id. at 613–14 (Tyson, J., dissenting).

On 7 March 2022, defendant filed a notice of appeal with this Court based on the dissent. *See* N.C.G.S. § 7A-30(2) (2021) ("[A]n appeal lies of right to the Supreme Court from any decision of the Court of Appeals rendered in a case . . . [i]n which there is a dissent when the Court of Appeals is sitting in a panel of three judges.").

II. Analysis

In his principal brief to this Court, defendant concedes that the evidence on Brandon's cell phone was inadmissible under the Rules of Evidence. He argues, however, that the State opened the door to the evidence "th[r]ough the testimony of [Brandon's] parents." Specifically, defendant points to Mrs. Clark's testimony that Brandon was "always a happy, smiling child" who nonetheless admitted to Mrs. Clark that he had obtained a firearm for protection. Defendant also cites Mr. Clark's assertion that Brandon was "always a happy guy" who did not have a gun in the house or in his car on 9 December 2016, as well as Mr. Clark's denial of any knowledge that Brandon had ever possessed a gun. Defendant maintains that the trial court's exclusion of the cell phone evidence prejudiced his defense:

> If the jury had been allowed to hear that [Brandon] . . . was a person who had possession of guns on multiple occasions when under no threat of harm, it would have been reasonable for the jury to conclude that the State had failed to prove beyond a reasonable doubt that [defendant] used more force than

> reasonably necessary to repel . . . Brandon's lethal attack on him.[1]

Defendant asks this Court to reverse the Court of Appeals and remand this case to the trial court for a new trial.

The State denies opening the door at trial to the cell phone evidence. It argues that descriptions of Brandon as a generally happy person did not amount to a claim that Brandon was peaceful or law-abiding. The State further argues that the trial court acted within its sound discretion in limiting the questions that defense counsel could ask on cross-examination regarding the cell phone evidence. Lastly, the State contends that, even if the trial court excluded the cell phone evidence in error, defendant has not shown the prejudice necessary to support his demand for a new trial.

A. Scope of Appellate Review

When a case comes to us under N.C.G.S. § 7A-30(2) based solely on a dissent in the Court of Appeals, "the scope of review is 'limited to those questions on which there was division in the intermediate appellate court.' " *State v. Rankin*, 371 N.C. 885, 895 (2018) (quoting *C.C. Walker Grading & Hauling, Inc. v. S.R.F. Mgmt. Corp.*, 311 N.C. 170, 175 (1984)); *see also* N.C. R. App. P. 16(b) ("When the sole ground of the appeal of right is the existence of a dissent in the Court of Appeals, review by the Supreme Court is limited to a consideration of those issues that are (1) *specifically set out in the dissenting opinion as the basis for that dissent*, (2) stated in the notice of appeal, and (3) properly presented in the new briefs . . . filed in the Supreme Court." (emphasis added)).

In their briefs to this Court, the parties argue extensively over whether the State opened the door at trial to the disputed cell phone evidence; however, we perceive no division between the majority in the Court of Appeals and the dissenting judge on this point. The majority opinion does not take a position contrary to the dissent's assertion that

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1. In his principal brief, defendant also seems to argue that the trial court's ruling implicates his constitutional right "to call witnesses and to elicit testimony that bolsters a theory of defense." Defendant did not make any constitutional arguments to the trial court regarding the cell phone evidence. To the extent that he attempts to raise constitutional claims for the first time on appeal, our case law bars him from doing so. *State v. Garcia*, 358 N.C. 382, 410 (2004) ("It is well settled that constitutional matters that are not 'raised and passed upon' at trial will not be reviewed for the first time on appeal." (citation omitted)), *cert. denied*, 543 U.S. 1156 (2005); *see also* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion . . . .").

the State opened the door to the evidence in question; rather, it assumes that the door was opened. *McKoy*, 281 N.C. App. at 608. The disagreement between the majority and the dissent thus centers not on whether the State opened the door but on whether, if the door was opened, defendant had the right to ask Mr. Clark specific questions about the cell phone's contents in front of the jury. *See id.* at 607 ("[T]he ultimate question on appeal is whether the trial court abused its discretion by excluding the cell-phone evidence, not whether the State 'opened the door' to evidence of Mr. Brandon's allegedly violent character."). We therefore limit our review to that issue and look to our precedents for guidance on the authority of a trial court to exclude evidence to which a party has opened the door.

B. Opening the Door

"The basis for the rule commonly referred to as 'opening the door' is that when a [party] in a criminal case offers evidence which raises an inference favorable to his case, the [other party] has the right to explore, explain or rebut that evidence." *State v. Brown*, 310 N.C. 563, 571 (1984). Specifically, "the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though such latter evidence would be incompetent or irrelevant had it been offered initially." *State v. Albert*, 303 N.C. 173, 177 (1981).

The opening-the-door rule originates in case law and predates the General Assembly's enactment of the North Carolina Rules of Evidence. *Compare* An Act to Simplify and Codify the Rules of Evidence, ch. 701, 1983 N.C. Sess. Laws 666–84, *with State v. Small*, 301 N.C. 407, 434–36 (1980) (applying the opening-the-door rule), *superseded by statute*, An Act to Abolish the Distinction Between Accessories Before the Fact and Principals and to Make Accessories Before the Fact Punishable as Principal Felons, ch. 686, § 1, 1981 N.C. Sess. Laws 984, 984. *See generally* Kenneth S. Broun et al., *Brandis & Broun on North Carolina Evidence* § 2 (8th ed. 2018) ("Prior to enactment of the Rules [of Evidence], the North Carolina law of evidence embodied constitutional decisions, specific statutes, and common law as evolved by the courts.").

Reliance on the opening-the-door rule is no longer necessary in many instances because the Rules of Evidence expressly provide for the introduction of rebuttal or explanatory evidence in certain situations. *See*, *e.g.*, *State v. Duke*, 360 N.C. 110, 121–22 (2005) (observing that Rule 404(a)(1) allowed the State to introduce evidence of a defendant's character for violence after the defendant introduced evidence of his character for peacefulness), *cert. denied*, 549 U.S. 855 (2006). Nonetheless, the

rule is still sometimes invoked to permit the introduction of evidence that the Rules might otherwise exclude. *See*, *e.g.*, *State v. Chandler*, 100 N.C. App. 706, 710–11 (1990) (concluding that a defendant's misleading testimony regarding his criminal record opened the door to admission of his conviction of misdemeanor marijuana possession notwithstanding the time restrictions in Rule 609(b)).

As our precedents illustrate, the opening-the-door rule is intended to reduce the likelihood that a party's introduction of misleading or confusing evidence will impair the capacity of the jury to perform its fact-finding role. In *State v. Patterson*, for example, the defendant's stepdaughter testified for the prosecution at the defendant's murder trial. 284 N.C. 190, 195 (1973). On cross-examination, defense counsel elicited statements from the stepdaughter "that she disliked the defendant and harbored a feeling of ill will toward him." *Id.* The prosecutor asked the stepdaughter on redirect why she disliked the defendant, and she alleged that the defendant had raped her. *Id.* On appeal, the defendant argued that the trial court erred by admitting the stepdaughter's rape allegation. *Id.* While acknowledging the "general rule of evidence that in a prosecution for a particular crime the State cannot offer evidence tending to show that the accused has committed another distinct, independent, or separate offense," this Court found no error. *Id.* at 195–96.

> Here, evidence was elicited from [the defendant's stepdaughter] on cross-examination calculated and intended to show bias and to discredit her testimony. This calls for application of the rule that where evidence of bias is elicited on cross-examination[,] the witness is entitled to explain, if he can, on redirect examination, the circumstances giving rise to bias *so that the witness may stand in a fair and just light before the jury*.

Id. at 196 (emphasis added); *see also Small*, 301 N.C. at 436 ("Here on direct examination defendant testified in such a way as to leave the false impression that the state had refused to accept his offer to submit to a polygraph examination. It was proper for the state, therefore, on cross-examination to show that, in fact, defendant had been given a polygraph [and failed it]. . . . Defendant by first injecting the subject of the polygraph into the trial in a manner designed to mislead the jury invited the very cross-examination of which he now complains.").

Although a party can open the door to otherwise irrelevant or inadmissible evidence, we have never held that the opposing party's right to

introduce such evidence is absolute. The opening-the-door rule exists to prevent the jury from being led astray, and there may be circumstances in which the opposing party's evidence risks confusing or misleading the jury as much as the evidence that the opposing party wishes to refute or contextualize. Thus, even when the door has been opened to otherwise irrelevant or inadmissible evidence, the trial court as gatekeeper may still exclude it pursuant to Rule 403 of the Rules of Evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[2] N.C. R. Evid. 403. *See generally Queen City Coach Co. v. Lee*, 218 N.C. 320, 323 (1940) ("The competency, admissibility, and sufficiency of the evidence is a matter for the [trial] court to determine.").

A trial court's decision to admit or exclude evidence to which a party has opened the door is subject to review on appeal for abuse of discretion. *State v. Darden*, 323 N.C. 356, 359 (1988) ("[D]efendant 'opened the door' to cross-examination designed to rebut his assertion. . . . We find no abuse of discretion in the cross-examination allowed. We likewise find no abuse of discretion in the refusal to prohibit the cross-examination on the ground that the probative value of the evidence produced thereby was outweighed by the danger of unfair prejudice."), *cert. denied*, 517 U.S. 1197 (1996). *See generally State v. Campbell*, 359 N.C. 644, 673 (2005) ("The decision whether to exclude evidence under Rule 403 . . . is within the discretion of the trial court and will not be overturned [on appeal] absent an abuse of discretion."), *cert. denied*, 547 U.S. 1073 (2006).

"A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Hayes*, 314 N.C. 460, 471 (1985) (citation omitted); *see also In re K.N.L.P.*, 380 N.C. 756, 759 (2022) ("Under [the abuse of discretion] standard, we defer to the trial court's decision unless it is manifestly unsupported by reason or one so arbitrary that it could not have been the result of a reasoned decision." (quoting *In re A.K.O.*, 375 N.C. 698, 701 (2020))). Hence, in a case in which the door was opened to otherwise irrelevant or inadmissible evidence,

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2. We have also held that a trial court must exclude rebuttal or explanatory evidence that lacks a proper foundation. *See State v. Wilkerson*, 363 N.C. 382, 409–10 (2009) ("Even though a defendant may open the door to otherwise inadmissible testimony, . . . '[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter.' " (second alteration in original) (quoting N.C. R. Evid. 602)), *cert. denied*, 559 U.S. 1074 (2010).

the party appealing the trial court's decision to admit or exclude such evidence under Rule 403 faces a steep uphill climb.

C. No Reversible Error

The Court of Appeals' majority correctly rejected defendant's call for a new trial. In the first place, the trial court did not abuse its discretion by preventing defense counsel from using cross-examination to inform the jury that Brandon's cell phone contained photographs of Brandon holding firearms and text messages implicating Brandon in acts of violence. The court took seriously defense counsel's contention that the State had opened the door to this evidence. It also recognized, however, that evidence of a victim's past violent acts can sometimes unduly influence a jury. *See State v. Bass*, 371 N.C. 535, 544 (2018) (explaining that Rule 405(b) does not allow a defendant claiming self-defense to use evidence of the victim's past violent acts to prove that the victim was the aggressor because "a generally peaceful person may experience a moment of violence, and a normally aggressive or violent person might refrain from violence on a specific occasion").

The trial court tried to strike a balance that was fair to both parties and protective of the jury. It did not allow defense counsel to ask Mr. Clark specific questions about the cell phone's contents, but it did permit defense counsel to ask Mr. Clark whether Detective Reimann had shared the contents of Brandon's cell phone with him. Especially when viewed alongside Mrs. Clark's testimony that Detective Reimann had done just that, this question invited the jury to doubt Mr. Clark's testimony that he did not know anything about Brandon possessing a firearm. We are not prepared to conclude based on the record before us that the trial court's ruling was "so arbitrary that it could not have been the result of a reasoned decision." *Hayes*, 314 N.C. at 471.

Furthermore, even if the trial court abused its discretion, a new trial is not warranted because the exclusion of the cell phone evidence did not prejudice defendant. We have explained that

> evidentiary error does not necessitate a new trial unless the erroneous admission was prejudicial. The same rule applies to exclusion of evidence. Evidentiary 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 out of which the appeal arises. Defendant bears the burden of showing prejudice.

State v. Jacobs, 363 N.C. 815, 825 (2010) (internal citations and quotation marks omitted); *see also State v. Brewer*, 325 N.C. 550, 565 (1989) ("Assuming *arguendo* that defendant's proffered evidence was erroneously excluded, . . . [d]efendant has not carried his burden of showing a 'reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial.' " (quoting N.C.G.S. § 15A-1443(a) (1988))), *cert. denied*, 495 U.S. 951 (1990).

The trial court instructed the jury that defendant was not guilty of murder if he shot Brandon in self-defense. The court further explained that, even if defendant acted in self-defense, the jury should convict him of voluntary manslaughter if it found beyond a reasonable doubt that he used excessive force, which the court defined as "more force than reasonably appeared to the defendant to be necessary at the time of the killing." As the dissenting judge at the Court of Appeals acknowledged, once the jury determined that defendant was not guilty of murder, the only remaining question was whether defendant's use of force in self-defense was reasonable "under the facts as [they] appeared to him at the time." *McKoy*, 281 N.C. App. at 613 (Tyson, J., dissenting). By convicting defendant of voluntary manslaughter, the jury signaled its belief that defendant acted in self-defense but that the force he employed was excessive. *See id.*, 281 N.C. App. at 608–09 (majority opinion) ("As Defendant concedes, the guilty verdict suggests 'that the jury concluded that [Defendant] had a reasonable fear that he was facing an imminent threat of death or great bodily injury from [Mr.] Brandon at the time of the shooting, but that the State had proven beyond a reasonable doubt that he used more force than necessary.' " (alterations in original)); *id.* at 613 (Tyson, J., dissenting) ("Defendant was convicted of voluntary manslaughter for imperfect self-defense because the jury found his degree of force was unreasonable.").

There is no reasonable possibility that the cell phone evidence would have persuaded the jury that defendant's use of force was appropriate under the circumstances. The record nowhere indicates that defendant saw or knew anything about the photographs and text messages on Brandon's phone in advance of his fatal encounter with Brandon on 9 December 2016. It follows that the photographs and messages could not have influenced defendant's actions on that date. *See id.* at 613 (Tyson, J., dissenting) ("Defendant's . . . belief at the time of the incident determines the degree of force necessary to use for self-defense.").

Defendant insists that the cell phone evidence might have persuaded the jury that Brandon had a firearm on 9 December 2016 and thus that defendant did not use excessive force. Defendant highlights

the testimony of two eyewitnesses who observed the final moments of his fatal encounter with Brandon. According to defendant, both eyewitnesses testified to hearing more gunshots than the three shots fired by him. When this testimony is considered together with the photographs on Brandon's cell phone of Brandon holding firearms, defendant asserts, the extra gunshots "can most reasonably be explained as being fired by [Brandon]."

We are unconvinced. The cell phone evidence demonstrated that Brandon and some of his friends had access to firearms before 9 December 2016, but the jury heard other evidence to the same effect. Defendant testified that Brandon showed him a video of Brandon shooting a gun; he likewise alleged that Brandon and his friends were known "to rob people" and "gang bang and to tote guns." One of Brandon's friends seemingly corroborated some of defendant's allegations by admitting on the witness stand to misdemeanor convictions for carrying a concealed weapon and breaking and entering. Brandon's own mother testified that Brandon confessed to having possessed a firearm, though he claimed that someone had stolen it.

Moreover, on closer inspection, the eyewitness testimony offers little support for the theory that Brandon shot at defendant. Although one of the two eyewitnesses recalled hearing as many as seven shots, the other testified to hearing "between three and four" shots, an estimate consistent with the State's contention that Brandon was unarmed on 9 December 2016. The second eyewitness's recollection also accords with the testimony of a third person at the scene who remembered hearing "at least three shots." Notably, no eyewitness reported observing Brandon with a gun.

Of course, the biggest hole in defendant's theory is the uncontested fact that defendant's rifle was the only weapon found at the crime scene. Given this evidentiary lacuna, no reasonable possibility exists that the cell phone evidence would have persuaded the jury that Brandon fired at defendant and defendant was therefore justified in killing him.

Finally, the cell phone evidence would not have helped defendant rebut substantial evidence showing that Brandon was attempting to flee when defendant fired his last two shots. The two eyewitnesses who had a clear view of Brandon testified that defendant fired at Brandon as he was running away. Brandon was wounded in the back of the head and in the back, which indicates that he was not facing defendant when defendant shot him. This eyewitness testimony, combined with the location of Brandon's injuries, undoubtedly contributed to the jury's apparent

belief that defendant used excessive force under the circumstances as they appeared to him on 9 December 2016. We do not think the photographs and text messages on Brandon's cell phone would have blunted the impact of this evidence.

III. Conclusion

The trial court's refusal to permit defense counsel to ask the victim's father or other witnesses about the photographs and text messages on the victim's phone did not constitute an abuse of discretion. There is no reasonable possibility that a ruling in defendant's favor on that matter would have led to a different jury verdict. We therefore affirm the decision of the Court of Appeals upholding defendant's voluntary manslaughter conviction.

AFFIRMED.

STATE OF NORTH CAROLINA
v.
JONATHAN DOUGLAS RICHARDSON

No. 272A14

Filed 1 September 2023

1. Judges—motion to disqualify—murder trial—judge previously prosecuted defendant's mother—potential witness—appearance of impropriety

In defendant's capital trial for murder by torture of a child and related charges, defendant's motion to disqualify the trial judge (which was assigned to another judge for ruling) was properly denied where, although the presiding judge had been the prosecutor twenty years earlier at defendant's mother's trial for allegedly hiring someone to kill defendant's father (for which she was acquitted), there was no indication—despite defendant's assertion that the judge was a potential witness with regard to the childhood trauma that defendant experienced as a result of family dysfunction—that the judge had knowledge of any evidence that would be relevant to defendant's defense, nor was there any actual bias or the risk of impartiality based on the judge's interactions with the family in the past.

2. Evidence—photographs—murder by torture—child victim—number, size, and manner of display

In defendant's capital trial for multiple charges including murder by torture, sexual offense with a child, and felony child abuse inflicting serious bodily injury, the trial court did not abuse its discretion by allowing the State to introduce eighty-eight photographs of the child victim's body and injuries—some of them close-ups—by showing them on a large monitor located close to the jury, where the photographs were more probative than prejudicial because they were: relevant to the offenses charged and to defendant's credibility, used to illustrate the respective testimonies of different witnesses, and not needlessly cumulative or excessive given evidence that the victim suffered at least 144 separate injuries over an extended period of time.

3. Evidence—expert testimony—murder by torture of child victim—emotional reactions from medical and law enforcement personnel

In defendant's capital trial for multiple charges including murder by torture and felony child abuse inflicting serious bodily injury, the trial court did not err by allowing various medical personnel and law enforcement officers to testify regarding their emotional reactions immediately upon seeing the extent of the victim's injuries after defendant brought her to the hospital. The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice where the witnesses' reactions provided context to the jury regarding the severity of the victim's injuries in relation to the types of cases the witnesses usually saw in the course of their work. Moreover, defendant could not demonstrate prejudice given the overwhelming evidence of his guilt and of the victim's numerous severe injuries that she suffered over an extended period while in defendant's sole care.

4. Evidence—expert testimony—murder by torture of child victim—bite marks—abuse of discretion analysis

In defendant's capital trial for murder by torture of a child victim, the trial court did not abuse its discretion by allowing the State's expert witness in forensic dentistry to testify regarding numerous bite marks found on the victim's body—which he attributed to an adult human—even though three physicians had already testified with their opinions that certain marks on the victim's body were human bite marks made within a certain number of days prior to her arrival at the hospital. There was no meaningful dispute that

defendant caused the marks on the victim's body since he had been her sole caretaker during the time period in question.

5. Evidence—expert testimony—murder by torture—question of whether child victim was tortured—abuse of discretion analysis

In defendant's capital trial for murder by torture of a child victim, the trial court did not abuse its discretion by allowing two expert witnesses to testify (one during the guilt-innocence phase, the other during sentencing) regarding whether the victim was tortured. Where the term "torture" is not a legal term of art, testimony from the first witness (accepted as an expert in pediatrics and child abuse) that the victim's extensive and severe injuries were consistent with torture did not improperly invade the province of the jury and was properly admitted as being based on the expert's training and specialized knowledge. Further, testimony at sentencing from the second witness (accepted as an expert in forensic pediatrics with a specialization in child abuse and maltreatment) was not cumulative or unfairly inflammatory where that expert's opinions—in general with regard to the state of mind of a person who tortures and specifically that the victim's injuries were not accidental—were similarly based on a proper foundation of specialized training and background.

6. Confessions and Incriminating Statements—custodial interrogation—murder by torture of child victim—defendant's statements at hospital—extent of restraint

In defendant's capital trial for murder by torture of a child victim and related charges, the trial court correctly concluded that defendant was not in custody for purposes of *Miranda* when he made incriminating statements to law enforcement officers at the hospital where he had brought the victim. Defendant had not been restrained to the extent associated with formal arrest where, although he was grabbed by a nurse as he attempted to leave and pushed into a room and told not to leave prior to the arrival of law enforcement, he was subsequently told by officers that he was not under arrest, the door to the room was left open for part of his questioning, and he was not accused of anything or physically restrained in any manner.

7. Evidence—cumulative error—murder by torture of child victim—inflaming jury's passion—prejudice analysis

In defendant's capital trial for murder by torture of a child victim and related charges, where each of defendant's evidentiary challenges were rejected on appeal—including that the State introduced

an excessive number of photographs of the victim's injuries, that some photos were needlessly shown during the testimony of more than one witness, and that witnesses were erroneously allowed to testify to their emotional reactions upon seeing the extent of the victim's injuries—there was no cumulative, prejudicial error in the trial court's evidentiary decisions taken as a whole given the overwhelming evidence of defendant's guilt.

8. Jury—selection—Batson challenge—prima facie showing

In defendant's capital trial for murder by torture of a child victim and related charges, defendant did not establish a prima facie case of intentional discrimination pursuant to *Batson* after the prosecutor used peremptory challenges early in the jury selection process to dismiss two Black prospective jurors, where certain factors—including the racial identification of defendant, the victim, and primary witnesses—did not support defendant's argument and where the trial court's discretionary decision to exclude a report analyzing historical jury strikes as hearsay was not clearly erroneous.

9. Jury—selection—gender discrimination—prima facie showing

In defendant's capital trial for murder by torture of a child victim and related charges, the trial court did not clearly err by determining that defendant had not established a prima facie case of intentional discrimination based on gender after the prosecutor used a peremptory challenge early in the jury selection process to dismiss a Black female prospective juror, where there were twice as many females as males in the potential juror pool and, at the time of defendant's challenge, four of the five jurors already seated were women. Further, a statement by one of the prosecutors indicating a lack of familiarity with the law prohibiting gender-based juror strikes was not, by itself, sufficient to demonstrate intentional discrimination.

10. Jury—selection—excusal for cause—reservations about death penalty—empathy for drug users

In defendant's capital trial for murder by torture of a child victim and related charges, the trial court did not abuse its discretion or violate defendant's right to a fair and impartial jury by excusing two potential jurors for cause where the court had the opportunity to hear the jurors in person and assess their ability to follow the law. Although the first juror equivocated about whether his religious convictions and conscience would allow him to impose the death penalty, he eventually indicated that his ability to follow the law would be substantially impaired even if he was convinced beyond a reasonable doubt that defendant was guilty and that punishment

by death was warranted. Similarly, the second juror dismissed for cause expressed reservations about whether he could impose death as punishment and, given his own past experiences and substance abuse, stated that he would have trouble being objective and impartial as it related to drug use, which was forecast to be an issue in the case.

11. Evidence—mental health records—under seal—in camera review by appellate court—no exculpatory evidence

On appeal after defendant's capital trial for murder by torture of a child victim and related charges, in which the trial court ordered mental health records of the victim's mother to be placed under seal—after allowing some of the records to be released to defendant—the Supreme Court reviewed the sealed records in camera upon defendant's request and determined that they contained no exculpatory or impeaching evidence requiring disclosure.

12. Criminal Law—murder—death penalty—not disproportionate or arbitrary

Defendant's sentence of death in a murder prosecution for the killing of a young child was not disproportionate, excessive, or arbitrary where, after defendant was convicted of first-degree murder based on murder by torture and the felony murder rule based upon the felonies of first-degree kidnapping, sexual offense with a child, and felony child abuse inflicting serious bodily injury, and was also convicted of each of those three felonies, the jury found the existence of all three aggravating factors submitted to it, which were supported by the record.

13. Criminal Law—capital murder prosecution—preservation issues

The preservation issues defendant raised on appeal from his convictions for first-degree murder and related charges and his sentence of death were rejected by the appellate court as having no merit based on precedent.

Justice BERGER concurring.

Chief Justice NEWBY and Justices BARRINGER, DIETZ, and ALLEN join in this concurring opinion.

Justice EARLS concurring in part and dissenting in part.

Appeal as of right pursuant to N.C.G.S. § 7A-27(a) from a judgment imposing a sentence of death entered by Judge Thomas H. Lock on 3 April 2014 in Superior Court, Johnston County, upon a jury verdict finding defendant guilty of first-degree murder. Heard in the Supreme Court on 8 February 2023.

Joshua H. Stein, Attorney General, by Teresa M. Postell and Kimberly N. Callahan, Special Deputy Attorneys General, for the State-appellee.

Glenn Gerding, Appellate Defender, by Kathryn L. VandenBerg and James R. Grant, Assistant Appellate Defenders, for defendant-appellant.

David S. Rudolf and Brandon L. Garrett for The Innocence Project, Inc. and the Wilson Center for Science and Justice, amici curiae.

Justice MORGAN delivered the opinion of the Court.

Justice BERGER delivered the supplemental opinion of the Court as to Issue F.

Justice EARLS concurred in part and dissented in part.

MORGAN, Justice.

While this appeal arising from the abuse and murder of a young child presents this Court with a disturbing series of facts and circumstances, its resolution largely requires the application of well-established legal principles to the issues raised by defendant. We have carefully considered each issue and, being mindful of both the extremity of the crimes committed by defendant and the resulting sentence imposed upon him, we conclude that defendant's trial was free from prejudicial error and that his sentence of death must be upheld.

I. Factual and Procedural Background

A. Factual events leading up to and including Taylor's death

This case involves profoundly significant abuses which were committed against "Taylor,"[1] ultimately leading to the youngster's death at

1. The parties have stipulated pursuant to Rule 42 of the North Carolina Rules of Appellate Procedure that the minor victim in this case will be identified as "Taylor," a pseudonym.

the hands of defendant. The evidence in the record before this Court is extensive, and in this introductory segment of the Court's opinion, we present an overview of the matters which culminated in Taylor's death. Additional facts will be incorporated into various portions of our analysis as they become relevant to each legal issue addressed.

The evidence in the record shows that Taylor was born on 6 July 2006 to Helen Reyes and Jerry Skiba. Reyes and Skiba first met one another at work. Although they never married, Reyes and Skiba lived together at the home of Skiba's parents beginning near the start of their relationship in 2003 and ending sometime in 2007. Reyes described her relationship with Skiba as having "ups and downs," including incidents of physical, emotional, and verbal abuse committed by Skiba against Reyes. Upon learning in 2005 that Reyes was pregnant, the couple attempted to improve their relationship and remained together through the birth of Taylor on 6 July 2006.[2] However, difficulties continued for Reyes and Skiba in their relationship. When Taylor was about one year old, Reyes took the child and moved back into her mother's home in Raleigh where two of Reyes's sisters also resided. Although Skiba's contact with Taylor was intermittent thereafter, Skiba's parents had "a good relationship" with their grandchild and Reyes took Taylor to the paternal grandparents' home for visits.

In September 2008, Reyes enlisted in the United States Army Reserve. Reyes was required to establish a family care plan for Taylor. The family care plan established that Reyes's mother would provide care for Taylor during periods when Reyes was involved in training or deployment obligations. Following an extended period of basic training, Reyes's Army Reserve commitments generally were to consist of one weekend per month and, beginning in July 2010, an additional two-week session each year. Although the official family care plan for Taylor called for Reyes's mother to care for Taylor, Reyes testified that on some occasions, Reyes's sisters or Skiba's parents would keep Taylor. Other than her Army Reserve role, Reyes was not working at this time, and Taylor was not enrolled in any preschool or childcare programs, so Reyes spent the greater part of each day with her daughter.

In December 2009, Reyes went to a bar and nightclub in Smithfield with a female friend when she noticed defendant whom Reyes described as "a tall, handsome, southern guy, respectful." Reyes and defendant talked and danced with one another at the club that night,

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2. At several places in the trial transcript, the year of Taylor's birth is misstated, but the testimony of Taylor's mother, Reyes, confirmed 6 July 2006 as the correct date of the child's birth.

leaving separately. Both returned to the establishment on the following night, where they conversed again and exchanged telephone numbers. Thereafter, Reyes began a romantic relationship with defendant. The tie between the twenty-seven-year-old Reyes and the twenty-year-old defendant progressed quickly, becoming sexual and involving multiple dates with one another each week by February 2010.

After Reyes and defendant had been dating for about two months, Reyes felt that their relationship was proceeding sufficiently well for Reyes to introduce defendant to Taylor. Reyes felt very positive about the rapport that developed between Taylor and defendant, and the couple began to include the child in some of their activities, including several trips to the beach. Reyes began to hope that she, Taylor, and defendant could form a family, despite the fact that one of Reyes's sisters had told Reyes that the sister saw defendant physically shake Taylor "early on" in the relationship between Reyes and defendant; Reyes did not believe her sister's report and never asked defendant about it.

When defendant and Reyes were dating, defendant was living with his grandparents. Reyes often spent time at the home of defendant's grandparents and sometimes brought Taylor. Reyes described a "little house" located behind the home of defendant's grandparents where Reyes and defendant would "hang out" and where Reyes sometimes spent the night with defendant. The backyard outbuilding[3] had air-conditioning and electricity, but it did not have a refrigerator, bathroom, or running water, although there was running water available "outside near the outbuilding."

At some point in March or April of 2010, Reyes began to be concerned about her relationship with defendant, noticing that defendant did not want to see Reyes as often and "appeared to want to break off the relationship." Around the same time, Reyes and her mother were not getting along as well as they had been, due in large measure to the issue of Reyes's contributions to the financial needs of their shared household. In addition, there was also conflict among Reyes, her mother, and Reyes's sisters about Reyes's relationship with defendant. By late May or early June of 2010, Reyes's mother announced that she did not want defendant at their home, which led Reyes to consider taking Taylor and moving out of the residence. Ultimately, by 12 June 2010, Reyes and Taylor moved into defendant's residence to live with him.

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3. The building is described by various terms in the transcript and record of this case. For consistency and ease of reading, we shall refer to it as "the outbuilding."

Reyes made the decision that she and Taylor would reside with defendant despite her awareness of "incidents of . . . injuries or harm . . . to [Taylor]" when the child was alone with defendant, including Taylor suffering a one-half inch cut to the top of her head which defendant claimed had occurred when Taylor was jumping on the bed in the outbuilding and struck her head on the corner of a stationary bicycle. Although Reyes had wanted to take Taylor to the hospital on this occasion, nonetheless defendant dissuaded Reyes from doing so. Reyes also knew of another incident which occurred while Reyes, Taylor, and defendant were at the beach. While Reyes remained on the beach, defendant took Taylor "surfing" in the ocean. When Taylor and defendant came back onto the beach, Taylor had an eyelid injury which resulted in a black eye. Defendant explained that Taylor's injury occurred when a large wave caused the "small surfboard" to strike Taylor. Before moving in with defendant, Reyes had also witnessed the physical results of defendant's discipline of Taylor at least once, when Reyes returned from shopping to find Taylor with three or four welts on her back which defendant said resulted when defendant whipped Taylor. Reyes had actually seen defendant whip Taylor with his belt on multiple occasions without leaving marks on the child.[4] At trial, Reyes was also asked about photographs taken of Taylor which showed the child with an unlit cigarette in her mouth and other photographs which showed Taylor holding a beer bottle as if she were drinking it. While Reyes admitted her awareness of defendant's creation of the situations shown in the photographs, Reyes stated that she had not approved of them.

Although defendant had been living in his grandparents' home, once Reyes and three-year-old Taylor moved in with defendant, the three resided solely in the outbuilding. They shared a bed which consisted of an air mattress with a hole which had been repaired with duct tape. During the three or four weeks that Reyes and Taylor resided with defendant in the outbuilding, Reyes saw defendant slap Taylor in the face with enough force to cause Taylor to fall to the floor; the blow did not leave a mark. Defendant slapped Taylor because the child refused to eat certain food that defendant had given to her. Reyes testified that she had witnessed defendant physically discipline Taylor four times.[5]

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4. It is not entirely clear from the record whether these whippings occurred before or after Reyes and Taylor resided with defendant, or both.

5. Reyes's testimony was inconclusive with regard to the residential circumstances of Reyes, Taylor, and defendant when these "disciplinary" incidents transpired.

Defendant was working in a construction job during the time period when Reyes and Taylor lived in the outbuilding with him. While defendant was at work during the day, Reyes and Taylor remained in the outbuilding, watching television, reading, and playing. They used the woods behind the outbuilding for toilet purposes and bathed at a nearby outdoor water source. They kept perishable foodstuffs in a cooler. Reyes and Taylor had little contact with defendant's grandparents, although "[t]here were times that [they] had gone in the house and showered[ ] and were able to use the bathroom as well" late at night after defendant's grandparents had gone to bed or during the day when the grandparents were away from the home, and once when defendant's grandmother invited Reyes and Taylor inside. Reyes testified that while defendant's grandmother did not make her feel unwelcome, nonetheless Reyes did not ask to use the bathroom inside the home of defendant's grandparents on other occasions.

On 2 July 2010,[6] Reyes took Taylor to the home of Reyes's mother to celebrate the birthday of Reyes's mother with family members. This was the first time that Reyes and Taylor had seen Reyes's family since moving out of the residence of Reyes's mother. Reyes knew that her two-week Army Reserve training obligation in New Mexico was approaching, although the exact dates were still being determined. In contemplating arrangements to be made for Taylor's care during Reyes's upcoming military training, Reyes knew that she could leave Taylor with Reyes's mother but did not want to do so in light of the "strained relationship" between Reyes and Reyes's mother. Reyes also knew that Taylor's paternal grandparents would be happy to care for the child, but Reyes did not want to leave Taylor with them because Reyes believed that the paternal grandparents were trying to obtain custody of the child.

Defendant offered to keep Taylor while Reyes was away for Reyes's two weeks of training, stating that his grandmother would take care of Taylor while defendant was at work. Reyes did not talk to defendant's grandmother about this plan, trusting defendant's statements. On 5 July 2010—the day before Reyes was to depart for New Mexico—defendant drove to the home of Reyes's mother with Reyes and Taylor. No one was at the residence, and defendant left Reyes there at about 8:00 p.m. and then departed with Taylor. Reyes testified that, at that point, Taylor had no injuries or marks on her body other than those resulting from

6. Reyes's testimony indicates slightly different dates for this event, but the testimony is consistent that it occurred on a Friday; therefore, it appears that this event occurred on 2 July 2010.

"her normal kid activities, scratches on her legs and arms" and "mild" eczema, which even when inflamed only appeared as dry patches of skin around Taylor's arms. Reyes also confirmed that Taylor had not experienced bloody stools or any blood coming from her vaginal area. When one of Reyes's sisters returned to their mother's house later that evening, the sister was surprised to learn that Taylor was not going to be staying at the home of Reyes's mother during Reyes's Army Reserve trip to New Mexico. Reyes traveled to New Mexico on 6 July 2010. While she was in New Mexico, Reyes texted defendant and tried to call by telephone regularly, sometimes being able to speak briefly with Taylor.

Evidence tended to show the circumstances which existed for Taylor while she was in the care of defendant after he dropped off Reyes at the home of Reyes's mother on the evening of 5 July 2010. At 8:28 p.m. on 5 July 2010, shortly after leaving Reyes at her mother's home, defendant purchased a hasp, padlock, and related items from a home improvement store in Garner. At trial, Reyes viewed photographs which were taken of the door to the outbuilding and testified that the photographs depicted a hasp and padlock on the exterior of the door which had not been present when Reyes departed the outbuilding for her Army Reserve training on 5 July 2010. The hasp and padlock would have made it possible for someone to be sealed inside of the outbuilding, as opposed to the deadlock which had been the sole lock on the door and which could be opened from the inside of the outbuilding when Reyes exited the outbuilding earlier that day.

Defendant's purchase of these items and the installation of the hasp and padlock occurred in the face of defendant's failure to discuss with his grandmother—or anyone else—his need for help to care for Taylor while Reyes was out of town at her Army Reserve training, despite defendant's representation to Reyes that the grandmother would provide care for Taylor while defendant was at work. Defendant's grandmother did not learn that Taylor was staying alone with defendant in the outbuilding until Saturday, 10 July 2010. Investigation into defendant's financial transactions revealed that in the days following Reyes's departure for New Mexico to satisfy her Army Reserve training obligation, defendant was frequently away from the outbuilding during periods of time and that he was apparently without Taylor because the child was not seen by store clerks or on video surveillance footage during any of defendant's outings, errands, or work shifts during the succeeding ten days.

A video recording made at 2:31 a.m. on 10 July 2010 was recovered from defendant's cellular telephone; it showed Taylor inside the outbuilding, facing a wall and a window with her arms held straight to her

sides, repeatedly reciting, "If I have to pee, I promise I will tell someone." Reyes identified a voice that can be heard in the video recording requiring Taylor to repeat the phrase and to speak more loudly as defendant's voice. Reyes testified that Taylor was fully potty-trained at the point when Reyes and her daughter began to reside with defendant, although Reyes recalled one "accident" when Taylor urinated in the bed in the outbuilding, which lacked any toilet facilities.

On the following day of 11 July 2010, defendant's grandmother went to the outbuilding to invite defendant and Taylor to have a meal with the grandmother and defendant's grandfather after church. As she approached the outbuilding, defendant's grandmother saw "poop on the doorsteps [of the outbuilding] like somebody had diarrhea," so she knocked on the side of the outbuilding, rather than on the door, and called out to defendant. She heard defendant say "[Taylor], don't go to that [expletive] door" and also heard a "whine" or "whinnying" as if from "a child that . . . couldn't get her way." Defendant did not respond to his grandmother's knock, and the grandmother returned to her house. Defendant subsequently entered his grandparents' house alone, claimed that the diarrhea had been his, and claimed that he had removed it. Defendant then told his grandmother that Taylor was fine, and from that point on the afternoon of Sunday, 11 July 2010, defendant's grandmother never went back to the outbuilding or asked defendant about Taylor. A psychiatrist who testified at trial on defendant's behalf stated that defendant had told the psychiatrist that defendant's grandfather had offered "to help" once the grandfather learned that defendant alone was caring for Taylor, but the date of this offer does not appear in the record, and the record does not show that defendant ever enlisted anyone's assistance in caring for Taylor during Reyes's two-week training period in New Mexico.

On Thursday, 15 July 2010 at 2:53 a.m., defendant purchased gauze pads, bandages, Neosporin, and Flintstones vitamins from a Walmart store in Smithfield. Reyes testified that she was not able to speak to defendant by telephone on that day,[7] but defendant and Reyes apparently exchanged a number of text messages later that evening, including several in which defendant stated, and Reyes acknowledged, that defendant "was high" and "high as hell" from smoking marijuana. Also on 15 July 2010, defendant ran several errands with no one accompanying him,

7. Later in the direct examination of Reyes, she noted a "very brief" telephone conversation with Taylor on 15 July 2010 but could not recall anything troubling about the conversation. Testimony regarding the specific timing of some of the exchanges between Reyes and defendant are inconsistent in the trial transcripts.

including a 3:00 p.m. trip to an auto parts store to exchange truck brake pads that he had previously purchased and another trip to the Walmart store in Smithfield to buy, among other items, a queen-size air mattress.

On Friday, 16 July 2010, Reyes spoke to defendant by telephone at about 8:15 a.m.,[8] and during the telephone call, defendant told Reyes that Taylor was fine and asleep. Later that day around noon, however, Reyes's telephone indicated that she had missed three telephone calls from defendant. Reyes texted defendant that she was in a training session and could not respond, and defendant texted the reply, "It's [Taylor]. Call me ASAP."[9] When Reyes called defendant via telephone, defendant told Reyes "that something was wrong with [Taylor], and that he needed to take her to the doctor." Reyes agreed with defendant's assessment. Reyes received an update on Taylor's condition through a telephone call from someone informing Reyes that "something's really wrong with [Taylor] and they had to airlift her to UNC-Chapel Hill, and that [Reyes] needed to make [her] way back home."

Also at about noon on 16 July 2010, defendant's grandmother noticed defendant outside of the outbuilding, speaking on his cellular telephone. Shortly thereafter, defendant came inside his grandparents' house and without any conversation with his grandparents who were both present at the residence, "went to his room . . . long enough maybe to change shirts" before departing. Defendant's boxer shorts, later found on the floor in his bedroom in his grandparents' home, were subsequently tested and found to contain a mixture of DNA.[10] The mixture contained a sperm fraction which predominantly matched defendant's DNA and a non-sperm fraction which matched Taylor's DNA.

Shortly after defendant left his grandparents' house on 16 July 2010, defendant telephoned his grandmother to say that he was taking Taylor to the hospital emergency room because "[s]he fell off the bed last night and when she got up this morning she was dizzy." At approximately 12:45 p.m., defendant carried Taylor into the emergency room (ER) of Johnston Memorial Hospital[11] in Smithfield, "hollering, '[h]elp

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8. There was a time zone difference between Reyes and defendant due to their respective locations. The times noted in the transcript appear to reflect Eastern Daylight Time and we employ those times in this opinion.

9. An acronym meaning "as soon as possible."

10. Deoxyribonucleic acid.

11. This medical facility in Smithfield is currently known as UNC Health Johnston, but we refer to it in this opinion as "Johnston Memorial Hospital" as that is the designation given by certain witnesses. *See* UNC Health Johnston, *Find a Location*, https://www.johnstonhealth.org/locations/ (last visited Aug. 17, 2023).

me, help me' " and "she fell off the bed." Nurse Mary Butler noted that Taylor was limp, barely breathing, and cold to the touch, and was not sure "if [Taylor] was even alive at all." Butler called for help. Eventually, at least seven medical professionals were working on Taylor, cutting off her bloody and stained clothing, preparing her to be put on a ventilator, and struggling to find a place on Taylor's body to insert an intravenous line due to the large number of injuries that the child appeared to have sustained. Defendant told the medical personnel that Taylor "fell yesterday and hit [her] head, was fine this morning and playing" and claimed that "[f]ifteen minutes" prior to arrival at the hospital, Taylor was "conscious, alert[,] . . . complaining of dizziness and on [the] way to the ER [her] eyes rolled back in [her] head."

Upon the removal of Taylor's clothing, the hospital staff observed that Taylor had suffered injuries "[t]oo numerous to count," including lesions, abrasions, bruises, scabs, deep avulsions where her "skin ha[d] been . . . ripped off" and "chunk[s]" were missing, and obvious bite marks. The medical team could see multiple—maybe "fifty or a hundred"—"whip injuries" and "overlapping, criss-crossing" marks which they estimated to range in age from some that were "ten days, two weeks" old to others that were "fresher." Taylor's treating physician documented "multiple bruises, linear abrasions, bite marks and injuries" on all of the child's extremities. While attempting to insert a catheter into Taylor's urethra, the medical professionals noted "obvious signs of trauma" to Taylor's labia and hymen; when they attempted to take Taylor's temperature rectally, they saw signs of rectal injury, including bruising.

When asked about Taylor's injuries while he was at the hospital, defendant claimed that "those wounds were on her when he got her, when she was dropped off with him," represented that he needed to move his truck, and then ran toward an exit of the hospital. Nurse Butler followed defendant, grabbed him from behind, pushed him into a room, cursed at him, and told defendant that he could not leave. Defendant did not struggle with or attempt to get past Butler, and instead he simply sat down on a chair in the room. Eventually, law enforcement officers arrived at the hospital in response to a 911 emergency telephone call from a member of the hospital medical team that was working on Taylor, reporting suspected child abuse. After the officers saw the child's injuries, they went to speak with defendant. Defendant gave the officers some basic information: his birthdate, Taylor's birthdate, and the explanation that Taylor's mother Reyes had left Taylor with defendant while Reyes was away for Army Reserve training. Defendant then stated that Taylor had fallen off of the bed on the previous night and had hurt her

head, that defendant had put an ice pack on Taylor's head "boo-boo" that night, and that when Taylor "woke up [that] morning saying her head was hurting and dizzy . . . [defendant] fed her a granola bar and Gatorade . . . [and] she rested most of the morning, until he brought her here."

Defendant also acknowledged that "[the] past Wednesday, [Taylor] peed and pooped on him while they were sleeping, and that he lost it and whipped her with a drop cord"; the "marks on the butt and around the privates come from the cord"; "the power cord was brown"; and "when he found out how bad the marks it left [were], he ripped [the cord] up and put it in a trash bag" inside the outbuilding. Defendant also said that Taylor's mother "does not know about the power cord incident." Defendant told the officers that he did "not know where the other whips c[a]me from . . . [and that] the bite marks c[a]me from a [child] cousin." Defendant also represented that he had "never sexually assaulted" Taylor. One of the law enforcement officers drafted a statement recounting defendant's explanations. Defendant reviewed the statement and after having the officers make corrections to it which did not alter the substance of defendant's representations, signed the document.

Meanwhile, it was determined that Taylor would be transferred to the University of North Carolina Medical Center (UNCMC) in Chapel Hill.[12] In addition to her aforementioned injuries, Taylor had a head injury which resulted in severe brain trauma. Taylor was also diagnosed as hypothermic and determined to have suffered severe blood loss. Upon Taylor's arrival at UNCMC, one of the doctors treating the child examined her in an effort to diagnose the cause of Taylor's extremely low red blood cell count. After preliminarily assuming that Taylor was suffering from uncontrolled bleeding but ultimately determining that there was no such bleeding underway, the treating physician then ascertained that Taylor "clearly had been suffering for some time" and that her "blood count was extremely low because she had this pattern of injury to occur over a period of time and had lost blood acutely over a period of time." In addition to attempting to treat Taylor's extensive injuries, the medical team at UNCMC examined the child for signs of sexual abuse and discovered "multiple scars at various stages of healing" on the outside of her vaginal area on her mons pubis and her labia majora, along with "multiple scars" on both of her buttocks that "extended . . . down into the vaginal area" "and the rectal area." All of the injuries appeared likely

12. This medical center is variously referred to in witness testimony and record documents as "UNC Hospital," "UNC Hospitals," "UNC Children's Hospital," and other similar terms, all plainly referring to the facility located on Manning Drive in Chapel Hill.

to have been inflicted in the previous twenty-four to seventy-two hours. Taylor also had sustained an injury to her rectum that was still bleeding and showed evidence of trauma—bruising, tears, and lacerations—as well as cuts or tears to her hymen, all resulting from the penetration of her vagina. The treating professionals noted that these types of rectal and vaginal injuries would generally heal in twenty-four to forty-eight hours.

Despite treatment from a variety of medical experts, Taylor died on 19 July 2010. Taylor's body indicated injuries to her scalp, cheeks, nose, lips, chin, ear, chest, abdomen, arms, legs, wrists, hands, buttocks, vaginal area, feet, and toes, and there were tiny pieces of copper embedded in her arms, legs, vaginal area, and buttocks.

An autopsy conducted on Taylor determined that her cause of death was "[b]lunt force trauma of the head." The autopsy noted many other physical harms, including "multiple blunt force head injuries"; areas on the child's "chest, back, thigh, lower legs, arm and finger" where tissue had been torn from her body; deep lacerations in multiple areas of Taylor's body that had pieces of copper wire embedded in them; multiple injuries to her anus and vaginal area; and so many "healing shallow lacerations and abrasions" that the medical examiner "couldn't count them."

When investigators entered the outbuilding after Taylor had been taken to the hospital, it smelled of urine and feces, and the following items were discovered in it: a wooden board with blood and Taylor's DNA on it, propped behind the air mattress where defendant and Taylor slept; a brown belt with blood and Taylor's DNA on it; pieces of a brown extension cord with exposed wire ends, with blood and Taylor's DNA on it; pieces of gray duct tape and white tape with Taylor's hair and some of Taylor's hair roots stuck to the tape; and two pillow cases with defendant's sperm on them, one of which also had blood on it with a predominant DNA profile consistent with Taylor's DNA. Reyes testified at trial that photographs taken of the inside of the outbuilding after Taylor was taken to the hospital on 16 July 2010 depicted conditions which were very different from those conditions which were present when Reyes last saw the outbuilding. The pictures showed trash, toys, and duct tape on the floor; a rifle leaning in the corner; a different bed; and a shirt that belonged to Reyes, although Reyes stated that the shirt was not in the same condition as it had been when Reyes left for New Mexico. The photographs of the outbuilding's entrance door which featured a hasp and padlock which were not present on the door when Reyes left for her military training on 5 July 2010 were pictures which were taken after Taylor had been transported to the hospital on 16 July 2010.

B. Legal proceedings

On 2 August 2010, defendant was indicted on charges related to Taylor's death, including first-degree murder, felony child abuse inflicting serious injury, first-degree kidnapping, and the commission of a sex offense against a child under the age of thirteen years. On 9 September 2013, a superseding indictment was returned on the charge of the commission of a sex offense against a child under the age of thirteen years. On 20 September 2010, the trial court entered an order noting that the State intended to proceed capitally in defendant's case. As a result, the trial court ultimately determined that the trial would be conducted in, and jurors would be drawn from, neighboring Harnett County.

Defendant filed numerous other pretrial motions, including requests to prohibit the imposition of the death penalty as a potential sentence, to exclude certain photographs from admission at trial, "to Restrict the Use of the Term 'Torture' by Medical Professionals," to suppress defendant's statements which he made when he was interviewed at Johnston Memorial Hospital, and to disqualify the superior court judge who was assigned to preside over defendant's trial, the Honorable Thomas H. Lock. More specific details about the most pivotal motions and the trial court's rulings on them are discussed in the "Analysis" portion of this opinion as they become pertinent to defendant's appellate arguments.

Just before opening statements in defendant's trial, defense counsel informed the trial court outside of the presence of the jury:

> I will say that during opening statements we will be saying that [defendant] caused the injury that led to the death of [Taylor] . . . .
>
> We are denying that he is—we'll specifically deny that he is guilty of first[-]degree murder, kidnapping, sex offense. We are not going to concede that he's guilty of any crime specifically or any lesser form of homicide at this point.
>
> We are going to acknowledge that there was abuse that took place before Helen Reyes left and afterwards and that it was horrible.

During opening statements, the State told the jury that its theory of the case was "about . . . defendant for ten days tormenting, torturing, and terrorizing" Taylor.

Defendant's theory of the case, in keeping with the concessions that were forecast by his trial counsel to be offered during the trial's opening statement phase, was that defendant

> had been damaged by years of abuse, uncontrolled anger, and untreated mental problems. And when he tried to take care of [Taylor] over a ten-day period, the result was unbelievably tragic.
>
> [Defendant] never intended to kill [Taylor] and he never sexually assaulted her, but out of anger he caused injury that killed her. When [defendant] realized that [Taylor] had been seriously injured, he rushed her to the hospital. He was desperately trying to save her. Although [defendant] inflicted the wound upon [Taylor]'s head that eventually killed her, it was never his intent to kill her.

Defense counsel went on to suggest that defendant's acts and omissions with regard to Taylor were due, in significant part, to defendant's difficult childhood during which defendant's father narrowly survived being shot three times by a stranger when defendant was about one year old, with defendant's mother subsequently being criminally charged with hiring the shooter. She was acquitted of the alleged offense. Defense counsel stated that defendant's father, who obtained primary custody of defendant, largely ignored defendant and also physically abused defendant. Meanwhile, defendant's mother neglected defendant during the periods that defendant spent with her, as a result of her mental health struggles. Counsel for defendant also conceded that defendant had left Taylor locked in the outbuilding alone while he went shopping. Defendant's trial attorney emphasized, however, that Taylor's fatal head injury was not intentional and was separate and distinct from the child's other injuries. Finally, counsel for defendant acknowledged during opening statements that defendant had lied about what happened to Taylor but stated that once defendant took "[Taylor] to the hospital, he made no effort to cover up or hide anything that he had done to [Taylor]."

During the guilt–innocence phase of the trial proceedings, the State presented evidence which was consistent with the aforementioned factual background. This evidence included descriptions of Taylor's injuries and death from fourteen medical and law enforcement witnesses: medical doctors Edward Clark, Michael Evans, Keith Kocis, Jefferson Williams, Kenya McNeal-Trice, Sharon Cooper, and Jonathan Privette; dentist Richard Barbaro; registered nurses Kenneth Gooch and Mary

Butler; Johnston County Sheriff's Department detectives Jamey Snipes and Don Pate; Johnston County Sheriff's Department deputy Matt DeSilva; State Bureau of Investigation Special Agent Mike Smith; and Crime Scene Investigator Charlotte Yeargin Fournier. Defendant did not testify, but he introduced evidence relevant to his intent, state of mind, and mental condition, including testimony about the shooting of his father and the subsequent trial and acquittal of his mother; a report of physical abuse of defendant by his father when defendant was six years old; defendant's mother's unsanitary living conditions at some times when defendant was staying with her every other weekend; defendant's drug and alcohol use, beginning in his junior year of high school; defendant's aggressive and irritable temperament during his junior year of high school; an incident recounted by a friend of defendant in which defendant was found with a gun and talking about suicide; and defendant being put out of his parents' homes at nineteen years of age after defendant was charged with driving under the influence.

Defendant's argument at this stage of the trial proceedings was that he mistreated Taylor as a result of his traumatic life experiences, his mental health and substance abuse issues, and his frustration in attempting to care for a preschool-aged child without any help and in a difficult living situation; however, defendant's actions which caused Taylor's ultimately fatal head injury were not intended to cause her death and he tried to save the child's life once he realized that her condition was serious. Defendant asserted that there was a break in the chain of abusive acts which he committed against Taylor when he traveled to the Walmart store on Thursday, 15 July 2010 at 2:53 a.m. to purchase first-aid supplies to treat Taylor's wounds, which he contended would sever any proximate causal link between the head trauma that caused Taylor's death and the infliction of any other previous injuries. Defendant's complementary legal argument represented that such an interruption in the transaction of events would prevent this succession of acts from qualifying defendant's conviction for the offenses of first-degree kidnapping, sex offense against a child under the age of thirteen, and felony child abuse inflicting serious injury to invoke the felony murder rule, or to support the charge of murder by torture.

The jury returned verdicts in which it found defendant to be guilty of all charges. The jury specifically determined that the State had established beyond a reasonable doubt that defendant had murdered Taylor in the first degree expressly premised upon the theories of murder by torture and the felony murder rule based upon the felonies of first-degree kidnapping, sexual offense with a child, and felony child abuse inflicting serious bodily injury. The jury also found defendant guilty of

the remaining charges of first-degree kidnapping, sexual offense with a child, and felony child abuse inflicting serious bodily injury.

The matter then moved to the sentencing phase, during which defendant offered considerable evidence about his chaotic family background. It included accounts of the attempted killing of his father, which included the suggestion that defendant's mother had hired the shooter, even though she was acquitted of any wrongdoing; childhood physical abuse of defendant by defendant's father; substance abuse and suicide attempts by defendant; unsanitary conditions in the home of defendant's mother, with whom defendant spent time during his youth; a history of mental health issues throughout defendant's family, including abuse and depression; and defendant's statements which he made to a clinical psychologist while incarcerated in which he alleged that Reyes had imposed severe physical discipline on Taylor before Reyes left for Army Reserve training which had caused a lot of the child's injuries which were still evident on 16 July 2010. However, the same psychologist also testified that defendant had acknowledged leaving Taylor locked in the outbuilding while defendant worked. The clinical psychologist also testified that defendant admitted that defendant had shaken Taylor for picking at scabs on her body and had hit Taylor's head on "the metal door a couple of times" and then "la[id] her down on the bed" without getting medical attention for her, which apparently transpired on 15 July 2010. Only "a little after lunch" on the following day of 16 July 2010, after Taylor "wouldn't wake up," did defendant undertake any efforts to seek help for the child. Defendant's psychologist also recognized the extensive injuries to Taylor and concluded that defendant "anticipates the consequences of his own actions, he thinks logically and coherently" and "there is no obvious basis for inferring [defendant] was unable to recognize the criminality of his alleged offense or to appreciate the wrongfulness of his conduct at that time."

On 3 April 2014, the jury found the existence of all three aggravating factors which were submitted to it for consideration: (1) that defendant's murder of Taylor was committed in the commission of a sexual offense, (2) that defendant's murder of Taylor was committed in the commission of a kidnapping, and (3) that Taylor's murder was "especially heinous, atrocious, or cruel." The jury found the existence of three of the forty-six mitigating factors submitted to it: (1) that defendant "never intended to kill [Taylor]," (2) that "Reyes was aware that [defendant] abused [Taylor] and still left [Taylor] with him," and (3) that "Reyes chose to leave [Taylor] with [defendant] although he was only 21 years old and lived in a shed with no running water." The jury

then unanimously found beyond a reasonable doubt that the mitigating circumstances were "insufficient to outweigh the aggravating circumstance[s]" and recommended a sentence of death as the appropriate punishment for defendant. On the same date of 3 April 2014, the trial court entered a judgment and commitment including the imposition of a death sentence.

Defendant gave notice of appeal in open court. On 22 October 2014, defendant filed a "Motion for Stay of Appellate Proceedings in Light of Pending Racial Justice Act Motion," which this Court allowed on 18 December 2014. On 12 February 2021, defendant moved to bypass the Court of Appeals for review of his non-capital appellate issues, and the Court allowed this motion on 24 February 2021. The stay was dissolved by order of the Court entered on 4 May 2022. Oral argument took place in this Court on 8 February 2023.

II. Analysis

A. Denial of defendant's motion to disqualify Judge Lock

[1] Defendant's first two appellate arguments concern the denial of defendant's motion to disqualify the Honorable Thomas H. Lock, the superior court judge who was assigned to preside at defendant's trial, from involvement in this case. Defendant advances two bases for his contention that Judge Lock should have been removed. First, defendant asserts that Judge Lock was a potential witness for the defense at defendant's trial as a result of Judge Lock's involvement as the district attorney in the trial of defendant's mother which occurred in 1992 on charges related to the aforementioned allegations that she hired someone to shoot and kill defendant's father. Second, defendant contends that Judge Lock's role as the prosecutor of defendant's mother two decades before created an appearance and risk of bias in defendant's own murder trial. We conclude that defendant has failed to show any error in the trial court's denial of the motion to disqualify Judge Lock.

In 1992, when defendant was three years old, defendant's mother Sandra Richardson was tried and acquitted in the Superior Court, Johnston County on charges of (1) conspiracy to commit murder and (2) assault with a deadly weapon inflicting serious injury with intent to kill. The alleged victim was defendant's father Doug Richardson in January 1991, when defendant was approximately one year old.[13] At the

13. In the motion to disqualify, defendant's counsel asserted that in the attempted contract killing, defendant's father was shot three times by a man but survived, and that after Sandra Richardson's trial, defendant's parents divorced and defendant's father was

time of Sandra Richardson's trial, Judge Lock was the elected district attorney in District 11,[14] which is composed of Johnston, Harnett, and Lee Counties. He tried the case against Sandra Richardson.

In May 2012, defendant's trial counsel sent a letter to Judge Lock, notifying the judge of the mother-son relationship between Sandra Richardson and defendant. Defendant's counsel requested that defendant's trial team, the State's trial team, and Judge Lock have a meeting in order for defendant to have the opportunity to question Judge Lock about his recall of Sandra Richardson's case and his knowledge of any dynamics in defendant's family which the defense team could utilize in either the guilt–innocence phase of defendant's trial and/or potentially in mitigation arguments at sentencing. On 6 August 2012, Judge Lock addressed defense counsel's request in open court, producing an email communication from the North Carolina Judicial Standards Commission which was generated in response to an inquiry directed to the Commission by Judge Lock about whether Judge Lock should disqualify himself from defendant's criminal trial. In the email, counsel for the North Carolina Judicial Standards Commission opined that, based upon Judge Lock's statement that Judge Lock remembered Sandra Richardson's case but had no recall from it that would be pertinent to defendant's case, Judge Lock did not need to recuse himself, based upon the information which he provided to the Commission, from serving as the presiding judge in defendant's trial. Judge Lock did note, however, that he would comply with the recommendation of the Judicial Standards Commission to refer to another superior court judge any motions related to his participation in defendant's trial.

On 1 October 2012, defendant filed a motion to disqualify Judge Lock from presiding over defendant's criminal trial, asserting that Judge Lock was a potential witness for the defense and projecting that defendant planned to focus at trial on the trauma that defendant experienced as a result of growing up in a family which was plagued by a dysfunctional parental dynamic. Defendant deemed this subject matter to be highly relevant to the jury's decisions in both the guilt–innocence and sentencing phases of defendant's trial on the charges arising from

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given primary custody of defendant, although defendant's mother had visitation every other weekend and at other specified times. In a hearing on defendant's motion to disqualify Judge Lock from presiding over defendant's criminal trial for the abuse and murder of Taylor, defense counsel noted that in a child custody matter, the trial court made a finding that Sandra Richardson had sought to have someone hurt Doug Richardson.

14. The former District 11 has since been divided into two districts: 11A and 11B.

Taylor's death. In the motion to disqualify, defendant cited the Fifth, Sixth, and Eighth Amendments to the United States Constitution and Article I, §§ 19, 23, and 27 of the North Carolina Constitution, as well as N.C.G.S. § 15A-1223(e) and Canon 3(C)(1)(b) of the North Carolina Code of Judicial Conduct.[15]

In the motion to disqualify, defendant specifically represented that Judge Lock would have (1) "a lot of knowledge about the case against Sandra" including details not otherwise available, (2) knowledge about the manner in which the shooting affected defendant's father, and (3) "observations" about Sandra during her trial which would be "relevant to her stability and character." Defendant's trial team acknowledged that they had been able to review the existing record in defendant's mother's criminal case. Defendant's trial team also divulged, with regard to the motion, that the team had interviewed defendant's mother, defendant's father, other Richardson family members, and defense counsel from defendant's mother's trial, but defense counsel suggested that "[t]hese witnesses are naturally going to lack the prosecutors' objectivity about Sandra['s]" criminal trial. Finally, defendant emphasized that the "motion is not based on any claim that Judge Lock would be biased against [defendant] because twenty years ago he prosecuted [defendant's] mother," but rather that if Judge Lock was not disqualified, "he cannot be called as a material witness" and "it would create an appearance of impropriety for Judge Lock to preside over [d]efendant's trial." On the same date of 1 October 2012, defendant also filed a motion for disclosure of information from Judge Lock about the trial of defendant's mother and the facts surrounding her alleged crimes. The motion for disclosure contained factual allegations and legal requests which are essentially the same as those found in the motion to disqualify and in defendant's original letter to Judge Lock.

As Judge Lock had promised during the 6 August 2012 hearing, he requested that another superior court judge determine both of the motions as they related to Judge Lock's participation as the assigned presiding judge in defendant's trial. Consequently, the motions were assigned to be heard by the Honorable James Floyd Ammons Jr. *See State v. Poole*, 305 N.C. 308, 320 (1982) (discussing circumstances where a presiding trial judge who is being challenged should refer motions

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15. Defendant's motion to disqualify Judge Lock also discussed disqualifying Assistant District Attorney Michael Beam, who was co-counsel for the prosecution in Sandra Richardson's trial. On appeal, defendant does not argue any error regarding Beam's status in defendant's case, and thus we do not further address any portions of filings in the record on appeal which pertain to Beam.

to recuse or to disqualify to another judge for consideration). On 9 November 2012, Judge Ammons entered an order denying defendant's motion for the disclosure of Judge Lock's knowledge of mitigation information while ordering "complete discovery" from the State as required by statute or caselaw. Judge Ammons found as fact that while Judge Lock remembered serving as the prosecutor in Sandra Richardson's trial, Judge Lock did not have any knowledge of "evidence which would be pertinent to . . . defendant's capital case." Judge Ammons also noted that Judge Lock had an ethical duty to disclose any exculpatory or mitigating evidence regarding defendant's criminal trial, and that Judge Lock had no knowledge of such evidence. Accordingly, Judge Ammons concluded (1) that defendant had not sufficiently demonstrated that "interviews or depositions of Judge Lock" were required here and (2) "that Judge Lock is not a material witness" in defendant's case.

Judge Ammons additionally found in an "Order on Judge's Status" that although Judge Lock had "played a major role" in the prosecution of Sandra Richardson for the attempted murder of defendant's father, Judge Lock did not "have any information, exculpatory or otherwise, . . . that would be material to . . . [d]efendant's case" and further that defendant "ha[d] numerous other sources [from whom] to attempt to obtain [the] information" which defendant sought from Judge Lock.

On 19 December 2012, defendant filed a petition for writ of certiorari which sought review by this Court of Judge Ammons's rulings that Judge Lock was not required to recuse or disqualify himself from presiding over defendant's trial and that Judge Lock would not be required to disclose any information about his recollections of the criminal trial of defendant's mother. In his petition, defendant reiterated his belief that Judge Lock would potentially be a material witness in defendant's trial and his contention that Judge Lock would create the appearance of impropriety in the event that Judge Lock presided over defendant's trial. This Court denied defendant's petition for writ of certiorari by order entered 11 April 2013.

Thereafter, Judge Lock presided over defendant's trial at which, as noted earlier, defendant was convicted on numerous charges arising out of the abuse and murder of Taylor. Defendant received a sentence of death. Defendant contests the orders entered by Judge Ammons regarding defendant's request for Judge Lock to have been disqualified from presiding over the trial.

1. Disqualification pursuant to N.C.G.S. § 15A-1223(e) and the Code of Judicial Conduct of judges who may be a potential witness

The need for a judge to recuse himself or herself or to be disqualified where he or she is a potential witness in the trial in question is obvious. In our judicial system, a trial judge should be a neutral manager of an adversarial trial proceeding rather than appearing as a witness for one side or the other. *See*, *e.g.*, *State v. Britt*, 288 N.C. 699, 710 (1975) (holding that "[e]very person charged with a crime has an absolute right to a fair trial . . . [including] a trial before an impartial judge"); *see also State v. Williams*, 362 N.C. 628, 638 (2008) (quoting *Britt* for the same proposition). These fundamental legal principles comport with the provisions of North Carolina General Statutes Section 15A-1223(e) that "[a] judge must disqualify himself from presiding over a criminal trial or proceeding if he is a witness for or against one of the parties in the case." N.C.G.S. § 15A-1223(e) (2021). Likewise, Canon 3(C) of the North Carolina Code of Judicial Conduct states that a judge should recuse himself or herself whenever he or she has "personal knowledge of disputed evidentiary facts concerning the [matter]" and/or he or she is "likely to be a material witness in the proceeding." Code of Judicial Conduct, Canon 3(C)(1)(a) and (d)(iv). Defendant has not asserted that Judge Lock has any knowledge of any evidentiary facts in defendant's case. Therefore, in the case at bar, the issue is whether Judge Lock was potentially "a witness" or a "material witness" in defendant's murder trial as a result of Judge Lock's participation in a different criminal trial which occurred twenty years prior and which included parties that were different from those involved in defendant's trial.

When a ruling which resolves a motion to disqualify a judge under N.C.G.S. § 15A-1223 and Canon 3 of the Code of Judicial Conduct is at issue, this Court has opined that "the burden is upon the party moving for disqualification *to demonstrate objectively that grounds for disqualification actually exist.*" *State v. Fie*, 320 N.C. 626, 627 (1987) (emphasis added) (quoting *State v. Fie*, 80 N.C. App. 577, 584 (1986) (Martin, J., concurring)). To satisfy such a demonstration, "substantial evidence" must be presented by the moving party in order to establish that recusal is required. *State v. Scott*, 343 N.C. 313, 325 (1996). If the allegations about the judge's potential disqualification are made with "sufficient force" to require findings of fact, the motion to recuse should be referred to another judge. *Id.* at 326. In such a case, the findings of fact must be supported by evidence and not solely based upon "inferred

perceptions," and those factual findings must support the deciding court's conclusions of law. *Lange v. Lang*e, 357 N.C. 645, 649 (2003).

On appeal to this Court, defendant argues that it was reversible error for Judge Ammons to determine that Judge Lock did not need to be disqualified from presiding over defendant's criminal case based upon defendant's assertions that Judge Lock was a potential witness in defendant's trial. First, defendant contends that due to Judge Lock's role as the prosecutor in the 1992 criminal trial of defendant's mother, Judge Lock "had personal knowledge, and made firsthand observations that were relevant to the defense" in the criminal case of defendant and "had information about the parties" in Sandra Richardson's trial. The specific information that defendant contends Judge Lock would possess about the parties was what defendant's parents "[were] like" in the early 1990s when defendant was an infant or a toddler at the time of the shooting of defendant's father and of his mother's trial.

Defendant primarily focuses on the determination that Judge Ammons made in his "Order on Judge's Status" that, in order for a judge to be called as a witness, "the judge must be a *material* witness or have personal knowledge of *disputed material facts*" and that for Judge Lock to be called as a witness here, any evidence he possessed "must be *material* and disputed," while defendant emphasizes that N.C.G.S. § 15A-1223(e) does not include a materiality requirement. Although defendant is correct that the statute in question does not include a materiality component, nonetheless the State correctly notes that defendant repeatedly contended in his written motions and supporting oral arguments that Judge Lock could offer "material mitigating evidence," citing *both* N.C.G.S. § 15A-1223(e) (which includes no materiality requirement) *and* Code of Judicial Conduct Canon 3(C)(1)(b) (which explicitly *does* include a materiality requirement), along with various provisions of the United States Constitution and the North Carolina Constitution. Judge Ammons cited all of these legal resources in the following conclusion of law which he rendered on the issue: "That Judge Lock's presiding over [defendant's] case does not violate the Fifth, Sixth, and Eighth Amendments to the [U.S.] Constitution[;] Article I, [§§] 19, 23, and 27 of the North Carolina Constitution, N.C.[G.S. §] 15A-1223(e), and the North Carolina Code of Judicial Conduct Canon 3(C)(1)(b)."

In light of defendant's presentation of arguments for Judge Lock's recusal on each of these various bases, we cannot infer that Judge Ammons misapprehended the provisions of N.C.G.S. § 15A-1223(e) simply because Judge Ammons referenced materiality in his orders. During the hearing on the motion to recuse, Judge Ammons and defense counsel

engaged in at least one exchange in which Judge Ammons expressly observed and discussed that one of the questions under his consideration was whether Judge Lock "is a witness for or against" defendant. Later during the same hearing when the State referenced materiality, defense counsel agreed that "the material witness [consideration] is . . . part of it." Although during the hearing both parties and Judge Ammons discussed whether Judge Lock would potentially be a "witness" or a "material witness" in defendant's trial, defense counsel never expressed any concern that Judge Ammons misapprehended the legal questions before Judge Ammons regarding defendant's motion to disqualify.

It is also significant that in the two orders which he entered in his resolution of defendant's motion seeking disqualification of Judge Lock, Judge Ammons found as fact that Judge Lock "is not privy to any exculpatory or mitigating evidence relating to [defendant]" and that Judge Lock had repeatedly stated that he did not have any knowledge of "evidence which would be pertinent to . . . defendant's capital case." "Pertinent" means "relevant in the context of the crime charged." *State v. Bogle*, 324 N.C. 190, 198 (1989) (quoting *State v. Squire*, 321 N.C. 541, 548 (1988)). Defendant has not argued that Judge Lock was untruthful or dishonest in representing that Judge Lock did not have any knowledge of any evidence that would be exculpatory, mitigating, or otherwise pertinent to defendant's trial or sentencing. Only relevant evidence is admissible in the guilt–innocence phase of a trial, N.C.G.S. § 8C-1, Rule 402 (2021), and while the Rules of Evidence do not apply at capital sentencing proceedings, nonetheless a trial court may only permit the introduction of evidence which is somehow relevant or pertinent to sentencing. *See State v. Warren*, 347 N.C. 309, 325 (1997), *cert. denied*, 523 U.S. 1109 (1998).

As the party moving for disqualification of the presiding trial judge under the governing law and the Code of Judicial Conduct, defendant had the burden "to demonstrate objectively that grounds for disqualification *actually* exist," *Fie*, 320 N.C. at 627 (emphasis added) (quoting *Fie*, 80 N.C. App. at 584 (Martin, J., concurring)), and that such grounds exist through the production of "substantial evidence," *Scott*, 343 N.C. at 325. Where a "[d]efendant carries the burden to produce substantial evidence . . . mere speculation or conjecture is not sufficient to satisfy this requirement." *State v. Polke*, 361 N.C. 65, 72 (2006) (citing *State v. Anderson*, 350 N.C. 152, 183, *cert. denied*, 528 U.S. 973 (1999)).

Although defendant speculated that Judge Lock "*potentially* has a lot of knowledge about the case against Sandra"—including circumstances regarding "her stability and character"—and "*presumably*" had

sufficient familiarity with her husband so as to have impressions about how defendant's father was affected by defendant's mother's alleged harm which was inflicted upon defendant's father by his shooter, defendant has not identified any particular knowledge that Judge Lock could have that would be relevant to defendant or to the crimes for which defendant faced trial. Moreover, even if Judge Lock had recollections of, or thoughts about, defendant's parents, such evidence would not be admissible even as mitigation evidence in favor of defendant. "While a trial court should allow the jury to consider any mitigating evidence related to a defendant's character and record or the circumstances of the crime, *the feelings*, *actions*, *and conduct of third parties have no mitigating value as to defendant and are irrelevant in capital sentencing proceedings*." *State v. Smith*, 359 N.C. 199, 214–15 (emphasis added), *cert. denied*, 546 U.S. 850 (2005).

Judge Lock's surmised meaningful insight into any of defendant's family dynamics which may have been relevant to the accused's trial defenses or mitigation arguments upon sentencing on the basis of Judge Lock's limited exposure to defendant's parents for only a narrow period of time some twenty years before defendant's crimes occurred, arising only out of the constrained circumstances of the trial which Judge Lock prosecuted as the district attorney in which defendant's mother was the alleged wrongdoer and defendant's father was the victim, is only speculative conjecture and does not constitute the type of substantial evidence that a defendant must produce to compel a trial judge's disqualification from a proceeding. These circumstances are particularly determinative where Judge Lock has unequivocally represented that he does not have any evidence to offer which is pertinent to defendant's case and where defendant does not suggest that Judge Lock was untruthful in this representation.

2. Appearance of impropriety

Defendant also contends that Judge Lock should have been disqualified from presiding over defendant's trial because his prior role as a prosecutor of Sandra Richardson created an appearance and a risk of actual bias at defendant's trial.

As an initial matter, with regard to defendant's assertion on this appeal concerning any risk of Judge Lock's actual bias, we note that in defendant's motion to disqualify which was filed on the trial court level, defendant candidly and explicitly stated that "[t]his motion is not based on any claim Judge Lock would be biased against [defendant] because twenty years ago he prosecuted [defendant's] mother." In addition, during a pretrial hearing on the motions, defendant's counsel reiterated:

> [N]obody's suggesting here that Judge Lock is — did anything wrong either as a prosecutor or judge in this case.
>
> *And we're not claiming that he's biased as a result of this. We realize this happened twenty years ago and it did not directly involve this defendant.*
>
> What we are saying is this. Because he prosecuted Sandra Richardson those many years ago at a critical time in [defendant's] life, he is a potential witness in this case. And if he presides over the case, we're going to lose the right to call him as a witness.

(Emphasis added.) At the same hearing, defense counsel later reaffirmed that defendant was not alleging that Judge Lock would be prejudiced against defendant or for the prosecution, or that Judge Lock otherwise would be unable to preside at defendant's trial in an impartial manner, but that defendant's challenge to Judge Lock's ability to properly preside was based upon "him being a witness." Likewise, defendant did not claim that Judge Lock harbored any actual bias in defendant's petition for writ of certiorari filed in this Court on 19 December 2012 in Case No. 526P12. *See State v. Benson*, 323 N.C. 318, 322 (1988) ("Defendant may not swap horses after trial in order to obtain a thoroughbred upon appeal."). Accordingly, defendant's argument that Judge Lock possessed actual bias at defendant's trial is unpersuasive here.

We next address defendant's contention that Judge Lock should have been disqualified because there was a potential for the *appearance* of impropriety in the event that Judge Lock presided over defendant's trial in light of Judge Lock's participation in the prosecution of defendant's mother on charges related to her alleged hiring of an individual to kill defendant's father. As discussed above, both N.C.G.S. § 15A-1223 and Canon 3(C) of the Code of Judicial Conduct "control the disqualification of a judge presiding over a criminal trial when partiality is claimed." *Scott*, 343 N.C. at 325. Prior to the year 2003, Canon 2 of the Code stated that "[a] judge should avoid impropriety and the *appearance of impropriety* in all his activities." *See* Code of Judicial Conduct, Canon 2 (2002) (emphasis added). Under this earlier version of the Code, a defendant who contended that a trial judge should be disqualified from presiding over a case due to partiality was required to present "substantial evidence of partiality or evidence that there was an *appearance of partiality*" on the part of the trial judge. *State v. Vick*, 341 N.C. 569, 576 (1995) (emphasis added); *see also Scott*, 343 N.C. at 326. However, under the current version of the Code of Judicial Conduct

which applies in defendant's case, Canon 3(C) provides that "a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned, including but not limited to instances where . . . [t]he judge has a personal bias or prejudice concerning a party[.]" Code of Judicial Conduct, Canon 3(C)(1)(a). While defendant has expressly noted, and we have expressly acknowledged, that defendant here does not assert that Judge Lock maintained any actual bias or prejudice against defendant in this case, nonetheless we are left to consider the remaining factor of the cited canon as to whether, in presiding at defendant's trial, Judge Lock's "impartiality [might] reasonably be questioned." *Id.*

Defendant relies upon *Fie* as an illustration of the type of circumstances in which, despite the lack of any actual bias on the part of a trial judge or any lack of ability of the trial judge to preside impartially over a trial, nonetheless the *appearance* of impartiality required disqualification of the trial judge in question. In *Fie*, which was decided under the earlier version of Canon 3(C) of the Code of Judicial Conduct, this Court analyzed a situation in which the trial judge "initiated the criminal process against the two defendants" by writing a letter to the local district attorney which requested that a grand jury consider numerous criminal charges against the defendants after the trial judge had heard certain testimony in another trial over which the trial judge had presided. 320 N.C. at 626–28. Upon this particular background, this Court held that "a perception could be created in the mind of a reasonable person that [the trial judge] thought the defendants were guilty of the crimes with which they were charged and that it would be difficult for the defendants to receive a fair and impartial trial before" the trial judge. *Id.* at 628. While we find unassailable the assertion in *Fie* that a trial judge who recommends that criminal charges be brought against a defendant should not then serve as the presiding judge over the defendant's trial in light of the appearance of the trial judge's partiality due to the trial judge's recommendation of the very charges which are the subject of defendant's trial over which the same trial judge presides, the extraordinary procedural facts presented in *Fie* are markedly distinguishable from the present case. Here, Judge Lock had no previous connection to defendant's criminal case and had no input in the initiation of criminal charges against defendant regarding the death of Taylor. Judge Lock's role as the prosecutor of defendant's mother in a criminal matter involving defendant's parents at a time period which was twenty years prior to defendant's trial, in a prosecution of defendant's mother at a time when defendant was two years of age, and in a prosecution of defendant's mother in which there was no issue of the trial's outcome which was

premised upon defendant, is so different from the trial judge's relationship to the defendants in *Fie* that there is no consequential parallel to impact the current case.

Turning to defendant's due process claims, defendant acknowledges that the United States Constitution protects the guarantee of "an absence of actual bias" on the part of a presiding judge. *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016). In detecting the existence of a trial judge's inability to preside over a case due to bias, the United States Supreme Court authorizes "an objective standard" in order to "avoid[ ] having to determine whether actual bias is present." *Id.* ("The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias." (extraneity omitted)). In *Williams*, which defendant frequently cites in his argument, the United States Supreme Court considered whether there was a due process violation in the form of "an impermissible risk of actual bias when a judge earlier had *significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case*." *Id.* (emphasis added). In *Williams*, Ronald Castille, then-district attorney, approved the pursuit of the death penalty in the defendant's first-degree murder case. *Id.* at 5. Two and one-half decades later, the defendant—who had been convicted of murder and sentenced to death—sought post-conviction relief, receiving both a stay of execution and a new sentencing hearing. *Id.* at 6. The Commonwealth of Pennsylvania then sought further review in the Pennsylvania Supreme Court where Castille, who as the district attorney had approved proceeding capitally against the defendant, was serving as its chief justice. *Id.* After the defendant's motion for the chief justice to recuse himself from the defendant's appellate case was denied, the lower court ruling which granted post-conviction relief to the defendant was vacated. *Id.* at 7. Consequently, the defendant's death sentence was reinstated. *Id.* In determining that the Chief Justice of the Pennsylvania Supreme Court should have been disqualified from considering the defendant's appeal, the United States Supreme Court opined that "[t]he due process guarantee that 'no man can be a judge in his own case' would have little substance if it did not disqualify a former prosecutor from sitting in judgment of a prosecution in which he or she had made a critical decision." *Id.* at 9.

Just as with the *Fie* case, we find *Williams* to be inapposite here to defendant's case because Judge Lock had no involvement as a prosecutor in defendant's criminal case and had no apparent involvement in any

previous legal proceeding directly involving defendant, much less "significant, personal involvement." *Id.* at 8. Thus, we believe that "the average judge in [Judge Lock's] position is 'likely' to be neutral." *Id.* (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009)).

In sum, we conclude that defendant has not established, at a minimum, the existence of the appearance of impropriety in Judge Lock's service as the presiding judge over defendant's trial due to Judge Lock's prior position as a prosecutor of defendant's mother at a point in time when defendant was a young child. Accordingly, we are unpersuaded by defendant's argument.

B. Admissibility of photographic evidence

[2] Defendant next argues that the trial court committed reversible error in its admission of eighty-eight color photographs of Taylor's body and her injuries which were allowed into evidence through the testimony of eight of the State's witnesses. Defendant also contends that the trial court erred in permitting these photographs to be displayed before the jury on a sixty-inch monitor,[16] with the ability for witnesses to utilize enlarged and close-up views of the photographs during the witnesses' respective accounts. Although defendant acknowledges that the number and nature of Taylor's injuries were relevant to the factual determinations to be made by the jury, he contends that "the manner and extent of the State's photographic display was excessive, inflammatory, and unfairly prejudicial[,] . . . because there was no dispute about who caused the injuries and whether they were extreme and tragic. Rather at both phases of trial, the primary issue was [defendant's] state of mind." We do not determine any abuse of the trial court's discretion with regard to the forum's admission of the challenged photographs.

"All relevant evidence is admissible" at trial unless the Constitution, the legislature or the Rules of Evidence provide otherwise. N.C.G.S. § 8C-1, Rule 402 (2021). Relevant evidence includes all evidence that has "any tendency to make the existence of any fact that is of consequence to the determination of the action" either more or less probable. N.C.G.S. § 8C-1, Rule 401 (2021). A trial court may, however, exclude evidence when that evidence is "substantially outweighed by the danger of unfair prejudice, confus[es] the issues, . . . mislead[s] the jury," or causes "undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (2021). A trial court's decision

16. The monitor screen's diagonal measurement was sixty inches. The apparatus was twenty-nine inches high and fifty-three inches wide.

whether to admit or exclude evidence under Rule 403 is reviewed for abuse of discretion. *State v. Roache*, 358 N.C. 243, 284 (2004). An abuse of discretion results where the court's ruling is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285 (1988). A defendant advancing such an argument must also demonstrate that any abuse of discretion prejudiced the defendant. *State v. Temple*, 302 N.C. 1, 14 (1981).

Photographs are allowed to prove "the character of the attack made by defendant upon the deceased," *State v. Gardner*, 228 N.C. 567, 573 (1948), and "to illustrate testimony regarding the manner of a killing" in order "to prove circumstantially the elements of murder in the first degree," *Hennis*, 323 N.C. at 284. "Photographs of a homicide victim may be introduced even if they are gory, gruesome, horrible or revolting, so long as they are used for illustrative purposes and so long as their excessive or repetitious use is not aimed solely at arousing the passions of the jury." *Id.* (citing *State v. Murphy*, 321 N.C. 738 (1988); *State v. King*, 299 N.C. 707 (1980)); *see also State v. Williams*, 334 N.C. 440, 460 (1993), *remanded for reconsideration on other grounds*, 511 U.S. 1001 (1994). But "when the use of photographs that have inflammatory potential is excessive or repetitious, the probative value of such evidence is eclipsed by its tendency to prejudice the jury." *Hennis*, 323 N.C. at 284. "The number of photographs alone is an insufficient measure of their capacity to prejudice and inflame the jury; instead, the court looks to their probative value and the circumstances of their introduction into evidence." *State v. Phipps*, 331 N.C. 427, 454 (1992); *see also Hennis*, 323 N.C. at 284.

"The test for excess is not formulaic: there is no bright line indicating at what point the number of crime scene or autopsy photographs becomes too great." *Hennis*, 323 N.C. at 285. Ultimately, "[w]hether the use of photographic evidence is more probative than prejudicial and what constitutes an excessive number of photographs in the light of the illustrative value of each likewise lies within the discretion of the trial court." *Id.* Factors that may be considered in determining whether photographs should be excluded under Rule 403 include: (1) the number of photographs; (2) whether the photographs are unnecessarily duplicative of other testimony; (3) whether the purpose of the photographs is aimed solely at arousing the passions of the jury; and (4) the circumstances surrounding their presentation. *State v. Mlo*, 335 N.C. 353, 374–75 (1994). In addition,

> [w]hat a photograph depicts, its level of detail and scale, whether it is color or black and white,

> a slide or a print, where and how it is projected or presented, the scope and clarity of the testimony it accompanies—these are all factors the trial court must examine in determining the illustrative value of photographic evidence and in weighing its use by the [S]tate against its tendency to prejudice the jury.

Hennis, 323 N.C. at 285. "When a photograph 'add[s] nothing to the State's case,' then its probative value is nil, and nothing remains but its tendency to prejudice." *Id.* at 286 (alteration in original) (quoting *Temple*, 302 N.C. at 14).

Defendant relies heavily on *Hennis*, which defendant characterizes as "a triple murder case involving the brutal stabbing of a mother and her two children[17] where the display of a total of thirty-five victim photographs was held to be so inflammatory as to require a new trial." In *Hennis*, slides of the thirty-five photographs approved by the trial court for display were projected on "a screen large enough to project two images 3 feet 10 inches by 5 feet 6 inches side-by-side on the courtroom wall opposite the jury. This design permitted the jury to view the slides projected just above [the] defendant's head." *Id.* at 282. In addition to nine pictures of the victims' bodies which were photographed at the crime scene, and "[d]espite the fact that [the] defendant had signed stipulations as to the cause of the victims' deaths that tracked the autopsy reports, twenty-six slides of the bodies taken at the autopsy were used by forensic pathologists to illustrate their testimony as to the nature and extent of the wounds." *Id.* at 283. Moreover, after the pathologists and other witnesses utilized the projected enlarged slides to illustrate their respective testimonies, exhibition of the same photographic evidence was repeated when

> thirty-five 8-by-10-inch glossy photographs, the majority of which were in color, were subsequently distributed, one at a time, to the jury. This process took a full hour *and was unaccompanied by further testimony.* The autopsy photographs generally depicted the head and chest areas of the victims and revealed in potent detail the severity of their wounds, made all the more gruesome by the visible protrusion of organs, caused by process of decomposition. The trial court's charge to the jury shortly before it retired

17. A third child, who was an infant, was discovered unharmed in a crib. *State v. Hennis*, 323 N.C. 279, 281 (1988).

> to consider its verdicts included the admonition that the photographs and other illustrative evidence were to be used "for the purpose of illustrating and explaining the testimony of the various witnesses. . . . [and that they were not to] be considered . . . for any other purpose."

Id. (alterations in original) (emphasis added).

In concluding that admission of this photographic evidence constituted prejudicial error and in awarding the defendant a new trial in *Hennis*, this Court observed:

> In spite of the trial court's appropriate determination that many of the photographs initially proffered by the [S]tate were repetitious and the court's consequential ruling that these could not be admitted into evidence, many other photographs with repetitive content were allowed. The record reflects such repetition even in the testimony of one of the pathologists, who at one point had nothing to say concerning a slide depicting a child's neck wound except to identify it and add, "This looks like the one we saw before." Likewise, the several color images of the same victim's neck wound taken at the autopsy cannot be said to have added anything in the way of probative value to the color images of that same wound taken at the crime scene and projected before the jury in illustration of the previous testimony, even when the witness was testifying to different facts. Although this Court has not disapproved the illustrative use of autopsy photographs, the majority of the twenty-six photographs taken at the victims' autopsies here added nothing to the [S]tate's case as already delineated in the crime scene slides and their accompanying testimony. Given this absence of additional probative value, these photographs—grotesque and macabre in and of themselves—had potential only for inflaming the jurors.
>
> In addition, the prejudicial effect of photographs used repetitiously in this case was compounded by the manner in which the photographs were presented. . . . [on] an unusually large screen on a wall

> directly over defendant's head [and in addition] the thirty-five duplicative photographs published to the jury one at a time just before the [S]tate rested its case were excessive in both their redundancy and in the slow, silent manner of their presentation.

Id. at 286 (citations omitted). Defendant analogizes the facts of *Hennis* to the facts existent in the present case to support his contention that the admission of eighty-eight photographs of Taylor and her injuries here were likewise an abuse of discretion which requires that defendant receive a new trial. We find defendant's comparison of the two cases to be unavailing.

Defendant suggests that the trial court here could have reduced the alleged prejudicial effect of the photographs by altering, in various ways, the manner in which the photographs were displayed. He posits that the photographs at issue could have been displayed on a smaller monitor; the monitor could have been positioned further away from the jury; the size of the photographs displayed on the monitor could have been reduced; or printed copies of the photographs could have been distributed individually to the jurors.

As an initial matter, we agree with defendant that the photographs in his trial that were presented on the monitor were displayed with "high definition and zooming capability" and in a manner "that did not exist in 1988," when this Court's Hennis opinion was issued. Further, defendant's trial took place in 2014—more than twenty-eight years after defendant Hennis's trial occurred—and advancements in technological areas such as photographic reproductions and electronic presentations have been acknowledged and accepted in society's various institutions, including the judicial system. As a result, trial courts are certainly eligible, in the exercise of proper discretion, to utilize such advancements in an effort to maximize the effectiveness of the judicial system's ability to adapt such advancements in the evolution of technology to the achievement of justice.

With regard to the size and location of the monitor which was used to display the photographic evidence at issue, defendant asserts that as in "*Hennis*—where the jurors viewed 3 x 5 foot photos [projected] on a wall, then sat in eerie silence viewing and passing 8 x 10 photographs for an hour—the manner of presentation here was unfairly prejudicial and inflammatory." We recognize that there are numerous significant distinctions between the manner of display of the photographic evidence in *Hennis* and in the case at bar. First, the size of the photographic monitor

here—a device twenty-nine inches high and fifty-three inches wide—was notably smaller than "a screen large enough to project two images 3 feet 10 inches by 5 feet 6 inches side-by-side" utilized in *Hennis*. *Id.* at 282. While defendant postulates that "[f]rom the jury's perspective, the display here was probably as large or larger than in *Hennis*"—noting that the monitor in defendant's trial was placed "seven feet from the jury"—he acknowledges that "[n]o measurement of the exact distance between the jurors and the courtroom wall appears in the *Hennis* opinion, so it is not possible to make an exact relative comparison."

Secondly, as opposed to the monitor which displayed the photographs in *Hennis*, the location of the projected images in the instant case did not "permit[ ] the jury to view the slides projected just above defendant's head" in a way "that the jury would continually have [defendant] in its vision as it viewed the slides[, which] was a manner of presentation that in itself quite probably enhanced the prejudicial impact of the" photographic evidence. *Id.* at 282, 286. Moreover, after hearing from the parties about the placement of the monitor and the potential alternative of the distribution of copies of the photographs among the jurors, the trial court here determined that there was no better location in the courtroom than the selected one for the monitor to be placed that would permit all of the jurors and alternates, as well as the lawyers and witnesses, to see it; that placing the monitor in a courtroom location suggested by defendant which was more distant from the jury box would cause the courtroom to be too crowded; and that distributing smaller photographs of the evidence in question to the jurors by hand would take more time. The trial court also noted that employing the sixty-inch monitor rather than using a smaller one, or alternatively circulating eight-inch by ten-inch photographs would prevent the repetitive display of the pictures by making the evidence "visible to all jurors during a witness's testimony without the witness having to repeat the testimony, without having the exhibit shown at multiple locations along the jury box as would be required if a smaller monitor was being used or smaller photographs were being used."

The trial court's extended discussion with the parties of the benefits and drawbacks of potential methods for displaying the photographic evidence and the trial court's ultimate discretionary decision regarding the location and manner of display of the pictures which (1) were not presented so as to have defendant closely and continually in the same visual field as graphic images of the victim, (2) involved a photographic monitor which was smaller than the display screen utilized in *Hennis*, and (3) conserved time and prevented repetitive exhibitions

of the evidence as compared to the alternative option of the distribution of individual photographs among the jurors all combine as factors to render defendant's analogy to *Hennis* in this arena as unpersuasive. Therefore, we do not identify any abuse of the trial court's discretion in its chosen manner of display of the challenged photographic evidence which was shown during defendant's trial.

Defendant also objected both to the total number of photographs introduced into evidence and the multiple exhibitions of some of the photographs upon the State's occasional utilization of the same photographs to illustrate the respective testimonies of different witnesses. Defendant again cites *Hennis*, emphasizing that a trial court must engage in the "critical" determination of whether the proffered photographs "unduly reiterate illustrative evidence already presented" before ruling on admissibility where the number of disputed photographs is asserted to be excessive, because "[w]hen a photograph 'add[s] nothing to the State's case,' " it lacks any probative value, is solely prejudicial, and thus is inadmissible under the Rule of Evidence 403 balancing test. *Id.* at 286 (second alteration in original) (quoting *Temple*, 302 N.C. at 14).

As previously noted, in *Hennis*, this Court held that the trial court abused its discretion in admitting thirty-five color photographs because they were repetitious, lacked probative value and served only to inflame the jurors. *Id.* at 286. In making this determination, the Court perceived that multiple photographs of the same wounds were gratuitously displayed; the State's witnesses acknowledged that some of the photographs showing the same wound did not add anything to the illustration of their respective accounts; "the majority of the twenty-six photographs taken at the victims' autopsies . . . added nothing to the [S]tate's case as already delineated in the crime scene slides and their accompanying testimony"; and *all* of the thirty-five pictures, which had already been displayed to illustrate testimony during the presentation of the State's case, were published to the jury for a second time—one at a time—in a process that consumed a full hour and was "*unaccompanied by further testimony*." *Id.* at 283, 286 (emphasis added).

Once again, we find that aspects of *Hennis* upon which defendant heavily relies are readily distinguishable from the circumstances to which defendant offers parallels in his case. Here, any usage of a displayed photograph was in conjunction with the illustration of a witness's testimony. Also, the State in the current case did not ever show a photograph to the jury at any time, "unaccompanied by . . . testimony," while in *Hennis* the State displayed every admitted photograph to the jury one final time just prior to the jury's deliberations and without accompanying

testimony. Having generally identified the salient distinctions between *Hennis* and the present case with reference to defendant's arguments about the analogous nature of the presentation of photographic evidence, we now exercise a closer look at specific photographs which defendant features in his contentions.

State's Exhibit 26, which was a photograph of Taylor's full body as it appeared in the emergency room treatment area of Johnston Memorial Hospital, was used to illustrate the respective testimonies of Dr. Evans and nurses Butler and Gooch. These three medical providers all treated Taylor when defendant brought her to the facility. Gooch used State's Exhibit 26 in order to illustrate the "marks, lacerations, abrasions, bruises," and avulsions on the front side of Taylor's torso, arms, and legs, along with redness in Taylor's vaginal area, that were visible upon the removal of Taylor's clothes and in order to confirm that none of the injuries to Taylor's body were caused by any of the treatment that the medical professionals were providing, such as the insertion of a catheter into Taylor's urethra or the insertion of a needle into Taylor's body. Evans then used the exhibit to "give an idea of the extent of the injuries"; to illustrate his reason for making a notation on Taylor's medical chart that her injuries were "[t]oo numerous to count, bite marks, abrasions, and lesions"; and to demonstrate that the injuries were not eczema, as defendant had suggested. Each of these displays served to illustrate a different point and thus can be viewed to have "added" a component to the State's case. When the prosecution subsequently displayed State's Exhibit 26 during Butler's testimony, however, the only two questions posed by the State to Butler were whether Butler could identify the person depicted in the photograph as Taylor. While the testimony elicited during this third display of State's Exhibit 26 was not probative, we view the presentation through this third witness as primarily corroborative testimony of the other two witnesses as to Taylor's identity.

Defendant contends that Dr. Kocis of the pediatric intensive care unit at UNCMC and Dr. Williams of the emergency room at UNCMC used some[18] of the same photographs to illustrate their testimony. Just

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18. Defendant represents to this Court that *five* photographs were displayed during both doctors' respective testimonies. Our review of the trial transcripts indicates, however, that only *three* photographs were displayed to the jury during both Kocis's and Williams's testimony: State's Exhibits 578, 579, and 586. Two photographs which are noted in the trial transcript as being *received* during Kocis's testimony—State's Exhibits 584 and 585—are specifically denoted as *not having been published to the jury* during Kocis's testimony, and at no point in the transcript portions covering Kocis's testimony did Kocis or the prosecutor mention those exhibits. State's Exhibits 584 and 585 were employed to illustrate Williams's testimony.

before Williams testified, defendant asked to be heard outside of the presence of the jury regarding Williams's potential testimony and any photographic evidence that the State intended to introduce. Defendant expressed his apprehension that the evidence would be cumulative and prejudicial, and in agreeing that there was reason for concern, the trial court specifically inquired as to whether the State intended to show every photograph during Williams's testimony that had been displayed during Kocis's testimony. The State agreed to "cull them down" and the trial court then instituted a fifteen-minute recess. When the trial court and the parties' counsel discussed the matter of the photographs after the recess, the State proposed to display only five photographs during Williams's testimony. An express entry regarding the operation of Rule of Evidence 403 was made thereafter in the record.

Kocis used State's Exhibit 578, which depicted a frontal view of Taylor from her head to her hips. The photograph apparently was taken while Taylor was waiting to be moved into the pediatric intensive care unit. The exhibit illustrated Taylor's appearance at the time that Kocis first saw the child. It showed that Taylor had been placed in a collar to prevent additional injury to the neck region of her body, that Taylor was using a breathing tube, and that there were "few spared areas" on the child's skin which avoided black and blue discoloration along with scabbed wounds in different shades of red. There were darker scabs indicating older wounds that had started to heal and other scabs with "fresh red blood," indicating that they had been caused "within hours." Kocis also noted an avulsion—"a pit" where layers of skin had been removed—in the location on the body where one of Taylor's nipples would have been and nearby areas of skin that were healing but appeared infected. Kocis also identified areas that were "scabbing, some healing, and pus down below," as well as "pink healthier skin," bruising, and an older scar. He emphasized that in "the only place [on Taylor's body] that's spared . . . from the redness, from the lacerations, from the cuts, . . . you still see the bruising from underneath that. So it's not normal skin, it's just not as abnormal as everything else." Kocis related that he had observed "injuries on top of injuries," and stated, in describing the wounds depicted in State's Exhibit 578: "[T]his is within hours. This is within days. And then the more mature scarring that I showed you a little earlier was closer to the seven-to-ten days." When Williams utilized this exhibit in his own testimony, he—like Kocis—also detected Taylor's missing right nipple and numerous other wounds, while also noting that the injuries had occurred over "a ten-day time frame." Williams then testified that Taylor's condition as revealed in the exhibit, in conjunction with medical tests, helped the treating team which was diagnosing

Taylor to determine the timing of her head injury as compared to the other injuries she suffered:

> I think the most profound thing to us in terms of this happening over a period of days was all the evidence we had, based on her clinical appearance and based on the head CT scan, was that that injury had occurred several hours ago maybe, at most maybe the night prior. And then these obviously did not occur today. These, again, are starting to scab over to some extent. You know, that would happen over a period of time.

In light of defendant's indicted charge of murder by torture, which connotes the repeated infliction of suffering over time, *see State v. Lee*, 348 N.C. 474, 489 (1998), we cannot opine that Williams's use of this exhibit "add[ed] nothing" to the resolution of the issues before the jury in this case. *Hennis*, 323 N.C. at 286.

Kocis also used State's Exhibit 579 during the course of his testimony, which depicted the front of Taylor's body from shoulders to knees. Kocis identified "lots of linear lesions . . . typical of a whipping type injury," including on the child's labia majora, where Kocis noted a "deep pit" that appeared to be infected and that might have been healing and scabbing. In discussing this photograph with the jury, Williams noted "a retention sticker" used to keep a catheter in place and observed that "the nurse or tech" who had placed the sticker had difficulty in applying it "without it covering up a wound." Williams then discussed "a deeper avulsion" which was attempting to heal in a manner that suggested a "wound[that hadn't been] cared for and closed within a period of 24 or 36 hours." Williams's use of the photograph to explain to the jury that Taylor had suffered a deep wound, which was healing in a manner that suggested no one had treated it, added relevant information to the State's case given defendant's position at trial that he had undertaken some efforts to aid Taylor following the abuse he inflicted prior to causing her head injury.

In displaying State's Exhibit 586, a photograph of Taylor's head and face, Kocis again focused on illustrating that Taylor had received many varied types of injuries—wounds to her nose and a black eye—and that the injuries appeared to have occurred over a period of time—scabbing on the nose but a more recent black eye. Kocis also noted that although Taylor's eyes were open, she likely had minimal brain function at this point and noted that she had a breathing tube placed. Later, Williams

used the same photograph to illustrate his testimony going into more detail about the effects of Taylor's head trauma on her brain function, stating that Taylor's eyes were fixed in an indication that "brain function at the time of this picture is essentially devastated," confirming the theory of Kocis's testimony. Williams also explained to the jury that the endotracheal tube that had been placed, distinct from the breathing tube Kocis had described, was intended "to help alleviate secretions that will occur under stress."

Defendant next identifies as cumulative five photographs taken by Barbaro, who testified as a bite mark expert, to illustrate his opinions. Defendant acknowledges that these photographs were not shown during the testimony of any other witness, but emphasizes that they depicted injuries already shown; to wit, bite marks on Taylor's body. Barbaro used the photographs to explain: (1) the different levels of bite marks Taylor sustained, (2) how Barbaro determined that the bites were caused by an adult rather than a child, (3) how Barbaro determined that certain of the bite marks were consistent with defendant's dentition, (4) that the bite marks had been inflicted "at different times" within a ten-day period, (5) that at least one bite cut through Taylor's skin and caused bleeding, and (6) that one injury to Taylor's cheek indicated an extended bite. While other medical professionals testified that they believed Taylor had suffered many bite marks across her body, no other witness used photos of the bite marks to illustrate the same testimony as Barbaro presented. Therefore, we cannot conclude that this expert witness's use of five photographs taken as part of his specific consultation was cumulative and added nothing to the State's case.

Defendant also states that "the medical examiner used 28 photographs from the autopsy, many showing the same injuries and body parts previously displayed." It does not appear that any of the photographs displayed during the medical examiner's testimony had previously been shown. Further, our review of the testimony from this witness in conjunction with the photographic evidence concerned his identification of repetitious "pattern" injuries in various areas of Taylor's body; multiple foreign bodies discovered in many areas of Taylor's body (at least some of which appeared to be metal wire fragments); and *inter alia*, specific injuries to Taylor's cheek, legs, arms, ears, hands, fingers, legs, feet, and toes; wounds in her external and internal vaginal area; and multiple lacerations inside her mouth in addition to a likely self-inflicted bite to her lip. While different photographs of the same body parts were displayed to illustrate the testimony of other witnesses, because Taylor was no longer being treated medically, the autopsy photographs allowed

the medical examiner to provide detailed testimony about the nature and number of various types of injuries to different areas of her body. In addition, a number of the photos in question were taken after the medical examiner had manipulated or cut into Taylor's body in a manner impossible before her death, plainly revealing information about her condition and injuries which could not have been evident to previous witnesses, each of whom testified about their opinions of Taylor's condition before her death and while they were providing urgent care to her. The medical examiner was also able to opine about the ways in which an extension cord with the metal interior strands exposed could have caused some of Taylor's injuries. We are unable to conclude that the autopsy photographs which the medical examiner used to illustrate his testimony failed to add to the State's case or that their prejudicial impact substantially outweighed their probative value.

Defendant also notes that expert witness McNeal-Trice, who testified regarding whether the injuries defendant inflicted upon Taylor constituted torture "discussed four previously-used body photographs and five new close-up photographs of genitalia to illustrate her testimony." Defendant does not, however, explain how these photographs were duplicative of the evidence previously offered. As with the photographs used to illustrate Barbaro's bite mark testimony, this expert was testifying to a specific question—torture—not addressed by any previous witness, and we see no excess in her usage of a relatively small number of photographs, even if some may have been seen previously.

Finally, defendant notes that during its closing argument, the State showed eight photographs of Taylor's wounds, including bite marks and genital injuries, which had previously been published to the jury. As with the manner of presentation of the photographs, we find defendant's reliance on *Hennis* to support his argument that the repetition of the publication of some photographs of Taylor's body was cumulative and constituted prejudicial error to be unavailing. With the exception of the third display of Exhibit 26 during Butler's testimony, the purpose of the republication of photographs here is more analogous to that in *Williams*. The defendant in that case also relied on *Hennis* to support his argument "that the republication of [certain gory] photographs was 'unnecessarily repetitive' and that it was performed 'for no other reason than to inflame the jurors' anger towards defendant.' " *Williams*, 334 N.C. at 461. In rejecting the defendant's position and finding his analogy to *Hennis* "inapposite," the Court noted, *inter alia*, that the repeated display of certain photographs during the State's case was a result of their use to illustrate both general testimony from one witness and then

for more detailed purposes with another witness. *Id.* at 461–62; *see also State v. Dollar*, 292 N.C. 344, 354 (1977) (declining to find error where "photographs were not merely repetitious, each being useful to illustrate a portion of the testimony of the witness not illustrated by other photographs"). The Court in *Williams* also emphasized that the republication of photographs in that case did not involve presentation "in a fashion likely to heighten the jury's emotional reaction," such as passing individual photographs directly to each member of the jury separately, "one by one and in total silence," as occurred in *Hennis*. *Williams*, 334 N.C. at 461–62.

In addition to arguing that the trial court reversibly erred in admitting cumulative evidence by allowing the repeated presentation of certain photographic evidence, defendant characterizes the admission of eighty-eight photographs of Taylor's body as excessive to the point of prejudicial, suggesting that

> [i]t was not necessary to magnify in grim detail every square inch of Taylor's body, over and over again. Her injuries were horrible. No juror could have failed to grasp that fact, which could have been conveyed in a brief period of time, with a handful of photographs, through a few witnesses.

Defendant reminds us that in *Hennis*, thirty-five photographs were found to be excessive even though that case involved three victims, each of whom had several wounds. Yet, standing alone, the *number* of photographs offered is not dispositive to the question of their admissibility. *See, e.g.*, *Phipps*, 331 N.C. at 454. For example, in *State v. Pierce*, the trial court admitted "twenty-six photographs of the [single] victim's body to illustrate the testimony describing [the child's] injuries," including that she "had been severely beaten and . . . had bruises, grab marks, pinch marks, scratches, nicks, bumps, and other injuries on almost every inch of her body." 346 N.C. 471, 487 (1997). The Court concluded that, "[g]iven the number, nature, and extent of the victim's injuries, . . . the trial court did not abuse its discretion by admitting twenty-six photographs of the victim's body." *Id.* at 488.

We are mindful that the severity of the crimes with which defendant was being charged and the unusually extended time period over which those crimes were alleged to have occurred, when combined with the youth and complete vulnerability of the victim and the extraordinary number of injuries she sustained, created a situation where the emotions of jurors would be easily inflamed. In contrast to defendant's

suggestion, however, the State was not attempting to demonstrate to the jury merely that Taylor's "injuries were horrible," a fact which was beyond dispute and could likely have been "conveyed in a brief period of time, with a handful of photographs." Rather, the State was not only faced with a case that involved "horrible" injuries—for example, according to the medical examiner Taylor's wounds encompassed "shallow lacerations and abrasions" that were "just too much [sic] to count," as well as at least 144 separate injuries, including at least sixty-six bite marks, multiple injuries from sexual assaults, and her fatal head injury—but was proceeding on charges that included, *inter alia*, murder by torture, felony murder, and felony child abuse inflicting serious injury.

The conviction of a defendant on a charge of felony intentional child abuse inflicting serious bodily injury requires that the State prove "serious bodily injury," *see* N.C.G.S. § 14-318.4(a3) (2021), and "to sustain a conviction of first-degree murder by torture, the State must prove that the defendant intentionally tortured the victim and that such torture was a proximate cause of the victim's death," *State v. Stroud*, 345 N.C. 106, 112 (1996), *cert. denied*, 522 U.S. 826 (1997). "Torture is defined as the course of conduct by one or more persons which intentionally inflicts grievous pain and suffering upon another for the purpose of punishment, persuasion, or sadistic pleasure," and "[c]ourse of conduct has been defined as the pattern of the same or similar acts, repeated over a period of time, however short, which established that there existed in the mind of the defendant a plan, scheme, system or design to inflict cruel suffering upon another." *Lee*, 348 N.C. at 489 (extraneity omitted). "Felony murder on the basis of felonious child abuse requires the State to prove that the killing took place while the accused was perpetrating or attempting to perpetrate felonious child abuse with the use of a deadly weapon," which can include, *inter alia*, "an attack by hands alone upon a small child." *Pierce*, 346 N.C. at 493 (citing N.C.G.S. § 14-17(a)). Conviction of a defendant on a charge of felony intentional child abuse inflicting serious bodily injury requires the State to prove "serious bodily injury," *see* N.C.G.S. § 14-318.4(a3) (2021), which is defined as "[b]odily injury that creates a substantial risk of death or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization," *id.* § 14-318.4(d) (2021).

While defendant admitted to inflicting some of the injuries upon Taylor, he pled not guilty to charges against him. The "prosecution's burden to prove every element of the crime is not relieved by a defendant's

tactical decision not to contest an essential element of the offense." *Estelle v. McGuire*, 502 U.S. 62, 69 (1991). Even "a stipulation as to the cause of death does not preclude the State from proving all essential elements of its case." *State v. Elkerson*, 304 N.C. 658, 665 (1982). Defendant also specifically denied sexually assaulting Taylor, argued that there was a legally significant break between his prior abuse of the child and his infliction of her head injury by shaking her, claimed that the head injury was accidental, and argued that he lacked the intent to torture Taylor or otherwise cause her death. Defendant's theory of the case made both the number and severity of the injuries to Taylor and the time frame over which they were inflicted central to numerous issues before the jury, including: (1) the seriousness of Taylor's injuries, (2) the level of pain and suffering she endured as a result of defendant's abuse, (3) defendant's intention in inflicting both the fatal head injury and the other abuse on Taylor, (4) whether there was any break in defendant's abuse of Taylor before he struck her head against the wall or door of the outbuilding, (5) whether defendant had treated or attempted to treat any of Taylor's injuries, and (6) whether defendant should have known Taylor needed medical attention when he refused the help offered by his grandmother. The jury also needed to evaluate defendant's credibility as it considered his accounts of how Taylor's injuries had occurred—from falling off an air mattress, scratching areas of eczema, the bites of another child, or discipline by Reyes—and his denial that he sexually assaulted Taylor.

"[A]ny evidence probative of the State's case is always prejudicial to the defendant." *State v. Stager*, 329 N.C. 278, 310 (1991). Here, the challenged photographs accurately reflected the reality of the crimes with which defendant was being tried and were probative to the issues before the jury, and therefore they cannot be said to have added "*nothing* to the State's case," *Hennis*, 323 N.C. at 286 (emphasis added), or to have been offered for the sole purpose of inflaming the passions of the jury, *Mlo*, 335 N.C. at 375. In light of this Court's precedent and the totality of the circumstances in this case, we conclude that the eighty-eight photographs admitted to illustrate the testimony of the State's witnesses were not excessive, repetitive, or unduly prejudicial, and we see nothing in the trial court's considered limitation of the photographs permitted to illustrate the testimony of the State's witnesses that would suggest that the trial court's decision was "manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision." *Hennis*, 323 N.C. at 285. Defendant's argument to the contrary is overruled.

C. Evidence of emotional reactions from medical and law enforcement personnel

[3] Defendant next argues that the trial court erred by permitting various medical personnel and law enforcement officers to testify during the guilt–innocence phase of trial about their emotional reactions to initially seeing Taylor's injuries. Defendant characterizes this testimony as "a version of victim impact evidence" and contends that it was both irrelevant and so highly prejudicial that its admission violated the North Carolina Rules of Evidence and requires that defendant receive a new trial. We are not persuaded.

As noted above, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," N.C.G.S. § 8C-1, Rule 401, and "relevant evidence is admissible" in most situations, *id.* § 8C-1, Rule 402. A trial court's rulings on the relevancy of evidence "are technically not discretionary," but they are accorded great deference on appeal. *State v. Lane*, 365 N.C. 7, 27, *cert. denied*, 565 U.S. 1081 (2011). When evidence is challenged on relevancy grounds,

> [t]he burden is on the party who asserts that evidence was improperly admitted to show both error and that he was prejudiced by its admission. The admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded.

State v. Gappins, 320 N.C. 64, 68 (1987) (citations omitted).

Further, even relevant "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403 (2021). As this Court has recognized, "most evidence tends to prejudice the party against whom it is offered. However, to be excluded under Rule 403, the probative value of the evidence must not only be outweighed by the danger of unfair prejudice, it must be *substantially* outweighed." *State v. Lyons*, 340 N.C. 646, 669 (1995). On appellate review, we will reverse a trial court's decision to admit evidence after undertaking the Rule 403 balancing determination only where an abuse of discretion is demonstrated. *Hennis*,

323 N.C. at 285. With these statutory definitions and standards of review in mind, we turn to a consideration of the evidence defendant challenges.

Defendant filed a pretrial motion to prohibit the State's witnesses from describing their emotional reactions to seeing Taylor's injuries, and following a hearing, the trial court allowed the motion in limine, determining that it would rule on the admissibility of such testimony on a witness-by-witness basis as each specific challenge arose at trial. The trial court stated that it perceived an important distinction between witnesses' testimony about their immediate reactions to seeing Taylor's injuries and any later aftereffects those witnesses may have experienced as a result, and thus informed the parties that the State would generally be permitted to elicit testimony regarding the former but not the latter. Once the trial began, defendant challenged the following portions of the testimony of five of the State's witnesses.

Registered nurse Gooch, who had ten years of medical experience, was on duty at Johnston Memorial Hospital when Taylor was brought in by defendant. Defendant objected when Gooch testified that Taylor's injuries were "distracting" and "unusual," at which point the trial court sustained the objection and struck the testimony. However, when the prosecutor asked Gooch about the effect of seeing Taylor's injuries, the trial court overruled defendant's objection and allowed Gooch to testify:

> I was kind of paralyzed for just a few moments. I really didn't know what to think or feel. I have been in the emergency room for quite some time. . . . I remember telling the dispatcher that I couldn't explain to them what it was that I was seeing, that I could not put it into words. And I just asked them if they'd please send law enforcement over here so they can see what it is that I'm seeing. . . . I just was unable to even verbalize what I was seeing to try to get them to send someone over there.

Similarly, Butler, a nurse with twenty years of experience who also treated Taylor at Johnston Memorial Hospital, was allowed to testify, over defendant's objections, about seeing Taylor's injuries generally, explaining, "It . . . was horrible. I mean, we see a lot of stuff, but to see, you know, I mean—." She then described her reaction to seeing a bruise on Taylor's rectum stating, "I just couldn't take any more . . . so I looked at him, . . . I said, 'Oh, my God!' . . . [and] it got kind of quiet. And then one of the other nurses, because a lot of us have children, one of the other nurses said, 'What have you done?' " Butler also explained

why she chased and tackled defendant when he attempted to leave the emergency room:

> Well, after I had seen [Taylor] like that, I mean, I was very, very upset. . . . [H]e was trying to leave, and so I come around the corner and jumped on him. I grabbed him by the throat, slung him around . . . .
>
> . . . .
>
> I caught him from behind. I caught him by the throat, and I slung him around, and I started pushing him for everything I was worth. I was trying to get him back to the E.R., you know.
>
> . . . .
>
> [When I grabbed him by the throat] I was trying my best — I tried to rip his esophagus out.
>
> . . . .
>
> . . . I'm standing in the doorway. And by this point, I'm crazy. I mean, I'll be honest with you, I mean, after you've seen something like that on a little child, with wounds everywhere and everything else that happened, and then he's going to run, you have to chase him down, and I got him in the room . . . . I just remember uniforms showed up on my left side. . . . By this time, . . . I have just lost it. I told them, I said, "Give me your gun—
>
> . . . .
>
> —I'll do what the hell needs to be done, right here, right now."
>
> . . . .
>
> . . . I realized that I had totally lost it, and — and I knew that [law enforcement officers] were there, and so I went outside. I couldn't take any more. That was it.
>
> . . . .
>
> . . . [I]t broke my heart to see [Taylor] like that. I just had had all I could take. That was it.

. . . .

> [After the incident, it was] at least thirty minutes before I could go back in and continue to work.

The trial court also overruled defendant's objection to testimony from Keith Kocis, an attending pediatric physician in the intensive care unit of the UNCMC with over ten years of experience treating patients who had suffered "severe child abuse," describing Taylor's condition as "deeply disturbing." Kocis was also permitted to testify that he had "a very visceral response where I felt I was going to vomit" upon viewing Taylor's injuries because, despite having been "exposed to serious and traumatic" injuries in the course of his work, he had "never seen" such harm in his career.

Matt DeSilva, a deputy with the Wake County Sheriff's Office with more than a decade of experience, including with child death investigations, was permitted to testify that when a physician rolled Taylor onto her side, DeSilva told the doctor he "just couldn't bear to look at it anymore, I asked him to stop . . . . I told him that was enough, I couldn't look at it. I couldn't bear to see that" and described viewing Taylor's body as "the most horrifying thing." Defendant objected to this final comment and the trial court sustained the objection. Citing Rule of Evidence 403 and noting that DeSilva "became visibly upset in the presence of the jury while testifying" such that "it's already obvious to the jury the emotional effect of observing [Taylor's injuries] upon the witness," the trial court prohibited the State from eliciting further testimony from DeSilva about the emotional impact of his seeing Taylor's injuries.

Finally, Jefferson Williams, an attending physician in the emergency room at the UNCMC with experience treating child abuse and trauma victims, was permitted to testify, over defendant's objections, that he was "shocked" by the "huge display of other injuries" on Taylor's body beyond the head injury which eventually proved fatal to the child. Williams was also allowed to testify about his initial reaction upon seeing Taylor's injuries:

> So, I was immediately nauseated I think. We moved beyond that, obviously you have to do your job. And I became—I think probably the best way to describe it is I became angry. Most of—when a person gets injured, when we see an injured patient in a Level 1 trauma center, most of the time that injury has happened in an instant. You know, they've been in a car wreck or they've been shot or been stabbed or,

> you know, obviously they had some pain and we work on that, we treat that. That happens in an instant and they bring them to us and we fix them up.
>
> When they unwrapped the sheet [covering Taylor], it became very clear that this person had been suffering for a long period of time and I was not prepared for that.

We begin our analysis with the question of relevance as regards these witnesses' remarks about their reactions to seeing Taylor's body and the injuries she suffered at the hands of defendant. Defendant was charged with and convicted of, *inter alia*, felony intentional child abuse inflicting serious bodily injury and first-degree murder on theories of murder by torture and felony murder. Evidence which goes to any element of an offense charged is plainly relevant since the State must "prove every element of a crime beyond a reasonable doubt before an accused may be convicted." *See, e.g.*, *State v. Keel*, 333 N.C. 52, 59 (1992). First-degree murder by torture plainly requires the State to prove torture as an element, and while the General Assembly did not define that term in its statutory enactment, *see* N.C.G.S. § 14-17 (2021), this Court has approved the following as a definition of the term: "the course of conduct by one or more persons which intentionally inflicts *grievous pain and suffering* upon another for the purpose of punishment, persuasion, or sadistic pleasure." *State v. Crawford*, 329 N.C. 466, 484 (1991) (emphasis added)*; see also Stroud*, 345 N.C. at 112 ("In order to sustain a conviction of first-degree murder by torture, the State must prove that the defendant intentionally tortured the victim and that such torture was a proximate cause of the victim's death."). Likewise, conviction of a defendant on a charge of felony intentional child abuse inflicting serious bodily injury requires the State to prove "serious bodily injury," *see* N.C.G.S. § 14-318.4(a3) (2021), which is defined as "[b]odily injury that creates a substantial risk of death or that *causes serious permanent disfigurement*, coma, a permanent or protracted condition that *causes extreme pain*, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization," *id.* § 14-318.4(d) (emphases added).

Defendant acknowledges precedent of this Court holding both that a jury may consider the nature of a victim's injuries to determine their seriousness, *State v. Hedgepeth*, 330 N.C. 38, 53 (1991), in support of the felony child abuse charge, and that the State was entitled to present evidence supporting its allegation that Taylor experienced "grievous pain and suffering" as part of its case for murder by torture,

State v. Anderson, 346 N.C. 158, 161 (1997). However, defendant contends that the above-quoted testimony about certain witnesses' emotional reactions was not relevant—that it did not "satisf[y] the low bar of logical relevance"—to show the seriousness of Taylor's injuries or to shed light on the extent of her pain and suffering. *See State v. Hembree*, 368 N.C. 2, 17 (2015). We disagree.

The challenged testimony can fairly be characterized as expressions by witnesses, each of whom had regular exposure to traumatic physical injuries and/or physical and sexual child abuse, that Taylor's injuries were more severe and extensive than those usually seen in their work and, in some cases, were the worst injuries they had witnessed in their professional experience. That the number and degree of Taylor's physical injuries were far beyond what the experts expected to encounter or typically see in their professional capacities would appear to provide context for the jurors who were tasked with determining whether Taylor's bodily injuries were "serious" or would have caused her "grievous pain and suffering." Viewed in this light, the challenged testimony would certainly appear to have had at least a "*tendency* to make the existence of any fact that is of consequence to the determination of the action more probable . . . than it would be without the evidence." *See* N.C.G.S. § 8C-1, Rule 401 (emphasis added).[19] Accordingly, we hold that the challenged testimony was relevant and properly admitted to the extent that it constituted expressions by the witnesses that Taylor's injuries were much more severe than those in a typical child abuse or trauma case and that the number and degree of these injuries indicated that Taylor would have experienced grievous pain and suffering.[20]

To the extent that any of the challenged portions of the five witnesses' testimony discussed here were not relevant and thus were

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19. We are also mindful that a trial court's rulings on relevancy are reviewed with great deference, *State v. Lane*, 365 N.C. 7, 27 (2011), and we observe that the trial court here considered defendant's motion to prohibit all such testimony, explained its general plan for assessing relevancy before the trial began, and then evaluated the admissibility of emotional reaction testimony from each witness as it was challenged by defendant, sustaining some objections while overruling others.

20. We decline defendant's suggestion that we analyze his challenges to this evidence by viewing the witnesses' testimony as akin to victim impact evidence, which is permissible for a jury's or court's consideration at a sentencing proceeding. *See* N.C.G.S. § 15A-833(a)(1) (2021) (defining such evidence as including "[a] description of the nature and extent of any physical, psychological, or emotional injury suffered by the victim as a result of the offense committed by the defendant"). The expert witnesses provided their testimony during the guilt–innocence phase of defendant's trial and were called by the State to meet its burden at that stage of the proceedings of proving beyond a reasonable doubt every element of each crime charged.

"technically inadmissible," defendant cannot meet his additional burden to obtain relief on this issue by demonstrating that the erroneously admitted testimony prejudiced him "such that a different result likely would have ensued had the evidence been excluded." *Gappins*, 320 N.C. at 68. Regarding prejudice, defendant contends that "[b]ased on their inadmissible emotional reactions, these witnesses appeared to find [defendant] guilty, and among the worst of the worst offenders"; that this "dramatic testimony, standing alone, was powerful enough to convince a jury to root all of its deliberations in improper prejudice and passion"; and that "[i]n the absence of that evidence, there is a reasonable possibility [defendant] would not have been convicted and sentenced to death." *See* N.C.G.S. § 15A-1443(a) (2021). Given the totality of the evidence introduced during defendant's trial, we cannot agree with these assertions.

In determining defendant's guilt and in recommending a sentence of death, the jury had before it, *inter alia*, evidence that: defendant was for ten days the sole caretaker for a four-year-old child upon whom he had previously used inappropriate and/or abusive "discipline"; defendant's first action upon obtaining sole control of the child was to purchase materials to permit him to lock her inside of the outbuilding where they were living; defendant took a video of the child being punished for toilet accidents despite the fact that the outbuilding lacked a bathroom or running water; defendant was aware of at least some injuries to the child during the ten days he cared for her as suggested by his purchase of first-aid supplies; defendant admitted causing the ultimately fatal injury to the child by causing her head to strike a wall in the outbuilding; defendant only took the child to the hospital for medical assistance after being directed to do so by the child's mother; upon arrival at the hospital, the child's body showed, in addition to the head injury, many dozens of bite marks, evidence of sexual abuse, and wounds from beatings with an electrical cord so severe that pieces of metal were embedded in her body; and defendant tried to flee the hospital once medical professionals saw the child's condition. The evidence of Taylor's injuries came from numerous witnesses, including medical and forensic professionals to law enforcement personnel, who were properly permitted to offer lengthy and detailed testimony—beyond that challenged by defendant—regarding Taylor's condition, and in some cases, illustrated by photographs of her body and her injuries, which as we explained above were admissible. Given the overwhelming evidence of defendant's guilt and of Taylor's severe, painful, and ultimately fatal injuries inflicted over time, we conclude that there is no reasonable possibility that defendant would not have been convicted and sentenced to death *but for* the

challenged testimony of the five witnesses about their emotional reactions to seeing Taylor's condition.

For the same reason, we see no abuse of discretion in the trial court's decisions to admit the challenged evidence after undertaking the required Rule 403 balancing determination and holding that the probative value of the evidence did not "substantially outweigh[ ]" the risk of unfair prejudice. *See Lyon*s, 340 N.C. at 669. Particularly given the trial court's consideration of the parties' pretrial arguments on the relevancy and potential prejudice of the challenged testimony and its ongoing assessment of both questions throughout the presentation of the testimony from the State's witnesses, including numerous instances where defendant's objections were sustained, we cannot say that the trial court's "ruling[s were] manifestly unsupported by reason or [were] so arbitrary that [they] could not have been the result of a reasoned decision." *Hennis*, 323 N.C. at 285. Defendant's argument as to the testimony of various witnesses about their emotional reactions to seeing Taylor's injuries is overruled.

D. Testimony from Dr. Richard Barbaro regarding bite marks

[4] Defendant next argues that the trial court abused its discretion by allowing Dr. Richard Barbaro, a dentist, to testify as an expert in forensic dentistry about the bite marks on Taylor's body—testimony which defendant contends was unreliable, inflammatory, prejudicial, and constituted "an outlandish sideshow," citing Rules of Evidence 702 and 403. We review a trial court's ruling on the admission of expert testimony under Rule of Evidence 702 only for an abuse of discretion. *State v. McGrady*, 368 N.C. 880, 893 (2016). As previously noted, a trial court's ruling on admissibility under the balancing test of probative value versus prejudice under Rule 403 is also reviewed for abuse of discretion. *Hennis*, 323 N.C. at 285. We are not persuaded that the trial court here abused its discretion in allowing Barbaro's testimony.

Rule of Evidence 702 provides that when "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." N.C.G.S. § 8C-1, Rule 702(a) (2009).[21] Courts should employ a "three-step inquiry for evaluating the

21. Rule of Evidence 702 was amended in 2011, with that amendment applying to actions "commenced on or after October 1, 2011." Defendant was indicted in 2010, and thus the earlier version of Rule 702 applies to his case. Other aspects of the amendment are discussed in the following section of this decision. In any event, the trial court ruled that Barbaro's evidence was admissible under both versions of Rule of Evidence 702.

admissibility of expert testimony: (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?" *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 458 (2004) (citations omitted). The proponent of the offered expert opinion has the burden to show its compliance with the requirements of Rule 702(a). *State v. Ward*, 364 N.C. 133, 140 (2010). Under Rule 403, evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C.G.S. § 8C-1, Rule 403. Both determinations are reviewed under an abuse of discretion standard. *McGrady*, 368 N.C. at 893; *Hennis*, 323 N.C. at 285.

As an initial matter, we must clarify the testimony that is properly before the Court on appeal, as well as the bases for excluding such evidence that defendant has preserved for our consideration. In a pretrial motion, defendant sought to exclude Barbaro's testimony as an expert in forensic dentistry, arguing that the prejudice of his testimony would substantially outweigh any relevance it could provide under Rule 403 and that his data and methods were unreliable under Rule 702. Following a hearing on the question, the trial court filed a written order concluding that North Carolina precedent has previously allowed bite mark testimony; Barbaro was qualified to testify as an expert in forensic dentistry; his method of proof was sufficiently reliable under Rule 702; and the relevance of Barbaro's testimony would not be outweighed by its prejudicial effect under Rule 403.

Once trial began, as the State emphasizes, defendant did not object to significant portions of Barbaro's testimony, such as his explanations of the methods used in the field of forensic dentistry, how Barbaro applied those methods to the facts of defendant's case, and Barbaro's opinion that Taylor had bite marks on her body which were inflicted by an adult. As a result of defendant's failure to object to this testimony at trial, defendant has waived his right to any argument of error regarding those issues on appeal. N.C. R. App. P. 10(a)(1). Thus, only Barbaro's testimony that the bite marks were consistent with defendant's dentition is a topic of testimony that could be challenged on appeal. However, in his brief, defendant concedes that "[t]he State had . . . established through [defendant's] statement to police that he was the only one watching Taylor during that time [when the bites were inflicted]" and then represents that "[t]he defense did not *meaningfully* contest that [defendant] had inflicted the injuries that occurred during the ten days

before he brought her to the hospital."[22] (Emphasis added.) Thus, it appears that at trial the State's evidence showed that Taylor (1) suffered numerous bites (2) inflicted by defendant (3) during the ten days before defendant brought her to the hospital and that this evidence was not meaningfully contested. To the extent that there was any question that defendant inflicted multiple bites on Taylor in the ten days wherein he had sole access to the child, we conclude that in light of the precedent then existing, along with the findings and conclusions included in the trial court's order denying defendant's motion to exclude—in conjunction with the trial court's decision, nonetheless, to sustain certain of defendant's objections to portions of the expert's testimony—we cannot say that the trial court's allowance of other testimony by the expert witness was "manifestly unsupported by reason or [was] so arbitrary that [it] could not have been the result of a reasoned decision." *Hennis*, 323 N.C. at 285.

We recognize that as to the question of the reliability of Barbaro's testimony, defendant cites several reports and studies from government and scientific sources which address the increasing scientific skepticism regarding the validity of bite mark identification, including those that cast doubt on the ability for a witness to accurately identify a lesion on the skin as a human bite mark,[23] notes that "[n]o recent North Carolina [appellate decision] affirmatively accepts bite mark identification testimony," and urges that precedent from North Carolina's appellate courts which accept bite mark testimony by an expert witness contested under Rule 702 should be overruled. Whatever the merits of defendant's assessment regarding the reliability of testimony concerning the identification of bite marks and related matters, we need not address any

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22. Given defendant's concession in his brief, we note the remark of defense counsel that Barbaro "does have expertise to say that these are bite marks" just prior to his clarification to the trial court that defendant's position regarding Barbaro's testimony: "I'm more making a 403 argument on that, your Honor." Both of defendant's trial counsel conferred with each other, and then affirmatively informed the trial court "[w]e're not disputing that he can say they are bite marks, we're saying he can't say who put them, and give an opinion about who put them there."

23. Defendant cites: (1) Committee on Identifying the Needs of the Forensic Sciences Community National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* (2009), https://www.ojp.gov/pdffiles1/nij/grants/228091.pdf; (2) President's Council of Advisors on Sci. and Tech., *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* (2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf; and (3) Am. Bd. Of Forensic Odontology, *Standards and Guidelines for Evaluating Bitemarks*, http://abfo.org/wp-content/uploads/2012/08/ABFO-Standards-Guidelines-for-Evaluating-Bitemarks-Feb-2018.pdf.

Rule 702 arguments regarding Barbaro's testimony, given defendant's concessions to the truth of the bite mark facts relevant to the elements of the offenses with which defendant was charged and to which Barbaro testified in this case.

This leaves for our consideration only defendant's argument that the trial court's decision to admit Barbaro's testimony constituted an abuse of discretion and likely altered the outcome of defendant's trial and sentence where defendant contends that Barbaro's testimony was needlessly repetitive because three physicians had already testified about the multiple marks and lesions on Taylor's body which they believed to be human bite marks inflicted within approximately three to ten days of Taylor's arrival at Johnston Memorial Hospital[24] and was otherwise substantially more prejudicial than probative of the issues before the jury, citing *State v. Barton*, 335 N.C. 696, 704–05 (1994).

As to repetition, in *Barton*, applying the abuse of discretion standard, we upheld a trial court's decision to exclude evidence from an expert witness as cumulative pursuant to Rule 403. *Id.* at 704. *Barton*, therefore, simply demonstrates the appropriate deference given to trial court rulings under Rule 403 on appeal. *See* N.C.G.S. § 8C-1, Rule 403 (providing that relevant evidence "*may* be excluded if its probative value is substantially outweighed . . . by considerations of . . . needless presentation of cumulative evidence"). Barbaro's testimony opining that Taylor suffered numerous bite marks by an adult human during the time period when defendant had sole access to the child, even if cumulative, did not likely tip the scales in defendant's case either as to his convictions or sentences given defendant's acknowledgment that "[t]he defense did not meaningfully contest that [defendant] had inflicted the injuries that occurred during the ten days before he brought her to the hospital."[25]

Regarding the "inflammatory potential" of Barbaro's testimony otherwise, including its content and its manner of presentation, defendant contends that Barbaro "inflamed the jury with a series of dramatic and baseless assertions and gruesome commentary," including Barbaro's "comments that 'most . . . bite mark injuries are caused by animals — bears and dogs' 'tearing and using their teeth as their tool or weapon

24. Dr. Evans identified multiple bite marks which he estimated had been inflicted between three and ten days prior to Taylor's hospitalization, Dr. Kocis identified multiple bite marks "mostly in the three- to seven-day range," and Dr. Williams suggested that the bite marks had occurred within a ten-day timeframe.

25. See footnote 22.

to tear or maim their victim' and that particular bite marks on Taylor's body evidenced 'a lot of intention' and lasted 'for a significant amount of time.' " While "[t]his Court does not condone comparisons between defendants and animals," *Roache*, 358 N.C. at 297, Barbaro's comment that most bite injuries to humans are caused by animals does not compare defendant to an animal but rather makes a factual statement with which defendant does not disagree. Further, defendant does not appear to have meaningfully contested that he inflicted the numerous bite marks on Taylor's body, and we also conclude that, in light of the facts presented in this case, the intentionality of the biting is a reasonable inference for any witness to draw. Finally, whether the bites inflicted upon Taylor were brief or sustained, given their large number and when viewed in conjunction with the other physical and sexual abuse inflicted upon the child, we cannot say that Barbaro's testimony made the difference in defendant's conviction or sentence. Accordingly, defendant's arguments regarding Barbaro's testimony are overruled.

E. Expert testimony about whether Taylor was tortured

[5] Defendant argues that the trial court erred by allowing testimony which was inadmissible under Rules of Evidence 401, 403, and 702 from two physicians—from Dr. McNeal-Trice during the guilt–innocence phase and from Dr. Cooper during the sentencing phase—on the question of whether Taylor was tortured. Defendant also contends that the opinions expressed during the testimony in question "were not based on reliable or established medical science, nor on a complete factual basis; were biased; were unhelpful; and were unfairly prejudicial," citing specific examples of testimony where he asserts that these two doctors "improperly speculated about [defendant's] intent and state of mind, concluding the injuries were 'intentionally inflicted,' 'deliberate,' 'systematic,' 'carefully calculated,' 'wanton,' and [were] done for the 'purpose of inflicting pain' and for 'sadistic gratification.' "

As previously noted, we review rulings under Rules 401, 403, and 702 regarding the admission of evidence at the guilt–innocence phase of a trial for an abuse of discretion. *McGrady*, 368 N.C. at 893; *Hennis*, 323 N.C. at 285. Further, to obtain relief, a defendant must demonstrate not only an abuse of discretion by the trial court in admitting challenged evidence but also that there would likely have been a different result but for the admission of that evidence. *State v. White*, 355 N.C. 696, 707–08 (2002).

At the sentencing stage of a capital proceeding, the Rules of Evidence do not apply, but "the ultimate issue concerning the admissibility of evidence must still be decided by the presiding trial judge, and his decision

is guided by the usual rules which exclude repetitive or unreliable evidence or that lacking an adequate foundation." *State v. Rose*, 339 N.C. 172, 200 (1994) (extraneity omitted); *see State v. Daniels*, 337 N.C. 243 (1994) (applying Rule of Evidence 702 standards to the review of expert testimony at a capital sentencing hearing). At a capital sentencing hearing, however, the Rule 403 balancing test of probity versus prejudice is not applied, *White*, 355 N.C. at 714, although only competent, relevant evidence pertaining to the jury's sentencing decision may be introduced by the State, N.C.G.S. § 15A-2000(a)(3) (2021). In this case, we see no abuse of discretion or any other legal error by the trial court's decision to allow expert testimony from McNeal-Trice and Cooper regarding torture.

Defendant's challenge to the admission of torture testimony from McNeal-Trice and Cooper concerns three sub-arguments: (1) whether "torture" is an area or field of expertise upon which expert testimony is appropriate, (2) whether McNeal-Trice and Cooper were qualified to opine about whether Taylor was tortured, and (3) whether the expert testimony regarding torture was relevant in defendant's case. We address these questions as they apply to each of these two experts in turn.

1. Precedent regarding the applicable version of Rule 702

Citing Rule of Evidence 702 and addressing expert testimony regarding torture from both McNeal-Trice and Cooper, defendant contends that "[t]he State did not meet its burden to show the existence of widely accepted medical literature or consensus on the ability to diagnose torture. The factors used to determine reliability, such as testing of a theory; peer review and publication; evaluation of error rates; standards; and general acceptance; are all absent in this 'field,' " citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593–94 (1993), and *McGrady*, 368 N.C. at 890–91. As an initial point, defendant's citations are inapposite to this portion of his argument as *Daubert* and *McGrady* did not address the version of Rule of Evidence 702 that was applicable at defendant's trial and therefore the standards and provisions enunciated in those cases and advanced by defendant here are of limited help in supporting defendant's position.

The United States Supreme Court's decision in *Daubert* involved the interpretation of Rule 702 of the Federal Rules of Evidence, as that rule existed in 1993. 509 U.S. at 588–89. In *Daubert*, the Court held that a trial court must perform a "gatekeeping" function in determining the admissibility of expert testimony under Federal Rule 702 in order to ensure "that any and all scientific testimony or evidence admitted is not only relevant, but reliable," based upon "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid

and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 589, 592–93. A decade later, this Court construed the then-existing North Carolina Rule of Evidence 702—the same version of the rule which applies in defendant's case—and observed that while the "text of North Carolina's Rule 702 was largely identical to the . . . text of Federal Rule 702 [as discussed in *Daubert*,] . . . the judicial construction of North Carolina's rule took a different path" than that pursued by the U.S. Supreme Court in *Daubert* and its progeny. *McGrady*, 368 N.C. at 886 (citations omitted). "In *Howerton*, [the Court] examined the development of Rule 702(a) in North Carolina law and concluded that 'North Carolina is not, nor has it ever been, a *Daubert* jurisdiction.' " *Id.* (quoting *Howerton*, 358 N.C. at 469); *see also Howerton*, 358 N.C. at 469 ("expressly reject[ing] the federal *Daubert* standard" for analysis of decisions under the version of Rule 702 at issue in *Howerton* and in defendant's case).

The Court in *Howerton* denoted that the proper assessment under North Carolina's version of Rule 702 which is applicable here involves three considerations, the first of which being whether an area is sufficiently reliable for expert testimony. 358 N.C. at 458. Thus, "reliability is . . . a preliminary, foundational inquiry into the basic methodological adequacy of an area of expert testimony. This assessment does not, however, go so far as to require the expert's testimony to be proven conclusively reliable or indisputably valid before it can be admitted into evidence." *Id.* at 460. "In this regard, [the Court] emphasize[d] the fundamental distinction between the admissibility of evidence and its weight, the latter of which is a matter traditionally reserved for the jury." *Id.* Accordingly, the Court in *Howerton* opined "that '[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.' " *Id.* at 461 (alteration in original) (quoting *Daubert*, 509 U.S. at 596). In order to prevent trial judges from being inappropriately tasked with evaluating "the substantive merits of the scientific or technical theories undergirding an expert's opinion," the Court held that "application of the North Carolina approach [to Rule 702] is decidedly less mechanistic and rigorous than the 'exacting standards of reliability' demanded by the federal approach." *Id.* at 464 (quoting *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000)). In other words, as regards the statutory law applicable to defendant's case, "North Carolina law . . . favor[s] liberal admission of expert witness testimony and [leaves] the role of determining its weight to the jury." *McGrady*, 368 N.C. at 886 (citing *Howerton*, 358 N.C. at 468–69).

Not until the amendment of North Carolina Rule of Evidence 702 in 2011, did the considerations cited in defendant's appellate argument regarding the evaluation of reliability—lack of "the existence of widely accepted medical literature or consensus on the ability to diagnose torture . . . [and additional] factors used to determine reliability, such as testing of a theory; peer review and publication; evaluation of error rates; standards; and general acceptance"—explicitly become part of the applicable standard when determining the admissibility of expert testimony. Thus, the question for the Court here is whether, in light of a liberal construction of Rule 702 favoring admissibility, the trial court abused its discretion in determining that "the basic methodological adequacy of" the doctors' testimony about torture, even if "shaky," was sufficiently reliable for the testimony to be allowed and then to be tested via cross-examination, and ultimately, weighed by the jury. *Howerton*, 358 N.C. at 460, 468–69.

Defendant asserts that the area or field of expertise relevant here is torture and represents that "[t]he State presented both Cooper and McNeal-Trice as medical experts in diagnosing child torture; the prosecutor called Cooper a 'world-renowned expert' in child torture." To clarify, McNeal-Trice was offered and accepted without objection from defendant as an expert in pediatrics and child abuse, not as an expert in "torture." Likewise, although defendant emphasizes that Cooper was initially offered as an expert in, *inter alia*, "torture," the trial court actually accepted Cooper as an expert in "developmental and forensic pediatrics" with a specialization in "child abuse and maltreatment." Thus, we consider not whether the two doctors were experts in the "field" of torture or even whether such a field exists, but rather whether these two medical experts in child abuse should have been allowed to testify about whether they believed that Taylor had been tortured.

2. Testimony about torture from McNeal-Trice

After McNeal-Trice had been accepted as an expert in pediatrics and child abuse and gave testimony on a number of topics without objection, the trial court excused the jury and allowed voir dire before McNeal-Trice testified regarding whether Taylor had been tortured.[26] On voir dire, McNeal-Trice acknowledged that she had never previously diagnosed torture in her work in child abuse cases, but she also explained

26. There was an earlier pretrial hearing on the defense motion to exclude torture opinions. The trial court deferred ruling, asking to see the experts' reports. The following week, the trial court denied the motion to exclude in limine but held the matter open for trial.

that she had never "seen anyone with injuries this significant before." McNeal-Trice further stated that, in her written report, she had cited three definitions for torture for reference—one from "the Merriam[-] Webster dictionary," one from the "United Nations Convention Against Torture," and the third "from Webster's Third New International Dictionary"—none of which definitions was from a "medical textbook[ ]." Defense counsel then cited Rule 403 and "the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution" in asking the trial court to prevent McNeal-Trice from bringing "the word torture [into] her testimony." Defense counsel argued that by using "lay definitions of torture," McNeal-Trice's testimony would create a greater "danger of invading the province of the jury in this regard," noting concerns about both the charge of first-degree murder by torture and the aggravating factor of the murder being "heinous, atrocious, and cruel."

The discussion which occurred upon defendant's objection at trial to McNeal-Trice using the word "torture" in her testimony largely focused on the potential applicability of the Court of Appeals decision in *State v. Paddock*, 204 N.C. App. 280 (2010)—an otherwise unrelated case in which Cooper happened to be the expert whose torture testimony was at issue. Defendant argued that *Paddock*, a decision in which Cooper's testimony that child victims had been tortured was held to be admissible, was distinguishable from defendant's case because, in the *Paddock* case the expert had relied upon "a greatly used medical diagnosis of torture" while McNeal-Trice had not previously diagnosed torture and relied on "lay definitions of torture." Defense counsel also suggested that, in any event, *Paddock* was wrongly decided by the Court of Appeals.

In *Paddock*, the defendant was being tried on charges of felonious child abuse inflicting serious bodily injury and first-degree murder in connection with the death of her three-year-old child and the severe abuse of three of her other children. 204 N.C. App. at 281. The defendant in *Paddock* argued to the Court of Appeals that the trial court erred in admitting the offered expert's testimony on torture because, according to the defendant, the offered expert was using a medical definition of torture[27] rather than a legal definition of torture; for that reason, the defendant characterized the offered expert's testimony about torture as either unhelpful or misleading to the jury. *Id.* at 287. The offered expert was accepted as an expert in "the field of developmental and forensic

27. Nothing in the Court of Appeals decision indicates the source of Cooper's definition of torture or upon what research, training, or resources—medical or otherwise—she relied in forming her expert opinion that the children in *Paddock* were tortured.

pediatrics" and during the guilt–innocence phase, she testified that three of defendant's children were "victim[s] of ritualistic child abuse, sadistic child abuse, and torture." *Id.* at 282, 287. That opinion was formed after the expert reviewed, *inter alia*, photographs of the children, medical records, reports and interviews from a guardian ad litem and law enforcement officials, and histories taken from the surviving children by the expert. *Id.* at 288–89. The expert also

> testified to the nature of . . . torture: torture occurs when a person "takes total control and totally dominates a person's behavior and most the [sic] basic of behaviors are taken control of. Those basic behaviors are eating, eliminating and sleeping. Those are the three more common behaviors that a person will take total control of."

Id. at 289 (second alteration in original). The expert then provided examples of the torture of children and "stated that she was not testifying to a legal definition of torture but was defining the term based on her medical expertise." *Id.* The lower appellate court concluded that the trial court did not abuse its discretion in admitting the expert's testimony regarding torture, citing *State v. Jennings*, 333 N.C. 579, 599 (1993).[28] *Id.*

In *Jennings*, another capital case wherein one of the theories for the charge of first-degree murder was murder by torture, this Court held that

> the term "torture" is not a legal term of art which carries a specific meaning not readily apparent to the witness. "Torture" does not denote a criminal offense in North Carolina and therefore does not carry a precise legal definition, as "murder" and "rape" do, involving elements of intent as well as acts. Further, the commonly understood meaning of the term is approximately the same as the instructions the trial court gave the jurors—"inflict[ion of] pain or suffering upon the victim for the purpose of satisfying some untoward propensity." *Cf. Webster's Third New International Dictionary* 2414 (1976) (torture means the "infliction of intense pain . . . to punish or coerce

28. *Jennings*, like *Paddock*, was decided prior to the 2011 amendment to Rule of Evidence 702 and thus applies the *Howerton* precedent which is appropriate in defendant's case.

> someone"; "torment or agony induced to give sadistic pleasure to the torturer").

333 N.C. at 589, 599.[29] The Court emphasized that the expert in that case

> did not testify that, in his opinion, [the] defendant tortured [the victim]; he gave his expert medical opinion about the pattern and types of injuries he observed during the autopsy. [The expert] had previously testified, *inter alia*, that the bruises to the head, chest, and abdomen were caused by a blunt force, and that the blow to the head may have stunned [the victim]. The blood loss occasioned by the blow to the abdomen would cause considerable pain, drowsiness, eventual unconsciousness and death, if unattended. The scrapes and bruises to [the victim's] legs, arms, and buttocks were not received in a fall—there were no graze wounds, skid type marks, concrete or gravel burns. [The expert] testified that in his opinion most of the wounds were fresh, recent, suffered "pretty close to time of death," and not self-inflicted. Finally, the amount of mucus collected in the lower part of [the victim's] bronchial tubes was "common in persons who die slowly of multiple injuries." The challenged testimony summarized this pattern of injuries and constituted a medical conclusion which [the expert], [a] forensic pathologist and Chief Medical Examiner, was fully qualified to reach.

Id. (alterations in original). The trial court permitted the prosecutor to ask the expert, "[C]onsidering all of the injuries that you observed on the body of [the victim], do you have an opinion as to whether or not [he] had been the victim of torturous activity?" *Id.* at 598–99. The expert responded, "In my opinion, he had been tortured." *Id.* This Court found no abuse of discretion or other error where a doctor who had been tendered and accepted as an expert in forensic pathology testified that the murder victim "had been tortured," "considering all of the injuries" that the expert had observed on the body of the victim. *Id.*

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29. Defendant suggests that torture, in addition to not being a legal term of art, is not a medical term of art or an appropriate diagnosis, citing caselaw from Ohio where the *Daubert* standard was applied to that jurisdiction's version of Rule of Evidence 702 considerations. *See State v. Hawkey*, 62 N.E.3d 721, 725 (Ohio Ct. App. 2016). In light of the express application of the *Daubert* standard employed by the Ohio court, the cited authority is not useful in our resolution of defendant's case, even as persuasive authority.

Nothing in the *Jennings* opinion explicates any specific type or number of research studies, medical literature, or other source required to undergird the expert's opinion or suggests that any torture-specific training or background would be required of an expert witness in order to support the expert's testimony that, based upon the injuries that the expert had observed on the victim's body, the victim suffered torture. The *Jennings* decision also specifically noted with approval that the medical expert's reliance upon the definition of torture from "*Webster's Third New International Dictionary* 2414 (1976) (torture means the 'infliction of intense pain . . . to punish or coerce someone'; 'torment or agony induced to give sadistic pleasure to the torturer')" was "approximately the same as" the definition which the trial court provided to the jurors in its instruction—the "inflict[ion of] pain or suffering upon the victim for the purpose of satisfying some untoward propensity." *Id.* at 599 (alterations in original).

In discussing the admissibility of McNeal-Trice's testimony using the word "torture" here, the prosecutor cited *Paddock*, asserted "that torture is a subset of child abuse," like battered child syndrome, and contended that "this type of diagnosis and this type of opinion is permissible." When the trial court issued its oral ruling on the record that "the proffered testimony of . . . McNeal-Trice that [Taylor] suffered torture" was admissible under Rule 702 and was not unfairly prejudicial under Rule 403, the trial court noted that it would "define the term torture for the jury if appropriate later in the trial."

Before the jury, McNeal-Trice, much like the expert in the *Jennings* case, was accepted without objection as an expert, here in pediatrics and child abuse as opposed to pathology as was the case with the expert in *Jennings*, and then testified to the jury in detail about Taylor's injuries—specifically, that Taylor, *inter alia*, suffered "global physical scarring that was too extensive to enumerate" including "lacerations, puncture wounds, burns, bite marks, and bruising"; had scars and healing indicating that her wounds had been inflicted over time, consistent with a ten-day period; had lacerations to the external buttocks and intergluteal folds plus lacerations to the vaginal area in various states of healing, some of which were caused within the past 24-72 hours; had injuries from the buttocks to the vaginal area that displayed a "multiple kind of pattern and repetitive injuries" consistent with the "child being restrained or being . . . unable to move"; had vaginal injuries "consistent with penetrating trauma" supporting a diagnosis of sexual abuse; had "a rectal fissure" due to trauma; experienced head trauma due to the child being shaken or her head striking a hard surface; showed evidence

of two broken forearm bones in the early stages of healing; and had multiple tiny pieces of metal embedded deeply enough not to be easily seen by visual examination in "[h]er feet, her legs, over her knees, her thighs, the pelvic region, [and] her buttocks"; to the extent that these injuries "indicated a delay in seeking medical attention." Like the expert in *Jennings*, based on these observations of all of the injuries suffered by the victim, McNeal-Trice then opined that Taylor's injuries were the result of "intentionally inflicted trauma" and were "consistent with severe physical child abuse, also known as battered child syndrome, abusive head trauma, and torture associated with significant morbidity and high risk [of] mortality." Very similar to the expert in *Paddock*, McNeal-Trice explained to the jury that her opinion that Taylor's injuries were consistent with torture was based not only on her own observations of Taylor while the child was hospitalized, but also upon a case history review which included statements regarding defendant's various accounts to law enforcement and medical professionals about the causes of Taylor's injuries, along with McNeal-Trice's discussion with Reyes. In considering the injuries inflicted upon Taylor, McNeal-Trice was able to testify that Taylor's "pain would probably have been indescribable" because "the number of lacerations and marks to her skin [would have been] extremely painful" and because Taylor would have experienced, "[n]ot only the pain associated with initially getting the injuries, but injuries on top of injuries, not having medical treatment for the injuries, not having pain medicine for the injuries, [and] not having antibiotics for the injuries."

We conclude that the facts and circumstances in this case and those presented in *Jennings* are not meaningfully distinguishable. In each case, a medical professional was admitted as an expert witness in a case where murder by torture was one theory of first-degree murder charged by the State and then testified about multiple severe injuries suffered by the victim as observed by the expert before opining that the victim had likely suffered torture. McNeal-Trice, like the expert in *Jennings*, referred to the definition of torture contained in Webster's Third New International Dictionary in forming her opinion. Nothing in the *Jennings* decision suggests that the expert there had previously "diagnosed" or testified about a victim being tortured; McNeal-Trice acknowledged that she had not done so, but also explained that she had never before witnessed the level of abuse that was inflicted on Taylor. In any event, this Court has stated that "[a]s pertains to the sufficiency of an expert's qualifications, we discern no qualitative difference between credentials based on formal, academic training and those acquired through practical experience," because "[i]n either instance, the trial court must be

satisfied that the expert possesses 'scientific, technical or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue.' N.C.G.S. § 8C-1, Rule 702(a)." *Howerton*, 358 N.C. at 462 (alteration in original) (also citing 2 Kenneth S. Broun, *Brandis & Broun on North Carolina Evidence* § 184, at 44–45 (6th ed. 2004) ("[A] jury may be enlightened by the opinion of an experienced cellar-digger, or factory worker, or shoe merchant, or a person experienced in any other line of human activity. Such a person, when performing such a function, is as truly an 'expert' as is a learned specialist . . . ." (footnotes omitted))). As to McNeal-Trice's testimony that Taylor's injuries were the result of "intentionally inflicted trauma," at the guilt phase, expert testimony is relevant and admissible to support the State's position that a defendant did not "snap and lose control" but instead "engaged in a deliberate, prolonged process of severely beating and torturing" a child victim. *State v. Atkins*, 349 N.C. 62, 100 (1998).

The apparent distinctions between the expert testimony here and in *Jennings*, to the extent that they are pertinent, reveal that McNeal-Trice was potentially better equipped and positioned to offer her testimony regarding torture. For example, McNeal-Trice referenced two additional definitions of torture beyond that contained in Webster's Third New International Dictionary as relied upon by the expert in *Jennings*. Furthermore, while the expert in *Jennings* testified that the victim "had been tortured," McNeal-Trice's testimony was only that Taylor's injuries "were consistent with" torture. Another distinction between the experts here and in *Jennings* is that McNeal-Trice, unlike the pathologist in *Jennings*, was admitted as an expert in child abuse and, while not having previously testified that a child had been tortured, she had experience working with living victims who had survived their abuse, and thus McNeal-Trice might reasonably be expected to have more knowledge of the pain and suffering those victims experienced as compared to the pathologist and Chief Medical Examiner in *Jennings*, who definitionally spent much of his professional time examining deceased victims who could not communicate about any pain and suffering they had experienced prior to their deaths. Further, the expert in *Jennings* was relying solely on his examination of the deceased victim in developing his expert opinion regarding torture, while McNeal-Trice in addition to examining Taylor before her death had spoken to medical professionals who treated Taylor, to Reyes, and to law enforcement officials.

In light of these circumstances and viewed in conjunction with this Court's precedent, we see no abuse of discretion in the trial court's determination that McNeal-Trice's testimony that Taylor's injuries were

consistent with torture was admissible pursuant to the *Howerton* test applicable under the pre-2011 version of Rule of Evidence 702. *See Jennings*, 333 N.C. at 599 (holding that a medical expert's "testimony summariz[ing a] pattern of injuries and [providing] a medical conclusion" that a victim's injuries were consistent with torture is admissible under that version of Rule 702).

3. Torture testimony from Cooper

As we observed previously, at the sentencing phase of a capital proceeding, the Rules of Evidence do not apply, although "repetitive or unreliable evidence or that lacking an adequate foundation" may not be admitted. *Rose*, 339 N.C. at 200 (citation omitted). The Rule 403 balancing test does not apply. *White*, 355 N.C. at 714 (2002). "Evidence may be presented as to any matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances . . . . Any evidence which the court deems to have probative value may be received." N.C.G.S. § 15A-2000(a)(3) (2021).

Cooper was set to be the first witness called to testify during the State's case during the sentencing phase of defendant's trial. The defense objected, asserting bases that included cumulative expert testimony, the torture diagnosis, and the state of mind conclusions in Cooper's report, arguing that these were unfairly prejudicial and unfairly inflammatory. Prior to Cooper appearing before the jury, counsel for both parties and the trial court discussed defendant's motion concerning Cooper's testimony. Defense counsel stated that defendant was "not challenging [Cooper's] qualifications." The trial court then clarified that defendant was objecting to opinions in Cooper's "report in which she expresses, or seems to express, in any event the opinions about the defendant's state of mind, . . . among other things, that such opinions are beyond her area of expertise, . . . [and] . . . Cooper's use of inflammatory language." After resolving one aspect of defendant's motion with the agreement of defense counsel, the trial court stated, "the motion challenges opinions stated by . . . Cooper to the effect that [Taylor] was tortured. Essentially, the same arguments which the [c]ourt entertained and ultimately [rejected] during the testimony of . . . McNeal-Trice." Defense counsel noted concerns about the repeated use of photographs and then stated:

> On the torture area, I understand the [c]ourt's ruling and we certainly, although except—made an exception to it, respectfully, we think that there is a little bit of difference because now they're talking

> about supporting it for the EHAC[30] aggravator, which unlike murder by torture, which is one of the things we talked about, is the [c]ourt would be giving the very definition, the definition of torture for that.
>
> When it come[s] to the EHAC aggravator, it in fact uses torture as the definition of EHAC. So, I think that puts it in a slightly different situation. And therefore, we argue it's more akin to invading the province of the jury at this stage even in the light of *Paddock* than it would be if this was just given during the guilt/innocence presentation.

After reminding the parties that the Rules of Evidence do not apply at a sentencing proceeding, the trial court acknowledged that "there is arguably some constitutional concern about what is described in Rule 403 as a needless presentation of cumulative evidence," and then asked the State whether "it is your purpose in calling . . . Cooper to further offer proof of what the defense is calling . . . the especially heinous, atrocious, and cruel aggravating circumstances[?]" The State agreed, referring to Cooper as "a world[-]renowned expert in the area of child abuse torture." But the State tendered, and the trial court accepted, Cooper "as an expert in the area of developmental forensic pediatrics with a subspecialty in child abuse." Defendant did not object.

On voir dire, Cooper explained that she had based her opinions about Taylor being tortured after review of "the investigative report[;] all hospital records for this patient[;] the autopsy report[;] video and digital images that were part of the investigative report[;] normal pictures that had been taken of this child[;] the neuropathology as part of the autopsy[; and] the mental health assessment of [defendant]," as well as "certain videos." When the trial court then asked defendant what concerns remained about Cooper's testimony, defense counsel responded that they fell into

> three primary areas. One is—and maybe we have enough. I am certainly concerned about [Cooper's] psychological conclusions. I am concerned about the use of torture and how—furthermore, from the testimony that's come up, and concerned about the piling on effect

30. An "[a]ggravating circumstance which may be considered" during the sentencing phase of a capital case is whether "[t]he capital felony was especially heinous, atrocious, or cruel." N.C.G.S. § 15A-2000(e)(9) (2021).

> for lack of a better word—403 purposes for however we're going to describe it at the sentencing phase.

After defense counsel questioned Cooper during voir dire, counsel clarified to the trial court that "Cooper is incredibly accomplished in her field and we certainly are not disputing that, but our concerns are several here about it":

> The first has to do with her giving opinions regarding psychiatric or mental health conclusions in this case and all. And not only concerns about her giving those opinions, given both her qualifications, which I admit are not in that particular area, but second in a situation where she did not perform a psychiatric evaluation of the defendant by any means. She did not interview the defendant. She reviewed the reports of the two experts that we had but not yet underlying data about that.
>
> And even though I understand that the State was going with that, that she's comparing—well, it can't be because of this health and mental health break. I think one thing the Court has to take into mind is confusion of the jurors in that aspect about it. It sounds like reading the report—it's her testimony that she's basically making a mental health diagnosis, which I think using as a guidance the Rule 702, she's not in position to make in this particular case. I think it would be highly prejudicial.

After hearing extended arguments from each party regarding Cooper's proposed testimony, the trial court eventually stated it would allow Cooper's testimony.

Before the jury, Cooper provided information about her training and background more generally and explained her "specialized training, education or experience . . . focusing on child torture." Cooper stated that she had done teaching on the topic for the National District Attorneys Association and Interpol,[31] providing training "for the FBI

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31. The International Criminal Police Organization, an intergovernmental organization that assists police in member countries. *See* INTERPOL, *What is INTERPOL?*, https://www.interpol.int/en/Who-we-are/What-is-INTERPOL (last visited Aug. 17, 2023).

and also ICE,"[32] had been "a trainer in this particular area for at least the last three years although I have testified in child torture cases for more than ten years," and was a peer reviewer for "a scientific article on the torture of children." Cooper agreed that torture is a "medical diagnosis," noting "the Tokyo Declaration" issued in 1975 "by the World Medical Association."

Cooper then testified about the materials she had reviewed in Taylor's case and explained the differences between battered child syndrome or severe child abuse and torture. Cooper stated that battered child syndrome was a diagnosis that indicated intentional rather than accidental injuries to a child victim, which are "severe" and which usually "have occurred at one time" as the result of an "extreme loss of control." Cooper testified that torture, in contrast, is "very deliberate . . . very systematic" with an intent by the offender "to cause both mental and/or physical pain and suffering" to the victim, rather than simply "a sudden loss of control." Cooper also noted that torture usually occurs over "a significant duration in the child's life."

Defendant on appeal contends that Cooper lacked a sufficient factual basis for her testimony "about the state of mind of a person" who tortures, to wit: "It's really about the offender" "who has one of three desires"; it is "carefully calculated"; it "includes a need for power and control"; it involves "a lack of empathy"; and is done for "sadistic pleasure" or "gratification." In these portions of the testimony cited by defendant, however, Cooper is providing background information about torture and people who torture generally, and plainly was not testifying in reference to defendant's specific acts against Taylor. The same analysis applies to other portions of the testimony from Cooper to which defendant draws our attention on appeal: "Biting of children is a science unto itself"; "duct tape . . . across the mouth and all around the hair, over the scalp, which is usually how children are duct taped in torture scenarios"; and "[T]he purpose for individuals videotaping these kinds of scenes is because they want to come back and look at it again. . . . [T]his is part of sadistic gratification. It makes that person happy. It gives them pleasure to be able to see how much pain they were able to inflict upon someone else." While defendant correctly states that "Rule 702 does not allow a doctor to opine about what went on in the mind of the person

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32. Apparently, these are references to the Federal Bureau of Investigation and the Immigration and Customs Enforcement Agency. *See FBI: What We Investigate*, https://www.fbi.gov/investigate, and U.S. Immigration and Customs Enforcement, https://www.ice.gov/.

who inflicted the injuries absent a sufficient basis and level of expertise for that opinion," emphasizing that Cooper was not a psychologist or psychiatrist and never interviewed defendant, our review of the transcript cited above reveals that Cooper did not make these statements as part of any diagnosis of defendant or regarding the specific injuries that Taylor had suffered. That testimony provided context for the testimony from Cooper that directly addressed Taylor's injuries.

Defendant also objects to Cooper's use of the term "cat o' nine tails," which is defined as "a whip made of nine knotted cords fastened to a handle." *See* https://www.merriam-webster.com/dictionary/cat-o'-nine-tails (last visited August 17, 2023). Cooper did refer to certain wounds on Taylor's body—linear wounds, some of which were embedded with tiny slivers of copper filament—that appeared to have been caused by defendant beating Taylor with an electrical cord which had been partially stripped of its covering to reveal the wiring which was found inside the outbuilding as being like those caused by a "cat o' nine tails" and then used that term as a short-hand reference to an implement defendant created to cause certain injuries in several other portions of Cooper's testimony. Cooper clearly identified that she was using this term to refer to the electrical cord as modified by defendant. Defendant does not explain his objection to Cooper's use of this term beyond characterizing it as a reference to an "instrument[ ] . . . from 'torture literature.' " While the electrical cord which defendant altered and used to whip Taylor over much of her body, including her genital area and buttocks, may not technically have been a "cat o' nine tails," we see no additional prejudice beyond the reality of these particular injuries suffered by Taylor in Cooper's decision to use the challenged term in a short-hand fashion rather than to repeatedly refer to the electrical cord cut and stripped of its insulation in a manner so that its metal wire interior was exposed such that, when Taylor was whipped with it, she received lacerations severe enough that tiny pieces of metal were embedded inside her wounds.

Defendant also objects to Cooper opining that Taylor's "injuries . . . were carefully calculated. Her imprisonment was carefully calculated." In light of the evidence presented during the guilt–innocence phase which showed that defendant bought and installed a mechanism by which he could lock Taylor inside the outbuilding without her ability to escape almost immediately after he gained sole control of the child, that Taylor was not seen outside the outbuilding during the last ten days of her life, and that defendant rejected an offer of help in caring for Taylor from his grandmother, the fact that Taylor was intentionally

and "carefully" imprisoned by defendant appears to be uncontroverted. Moreover, Cooper gave this specific testimony in response to the prosecutor's question about whether Taylor's injuries could have been the result of "a sudden lack of control." Cooper replied

> And the answer is no, this is not consistent with a sudden lack of control. Because typically in a sudden lack of control, [a] patient can be fatally injured and most commonly that is going to be from either abusive head trauma or from direct blunt force trauma to the abdomen. Those are the two most common ways in which children are fatally injured from a sudden loss of control. But you usually don't see any other evidence of other injuries for the child. Because this child had new and old injuries, healing injuries, very carefully inflicted injuries, the 66 bite marks that this child had, the removal of a fingernail, these are not the kinds of injuries that you see from a sudden loss of control. These are injuries that were carefully calculated. Her imprisonment was carefully calculated.

Thus, read in context, Cooper's testimony was that, in her expert opinion, Taylor's injuries were not accidental or the result of "a sudden loss of control" as opposed to ongoing, intentional child abuse. Cooper went on to buttress this opinion by noting that defendant had purchased and installed the lock on the outbuilding, left Taylor locked inside that structure while defendant came and went over the next ten days, and never sought help from any of the people whom defendant knew could and would have helped to care for Taylor. Cooper explained that "that's not the kind of behavior that you see . . . from a lack of control. Because a lack of control is an impulsive, unpredictable response. This was not only predictable, but it was calculated. So, this is not consistent with a lack of control."

After giving additional testimony about Taylor's specific injuries, including her severe sexual abuse, her nipple being bitten off, the "hundreds" of places where tiny metal fragments were embedded in Taylor's wounds, the removal of a fingernail, and more, Cooper gave her ultimate opinion that Taylor "sustained severe torture." Cooper testified that the "presence of and nature of the injuries that this child sustained as well as the memorialization of the victim's trauma and psychological damage as well as her imprisonment over the period of time that she was under the power and control of [defendant], it's consistent with not only

torture but an individual who does these things basically for the purpose of sadistic pleasure."

Defendant also objects to the admission of the torture testimony from Cooper by asserting that it was unhelpful to the jury, because "[w]hether something might constitute torture is well within common knowledge." While the Rules of Evidence do not apply at a capital sentencing hearing, *Rose*, 339 N.C. at 200, and "[e]vidence may be presented as to *any* matter that the court deems relevant to sentence, and may include matters relating to any of the aggravating or mitigating circumstances . . . and [*a*]*ny* evidence which the court deems to have probative value may be received," N.C.G.S. § 15A-2000(a)(3) (emphasis added), the challenged evidence from Cooper would likely be admissible even under Rule 702.

As we discussed above, while torture is not a legal term of art but rather should be apprehended in "the commonly understood meaning of the term," *Jennings*, 333 N.C. at 599, regarding admissibility of expert testimony under Rule 702, the proper inquiry is "whether the witness because of [her] expertise is in a better position to have an opinion on the subject than is the trier of fact," *State v. Wilkerson*, 295 N.C. 559, 568–69 (1978); *see also State v. Evangelista*, 319 N.C. 152, 163 (1987) (holding that expert testimony is admissible "when it can assist the jury in drawing certain inferences from facts and the expert is better qualified than the jury to draw such inferences"). Certainly, Cooper was more experienced than the jurors in viewing a large number and wide range of child abuse circumstances. "Although the trial court 'should avoid unduly influencing the jury's ability to draw its own inferences, expert testimony is proper in most facets of human knowledge or experience.' " *State v. Jennings*, 209 N.C. App. 329, 337 (2011) (quoting *State v. Brockett*, 185 N.C. App. 18, 28, *disc. review denied*, 361 N.C. 697 (2007)). Further, a trial court does not engage in the balancing test under Rule of Evidence 403 during a capital sentencing proceeding. *White*, 355 N.C. at 714. In *Jennings*, the same physician testified about the "nature and extent" of the victim's injuries during both the guilt and sentencing phases. 333 N.C. at 593.

At the sentencing phase specifically, "what makes a murder especially heinous, atrocious, or cruel is the entire set of circumstances surrounding the killing," including evidence that supports both the defendant's motive as well as his depravity of mind. *White*, 355 N.C. at 705 (extraneity omitted). Murders which may be deemed especially heinous, atrocious, or cruel may include cases involving physical injury or torture inflicted prior to death; killings that are physically agonizing

or dehumanizing to the victim; murders which are less violent but which are "conscienceless, pitiless, or unnecessarily torturous" including those where the victim was aware yet helpless to prevent her death; and murders that demonstrate a defendant's unusual depravity of mind even if that fact is not an element in other first-degree murders. *State v. Gibbs*, 335 N.C. 1, 61–62 (1993).

In sum, defendant has failed to demonstrate that the trial court abused its discretion by admitting any of the testimony from Cooper during defendant's capital sentencing hearing in a manner that was "manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision." *Hennis*, 323 N.C. at 285.

F. Defendant's statements at Johnston Memorial Hospital

[6] Defendant next raises concerns arising under *Miranda v. Arizona*, 384 U.S. 436 (1966), specifically arguing that defendant "on being detained by a nurse who tackled him, pulled him by the throat down a hall and into a room, and then handed him over to two armed officers who closed the door behind them and began an interrogation—was restrained to a degree associated with formal arrest." Specifically, defendant contends that his initial detention by the nurse "was a black-letter 'citizen's detention' culminating in 'surrender of the person detained to a law-enforcement officer' as provided by statute," citing N.C.G.S. § 15A-404, and that the nurse then "surrendered custody of" defendant to law enforcement officers, after which "[n]othing the officers did or said would have led a reasonable person to believe his detention had ended simply because he had not yet been formally arrested." Defendant's argument misconstrues the essential tenets of *Miranda* and inappropriately shifts the focus away from the key question of whether a "custodial interrogation" occurred.

Defendant moved to suppress statements he made to law enforcement officers while in the hospital on grounds that he was not advised of his rights and his request for legal counsel was not honored. At the hearing on that motion, the following evidence was received: Two law enforcement officers with the Johnston County Sheriff's Office, Lieutenant Norman Whitley, in uniform and armed, and Detective Jamey Snipes, in plainclothes but displaying a badge and visible sidearm, arrived at the hospital after receiving a report of suspected child abuse. The officers entered the exam room where defendant was seated alone and closed the door, at which point Snipes identified himself to defendant as a detective. In response to questions from the officers, defendant provided Taylor's and Reyes's names, explained that he had been caring

for Taylor while Reyes was away, and stated that Taylor had fallen while jumping on a bed and struck her head the previous night. Snipes then left the exam room, while Whitley asked defendant about Taylor's other injuries. Defendant told Whitley that Taylor's cousin, a child, had bitten her and stated that Taylor's other wounds were the result of Taylor scratching herself. After Snipes returned to the exam room and Whitley stepped out, Snipes asked defendant what, other than falling off a bed, had caused Taylor's injuries. Defendant stated that he might need legal counsel, at which point Snipes told defendant that he was not under arrest. Snipes continued questioning defendant. In response to Snipes' questions, defendant confessed that he had "lost it" and whipped Taylor with an electrical cord after she urinated and defecated on the bed, and defendant also stated that he is bipolar and little things set him off. After their exchange, Snipes had defendant review and sign Snipes's handwritten account of the interview. Thereafter, Snipes handcuffed defendant, told him he was under arrest for child abuse, and transported him to the Johnston County Sheriff's Office where defendant was read his *Miranda* rights.

Following the hearing, the trial court entered an order in which it concluded that defendant was not in custody while at the hospital and denied defendant's motion to suppress. In that order, the trial court made findings of fact that when the two officers with the Johnston County Sheriff's Office arrived, one in plainclothes and one in uniform, they found defendant seated in a chair in an exam room, alone; that the officers had received information that a child brought to the hospital by defendant was badly injured; that the officers did not arrest, handcuff, or otherwise restrain defendant; that they questioned defendant about how Taylor had been injured; that defendant initially claimed that Taylor had struck her head after jumping on a bed, had been bitten by another child, and already had some of her injuries when Taylor's mother left the child with defendant; that when defendant said that he thought he needed a lawyer, one of the officers told defendant that he was not under arrest; that at various times one of the officers would leave the room to look at or take photos of Taylor and on one occasion both officers stepped out of the room together to discuss Taylor's injuries; that after defendant eventually made statements acknowledging that he had whipped Taylor with a power cord, one of the officers reduced defendant's statement to writing and had defendant sign the statement; and that defendant was then arrested and taken to the Sheriff's Department where he was read his *Miranda* rights. The trial court also found, *inter alia*: that after being read his *Miranda* rights, defendant asked to speak to an attorney at which point questioning by law enforcement officers

ceased; that officers did allow defendant's mother, who had arrived at the Sheriff's Department, to speak to defendant after cautioning her that she could not ask defendant any questions on behalf of law enforcement and could not ask defendant about Taylor's injuries; and that when defendant's mother asked him if he wanted to talk to her, defendant made several incriminating statements, including "that he had hit the child with a power cord." The trial court concluded that defendant had not been arrested when he made his statement in the exam room at the hospital and that he had not been restrained "to any degree associated with a formal arrest." The trial court also concluded that defendant's incriminating statements to his mother while under arrest did not implicate *Miranda* concerns because defendant's mother was not acting as an agent of law enforcement and defendant made the statements "freely and voluntarily."

After defendant received supplemental discovery material which showed that a nurse at the hospital, Mary Butler, had forcibly detained defendant before law enforcement officers arrived to question defendant, defendant requested reconsideration of his motion to suppress. The relevant evidence introduced during the two hearings on this topic showed that Butler was present when defendant brought Taylor into the emergency room and during the initial examination of Taylor where the extent of her injuries was revealed. After medical professionals began to question defendant about how Taylor's injuries had occurred and their level of distress about the injuries became apparent, defendant stated that he needed to "move his truck," and ran out of the trauma room toward the lobby. Butler followed defendant and, in her own words, "grabbed him around the throat, and told him he ain't going no damn where, and pulled him back down the hall. . . . I got down the hall with him, and I put him in [exam] room 5. And I said, 'Motherfucker, you ain't going no damn where.' " Defendant sat in a chair and did not attempt to leave the room as Butler stood in the doorway. After some period of time, two law enforcement officers with the Johnston County Sheriff's Office, Lieutenant Norman Whitley, in uniform and armed, and Detective Jamey Snipes, in plainclothes but displaying a badge and visible sidearm, approached and briefly spoke to Butler, who stated, "Give me your gun. I'm going to do what the hell needs to be done, right here, right now."[33] The officers briefly walked away from the exam room where

33. Defendant contends that this statement was made within defendant's hearing, but as the State noted at the 19 February 2014 suppression hearing, there was no evidence to support defendant's assertion since Butler could not testify as to what defendant heard. The evidence was only that defendant "may have been in close proximity" when Butler made these remarks.

defendant was, but returned within a minute or two, at which point the officers entered the exam room and Butler departed the area.

After Butler's evidence was received at the second suppression hearing, defense counsel contended to the trial court that based upon Butler's actions, defendant would not have felt free to leave and that he was in effect in custody at that point. The trial court stated that "Butler was not a law enforcement officer, and the evidence suggests that she was not acting at the behest of any law enforcement officer," and then asked defense counsel for "any case at all discussing the applicability of *Miranda* when a private citizen restrains or attempts to restrain the movement of someone who may have committed a crime." (Italics added.) Defense counsel stated that he had not found any such case. In response to the same inquiry, the prosecutor cited "Illinois versus Perkins" and asserted that for *Miranda* concerns to apply "not only does there have to be State action, the defendant has to know that the person they're talking to is acting on the behest of law enforcement." The State then cited several North Carolina cases—*State v. Holcomb*, 295 N.C. 608 (1978), *State v. Powell*, 340 N.C. 674 (1995), *State v. Johnson*, 29 N.C. App. 141 (1976), *State v. Perry*, 50 N.C. App. 540 (1981), and *State v. Conrad*, 55 N.C. App. 63 (1981)—which the State contended stood for the same proposition.

On 24 February 2014, the trial court entered an "Order Denying Defendant's Second Motion to Suppress Statements," incorporating the findings of fact and conclusions of law contained in the trial court's first order denying defendant's original motion to suppress and including additional findings of fact about defendant's interactions with Butler, beginning with defendant bringing Taylor into the emergency room and continuing through defendant's attempt to leave the hospital, Butler's actions in physically putting defendant into an exam room, and her keeping defendant there until Snipes and Whitley entered the room with defendant and closed the door as described above. The trial court also found the following facts:

> 13. At no time was Butler acting at the behest of or as an agent of law enforcement office[r]s.
>
> 14. The uniformed law enforcement officers who approached Butler at the door of treatment room 5 did not know about or acquiesce in her conduct or give prior approval to her actions.

The order also included the following conclusions of law:

> 1. Butler's actions were those of a private person and did not constitute an arrest of defendant

or a seizure of his person within the meaning of the Fourth Amendment.

2. None of Butler's actions triggered defendant's *Miranda* rights and they did not transform the officers' subsequent questioning of defendant in the hospital emergency treatment room into a custodial interrogation.

3. None of Butler's actions rendered defendant's statements to the officers in the hospital emergency room involuntary.

4. None of defendant's federal or state constitutional rights were violated by Butler's actions.

In reviewing a suppression order, an appellate court must determine whether competent evidence supports the trial court's findings of fact, and whether those findings of fact in turn support the trial court's conclusions of law, which are reviewed de novo. *Williams*, 362 N.C. at 632–33. Here, defendant does not challenge any of the trial court's findings of fact as unsupported by the evidence presented at the hearings, but citing *Stansbury v. California*, 511 U.S. 318 (1994), he contends that in the second order denying defendant's motion to suppress his statements made at the hospital, "the trial court failed to address 'how a reasonable person in [defendant's] position would perceive his or her freedom to leave.' " Among the relevant circumstances here, defendant identifies: (1) medical staff believed that defendant had committed a serious crime; (2) defendant was unable to get through the locked doors which led to the lobby and the hospital exit without the assistance of hospital staff; (3) Butler physically placed defendant in a room, stood in the doorway blocking his exit, and prevented him from leaving if he tried; (4) hospital staff contacted law enforcement to report that defendant had committed a serious crime; (5) Butler made clear to defendant that she would not permit him to leave the room; and (6) once the law enforcement officers arrived, they entered the room, closed the door, and began to question defendant without informing defendant that he had the option of leaving or providing him with *Miranda* warnings.

A criminal suspect must be advised of his pertinent constitutional rights before being "questioned while in custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 445; *see also State v. Buchanan*, 353 N.C. 332, 336 (2001) (stating that *Miranda* safeguards were "conceived to protect an individual's Fifth Amendment right against self-incrimination in the inherently compelling

context of custodial interrogations by police officers"). The relevant inquiry under *Miranda* is more narrow than the broad "free to leave" test employed to determine whether a person has been seized within the meaning of the Fourth Amendment. *Buchanan*, 353 N.C. at 339; *see also Howes v. Fields*, 565 U.S. 499, 509 (2012) (stating that "[n]ot all restraints on freedom of movement amount to custody for purposes of *Miranda*," which only applies where "the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*" (citation omitted)).

"Both the United States Supreme Court and this Court have held that *Miranda* applies *only* in the situation where a defendant is subject to custodial interrogation." *State v. Barden*, 356 N.C. 316, 337 (2002) (citations omitted) (emphasis added). "Custodial interrogation means 'questioning initiated by law enforcement officers after a person has been taken into custody . . . .' " *Illinois v. Perkins*, 496 U.S. 292, 296 (1990) (quoting *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)). When considering statements challenged under *Miranda*, a court must consider "whether, based on the totality of the circumstances, there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest." *State v. Hammonds*, 370 N.C. 158, 162 (2017) (extraneity omitted). When considering "the circumstances surrounding the interrogation," the question for a court is not whether an individual being questioned actually felt that he or she was being restrained, but rather an objective inquiry, to wit: "would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave." *Id.* at 162–63 (extraneity omitted).

Circumstances which may be considered include "the location of the questioning, its duration, statements made during the interview, the presence or absence of physical restraints during the questioning, and the release of the interviewee at the end of the questioning," *Howes*, 565 U.S. at 509 (citations omitted), as well as whether there was a police officer "standing guard at the door, [or] locked doors," *Buchanan*, 353 N.C. at 339, whether the defendant was told he was not under arrest, *State v. Waring*, 364 N.C. 443, 471 (2010), *cert. denied*, 565 U.S. 832 (2011), and whether law enforcement officers raised their voices, threatened the defendant, or made promises to him, *State v. Garcia*, 358 N.C. 382, 397 (2004). Regardless of which of these or other circumstances apply in a particular case, no single factor controls under the *Miranda* analysis. *Hammonds*, 370 N.C. at 167.

In light of the limitations on *Miranda*'s intent and reach as noted in *Buchanan* and *Howes*, statements made to private individuals

unconnected with law enforcement are generally admissible so long as they were made freely and voluntarily. *State v. Etheridge*, 319 N.C. 34, 43 (1987). An exception to this rule is if the private citizen was acting as an instrument or agent of the State which could bring an interrogation by a private citizen within the ambit of *Miranda*. *Etheridge*, 319 N.C. at 44. Each of the cases cited by the State at the second suppression hearing pertains to such situations. For example, in *Illinois v. Perkins*, the case initially cited by the prosecutor during the second suppression hearing,

> [a]n undercover government agent was placed in the cell of respondent Perkins, who was incarcerated on charges unrelated to the subject of the agent's investigation. Respondent made statements that implicated him in the crime that the agent sought to solve. Respondent claims that the statements should be inadmissible because he had not been given *Miranda* warnings by the agent. We hold that the statements are admissible. *Miranda* warnings are not required when the suspect is unaware that he is speaking to a law enforcement officer and gives a voluntary statement.

496 U.S. 292, 294 (1990). In explaining its decision, the Court noted that

> [t]he warning mandated by *Miranda* was meant to preserve the privilege during "incommunicado interrogation of individuals in a police-dominated atmosphere." [*Miranda*, 384 U.S.] at 445. That atmosphere is said to generate "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Id.* at 467.

Id. at 296. Thus, "[f]idelity to the doctrine announced in *Miranda* requires that it be enforced strictly, but only in those types of situations in which the concerns that powered the decision are implicated." *Id.* (quoting *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984)). The same holding is found in the North Carolina cases cited by the State during the second suppression hearing. *See Holcomb*, 295 N.C. at 611–12 (holding that "dialogue between [the] defendant and his uncles at the sheriff's office [where defendant was in custody] which resulted in his assistance in finding the murder weapon [did not] constitute[ ] a 'custodial interrogation' which was conducted without the warnings or procedural safeguards required by *Miranda*" because the uncles were not acting as

agents of the State); *Powell*, 340 N.C. at 686–87 (holding that there was no *Miranda* violation where the defendant's incriminating telephone call from prison to two non-law enforcement parties was recorded by those parties "for personal reasons" and those parties then turned the recording over to the police); *Johnson*, 29 N.C. App. at 143–44 (finding no *Miranda* violation where a witness who worked as a radio dispatcher for the local police department testified about the defendant's confession to the witness while the witness was visiting her relative who happened to be defendant's cellmate); *Perry*, 50 N.C. App. at 542 (holding that "[w]hen taking a bail jumper into custody, a bail bondsman is not acting as a law enforcement officer or as an agent of the state in any regard . . . and [t]hus, there was no obligation on the part of the bail bondsman to give *Miranda* warnings"); *Conrad*, 55 N.C. App. at 65 (finding that *Miranda* was not offended where a juvenile defendant asked to speak to a magistrate with whom the defendant "had worked . . . in the past [when the magistrate had been] a juvenile officer"). We do not find any of these cases applicable in defendant's case, however, because as defendant correctly notes, "[i]n every one of the authorities cited by the State to the trial court, the contested issue was not 'custody' per se, but the private or official character of the person to whom contested statements were made." The statement which defendant challenges here was not made to Butler, a private citizen, but rather to Whitley and/or Snipes, who were law enforcement officers acting in their official capacities at the time.

Instead, defendant begins his appellate argument by stating that, "Butler conducted a legal citizen's detention, then surrendered custody of [defendant] to Whitley and Snipes," such that "a reasonable person in [defendant's] position would not have felt free to leave at any time during questioning by Lt. Whitley and Det. Snipes. There was a restraint on [defendant's] freedom associated with formal arrest." Defendant cites N.C.G.S. § 15A-404 ("Detention of offenders by private persons"), which permits a private party to detain another of whom there is probable cause to believe has committed "[a] felony" or "[a] crime involving physical injury to another person" "in a reasonable manner considering the offense involved and the circumstances of the detention." N.C.G.S. § 15A-404(b)(1), (3), and -404(c) (2021). The only references to law enforcement officers in the statute are in subsection (d)—"The detention may be no longer than the time required for the earliest of the following: (1) The determination that no offense has been committed [and] (2) Surrender of the person detained to a law-enforcement officer as provided in subsection (e)"; and in subsection (e)—"A private person who detains another must immediately notify a law-enforcement officer

and must, unless he releases the person earlier as required by subsection (d), surrender the person detained to the law-enforcement officer." N.C.G.S. § 15A-404(d), (e) (2021). We agree with defendant that Butler's actions here would appear to have constituted a "citizen's detention" under express terms of the statute; we also recognize that this Court has opined that "the ordinary meaning of the word 'detain,' and the meaning we believe our legislature intended when it enacted [N.C.]G.S. 15A-404, is 'To hold or keep in or as if in custody.' " *State v. Wall*, 304 N.C. 609, 615–16 (1982) (quoting Webster's Third New International Dictionary 616 (1976)).

Neither *Wall*, which concerned a convenience store worker who chased a shoplifter out of the store, fired into an automobile the thief entered, and killed another occupant of the car, *id.* at 615, nor any of the few other cases citing this statute, are useful as regards the substantive issue presented here, namely, how a citizen's detention under N.C.G.S. § 15A-404 implicates *Miranda* concerns when the citizen "surrender[s] the person detained to a law-enforcement officer." *See*, *e.g.*, *State v. Gaines*, 332 N.C. 461, 475 (1992) (citing, *inter alia*, the statute in question and stating that "[a] uniformed law enforcement officer is expected under his duty to use the powers a private security guard does not possess, i.e., the power to enforce the law and to arrest where necessary"); *State v. Ataei-Kachuei*, 68 N.C. App. 209 (1984) (discussing the statute in relation to a defendant, the owner of an ice cream company, who shot and killed an employee whom, in the defendant's telling, was attempting to quit his job and abscond without settling up his debts to the defendant); *Caldwell v. Linker*, 901 F. Supp. 1010 (M.D.N.C. 1995) (discussing a teacher who was briefly detained by school officials upon refusing to return keys to the school); *State v. Gilreath*, 118 N.C. App. 200 (1995) (discussing the interplay between the statute in question and self-defense law); *State v. Beal*, 181 N.C. App. 100 (2007) (discussing the statute in question in conjunction with false imprisonment jurisprudence).

While the interplay between a citizen's detention of a suspected criminal, the citizen's subsequent "surrender" of the detainee to law enforcement officers, and incriminating statements thereafter made to law enforcement officers by the suspected criminal before he or she has received the required *Miranda* warnings appears to be a matter of first impression in North Carolina,[34] as noted above, the standard

34. Nor does caselaw from other jurisdictions concerning *Miranda* and citizen's arrests shed light on the specific situation here. *See*, *e.g.*, *Estelle v. Smith*, 451 U.S. 454, 467 (1981) (holding that a psychiatrist performing court-ordered pretrial psychiatric examination of a defendant in custody was required to provide a *Miranda* warning as an "agent of

of review for motions to suppress evidence is well established, and in our view, the trial court's 24 February 2014 "Order Denying Defendant's Second Motion to Suppress Statements" fails to make findings of fact which would address the essence of defendant's argument: that Butler's actions as a private person, not an agent of the State, constituted a detention of defendant and that the circumstances of her detention and subsequent "surrender" of defendant to the Sheriff's Department officers, when considered along with the factors surrounding the officers' questioning of defendant, created a situation where a reasonable person would not have felt able to leave and thus resulted in "a restraint on freedom of movement of the degree associated with a formal arrest." *See Hammonds*, 370 N.C. at 162 (quoting *Buchanan*, 353 N.C. at 339).

Neither of the trial court's orders denying defendant's motion to suppress his statements made at the hospital include crucial findings of fact that would be helpful in resolving this argument from defendant, although the trial court did make findings that Butler was not an agent of the State and that law enforcement officers were not aware of Butler's actions in detaining defendant when they questioned him in the exam room.[35] Accordingly, the trial court's second suppression order did not include findings of fact that would support its conclusions that "[n]one of Butler's actions triggered defendant's *Miranda* rights and they did not transform the officers' subsequent questioning of defendant in the hospital emergency treatment room into a custodial interrogation"; "[n]one of Butler's actions rendered defendant's statements to the officers in the hospital emergency room involuntary"; and "[n]one of defendant's federal or state constitutional rights were violated by Butler's actions."[36]

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the State"); *Hood v. Commonwealth*, 448 S.W.2d 388, 391 (Ky. 1969) ("rejecting the proposition that *Miranda* applies to a citizen's arrest lies in the fact that the ordinary citizen, not being a police officer, would not have the faintest notion concerning the matter of advising of rights"); *State v. La Rose*, 174 N.W.2d 247, 248 (Minn. 1970) ("hold[ing] that the exclusionary rule adopted in the *Miranda* case has no application with respect to [statements made by a detainee to the citizen detainer during] a citizen's arrest"); *State v. Kelly*, 294 A.2d 41 (N.J. 1972) (holding that *Miranda* did not apply during a citizen's arrest situation); *In re Deborah C.*, 635 P.2d 446 (Cal. 1981) (discussing the application of *Miranda* to store detectives).

35. We are mindful that defendant, while stating his argument at the second suppression hearing with sufficient clarity, had no caselaw to cite in support thereof, and that the State cited a number of cases which, as discussed previously, concerned *Miranda*'s application to statements made to private parties and were thus inapposite. Thus, the trial court's mistaken focus on whether Butler was acting as an agent of the State is understandable.

36. None of the cases cited by the State on appeal line up convincingly with those here where defendant, when attempting to leave the hospital was confronted with a locked door and was then physically forced into a room by a private citizen who repeatedly

Where the admission of evidence violates a defendant's constitutional rights, the burden shifted to the State to demonstrate beyond a reasonable doubt that the admission was harmless. *See* N.C.G.S. § 15A-1443(b) (2021) ("A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt."). Defendant argues that he was prejudiced by the admission of his statement made to Snipes at the hospital because "[t]he State was then able to use [the] statement to argue in closing at the guilt phase that he was guilty of murder by torture because the wounds inflicted on [Taylor] were 'all punishment. The shaking was punishment by his own admission' "; "[Taylor] was picking at her scabs and he whipped her for it"; and "Doctor [Schwartz-Watts, defendant's mental health expert witness] said that [defendant] didn't know anything about those bites. Really? He didn't know anything about the bites. You're still going with the [cousin] story."

The State contends that it can meet the burden of showing harmless error beyond a reasonable doubt here because

> [t]he only inculpatory admission contained in defendant's statement to law enforcement in the emergency room was that he whipped Taylor with a power cord when she used the bathroom in his bed. The admission did not remotely touch the bulk of overwhelming evidence which showed defendant murdered Taylor by torture over a period of ten days. And although

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cursed defendant, stated in no uncertain terms that she would not permit him to leave, and stood in the doorway to prevent defendant from departing until law enforcement officers arrived. The State's brief contains the following citations: "*See*, *e.g.*, *Waring*, 364 N.C. at 471 . . . (holding the defendant was not in custody where he voluntarily agreed to accompany detectives to the police station; the defendant was told he was not under arrest and was never restrained; he was frequently left alone in the interview room with the door unlocked; the officers never raised their voice, threatened the defendant, or made him promises; and once he implicated himself in the murder, the interview ended and he was read his *Miranda* rights); *Garcia*, 358 N.C. at 397 . . . (no custody where the defendant was twice informed he was not under arrest; was free to move about unescorted to get a drink from the water fountain; was interviewed by a plain-clothed, unarmed officer with the interview room door closed; no party raised their voice, the defendant was not threatened, and no promises were made); *State v. Sweatt*, 333 N.C. 407 . . . (1993) (where the defendant was in the hospital because of his own intentional actions, there was an absence of a guard posted outside of his door, and lack of any overt actions by police officers indicated that defendant was not in custody when interviewed at the hospital); *accord State v. Alston*, 295 N.C. 629, 632 . . . (1978) (incriminating statements made in response to general on-the-scene police questioning, such as "what happened" when the defendant walked into the emergency room, are admissible)."

> he now argues such an admission was "unduly prejudicial," defendant himself vigorously attempted to get similar statements admitted into evidence during his case-in-chief that he made . . . to his own mental health expert.

In allowing the admission of defendant's statements to Schwartz-Watts, his mental health expert witness, as the basis of her opinion, the trial court noted that his statements to Schwartz-Watts were "substantially similar" to the statement he made to Detective Snipes when he was at the hospital. Schwartz-Watts was permitted to testify that she spoke to defendant about his crimes in order to determine whether any mental illness was related to his acts against Taylor. Pertinent to the consideration of prejudice to defendant from the admission of defendant's statement to Snipes at the hospital, Schwartz-Watts testified about several statements that defendant made to her: that defendant said "in regards to her head injury that [Taylor] had been picking scabs and [defendant] was shaking her and when he shook her that her head hit the door"; that defendant "put all the marks on [Taylor] because she peed in the bed"; and that defendant "reported whipping [Taylor] with the cord . . . the day before he cut the power cord into pieces. I don't know if that was that evening when he shook her and she then was picking the scabs and he grabbed her again." In light of this testimony from defendant's witness, we see no possible prejudice in the admission of the statement defendant made to Snipes at the hospital to the extent the challenged statement touched upon defendant's admissions that he shook Taylor and struck her head on a door due to Taylor picking at scabs, that defendant caused "all the marks on" Taylor's body because Taylor had urinated in the bed, or that defendant had whipped Taylor with an electrical cord, possibly due to further picking at scabs. To the extent that defendant objects to the State's argument during closing arguments that such injuries were inflicted "as punishment," that detail would seem to be exculpatory regarding the charge against defendant of murder by torture, in that murder by torture implicates pain and suffering inflicted in order for the defendant to achieve sadistic gratification from the pain and suffering, while injuries inflicted in even an ill-conceived and overzealous attempt to discipline or punish a child for perceived misbehavior might not qualify as torture.

Finally, the "[cousin] story" remark by the prosecutor which defendant notes as prejudicial in connection to the bites covering Taylor's body appears to refer to defendant's claim in the challenged statement that the bites had been inflicted by one of Taylor's cousins, who was also a young child. The intent of this remark by the prosecutor appears

to have been to suggest that defendant had lied to his mental health expert witness when he said he knew nothing about the source of the more than five dozen bites on Taylor's body, some of which involved the removal of flesh. Schwartz-Watts testified that defendant had "denied" the bite marks, but then clarified that she did not "recall [defendant] saying anything about the bite marks." The challenged statement was also referenced, without objection from defendant, during the following exchange between the prosecutor and Schwartz-Watts:

> Q. Now, I know that you reported what he said he told the detective, but in reading the detective's report he never admitted to putting all the marks on Taylor; is that correct?
>
> A. That's correct.

In light of the extensive testimony from multiple witnesses regarding those human bite wounds—which, as already discussed, was properly admitted—that the bites had been inflicted by an adult rather than by a child during the ten-day period when Taylor was in the sole custody of defendant and when she was never in the presence of any other person, much less her cousin, the passing remark by the State was plainly harmless beyond a reasonable doubt.

In sum, any alleged error in the admission of the statement defendant made to the law enforcement officer at Johnston Memorial Hospital was harmless beyond a reasonable doubt in light of (1) the fact that all of the information which defendant has identified as potentially prejudicial was placed before the jury by defendant's own witness and (2) because of the overwhelming evidence of defendant's guilt as set forth above in the statement of facts. *State v. Morgan*, 359 N.C. 131, 156 (2004).

G. Cumulative prejudice from alleged evidentiary errors

[7] Defendant next argues that "[t]he combined effect of the inadmissible evidence influenced the jury toward passion and prejudice, compounding the prejudice of each single instance," citing *Hembree*, 368 N.C. at 20 ("Regardless of whether any single error would have been prejudicial in isolation, we conclude that the cumulative effect of these three errors deprived defendant of a fair trial."). This Court's precedent provides that even where "none of the trial court's errors, when considered in isolation, [a]re necessarily sufficiently prejudicial to require a new trial, the cumulative effect of the errors [may] create[ ] sufficient prejudice to deny [a] defendant a fair trial." *State v. Canady*, 355 N.C. 242, 246 (2002); *see also State v. Wilkerson*, 363 N.C. 382, 426 (2009)

("Cumulative errors lead to reversal when taken as a whole they deprive[ ] the defendant of his due process right to a fair trial free from prejudicial error." (extraneity omitted)). We are not persuaded by defendant's argument.

In *Hembree*, the defendant was charged with two unrelated murders, for each of which he was tried separately. 368 N.C. at 5–6. At the trial discussed in *Hembree*, defendant admitted that he had been present when the victim died after the two had used cocaine together and that he had disposed of her body; thus, "[t]he principal contested issue of fact at trial was the cause of [the victim's] death," whether murder or "cocaine toxicity." *Id.* at 14. The Court concluded that, in one of the murder trials, "the trial court [had] committed three errors: first, by allowing admission of an excessive amount of the [second] murder evidence under Evidence Rule 404(b), including more than a dozen photographs of [the second victim's] burnt body; second, by allowing [the second victim's] sister . . . to testify about [the second victim's] good character; and third, by allowing the prosecution to argue without basis to the jury that defense counsel had in effect suborned perjury." *Id.* at 9. The Court held that defendant was entitled to a new trial because "the cumulative effect of [those errors] deprived him of a fair trial." *Id.*

In reaching this result, the Court first "note[d] the particular dangers presented by Rule 404(b) evidence. . . . [S]uch evidence can be misused, especially by allowing the jury to convict the accused for a crime not actually before it." *Id.* at 13 (citations omitted). The State had presented this Rule 404(b) evidence regarding the alleged second victim "on seven of the eight days it offered evidence" at the guilt–innocence phase of the defendant's trial, and the Court "conclude[d] that the decision to allow the State to present so much evidence about the [second] murder stretched beyond the trial court's broad discretion." *Id.* at 14, 16. The Court then found that the testimony from the second victim's sister about the second victim's good character was plainly irrelevant at defendant's trial for the alleged murder of a different victim, and therefore "any probative value the testimony might have had was substantially outweighed by the danger of unfair prejudice." *Id.* at 16. In regard to closing arguments, the Court determined that

> [t]he State argued to the jury, not only that [the] defendant had confessed truly and recanted falsely, but that he had lied on the stand in cooperation with defense counsel. Whether or not [the] defendant committed perjury, there was no evidence showing that he had done so at the behest of his attorneys.

> Accordingly, we hold that the prosecutor's statements to this effect were grossly improper, and the trial court erred by failing to intervene *ex mero motu*.

Id. at 20. "Regardless of whether any single error would have been prejudicial in isolation, [the Court] conclude[d] that the cumulative effect of these three errors deprived defendant of a fair trial." *Id.*

The State contends that, in regard to cumulative error, the case at bar is more analogous to *Wilkerson*. The defendant in *Wilkerson*, who sold drugs illegally, was convicted of, *inter alia*, two counts of first-degree murder. 363 N.C. at 391. On appeal, the Court identified four errors in defendant's capital trial: (1) the admission of a police report of the arrest of one of defendant's drug sources which "was admitted for the purpose of establishing [the source's] cellular telephone number, . . . the same number [the] defendant dialed while hiding . . . immediately after the" murders, which the Court concluded was hearsay; (2) the admission of "opinion testimony concerning [one of the victim's] reputation for peacefulness"; (3) the admission of hearsay testimony from the drug source's wife "that her husband sold drugs to defendant in their back bedroom"; and (4) the failure of the trial court to intervene *ex mero motu* in response to the prosecutor's personal vouching for the veracity of one of the State's witnesses during closing arguments. *Id.* at 419, 426. After "review[ing] the record as a whole and, after comparing the overwhelming evidence of [the] defendant's guilt with the evidence improperly admitted, [the Court] conclude[d] that, taken together, these errors did not deprive defendant of his due process right to a fair trial." *Id.* at 426.

Before this Court, defendant states that his "defense at both phases of trial [was] that he was not guilty of the most serious charges, and should not receive a death sentence, because his actions with regard to Taylor were influenced heavily by his dysfunctional upbringing" and represents that

> the excessive manner and display of photographs, presented as professional witnesses exclaimed about their personal horror, multiplied the prejudice of each photo and each witness. Then Drs. Barbaro, McNeal-Trice, and Cooper gave unreliable opinions, unmoored from any reliable research or science, about bite marks and torture. Their opinions were replete with gratuitous, graphic commentary, inappropriate in a court of law where someone's life is being

> determined. Combined, they spent hours repeatedly describing gruesome injuries while displaying color photographs of injuries in a display excessive in size and scope by any prior standard. And as they narrated the photographs, they gave opinions prejudicially dictating to the jury how it should decide the case on guilt and on sentence.
>
> The prejudice to [defendant] increased even further when the trial court allowed the State to present statements he made to law enforcement without the necessary *Miranda* warnings. The State used [defendant's] un-*Mirandized* statements against him in closing argument to impugn his mental health experts and the defense theories at both phases of trial.

As we have opined above, the only evidence that we have determined was clearly erroneously admitted at defendant's trial consisted of the brief display to the jury of State's Exhibit 26, a full-body photograph of Taylor taken at Johnston Memorial Hospital, which was properly published to the jury during the testimony of other medical professionals, but which was unnecessarily shown during the testimony of nurse Butler. We have also stated that some portions of testimony from law enforcement and medical expert witnesses about their emotional reactions to seeing Taylor's injuries may have been improper, although we found the challenged evidence was not prejudicial. Finally, we determined that the trial court's order denying defendant's second motion to suppress the statement defendant made to law enforcement officers at Johnston Memorial Hospital was erroneous in that it failed to adequately address defendant's argument in favor of suppression. However, the potentially inculpatory evidence contained in that statement was admitted through one of defendant's own witnesses, such that there was no prejudice whatsoever in the trial court's error.

We find the facts here easily distinguishable from those in *Hembree*, where it was unclear whether the victim had died by murder or as a result of her ingestion of cocaine, and the State spent the majority of its case-in-chief introducing evidence of an unrelated murder. The uncontradicted evidence in this case tended to show that defendant: (1) had a history of physically disciplining Taylor; (2) volunteered to take care of Taylor while Reyes was away although they were living in a one-room outbuilding that lacked a kitchen, bathroom, or running water; (3) within an hour of gaining total control of Taylor purchased materials to install a padlock on the outbuilding to prevent Taylor from being able to open

the only door of the structure from the inside; (4) over the next ten days was the only person who had access to Taylor; (5) left Taylor, who turned four during the ten-day period, alone and locked inside the outbuilding on multiple occasions while defendant worked and made purchases; (6) refused his grandmother's offer to help care for Taylor once the grandmother learned that the child had been left alone with defendant; (7) brought Taylor to a hospital emergency room in a hypothermic and near-death condition with her body revealing at least 144 separate injuries that appeared to have been inflicted at different points over a ten-day period and some of which were badly infected, including signs of vaginal and anal sexual trauma, numerous lacerations apparently from the electrical cord—in some of which tiny pieces of metal wire were embedded, more than five dozen bite marks—some of which involved the removal of flesh, and head trauma which had rendered Taylor's brain function minimal and ultimately led to her death; (8) first lied about the cause of Taylor's head injury being a fall from jumping on a bed; and (9) later admitted to whipping Taylor with an electrical cord and shaking her in a manner that caused the child's head to strike a door inside the outbuilding for soiling the inflatable mattress Taylor slept on with defendant. In light of this overwhelming evidence that defendant intentionally inflicted all of these injuries to Taylor over an extended period of time and caused the child great pain and suffering, as well as being responsible for her death, the minimal points of evidence which were even arguably admitted in error, even considered cumulatively, did not prejudice defendant by depriving him of a fair trial. We cannot agree with defendant that the erroneous repeated showing of a single photograph of Taylor's body as she appeared when defendant brought her to the hospital and the testimony of witnesses that they found seeing the child's extraordinarily numerous and severe injuries emotionally upsetting, even taken together, had a meaningful impact on the jury's determinations at either the guilt–innocence or sentencing phase of trial. Accordingly, defendant's argument regarding cumulative prejudice is overruled.

H. Defendant's claims of intentional discrimination in jury selection

Defendant next argues the trial court erred in addressing defendant's assertions that the prosecutor in his case used the State's peremptory challenges against jurors in a manner that was discriminatory as to both race and gender in violation of the federal and state constitutions. We disagree.

"[A] prosecutor ordinarily is entitled to exercise permitted peremptory challenges 'for any reason at all, as long as that reason is related

to his view concerning the outcome' of the case to be tried," subject to constitutional restrictions. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (quoting *United States v. Robinson*, 421 F. Supp. 467, 473 (Conn. 1976), mandamus granted *sub nom. United States v. Newman*, 549 F.2d 240 (2d Cir. 1977)). In the capital case at bar, the State and defendant were each able to use up to eighteen peremptory challenges during jury selection. *See* N.C.G.S. § 15A-1217(a), (c) (2021). When the State indicated it would exercise its fifth peremptory strike to remove prospective juror Cubia Massey,[37] a Black woman, the defense objected, arguing the strike was impermissibly based on Massey's race and gender.

After the venire was excused from the courtroom, defendant first emphasized that the State had peremptorily struck two of three (~67%) Black prospective jurors who had not been challenged for cause, while the State had only struck three of sixteen (~19%) white jurors. Defendant then asserted that one of the appropriate considerations upon a *Batson* challenge is "the particular strike rates of the particular prosecutors involved," offering an affidavit (the MSU affidavit) that was from two academic researchers who had studied jury selection in North Carolina capital cases tried between 1990 and 2009 and that had been offered in various Racial Justice Act[38] appeals, which defendant purported showed that the prosecutor who stated that he planned to strike Massey had, in four prior capital cases, disproportionately excused Black jurors using peremptory challenges. The State objected to admission of the MSU affidavit, characterizing it as "one of the most ridiculous studies [he had] seen in [his] entire life," as well as challenging its relevance. Defendant noted that "patterns and practices of the individual prosecutors" in a case have been held relevant under *Miller-El v. Cockrell*, 537 U.S. 322 (2003). The trial court, after framing the prosecutor's objection as being based on hearsay grounds, sustained that objection but held open the question of whether the affidavit might later be included "in the record for possible appellate review."

Following defendant's argument that the State's proposed strike of Massey was impermissibly race-based and the State's response, defendant turned to the issue of gender-based peremptory challenges, stating

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37. The transcript notes the prospective juror's name as Cubia McLean-Massey, but the juror stated that she preferred to use the surname "Massey" during voir dire. In this opinion, we refer to Ms. Massey in the manner she requested.

38. Defendant was clear at trial that he was not making any claim under the Racial Justice Act in regard to his jury challenges as discussed here.

> I was just going to also point out that under—that is our argument concerning the *Batson* challenge. As far as gender, . . . there have been seven male jurors [and the State has] struck one with a strike rate of 14.28 percent. There have been twelve women who have reached that stage and they have struck four.

(Italics added.) After those brief remarks by defendant, the trial court asked the State to respond "to the prima facie showing issue," in regard to both race- and gender-based juror strikes. The State remarked, "First of all, I would also say that, well, I disagree with that on the gender issue, *Batson*. We'll deal with that at the appropriate time." (Italics added.)

The State then made several points, first appearing to challenge defendant's strike rate evidence by suggesting that the *Batson* challenges as to racially discriminatory strikes were coming too early in the jury selection process for the statistical strike rate to be sufficient to meet the prima facie burden, with the prosecutor noting that if the first potential juror who is questioned is struck and also happens to be Black, then the strike rate for Black jurors at that point would be one hundred percent of Black jurors. The prosecutor then pointed out that defendant is white, that the victim was white and of "El Salvador[an]" background, and that "most, if not all, [of] the key witnesses in this case are either . . . from El Salvador or white." The State noted "questions about [Massey's] job, . . . [Massey's] issues with the death penalty and so forth." Finally, the State noted that it had struck the first potential juror who was Black but had accepted the second prospective juror who was Black, and asserted that in light of all of these circumstances, the State's use of a peremptory challenge to strike the third Black potential juror was insufficient to establish the required prima facie showing under *Batson*.

With respect to gender, the prosecutor then stated,

> I would also want to say, if they intend, and I'm going to do some research on it, but if [the defense] intend[s] to make an issue and try to say *Batson* applies to gender, then we will be — I can go ahead and put the [c]ourt and [d]efense on notice that we will begin challenging reverse *Batson* issue [sic] as far as gender also, because they are repeatedly removing male jurors in this case, and so if that's where – an issue we're going to go to, we'll have — we'll put everybody on notice of that, because that is a common — and you go back in history, that is a

> common issue that comes to rise from the [d]efense in these cases, so we'll address that as appropriate.

(Italics added.) The State then referred again to the racial discrimination issue and asked the trial court to deny defendant's motion.

The trial court overruled both defendant's *Batson* and *J.E.B.* objections, stating,

> All right, I do believe that the appellate opinions in this State indicate that a numerical or statistical analysis of a prosecutor's use of peremptory strikes could be helpful to the [c]ourt in ruling on a prima facie decision, a prima facie showing decision, but that such analysis is not dispositive. The Court has carefully reviewed and considered the voir dire process in this case thus far, and has considered its observations of the prosecutors' conduct and method of voir dire.
>
> The [c]ourt does find that the prosecutors' statements and questions during voir dire, whether asked by [either prosecutor], have been consistent and evenhanded throughout. The [c]ourt does not find that any of the statements and questions have been racially motivated thus far. And the [c]ourt does rule that [d]efendant, at this time, has failed to establish a prima facie showing of either racial or gender discrimination in its use of peremptory challenges.

The trial court then gave the State an opportunity to offer any race-neutral or gender-neutral reasons for its use of a peremptory challenge against Massey for the record, but the State declined to do so, stating that "the record is clear."

1. Racial discrimination in jury selection

[8] The North Carolina court system has a well-documented problem with Black citizens being disproportionately excluded from the fundamental civil right to serve on juries. *See, e.g.*, *State v. Robinson*, 375 N.C. 173, 181 (2020) (noting a trial court's "meticulously detailed findings . . . that race was a significant factor in the decisions of prosecutors to exercise peremptory challenges to strike African-American jurors . . . [across] the State of North Carolina" in capital trials). In this case, according to defendant: (1) "when . . . trial counsel objected to the State's peremptory strike of a prospective Black juror, and supported

the objection with evidence showing the prosecutor had a history of disproportionately removing Black jurors in capital cases, the trial court categorically refused to consider the evidence"; (2) "the trial court failed to make specific findings, as this Court's precedent requires, about the statistical evidence of discrimination that [defendant] raised"; (3) "when considering whether [defendant] established a prima facie case of discrimination, rather than applying the correct legal standard that asks only whether a defendant produced sufficient evidence to make an arguable claim, the trial court focused on whether the prosecutors' comments were facially 'evenhanded' or 'racially motivated' " which is "not the test at the prima facie stage"; and (4) "the trial court concluded erroneously that [defendant] failed to establish a prima facie case of discrimination even though the State had struck 67% of the Black jurors at the time the objection was raised, and where the prosecutor had a history of disproportionately removing Black jurors over the course of four other capital trials."

The race-based exclusion of jurors violates both the state and federal constitutions. *See* N.C. Const. art. I, § 26 (prohibiting exclusion "from jury service on account of sex, race, color, religion, or national origin"); *see also* N.C. Const. art. I, § 19 (guaranteeing "the equal protection of the laws"). In *Batson*, the United States "Supreme Court deemed purposeful discrimination in jury selection to be an equal protection violation." *State v. Bennett*, 374 N.C. 579, 592 (2020) (citing *Batson*, 476 U.S. at 88–89). An objecting party will prevail if it can demonstrate that a peremptory strike was "motivated in substantial part" by an improper factor. *Foster v. Chatman*, 578 U.S. 488, 514 (2016). When a *Batson* challenge is raised during jury selection, the trial court must engage in a three-step inquiry:

> First, the party raising the claim must make a prima facie showing of intentional discrimination under the totality of the relevant facts in the case. Second, if a prima facie case is established, the burden shifts to the State to present a race-neutral explanation for the challenge. Finally, the trial court must then determine whether the defendant has met the burden of proving purposeful discrimination.

State v. Waring, 364 N.C. 443, 474–75 (2010) (extraneity omitted). Here, only the first prong of the *Batson* analysis is at issue, to wit: whether defendant made "a prima facie showing of intentional discrimination" by the prosecutor. *Id.*

"Step one of the *Batson* analysis, a *prima facie* showing of racial discrimination, is not intended to be a high hurdle for defendants to cross." *State v. Hoffman*, 348 N.C. 548, 553 (1998). Thus, "a defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson v. California*, 545 U.S. 162, 170 (2005). At the prima facie stage of its analysis, the question is not "whether a prosecutor has actually engaged in impermissible purposeful discrimination at the first step of the *Batson* inquiry because '[t]he inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question.' " *Bennett*, 374 N.C. at 599 (quoting *Johnson*, 545 U.S. at 172). Instead, "the burden on a defendant at this stage is one of production, not of persuasion." *State v. Hobbs*, 374 N.C. 345, 351 (2020).

Among the relevant facts which a trial court should consider in their totality at the prima facie stage are

> the defendant's race, the victim's race, the race of the key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, repeated use of peremptory challenges against blacks such that it tends to establish a pattern of strikes against blacks in the venire, the prosecution's use of a disproportionate number of peremptory challenges to strike black jurors in a single case, and the State's acceptance rate of potential black jurors.

State v. Quick, 341 N.C. 141, 145 (1995). Statistical analyses of peremptory challenge patterns, while "not necessarily dispositive" of whether a defendant has succeeded in making out a *prima facie* case, show that such evidence "can be useful in helping . . . the trial court determine whether a prima facie case of discrimination has been established." *State v. Barden*, 356 N.C. 316, 344 (2002). Other relevant factors must be considered by a trial court, including historical evidence of racial discrimination in a jurisdiction. *Hobbs*, 374 N.C. at 351. In sum, to establish a prima facie case at the first stage of a *Batson* inquiry, a defendant must offer sufficient evidence which may be drawn from a wide range of factors from which the trial court can infer racial discrimination in jury selection, and the trial court has substantial discretion in reaching such a determination.

For this reason, when a trial court rules that a defendant has failed to establish a prima facie case of racial discrimination during jury selection, that ruling is accorded deference upon appellate review and will not be disturbed unless it is "clearly erroneous." *State v. Augustine*, 359 N.C. 709, 715 (2005), *cert. denied*, 548 U.S. 925 (2006). Appellate courts must be "mindful that trial courts, given their experience in supervising *voir dire* and their ability to observe the prosecutor's questions and demeanor firsthand, are well qualified to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination." *State v. Taylor*, 362 N.C. 514, 527 (2008) (quotation marks and citation omitted), *cert. denied*, 558 U.S. 851 (2009).

In this case, many of the typical factors suggested by applicable precedent—namely, those that concern the racial identification of the defendant, the victim, and key witnesses—are absent or muted. Defendant is white, Taylor was apparently white and of an El Salvadoran background, and the primary witnesses appear, upon the record, to be white and/or of El Salvadoran background. Moreover, race does not appear to have been a motivation or relevant aspect in the crimes alleged or in their prosecution. Further, upon resolving defendant's *Batson* challenge, the trial court opined that "the prosecutors' statements and questions during voir dire . . . have been consistent and evenhanded throughout. The [c]ourt does not find that any of the statements and questions have been racially motivated thus far." Defendant does not present any arguments to the contrary regarding these factors. Instead, defendant contends that the trial court erred because it

> refused to consider the prosecutor's race-based strike history across cases[;] applied an incorrect legal standard when deciding whether the prima facie case was met[;] failed to make specific findings about the statistical evidence[; a]nd . . . failed to appreciate that the statistical racial disparity in this case, in tandem with the prosecutor's multi-case track record of disproportionately excluding Black jurors, combined to establish a prima facie showing.

Considering defendant's argument regarding the MSU affidavit, which defendant averred showed a multi-case pattern of racially disparate juror strike rates for one of the State's two prosecutors in this case, we agree that this Court has held that "a court *must* consider historical evidence of discrimination in a jurisdiction" if it has been admitted. *Hobbs*, 374 N.C. at 351 (emphasis added) (citing *Miller-El v. Cockrell*,

537 U.S. at 346; *Flowers v. Mississippi*, 139 S. Ct. 2228, 2243 (2019)). However, nothing in *Hobbs* touches upon the *admissibility* of evidence of historical strike patterns.

The trial court here decided to exclude the MSU affidavit because the State was not able to cross-examine the affiants or the authors of the research from which the MSU affidavit was drawn, using the term "hearsay" to describe the affidavit. According to defendant, "[e]videntiary rules do not strictly govern *Batson* proceedings," citing *Foster* and *State v. Jackson*, 322 N.C. 251 (1988)—cases which defendant asserts shed light on his argument here. We find these cases to be inapposite and unhelpful in our consideration of defendant's argument regarding whether the trial court clearly erred in exercising its discretion by declining to admit the MSU affidavit at the first stage of *Batson*—the determination of whether defendant established a prima facie case of racial discrimination.

In *Foster*, for example, a post-conviction *Batson* case, the "parties agree[d] that [the defendant had] demonstrated a prima facie case, and that the prosecutors ha[d] offered race-neutral reasons for their strikes." 578 U.S. at 500. Thus, the Supreme Court "address[ed] only *Batson*'s third step, . . . [which] turns on factual determinations, [where], 'in the absence of exceptional circumstances,' [appellate courts] defer to state court factual findings unless [the appellate courts] conclude that they are clearly erroneous." *Id.* (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008)). The evidence in question in *Foster* was "a 'certif[ied] . . . true and correct copy of 103 pages of the State's case file' " from the defendant's trial, which Foster had received in response to an open records request. *Id.* (alterations in original). Applying a deferential review to the State's challenge of the trial court's decision to admit the portion of the State's case file in the defendant's case, the Supreme Court upheld the trial court's decision to "admit[ ] the file into evidence, reserving 'a determination as to what weight the Court is going to put on any of [it]' in light of the objections urged by the State," some of which were potentially hearsay-based. *Id.* at 501. While the Supreme Court then stated that it could not

> accept the State's invitation to blind ourselves to [the file's] existence. We have "made it clear that in considering a *Batson* objection, or in reviewing a ruling claimed to be *Batson* error, all of the circumstances that bear upon the issue of racial animosity must be consulted." *Snyder*, 552 U.S., at 478. . . . As we have said in a related context, "[d]etermining whether

> invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial . . . evidence of intent as may be available." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). At a minimum, we are comfortable that all documents in the file were authored by *someone* in the district attorney's office. Any uncertainties concerning the documents are pertinent only as potential limits on their probative value.

Id. at 501 (third and fourth alterations in original). We find *Foster* distinguishable because that appeal concerned: (1) the third—and ultimate—stage of a *Batson* inquiry, as opposed to the stage one prima facie inquiry at issue in this case; (2) the deferential review of a trial (or hearing) court's decision to *admit* challenged evidence as part of a *Batson* claim as opposed to such a court's decision to *exclude* offered evidence; and (3) evidence specific to the jury selection in the defendant's own trial as opposed to an analysis of historical jury strikes across other trials involving a prosecutor in defendant's trial here. In sum, *Foster* does not address the admissibility of evidence at the prima facie stage of a *Batson* hearing during jury selection and unsurprisingly does not explicitly state that rules of evidence do not apply in *Batson* determinations.

Similarly, in *Jackson*, this Court considered the trial court's ultimate determination after a post-trial full *Batson* proceeding, not upon a first stage, prima facie sufficiency argument raised during trial. 322 N.C. at 254. Applying the deference just discussed, the Court opined, that the Court "might not have reached the same result as the superior court but giving, as we must, deference to its findings, we hold it was not error to deny the defendant's motion for mistrial." *Id.* at 257. Specifically, in considering "the quashing of the subpoenas to . . . the prosecutors in the case," the Court held that

> a defendant who makes a *Batson* challenge does not have the right to examine the prosecuting attorney. In balancing the arguments for and against such an examination, we believe the disruption to a trial which could occur if an attorney in a case were called as a witness overbears any good which could be obtained by his testimony. We do not believe we should have a trial within a trial. The presiding judges are capable of passing on the credibility of prosecuting attorneys without the benefit of cross-examination.

Id. at 257–58. As with *Foster*, this case does not bar a trial court's use of the rules of evidence and evidentiary concepts such as hearsay from serving as guidance in *Batson* hearings, does not pertain to prima facie *Batson* determinations, and employs a deference to the decisions of the trial court rather than providing this Court with a precedential basis to reverse a trial court's discretionary evidentiary determination.

We find defendant's citations to *Waring*, 364 N.C. at 487, and *State v. Smith*, 352 N.C. 531, 540 (2000), cases that defendant asserts demonstrate that "[t]his Court has repeatedly affirmed trial court denials of *Batson* objections by relying on the prosecutor's assertion at trial that the juror had a criminal record," equally unavailing. Neither of those cases involved review of the trial court's decision to exclude hearsay evidence upon the proffer of an affidavit at the prima facie stage of a *Batson* inquiry. In *Waring*, the prosecutor, at the second stage of the test set forth in *Batson*, noted as one race-neutral reason among several for striking a Black prospective juror "that she had been charged with a felony and both her jury questionnaire and [voir dire] testimony concerning the disposition of the charges were inconsistent with the 'AOC records.' " 364 N.C. at 487. This Court did not address any "hearsay" concerns in its decision, because no such objection was apparently made as to the "AOC records," but rather the defendant there had argued that the reason was pretextual because similar consultation of "AOC records" was not done in connection to white jurors. *Id.* at 489–90.

In *Smith*, the defendant "contend[ed] the jury selection was flawed" at his trial, in part because "he did not have equal access to the criminal records of prospective jurors." 352 N.C. at 539. The trial court then accepted the State's race-neutral reason for excusing one potential juror—that the juror appeared to have lied about her previous criminal history on her jury questionnaire—without any consideration of hearsay concerns. *Id.* at 540. However, the record in that case does not indicate that the defendant made any objection to the evidence in question on hearsay grounds and thus it is unsurprising that the trial court, and this Court on appellate review, simply addressed the non-hearsay arguments brought forward as error. *See id.* at 540–41.

We acknowledge the lack of any precedent which categorically provides that the rules of evidence may not be employed in the discretion of a trial court during the prima facie stage of a *Batson* challenge during jury selection and therefore decline to create such an exception to the general applicability of the evidentiary rules during trial proceedings based on the facts presented here with regard to the MSU affidavit. *See, e.g.*, *N.C. State Bar v. Sheffield*, 73 N.C. App. 349, 362 ("Affidavits are

generally inadmissible as evidence during trial, as they are an inherently weak method of proof, prepared without notice and without opportunity for cross[-]examination."), *cert. denied*, 314 N.C. 117, *cert. denied*, 474 U.S. 981 (1985). In light of the broad discretion given to trial courts at the first stage of a *Batson* inquiry and the great deference that we must give such determinations on appellate review, we do not perceive clear error in the trial court's decision to sustain the State's hearsay objection to the MSU affidavit.

We therefore must look at the factors properly before the trial court here at the prima facie stage of defendant's *Batson* challenge based upon the State's alleged racially discriminatory use of peremptory strikes at the point when defendant lodged his objection: (1) it was relatively early in the jury selection process and only three Black prospective jurors had been individually questioned; (2) strike statistics showed that the State had struck Black potential jurors at a higher rate than white prospective jurors; (3) there were no apparent racial concerns raised by the racial and ethnic backgrounds of defendant, Taylor, or any of the key witnesses in this case; and (4) "the prosecutors' statements and questions during voir dire . . . [did not appear to be] racially motivated." In other words, the only evidence before the trial court at the prima facie stage tending to suggest potential discrimination consisted of the disparate strike rates of Black and non-Black potential jurors. But, such statistical analyses of peremptory challenge patterns, while "useful in helping . . . the trial court determine whether a *prima facie* case of discrimination has been established," are "not necessarily dispositive." *Barden*, 356 N.C. at 344. Giving the appropriate deference to the trial court's ruling, we do not believe that defendant has established that the trial court's decision was "clearly erroneous." *Augustine*, 359 N.C. at 715; *see also Taylor*, 362 N.C. at 527 (cautioning that reviewing courts should be "mindful that trial courts, given their experience in supervising *voir dire* and their ability to observe the prosecutor's questions and demeanor firsthand, are well qualified to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination" (extraneity omitted)).

Defendant next cites *Hobbs* in support of his argument "that a trial court commits error requiring remand when it fails to 'explain how it weighed the totality of the circumstances surrounding the prosecution's use of peremptory challenges . . . ' and fails to explain 'how or whether [the defendant's evidence was] evaluated.' " 374 N.C. at 358–59. The *Hobbs* decision, however, explicitly noted that its analysis was *not* regarding the prima facie prong under *Batson*, that issue being moot

at the point when the *Hobbs* appeal reached this Court, but rather addressed the ultimate determinations by the trial court upon its consideration of the State's race-neutral reasons for its peremptory strikes against Black prospective jurors. *Id.* at 355–57. Defendant cites no precedent requiring specific findings of fact by the trial court in holding that defendant failed to make a prima facie case under *Batson* and the Court has in fact expressly rejected the argument that findings are required at the prima facie stage. *See State v. Williams*, 343 N.C. 345, 359 (1996) (upholding trial court's ruling from bench, over argument that further findings were required, that "there hasn't been a prima facia [sic] showing"). In any event, the trial court, from the bench, here identified the factors it considered in concluding that defendant had not met its burden of production.

Relatedly, defendant takes issue with the trial court's statement that none of "the statements and questions [by the State during voir dire] have been racially motivated" as evidence that the trial court was erroneously "jumping ahead" in the *Batson* process to the third stage of that analysis. This assertion by defendant is unpersuasive as the State had not at that point (and in fact never did) offer race-neutral reasons for its peremptory strikes—the process of stage two under *Batson*—because the trial court quite clearly noted that it was opining about defendant's prima facie showing. Further, whether the prosecutor had asked questions or made statements during voir dire that suggested racial discrimination is specifically identified in *Quick* as an appropriate factor for consideration at this point in the evaluation of a *Batson* challenge. *Quick*, 341 N.C. at 145 (listing "questions and statements of the prosecutor which tend to support or refute an inference of discrimination" as a factor to be considered at the prima facie stage of a *Batson* hearing). It is thus clear that the trial court's statements were not regarding any determination of purposeful discrimination, but rather, as the trial court stated, were about defendant's prima facie challenge. We therefore reject this part of defendant's argument.

In sum, we hold that defendant has not shown clear error by the trial court in regard to its determination that defendant failed to establish a prima facie case of racial discrimination at the point when his *Batson* challenge was raised.

2. Defendant's J.E.B. claim

[9] Defendant next contends that he is entitled to a new trial, or in the alternative, for remand to the trial court for a new hearing, because the State's strike of potential juror Massey—a Black woman whose excusal

was discussed above in regard to defendant's racial discrimination *Batson* argument—was also impermissibly based upon her gender. We disagree.

The exclusion of jurors based upon gender is barred by both the state and federal constitutions. *See* N.C. Const. art. I, § 26 (prohibiting exclusion "from jury service on account of sex, race, color, religion, or national origin"); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130–31 (1994) ("Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause . . . ."); *see also* N.C. Const. art. I, § 19 (also guaranteeing "the equal protection of the laws"). "Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process." *J.E.B.*, 511 U.S. at 140. Specifically, "[s]triking individual jurors on the assumption that they hold particular views simply because of their gender is practically a brand upon them, affixed by the law, an assertion of their inferiority." *Id.* at 142 (extraneity omitted).

In considering an objection to the proposed strike of jurors based on gender, a trial court applies the same three-prong analysis set forth in *Batson*. *See State v. Maness*, 363 N.C. 261, 271–72 (2009). Thus, a party lodging an objection to a juror strike alleged to have been made based upon gender must "make a *prima facie* showing of intentional discrimination before the party exercising the challenge is required to explain the basis for the strike." *State v. Call*, 349 N.C. 382, 403 (1998) (quoting *J.E.B.*, 511 U.S. at 144–45). We review such determinations for clear error. *See State v. Barnes*, 345 N.C. 184, 210, *cert. denied sub nom.*, *Chambers v. North Carolina*, 522 U.S. 876 (1997), and *cert. denied*, 306 U.S. 666 (1998).

As with a challenge under *Batson* raising racial discrimination, relevant factors to be considered when determining whether a prima facie case of gender-based discrimination in jury selection has been shown include:

> the gender of the defendant, the victim and any key witnesses; questions and comments made by the prosecutor during jury selection which tend to support or contradict an inference of gender discrimination; the frequent exercise of peremptory challenges to prospective jurors of one gender that tend[s] to establish a pattern, or the use of a disproportionate number of peremptory challenges against venire members of one gender; whether the State exercised

> all of its peremptory challenges; and the ultimate gender makeup of the jury.

Call, 349 N.C. at 403–04. A trial court's ruling on an objection asserting that a peremptory strike was discriminatory is reviewed for clear error. *Snyder*, 552 U.S. at 477, 487; *Bennett*, 374 N.C. at 592.

At the point during jury selection when the State proposed to strike Massey, the State had used its peremptory strikes to remove four of twelve (33%) female prospective jurors and one of seven (14%) male prospective jurors. Defendant first asserts that this "numerical pattern alone raised an inference of discrimination." When Massey was challenged, sixteen potential jurors were still eligible to serve, eleven women and five men. The State had previously used its peremptory challenges on three female prospective jurors and one male prospective juror. Five jurors had been seated at that point: one man and four women. Given that twice as many female potential jurors were available as male potential jurors, and in light of the composition of the jury as it existed in part at the point of defendant's *Batson* challenge, we cannot see "clear error" in the trial court's ruling on this ground alone.

Defendant's only other argument of error by the trial court regarding gender-based discrimination is based upon statements by one of the prosecutors in response to defendant's challenge:

> I would also want to say, if they intend, and I'm going to do some research on it, but if [the defense] intend[s] to make an issue and try to say *Batson* applies to gender, then we will be – I can go ahead and put the [c]ourt and [d]efense on notice that we will begin challenging reverse *Batson* issue [sic] as far as gender also, because they are repeatedly removing male jurors in this case, and so if that's where — an issue we're going to go to, we'll have — we'll put everybody on notice of that, because that is a common – and you go back in history, that is a common issue that comes to rise from the [d]efense in these cases, so we'll address that as appropriate.

(Italics added.) Defendant asserts that these remarks indicate "that the prosecutor did not know *J.E.B.* prevented him from removing jurors based on gender, and that he felt free to do so . . . [and t]he second comment shows the prosecutor was striking women to counterbalance his (inaccurate) belief that the defense was disproportionately striking men." We cannot adopt defendant's suggested interpretation of these

statements by one of the prosecutors at defendant's trial. Even if we were to agree with defendant that, in the first statement, this prosecutor was expressing a complete lack of familiarity with precedent making clear that gender-based juror strikes are prohibited, the prosecutor's alleged ignorance on that point does not itself indicate that he was seeking to strike Massey or had struck other jurors based on gender. A prosecutor could theoretically be unaware of such caselaw and still actually proceed in jury selection without any gender-based discriminatory intent. Further, we read the prosecutor's second remark as simply suggesting that it might potentially make a *Batson* objection against the defendant for gender-based discrimination in juror selection.

Defendant asks the Court to take judicial notice of the prosecutor's statements which are part of a different case, part of which is pending in this Court. Defendant contends that these statements are pertinent to this prosecutor's intent in excusing female prospective jurors. We decline defendant's invitation because here we are reviewing the trial court's ruling on defendant's prima facie challenge to the strike of Massey for clear error, and the trial court here did not have the benefit of the appellate filings in other cases involving the prosecutor here. Accordingly, we find no error in the trial court's ruling related to defendant's attempt to establish a prima facie case of gender-based discrimination.

I. Excusal of jurors for cause

[10] Defendant next argues that the trial court improperly excused prospective jurors Steven Pierce and Slade Long for cause, violating defendant's constitutional right to a fair and impartial jury. Specifically, defendant contends that

> Pierce said he believed in the death penalty for some cases, and said he could consider both death and life sentences. His hesitation in personally imposing a death sentence was morally appropriate and did not show he was substantially impaired. . . . Long used drugs in his youth but had been clean for 27 years. His expression of empathy for people addicted to drugs did not render him incapable of being fair in this case. Further, the trial court erred in denying defense counsel the opportunity to question . . . Long.

Both the United States Constitution and the North Carolina Constitution guarantee capital defendants have a right under the United States Constitution to trial by an impartial jury. *Wainwright v. Witt*, 469 U.S. 412, 416 (1985) (citing Sixth and Fourteenth Amendments);

State v. Crump, 376 N.C. 375, 381 (2020) (citing N.C. Const. art. I, § 24). The standard for determining when a potential juror may be excluded for cause is whether his or her views "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " *State v. Davis*, 325 N.C. 607, 622 (1989) (quoting *Wainwright*, 469 U.S. at 424).

A juror may not be excused for cause simply for "voic[ing] general objections to the death penalty or expressed conscientious or religious scruples against its infliction," *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968), and even "those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law," *Lockhart v. McCree*, 476 U.S. 162, 176 (1986). A prospective juror may be excused for cause, however, if his or her views on capital punishment would serve to "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright*, 469 U.S. at 424 (footnote omitted). The North Carolina General Assembly has codified these constitutional principles in subsection 15A-1212(8) of the General Statutes. *See* N.C.G.S. § 15A-1212(8) (2021) (providing that a challenge for cause to an individual juror may be made by any party on the ground that the juror, "[a]s a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina").

"[E]xcusals for cause may properly include persons who equivocate or who state that although they believe generally in the death penalty, they indicate that they personally would be unable or would find it difficult to vote for the death penalty." *State v. Simpson*, 341 N.C. 316, 342–43 (1995); *see also State v. Jones*, 355 N.C. 117, 122 (2002) (holding no abuse of discretion in allowing the State's challenge for cause based on "the equivocating nature of her responses" regarding whether the prospective juror could impose a death sentence which led the trial judge to conclude that she "would be unable to faithfully and impartially apply the law in this case"); *State v. Greene*, 351 N.C. 562, 567–68 (no abuse of discretion where the prospective juror gave conflicting responses including that (1) it would be hard for him to impose the death penalty because of his religious beliefs, and (2) he could follow the law and vote for the death penalty but it would be against what he believed), *cert. denied*, 531 U.S. 1041 (2000); *State v. Yelverton*, 334 N.C. 532, 544 (1993) (no abuse of discretion in excusing a juror where he answered that he could follow the trial court's instructions, but also "steadfastly indicated

reluctance or uncertainty as to his ability to carry out [his] duties as a juror" in regards to imposing a death sentence (alteration in original)); *State v. Bowman*, 349 N.C. 459, 471 (1998) (holding no abuse of discretion in excusing a juror because she clearly stated that she felt her personal beliefs might affect her consideration of the death penalty for the defendant and her responses were at best equivocal, in comparison, and "the trial court gave ample opportunity to both sides to explore and elicit [her] views"), *cert. denied*, 527 U.S. 1040 (1999); *Davis*, 325 N.C. at 624 (finding no abuse of discretion where prospective juror's answers "reveal that he wanted to follow the law, but thought his views on capital punishment would interfere with the performance of his duties during the sentencing phase").

"Challenges for cause in jury selection are matters in the discretion of the court and are not reviewable on appeal except for abuse of discretion." *State v. Kennedy*, 320 N.C. 20, 28 (1987). This is so because the trial judge "has the opportunity to see and hear the juror on voir dire and to make findings based on the juror's credibility and demeanor, to ultimately determine whether the juror could be fair and impartial." *Id.* at 26. Because a prospective juror's biases may not always be provable with unmistakable clarity, reviewing courts must "defer to the trial court's judgment concerning whether the prospective juror would be able to follow the law impartially." *State v. Brogden*, 334 N.C. 39, 43 (1993) (quoting *Davis*, 325 N.C. at 624); *see also State v. Walls*, 342 N.C. 1, 33 (1995) ("Based on the superior vantage point of the trial court, its decision as to whether a juror's views would substantially impair the performance of his duties is to be afforded deference."), *cert. denied*, 517 U.S. 1197 (1996).

In addition, "[a] defendant has no absolute right to question or to rehabilitate prospective jurors before or after the trial court excuses such jurors for cause." *Warren*, 347 N.C. at 326. In capital cases, the trial court is vested with discretion to regulate and supervise jury selection. *Gibbs*, 335 N.C. at 26. "[W]here the record shows the challenge is supported by the prospective juror's answers to the prosecutor's and court's questions, absent a showing that further questioning would have elicited different answers, the court does not err by refusing to permit the defendant to propound questions about the same matter." *Id.* at 35. Whether to allow a defendant an opportunity to rehabilitate a prospective juror challenged for cause also lies within the trial court's discretion. *State v. Stephens*, 347 N.C. 352, 366 (1997), *cert. denied*, 525 U.S. 831 (1998).

1. Prospective juror Pierce

During the voir dire, after confirming that Pierce did not know any of the parties, possible witnesses, or attorneys involved in the case and had no media or other exposure to the crimes with which defendant was charged, after the prosecutor described the offenses with which defendant was charged, the prosecutor turned to questions about Pierce's "thoughts about the death penalty." Pierce's initial response was:

> That's difficult, because I'm a Christian. I value life, both physically and spiritually. I read in the Bible that God does submit the death penalty at times. And I have thought about already the possibilities; the Judge had mentioned it. If it came down to it, my — my thoughts are that I would go with the facts presented and look at the situation, with much prayer, I would make a call [based on] the evidence put before me, the arguments. As far as capital punishment, I'm still — I have a hard time with it. Am I totally against it? I'm not sure. And that's my honest answer.

The prosecutor followed up by asking whether Pierce felt he could "personally be a part of [the capital sentencing] process," and the following exchange occurred:

> MR. PIERCE: I do not know. That's a good question. I've thought about it. I just do not know. That would be hard. I value life, like I said.
>
> [PROSECUTOR]: And we all do. I mean, we — we understand that. And we all do value life. So —
>
> MR. PIERCE: With that said, I value life on both sides, the one who lost their life, too. There's more than one affected.
>
> [PROSECUTOR]: Now, do you feel like that you might have some moral or religious — based upon your religious or moral beliefs that you might have some real problems with doing that; that it might cause you some personal — your conscience some personal trouble?
>
> MR. PIERCE: No. And I'll say that because I have a relationship with the Lord, and I will be talking to him about it, and I will make a decision on how he leads me.

The prosecutor then clarified that Pierce would need to apply "man's law" in the case and asked, "Do you feel like [the death penalty] is an appropriate sentence in some cases?" and Pierce responded, "I would have to say yes. Again, it's difficult. It's difficult." Pierce went on to explain, "The only reason—the only reason I would say yes is because—because I believe in an eternity as well. Although someone could have a short life here, they could have an eternal life; will have eternal life." He further noted that he had held "reservations about the death penalty" for "twenty-five or thirty years" based upon his reading of the Bible. Pierce did agree that "the sentence of death . . . is a necessary law." The prosecutor then asked Pierce whether, if the State had proved its capital case against defendant beyond a reasonable doubt, he could "personally" vote for a death sentence for defendant. Pierce replied, "It's hard." When the prosecutor pressed Pierce about whether his "religious beliefs and . . . personal convictions . . . may substantially impair [his] ability to" impose the death penalty in defendant's case and Pierce first stated, "Oh, it definitely makes it—I mean, it affected my decision, obviously, to be able to make the decision, I mean—"; and then responded to the question being posed again by saying, "It would—there is a potential, I'm going to tell you, because it's hard. It's definitely difficult." Pierce went on to say, "I wouldn't be able to—and it would be hard for me to separate the—my beliefs . . . in making the decisions that I make. I know it would be better for y'all if I were able to . . . give you a yes-or-no answer." Eventually, in response to being asked yet again about the impact Pierce's religious convictions might have on his ability to follow the law, he affirmed, "It would not impair my ability to follow the law, but it would be very difficult." But when the prosecutor asked Pierce a final time about the same issue, Pierce responded:

> MR. PIERCE: I guess the best answer is there is a potential for that. I don't think I can say yes or no. If I were firm in my conviction of whether the death penalty was okay for me as a Christian, then I could say yes or no, but I have not settled that conviction in my heart. And there's—I mean, there's—obviously, you've realized by now there's a potential. I hate to keep going in circles, I know.
>
> [PROSECUTOR]: It's okay. So what I'm hearing from you, and you correct me if I'm wrong, is that there is this personal religious conscientious conviction that you have that could potentially impair your ability to render a sentence of death, even

though the State has proven the case beyond a reasonable doubt?

MR. PIERCE: That would be correct.

[PROSECUTOR]: So—and it's hard, and I get that. And that's sort of what we're getting at, if you are that person—

You need to be honest, you know, honest about it, and I know that you are being honest. Obviously, you are a very honest man.

—is that if that is the case, that you—that that personal conviction substantially impairs your ability to come into this courtroom and announce a sentence of death to this [d]efendant, then that means that you would not be—it would not be appropriate for you to sit on the jury. And so do you feel like that that is the case?

MR. PIERCE: I'll have to say yes.

[PROSECUTOR]: And so, you know, you are going to be instructed that you have to follow the law; that, you know, it would be your obligation to follow the law, that you would swear an oath to do that. And I know that that's important to you. Following the law is important to you and seeing that the process works. I mean, that's why we have this part of the process, the voir dire process. We talk to people about whether or not they will be able to do that, even if it's your strongest desire to do that, I understand, to follow the law and follow the Court's instruction. And there's nothing wrong with being honest and saying that, "Because of my personal beliefs regarding the death penalty, I would be substantially impaired in doing that."

And so I just want to make sure that I understand you correctly, that even though you strongly believe that you have a duty to follow the law, that you would be substantially impaired when it came to coming in and announcing the death penalty, a sentence of death, even though the State had met its burden. Am I understanding you correctly?

> MR. PIERCE: There is a potential for that. And the problem is the difference between God's law and man's law. And I do want to abide by man's law. If it came down to it, if I had to choose between God's and man's, I'm going to go with God's.
>
> . . . .
>
> [PROSECUTOR]: It's going to impair—yes, impair your ability.
>
> MR. PIERCE: There's very good potential. I'll just say yes.

The State then moved to excuse Pierce for cause, but the trial court denied that motion. After the prosecutor again asked Pierce "the ultimate question is, after thinking about it, after understanding that there is this process, do you feel like if the State proves its case beyond a reasonable doubt in both phases, that your ability to come—because of your beliefs and convictions, that your ability to come into this courtroom and announce a sentence of death would be substantially impaired?" Pierce replied, "Yes," and the trial court then gave the defense an opportunity to question Pierce before making its decision regarding an excusal for cause.

In his exchanges with defense counsel, Pierce agreed several times that he was "struggling" with the question of the death penalty. Defense counsel explained the jury's role in deciding the presence of aggravating and mitigating circumstances and then weighing them before the death sentence can be recommended in capital cases where a guilty verdict has been reached on a first-degree murder charge. Defense counsel then asked Pierce if he could follow the trial court's instructions on those issues, and Pierce replied

> I could listen to his instructions and follow what he said. The problem would come down to if the circumstances had been all weighed out and [d]efendant was found guilty and it came down to administering the death penalty, I would have difficulty. I would have difficulty with that. It's difficult.

The trial court then questioned Pierce briefly, asking whether he could "return a sentence of death against a defendant," and Pierce then responded that he was "struggling." The following exchange then occurred:

> THE COURT: . . . . What we're trying to determine, if you can answer the question for us, is whether or

> not you as a juror could return a sentence of death against a defendant found guilty of first[-]degree murder, if you were convinced beyond a reasonable doubt under the facts and the law that the penalty of death was the appropriate punishment.
>
> MR. PIERCE: I know you're asking me to decide right now. And if I had to decide right now, I would probably say no.
>
> THE COURT: So is it fair to say, then, that based upon your religious or moral convictions, that you believe your ability to return a sentence of death against a defendant found guilty of first[-]degree murder would be substantially impaired even if you were convinced beyond a reasonable doubt under the facts and the law that death was the appropriate punishment?
>
> MR. PIERCE: That is correct.

At that point, Pierce was excused from the courtroom and the parties engaged in a discussion with the trial court about the State's request to excuse the potential juror for cause. The trial court acknowledged defendant's

> observations about the intelligence and thoughtfulness of this juror. It does appear to the [c]ourt, based upon the totality of his answers, that his beliefs concerning the penalty of death are such that that is a matter of his conscience. Those feelings would interfere with or substantially impair his ability to return a sentence of death against [d]efendant even if he were convinced beyond a reasonable doubt under the law and the facts that the penalty of death was the appropriate punishment and should be imposed.

The trial court then allowed the State's challenge for cause.

We see no abuse of discretion here. "Based on the superior vantage point of the trial court," given its ability to see and hear the voir dire of prospective juror Pierce, we afford deference to "its decision as to whether a juror's views would substantially impair the performance of his duties." *Walls*, 342 N.C. at 33. Even before Pierce directly agreed at least three times that his religious convictions could or would substantially impair his ability to impose the death penalty where it was

warranted under law, he stated multiple times that it would be "difficult" or "very difficult" for him to vote to impose the death penalty, said that he was "struggling" with the question, and said that between "God's law and man's law," he would have to follow God's law. In light of the extended amount of time the trial court provided to the parties for an opportunity to discuss with Pierce his obviously sincere and deeply thoughtful concerns regarding capital punishment, we cannot say that the trial court's decision to excuse Pierce for cause was the result of an unreasoned or arbitrary decision.

2. Prospective juror Long

On voir dire, once the State turned to the issue of the death penalty, Long initially expressed that he had

> a little problem with my faith as far as being able to actually — I watch a lot of shows where people get twenty years and down the road, they're found innocent and stuff like that. I feel like — I'd feel guilty if I put an innocent man to death, or even locked him up for life. I've just got issues with that.

Long also expressed concerns about life sentences and long delays before death sentences are carried out. Long then stated that he was "not totally opposed to" capital punishment. When Long was asked if he "believe[d] it's a necessary law that we have the death penalty as a potential punishment in some first[-]degree murder cases," Long responded "That's a hard one for me as a human being, being the judge on someone's life." When the question was repeated, Long added, "It's in the Bible, and I study it every day, that if a man kills another man, then his penalty — I mean, there's — if you go back in the Old Testament, there were safe — safe towns they had because sometimes there were accidents. But if they were going with death, they didn't waste no time, they just stoned them." The State then asked Long if he "could be part of the legal machinery, be part of the process that might bring about the death penalty in this particular case if the evidence was appropriate," and Long responded, "It's possible. I mean, I just — I didn't expect this." When the prosecutor clarified that the question was not specific to defendant's case but rather was whether Long could hypothetically "be part of the process that . . . might ultimately bring about the death penalty," Long affirmed, "Yes, I believe I could." Yet as the State continued to speak with Long about the issue of imposing the death penalty, Long raised concerns about the sufficiency of evidence. The voir dire of Long was continued to the following day.

The following morning, the State turned to other issues and Long stated that he was self-employed as a finish carpenter, was hoping to get a new project soon, and was deeply in debt, but he did not previously reveal this information because he "didn't want to be a complainer" when the trial court had questioned the entire venire about hardships. Long noted a legal proceeding of some type regarding a builder who "went under." When the prosecutor turned to the theories of first-degree murder that the State had alleged in defendant's case—felony murder and murder by torture—Long volunteered information about being charged and found "guilty of torturing and killing an animal" in connection with the unintentional killing of "[a] scarlet macaw parrot" in California when Long was nineteen years old. Long further stated that he had missed restitution payments which resulted in his being "locked . . . up." Long emphasized that he "got accused of torturing," although Long represented that he was only trying to "wing" the bird to catch it so that he could sell it.

Thereafter, the prosecutor and Long had the following exchange:

> [PROSECUTOR]: Well—and again, I'm not trying to put any words in your mouth or anything about this, but I want to ask you, do you—you mentioned that you have actually been prosecuted and convicted for being—what they described as torturing an animal, convicted of that some time ago, but do you—that, and I guess you also mentioned, seriously, about the issues with your financial situation that you're the main—almost the only breadwinner in your family; is that correct?
>
> MR. LONG: Yes, sir.
>
> [PROSECUTOR]: Do you feel like the—let me ask you, the fact that you have—what you went through, and we're talking about torture in this case, do you feel like that would in any way affect your ability to sit on this jury and fairly consider these issues, or do you feel like that might influence—your past history, that that might influence you?
>
> MR. LONG: I was in another murder trial, too.
>
> [PROSECUTOR]: Were you charged?
>
> MR. LONG: No. My best friend I grew up with, we was out in Barstow, California, at a party joint

where they had a lake where everybody went to, and someone stole his cassette tape, and he went over to the van next to it where we were camped at, and pulled it off the guy's dash, and we were twenty-four at the time, me and my buddy, Jim, we grew up ever since we—

[PROSECUTOR]: Right. I'm not trying to cut you off—

MR. LONG: I had to go sit through the whole thing of a murder trial.

[PROSECUTOR]: Was your buddy the one charged?

MR. LONG: My buddy was the one that got killed. The other—the nineteen-year-old boy killed him in a fistfight, which I never thought it would have happened, but just a—just appeared—I thought it was going to be a little fistfight.

[PROSECUTOR]: Right. Have you had any other—any other dealings with the court system or law, either yourself or someone close to you?

MR. LONG: I've been—I'm twenty-seven years straight now. I got saved that night, accepted Jesus Christ as my Lord and Savior in California. I had a ten-year heroin addiction. I started that drug when I was sixteen years old, and by the time I was nineteen, I was shooting up every day, so I've been in and out of—usually I'm not on this side.

[PROSECUTOR]: And I appreciate it, and I'm happy to see that you—twenty-seven years you've been clean and straight.

MR. LONG: Right.

[PROSECUTOR]: Did you have any other criminal charges against you while you were in California?

MR. LONG: I had eight petty thefts, stealing for my habit. And then I got pulled, I don't know how many times. The detectives knew me when they see me driving the road. They would just pull me over

> and then they would go ahead and take a magnifying glass, check me, identify fresh marks, and then they would haul me off to jail, and I'd have to sign a promise to appear. I mean, I spent a lot of time in these places back then.

The State then asked whether Long "had any experience of either yourself, a close family member, a close friend, with either child abuse, or child sexual abuse, or domestic violence in your life? And you can just say yes or no at this point." The following discussion then ensued:

> MR. LONG: Yes.
>
> [PROSECUTOR]: Okay. But that's something—was it more back in your previous—sometime now or back—or was it—
>
> MR. LONG: Well, it was after I moved out here, a pretty similar case to this right here.
>
> [PROSECUTOR]: Do what, now?
>
> MR. LONG: Pretty similar case to what I think this case is.
>
> [PROSECUTOR]: Okay. Similar to this case, what you think the case is? And is that—was that involving—who was the person that was involved?
>
> MR. LONG: It was a good friend I went to junior high and high school with.
>
> [PROSECUTOR]: And they were charged with something like a sex or child sexual case?
>
> MR. LONG: Well, shook the baby to death.
>
> [PROSECUTOR]: Just sort of—I'm sorry.
>
> MR. LONG: Shook the baby to death. He was on crystal meth, baby wouldn't quit crying, and he just yelling at it and shook it up. He's out of prison now. I mean, he got, like, ten years or something like that.
>
> [PROSECUTOR]: So, you got—so, how old was the baby?
>
> MR. LONG: He had a girlfriend. The baby was just—I don't even know if it was about a year old, something like that. I was living out here.

. . . .

> [PROSECUTOR]: Were you familiar with the situation and everything?
>
> MR. LONG: Well—
>
> [PROSECUTOR]: I mean, as far as talking to him when it was happening, him going to court and what happened there?
>
> MR. LONG: I was getting information from my friend that used to be married to this man, and so as far as personally, I have talked to the boy a few times since he's been out, but he doesn't like to—

The prosecutor then broke in and summarized Long's "life experiences" that might impact his ability to serve as a fair and impartial juror in a potentially extended trial:

> [Y]our issue with your work and your paying bills and things[,] . . . what you know about this case, do you feel like that your experiences and knowledge of other situations with the torture, and the sex offense involving your friend, your issues with drugs, and so forth, and your job situation, do you feel like that would be—substantially impair your ability in this particular case, because of the issues that are in this case, to say that you could not be a—fulfill the duties as a juror in this particular case? In other words, be totally fair and impartial in this case?

Long responded that he would "have compassion" for people in "that situation"—apparently referring to those who have substance abuse issues—and noted that "[t]he things that I did not being in my right mind has hurt [sic]." The trial court stepped in shortly thereafter:

> THE COURT: Mr. Long, I've been sitting here and listening to you talk about your life's experiences. And the bottom line of the question is this, considering the issues that may be involved in this case, involving an allegation of murder by torture, a case in which there may be some evidence of child abuse and evidence of drug use, do you believe that your own life's experiences would affect your own ability to be a completely objective and fair and impartial juror to both sides?

> MR. LONG: I believe that I would struggle.
>
> THE COURT: Struggle with being fair?
>
> MR. LONG: Yeah, my—
>
> THE COURT: Struggle with—let me put—do you think you would struggle with being objective and impartial?
>
> MR. LONG: Like I said, I don't know the whole case or anything like that. I know what drugs can do to people, and I just—I've got a soft spot in my heart for people who get addicted.

Long was excused from the courtroom briefly during which time the defense stated it would not consent to Long being excused for cause at that point. Long was returned to the courtroom for further voir dire. During further questioning by the State, Long stated that he had a "soft spot" for people who are using illegal drugs because when a person is on drugs:

> You're not in your right mind. You're really not who you were born to be, and it changes you, and, you know, you're breaking the law by doing it, so everything that goes with it is breaking the law, and unless you've been there, you won't ever understand what it's like to be on the other side.

When the State asked directly whether Long's life experiences would "impair your ability to be objective in this particular case," Long answered, "Yes." Long answered affirmatively three more times to variations of the same inquiry by the State. The State moved to excuse Long for cause but the defense objected again. Long was again asked to step out of the courtroom.

The trial court noted the life experiences of Long and his explicit answer that those would substantially impair his ability to be a juror in a case that involved substance abuse. The State agreed, while defendant contended that Long had only suggested he would be more compassionate to defendants who had experienced substance abuse. Ultimately, after hearing arguments from each side, the trial court announced that

> upon consideration of the totality of Mr. Long's responses to questions asked by the prosecutor and by the [c]ourt, including but not limited to his

> description of his extensive history of substance abuse, his admission of sympathy for persons suffering [from] substance abuse; and representations of [c]ounsel for the State and [d]efendant that there may be evidence of substance abuse by [d]efendant introduced during the trial of this case, especially if this case reaches a sentencing phase; the Court also noting that when describing his history of drug abuse, that this prospective juror became visibly upset and began softly weeping, the [c]ourt does find that this prospective juror's ability to be completely objective, fair, and impartial to both the State, as well as [d]efendant, would be substantially impaired, and accordingly, the State's challenge for cause is sustained.

On appeal, defendant, quoting *Wainwright*, 469 U.S. at 424, contends that the trial court abused its discretion in allowing the State's motion to excuse Long for cause, asserting that "the State did not establish that . . . Long's 'concerns' would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.' " We cannot agree. While, as defendant notes, the alleged substance use and abuse forecast to be presented in defendant's case was not identical to Long's experiences, Long stated several times that his experiences would impair his ability to be impartial in a case that involved substance abuse. Given that the excusal of cause is left to the trial court's discretion, we must "defer to the trial court's judgment concerning whether the prospective juror would be able to follow the law impartially." *Brogden*, 334 N.C. at 43 (quoting *Davis*, 325 N.C. at 624).

Regarding defendant's argument that the trial court erred in declining to offer defense counsel the opportunity to question Long, "[w]hether to allow defendant[ ] an opportunity to rehabilitate a prospective juror challenged for cause also lies within the trial court's discretion." *Stephens*, 347 N.C. at 366. Here, "the record shows the [State's] challenge is supported by the prospective juror's answers to the prosecutor's and court's questions," and there has been no "showing that further questioning would have elicited different answers" by Long. *See Gibbs*, 335 N.C. at 35. Accordingly, "the [trial] court [did] not err by refusing to permit the defendant to propound questions about the same matter." *Gibbs*, 335 N.C. at 35; *see also Warren*, 347 N.C. at 326 ("A defendant has no absolute right to question or to rehabilitate prospective jurors before or after the trial court excuses such jurors for cause."). This argument is overruled.

J. In camera review of Reyes's mental health records

[11] Defendant next represents that on his motion,[39] the trial court entered an order for disclosure of mental health records of Reyes and a subsequent order explaining the trial court had reviewed records in camera and would order some of Reyes's records disclosed to the defense, while the remainder of the records in question would be placed under seal in the superior court file. In that order, the trial court stated:

> The court has carefully reviewed these records and found that, with the exception of the attached letters, all of them pertain to grief counseling Ms. Reyes received following the death of her minor child. The mental health records of Ms. Reyes contain no information that would tend to exculpate defendant or to mitigate his punishment if he is found guilty of any crime charged. The attached letters, contained in Ms. Reyes'[s] mental health records, appear to be from . . . defendant to Ms. Reyes.

Defendant asks this Court to review the records that were sealed in the superior court file "for any inconsistent statements or other impeachment evidence, and to remand the case for a new trial if it determines that [defendant] was denied access to evidence or information that was material and favorable to his defense," citing "the importance of Taylor's mother to the credibility of the State's case."

Where the trial court conducts an in camera inspection of certain evidence and denies the defendant's request for its production, the evidence should be sealed and "placed in the record for appellate review." *State v. Hardy*, 293 N.C. 105, 128 (1977). Having examined these records to determine whether they contain any evidence that is "both favorable to the accused and material to guilt or punishment," *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987), we agree with the trial court's assessment that Reyes's medical records under seal contain no information—either

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39. At the hearing on defendant's motion for disclosure of Reyes's medical records, which is not included in the record on appeal, the State represented that it was not aware of and did not possess any such evidence. Counsel for Reyes, who had been charged with felony child abuse in connection with Taylor's death, was also present and objected on her behalf. Reyes's counsel contended that the discovery of Reyes's medical records would violate her rights under the Fifth Amendment and her right to privacy and physician/patient privilege, although her counsel acknowledged that the trial court could compel disclosure of this information if it was necessary to a proper administration of justice under N.C.G.S. § 8-53.

exculpatory or impeaching—that is pertinent, much less material, to defendant's guilt or sentence. *See id.* ("[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.").

K. Arbitrary capital sentencing system

[12] Defendant further argues that he received a capital sentence as part of "an arbitrary system that fails to rationally distinguish between the many potentially-capital cases that do not receive the death penalty, and the very few that do." In support of his position, defendant cites numerous murder cases, including those in which "[d]efendants killed young children in appalling circumstances," *see State v. Stacks*, No. COA21-167, 2022 WL 2204788 (N.C. Ct. App. June 21, 2022) (unpublished); *State v. Stepp*, 232 N.C. App. 132 (2014); *State v. Hampton*, No. COA14-394, 2014 WL 7149212 (N.C. Ct. App. Dec. 16, 2014) (unpublished); *State v. Keels*, No. COA11-350, 2011 WL 6046177 (N.C. Ct. App. Dec. 6, 2011) (unpublished); were "engaged in mass killing, or murdered serially," *see State v. Bradley*, No. COA17-1391, 2018 WL 5796233 (N.C. Ct. App. Nov. 6, 2018) (unpublished); *State v. Thomas*, 268 N.C. App. 121 (2019); *State v. Hurd*, 246 N.C. App. 281 (2016); *State v. Stewart*, 231 N.C. App. 134 (2013); *State v. Cooper*, 219 N.C. App. 390 (2012); or "committed planned-out murders for money," *see State v. Dixon*, No. COA15-350, 2016 WL 4608185 (N.C. Ct. App. Sept. 6, 2016) (unpublished); *State v. Chaplin*, No. COA13-393, 2013 WL 5947754 (N.C. Ct. App. Nov. 5, 2013) (unpublished); *State v. Britt*, 217 N.C. App. 309 (2011); where juries nonetheless rejected the opportunity to recommend the imposition of a death sentence following their return of guilty verdicts. Defendant also cites recent murder cases where "prosecutors have chosen to try defendants non-capitally even though they subjected children to horrendous and protracted abuse." *See State v. McCullen*, No. COA19-319, 2020 WL 2126784 (N.C. Ct. App. May 5, 2020) (unpublished); *State v. Lail*, No. COA19-468, 2020 WL 774106 (N.C. Ct. App. Feb. 18, 2020) (unpublished); *State v. Cheeks*, 267 N.C. App. 579 (2019); *State v. Paddock*, 204 N.C. App. 280 (2010). Finally, defendant cites media accounts of "potentially-capital cases involving heinous and shocking facts that nonetheless were not even taken to trial, but were resolved with non-capital plea agreements."

Defendant asserts that these examples demonstrate that "the overwhelming majority of potentially capital cases" are resolved without the imposition of a death sentence, such that those defendants who "receive

the death penalty are not chosen rationally, for reasons unique to those cases[, but r]ather, they are a random and infinitesimal subset of defendants whose cases are not meaningfully distinguishable from the scores of other aggravated murder defendants who receive life sentences or less." Defendant then suggests that this impermissible arbitrariness could be rectified in either of two ways:

> One is to vacate [defendant's] death sentence pursuant to the statutory obligation to ensure proportionality, which provides relief from arbitrarily imposed death sentences. *See* N.C.G.S. § 15A-2000(d)(2) (requiring a death sentence to be overturned "upon a finding that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor").
>
> The alternative remedy is for the Court to declare the death penalty unconstitutional as applied to [defendant]. The federal and state constitutions prohibit cruel and/or unusual punishments. *See* U.S. Const. amend. VIII (banning "cruel and unusual punishments"); N.C. Const. art. I, § 27 (banning "cruel *or* unusual punishments") (emphasis added).

Engaging in proportionality review as directed by the General Assembly, we have considered whether (1) the record in this case supports the aggravating circumstances found by the jury, (2) defendant's capital sentence "was imposed under the influence of passion, prejudice, or any other arbitrary factor," and (3) the death sentence in defendant's case "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.C.G.S. § 15A-2000(d)(2) (2021); *see also State v. McNeill*, 371 N.C. 198, 264 (2018). As the Court observed in *McNeill*, "[t]his Court has held the death penalty to be disproportionate in eight cases." *Id.* at 264–65 (citing *State v. Kemmerlin*, 356 N.C. 446, 487–89 (2002); *Benson*, 323 N.C. at 328–29; *State v. Stokes*, 319 N.C. 1, 19–27 (1987); *State v. Rogers*, 316 N.C. 203, 234–37 (1986); *State v. Young*, 312 N.C. 669, 686–91 (1985); *State v. Hill*, 311 N.C. 465, 475–79 (1984); *State v. Bondurant*, 309 N.C. 674, 692–94 (1983); *State v. Jackson*, 309 N.C. 26, 45–47 (1983)). We conclude that neither the facts of defendant's crimes against Taylor nor defendant's personal circumstances are substantially similar to the crimes or defendants in any of those eight cases. We also note that "this Court 'ha[s] never found a death sentence disproportionate in a case involving a victim of first-degree murder who also was sexually assaulted,' " as was the

case with Taylor here. *Id.* at 265 (alteration in original) (quoting *State v. Kandies*, 342 N.C. 419, 455, *cert. denied*, 519 U.S. 894 (1996)).

We must also reject defendant's suggestion that our state's capital sentencing scheme is cruel and/or unusual in violation of the United States Constitution or North Carolina Constitution. "The rights guaranteed by N.C.G.S. § 15A-2000 are anchored in the eighth amendment prohibition against cruel and unusual punishment in that the statute 'requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.' " *State v. Wilson*, 322 N.C. 117, 144 (1988) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)). Accordingly, North Carolina's death sentence system has been upheld repeatedly as constitutional. *See, e.g.*, *McNeill*, 371 N.C. at 262.

L. Preservation issues

[13] Defendant raises five additional issues that he concedes have previously been decided by this Court contrary to his position. First, defendant contends that the trial court erred by overruling his objection to the imposition of the death penalty in the absence of a jury finding that defendant had acted with a specific intent to kill Taylor. The jury here found defendant guilty of first-degree murder only on theories of murder by torture and felony murder. Second, defendant argues that the trial court erred in denying his pretrial motion to prevent the State from seeking the death penalty, alleging that the murder indictment against defendant failed to raise any element which elevates the crime of murder from second-degree to first-degree and failed to allege any aggravating circumstances. Third, defendant asserts that the trial court erred in denying his motions objecting to the submission to the jury of the aggravating factors, namely a motion objecting to the submission of the aggravating circumstance found in N.C.G.S. § 15A-2000(e)(5) (capital felony was committed while the defendant was engaged in other specified felonies) on the ground that it subjected him to double jeopardy and multiple punishments and to the submission of the aggravating circumstance found in N.C.G.S. § 15A-2000(e)(9) (capital felony was especially heinous, atrocious, or cruel) on the ground that it is vague and overly broad. Fourth, defendant contends that the trial court erred in overruling his "objection to the death penalty due to the failure, in practice, of existing procedures to meet minimum constitutional requirements." Fifth, defendant argues that the trial court erred when it overruled his objection to the death penalty under international law.

While he acknowledges the existing law is contrary to his position, defendant asks the Court to revisit these issues. *See State v. Leary*, 344 N.C. 109, 119 (1996) (addressing culpability and specific intent to kill in determining whether the defendant was eligible for the death penalty); *State v. Hunt*, 357 N.C. 257, 269 ("Since the genesis of the short-form murder indictment in 1887, its validity has continually been avowed by the General Assembly."), *cert. denied*, 539 U.S. 985 (2003); *State v. Gregory*, 340 N.C. 365, 412 (1995) (holding that the submission of the aggravating circumstance in N.C.G.S. § 15A-2000(e)(5) is proper when a murder occurred during the commission of one of the enumerated felonies but when the defendant was also convicted of first-degree murder on some other basis); *McNeill*, 371 N.C. at 262 (noting that North Carolina's capital sentencing scheme has repeatedly been upheld as constitutional under the United States Constitution and North Carolina Constitution); *State v. Thompson*, 359 N.C. 77, 126 (2004) (holding that North Carolina's death penalty does not violate international law), *cert. denied*, 546 U.S. 830 (2005). Having considered each of defendant's arguments on these points, we conclude that there is no reason to revisit or depart from our precedent, and accordingly, we overrule all of defendant's preservation arguments.

III. Conclusion

For the foregoing reasons, we conclude that defendant received a fair trial and capital sentencing proceeding free of prejudicial error and that the death sentence recommended by the jury and imposed by the trial court is not excessive or disproportionate.

AFFIRMED.

Justice BERGER concurring.

I concur in Justice Morgan's opinion but write separately to address the conclusion that defendant's *Miranda* rights were violated during questioning by law enforcement.

"Both the United States Supreme Court and this Court have held that *Miranda* applies *only* in the situation where a defendant is subject to custodial interrogation." *State v. Barden*, 356 N.C. 316, 337 (2002) (emphasis added). "Custodial interrogation means 'questioning initiated by law enforcement officers after a person has been taken into custody . . . .' " *Illinois v. Perkins*, 496 U.S. 292, 296 (1990) (alteration in original) (quoting *Miranda v. Arizona*, 384 U.S. 436, 444 (1966)). "A person is in custody for purposes of *Miranda* when it is apparent from the totality

of the circumstances that there is a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *State v. Garcia*, 358 N.C. 382, 396 (2004) (cleaned up).

Certainly, if *Miranda* applied to detention by private citizens, the lead opinion is correct in its reasoning. However, I believe centering our attention on the actions of a private citizen muddies the very clear waters of our *Miranda* jurisprudence in two important ways.

First, *Miranda*'s strictures developed so that "the constitutional rights of the individual could be enforced against overzealous *police practices*," *Miranda*, 384 U.S. at 444 (emphasis added), not against other private citizens. This is why "[o]ur appellate court decisions are replete with examples of individuals who, though occupying some official capacity or ostensible position of authority, have been ruled unconnected to law enforcement for *Miranda* purposes." *State v. Etheridge*, 319 N.C. 34, 43 (1987). While the lead opinion correctly notes that these decisions primarily involve statements made to private citizens, the rationale for excluding them from the *Miranda* analysis is equally applicable to detention by private citizens who are unconnected to law enforcement. A private citizen acting on his or her own authority cannot take a person into "custody" for purposes of *Miranda*, and our inquiry here should focus on whether law enforcement took defendant into custody when they arrived at the hospital.

Second, our task is to review whether defendant was subjected to a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Garcia*, 358 N.C. at 396 (cleaned up). The "free to leave" standard is not the appropriate lens through which we view the conduct at issue here. *See State v. Buchanan*, 353 N.C. 332, 339–40 (2001) (The formal arrest inquiry and "free to leave" standard "are not synonymous[,]" and we have disavowed opinions that "stated or implied that the determination of whether a defendant is 'in custody' for *Miranda* purposes is based on a standard other than the 'ultimate inquiry' of whether there is a 'formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.' ").

Thus, "*Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' " *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977). Here, although defendant may "not have felt able to leave" prior to the arrival of law enforcement, the pertinent inquiry is whether law enforcement, once present, subjected defendant to a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Garcia*, 358 N.C. at 396 (cleaned up).

The trial court's unchallenged findings of fact demonstrate that when defendant made the challenged statements: (1) defendant was not placed under arrest; (2) the door to the exam room was open for portions of the interaction; (3) both officers had left the exam room for a time upon arrival, leaving defendant alone with the door open; (4) defendant was informed that he was not under arrest; (5) defendant was not accused of anything, promised anything, or threatened; and (6) defendant was not handcuffed "or restrain[ed] in any manner." These factual findings amply support the trial court's conclusion that defendant was not in custody for purposes of *Miranda*.

Chief Justice NEWBY, Justice BARRINGER, Justice DIETZ, and Justice ALLEN join in this concurring opinion.

Justice EARLS concurring in part and dissenting in part.

The death penalty is an "unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering." *Furman v. Georgia*, 408 U.S. 238, 287 (1972) (Brennan, J., concurring). In this way, a sentence of death "is the ultimate sanction." *Id.* at 286; *see also Gregg v. Georgia*, 428 U.S. 153, 188 (1976) ("[T]he penalty of death is different in kind from any other punishment imposed under our system of criminal justice."). And when a crime as heinous as that committed in this case occurs, there is an unsurprising and perhaps human urge to impose upon the perpetrator this most grievous consequence. In these circumstances, a trial court's responsibility to quell this impulse and ensure that justice is delivered dispassionately and evenhandedly is at its highest, meaning that a trial court has a heightened duty to "ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of . . . passion." *Eddings v. Oklahoma*, 455 U.S. 104, 117–18 (1982) (O'Connor, J., concurring).

As the majority recounts, Taylor, the four-year-old victim in this case, died after being subjected to unimaginable and appalling abuse. The State introduced overwhelming evidence at trial tending to prove that Mr. Richardson inflicted her injuries and was solely responsible for her death. Given the severity and brutality of Taylor's injuries and the evidence of the abuse she suffered, it would be easy in this case to excuse any errors committed by the trial court by reasoning that Mr. Richardson's death sentence was inevitable, regardless of the trial court's conduct.

It is this line of reasoning that I believe underlies the majority's decision today, though it does not say so outright. Instead, the majority overlooks blatant errors committed by the trial court by employing shaky legal reasoning to affirm Mr. Richardson's conviction and death sentence. But as Mr. Richardson's appellate counsel eloquently explained during oral argument before this Court, "if the rule of law matters at all, it matters not just in the easy cases and the convenient cases; it matters most in the hard cases." This is, without question, an extraordinarily hard case. But the rule of law does not cease to exist in the face of any crime, no matter how extreme.

In this case, I concur in the majority's decision to affirm Mr. Richardson's conviction. But because I believe that the trial court committed both structural error and allowed the State to present unfairly prejudicial evidence, I would hold that a new sentencing hearing is required so that the punishment Mr. Richardson receives is the product of just process. I only address the issues as they relate to sentencing.

I. Discussion

A. Judge Lock's Failure to Recuse was Prejudicial Error

As the majority explains, when Mr. Richardson was about one year old, his father, Doug Richardson, was shot several times in his home. Mr. Richardson's mother, Sandra Richardson, was charged and tried with conspiracy to murder Mr. Richardson's father. The State alleged that Sandra Richardson hired a hitman to kill Doug Richardson. She was acquitted after her criminal trial, but the judge who presided over child custody proceedings for the custody of Mr. Richardson later found that she bore responsibility for the incident.

Much of Mr. Richardson's defense during both the guilt and sentencing phases of his trial centered on the trauma he experienced being raised by Doug and Sandra Richardson in this dysfunctional atmosphere. This defense strategy required Mr. Richardson's trial counsel to investigate the circumstances of Doug Richardson's shooting to gain insight into the reverberating effects it may have had on Mr. Richardson. As Mr. Richardson explains in his brief to this Court:

> [D]efense counsel interviewed Doug, Sandy, and other Richardson family members about the event. Defense counsel spoke with one of Sandy's codefendants. They interviewed Sandy's defense attorney. They reviewed the superior court file of both the criminal trial and civil custody proceedings. Defense

> counsel also tried to obtain the District Attorney's file, but it had been destroyed. In addition, defense counsel determined that the chief police investigator in Sandy's case was deceased, and because Sandy was acquitted, the transcript from her trial was not available.

There was one other individual with inside information about the incident that the defense was unable to interview: Judge Thomas H. Lock himself.

Judge Lock, who presided over Mr. Richardson's trial, was one of the primary prosecutors who prosecuted the case against Sandra Richardson. Judge Lock's role in prosecuting Sandra Richardson included acting as one of two counsel of record, signing indictments, participating in interviews of witnesses, and delivering the State's closing argument at trial. The record also reflects that at least one of Mr. Richardson's relatives remembered seeing Judge Lock at the subsequent custody hearing after Doug Richardson filed for divorce and sought custody of Mr. Richardson.

Based on Judge Lock's significant role as a prosecutor, the defense sought to meet with him to discuss his knowledge of the case and the Richardson family. Judge Lock addressed the defense's request in open court, explaining that the executive director of the North Carolina Judicial Standards Commission advised him that he need not recuse himself from Mr. Richardson's trial and emphasizing that although he remembered the case against Sandra Richardson, it had occurred twenty years earlier and he did not recall it involving any evidence that would bear on Mr. Richardson's case. Judge Lock declined to answer any questions the defense had about the prosecution.

In response to Judge Lock's refusal to discuss Sandra Richardson's case, the defense moved to disqualify him from presiding over Mr. Richardson's trial and filed a discovery motion seeking the disclosure of any information Judge Lock had about the earlier case. The motion for disqualification explained that "[t]he fact that Defendant's father was shot three times by a[n unknown] person purportedly acting at the bequest [sic] of Defendant's mother [was] . . . likely to be a major focus of Defendant's case should it reach a capital penalty phase," and "[t]he defense [could not] fully investigate or develop a critical and material piece of mitigation as long as Judge Lock [was] presiding over [the] case."

The motion specifically explained that it was important that the defense interview Judge Lock because:

> 1) he potentially has a lot of knowledge about the case against Sandra Richardson and can fill the defense in about details that are not readily understood through the discovery; 2) Judge Lock presumably interacted a fair amount with the victim in that case, Doug Richardson, and therefore can discuss his observations about how the shooting may have effected [sic] Doug Richardson physically, mentally and emotionally; and 3) Judge Lock can describe his observations of Sandra Richardson throughout the trial. Judge Lock's observations about Mr. Richardson are relevant to her stability and character.

In short, the defense hoped to use Judge Lock's knowledge as mitigation evidence regarding the shooting itself and Judge Lock's observations of Mr. Richardson's parents in light of the incident. The motions were considered by Judge James Floyd Ammons Jr., who denied them both.

N.C.G.S. § 15A-1223(e) provides that "[a] judge *must* disqualify himself from presiding over a criminal trial or proceeding if he is a witness for or against one of the parties in the case." N.C.G.S. § 15A-1223(e) (2021) (emphasis added). Our Court has yet to interpret the text of § 15A-1223(e), but the text of the statute is simple: If Judge Lock was a witness for or against Mr. Richardson, disqualification was required. *See* N.C.G.S. § 15A-1223(e).

A witness is "[s]omeone who sees, knows, or vouches for something." *See Witness*, Black's Law Dictionary (11th ed. 2019). The defense had good reason to believe that Judge Lock may have been a witness for Mr. Richardson. In his order on Mr. Richardson's motion to disqualify Judge Lock, Judge Ammons found that "Judge Lock played a major role in the prosecution of Sandra Richardson," including serving as counsel of record and interviewing witnesses. Based on this role, it is entirely plausible that Judge Lock developed his own personal impressions of Mr. Richardson's parents and had the opportunity to gain insight into their relationship and the circumstances surrounding the shooting through his witness interviews and the additional efforts he devoted to developing the case.

There is also the chance that Judge Lock did not develop the kind of impressions that would have been useful or relevant to Mr. Richardson as mitigation evidence. The error that was invited here, however, is that Judge Lock never disclosed *anything* that he knew to the defense or a neutral arbiter like Judge Ammons who could have reviewed the content

of his recollections to determine whether the information constituted relevant mitigating evidence. Instead, Judge Lock simply made that decision for Mr. Richardson, declaring that he "did not recall [Sandra Richardson's] case containing any evidence which would be pertinent to the defendant's capital case." This was not Judge Lock's decision to make unilaterally, especially given his admission that he recalled the prosecution. At minimum, Judge Lock's recollections of the prosecution and any opinions he developed should have been provided to Judge Ammons prior to Judge Ammons' consideration of Mr. Richardson's motion to disqualify Judge Lock and motion seeking discovery. Because no one except for Judge Lock himself knows what information he retained about the trial and the impressions he developed about the members of the Richardson family, it is impossible to determine whether he was a witness for Mr. Richardson under § 15A-1223(e) such that recusal was required.

The majority holds that the information the defense sought to elicit from Judge Lock was "speculative conjecture." And it faults Mr. Richardson for not identifying "any particular knowledge that Judge Lock could have that would be relevant to defendant or to the crimes for which defendant faced trial." This assertion ignores that the defense had no choice *but* to speculate about what information Judge Lock might be able to provide because Judge Lock refused to meet with or answer any of the defense's questions regarding Sandra Richardson's prosecution. The defense could therefore only identify the kind of information that Judge Lock might be able to shed light on, meaning its intention to obtain discovery from Judge Lock was necessarily based on its theory of what he might be able to discuss. The defense cannot now be penalized for Judge Lock's own failure to provide this information or recuse himself as he was required to do by statute.

Though we cannot say with certainty what information Judge Lock would have provided to the defense, it is undisputed that he played a substantial role in Sandra Richardson's prosecution and remembers the case, despite it happening over twenty years earlier. It therefore seems highly likely that Judge Lock developed the kinds of insights that the defense sought to obtain, such as impressions about Doug Richardson's mental state following the shooting, information that Doug Richardson provided about Sandra Richardson's personality, and details about the state of their relationship and ability to care for Mr. Richardson.

To assert that Judge Lock was free of any of this kind of information is to ignore the indispensable role a prosecutor plays in trying a criminal defendant and the extreme attention to detail that the prosecutor is

required to pay to develop his or her case. Any trial lawyer is familiar with the importance of developing a "theory of the case"—an important technique that "distills and organizes all the particular elements of the case, including those for which there may be no strong answer. It is the overall theme advanced by the attorney through different means in every part of his presentation of the case." Kenneth M. Mogill & Lia N. Ernst, *Examination of Witnesses* § 1:3 (2d ed. 2022). To develop this overarching theme in prosecuting Sandra Richardson, Judge Lock almost certainly would have delved into the dynamics of her relationship with Doug Richardson, her personality and stability in general, and Doug Richardson's own behaviors. Thus, despite uncertainty regarding the precise substance of Judge Lock's impressions, it is likely that he gained at least some insight in these areas.

But Judge Lock's unique relationship to the Richardson family is significant not just for purposes of § 15A-1223(e); it also implicates Mr. Richardson's rights under the U.S. Constitution. The U.S. Supreme Court has "firmly established that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007); *see also Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." (citation omitted)). To wit, "the sentencer may not . . . be precluded from considering 'any relevant mitigating evidence.' " *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986) (quoting *Eddings*, 455 U.S. at 114). "Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation" and can be "particularly relevant." *Eddings*, 455 U.S. at 115.

The defense placed particular emphasis on obtaining such information from Judge Lock because "[t]estimony from a respected superior court judge that he observed, firsthand, serious dysfunction in the Richardson family would have been . . . powerful" mitigating evidence. And, as already discussed, it is not just plausible but likely that through his work on the case and his contact with Doug Richardson, Judge Lock gained an intimate look into Doug and Sandra Richardson's marriage, their points of tension, and the events that led to the alleged shooting. But by refusing to disclose any information regarding his recollections

of prosecuting Mr. Richardson's mother for allegedly conspiring to murder his father, Judge Lock deprived the jury of the opportunity to hear this testimony and Mr. Richardson of the chance to present all of the mitigating evidence that was reasonably available.

The majority downplays this deprivation, opining that any information Judge Lock may have been able to provide would have been immaterial, "speculative conjecture," and not "pertinent to defendant's case." As an initial matter, even if a materiality requirement existed, there would be no way to objectively assess whether Judge Lock was a material witness here because he did not reveal any of the knowledge he retained from prosecuting Sandra Richardson to either the defense or a neutral judge like Judge Ammons. What is more, neither the U.S. Constitution's guarantee that "criminal defendants be afforded a meaningful opportunity to present a complete defense," *California v. Trombetta*, 467 U.S. 479, 485 (1984), nor § 15A-1223(e) contain any form of a materiality requirement as contemplated by the majority.

Start with the Eighth Amendment to the U.S. Constitution. Though mitigation evidence must be relevant, this is a "low threshold" that includes "evidence which tends logically to prove or disprove some fact or circumstance which a factfinder could reasonably deem to have mitigating value." *Tennard v. Dretke*, 542 U.S. 274, 285 (2004) (cleaned up). And "[o]nce this low threshold for relevance is met, the 'Eighth Amendment requires that the jury be able to consider and give effect to' a capital defendant's mitigating evidence." *Id.* (quoting *Boyde v. California*, 494 U.S. 370, 377–78 (1990)). Thus, in terms of the kind of evidence that Mr. Richardson was constitutionally entitled to introduce, the standard is based purely on relevance—not materiality.

For the reasons already described, though it is not certain, it is likely that Judge Lock could have provided at least some relevant mitigating evidence, meaning that had it been provided by Judge Lock during discovery, Mr. Richardson would have had a constitutional right to introduce it at trial. But again, the problem here is that Judge Lock refused to provide this information in the first place, and Judge Ammons denied Mr. Richardson's discovery motion which would have required Judge Lock to do so. But there is no constitutional basis for imposing a higher burden (i.e., a materiality requirement) on the compelled production of mitigation evidence than that imposed on its introduction to a jury. Under this approach, criminal defendants would be required to prove that potential witness testimony is material before that testimony is even provided. Instituting this onerous burden at the outset would be repugnant to a criminal defendant's "constitutionally protected right . . . to provide

[a] jury with . . . mitigating evidence," *Williams v. Taylor*, 529 U.S. 362, 393 (2000), and impede defense counsel from "fulfill[ing] their obligation to conduct a thorough investigation of [a] defendant's background," *id.* at 396. But in characterizing the evidence that Mr. Richardson's defense sought from Judge Lock as immaterial, this is exactly the kind of burden the majority appears to believe was required here.

Subsection 15A-1223(e) also lacks a materiality requirement. Again, the plain text of the statute states that "[a] judge must disqualify himself from presiding over a criminal trial or proceeding if he is a witness for or against one of the parties in the case." N.C.G.S. § 15A-1223(e). This text does not contain any reference to the position that the judge must be a material witness, and "in effectuating legislative intent, it is [this Court's] duty to give effect to the words actually used in a statute and not to delete words used or to insert words not used." *Lunsford v. Mills*, 367 N.C. 618, 623 (2014).

The majority accepts the State's argument that the materiality requirement was "invited error" because Mr. Richardson "contended in his written motions and supporting oral arguments that Judge Lock could offer 'material mitigating evidence.' " Even if true, Judge Ammons had a duty to properly apply the law. As already described, § 15A-1223(e) does not contain any materiality requirement. When a trial court judge makes an error of law, it is the duty of an appellate court to correct that misapplication. It does not matter which party advocated for the misapplication because any legal error, regardless of its source, must be corrected. It is therefore Judge Ammons's misapplication of the law by inserting a materiality requirement that resulted in error here. There is no legal basis for binding the party that advocated for that misapplication to an incorrect legal standard.

Based on his unusual relationship with the Richardson family, Judge Lock should have been disqualified from presiding over Mr. Richardson's trial under § 15A-1223(e), and he was required to disclose his knowledge of the prosecution and the Richardson family either to the parties in this case or a neutral arbiter under the Eighth Amendment to the U.S. Constitution. "[E]rror committed at trial which infringes upon [a] defendant's constitutional rights is presumed to be prejudicial and entitles him to a new trial unless the error in question is harmless beyond a reasonable doubt." *State v. Autry*, 321 N.C. 392, 399–400 (1988). Here, however, there is no way to assess whether the error was harmless beyond a reasonable doubt because Judge Lock's knowledge remains undisclosed.

At sentencing, the jury declined to find any of the seven mitigating factors that the defense introduced relating to Sandra Richardson's

prosecution. It is impossible to determine whether the information Judge Lock possessed, if presented as mitigating evidence, would have changed the jury's decision to impose the death penalty in this case. As a result, the State cannot overcome the presumption of prejudice that exists here stemming from Judge Lock's refusal to provide potential mitigating evidence that Mr. Richardson had a constitutional right to introduce as part of his defense.

B. The Trial Court's Evidentiary Errors Unfairly Prejudiced Mr. Richardson for Sentencing Purposes

1. North Carolina's Arbitrary Death Penalty Sentencing Scheme Requires Trial Courts to Exercise the Utmost Care to Avoid Death Sentences Imposed Arbitrarily

In *Furman*, the U.S. Supreme Court "held that the penalty of death may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980). In other words, capital punishment schemes that provide "no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not" are unconstitutional. *Furman*, 408 U.S. at 313 (White, J., concurring). In a separate concurrence, Justice Stewart explained that the death sentences at issue were imposed arbitrarily, making them "cruel and unusual in the same way that being struck by lightning is cruel and unusual" in that "of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." *Id.* at 309–10 (Stewart, J., concurring) (footnote omitted).

"[W]antonly and . . . freakishly imposed," *id.* at 310, death sentences persist in North Carolina's capital sentencing scheme. *See* Matthew Robinson, *The Death Penalty in North Carolina, 2021: A Summary of the Data and Scientific Studies* (2021); *see also* James G. Exum Jr., *Capital Punishment in North Carolina: A Justice's View On Why We Can 'No Longer Tinker With the Machinery of Death'*, 99 N.C. L. Rev. 101 (2020) (cataloguing arbitrariness in North Carolina death sentences).

Because randomly imposed death sentences are pervasive in North Carolina, it is incumbent upon trial court judges who preside over capital trials to exercise the utmost care to avoid erroneous rulings that could unfairly prejudice criminal defendants. Given that this form of punishment is imposed so arbitrarily, a trial court's failure to exercise proper care, for example, by admitting improper evidence, could mean

the difference between life and death for a defendant. With stakes so high and chances of a randomly imposed death sentence so great, trial courts have a duty to make sure that their own mistakes are not the reason an individual is sentenced to death. For the reasons discussed below, I do not believe that the trial court exercised this degree of care in Mr. Richardson's case.

2. The Manner of the State's Display of Photographs was Excessive and Unfairly Prejudicial at Sentencing

At trial, the State fixated on the nature and severity of the victim's injuries. To that end, it deluged the jury with gut-wrenching images of the victim's body and wounds. The defense objected to the introduction of the photographs, urging the trial court to exclude them under Rule 403 of the North Carolina Rules of Evidence. In the defense's view, the tsunami of gruesome images held minimal probative value and a monstrous prejudicial risk.

The trial court disagreed. It permitted the State to introduce the images, reasoning that the interest of convenience outweighed any prejudice. The State jumped on that offer. Of the State's fourteen witnesses, eight relied on those lurid images in their testimony, presenting a total of eighty-eight distinct pictures to the jury.[1] The State took a similar tack during closing arguments. In their final pitch to the jury, prosecutors exhibited a photographic slideshow of the victim's face and wounds. Those images were the last things jurors saw before they deliberated.

In my view, the trial court erred by permitting a trial-by-photograph. The graphic images carried little probative weight, especially because Mr. Richardson did not contest the cause or extent of the victim's injuries. Yet the State belabored the victim's wounds, plying jurors with picture after gruesome picture of the victim's body. The excessive use of the photographs and how the State presented them only ballooned their prejudicial impact. Rule 403 was designed to prevent the very tactics the State engaged in here: Attempting to coax a decision based on emotion, not evidence. The trial court erred by holding otherwise—the majority errs, too, by affirming that ruling.

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1. The State's witnesses offered eighty-eight distinct pictures throughout their testimony. But many witnesses returned to previously admitted images, generating 108 photographic exhibits admitted through testimony. On top of that, prosecutors displayed eight photos already admitted into evidence during closing argument. All told, the State showed an image to the jury 116 times over the course of the trial.

Rule 403 of the North Carolina Rules of Evidence governs the admissibility of photographs. *State v. Mlo*, 335 N.C. 353, 374 (1994). In essence, Rule 403 is an evidentiary gatekeeper: It screens the information that reaches the jury, thereby fostering reasoned, dispassionate deliberation.

To do so, Rule 403 employs a balancing test. It tasks trial judges to exclude evidence if the probative value is "substantially outweighed" by the "danger of unfair prejudice." N.C.G.S. § 8C-1, Rule 403 (2021). That is, if the evidence carries an "undue tendency" to elicit a "decision on an improper basis, . . . [usually] an emotional one." *State v. Mason*, 315 N.C. 724, 731 (1986) (cleaned up).

Photographs carry a unique risk of prejudice. *See State v. Hennis*, 323 N.C. 279, 284 (1988). After all, hearing testimony about something is quite different from seeing it yourself. Recognizing that danger—and its special risk in emotionally charged cases like Mr. Richardson's—this Court has taken special care to screen when and how the State may admit photographs. In analyzing prejudice, our cases focus on three factors: the purpose for which the State admits the pictures, whether their use is "excessive or repetitious," and how the State presents them. *See id.* at 283–86.

First, Rule 403 permits the State to offer photographs—even lurid ones—"so long as they are used for illustrative purposes." *Id.* at 284; *see also State v. Watson*, 310 N.C. 384, 397 (1984) ("Properly authenticated photographs of the body of a homicide victim may be introduced into evidence under instructions limiting their use to the purpose of illustrating the witness' testimony." (quoting *State v. Cutshall*, 278 N.C. 334, 347 (1971))). The State, for instance, may offer pictures to "illustrate testimony as to the cause of death." *Hennis*, 323 N.C. at 284. In the same vein, prosecutors may use photographs to "illustrate testimony regarding the manner of killing so as to prove circumstantially the elements of murder in the first degree." *Id.* Or, when it is in dispute,[2] the State may admit pictures demonstrating "the character of the attack made by defendant upon the deceased." *State v. Gardner*, 228 N.C. 567, 573

2. As our cases make clear, the State may not admit photographs to settle a nonexistent dispute. Where the parties do not contest a point, photographs illustrating that point lack probative value—their only conceivable purpose is to elicit prejudice. *See*, *e.g.*, *State v. Mercer*, 275 N.C. 108, 121 (1969) (barring the State from admitting "poignant and inflammatory" pictures of the victim's body when the evidence as to the cause of death was uncontradicted), *overruled on other grounds by State v. Caddell*, 287 N.C. 266 (1975); *see also State v. Johnson*, 298 N.C. 355 (1979) (determining that where there was no evidence that the defendant had mutilated or dismembered the body of the deceased, photographs of the victim's body after its having been ravaged by animals not probative of any material fact at issue).

(1948). In each of those cases, the photographs served a legitimate and limited purpose: Illustrating a witness's testimony to bolster the State's case. For that reason, their probative weight tipped Rule 403's scales.

Second, the "excessive" use of inflammatory photographs triggers Rule 403's bar. *See Hennis*, 323 N.C. at 283. Our cases have used a slew of descriptors— "redundant," "excessive," "repetitious," "unnecessary," "duplicative," "unduly reiterat[ive]." *See id.* at 284–87 (collecting cases). But the core insight is simple: When a "photograph adds nothing to the State's case, then its probative value is nil"—"nothing remains but its tendency to prejudice." *Id.* at 286 (cleaned up); *see also State v. Mercer*, 275 N.C. 108, 120 (1969) ("But where a prejudicial photograph is relevant, competent and therefore admissible, the admission of an excessive number of photographs depicting substantially the same scene may be sufficient ground for a new trial when the additional photographs add nothing in the way of probative value but tend solely to inflame the jurors."), *overruled on other grounds by State v. Caddell*, 287 N.C. 266 (1975).

Third, and finally, *how* the State presents photographs matters as much as the pictures themselves. In other words, context matters because it shapes the way jurors perceive, process, and weigh photographic evidence. For that reason, our Rule 403 analysis looks to factors like the "level of detail and scale," whether the pictures are colorized, and "where and how [they are] projected or presented." *See Hennis*, 323 N.C. at 285; *see also Mlo*, 335 N.C. at 374–75 (admonishing courts to consider "the circumstances surrounding the presentation of the photographs" when applying Rule 403). *Hennis* marks our clearest decision on that point. *See Hennis*, 323 N.C. at 285.

In that case—a grisly murder trial much like this one—the State offered thirty-five photographs of the crime scene and the victims' autopsies. *Id.* at 282. Of those photographs, nine depicted the victims' bodies at the scene. *Id.* at 282–83. The remaining twenty-six detailed the victims' injuries. *Id.* at 283. More specifically, the photographs zeroed in on the "head and chest areas of the victims," revealing "in potent detail the severity of their wounds" and the effects of decomposition. *Id.* To display the images, the State erected a screen on the courtroom wall opposite the jury. *Id.* at 282. The screen was large—large enough to "project two images 3 feet 10 inches by 5 feet 6 inches side-by-side." *Id.* On top of that, the State projected the photographs directly above the defendant's head. *Id.*

On review, this Court held that the number of photographs and the manner of their presentation flunked Rule 403's balancing test. *Id.* at

286–87. For one, the pictures were unduly "repetitious." *Id.* at 286. The State presented picture after picture "depicting substantially the same scene." *Id.* at 284–85 (quoting *Mercer*, 275 N.C. at 120). For example, the State offered "several color images of the same victim's neck wound." *Id.* at 286. But because the State presented other "color images of that same wound taken at the crime scene," the extra photographs "added nothing to the [S]tate's case." *Id.* And since the deluge of "grotesque and macabre" pictures lacked marginal probative value, they had "potential only for inflaming the jurors." *Id.*

The State's method of presenting the pictures compounded their prejudicial impact. *Id.* By projecting the lurid photos on an "unusually large screen," the State rendered them larger than life, inescapable even. *Id.* The jury had no choice but to stare at close-ups of the victims' wounds. And because the pictures appeared "directly over [the] defendant's head," the jury "continually [had] him in its vision as it viewed the slides." *Id.* All in all, the Court concluded, the photographs' "redundant content" undercut their probative value. *Id.* at 287. But they carried an extreme risk of prejudice—plying jurors with picture after blown-up picture of the victims' wounds created an "undue tendency" to elicit an improper verdict. *See id.* at 283 (reciting Rule 403's definition of "unfair prejudice"). Because the trial court thus erred by admitting the pictures, the defendant deserved a new trial.

Hennis demands the same result here. In Mr. Richardson's case—just as in *Hennis*—the State flunked each Rule 403's prejudice factors.

Begin with the purpose of the photographs. During Mr. Richardson's trial, the State offered eighty-eight pictures. It repeated many of them. So in total, the State showed jurors an image 116 times over the course of trial. And not just any images—gruesome, zoomed-in shots of the victim's injuries. Of the State's fourteen witnesses, eight used photographs during their testimony. Those witnesses decamped from the witness stand and stood in front of the jury box. They first narrated the victim's injuries—then they described the wounds again, this time with the aid of a picture displayed on a sixty-inch monitor. To underscore their testimony, they zoomed in on the pictures to magnify the wounds.

The State, of course, may offer photographs for a legitimate purpose like illustrating witness testimony. But the pictures shown here stray far beyond Rule 403's guardrails. Witness after witness used the same pictures to discuss the same injuries. In fact, at least four witnesses rehashed points made by others, relying on identical pictures used in prior testimony. Put simply, many of the State's witnesses had little to

illustrate because their testimony traversed well-worn terrain. And for that reason, the State lacked a legitimate purpose in continuing to ply jurors with redundant, inflammatory images. Instead, the State's campaign of photographic warfare sought merely to "arouse the passions of the jury"—the very risk Rule 403 was created to forestall. *See State v. Murphy*, 321 N.C. 738, 741 (1988).

In the same vein, the State's "excessive or repetitious" use of photographs crossed the line from probative to prejudicial. As *Hennis* made clear, when the "use of photographs that have inflammatory potential is excessive or repetitious, the probative value of such evidence is eclipsed by its tendency to prejudice the jury." *Hennis*, 323 N.C. at 284. The pictures here were certainly inflammatory—larger-than-life images of a four-year-old's battered body could not be anything but. Any juror could grasp the horror of her wounds with a handful of photographs presented by a handful of proper witnesses. That is especially so because Mr. Richardson did not dispute the cause of the victim's injuries or their severity. Instead, at both the guilt and sentencing phases of trial, the defense focused on Mr. Richardson's state of mind.

Yet the State belabored the victim's wounds, inaugurating the gruesome details of the crime as the centerpiece of its case. Just look at the numbers: eight witnesses presented 108 pictures to the jury. That is over three times the number in *Hennis*—and in that case, three victims suffered multiple injuries. *See id.* at 281–86. Put another way, the prosecutor in *Hennis* had more ground to cover than the State did here. And still, this Court concluded that the repetitious and redundant use of grotesque photographs tipped Rule 403's scales. *Id.* at 286. If that was true in *Hennis*, it is doubly—no, *triply*—true here.

Another data point: In this case, the testimony of witnesses who relied on photographs spilled into 158 pages of transcripts. By Mr. Richardson's estimate, the State sunk nearly four hours of witness testimony flashing lurid photos to the jury. And as in *Hennis*, many of those images depicted "substantially the same scene." *See Hennis*, 323 N.C. at 284 (quoting *Mercer*, 275 N.C. at 120). In fact, the State displayed five photographs three times, showing jurors again and again (and again) images of the victim's head, torso, back, arms, legs, and genitalia. Even the trial judge chided the State's tactics, warning the prosecutors that he harbored "some of the same concerns" as the defense about "unfair prejudice and needless presentation of cumulative evidence."

All told, the State's use of photographs meets any definition of "excessive." Even more because Mr. Richardson did not contest the

cause or extent of the victim's injuries. By rehashing inflammatory images to prove an undisputed point, the State exceeded the limits set by Rule 403.

If any doubt about prejudice remains, the State's method of presentation extinguishes it. Start with the screen. As in *Hennis*, the State displayed the pictures on an "unusually large screen," here a sixty-inch monitor. *Cf. Hennis*, 323 N.C. at 286. That means that each image was two and one-half feet wide and four and one-half feet tall. To jurors, the pictures may have appeared even larger—prosecutors parked the screen just seven feet in front of the jury box. While testifying, the State's witnesses stood beside the screen, manipulating the photographs to punctuate their descriptions of the victim's injuries. The images were in color. *Cf. id.* at 285 (noting that "whether [a photograph] is color or black and white" bears on its potential for prejudice). And unlike in 1988—when this Court decided *Hennis*—the pictures were high definition. So high definition, in fact, that the State's witnesses could magnify the grittiest of details for the jury. The images were, in a word, inescapable. The jury could not help but see each of the horrific pictures presented over four hours of testimony.

What's more, the State leveraged the most gruesome of the pictures in its closing argument to stoke the jury's anger. In urging jurors to return a guilty verdict, the State showed a photograph of the victim's battered face. Then again. And then again. Sandwiched between that face picture were graphic images of the victim's body, including five close-up shots of her genitalia. At one point, the prosecutor zoomed into a particularly gruesome image, remarking, "Now, that's an interesting bite." The timing, too, compounded the prejudicial impact. By focusing its closing argument on rehashing lurid, agonizing pictures, the State saturated the jury with emotion right before it retired to deliberate. The jurors left the courtroom with those gut-wrenching, ghastly images etched into their memories. How could they not? And for that reason, the State's resort to trial-by-photograph created an "undue tendency to suggest a decision on an improper [emotional] basis." *See Hennis*, 323 N.C. at 283.

All told, the State flounders on each Rule 403 factor. It lacked a legitimate purpose in admitting the photographs, instead relying on their shock value to sway jurors. The use of the pictures was also excessive. By any principled metric, the prejudice engendered by continually plying the jury with lurid images eclipsed any probative value, especially for an undisputed point. How the State presented the images clinches the case. Regardless of the content, a juror could scarce look away from larger-than-life, colorized, high-definition pictures on a monitor mere

feet from her face. But where that screen shows horrific images of a four-year-old's body—images magnified by witnesses and shown again and again—the effect is inescapable. Because the "danger of unfair prejudice" substantially outweighed any probative value, Rule 403—properly interpreted—barred the State from the "excessive or repetitious" use of the pictures. *See Hennis*, 323 N.C. at 284. The trial court clearly erred by holding otherwise.

The trial court's reasoning for allowing the State's preferred display was particularly misguided. Instead of implementing measures to ensure that the State's presentation of evidence did not veer into prejudicial territory given the nature of Taylor's injuries and the court's awareness that jurors would see a significant number of photographs often repeatedly, the trial court acquiesced to the State's preferred means of presenting the photos—on a large screen, just feet from the jury—because doing so was convenient for various reasons. Specifically, the trial court explained that the monitor's location was "plainly visible to all jurors including the alternate jurors at one time without having to relocate it" and without other individuals in the audience being able to see it and that its placement made it "visible to all jurors . . . without having [an] exhibit shown at multiple locations along the jury box as would be required if a smaller monitor was being used or smaller photographs were being used." The court went on to conclude that "in considering the balancing test required by Rule 403, . . . the value of displaying the photographs and exhibits in [the proposed] fashion [was] not substantially outweighed by the danger of unfair prejudice to the defendant."

The trial court's explanation focused exclusively on the reasons why the State's preferred display was the most convenient option. It did not reject other possibilities as logistically impossible, nor did it appear to consider the risks of the State's display in the context of this particular case and the evidence likely to be introduced during the trial. Thus, despite its invocation of Rule 403's balancing test, the record suggests that the trial court did not actually weigh the risk of unfair prejudice to Mr. Richardson against the probative value of presenting the evidence in the manner proposed by the State. Instead, the trial court chose expediency over its duty to prevent unfair prejudice. There is no basis for making this trade-off in the absence of proper balancing under Rule 403, no matter how convenient the State's display may have been. Moreover, the State has no right to present its photographic evidence in the most convenient way that it can conceive of.

All that the trial court was required to do here was implement a different, perhaps moderately less convenient, manner of displaying the

State's photographic evidence. With this in mind, it is hard to imagine that there are any circumstances in which the risk of unfair prejudice to a criminal defendant who is facing death does not substantially outweigh the mere expediency of the State's preferred manner of presenting evidence; a criminal defendant's life must always trump convenience. In employing an illusory balancing test under Rule 403 that failed to consider the gravity of what was at stake in this trial, the trial court's decision to allow the State's preferred photographic display was arbitrary and unsupported by reason, which amounted to an abuse of discretion. *See Hennis*, 323 N.C. at 285 ("Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.").

It is not enough that the trial court erred in permitting the State's introduction of photographic evidence, it must also be shown that this error caused actual prejudice. *Hennis*, 323 N.C. at 287 ("Only upon a showing that the trial court erred and that defendant has been prejudiced thereby will defendant be granted a new trial."). Though I do not believe that the trial court's error prejudiced Mr. Richardson at the guilt phase of trial, I would hold that it caused prejudice at the sentencing phase. As Mr. Richardson's brief to this Court points out, "[T]he jury's sound rejection of 43/46 mitigating factors (of which 32 were uncontroverted) is strong evidence of [its] lack of impartiality" because "[i]t is one thing to conclude that mitigating factors are outweighed by aggravating factors; it is another to deny they have any mitigating value at all." For example, "[n]ot one juror found that Mr. Richardson taking [Taylor] to the hospital was mitigating," and "[n]ot one juror found Mr. Richardson was under the influence of a mental or emotional disturbance, nor that his age of 21 was mitigating." This suggests that the jury was bent on sentencing Mr. Richardson with the harshest penalty possible, regardless of what the mitigating evidence showed. But, as discussed, a jury's anger is not a proper basis for sentencing a criminal defendant to death. *See Hennis*, 323 N.C. at 283.

3. Dr. Barbaro's Testimony was Unreliable, Needlessly Cumulative, and Unfairly Prejudicial

Appellate review of expert testimony in Mr. Richardson's case is based on an earlier version of North Carolina Rule of Evidence 702(a) that has since been amended. *See* N.C.G.S. § 8C-1, Rule 702(a) (2003). The previous version of the rule stated that when "scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may

testify thereto in the form of an opinion." *Id.* In *Howerton v. Arai Helmet, Ltd.*, this Court explained that the rule required a "three-step inquiry for evaluating the admissibility of expert testimony: (1) Is the expert's proffered method of proof sufficiently reliable as an area for expert testimony? (2) Is the witness testifying at trial qualified as an expert in that area of testimony? (3) Is the expert's testimony relevant?" 358 N.C. 440, 458 (2004) (citations omitted), *superseded on other grounds by statute as stated in SciGrip, Inc. v. Osae*, 373 N.C. 409 (2020). Dr. Barbaro's testimony failed the first requirement.

When assessing reliability under the former version of Rule 702(a), it is true that this Court has instructed that trial courts "should look to precedent for guidance in determining whether the theoretical or technical methodology underlying an expert's opinion is reliable." *Howerton*, 358 N.C. at 459. At the time of Mr. Richardson's trial, this Court had approved the use of bite mark testimony in two cases. First, in *State v. Temple*, which was decided in 1981, this Court held that expert witnesses who provided bite mark testimony "applied scientifically established techniques of dentistry and photography to the solution of a particular novel problem," leading it to conclude that the testimony "was based upon established scientific methods[ ] and is admissible as an instrumentality which aids justice in the ascertainment of the truth." 302 N.C. 1, 12–13 (1981). A year later, this Court approved *Temple* in *State v. Green*, 305 N.C. 463 (1982). There, the Court declined to reverse *Temple*'s acceptance of bite mark testimony as a form of reliable evidence seemingly because the methodology "ha[d] been approved in other jurisdictions." *Id.* at 471.

Since *Temple* and *Green* were decided, however, there has been increasing skepticism as to the reliability of bite mark testimony. *See, e.g.*, David L. Faigman et al., *The Judicial Response to Expert Testimony on Bitemark Identification—Cases after Daubert*, 4 Mod. Sci. Evidence § 35:6 (2022) ("[B]etween the mid[-]1970s and today, a paucity of research [regarding bite mark evidence] has been replaced by a more substantial, though still limited body of research and earlier assumptions of accuracy have been replaced by data suggesting that moderate to high error rates are typical."). In light of this evolving understanding of bite mark evidence, there is no reason that "non-novelty, by itself, [should] shelter from reexamination erroneous scientific claims that have lost the support of the field or fields from whence they came." *Id.* Such reexamination is necessary here.

In 2009, the first independent report examining the reliability of bite mark evidence was published by a committee of neutral scientists.

See Comm. on Identifying the Needs of the Forensic Scis. Cmty., Nat'l Rsch. Council, *Strengthening Forensic Science in the United States: A Path Forward* (2009) (NAS Report). "In [the NAS Report], The National Academy of Sciences' Committee on Identifying the Needs of the Forensic Science Community fulfill[ed] the congressional charge of providing recommendations on policy initiatives that must be adopted in any plan to improve the forensic science disciplines." *Strengthening Forensic Science in the United States: A Path Forward*, U.S. Dep't of Just., Off. of Just. Programs, https://www.ojp.gov/ncjrs/virtual-library/abstracts/strengthening-forensic-science-united-states-path-forward (last visited Aug. 2, 2023). The NAS Report outlined some of the "problems inherent in bite mark analysis and interpretation," including that "[t]he uniqueness of the human dentition has not been scientifically established" and that "[t]he ability of the dentition, if unique, to transfer a unique pattern to human skin and the ability of the skin to maintain that uniqueness has not been scientifically established." NAS Report, at 175. The NAS Report therefore explained that "no scientific studies support" the position that "bite marks can demonstrate sufficient detail for positive identification." *Id.* at 176. The NAS Report found that bite mark evidence is unreliable in other ways as well. For example, it "suffers from the potential for large bias among bite mark experts in evaluating a specific bite mark." *Id.* at 174.

Since the NAS Report was published, several other expert commissions have reached similar, and even more forceful, conclusions regarding the unreliability of bite mark evidence. For example, the Texas Forensic Science Commission, a body statutorily-created by the Texas legislature,[3] issued a report concluding that courts should not admit bite mark evidence in criminal cases and explaining that "1) there is no scientific basis for stating that a particular patterned injury can be associated to an individual's dentition; and 2) there is no scientific basis for assigning probability or statistical weight to an association, regardless of whether such probability is expressed numerically." Tex. Forensic Sci. Comm'n, *Forensic Bitemark Comparison Complaint Filed by National Innocence Project on Behalf of Steven Mark-Chaney—Final Report* (2016) (TFSC Report). The report further stated that "[t]hough these claims were once thought to be acceptable and have been admitted into evidence in criminal cases" around the country, "it is now clear

3. Among other things, the commission is charged with investigating the misuse of forensic evidence. *See About Us*, Tex. Forensic Sci. Comm'n, Tex. Jud. Branch, https://www.txcourts.gov/fsc/about-us/ (last visited Aug. 2, 2023).

they lack any credible supporting data." *Id.* at 15; *see also* President's Council of Advisors on Sci. & Tech., *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* 9 (2016) (PCAST Report) (explaining that the "available scientific evidence strongly suggests that examiners . . . cannot even consistently agree on whether an injury *is* a human bite mark" and that "the prospects of developing bitemark analysis into a scientifically valid method [are] low").[4]

Though courts have historically been willing to admit bite mark evidence, in response to this growing body of research refuting the reliability of bite marks as a valid or reliable form of forensic evidence, in recent years many courts have questioned whether its admission is appropriate. *See*, *e.g.*, *Ege v. Yukins*, 485 F.3d 364, 376 (6th Cir. 2007) (opining that "[b]ite mark evidence may by its very nature be overly prejudicial and unreliable"); *Starks v. City of Waukegan*, 123 F. Supp. 3d 1036, 1052 (N.D. Ill. 2015) (explaining that "[i]t is . . . doubtful that 'expert' bite mark analysis would pass muster under Federal Rule of Evidence 702 in a case tried in federal court"); *State v. Lopez-Martinez*, No. 100,643, 2010 WL 2545626, at *4 (Kan. Ct. App. June 11, 2010) (Leben, J., concurring) (agreeing with the majority that "this case d[id] not present [the court] with an opportunity to consider whether [the Kansas Supreme Court's] holding that bite-mark testimony is admissible remains good law" but opining that, based on modern scientific developments, "[r]econsideration of the admissibility of bite-mark testimony seems appropriate").

Rather than engaging with the modern scientific developments that have led to a growing consensus that bite mark testimony is unreliable, the majority relies on this Court's holdings from over forty years ago that condoned the admission of such testimony. But as scientific understandings of various forms of forensic evidence evolve, courts have an obligation to respond to those advancements accordingly. By failing to re-examine the admissibility of a certain form of evidence in light of new science and relying solely on historical acceptance to justify its continued use, this Court allows junk science to serve an improper role in the criminal justice system. Because the emerging scientific consensus suggests that bite mark testimony is inherently unreliable, I dissent from the majority's view that it is admissible evidence and would

4. "The President's Council of Advisors on Science and Technology (PCAST) is an advisory group of the Nation's leading scientists and engineers, appointed by the President to augment the science and technology advice available to him from inside the White House and from cabinet departments and other Federal agencies." PCAST Report.

take this opportunity to revisit this Court's previous decisions that conclude otherwise.

Aside from failing to pass muster under the former version of Rule 702(a), the probative value of Dr. Barbaro's testimony was substantially outweighed by the risk that his testimony would unfairly prejudice Mr. Richardson, and it was needlessly cumulative. *See* N.C.G.S. § 8C-1, Rule 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence."). The probative value of Dr. Barbaro's testimony in this case was minimal. First, Dr. Barbaro's testimony was not necessary for the State to show that Taylor sustained a significant number of bites. The State had at least three witnesses who treated or inspected Taylor, identified several of the wounds on her body as bite marks, and estimated the age of those wounds. The State's own description of the bite marks demonstrates that there was no need for a forensic odontologist to identify the wounds as bite marks on top of the testimony from the other medical professionals in this case. For example, the State points out that there were a considerable number of bite marks on her body, and the marks were so detailed that "some of the[m] . . . included impressions from eight upper and lower teeth." Further, the defense did not dispute the testimony of the three other medical professionals that the marks were indeed bite marks.

Aside from establishing that the wounds were bite marks through the testimony of several other medical professionals, the State also introduced overwhelming evidence that Mr. Richardson was the only person who had access to Taylor and could have caused her injuries, meaning that Dr. Barbaro's testimony was not necessary for identification purposes. For example, a police officer who interviewed Mr. Richardson after he brought Taylor to the hospital testified for the State that Mr. Richardson admitted both "[t]hat he had been watching [Taylor] for the past two weeks while her mother . . . was in military training" and that "he was the only person that had been watching her." Mr. Richardson did not contest the veracity of this admission. In sum, Dr. Barbaro's testimony did not serve any independent purpose, and in light of all other evidence introduced in this case, was needlessly cumulative.

While Dr. Barbaro's testimony was not particularly helpful in proving any element of the State's case either at the guilt phase or the sentencing phase, it was massively inflammatory. For example, when asked to describe his reaction when he saw Taylor and her injuries, Dr. Barbaro

testified that he "immediately said a prayer that she would die." He testified over the defense's objection about Mr. Richardson's intent in biting Taylor by discussing the purpose of animal bites, opining that "[b]ears and dogs are trying, for the most part, to kill their victim. So, they're tearing and using their teeth as their tool or weapon to tear or maim their victim" and that "bite mark evidence in adolescents and above . . . is used strictly for punishment."[5] All the while, Dr. Barbaro relied on photographs to illustrate his testimony, utilizing the prejudicial monitor display previously discussed. Dr. Barbaro zoomed in on photographs of Taylor's wounds, hyper-magnifying their appearance to the jury.

The trial court sustained the defense's objections to these inflammatory statements, as well as many others, and instructed the jury to disregard them. "It is not unreasonable to conclude that in many such cases the jury can and will follow the trial judge's instructions to disregard such information." *Bruton v. United States*, 391 U.S. 123, 135 (1968). But "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Id.* Dr. Barbaro's emotionally charged and highly prejudicial statements present one such context.

Despite the trial court's instructions that the jury ignore certain improper testimony, the content of Dr. Barbaro's statements was such that it would be unrealistic to believe that, when it came time for sentencing, the jurors could simply forget what they had heard. Though jurors may frequently be able to follow instructions to disregard evidence, jurors are human, and whether subconsciously or not, there are bound to be times when they are unable to do so. Where, as here, the testimony to be disregarded is both inappropriate expert testimony and intensely graphic and chilling, it is to be expected that those statements will reverberate in the minds of the jurors, infecting their capacity to render a dispassionate sentence. The exceedingly human tendency of failing to disregard this type of evidence has consequences, and in capital cases, those consequences are particularly extreme. Because the nature of Dr. Barbaro's testimony was such that a jury was likely incapable of properly disregarding it, his statements played into the difference between life and death for Mr. Richardson. In this way, the trial court's instructions were insufficient to cure the highly prejudicial effect of his testimony.

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5. These are a few of the many instances in which Dr. Barbaro's testimony crossed the line, serving no other purpose but to inflame the passions of the jury.

Because the State already presented substantial evidence of Mr. Richardson's guilt and his methods of abusing Taylor, it appears that the State introduced Dr. Barbaro's testimony merely to inflame the passions of the jurors such that any punishment imposed would not be based on a neutral, dispassionate application of the law but on the jury's own anger. In short, Dr. Barbaro's testimony served no other purpose than to enrage the jury. In this respect, his testimony was unnecessarily cumulative of testimony provided by other witnesses, and its content created a substantial risk of unfair prejudice to Mr. Richardson. Because it lacked probative value, it was error to admit it under Rule 403.

Taken together, the trial court's errors prejudiced Mr. Richardson at sentencing. Even if individual missteps may not establish prejudice "when considered in isolation," the "cumulative effect of the errors" may undermine a proceeding's reliability and fairness. *See State v. Canady*, 355 N.C. 242, 246 (2002) (aggregating trial court's multiple errors and concluding that cumulative effect of errors prejudiced defendant); *see also State v. Allen*, 378 N.C. 286, 304 (2021) (holding that courts must "consider the cumulative effect of alleged errors by counsel" in analyzing whether a defendant alleging ineffective assistance of counsel has shown prejudice).

In capital cases, there is a heightened risk of cumulative error during sentencing—the phase when jurors decide whether to impose the death penalty. *See*, *e.g.*, *Moore v. Johnson*, 194 F.3d 586 (5th Cir. 1999) (holding that cumulative errors prejudiced defendant at sentencing phase of capital trial, but not during guilt phase).[6] That is because the choice to exact "our state's most extreme punishment," *State v. Robinson*, 375 N.C. 173, 175 (2020), is morally infused and deeply personal. *See Woodson*, 428 U.S. at 303–04. For that reason, emotional appeals carry unique sway in capital cases, as they color jurors' moral calculus and their assessment of a defendant's culpability. And for the same reason, courts shoulder a special duty to ensure that a jury's decision to impose a death sentence

6. Courts have recognized that the question of prejudice may apply differently at the guilt and sentencing phases of a capital trial. In other words, even if a legal error would not change a jury's finding of guilt, it could alter the sentence it would impose. *See*, *e.g.*, *Smith v. Wainwright*, 741 F.2d 1248, 1255 (11th Cir. 1984) (ordering hearing on trial counsel ineffectiveness claim in capital case because counsel's failure to impeach witness during guilt phase "may not only have affected the outcome of the guilt/innocence phase, it may have changed the outcome of the penalty trial"); *Cargle v. Mullin*, 317 F.3d 1196 (10th Cir. 2003) (recognizing in capital case that prejudice analysis varies depending on whether legal errors occurred during the guilt or sentencing phases of trial, and analyzing defendant's claims accordingly).

flows from reason, not rage. *See Eddings*, 455 U.S. at 117–18; *California v. Ramos*, 463 U.S. 992, 998–99 (1983).

In my view, the fairness and reliability of Mr. Richardson's sentencing was undercut by the cumulative error of Judge Lock's failure to recuse, thereby depriving Mr. Richardson of potentially mitigating evidence; the relentless deluge of multiple gruesome photographs the State repeatedly presented to the jury; and Dr. Barbaro's inflammatory testimony comparing Mr. Richardson to an animal. Without those errors and their aggregated effect, there is a "reasonable probability that at least one juror would have struck a different balance" in deciding whether to sentence Mr. Richardson to death. *Wiggins v. Smith*, 539 U.S. 510, 535 (2003); *Porter v. McCollum*, 558 U.S. 30, 40–42 (2009) (per curiam). And because the death penalty requires jurors' unanimous agreement, N.C.G.S. § 15A-2000(b)(3), there is an unacceptable risk that Mr. Richardson's sentence was the fruit of flawed legal process. To ensure that the "most serious and irrevocable of our state's criminal punishments" is imposed through fair and just proceedings, *see State v. Ramseur*, 374 N.C. 658, 686 (2020), I would remand for a new sentencing hearing.

II. Conclusion

I concur with the results of the majority affirming the jury's verdict that Mr. Richardson was guilty of the first-degree murder of Taylor, as well as guilty of first-degree kidnapping, sexual offense with a child, and felony child abuse inflicting serious injury. However, I believe that the errors identified above require a new sentencing hearing.

VALUE HEALTH SOLUTIONS, INC. AND NAGARAJAN NEIL PARTHASARATHY
v.
PHARMACEUTICAL RESEARCH ASSOCIATES, INC. AND
PRA HEALTH SCIENCES, INC.

No. 100A22

Filed 1 September 2023

1. Fraud—dismissal—fraud by omission and promissory fraud—failure to state a claim—failure to meet particularity requirement

In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not err by dismissing plaintiffs' claims of fraud by omission and promissory fraud pursuant to Civil Procedure Rules 12(b)(6) and 9(b). In the first place, plaintiffs did not raise those claims in their amended complaint; furthermore, plaintiffs failed to satisfy the particularity requirement of Rule 9(b).

2. Fraud—dismissal—fraud and fraudulent inducement—failure to meet particularity requirement—broad allegations

In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not err by dismissing plaintiffs' claims for fraud and fraudulent inducement based on representations allegedly made before the execution of the Asset Purchase Agreement and not involving the Non-Binding Letter of Intent. The claims were not pleaded with sufficient particularity to satisfy Civil Procedure Rule 9(b) where the complaint did not specify the time, place, particular content of the alleged representation, or the person who made the alleged representation.

3. Fraud—dismissal—negligent misrepresentation—failure to meet particularity requirement

In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not err by dismissing plaintiffs' negligent misrepresentation claim for failure to satisfy the heightened pleading standard of Civil Procedure Rule 9(b) where the complaint did not allege the time, place, speaker, or specific contents of the alleged misrepresentation.

4. Contracts—breach of contract—implied covenant of good faith and fair dealing—contractual gap

In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not err by granting defendants' motion for summary judgment on plaintiffs' breach of contract claims as related to certain sections of the Asset Purchase Agreement that permitted defendants to "reasonably determine" completion of the first and second software development earnout milestones. Because the tasks required for the milestones were not completed, defendants reasonably determined that the milestones had not been met. Where the contract was not silent on the issue, plaintiffs' arguments regarding the implied covenant of good faith and fair dealing were misplaced.

5. Contracts—breach of contract—express terms—summary judgment

In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court erred by granting defendants' motion for summary judgment on plaintiffs' breach of contract claim as related to the Asset Purchase Agreement's Independent Milestone Provision, which provided that satisfaction of the criteria of one earnout milestone was not contingent on satisfaction of the criteria of any other milestone. Plaintiffs presented evidence tending to support their assertion that defendants conditioned certain milestones on the completion of others, in breach of the express terms of the contract.

6. Contracts—breach of contract—third-party sales—summary judgment—remand

In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court erred by granting defendants' motion for summary judgment on plaintiffs' breach of contract claim as related to the Asset Purchase Agreement's External Sales Provision, which concerned the sale of licenses to plaintiffs' software by defendants to third parties. Because defendants' Master Services Agreement (MSA) with a third-party pharmaceutical company included the use of the software and could be an "External Sale" under the Asset Purchase Agreement, the issue was remanded to the trial court for determination of whether the MSA was drafted such that the third-party company was required to pay consideration to acquire and use

a license to plaintiffs' software. In addition, the covenant of good faith and fair dealing was inapplicable to this issue.

7. Fraud—intentional misrepresentation and fraudulent inducement—letter of intent—non-binding

In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not err by granting summary judgment in favor of defendants on plaintiffs' claims for intentional misrepresentation and fraudulent inducement based on representations contained in the Non-Binding Letter of Intent (LOI). The LOI, which by its express terms was non-binding and not to be relied upon, could not form the basis of plaintiffs' fraud claims; furthermore, plaintiffs cited no authority in which a court has recognized a claim arising out of representations contained in a letter of intent.

8. Fraud—intentional misrepresentation and fraudulent inducement—attempt to amend purchase agreement—amendments not made

In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not err by granting summary judgment in favor of defendants on plaintiffs' claims for intentional misrepresentation and fraudulent inducement based upon statements made by defendants' chief executive officer and senior vice president of IT regarding possible amendments to the Asset Purchase Agreement (APA). Evidence in the record supported defendants' representations that the company was attempting to amend the APA, and failure to reach an agreement on the amendment did not mean that defendants' representations were false at the time they were made.

9. Unfair Trade Practices—breach of contract and fraud claims—termination of employment—substantial evidence

In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not err by granting summary judgment in favor of defendants on plaintiffs' claims under the Unfair and Deceptive Trade Practices Act (UDTPA). First, plaintiffs' UDTPA claims (aside from the claim regarding plaintiff founder's termination) were simply a repackaging of their breach of contract and fraud claims—essentially alleging that defendants had failed to perform under the terms of the contract, which did not support a

finding of the required "substantial aggravating circumstances." In addition, when viewed in the light most favorable to plaintiffs, the record did not contain evidence creating a genuine issue of material fact. As for plaintiffs' other UDTPA claim—that co-founder plaintiff's termination was unfair—plaintiffs failed to overcome the high threshold to surpass the at-will employment presumption.

10. Pleadings—amendments—undue delay and material prejudice—previous extensive revisions, discovery closed, full briefing on motion to dismiss

In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not abuse its discretion in denying, based on undue delay and material prejudice to defendants, plaintiffs' motion for leave to file a Second Amended Complaint. Plaintiffs had previously amended their complaint with extensive revisions; discovery had closed, with thousands of documents exchanged; and the parties had fully briefed the motion to dismiss plaintiffs' Amended Complaint.

11. Discovery—complex business case—third discovery request—unduly burdensome—remand

In a complex business case arising from defendants' agreement to purchase software applications from plaintiffs (a corporation and its founder), the trial court did not err in denying plaintiffs' Third Discovery Request. The trial court complied with Business Court Rule 10.9 and Civil Procedure Rule 26, and the Supreme Court rejected as baseless plaintiffs' argument that the trial court converted an informal and required email request into a motion to compel. However, given the Court's holding on another issue regarding the parties' contract, the question of what further discovery may be appropriate was open for the trial court to consider on remand.

Justice EARLS concurring in part and dissenting in part.

Justice MORGAN joins in this concurring in part and dissenting in part opinion.

Appeal pursuant to N.C.G.S. § 7A-27(a) from an order entered on 13 December 2019, an order and opinion entered on 4 February 2020, an order and opinion entered on 22 May 2020, and an order and opinion entered on 6 April 2021, by Judge Gregory P. McGuire, Special Superior

Court Judge for Complex Business Cases, in Superior Court, Wake County, after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(b). Heard in the Supreme Court on 15 March 2023.

Guidry Law Firm PLLC, by David G. Guidry, for plaintiff-appellants.

Barnes and Thornburg LLP, by John M. Moye, Allen R. Baum, and Mitchell Osterday, for defendant-appellees.

BARRINGER, Justice.

I. Factual Background

Pharmaceutical Research Associates, Inc. and PRA Health Sciences, Inc. (collectively defendants, will be referred to as PRA in the singular), together form a large contract research organization, providing clinical trial services to pharmaceutical and biotechnology companies around the world. Value Health Solutions, Inc. (VHS) is a software company, founded by plaintiff Neil Parthasarathy. VHS developed three software applications for use in the clinical trial process: ClinTrial Max (CTMax), Cloud Max, and Info Max (collectively, the Solutions). The Solutions were compatible with a platform called Salesforce, which is widely used by organizations involved in clinical trials. The Solutions caught the interest of PRA.

A. PRA's Evaluation of VHS's Software Capabilities

PRA approached Parthasarathy in early 2014, expressing interest in acquiring the Solutions. A year-long negotiation process and due diligence period ensued, during which PRA had full access to the Solutions. PRA tested the Solutions to determine what enhancements would be necessary if PRA were to acquire it. PRA identified several functional deficiencies in the software and prepared a list of enhancements PRA would require to "close the gap" between the Solutions and the software PRA was using at that time. PRA advised Parthasarathy of these functional deficiencies.

B. PRA's Letter of Intent

PRA's Executive Vice President and Chief Financial Officer, Linda Baddour, sent Parthasarathy a "Non-Binding Letter of Intent" (LOI) on 15 October 2014. The LOI outlined PRA's proposal to acquire VHS. The

LOI included, among other things, that PRA would make the following payments: (1) a one time, up-front payment to VHS and Parthasarathy of between one and three million dollars; (2) incentive payments of $333,000.00, with each conditioned upon the completion of one of three "Integration Milestones" within eighteen months of PRA acquiring VHS; and (3) future incentive payments to VHS and Parthasarathy, conditioned upon the completion of certain "Performance Milestones" as related to external sales of licenses of VHS's software.

As summarized by the trial court, the LOI proposed the following structure for the Performance Milestones:

> i. a payment of $2.5 million for reaching $25 million in annual sales within two years of closing;
>
> ii. a payment of $5 million for reaching $50 million in annual sales within three years of closing;
>
> iii. a payment of $7.5 million for reaching $75 million in annual sales within four years of the closing; and
>
> iv. payment of a one percent (1%) annual royalty on sales for an additional four years after the $75 million sales amount is reached.

The LOI also stated that it

> constitutes a statement of the intentions of the parties with respect to a potential Transaction, and does not contain all matters upon which agreement must be reached in order for a definitive agreement to be finalized or for the transaction to be consummated. Except for sections 3 through 8 of [the] LOI, which shall be legally binding in accordance with their respective terms, neither this LOI nor the acceptance thereof is intended to, nor shall it, create a binding legal obligation, or any obligation by any of the parties hereto to enter into any transaction, negotiate or take any other action in contemplation thereof, or [execute] any definitive agreements. The parties further acknowledge and agree that, except as otherwise provided in the immediately preceding sentence, none of this LOI, any proposal made . . . , nor the current on-going discussions between the parties are intended to (and shall not) create a legally

> binding obligation or commitment on the part of any party with respect to the negotiation or completion of the Transaction.

C. The Asset Purchase Agreement

On 21 May 2015, plaintiffs and defendants entered into an Asset Purchase Agreement (APA), governed by Delaware law. Under the terms of the APA, the Solutions would be sold to PRA, by plaintiffs, in exchanged for PRA stock and $2.5 million. The APA further provided for "contingent payments" if certain milestones were achieved.

The first group of contingent payments was outlined in Article 2.6(a)(i), (ii), and (iii) of the APA. The first group of contingent payments pertained to the following: integration of the VHS software into PRA's clinical trial system; completion of product enhancements coinciding with functional deficiencies identified during PRA's due diligence efforts; and completion of the migration of PRA clinical trial studies into VHS software (collectively, the Development Milestones).

The second group of contingent payments was outlined in the APA in sections 2.6(a)(iv), (v), (vi), and (vii). The second group of contingent payments pertained to the external sales of licenses to the Solutions within four years of the APA closing (the Sales Milestones).

Article 2.6 of the APA provides:

> Milestones. As additional consideration for the transactions contemplated hereby, and subject to the terms of this Section 2.6, Purchaser shall make (or [PRA] shall make on Purchaser's behalf) the following payments (each, a "Contingent Payment"):
>
> i. upon completion of the integration of the parties' Salesforce™ environments set forth on Schedule 2.6(a)(i), [PRA] shall issue to Seller (or as otherwise directed by Seller's Representative), within thirty (30) days after such completion, that number of shares of PRA Common Stock equal in value to Three Hundred Thirty-Three Thousand U.S. Dollars ($333,000.00), based on the Fair Market Value as of the date of issuance of such shares; provided, however, that completion occurs within the first consecutive eighteen (18) months from the Effective Time (the "Integration Period");

ii. upon completion of the key product enhancements set forth on Schedule 2.6(a)(ii), [PRA] shall issue to Seller (or as otherwise directed by Seller's Representative), within thirty (30) days after such completion, that number of shares of PRA Common Stock equal in value to Three Hundred Thirty-Three Thousand U.S. Dollars ($333,000.00), based on the Fair Market Value as of the date of issuance of such shares; provided, however, that completion occurs within the Integration Period;

iii. upon completion of the migration of the clinical trial management systems studies of Purchaser and its Affiliates into [CTMax] as set forth on Schedule 2.6(a)(iii), [PRA] shall issue to Seller (or as otherwise directed by Seller's Representative), within thirty (30) days after such completion, that number of shares of PRA Common Stock equal in value to Three Hundred Thirty-Three Thousand U.S. Dollars ($333,000.00), based on the Fair Market Value as of the date of issuance of such shares; provided, however, that completion occurs within the Integration Period;

iv. upon the achievement of aggregate External Sales equal to Twenty[-]Five Million U.S. Dollars ($25,000,000), Purchaser shall make, within thirty (30) days following the date on which [PRA] files its next quarterly report with the United States Securities and Exchange Commission (the "SEC") after such achievement, a cash payment of Two Million Five Hundred Thousand U.S. Dollars ($2,500,000.00) to Seller (or as otherwise directed by Seller's Representative) (the "First Milestone Payment"); provided, however, that such achievement occurs prior to the second (2nd) anniversary of the Closing Date (the "First Milestone period");

v. upon the achievement of aggregate External Sales equal to Fifty Million U.S. Dollars ($50,000,000.00), Purchaser shall make, within thirty (30) days following the date on which

[PRA] files its next quarterly report with the SEC after achievement, a cash payment of Five Million U.S. Dollars ($5,000,000.00) to Seller (or as otherwise directed by Seller's Representative) (the "Second Milestone Payment"); provided, however, that such achievement occurs prior to the third (3rd) anniversary of the Closing Date (the "Second Milestone Period");

vi. upon the achievement of aggregate External Sales equal to Seventy[-]Five Million U.S. Dollars ($75,000,000.00), Purchaser shall make, within thirty (30) days following the date on which [PRA] files its next quarterly report with the SEC after achievement, a cash payment of Seven Million Five Hundred Thousand U.S. Dollars ($7,500,000.00) to Seller (or as otherwise directed by Seller's Representative) (the "Third Milestone Payment"); provided, however, that such achievement occurs prior to the fourth (4th) anniversary of the Closing Date (the "Third Milestone Period"); and

vii. for four (4) consecutive calendar years following the achievement of aggregate External Sales equal to Seventy-Five Million U.S. Dollars ($75,000,000.00) (the "Major Milestone", and the date on which the Major Milestone is achieved, the "Major Milestone Date"), Purchaser shall make, within thirty (30) days following the date on which [PRA] files its next quarterly report with the SEC after each of the four (4) anniversaries of the Major Milestone Date, a per annum royalty payment to Seller (or as otherwise directed by Seller's Representative) equal to one percent (1%) of the aggregate amount of External Sales made during the applicable calendar year (such payments, the "Royalty Payments"). For the avoidance of doubt, any such Royalty Payments shall be made regardless of whether the First Milestone Payment, the Second Milestone Payment and/or the Third Milestone Payment have previously been made.

The APA defines "External Sale" as "the sale of one or more licenses to the Solutions by [PRA] or one of its Affiliates to a third party which is not (i) an Affiliate of [PRA] or (ii) using such license(s) in connection with providing services to [PRA] and/or any of its Affiliates."

The APA further provides for the independence of the contingent payments in Section 2.6(b), titled "Independence of Contingent Payments":

> [PRA]'s obligation to pay the Contingent Payments to [VHS] (or as otherwise directed by [VHS's] Representative) in accordance with Section 2.6(a) is an independent obligation of [PRA] and is not otherwise conditioned or contingent upon the satisfaction of any conditions precedent to any preceding or subsequent Contingent Payment and the obligation to pay a Contingent Payment to [VHS] shall not obligate [PRA] to pay any preceding or subsequent Contingent Payment. For the avoidance of doubt and by way of example, if the conditions precedent to the payment of the First Milestone Payment for the First Milestone Period are not satisfied, but the conditions precedent to the payment of the Second Milestone Payment for the Second Milestone Period are satisfied, then [PRA] would be obligated to pay such Second Milestone Payment for the Second Milestone Period for which the corresponding conditions precedent have been satisfied, and not the First Milestone Payment for the First Milestone Period.

D. The Takeda Master Services Agreement

On 31 August 2016, PRA entered into a Master Services Agreement (MSA) with Takeda Pharmaceuticals (Takeda). Under the MSA, PRA was to provide services to Takeda through use of PRA's "Owned Technology." Section 7.02(b) of the MSA is entitled "License to [PRA] Owned Technology During the Term." This section of the MSA reads as follows:

> Section 7.02(b) License to [PRA] Owned Technology During the Term. As of the Commencement Date and for the remainder of the Term, [PRA] hereby grants Takeda, Takeda Affiliates and their respective Personnel and third party service providers the right to access and use [PRA] Owned Technology used in supporting or providing the Services for purposes of receipt and use of the Services in the conduct of

> Takeda's and Takeda's Affiliates' business. For the avoidance of doubt, the foregoing right is granted under all [PRA] Owned IP and includes the right to use all configuration capabilities offered by the [PRA] Owned Technology.

The MSA defines PRA Owned Technology as follows:

> "[PRA] Owned Technology" means (i) all confidential or proprietary processes, procedures, methodologies, standard operating procedures, software, templates, programs[,] and other protectable materials that are used generally by [PRA] in [PRA]'s business[;] . . . (ii) derivative works [of item (i)] . . . ; and (iii) any form of delivery for (i) and (ii) received as part of the services, such as via Cloud Computing.

The MSA includes "software as a service" within cloud computing. PRA's Rule 30(b)(6) witness regarding the MSA, Brian Haas, testified that "software as a service means that the client does not have to own the technology . . . [to] utilize [it]," but instead, "through licensing," the client can be "provided with access to that output or that use of the software."

The Solutions is among the software PRA agreed to utilize in order to provide services to Takeda. PRA currently uses updated versions of VHS's software to manage "approximately three to four" projects for Takeda under the MSA. PRA has earned approximately $491 million under the MSA.

E. Discussions of Amending the APA Milestones

In December 2016, Parthasarathy and Colin Shannon, Chief Executive Officer of PRA, met to discuss amending the APA to provide new deadlines by which to achieve the milestones. Shannon requested that Deborah Jones-Hertzog, PRA's Senior Vice President of IT, work with Chuck Munn, PRA's in-house counsel, to develop a new framework for the milestone deadlines. A draft was proposed and circulated amongst Jones-Hartzog, Munn, and Mike Irene, PRA's Executive Director of IT. The draft was never presented to Parthasarathy.

Plaintiffs alleged before the trial court that PRA "falsely promis[ed] to amend the APA and extend the milestone deadlines" and "made representations to . . . Parthasarathy that induced him to believe that PRA intended to amend the payment milestone timelines." Specifically, those representations include an email from Shannon to Parthasarathy stating that PRA was "obviously trying to get [VHS and/or Parthasarathy] a

contract" regarding the milestones. The representations also include a communication from Jones-Hertzog to Parthasarathy stating that she had an updated milestone timeline for which she was awaiting approval.

In July 2017, Parthasarathy submitted his own proposed amendments to the Development Milestones and proposed resolutions of the Sales Milestones. In his proposal, Parthasarathy asserted the following: that milestone (i) had been completed and should be paid "as soon as possible"; and that milestones (ii) and (iii) "need[ed] to be rewritten" or, alternatively, PRA needed to identify what additional work was needed from Parthasarathy so that those milestones could be completed and paid no later than January 2018. Parthasarathy's proposal also acknowledged that milestone (iv), the first Sales Milestone, had not been achieved. No agreement was reached regarding amending the milestones.

F. Parthasarathy's Employment Agreement with PRA

As part of the acquisition plan regarding the Solutions, PRA hired Parthasarathy as the Vice President of Technology. His employment agreement stated that Parthasarathy would have the "status and responsibilities as determined from time to time" by PRA's "CEO or the CEO's designee." The employment agreement also required Parthasarathy to dedicate his full-time attention, skills, and energy to his role with PRA. PRA contends that, in 2017, Parthasarathy "checked out" of his role with PRA, started a business with his own employees, would attend meetings but make no contribution, and stopped replying to emails.

II. Procedural History

Plaintiffs filed the Complaint in this matter on 5 October 2018. On 26 March 2019, defendants filed the Amended Answer, Affirmative Defenses, and Counterclaims. On 4 September 2019, plaintiffs moved to amend the Complaint.

On 5 September 2019, Plaintiffs submitted Plaintiffs' Rule 10.9 Summary of Discovery Dispute (the Third Discovery Dispute) by email. The trial court determined that the Third Discovery Dispute was not sufficiently ripe. The discovery dispute sought determination as to whether documents requested were necessary to determine whether defendants had violated the External Sales provisions of the APA.

On 1 November 2019, the trial court granted leave for plaintiffs to file an Amended Complaint. The Amended Complaint asserted claims for breach of contract, intentional misrepresentation, negligent misrepresentation, fraudulent inducement, violation of North Carolina's Unfair and Deceptive Trade Practices Act (UDTPA), promissory estoppel, and

unjust enrichment. Plaintiffs renewed their Rule 10.9 discovery dispute on 25 November 2019, via email, to the court. A discovery teleconference was held on 9 December 2019. On 2 December 2019, defendants filed an answer to plaintiffs' amended complaint, and a motion to dismiss all of plaintiffs' claims except for the breach of contract claim. On 13 December 2019 the trial court entered its order denying plaintiffs' Rule 10.9 discovery request without prejudice to the trial court issuing a later order following disposition of summary judgment motions. On 17 December 2019, defendants voluntarily dismissed one of two remaining counterclaims, to which plaintiffs filed a reply on 30 December 2019.

Plaintiffs filed a Motion for Leave to File Second Amended Complaint on 23 January 2020. On 4 February 2020, the trial court denied plaintiffs' motion to amend the Complaint for a second time. On 22 May 2020, the trial court entered its Order and Opinion on Defendants' Motion to Dismiss Amended Complaint. The trial court dismissed plaintiffs' claims for negligent misrepresentation and fraudulent inducement "to the extent" the claims were based on pre-APA misrepresentations. Claims based on misrepresentations and statements made in the pre-APA LOI, and post-APA were not dismissed. The trial court granted defendants' motions to dismiss as related to the negligent misrepresentation, promissory estoppel, and unjust enrichment claims.[1] The trial court denied the motion to dismiss as related to the UDTPA claim.

Plaintiffs and defendants filed cross motions for summary judgment, filing briefs in support on 11 August 2020 and 12 June 2020, respectively. Plaintiffs sought summary judgment on the final remaining counterclaim. Additionally, as directed by the trial court in the Rule 10.9 discovery dispute conference and order, Plaintiff moved for summary judgment as to whether the Takeda MSA qualified as an "External Sale" under the APA. Defendants' motion sought summary judgment on plaintiffs' four remaining claims—breach of contract, intentional misrepresentation, fraudulent inducement, and violation of the UDTPA.

On 6 April 2021, the trial court entered its Order and Opinion granting summary judgment for defendants on all of plaintiffs' remaining claims. The order denied summary judgment to plaintiffs on defendants' final counterclaim for breach of contract against Parthasarathy and on the issue of whether the Takeda MSA constituted an "External Sale."

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1. Plaintiffs have not appealed the trial court's order granting defendants' Motion to Dismiss the claims of promissory estoppel and unjust enrichment. Accordingly, those issues are not before us and will not be discussed further in this opinion.

Defendants stipulated to the dismissal of the final counterclaim on 8 October 2021. Plaintiffs filed notice of appeal on 22 October 2021.

III. Motion to Dismiss

A. Standard of Review

Dismissal of a claim under Rule 12(b)(6) is subject to de novo review. *Bridges v. Parrish*, 366 N.C. 539, 541 (2013). A dismissal is warranted "when: '(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.' " *Krawiec v. Manly*, 370 N.C. 602, 606 (2018) (quoting *Wood v. Guilford Cnty.*, 355 N.C. 161, 166 (2002)). In evaluating a party's complaint, this Court will "take the allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor." *New Hanover Cnty. Bd. of Educ. v. Stein*, 380 N.C. 94, 106–07 (2022).

B. Fraud by Omission and Promissory Fraud

[1] The trial court correctly dismissed plaintiffs' purported claims of fraud by omission and promissory fraud pursuant to North Carolina Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted for failing to satisfy the requirements found in Rule 9(b). Plaintiffs did not plead fraud by omission or promissory fraud in their Amended Complaint. Instead, the Amended Complaint raised claims of intentional misrepresentation, negligent misrepresentation, and fraudulent inducement. A complaint that fails to allege a legal theory that is later briefed does not meet Rule (9)(b)'s pleading requirement. *See Terry v. Terry*, 302 N.C. 77, 85 (1981).

Moreover, plaintiffs did not satisfy the particularity requirement of Rule 9(b) as interpreted by this Court. N.C.G.S. § 1A-1, Rule 9(b) (2021). "[I]n pleading actual fraud[,] the particularity requirement is met by alleging time, place and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent acts or representations. *Terry*, 302 N.C. at 85; N.C.G.S. § 1A-1, Rule 9(b) ("In all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.") An alleged misrepresentation must be "definite and specific." *Ragsdale v. Kennedy*, 286 N.C. 130, 139 (1974).

C. Fraud and Fraudulent Inducement

[2] We agree with the trial court and affirm the order dismissing the claims of fraud and fraudulent inducement based on pre-APA

representations not involving the LOI. A successful fraud claim requires a plaintiff prove: "(1) representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Id.* at 138. The elements for showing fraudulent inducement are identical. *Ward v. Fogel*, 237 N.C. App. 570, 581 (2014), *disc. rev. denied*, 368 N.C. 249 (2015) (mem.).

The trial court divided plaintiffs' fraud-related claims into two categories: claims based on alleged misrepresentations occurring prior to execution of the APA; and claims based on alleged misrepresentations that occurred after execution of the APA. The trial court granted defendants' 12(b)(6) Motion to Dismiss plaintiffs' claims for intentional misrepresentation and fraudulent inducement for pre-APA representations claims not involving the LOI on the grounds that the claims were not pled with sufficient particularity to satisfy Rule 9(b) requirements.[2] Claims related to post-APA representations and those related to the LOI remained.

Here, the Amended Complaint is devoid of any facts that identify who specifically made statements to plaintiff Parthasarathy. Nor does the Amended Complaint specify exactly when the statements were made, or where. The Amended Complaint only made broad allegations stating that PRA knowingly made false representations. The closest allegation to providing particularity states that "[d]uring a yearlong due diligence period and negotiations, PRA represented to [plaintiff Parthasarathy] that in addition to using [the Solutions] to provide services to PRA's customers, PRA also would sell or license [the Solutions] to other PRA customers, and, with few exceptions to any customers VHS had developed relationships with prior to the acquisition." This allegation falls short of the particularity requirement of Rule 9(b).

The Amended Complaint is absent of facts sufficient to meet the heightened standard specifying the time, place, and content of the misrepresentation, nor does it identify who made the misrepresentation. *Terry*, 302 N.C. at 85. Accordingly, the trial court was correct in dismissing the claims for fraud and fraudulent inducement based on PRA's alleged pre-APA representations.

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2. Section IV. C. of this opinion affirms the trial court's summary judgment order dismissing plaintiffs' claims of intentional misrepresentation and fraudulent inducement in the LOI.

D. Negligent Misrepresentation

[3] The trial court granted defendants' 12(b)(6) Motion to Dismiss plaintiffs' claim for negligent misrepresentation based on insufficient pleading. We agree with the trial court and affirm the trial court's order dismissing plaintiffs' negligent misrepresentation claim.

The North Carolina Business Court and North Carolina's federal district courts have consistently held that complaints alleging negligent misrepresentation must plead such claims with particularity. *See*, *e.g.*, *Aldridge v. Metro Life Ins. Co.*, No. 18-CVS-1050, 2019 NCBC LEXIS 116, at *113 (N.C. Super. Ct. Union Cnty. (Bus. Ct.) Dec. 31, 2019); *Beam v. Sunset Fin. Servs.*, No. 18-CVS-2925, 2019 NCBC LEXIS 56, at **18 (N.C. Super. Ct. Iredell Cnty. (Bus. Ct.) Sept. 3, 2019); *Rabinowitz v. Suvillaga*, No. 17-CVS-244, 2019 NCBC LEXIS 8, at *33 (N.C. Super. Ct. New Hanover Cnty. (Bus. Ct.) Jan. 28, 2019); *Provectus Biopharmaceuticals, Inc. v. RSM US LLP*, No. 17-CVS-10396, 2018 NCBC LEXIS 101, at *57 (N.C. Super. Ct. Mecklenburg Cnty. (Bus. Ct.) Sept. 28, 2018); *Herrera v. Charlotte Sch. of Law, LLC*, No. 17-CVS-1965, 2018 NCBC LEXIS 35, at *36 (N.C. Super. Ct. Mecklenburg Cnty. (Bus. Ct.) Apr. 20, 2018); *Bucci v. Burns*, No. 16-CVS-15478, 2017 NCBC LEXIS 83, at *7–8 (N.C. Super. Ct. Wake Cnty. (Bus. Ct.) Sept. 14, 2017); *Deluca v. River Bluff Holdings II, LLC*, No. 13-CVS-783, 2015 NCBC LEXIS 12, at *20 (N.C. Super. Ct. Brunswick Cnty. (Bus. Ct.) Jan. 28, 2015); *Al-Jamal v. Michael Baker Corp.*, No. 5:12-CV-746-F, 2013 U.S. Dist. LEXIS 93676, at *18 (E.D.N.C. July 3, 2013) ("Plaintiff is cautioned that any fraud or negligent misrepresentation claims must comply with [Federal] Rule 9(b)'s pleading requirements."); *Rohlik v. I-Flow Corp.*, No. 7:10-CV-173-FL, 2011 U.S. Dist. LEXIS 73454, at *6 (E.D.N.C. July 7, 2011) ("[C]laims of negligent misrepresentation [also] fall within the purview of Rule 9(b)." (alterations in original)); *Suntrust Mortg., Inc. v. Busby*, 651 F. Supp. 2d 472, 484–85 (W.D.N.C. 2009) (applying Rule 9(b) to negligent misrepresentation fraud claims); *Madison River Mgmt. Co. v. Bus. Mgmt. Software Corp.*, 351 F. Supp. 2d 436, 447 (M.D.N.C. 2005) (applying Rule 9(b) to negligent misrepresentation fraud claims); *Angell v. Kelly*, 336 F. Supp. 2d 540, 549 (M.D.N.C. 2004) (applying Rule 9(b) to negligent misrepresentation fraud claims); *Breeden v. Richmond Cmty. Coll.*, 171 F.R.D. 189, 199 (M.D.N.C. 1997) (After noting a split among federal courts as to whether Rule 9(b) applies to claims for negligent misrepresentation, adopting the "approach that negligent misrepresentation . . . claims come within Rule 9(b).").

We hold that, in North Carolina, claims for negligent misrepresentation must satisfy the heightened pleading standard of North Carolina

Rules of Civil Procedure Rule 9(b). A claim of negligent misrepresentation is "closely akin to fraud, differing primarily in the requisite state of mind of the purported actor." *Dealers Supply Co., Inc. v. Cheil Indus., Inc.*, 348 F. Supp. 2d 579, 590 (2004) (citing *Breeden v. Richmond Cmty. Coll.*, 171 F.R.D. 189, 202 n.14 (M.D.N.C. 1997)). Similar to a claim for fraud or mistake, "negligent misrepresentation is based upon some 'confusion or delusion of a party such as by some misrepresentation.' " *Id.* at 590 (quoting *Breeden*, 171 F.R.D. at 203). The similarity of the claims supports the extension of Rule 9(b) to "all cases where the gravamen of the claim is fraud even though the theory supporting the claim is not technically termed fraud." *Id.* (quoting *Toner v. Allstate Ins. Co.*, 821 F. Supp. 276, 283 (D. Del. 1993)).

The key distinction between negligent misrepresentation claims and ordinary negligence claims is that the former requires proof not merely of a breach of duty, but also the additional requirement that the claimant *justifiably relied* to his detriment on the information communicated without reasonable care. *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206 (1988). As in a fraud case, we require the plaintiff to identify this alleged negligent misrepresentation with particularity so that the defendant can understand the time, place, and content of the representation, the identity of the person making the representation, and how the plaintiff justifiably relied on that information. *Cf. Terry*, 302 N.C. at 85. As a federal court succinctly explained when applying Rule 9(b) to negligent misrepresentation claims, "[u]nless defendant and others share plaintiff's view of the situation, they will find it difficult to grasp plaintiff's claim." *Breeden*, 171 F.R.D. at 202.

Here, plaintiffs have not alleged the time, place, speaker, or the specific contents of the alleged misrepresentation purported in the claim. Aside from the pleaded facts related to the letter of intent, the Amended Complaint contained only one reference to any misrepresentation: "[d]uring a yearlong due diligence period and negotiations, PRA represented to [plaintiff Parthasarathy] that in addition to using [the Solutions] to provide services to PRA's customers, PRA also would sell or license [the Solutions] to other PRA customers, and, with few exceptions, to any customers VHS had developed relationships with prior to the acquisition." This lone statement does not identify who, specifically, made the misrepresentation, when it was made, where it was made, or the specific nature of the misrepresentation. Therefore, the 9(b) heightened standard of pleading with particularity has not been met. Accordingly, the trial court was correct to dismiss plaintiffs' claim of negligent misrepresentation.

IV. Defendants' Motions for Summary Judgment

A. Standard of Review

"The standard of review for summary judgment is de novo." *Forbis v. Neal*, 361 N.C. 519, 524 (2007). Summary judgment is appropriate when no genuine issue of material fact exists, and a party is entitled to judgment as a matter of law. *Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523 (2012) (citing N.C.G.S. § 1A-1, Rule 56(c)). Rule 56(c) of the North Carolina Rules of Civil Procedure states that summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file . . . show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2021). "A 'genuine issue' is one that can be maintained by substantial evidence." *Dobson v. Harris*, 352 N.C. 77, 83 (2000). In review of the motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party. *Id.*

Contract interpretation is a question of law. *Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354 (1970). When interpreting a contract, the Court should presume that the words of the agreement were deliberately selected and be given their plain meaning. *Briggs v. American & Efird Mills, Inc.*, 251 N.C. 642, 644 (1960).

B. Breach of the APA

Under Delaware law, courts "interpret contracts as a whole," "will give each provision and term effect, so as not to render any part of the contract mere surplusage," and "will not read a contract to render a provision or term meaningless or illusory." *In re Shorenstein Hays-Nederlander Theatres LLC Appeals*, 213 A.3d 39, 56 (Del. 2019) (quoting *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010). "When the contract is clear and unambiguous, we will give effect to the plain-meaning of the contract's terms and provisions." *Id.* at 56–57 (quoting *Osborn*, 991 A.2d at 1159–60). It is true that under Delaware law the implied covenant of good faith and fair dealing "inheres in every contract," *Chamison v. HealthTrust*, 735 A.2d 912, 920 (Del. Ch. 1999), and may be used to imply terms for "developments that could not be anticipated." *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010). However, the covenant of good faith and fair dealing "is not an equitable remedy for rebalancing economic interests after events that could have been anticipated." *Id.* at 1128. Indeed, the covenant of good faith and fair dealing should not be applied "to give the plaintiffs contractual protections that 'they failed to secure for themselves at the bargaining table.' "

Winshall v. Viacom Int'l, Inc., 76 A.3d 808, 816 (Del. 2013) (quoting *Aspen Advisors LLC v. United Artists Theatre Co.*, 861 A.2d 1251, 1260 (Del. 2004).

1. Sections 2.6(a)(i) and (ii) of the APA

[4] The trial court granted defendants' motion for summary judgment for plaintiffs' breach of contract claims as related to Sections 2.6(a)(i) and (ii) of the APA. We affirm the trial court's order granting summary judgment.

Schedules 2.6(a)(i) and (ii) permit PRA to "reasonably determine" completion of the first and second software development earnout milestones. Plaintiffs assert that defendants breached the terms of the APA by failing to reasonably exercise their contractually afforded discretion to determine the completion of Integration Milestones (i) and (ii). "When a contract confers discretion on one party, the implied covenant requires that the discretion be used reasonably and in good faith." *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 146–47 (2009). Essentially, plaintiffs claim that PRA violated the implied covenant of good faith and fair dealing.

A plaintiff may rely on the implied covenant when there is a gap in the contract and a defendant behaves in an unexpected manner, "thereby frustrating the fruits of the bargain that the asserting party reasonably expected." *Nemec*, 991 A.2d at 1126. Stated another way, breach of the implied covenant is a claim available to a plaintiff who could not have contracted around a defendant's allegedly arbitrary or unreasonable behavior. *Id.* That is not the circumstance here.

The record presents evidence that during negotiations, PRA devised a list of functional deficiencies that were later incorporated into the APA as milestones. The record also presents evidence that the first milestone "was so loosely worded it can be argued either way" and that partial achievement of milestone two was "grey." Further, Parthasarathy acknowledged, in 2016 November via email, that milestones (i) and (ii) were partially done.

Following execution of the APA, it quickly became apparent that completing the milestones would be very difficult if not impossible. However, plaintiff Parthasarathy has "a right to enter into good and bad contracts, the law enforces both." *Nemec*, 991 A.2d at 1126. This Court will not utilize the nebulous covenant of good faith and fair dealing to "rewrite a contract" that a plaintiff "now believes to have been a bad deal." *Id.*

Parthasarathy, a sophisticated party and highly experienced software developer, could have anticipated the potential difficulties of these milestones. Parthasarathy could have declined to agree that the determination of milestone completion rested on the discretion of PRA. Defendants could have negotiated for these milestones to be performed on a sliding scale, or negotiated for the milestones to be revaluated at a certain point in time with a buyout/buyback if deemed unattainable. Plaintiffs could have declined to agree to incorporate into the APA the functional gaps[3] discussed during negotiations. Plaintiff Parthasarathy complains that defendants allocated inadequate resources towards completion of the milestones—Parthasarathy could have and should have anticipated the need for adequate resources and contracted for such allocations.

Plaintiffs have not presented evidence of a disputed issue of fact that PRA did not act reasonably and in good faith in determining that plaintiffs failed to meet milestones (i) and (ii). Simply put, the milestones required certain tasks to be completed. Because those tasks were not completed, defendants determined the milestones had not been met. The "implied [covenant of]good faith cannot be used to circumvent the parties' bargain." *MHS Capital LLC v. Goggin*, 2018 Del. Ch. LEXIS 151 at *30–31 (quoting *Dunlop v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005). Thus, plaintiffs have presented no evidence on which to base the existence of a triable issue of material fact sufficient to survive defendants' Motion for Summary Judgment.

Establishing the existence of a contractual gap is essential because the "implied covenant applies only if the contract is silent as to the subject at issue." *Id.* The "implied covenant of good faith and fair dealing involves inferring contractual terms to handle developments or contractual gaps that neither party anticipated." *Nationwide Emerging Managers, LLC v. NorthPointe Holdings, LLC*, 112 A.3d 878, 896 (Del. 2015) (cleaned up) quoting *Nemec*, 991 A.2d at 1125. "It does not apply when the contract addresses the conduct at issue." *Id.*

This contract is not silent on these contested actions. The APA expressly states that milestone (i) is triggered "upon completion of the integration of the parties' Salesforce environments set forth on Schedule 2.6(a)(i)." Schedule 2.6(a)(i) provides that integration "shall be deemed

3. The functional gaps discussed by the parties during negotiations are not to be confused with a contractual gap in the context of contractual construction, and as discussed in this opinion. In this opinion, for the sake of clarity, the functional gaps will be referred to as the functional deficiencies.

completed when, as reasonably determined by Purchaser, [CTMax] (A) sufficiently shares all core data with the PRA Salesforce Modules and (B) does not conflict with the functionality of the PRA Salesforce Modules." The APA then provides a non-exclusive list of what is included in the "PRA Salesforce Modules." Schedule 2.6(a)(ii) required that a list of specific "key product enhancements" be completed on a "substantially error-free basis, as reasonably determined by" PRA. The contract also states that milestone (ii) is triggered "upon completion of key product enhancements set forth in Schedule 2.6(a)(ii)." Schedule 2.6(a)(ii) provides the completion of key product enhancements "shall be deemed to have occurred when all of the following functions are available and operating on a substantially error-free basis, as reasonably determined by Purchaser, as part of [CTMax]." The APA is not silent on this issue; thus, there is no contractual gap to be filled by the implied covenant, making application of the implied covenant unnecessary and inappropriate here.

2. Breach of APA Section 2.6(b)

[5] The trial court granted defendants' Motion for Summary Judgment for plaintiffs' claim that defendants breached section 2.6(b) of the APA. We disagree with the trial court's decision and find that plaintiffs have met the threshold of presenting evidence to show a genuine issue of material fact does exist. *See Lowe v. Bradford*, 305 N.C. 366, 370 (1982).

Plaintiffs contend that defendants breached section 2.6(b) of the APA in two ways: (1) by conditioning all work on the third software Development Milestone on the completion of the first and second Development Milestones; and (2) by conditioning all External Sales on the completion of the three software Development Milestones.

Section 2.6(b) is titled "Independence of Contingent Payments," (the Independent Milestone Provision or IMP). The trial court and all parties agree that the IMP provides that PRA cannot make payment for achievement of any milestone conditioned on having completed a prior milestone. The trial court determined that the IMP *only* prohibits conditional payments. However, this interpretation ignores the independent nature of the IMP. Contrary to what the trial court held, the IMP also unambiguously provides that satisfaction of the criteria of one milestone is not contingent on satisfaction or completion of the criteria of any other milestone.

Defendants argue that the IMP's use of the word "payments" limits application of the IMP to only defendants' obligation of payments and does not address the manner in which PRA may condition all External

Sales on the completion of the three software Development Milestones. This argument is not persuasive.

Under Delaware law, "contracts are to be interpreted 'as a whole,' " and this Court should "give each provision and term effect, so as not to render any part of the contract mere surplusage," and "not read a contract to render a provision or term meaningless or illusory." *In re Shorenstein Hays-Nederlander Theatres LLC Appeals*, 213 A.3d at 56–57 (quoting *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010)).

Following defendants' logic, 2.6(b) "independence" is limited to only how and when payments are to be made—that defendants are not bound to pay for milestone (i) simply because milestone (ii) is completed. Conversely, defendants are bound to pay for milestone (ii) upon completion even if milestone (i) is not complete. But this reading would render the IMP in 2.6(b) duplicative of 2.6(a), rendering it meaningless, contrary to principles of contract construction. *See id.* at 56–57.

Put another way, defendants' interpretation is that 2.6(a) does not state how a milestone payment is earned, because it leaves room for prerequisites not contemplated by 2.6(a). Defendants would have it that, but for 2.6(b), plaintiffs could complete milestone (ii) and still not be owed payment if they have not completed milestone (i). While Defendants argue that 2.6(b) means PRA cannot withhold *payment* for completion of a milestone based on incompletion of another, PRA may still *condition*—in an undefined and unspecified manner—pursuit of a milestone until completion of another. This unreasonable interpretation is such "that no reasonable person would have accepted when entering the contract," thus producing an absurd result. *Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199, 1208 (2021) (quoting *Osborn*, 991 A.2d at 1160).

Additionally, the IMP even goes so far as to give an example of how the IMP should apply, "[f]or the avoidance of any doubt:"

> [I]f the conditions precedent to the payment of the First Milestone Payment for the First Milestone Period are not satisfied, but the conditions precedent to the payment of the Second Milestone Payment for the Second Milestone Period are satisfied, then Purchaser would be obligated to pay such Second Milestone Payment for the Second Milestone Period for which the corresponding conditions precedent have been satisfied, and not the First Milestone Payment for the First Milestone Period.

The negotiating parties knew how to illustrate their intentions. Thus, if they intended that completion of certain milestones be required before others could be pursued, the parties could have also illustrated that "for the avoidance of any doubt." The example provided in the APA evidences that the parties contemplated and intended that a subsequently listed milestone is contingent only on its respective requirements and the milestones have concurrently running deadlines for completion.

Plaintiffs have presented evidence tending to support their assertion that defendants did condition certain milestones on the completion of others, in breach of the express terms of the contract. When viewing these facts in a light most favorable to plaintiffs, and thus presenting a triable issue of material fact, summary judgment was not appropriate here. *See Lowe*, 305 N.C. at 370.

Specifically, Irene testified that completion of the first two milestones was made a dependency to the third milestone. Additionally, Irene testified that PRA's "primary purpose [in acquiring the software] was to use the system for PRA and then, also to commercialize it *in that order*." (Emphasis added.) When viewed in the light most favorable to plaintiffs, this is evidence of PRA acting in violation of the express terms of the contract and summary judgment is not appropriate.

Defendants argue further that this claim is barred by the three-year statute of limitations. N.C.G.S. § 1-52(1); 10 Del. C. 8106. To preserve an issue for appeal, N.C. R. App. P. 10(a)(1) requires a party to have "presented to the trial court a timely request, objection, or motion . . . and to obtain a ruling upon the party's request, objection, or motion." While defendants did plead that some or all of plaintiffs' claims are time barred, this argument was not presented to the trial court and no ruling was obtained. Therefore, we decline to reach the issue of whether any claim is time barred by the statute of limitations, because this issue is not before this Court.

3. Breach of Contract Associated with the External Sales Provisions

[6] The trial court granted defendants' Motion for Summary Judgment as related to plaintiffs' claim that defendants breached the express and implied terms of the APA External Sales provisions. We disagree with the trial court's grant of summary judgment for defendants on this claim and remand the issue for further proceedings.

The trial court misconstrued the definition of the unambiguous contract term "External Sale." The APA defines "External Sale" as "the sale of

one or more licenses . . . to a third party which is not (i) an Affiliate of Purchaser or (ii) using such license(s) in connection with providing services to Purchaser and/or any of its Affiliates." The trial court correctly hones in on the key language of the APA: "the sale of one or more licenses to the Solutions by [PRA] . . . to a third party." However, the trial court ultimately makes a misstep in the analysis by giving credence to defendants' argument that there has been no "External Sale" without a specific fee or payment attributable solely or separately to the license.

The plain meaning of "sale" is: "the transfer of property . . . for a price." *Sale*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2007). In the context of the Takeda Master Services Agreement (MSA), Section 7.02(b) of the MSA refers to the transfer as "License to [PRA] Owned Technology." As the trial court found, " 'License' is a familiar term when used in connection with software, typically meaning a limited right to access and use a software product owned by another entity."

The Takeda MSA closely mirrors the APA definition of "External Sale." As part of a bundle including the use of the software and providing services to Takeda, and in exchange for a price of approximately $491 million over a term of years, PRA transferred a license to Takeda; Takeda is neither an affiliate of PRA nor providing a service to PRA.

Defendants appear to be arguing that they have excluded the transaction with Takeda from the APA definition of "External Sale" by simply bundling the transfer of the license as part of a service package and by not including an invoice line item of the license. This interpretation is unreasonable and produces an absurd result. *Manti Holdings, LLC*, 261 A.3d at 1208.

Moreover, defendants could have contracted around the issue of a line-item requirement if such a carve out was truly an intended part of the bargain. In the APA, defendants excluded from the realm of "External Sale" "(i) an Affiliate of Purchaser or (ii) using such licenses in connection with providing services *to Purchaser* and/or any of its Affiliates." (Emphasis added.) The parties could have included a third carve out: "(iii) license bundled within a software as a service agreement in connection with PRA providing services *to a third-party*." *See Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 816 (Del. 2013) (quoting *Aspen Advisors LLC v. United Artists Theatre Co.*, 861 A.2d 1251, 1260 (Del. 2004). Defendants did not do so. Furthermore, defendants' own expert witness, Bryan Haas, testified that "software as a service is not always a license. Sometimes it's just that you have access to use [it]." It seems that a license did not necessarily have to be issued to provide this

service to Takeda. Nevertheless, PRA issued a license to Takeda and called it a license in the MSA.

To be sure, this Court is not suggesting that if PRA were to simply refuse to use the term "license" for a transfer of software that it would be excluded from the definition of "External Sale." Instead, what this Court is saying is that, here, in this circumstance, the Takeda MSA specifically included, for a price, the transfer of a license to use the "PRA[ ] Owned Technology." What is unknown is whether the Takeda MSA was drafted such that Takeda was required to pay consideration to acquire and use a license of the Solutions. Therefore, defendants' failure to pay for the transfer of the license to Takeda under the MSA, as required by the APA, may be a breach of contract.

We hold that the Takeda contract could be an "External Sale." This Court remands this issue to the trial court to determine whether the Takeda MSA was drafted such that Takeda was required to pay consideration to acquire and use a license of the Solutions. Because we hold that "External Sale" is an unambiguous contract term and that defendants could have contracted around the issue of a line item requirement, if such was truly intended in the bargain, we further hold that the application of the covenant of good faith and fair dealing does not apply to this case. *Id.* On remand the trial court may find there is a need for additional discovery to determine if there are other external contracts that include transfer of licenses to the Solutions, either in effect, or that were specifically termed as such and which required consideration in exchange for the Solutions.

When viewed in the light most favorable to plaintiffs, the Takeda MSA could meet the definition of an "External Sale." This possibility constitutes more than substantial evidence that PRA breached the APA by engaging in external sales, thereby creating a genuine issue of material fact. Thus, this Court overturns the trial court's decision to grant summary judgment on defendants' breach of contract term as related to the External Sales provisions.

C. Alleged Misrepresentations PRA Made in the Letter of Intent

[7] The trial court granted summary judgment in favor of defendants on plaintiffs' claims of intentional misrepresentation and fraudulent inducement based on representations contained in the LOI. We agree with the trial court's order and affirm summary judgment.

There must be evidence of a misrepresentation of existing "or ascertainable facts, as distinguished from a matter of opinion or representation

relating to future prospects." *Ragsdale v. Kennedy*, 286 N.C. 130, 139 (1974) (citing *Berwer v. Union Cent. Life Ins. Co.*, 214 N.C. 554 (1938)). "[U]nfulfilled promises cannot be made the basis for an action of fraud." *Williams v. Williams*, 220 N.C. 806, 810 (1942).

In support of their argument that misrepresentations were made in the LOI, plaintiffs point to evidence occurring *after* the LOI was signed. For example, plaintiffs raise PRA's internal discussions at a board meeting during which plaintiffs claim that PRA disclosed its alleged plan not to sell the Solutions and its intent to block competitors from acquiring the Solutions. This meeting occurred in December 2014. Yet, the LOI was executed on 15 October 2014. Plaintiffs also point to the "ability to earn" language contained in the LOI, upon which plaintiffs claim to have relied. The trial court, quoting *Ragsdale*, found that this language "is, by its very nature, a statement of future intent or a 'representation relating to future prospects.' " 286 N.C. at 139. Notably, the "ability to earn" language is not present in the APA.

The LOI expressly provided that it was a nonbinding document and contemplated a more complete future agreement. *See Ragsdale*, 286 N.C. at 139 (an action for fraud cannot be predicated on future conduct); *see also Triad Packaging, Inc. v. SupplyOne, Inc.*, 597 F. App'x 734, 739–40 (4th Cir. 2015) (applying North Carolina law to find that a party's statements regarding the sale price and closing date in a nonbinding letter of intent were "classic projections, exemplified by the letter's nonbinding nature . . . [and] cannot, therefore, form the basis of a fraud claim"). Further, an intentional misrepresentation must be "definite and specific." *Ragsdale*, 286 N.C. at 139. On this basis, the trial court determined that "[t]he LOI contains fulsome disclaimers making it clear that its contents should not be relied upon by any party to the transaction, and that any reliance on its terms are solely at the relying party's risk." We agree.

As aptly noted by the trial court, plaintiffs have cited no authority from North Carolina or other jurisdictions in which a court has recognized a claim arising out of representations contained in a letter of intent. This is not the case in which this Court should recognize such a claim.

We hold that this LOI cannot form the basis of a fraud claim. Accordingly, we hold that the trial court was correct in granting summary judgment in favor of defendants for plaintiffs' claims of intentional misrepresentation and fraudulent inducement based on representations contained in the LOI.

D. Alleged Misrepresentations PRA Made about Amending the APA

[8] The trial court granted summary judgment in favor of defendants on plaintiffs' claims of intentional misrepresentation and fraudulent inducement based on statements made by Shannon and Jones-Hertzog regarding possible amendments to the APA. We affirm the trial court's order on this issue.

Plaintiffs claim that PRA's alleged post-APA representations stating that it would amend the APA milestones were fraudulent and that PRA never intended to amend the APA milestones. However, the trial court found that evidence in the record supports the notion that PRA was attempting to amend and engaged in negotiations with plaintiff Parthasarathy regarding a potential amendment of the APA milestones.

Specifically, in December 2016, Shannon asked Jones-Hertzog to work with Munn on amending the milestones. Additionally, Jones-Hertzog reached out to Irene for input on an amendment. Irene also met in person with plaintiff Parthasarathy and discussed amendment. On 15 December 2016, potential amendments were shared internally at PRA. Evidence in the record establishes that in January 2017 an amendment framework was again shared internally at PRA. The record reveals that in May 2017, Jones-Hertzog told plaintiff Parthasarathy that she was awaiting approval of a proposed amendment.

Failure to reach an agreement on the amendment of the milestones does not support a finding that PRA knew it was false at the time it represented that PRA would work towards an amendment. *See Williams*, 220 N.C. at 810 ("It is generally held . . . that mere unfulfilled promises cannot be made the basis for an action of fraud.").

Plaintiffs have not presented evidence of a genuine issue of material fact as to whether defendants' statements regarding amendment were false at the time the statements were made. Thus, the trial court was correct in granting summary judgment in favor of defendants on this issue.

E. Unfair and Deceptive Trade Practice Act

[9] This Court affirms the trial court's order grant of summary judgment in favor of the defendants regarding plaintiffs' claim under the Unfair and Deceptive Trade Practice Act (UDTPA). "Whether an act found to have occurred is an unfair or deceptive practice which violates N.C.G.S. § 75-1.1 is a question of law for the court." *Nobel v. Foxmoor Grp., LLC*, 380 N.C. 116, 119 (2022).

Establishing a prima facie claim for unfair and deceptive trade practices requires a plaintiff to show: "(1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." *SciGrip, Inc. v. Osae*, 373 N.C. 409, 426 (2020) (quoting *Dalton v. Camp*, 353 N.C. 647, 656 (2001)). "[U]nfairness or 'deception either in the formation of [a] contract or in the circumstances of its breach' may establish the existence of substantial aggravating circumstances sufficient to support an unfair and deceptive trade practices claim." *Id.* (quoting *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989)). Notably, most employer-employee disputes fall outside the purview of the UDTPA. *Dalton*, 353 N.C. at 657.

Plaintiffs allege that defendants violated the UDTPA by negotiating the PRA under false pretenses, interfering with the APA milestones, and terminating plaintiff Parthasarathy's employment. Plaintiffs' UDTPA claim is an attempted second bite at the apple and, as the trial court stated, is a repackaging of the breach of contract and fraud claims. Setting aside the termination of Parthasarathy, this claim amounts to an allegation that PRA did not perform under the terms of the contract. This allegation does not support a finding of the required "substantial aggravating circumstances" attending the breach. *See SciGrip, Inc.*, 373 N.C. at 427 ("[A]n intentional breach of contract, standing alone, simply does not suffice to support the assertion of an unfair and deceptive trade practices claim.").

Moreover, plaintiffs have not presented any evidence that identifies a genuine issue of material fact to survive summary judgment on their UDTPA claim. Specifically, plaintiffs argue that an internal presentation to PRA's board shows that PRA did not intend to sell the software externally. However, the record reveals that at the internal presentation defendants considered VHS's software as "[r]evenue generating technology," and mirrored the milestone framework of the APA.

Plaintiffs allege that PRA acted fraudulently during negotiations by feigning interest in selling the software only to decline to pursue those sales until after the software was fully enhanced. However, aside from plaintiff Parthasarathy's own words, there is nothing in the record to support this assertion. Rather, the record contradicts this assertion. Specifically, the testimony of Chuck Piccirillo, PRA's Senior Vice President of IT, recounts internal discussions within PRA about "getting into software selling." Piccirillo also recounts a conversation between PRA staff and plaintiff Parthasarathy during which it was explained that functional deficiencies in the software would need to be addressed

prior to selling. The record also contained Shannon's deposition testimony that the negotiations made clear that the software could not be sold until modifications were made. Plaintiff Parthasarathy's testimony standing alone is not substantial evidence of a material fact to survive summary judgment. *See Lowe*, 305 N.C. at 369 ("An issue is 'genuine' if it can be proven by substantial evidence and a fact is 'material' if it would constitute or irrevocably establish any material element of a claim or a defense.").

The record does not support plaintiffs' assertion that PRA's promises to amend the APA were false, see sections I. E. and IV. D, *supra*. Thus, even after reviewing these claims in the light most favorable to the plaintiffs, we find no genuine issue of material fact exists for plaintiffs' allegations that PRA never intended to sell the software.

Lastly, plaintiffs assert that Parthasarathy's termination was unfair—specifically that PRA terminated Parthasarathy in an inequitable assertion of power. However, unless PRA's conduct is "egregious enough" to "overcome the longstanding presumption against unfair and deceptive practices claims as between employers and employees," plaintiff will not prevail. *Dalton*, 353 N.C. at 658.

What the record shows is that the employment agreement at issue states that Parthasarathy will have the "status and responsibilities as determined from time to time" by PRA's "CEO or the CEO's designee." In North Carolina, an at-will employment State, "in the absence of a contractual agreement between an employer and an employee establishing a definite term of employment, the relationship is presumed to be terminable at the will of either party without regard to the quality of performance of either party." *Kurtzman v. Applied Analytical Indus., Inc.*, 347 N.C. 329, 331 (1997). Subject to a few limited exceptions not relevant here, an at-will employee may be terminated "for no reason, or for an arbitrary or irrational reason." *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 175 (1989) (quoting *Sides v. Duke Univ.*, 74 N.C. App. 331, 342 (1985)). Thus, a high threshold must be overcome to surpass the at-will employment presumption. *See Kurtzman*, 347 N.C. at 331. Here, that threshold has not been surpassed. Accordingly, the trial court was correct in granting summary judgment in favor of defendants for plaintiffs' UDTPA claim.

V. Second Motion to Amend the Complaint

A. Standard of Review

"A motion to amend is addressed to the [sound] discretion of the trial court. Its decision will not be disturbed on appeal absent a showing

of abuse of discretion." *Isenhour v. Universal Underwriters Ins. Co.*, 345 N.C. 151, 154 (1996) (alteration in original) (quoting *Henry v. Deen*, 310 N.C. 75, 82 (1984)). An abuse of discretion occurs when the trial court's decision is "manifestly unsupported by reason" or is "so arbitrary that it could not have been the result of a reasoned decision." *Piazza v. Kirkbride*, 372 N.C. 137, 144 (2019) (quoting *White v. White*, 312 N.C. 770, 777 (1985)).

B. Motion for Leave to File an Amended Complaint

[10] The trial court denied plaintiffs' motion for leave to file a Second Amended Complaint on the basis of undue delay and material prejudice to the defendants. We hold that the trial court did not abuse its discretion and affirm the trial court's order denying plaintiffs' motion for leave to amend.

Once an answer has been served, a plaintiff may only amend their pleading by leave of court or written consent of the adverse party. N.C.G.S. § 1A-1, Rule 15(a) (2021). Leave to amend lies within the trial court's discretion, though should be freely given "when justice so requires." *Id.* "Among proper reasons for denying a motion to amend are undue delay . . . and unfair prejudice to the nonmoving party." *Azure Dolphin, LLC v. Barton*, 371 N.C. 579, 603 (2018).

Plaintiffs argue that the trial court's denial was not based in law, thus, an abuse of discretion. Plaintiffs further contend that the trial court's ruling is contrary to the notion that "leave [to amend] shall be freely given when justice so requires." N.C.G.S. § 1A-1, Rule 15(a). This argument is not persuasive. Review of the trial court's order demonstrates plentiful justification for denying plaintiffs' motion to amend. Specifically, the trial court noted that plaintiffs had previously amended their complaint and that the amendment contained extensive revisions. The trial court further noted that discovery had closed, with thousands of documents having been exchanged. The parties had fully briefed the motion to dismiss plaintiffs' Amended Complaint. The trial court then concluded that leave to amend would cause material prejudice to defendants and undue delay. Considering the reasoning provided by the trial court, we hold that the trial court did not abuse its discretion in denying plaintiffs' motion for leave to file a Second Amended Complaint.

VI. Discovery Motion Under Business Court Rule 10.9

A. Standard of Review

A trial court's discovery ruling is subject to an abuse of discretion standard and "will be overturned 'only upon a showing that its ruling

was manifestly unsupported by reason and could not have been the result of a reasoned decision.' " *Friday Invs., LLC v. Bally Total Fitness of the Mid-Atl., Inc.*, 370 N.C. 235, 241 (2017) (quoting *In re Foreclosure of Lucks*, 369 N.C. 222, 228 (2016)).

B. Business Court Rule 10.9

[11] We hold that the trial court's denial of plaintiffs' discovery request was not an abuse of discretion. Accordingly, we affirm the trial court's denial of plaintiffs' Third Discovery Request.

Business Court Rule 10.9 "applies to motions under Rules 26 through 37 and Rule 45 of the Rules of Civil Procedure." BCR 10.9(a). The trial court acted within the scope of Rule 10.9 in denying plaintiffs' request. Rule 26 states: "[t]he frequency or extent of use of discovery methods . . . *shall be limited by the court if it determines that:*

> (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) *the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice . . . .*

N.C.G.S. § 1A-1, Rule 26(b)(1a) (2021) (emphasis added).

Rule 26 requires the need for information by one party be balanced against the "likelihood of an undue burden imposed upon the other." *Willis v. Duke Power Co.*, 291 N.C. 19, 34 (1976). Additionally, North Carolina trial courts are vested with broad authority to manage cases in their dockets, including discovery issues. *See, e.g.*, *Beard v. N.C. State Bar*, 320 N.C. 126, 129 (1987) (explaining that trial courts retain inherent authority "to do all things that are reasonably necessary for the proper administration of justice"). Rule 26 grants the trial court, even acting on its own initiative, broad discretion to limit the frequency and extent of discovery. N.C.G.S. § 1A-1, Rule 26(b)(1a).

On 25 November 2019, plaintiffs renewed their previously submitted Rule 10.9 request (the Third Discovery Request), to which defendants objected as irrelevant, unduly burdensome, and time consuming.

Specifically, defendants argued that such an order would require defendants to review hundreds of customer agreements and alert customers before producing the contents of any agreements. Defendants also expressed concern that the customers whose contracts may be within the scope of production could, before release, object to disclosure of their contract information. Additionally, defendants contended that plaintiffs' discovery request would include "*all* financial information for *every* PRA customer agreement which includes as part of its terms a general license to access PRA's technology."

In response, plaintiffs argued that the previously produced contract with Takeda constitutes an "External Sale" under the APA. As such, plaintiffs needed to determine what similar contracts existed and which similar contracts would result in "additional External Sales underlying damages." To that end, plaintiffs requested production of all documents showing "sales, revenue, and profit[s]" arising from any of the contracts and agreements it sought. Plaintiffs also sought production of "all contracts or agreements of any kind" between PRA and its customers in which PRA has granted the customer "a license in, access to, or use of in any manner whatsoever, [of] any version of [the Solutions], whether express or implied, direct or indirect, alone, or in combination with any other software, products, or services," or in which PRA has agreed to provide products or services to its customers "using any version of [the Solutions] . . . whether express or implied, direct or indirect, alone, or in combination with any other software, products, or services."

As a pre-filing requirement to a discovery motion, Rule 10.9 mandates that the parties "engage in a thorough, good-faith attempt to resolve or narrow the dispute. If the dispute remains unresolved, then the party seeking relief must e-mail a summary of the dispute" to the trial court. BCR 10.9(b)(1). As required by Rule 10.9(b)(1) and Rule 10.9(b)(2), on 5 September 2019, plaintiffs emailed Plaintiffs' Rule 10.9 Summary of Discovery Dispute, along with Certificate of Compliance with BCR Rule 7.8. On 24 September 2019, the trial court advised the parties, by email, that "the dispute underlying the 10.9 [request was] not sufficiently ripe for the [c]ourt to provide reasonable guidance." Plaintiffs later advised the trial court by email, on 25 November 2019, that "the parties have conferred a few additional times but continue to be at an impasse on the same set of issues and could use the [c]ourt's guidance to help resolve them."

Pursuant to Rule 10.9, the trial court "schedule[d] a telephone conference with counsel to discuss the dispute." BCR 10.9(b)(3). The telephone conference was held on 9 December 2019. Rule 10.9 provides that the court may "order the parties to file a motion and brief regarding the

dispute . . . or issue an order that decides the issues raised or that provides the parties with further instructions." *Id.* Consistent with the Rule, "the [c]ourt . . . decide[d] the parties' dispute during the conference" by denying the Third Discovery Request. *Id.*

Plaintiffs now argue that the trial court abused its discretion by converting an informal and required email request into a motion to compel. Specifically, plaintiffs argue that the trial court converted the 25 November 2019 email into a motion to compel. We do not agree. Nothing in the record indicates that the trial court made such a conversion. Rather, in the Background Section of the Order, the trial court stated, "During the conference, the Court advised counsel that due to the late stage of discovery in this case and its concern that requiring PRA to produce the requested documents would be unduly burdensome and could unnecessarily cause a lengthy delay in resolving this case, the Court was *inclined to deny a motion to compel* PRA to respond to the Third Request." (Emphasis added.)

The Order in no way characterized the plaintiffs' email as a motion to compel. Instead, after "propos[ing] that the parties move for summary judgment on the issue of whether . . . the Takeda Agreement constituted an External Sale under the APA," the trial court indicated that it would compel production if the plaintiff prevailed on that issue. At best, this language contemplates a potential future motion to compel that may be filed. Moreover, the trial court denied the Rule 10.9 request "*without prejudice* to the [c]ourt issuing a later order, following disposition of summary judgment motions, compelling PRA to produce the documents and information sought in the Third Request." (Emphasis added.) In supporting its denial, the trial court reasoned that the request was unduly burdensome at this late stage of discovery and would unnecessarily cause delay in resolving this case, without first determining the issue regarding External Sales under the APA.

We hold that the trial court complied with both Business Court Rule 10.9 and Rule 26 of the Rules of Civil Procedure and that the denial of the Rule 10.9 discovery request was not an abuse of discretion. However, given this Court's holding that the Takeda contract does constitute an "External Sale" under the APA, what further discovery that may be appropriate, if any, is an open question for the trial court to address upon remand.

VII. Conclusion

We affirm in part and reverse in part the trial court's order in this case. We affirm the trial court's order for all issues except for the order granting defendants' motion for summary judgment on the issues of

breach of the APA section 2.6(b) and the External Sales provisions. Further, we hold that the trial court did not abuse its discretion by denying plaintiffs' discovery motion under Rule 10.9. Given that this Court hereby overturns the trial court's order for summary judgment on the breach of the APA regarding the External Sales provisions, determining that the Takeda MSA may be an "External Sale," the issue of further discovery should be reconsidered by the trial court.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Justice EARLS concurring in part and dissenting in part.

While I agree with the majority on many of the issues presented in this case, I disagree on three issues. First, I concur with the majority holding that plaintiffs' complaint is insufficient to plead the claim of negligent misrepresentation under the North Carolina Rules of Civil Procedure. However, I disagree that Rule 9(b) is the proper standard for this inquiry. *See* N.C.G.S. § 1A-1, Rule 9(b) (2021). Instead, in my view the clear language of the rules means that negligent misrepresentation claims are only subject to the pleading standard of Rule 8. *See* N.C.G.S. § 1A-1, Rule 8 (2021). Second, regarding the defendants' Motion for Summary Judgment as it relates to the plaintiffs' breach of contract claim under sections 2.6(a)(i) and (ii) of the Asset Purchase Agreement (APA), I would hold that under Delaware law the implied covenant of good faith and fair dealing applies to this case and thus summary judgment for defendants on this claim is not warranted.

Third, I would hold that under Delaware law the implied covenant of good faith and fair dealing applies to Pharmaceutical Research Associates, Inc.'s (PRA) post-closing conduct and that summary judgment for defendants is not appropriate as to whether PRA breached the implied terms of the APA's External Sales provision, as a reasonable jury could find that: (1) PRA sequenced the milestones such that work could not begin on the second and third milestones until work on the first milestone was completed; (2) PRA sequenced the External Sales Milestone by not allowing work to begin on External Sales until after work on the first three Development Milestones was completed; (3) when PRA unmanaged the software package it diverted resources away from the APA milestones and eliminated the possibility of licensing the software on the AppExchange[1] and thwarted Parthasarathy's efforts to meet the

1. Salesforce's AppExchange is the online platform where VHS had planned to license or sell its software to customers.

External Sales provision; and (4) PRA's interference with the Vertex deal was intentional.

I. Motion to Dismiss

On review, the dismissal of a claim under Rule 12(b)(6) is subject to de novo review. *Bridges v. Parrish*, 366 N.C. 539, 541 (2013). A dismissal is warranted when "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Krawiec v. Manly*, 370 N.C. 602, 606 (2018) (quoting *Wood v. Guilford Cnty.*, 355 N.C. 161, 166 (2002)). In evaluating the party's complaint, this Court must "take the allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor." *See New Hanover Cnty. Bd. of Educ. v. Stein*, 380 N.C. 94, 106–07 (2022).

A. Negligent Misrepresentation

"The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206 (1988). "[T]o establish justifiable reliance a plaintiff must sufficiently allege that he made a reasonable inquiry into the misrepresentation and allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence." *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 454 (2015) (cleaned up).

While the trial court applied the heightened Rule 9(b) pleading standard, negligent misrepresentation is properly pled under Rule 8's notice pleading standard. *See* N.C.G.S. § 1A-1, Rule 8; *see also Raritan River Steel Co.*, 322 N.C. at 207–08. Under Rule 8, a complaint must 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.G.S. § 1A-1, Rule 8(a). The majority asserts that a claim for negligent misrepresentation is similar to a claim for fraud and accordingly, the two require the same pleading standard under North Carolina Rule of Civil Procedure 9(b). However, Rule 9(b) does not apply to negligent misrepresentation, and the language of the rule specifically states that "[i]n all averments of fraud, duress or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." N.C.G.S. § 1A-1, 9(b). Thus, while Rule 9(b) clearly

applies to a claim of fraud, it does not apply to claims for negligent misrepresentation. *Id.*

Value Health Solutions, Inc. (VHS) and Neil Parthasarathy (together "VHS") assert that the amended complaint adequately pleads a claim for negligent misrepresentation. VHS argues that the gap analysis PRA conducted of the software allowed it to learn about the software's capabilities as well as identify any functions or features PRA may have wanted to develop further after acquiring it. According to VHS, the results of this analysis became the basis for the Letter of Intent (LOI) and APA. VHS alleges that despite PRA knowing the software would need to be developed further, this information was not shared with VHS. Thus, VHS alleges that PRA "failed to exercise care and competence in obtaining and communicating . . . to Mr. Parthasarathy and VHS regarding the timeline and development [of PRA's internal software platform] and the impact it would have on PRA's business and the timely completion of the milestones." VHS also contends that the information PRA did provide was "false or inaccurate" because "PRA knew or should have known that" its internal software development plans "would interfere and prevent the completion of the software and sales milestones." VHS notes that in the end, the technical requirements contained in each milestone "were a moving target" with many of them being "waived and abandoned" or "not required" in favor of other requirements. According to VHS, had it known that PRA would alter the milestones and condition them on one another it would have never entered into the APA with PRA. Lastly, VHS argues that its reliance on PRA was justified because PRA had " 'full' and 'unfettered' access to VHS's software, overall control of the due diligence process, and [the] opportunity to conduct any testing or analysis it desired."

While many of these allegations might support VHS's breach of contract claims, they do not allege that PRA made misstatements or misrepresentations about the technical requirements needed to integrate the software into PRA's internal platform. Moreover, the test for determining whether reliance was justifiable is whether the plaintiff "sufficiently allege[d] that he made a reasonable inquiry into the misrepresentation and allege[d] that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence." *Arnesen*, 368 N.C. at 454 (cleaned up). VHS does not argue that it made a reasonable inquiry into PRA's alleged misstatements, nor does it argue that it was denied the opportunity to investigate or that even if it had investigated, it could not have learned the true facts. *See id.*

Furthermore, to make a claim for negligent misrepresentation a party must allege that a duty of care existed. *Raritan River Steel Co.*, 322 N.C. at 206. VHS cannot meet this standard because the alleged negligent misrepresentation occurred as the result of an arm's-length transaction. An "[a]rm's-length transaction[ ] encompass[es] dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power; not involving a confidential relationship." *Head v. Gould Killian CPA Grp., P.A.*, 371 N.C. 2, 9 (2018) (cleaned up). In contrast, a fiduciary relationship is "characterized by 'a heightened level of trust and the duty of the fiduciary to act in the best interests of the other party.' " *Id.* at 10 (quoting *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 367 (2014)). Because the transaction between VHS and PRA was an arm's-length transaction and not one where a fiduciary relationship existed, VHS cannot show, and has not alleged, that PRA violated a duty necessary to plead negligent misrepresentation. VHS has not made a sufficient claim for negligent misrepresentation under North Carolina Rule of Civil Procedure 8, and the trial court was correct to dismiss this claim.

Accordingly, I concur with the majority in the result on this issue, namely that the plaintiffs' complaint was insufficient to plead negligent misrepresentation. However, I would hold that negligent misrepresentation is properly pled under North Carolina Rule of Civil Procedure 8 and not Rule 9(b).

II. Summary Judgment Claims Related to Triable Issues of Material Fact

A. Standard of Review

"This Court reviews decisions arising from trial court orders granting or denying motions for summary judgment using a de novo standard of review." *Cummings v. Carroll*, 379 N.C. 347, 358 (2021). To evaluate "the appropriateness of a trial court's decision to grant or deny a summary judgment motion in a particular case, 'we view the pleadings and all other evidence in the light most favorable to the nonmovant and draw all reasonable inferences in that party's favor.' " *Id.* (quoting *N.C. Farm Bureau Mut. Ins. Co. v. Sadler*, 365 N.C. 178, 182 (2011)).

"The purpose of [summary judgment] is to eliminate formal trials where only questions of law are involved." *Lowe v. Bradford*, 305 N.C. 366, 369 (1982) (citing *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523 (1971)). The summary judgment procedure, "allows the trial court to pierce the pleadings to determine whether any genuine factual controversy exists." *Id.* (cleaned up). Accordingly, Rule 56(c) of the North

Carolina Rules of Civil Procedure states that summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." *Id.* (quoting N.C.G.S. § 1A-1, Rule 56(c)). "An issue is genuine if it can be proven by substantial evidence and a fact is material if it would constitute or irrevocably establish any material element of a claim or a defense." *Id.* (cleaned up).

To prevail on summary judgment, the moving party must meet "the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim." *Id.* (first citing *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467 (1979); then citing *Zimmerman v. Hogg & Allen*, 286 N.C. 24 (1974)). "If the moving party meets this burden, the non-moving party must in turn either show that a genuine issue of material fact exists for trial or must provide an excuse for not doing so." *Id.* (citing *Econo-Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200 (1980)). Importantly, "[t]he opposing party need not convince the court that he would prevail on a triable issue of material fact but only that the issue exists." *Id.* at 370. Issues that are "legitimately called into question" must be preserved for resolution by a jury, and "it is not the function of this Court, or the trial court . . . , to weigh conflicting evidence of record." *Howerton*, 358 N.C. at 471.

B. Breach of the APA

Under Delaware law, courts interpret contracts as a whole, "will give each provision and term effect, so as not to render any part of the contract mere surplusage," and will not "read a contract to render a provision or term meaningless or illusory." *In re Shorenstein Hays-Nederlander Theatres LLC Appeals*, 213 A.3d 39, 56 (Del. 2019) (cleaned up). "[The] central aim . . . of contract law is to protect and fulfill the reasonable expectations of the parties in forming a contract." Mohsen Manesh, *Express Contract Terms and the Implied Contractual Covenant of Delaware Law*, 38 Del. J. Corp. L. 1, 7 (2013). While "parties [typically] articulate their intent in the express terms of an agreement," courts recognize that "[n]o matter how skilled, sophisticated, or resourceful[ ] [the] parties [are, they] will be unable to anticipate and address every possible situation that may develop after the contract is formed." *Id.* Accordingly, "[m]odern contract law . . . recognize[s] an implied covenant to the effect that each party to a contract will act with good faith towards the other with respect to the subject matter of the contract." *Katz v. Oak Indus. Inc.*, 508 A.2d 873, 880 (Del. Ch. 1986).

This covenant is breached when it is "clear from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith—had they thought to negotiate with respect to that matter." *Id.*

At the same time, the covenant of good faith and fair dealing "is not an equitable remedy for rebalancing economic interests after events that could have been anticipated, but were not, . . . later adversely affected one party to a contract. Rather the covenant is a limited and extraordinary legal remedy." *Nemec v. Shrader*, 991 A.2d 1120, 1128 (Del. 2010). The covenant should not be applied "to give plaintiffs contractual protections that they failed to secure for themselves at the bargaining table." *Winshall v. Viacom Int'l, Inc.*, 55 A.3d 629, 636–37 (Del. Ch. 2011) (cleaned up). Accordingly, a court should not use the implied covenant to "rewrite a contract" that a party "now believes to have been a bad deal." *Nemec*, 991 A.2d at 1126. Delaware courts have cautioned that the implied covenant is applied "rarely, and only in narrow circumstances." *NAMA Holdings, LLC v. Related WMC LLC*, No. 7934-VCL, 2014 WL 6436647, at *17 (Del. Ch. Nov. 17, 2014) (unpublished) (quoting *Allied Cap. Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1032 (Del. Ch. 2006)).

The implied covenant of good faith and fair dealing "inheres in every contract," *Chamison v. HealthTrust, Inc.-Hosp. Co.*, 735 A.2d 912, 920 (Del. Ch. 1999), and is "best understood as a way of implying terms in the agreement, whether employed to analyze unanticipated developments or to fill gaps in the contract's provisions[,]" *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005) (cleaned up). Moreover, if the terms of the contract provide a party with discretion in determining whether a condition is met, the implied covenant requires that the party use good faith in making that determination. *Gilbert v. El Paso Co.*, 490 A.2d 1050, 1055 (Del. Ch. 1984), *aff'd*, 575 A.2d 1131 (Del. 1990). The term "good faith" "exclude[s] a wide range of heterogenous forms of bad faith" and stated most simply, requires "a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain." *Dunlap*, 878 A.2d at 441–42 (cleaned up). Indeed, "[a] party may breach the implied covenant of good faith and fair dealing without violating an express term of the contract." *PAMI-LEMB I Inc. v. EMB-NHC, L.L.C.*, 857 A.2d 998, 1016 (Del. Ch. 2004) (citing *Chamison*, 735 A.2d at 920).

1. Breach of APA sections 2.6(a)(i) and (ii)

In this case, sections 2.6(a)(i) and (ii) of the APA required PRA to "reasonably determine" completion of the first and second software development earnout milestones. The use of the phrase "reasonably determine" grants PRA discretion, and this discretion must be exercised in good faith. *See Gilbert*, 490 A.2d at 1055. However, VHS contends that instead of exercising this discretion in good faith, PRA's determination regarding completion of the first and second development milestones was "unreasonable, arbitrary, and made in bad faith." Accordingly, VHS asserts that there is substantial evidence in the record showing that PRA violated the implied covenant of good faith and fair dealing.

More specifically, VHS argues that the APA development milestones "were in a constant state of flux." Indeed, VHS claims that the required functional updates were a moving target and that PRA never reasonably evaluated completion of those milestones. The evidence VHS presented shows that during the negotiation period, Mike Irene (PRA's Executive Director of IT) compiled a list of "functional gaps" to assess whether VHS's software was worth pursuing. This assessment was incorporated into the APA as milestones that needed to be met to trigger additional payments from PRA to VHS. However, in the case of the first milestone, which was the integration of Salesforce modules, PRA made changes to the agreed upon list of required modules. Specifically, PRA determined that some of the modules included in the APA no longer "made sense" and decided not to integrate them. After making this determination, PRA not only removed those modules from the list but also mandated the integration of additional modules which were not included in the APA.

In regard to the second milestone, which was the completion of key product enhancements, PRA determined that certain functional requirements "did not make the cut" or "were no[ ] [longer] required." Furthermore, the evidence presented supports that other functional requirements under the second milestone were changed based on incorrect information that PRA had about its existing Siebel System.

Determining whether PRA breached sections 2.6(a)(i) and (ii) of the APA requires this Court to look beyond whether the first and second milestones were completed. Instead, this Court must determine which party is responsible for these milestones not being met. Under the APA, PRA had an express and implied obligation to make a reasonable determination about the completion of the first two software development milestones and to exercise this discretion in good faith. However, changing the requirements necessary to meet the first two milestones

does not meet the definition of what it means to "reasonably determine" in good faith. Instead, it shows changes that were not originally agreed on by both parties in the APA. Based on the evidence presented above and viewed in the light most favorable to VHS, *see Cummings*, 379 N.C. at 358, summary judgment is not appropriate. Moreover, it is not this Court's role to weigh the evidence, *Howerton*, 358 N.C. at 471, and VHS is not required to "convince [this Court] that [it] would prevail on an issue of material fact[,]" but instead all that is required is for VHS to show that an issue of material fact exists, *Lowe*, 305 N.C. at 370. VHS has met this threshold. Accordingly, I would hold that the covenant of good faith and fair dealing applies to this case, and the trial court erred in granting defendants' Motion for Summary Judgment.

2. Breach of Contract Associated with the External Sales Provision

I agree with the majority that the trial court erred in granting summary judgment in favor of the defendants as it relates to plaintiffs' claim that PRA breached the External Sales provision of the APA. But in addition to concluding that a jury could find that the Takeda Deal constituted an External Sale, I would also hold that a jury could find PRA violated the implied covenant of good faith and fair dealing in its post-closing conduct as it pertains to the External Sales provision.

VHS contends that PRA violated the implied covenant of good faith and fair dealing associated with the APA's External Sales provisions, sections 2.6(a)(iv) through (vii) of the APA. The External Sales provision is a milestone that requires PRA to make earnout payments "upon the achievement of aggregate External Sales." Under Delaware law, courts first consider the express earnout covenants or clauses which may impact the buyer's post-closing obligations or efforts regarding earnout payments. *See Chamison*, 735 A.2d at 920. In the absence of such provisions, the implied covenant of good faith and fair dealing will be used to "protect the spirit of an agreement when, without violating an express term of the agreement, one side uses oppressive or underhanded tactics to deny the other side the fruits of the parties' bargain." *Id.*

Because the purpose of applying the covenant of good faith and fair dealing is to "protect the parties' reasonable expectations" under the contract, *Dunlap*, 878 A.2d at 447 (cleaned up), the parties cannot act "arbitrarily or unreasonably thereby frustrating the fruits of the bargain that the asserting party reasonably expected" at the time the contract was executed, *Nemec*, 991 A.2d at 1126. Furthermore, the implied covenant of good faith and fair dealing "requires the finder of fact to

extrapolate the spirit of the agreement from its express terms and based on that spirit, determine the terms the parties would have bargained for to govern the dispute had they foreseen the circumstances under which their dispute arose." *O'Tool v. Genmar Holdings, Inc.*, 387 F.3d 1188, 1195 (10th Cir. 2004) (cleaned up) (applying Delaware law).

In the case at bar, the APA does not include any post-closing covenants or express provisions that reserve or limit PRA's post-closing obligations under the implied covenant of good faith and fair dealing. However, in the court below, PRA argued that the implied covenant of good faith and fair dealing could not be applied to give VHS contractual protections that "they failed to secure for themselves at the bargaining table[,]" quoting *Winshall v. Viacom International, Inc.*, 76 A.3d 808, 816 (Del. 2013) (citation omitted). To support its contention, PRA cited *Airborne Health, Inc. v. Squid Soap, LP*, 984 A.2d 126, 147 (Del. Ch. 2009), and argued that here, as in that case, VHS "could have insisted on specific contractual commitments from PRA" such as the level of resources PRA needed to devote to developing CTMax or a "guarantee that Parthasarathy would have 'full authority' over the [software] development, or a plan for making external sales."

Agreeing with PRA, the trial court cited *Airborne Health*, 984 A.2d at 147, and found in PRA's favor. However, the Business Court's reliance on *Airborne Health* was misguided because that case involved express post-closing obligations. There, the seller had bargained for an express "contractual downside protection" that required the buyer to return assets to the seller if the buyer failed to spend certain threshold amounts to market the seller's products. *Id.* Taking this together with a general efforts clause that did not obligate the seller to spend any certain amount of money, the Delaware Court of Chancery concluded that the implied covenant of good faith and fair dealing did not apply. *Id.* Essentially, because the parties had bargained for post-closing obligations and included express terms to that effect in their contract, there were no gaps for the implied covenant of good faith and fair dealing to fill. *See id.*

No such provision exists in the APA in this case, accordingly the implied covenant of good faith and fair dealing is appropriate to fill in this gap. While it is true that the implied covenant should not be applied to create obligations for PRA that do not exist in the APA, *see Winshall*, 76 A.3d at 816, this does not detract from PRA's obligation to carry out the terms of the contract in good faith and ensure that the parties' reasonable expectations are honored, *see Dunlap*, 878 A.2d at 447. VHS argues there are three questions of fact for the jury: (1) the meaning of

the term "External Sales"; (2) PRA's post-closing obligations under the implied covenant of good faith and fair dealing; and (3) whether PRA used oppressive or underhanded tactics to thwart VHS's reasonable expectations under the APA.

On VHS's first point, the text of the APA is unambiguous. The APA defines an "External Sale" as "the sale of one or more licenses to the Solutions . . . to a third party which is not (i) an Affiliate of Purchaser or (ii) using such license(s) in connection with providing services to Purchaser and/or any of its Affiliates." Merriam-Webster's dictionary defines the term "sale" as "the act of selling," which refers to "the transfer of ownership of and title to property from one person to another for a price." *Sale*, Merriam-Webster.com Dictionary, Merriam-Webster https://www.merriam-webster.com/dictionary/sale (last visited May 30, 2023). While the trial court determined that the term "External Sale" is limited to a standalone sale of the license, this interpretation is inconsistent with the APA's text. By using the term "sale," the APA intended to keep the meaning of "External Sale" broad. If PRA is transferring title by allowing a third party to use the software, that transaction would qualify as an External Sale. This means that by the APA's terms, an External Sale could also include "software as a service" or the right to use VHS's software in conjunction with receiving clinical trial services from PRA. Accordingly, if PRA failed to credit a "software as a service" transaction as an External Sale, then this would be an express breach of the APA.

Second, VHS asserts that a jury must determine whether PRA's post-closing conduct breached the implied covenant of good faith and fair dealing. VHS asserts that four of PRA's actions constituted a breach of this covenant: (1) PRA's sequencing of the milestones, which according to VHS were supposed to be concurrently running; (2) PRA's decision to unmanage the package, which eliminated Salesforce licensing; (3) PRA's diversion of resources away from the APA milestones; and (4) PRA's rejection of specific External Sales opportunities.

The evidence VHS presented shows that as soon as Parthasarathy began working for PRA, he started working on both sets of earnout milestones by circulating plans to complete the milestones and requesting the necessary resources. Parthasarathy took these actions "because in [his] mind[the] clock [was] ticking" on all the milestones and addressing both milestone groups simultaneously was the best strategy to ensure the milestones were completed. However, Colin Shannon (PRA's Chief Executive Officer) expressed to Parthasarathy that the immediate focus would be on the internal software development rather than External

Sales, and only once the internal software development was completed would External Sales become a priority.

Accordingly, Parthasarathy began working on the internal software Development Milestones listed in the APA. However, PRA did not adhere to the milestone requirements listed in the APA. In fact, Chuck Piccirillo (PRA's Senior Vice President of IT) testified that he did not remember reviewing the APA after it was signed, and the transaction had closed. Moreover, at one point the person who had authored the requirements for these milestones, Irene, was no longer involved in this work, and while that person assumed Piccirillo was tracking the requirements for the Development Milestones, it is unclear if this was occurring.

There is also evidence that no development plan was instituted and there were no resource approvals for completion of the milestones for nearly eighteen months after the APA was signed. Namely, Irene testified that although he had "influence on the execution of the [software] plan and the timeline for it[,]" he was not involved in that work until almost eighteen months later. Indeed, Irene explained that eventually the work he did "right[ed] the ship" and was "part of the solution." Moreover, the requirements associated with PRA's internal software development were in flux. For example, regarding the first Development Milestone, the integration of Salesforce modules, PRA determined that some of the required modules no longer "made sense" to integrate. After making this determination, PRA removed those modules from the list and mandated the integration of a different and expanded list of Salesforce modules which were not included in the APA.

Similarly, there is evidence that for the second Development Milestone, key product enhancements, PRA determined that certain functional requirements "did not make the cut" or "were no[ ] [longer] required." In addition, other functional requirements under the second milestone were changed due to incorrect information PRA had about its existing Siebel System. There is also evidence that while PRA knew it would have to "develop [certain functional requirements] from scratch[,]" it never assigned the resources to realize this project.

Additionally, VHS provided evidence showing that VHS's software was originally a "managed package," which means that the application satisfied Salesforce's requirements for licensing through AppExchange. In October 2016, PRA decided to "unmanage the package" of VHS's software in order to customize the software "to [PRA's] own needs." The process to unmanage the code was lengthy and took approximately one to two months of work. Furthermore, by unmanaging the package, PRA

eliminated the possibility of licensing the software on AppExchange and with it any standalone External Sales.

Moreover, there is evidence that in March 2017, a customer named Vertex approached PRA seeking a licensable "managed package" version of the software. Because PRA had unmanaged the package, it could not offer Vertex what it sought. While Vertex ultimately used another software vendor, PRA still gained Vertex as a customer for providing clinical trial management services. There is also evidence that although Parthasarathy was initially involved in discussions regarding Vertex, he was removed from the email chain because Deborah Jones-Hertzog (PRA's Senior Vice President of IT) "did[n't] want [Parthasarathy] to read" the email she was sending. This email included Jones-Hertzog stating that if they sold the software "it would be the 1st time . . . [Parthasarathy's] product" would be sold and that accordingly, Parthasarathy would be entitled to receive royalties under the APA. Indeed, Jones-Hertzog explained in her email that she and Shannon were discussing "different models" under which Parthasarathy could sell the software that "need[ed] to [be] factor[ed] . . . into the conversation."

There is also evidence that in August 2016, PRA finalized its Master Services Agreement (MSA) with Takeda. Under the MSA, PRA agreed to provide clinical trial management services to Takeda using VHS's software. In doing so, PRA licensed its "owned technology," also known as VHS's software, to Takeda to support PRA's providing Takeda with clinical trial management services. During the time PRA provided Takeda with services, PRA earned nearly half a billion dollars in revenue from Takeda. At the same time, PRA has not credited the Takeda transaction toward the External Sales Milestones.

Third, VHS asserts that a jury must decide whether PRA's post-closing conduct thwarted VHS's reasonable expectations to realize the External Sales Milestones in violation of the implied covenant of good faith and fair dealing. As outlined above, the evidence presented by VHS provides support for VHS's version of events. Under the relevant case-law, the implied covenant of good faith and fair dealing must be used to fill in the gap in the APA and determine whether PRA acted arbitrarily or unreasonably thereby frustrating the parties' reasonable expectations at the time the APA was signed. *Nemec*, 991 A.2d 1120.

If a jury believes the evidence presented by VHS, it could find that PRA sequenced the milestones and did not allow work on the second and third milestones to begin until work on the first milestone was completed. A jury could also find the same is true for the External

Sales Milestone and that PRA did not allow work on External Sales to begin until after work on the first three Development Milestones was completed. Next, a reasonable jury could find that by unmanaging the package, PRA diverted resources away from the APA milestones and eliminated the opportunity of licensing the software on AppExchange, thereby thwarting Parthasarathy's efforts to meet the External Sales provision. Indeed, the emails sent by Jones-Hertzog could also lead a jury to believe that PRA's interference in the Vertex deal was intentional. Lastly, under the terms of the APA, a jury could also find that the Takeda Deal meets the definition of an External Sale and that PRA's failure to credit it as such is an express breach of the APA.

Thus, taking the evidence presented in the light most favorable to VHS and drawing all reasonable inferences in VHS's favor, *see Cummings*, 379 N.C. at 358, I would hold that summary judgment is not appropriate, and that the case should be remanded to the trial court so that a jury can decide whether PRA breached the External Sales provision of the APA, and whether PRA violated the implied covenant of good faith and fair dealing through its post-closing conduct.

III. Conclusion

In sum, I depart from the majority opinion on three issues. First, whether Rule 8 or Rule 9(b) of the North Carolina Rules of Civil Procedure applies to pleading a claim for negligent misrepresentation. Second, whether under Delaware law the implied covenant of good faith and fair dealing applies to plaintiffs' breach of contract claims under sections 2.6(a)(i) and (ii) of the APA. Third, whether the implied covenant of good faith and fair dealing applies to PRA's post-closing conduct. Therefore, on those issues I would hold that (1) negligent misrepresentation is properly pled under Rule 8; (2) the implied covenant of good faith and fair dealing applies to VHS's breach of contract claims under sections 2.6(a)(i) and (ii) of the APA and accordingly summary judgment is not appropriate; and (3) the implied covenant of good faith and fair dealing applies to PRA's post-closing conduct and thus summary judgment is not warranted.

Justice MORGAN joins in this concurring in part and dissenting in part opinion.

HOLLIS L. BATSON AND CAROL D. BATSON; LAWRENCE F. BALDWIN AND ELIZABETH C. BALDWIN; BALDWIN-BATSON OWNERS' ASSOCIATION, INC.

v.

COASTAL RESOURCES COMMISSION AND NORTH CAROLINA DEPARTMENT OF TRANSPORTATION

From N.C. Court of Appeals
21-110

From Carteret
19CVS797 19CVS798 19CVS799

No. 94A22

ORDER

Petitioner's motion to reschedule oral argument is allowed for the sole purpose of removing this case from the oral argument calendar currently set for Wednesday, 13 September 2023 and re-calendaring it for Wednesday, 20 September 2023.

By order of the Court in Conference, this the 21st day of June 2023.

Dietz, J., recused.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 21st day of June 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

BREWER v. RENT-A-CTR.

[385 N.C. 297 (2023)]

ROBERT BREWER, EMPLOYEE v. RENT-A-CENTER, EMPLOYER, TRAVELERS INSURANCE CO. (SEDGWICK CLAIMS SERVICES, THIRD-PARTY ADMINISTRATOR), CARRIER	From N.C. Court of Appeals 22-296 From N.C. Industrial Commission W94420

No. 139P23

ORDER

This matter is before the Court on plaintiff's motion for reconsideration of an order of this Court allowing defendants' motion for temporary stay on 8 June 2023. It appears to the Court that plaintiff argues that the temporary stay would allow a discontinuation by defendant of weekly disability payments not addressed in the briefs before the Court of Appeals and thus not affected by the opinion of the Court of Appeals. Because N.C. R. App. P. 16 and 28 set out the scope of review on appeal, unless and until there is a subsequent filing by defendants with a different disposition by this Court, the provisions of the Industrial Commission's Opinion and Award regarding the aforementioned monthly disability payments are unaffected by the temporary stay, and plaintiff's motion to reconsider is denied.

By order of the Court in Conference, this the 19th day of June 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 19th day of June 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

JAMES HWANG, MD

v.

BRUCE CAIRNS, THE UNIVERSITY OF NORTH CAROLINA, THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, AND UNIVERSITY OF NORTH CAROLINA HEALTH CARE SYSTEM

From N.C. Court of Appeals
22-31

From Durham
18CVS2942

No. 58P23

ORDER

On the plaintiff's petition for discretionary review filed 21 February 2023, the Court hereby allows the petition as to Dr. Hwang's first proposed issue: Did the Court of Appeals err in affirming the order granting Defendant Cairns's Motion for Summary Judgment? This issue is only allowed as to plaintiff's slander *per se* and tortious interference of contract claims against defendant Cairns.

On defendants' conditional petition for discretionary review filed 6 March 2023, the Court hereby allows defendants' petition as to the sole issue presented: Did the trial court err in denying defendants' initial motions to dismiss plaintiff's amended complaint under Civil Rules 12(b)(1), 12(b)(2) and 12(b)(6). This issue is only allowed as to defendant Cairns's immunity defenses as they apply to Dr. Hwang's claims for slander *per se* and tortious interference with contract.

By order of the Court in Conference, this the 30th day of August 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 30th day of August 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE v. TIRADO

[385 N.C. 299 (2023)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 20-213
v.	
FRANCISCO EDGAR TIRADO	From Cumberland 98CRS34831

No. 267P21

ORDER

The State's motion to dismiss defendant's notice of appeal based upon a constitutional question is allowed. Defendant's motion to amend his petition for discretionary review is allowed, and the petition for discretionary review is denied as to the first proposed issue and allowed as to the second proposed issue. The parties are directed to address in their briefing the issue of whether defendant's resentencing complied with the Court's decision in *State v. Kelliher*, 381 N.C. 558 (2022).

By order of the Court in Conference, this the 30th day of August 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 1st day of September 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

WESLEY WALKER

v.

WAKE COUNTY SHERIFF'S DEPARTMENT; GERALD M. BAKER, IN HIS OFFICIAL CAPACITY AS WAKE COUNTY SHERIFF; ERIC CURRY (INDIVIDUALLY); WESTERN SURETY COMPANY; WTVD, INC.; WTVD TELEVISION, LLC; SHANE DEITERT

From N.C. Court of Appeals
21-661

From Wake
20CVS9039

No. 279PA22

ORDER

Plaintiff's consent motion to dismiss appeal is allowed. The decision of the Court of Appeals is vacated. *See State ex rel. Utilities Comm'n v. S. Bell Tel. & Tel. Co.*, 289 N.C. 286, 289, 221 S.E.2d 322, 324–25 (1976) (vacating a decision of the Court of Appeals because the case became moot while on appeal) ("When a case becomes moot while on appeal, the usual disposition is simply to dismiss the appeal. This procedure, however, leaves the decision of the Court of Appeals undisturbed as a precedent when, but for intervening mootness, it might not have remained so. While we express no opinion as to its correctness, the better practice in this circumstance is to vacate the decision of the Court of Appeals." (internal citation omitted)); *see also N.C. Bowling Proprietors Ass'n, Inc. v. Cooper*, 375 N.C. 374, 374, 847 S.E.2d 745, 746 (2020) (dismissing appeal as moot and vacating order of lower court).

By order of the Court in Conference, this the 30th day of August 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 30th day of August 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

Justice DIETZ concurring.

Once again, this Court enters a routine order that draws an exaggerated, hyperbolic dissent from one of my colleagues. *See post* (Earls, J., dissenting). And, as is the case with so many of my colleague's dissents, one could be forgiven for thinking that doom is upon us.

My colleague accuses the majority of seeking "power" over reason, of engaging in a "radically destabilizing shift," of attempting to "brazenly warp the law," and on and on. Like so many of my colleague's dissents, this one has portions that read more like pulp fiction than a legal opinion.

Lawyers and judges are trained to push past empty rhetoric and weigh the strength of an argument on its merits. It is worth doing so here because reasonable jurists can disagree about how best to resolve this case. But that hardly means—as my dissenting colleague suggests—that "the integrity of our justice system" is now in question.

As an initial matter, our actions today are consistent with precedent. This Court has expressly held that when an appeal becomes moot while at this Court, we retain the power to vacate the lower court decision when we dismiss the appeal. *State ex rel. Utils. Comm'n v. S. Bell Tel. & Tel. Co.*, 289 N.C. 286, 290 (1976).

The concern this Court identified almost 50 years ago in *Southern Bell* is the same one at issue here. As the Court explained, "When a case becomes moot while on appeal, the usual disposition is simply to dismiss the appeal. This procedure, however, leaves the decision of the Court of Appeals undisturbed as a precedent when, but for intervening mootness, it might not have remained so." *Id.* (citation omitted). Thus, in *Southern Bell*, this Court chose to vacate the Court of Appeals decision so that it was not binding on the lower courts: "While we express no opinion as to its correctness, the better practice in this circumstance is to vacate the decision of the Court of Appeals." *Id.*

Our precedent also is far from unique. Federal appellate courts routinely vacate lower court orders when the parties reach a joint settlement or otherwise moot an appeal. As the U.S. Court of Appeals for the Federal Circuit once explained, "vacatur of the judgment at trial is appropriate when settlement moots the action on appeal." *U.S. Philips Corp. v. Windmere Corp.*, 971 F.2d 728, 731 (Fed. Cir. 1992).

Finally, the Court's order in this case serves our state's jurisprudence. We allowed discretionary review here because the appeal raises questions significant to our jurisprudence and to the public interest. *See*

N.C.G.S. § 7A-31 (2021). In particular, as the parties' briefing acknowledged, the Court of Appeals opinion may have unintentionally changed the law and put our state at odds with our sister states and with widely accepted doctrine found in the Restatement of Torts.

We are quite familiar with the issues presented. We spent months reviewing the parties' submissions before deciding to take up the case, and then we spent months more reviewing the parties' merits briefing ahead of the scheduled oral argument in just over two months. Most importantly—and contrary to the dissent's assertions—we have deliberated "as a body" on the merits of this case, on the consequences of the legal issues presented, and on how best to resolve this appeal. As is often the case, my dissenting colleague did not agree with the outcome of the Court's deliberations and therefore discredits them. But that does not mean they never occurred.

Moreover, given the importance of the legal issues presented, vacating the lower court decision is certainly preferable to the alternative—which is to keep the case because of its importance to our state's law and to force the parties to continue litigating it. *See*, *e.g.*, *N.C. State Bar v. Randolph*, 325 N.C. 699, 701 (1989). This, too, is far from unprecedented. As recently as last year, this Court *denied* a request to voluntarily dismiss an appeal—thus forcing parties to continue litigating a case unwillingly—because of the importance of the issues involved. *See Harper v. Hall*, 383 N.C. 89, 114 (2022), *opinion withdrawn and superseded on other grounds on reh'g*, 384 N.C. 292 (2023).

Rather than force the parties here to endure further, costly litigation, we chose—after much debate—to vacate the lower court opinion, as we did in *Southern Bell*. This permits the Court of Appeals to refine its holding in future cases and perhaps avoid the issues that led us to review this case in the first place. One can reasonably disagree with our approach, but to claim that our decision comes "at the cost of the integrity of our justice system and our citizens' faith in it" is a bit unhinged.

The dissent also argues that vacating the Court of Appeals decision is "contrary to law." This is so, the dissent reasons, because the Rules of Appellate Procedure state that a published Court of Appeals opinion "remains binding precedent unless reversed by this Court."

But that language has never meant that a strict "reversal" following oral argument is the only means of overturning lower court precedent. This Court routinely disavows or vacates Court of Appeals precedent without the need for oral argument and without a formal ruling "reversing" it. Doing so is part of our constitutional role in supervising the

decisions of the lower courts. *See*, *e.g.*, *State v. Ledbetter*, 372 N.C. 692 (2019) (denying petition for discretionary review but holding that the Court "disavows the language in the last paragraph of the Court of Appeals's decision"); *State v. Ore*, 383 N.C. 676 (2022) (summarily vacating Court of Appeals decision based solely on petition for discretionary review and response).

In sum, there is nothing earth-shattering about the Court's straightforward order in this case. As I said, reasonable jurists can disagree about how to resolve this case. I think it is fair, if one ends up on the losing end of that disagreement, to write separately and present an opposing legal view in a dissent. Two of my colleagues have done that in thoughtful dissents. *See post* (Morgan, J., dissenting and Berger, J., dissenting). But that is not what my other dissenting colleague has done. I write separately to emphasize that the reasonable differences of opinion that are present in this case do not warrant my dissenting colleague's angry rhetoric; the needless, toxic disparagement; and the worn-out insistence that every routine disagreement at this Court portends the end of the public's faith in our justice system.

Justice EARLS concurring in part and dissenting in part.

Today, this Court—without legal authority and without the benefit of argument, deliberation, or an opinion—reaches out and changes the law. Whatever the merits of the Court of Appeals decision in this case, it is improper for this Court to act to modify or vacate the Court of Appeals decision in these circumstances. To do so flouts basic principles of the judicial process, and it signals to North Carolinians that "[p]ower, not reason, is the new currency of this Court's decisionmaking." *See Payne v. Tennessee*, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting). I agree that the appeal should be dismissed but dissent from the portion of the Order directing that the previously published opinion of the Court of Appeals "stands without precedential value."

Legislatures do have the general power to change the law on their own initiative. Courts, however, play a more limited role. Or at least they used to. For nearly 150 years, this Court has adhered to a key constraint on our authority: The doctrine of mootness. *See State ex rel. Martin v. Sloan*, 69 N.C. 128, 128 (1873) (holding when "neither party has any interest in the case except as to costs[,]" this Court is "not in the habit of deciding the case"); *State v. Richmond & Danville R.R. Co.*, 74 N.C. 287, 289 (1876) (holding the same). Put simply, we decline to "hear an appeal

when the subject matter of the litigation has been settled between the parties or has ceased to exist." *Cochran v. Rowe*, 225 N.C. 645, 646 (1945).

Mootness serves twin aims. For one, it allows us to properly do our job. By only hearing live controversies, we "ensur[e] concrete adverseness that sharpens the presentation of issues." *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 595 (2021) (cleaned up). Put another way, parties with a stake in the controversy have a stronger incentive to fully and effectively argue their case. And so this Court, by extension, has a firmer and more informed basis to make a decision.

The mootness doctrine also underpins deeper questions about this Court's constitutional authority. As we recognized almost a century ago, "[i]t is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, . . . to answer moot questions." *Poore v. Poore*, 201 N.C. 791, 792 (1931). In other words, we lack the constitutional power to engage in "mere academic inquiry." *Town of Tryon v. Duke Power Co.*, 222 N.C. 200, 204 (1942). It is "not [our] province"—and it "ought not . . . be [our] desire"—to "decide questions or causes unnecessarily." *Hasty v. Funderburk*, 89 N.C. 93, 94 (1883). In light of that limit on our authority, we have described mootness as a "fundamental principle," *Tryon*, 222 N.C. at 204, "a form of judicial restraint," *In re Peoples*, 296 N.C. 109, 147 (1978), and a "prudential limitation on judicial power," *Comm. to Elect Dan Forest*, 376 N.C. at 572. It ensures that this Court stays in its constitutionally prescribed lane. It keeps us off the toes of other branches, thus "respect[ing] the separation of powers by narrowing the circumstances" when we may second-guess their actions. *Cmty. Success Initiative v. Moore*, 384 N.C. 194, 206–07 (2023). And most importantly, it ensures that we act only as the people have empowered us to.[1]

That doctrinal background underscores why the majority's action is such a "fundamental and radically destabilizing shift" in judicial

1. To be sure, there are exceptions to the mootness doctrine, *see*, *e.g.*, *Chavez v. McFadden*, 374 N.C. 458, 467–68 (2020) (noting that a court may still consider a moot case if the legal issue is "capable of repetition, yet evading review," meaning that "the underlying conduct upon which the relevant claim rests is necessarily of such limited duration that the relevant claim cannot be fully litigated prior to its cessation and the same complaining party is likely to be subject to the same allegedly unlawful action in the future"), but there is no contention that any of those exceptions apply in this case.

power. *See Mole' v. City of Durham*, 384 N.C. 78, 92 (2023) (Earls, J., dissenting). When we agreed to hear this case, the parties were locked in a legal disagreement—one they asked this Court to resolve. But since then, they have "reached a full settlement of the dispute between them." Because "a controversy no longer exists between [the parties]," as they themselves concede, they ask us to dismiss their appeal. After all, there is nothing left for this Court to do because there is no longer a legal dispute for us to resolve. That should be the end of it. And indeed, for well over a century, when confronted with a moot case like this one, this Court has simply dismissed it.[2]

The majority cites *State ex rel. Utilities Comm'n v. S. Bell Tel. & Tel. Co.*, 289 N.C. 286, 289 (1976), referring to language in that opinion providing that "the better practice in this circumstance is to vacate the decision of the Court of Appeals." (citing Note, *Cases Moot on Appeal: A Limit on the Judicial Power*, 103 U. Pa. L. Rev. 772 (1955)). The 1955 note which provides the legal authority for the proposition being advanced is significantly more nuanced than the "better practice" language might

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2. Our precedents are bursting with cases where we have dismissed an appeal when the case becomes moot without reaching out to change the law. *See*, *e.g.*, *Hasty v. Funderburk*, 89 N.C. 93, 94 (1883) ("This court has repeatedly held, that when it appears that the matter in litigation in the action before it has been settled by the parties, or is disposed of in some other way, and it has thus become unnecessary to decide the questions presented by the appeal, it will not proceed to consider and decide them, but will dismiss the appeal."); *Kidd v. Morrison*, 62 N.C. (Phil. Eq.) 31 (1866) (dismissing dispute over slave because emancipation mooted the question); *State v. Richmond & Danville R.R. Co.*, 74 N.C. 287 (1876); *State v. Atl. & N.C. R.R. Co.*, 77 N.C. 299 (1877); *Cochran v. Rowe*, 225 N.C. 645 (1945) (dismissing appeal as moot when parties resolved dispute over property possession); *Simmons v. Simmons*, 223 N.C. 841, 843 (1944) (dismissing appeal as moot because the defendant discharged the ruling against him by "pa[ying] all amounts in arrears"); *In re Estate of Thomas*, 243 N.C. 783 (1956) (dismissing case as moot when defendants paid and plaintiffs accepted judgment); *Stanley v. Dep't of Conservation and Dev.*, 284 N.C. 15, 29 (1973) ("Whenever it appears that no genuine controversy between the parties exists, the Court will dismiss the action *ex mero motu*."); *In re Peoples*, 296 N.C. 109, 147–48 (1978); *Pearson v. Martin*, 319 N.C. 449, 451 (1987) ("Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law." (quoting *In re Peoples*, 296 N.C. at 147)); *State ex rel. Rhodes v. Gaskill*, 325 N.C. 424, 425 (1989) (dismissing appeal as moot because, through the entry of a consent judgment, "the State and defendant have agreed upon and settled all matters in controversy between them as regards this proceeding"); *In re A.K.*, 360 N.C. 449, 452 (2006) ("The principal function of the judicial branch of government is to resolve cases or controversies between adverse parties. *See generally* U.S. Const. art. III, § 2; N.C. Const. art. I, § 18 *and* art. IV. When a legal controversy between opposing parties ceases to exist, the case is generally rendered moot and is no longer justiciable.").

suggest.[3] Most importantly, the "circumstance" addressed in that decision involved an intervening, unilateral act by one party, namely that a new Utilities Commission issued a new Order, thereby mooting the controversy before us and sparking a separate wave of litigation over the new Commission Order. *See Utilities Comm'n*, 289 N.C. at 288. Rather than a settlement by the parties, the original Order being appealed was no longer in effect. *Id.* That is very different from the posture of this case, where the parties agree that dismissal is appropriate because they have settled the controversy between them.

The second case cited in the majority's Order is even less applicable here. In *N.C. Bowling Proprietors Ass'n, Inc. v. Cooper*, 375 N.C. 374 (2020), this Court vacated a preliminary injunction that was no longer in effect because the underlying Executive Order had expired. *See id.*, ("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."). Vacating a preliminary injunction which, by nature is designed to temporarily preserve the status quo while the case proceeds, is quite different from vacating a substantive decision on the merits by the Court of Appeals after that court had full briefing, heard argument, and conducted its deliberations to reach a decision on the merits.

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3. The author of the note cited by the majority was discussing *United States v. Munsingwear*, 340 U.S. 36 (1950), long before that decision was limited by the U.S. Supreme Court's clarification in *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18 (1994) that "[w]here mootness is the result of settlement rather than happenstance, however, the losing party forfeits the equitable remedy of vacatur." *Id.*, 513 U.S. at 25. Moreover, the article concludes by making the same argument that I am making here:

> For a court to make an exception to so fundamental a jurisdictional rule as the one precluding the decision of moot cases, certain safeguards should be erected to prevent the dangers against which the rule was designed to guard. Even though sound precedent may arise from a court's decision in a moot case involving questions of great public importance, it should always be borne in mind that legislative or executive action can also accomplish this purpose in many instances, and that it is to keep clear the lines of demarcation between the branches of government that the various restrictions on the judicial power were developed and should be maintained. When such a moot case is decided the courts should take every precaution to insure that adverse and complete argument, or its equivalent, is presented.

Note, *Cases Moot on Appeal: A Limit on the Judicial Power*, *supra* at 796.

Thus, referencing inapposite authority from inapplicable cases, the majority today departs from our "well-established and time-honored practices." *See Mole'*, 384 N.C. at 90 (Morgan, J., dissenting). Despite the absence of a legal dispute and despite the request of the parties to simply dismiss the appeal, the Court reaches out to do something that neither party has requested and, indeed, that the North Carolina Rules of Appellate Procedure do not currently contemplate, namely, that it will effectively "unpublish" the previously published Court of Appeals opinion in this matter by declaring it has no precedential value. For all intents and purposes, the Court effectively vacates the decision below. For future litigants, the Court of Appeals' ruling holds no precedential water. And by effectively vacating the opinion, the majority sends an unmistakable message that it disagrees on the merits. For trial courts and future appellate panels, the Court mysteriously sends the message that the Court of Appeals is wrong without explaining how or why.

To take this step here is not just unwise, it is contrary to law. Under our Rules of Appellate Procedure, a published Court of Appeals opinion—like the one in this case—remains a binding precedent unless reversed by this Court. *In re Civil Penalty*, 324 N.C. 373, 384 (1989); *see also* N.C. R. App. P. 30(e)(1), (4) (the Court of Appeals panel hearing the case decides if its opinion has value as precedent, but counsel and pro se parties may move for publication of an unpublished opinion). Deeper still, to do so blows past fundamental principles of judicial restraint. As this Court has long recognized, when a case is extinguished, so too is our power to act. *See In re A.K.*, 360 N.C. 449, 452 (2006) ("The principal function of the judicial branch of government is to resolve cases or controversies between adverse parties. When a legal controversy between opposing parties ceases to exist, the case is generally rendered moot and is no longer justiciable." (cleaned up)); *see also Tryon*, 222 N.C. at 204; *Poore*, 201 N.C. at 792. No matter how much we dislike a result, we cannot conjure up jurisdiction by judicial fiat. By ignoring that principle—one "recognized in virtually every American jurisdiction," *Pearson v. Martin*, 319 N.C. 449, 451 (1987) (quoting *In re Peoples*, 296 N.C. at 147)—the effect is to write a blank check to retool the law.

The action the Court takes today is not inconsequential, particularly in light of what it telegraphs about our judicial system. The case was calendared for oral argument at our November 2023 session. We have not heard oral arguments. We have not deliberated as a body on the legal issues. And we have not written or exchanged opinions on whether the Court of Appeals was correct. In short, this case has not yet entered the crucible of our deliberative process.

Without any pretense of meaningful adjudication—without any semblance of "careful consideration and input from stakeholders," *Mole'*, 384 N.C. at 98 (Earls, J., dissenting)—this Court changes the law.

The upshot of that decision is clear. By its action in this case, the Court seems to be sending the message that ordinary doctrines of mootness are no longer operative. Moreover, the parties' oral arguments do not matter—we have not heard them. Our deliberations do not matter—we have not engaged in them. And our opinions do not matter—we have not written or exchanged any. All that matters is to achieve a particular result, namely, to make sure that no future litigants are bound by the legal rules articulated by the Court of Appeals in its opinion in this case. But that is not how our judicial system is supposed to work.[4]

The people of this state deserve more than "hasty and unexamined" jolts to the law. *See id.* at 92 (Earls, J., dissenting). And properly helmed, our judiciary curbs the arbitrary exercise of power by promoting consistency and certainty. *Id.* at 101. By continuing a trek down a different path, the action taken with this Order disserves those values, injecting yet more confusion, arbitrariness, and partisanship into North Carolina's legal system. This radical approach allows the Court to brazenly warp the law to its policy preferences unconstrained by the need to have a live controversy to decide through careful deliberation; this is at the cost of the integrity of our justice system and our citizens' faith in it.

I concur that the appeal should be dismissed and dissent from the remainder of the Court's Order.

Justice MORGAN joins in this concurring in part and dissenting in part opinion.

Justice MORGAN dissenting.

I respectfully dissent from this Court's determination that, upon its allowance of the parties' Consent Motion to Dismiss, the opinion issued

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4. In fact, some federal courts have found constitutional defects in the very existence of unpublished opinions. *See Anastasoff v. United States*, 223 F.3d 898, 901 (8th Cir.) (holding that rule declaring that unpublished opinions have no precedential effect is unconstitutional under Article III), *vacated as moot*, 235 F.3d 1054 (8th Cir. 2000); *see also United States v. Goldman*, 228 F.3d 942 (8th Cir. 2000); *In re Ark. Rules of Civ. Proc.*, 2007 Ark. LEXIS 332 (2007) (concluding that as a constitutional matter, published and unpublished opinions alike should be precedential).

by the Court of Appeals will be unilaterally stripped by this Court of any precedential authority. Historically, in the event that the jurisdiction of the Supreme Court of North Carolina is invoked for the purpose of reviewing a decision from a lower forum and the state's highest court does not render a decision which alters the outcome of the lower forum in any way, the decision from the lower forum fully stands as our judicial system's determination of the matter. In applying this institutionalized principle to the present action, since this Court's jurisdiction was invoked for the purpose of reviewing the Court of Appeals decision at issue here and this Court ultimately did not render a decision which altered the case's outcome which emanated from the lower appellate court, then the entrenched standard which would be routinely implemented by this Court is the recognition of the Court of Appeals opinion as the final and citable result of the legal action. However, a majority of this Court once again chooses to pursue a newfound practice to confound the orderly methodology of this Court and our judicial system. This unfortunate overreach by a majority of this Court to deprive the Court of Appeals opinion of its appropriate precedential value is a bewildering indication of the extent to which this Court now goes in order to upend its institutionalized practices to achieve its desired ends.

For these reasons, I respectfully dissent.

Justice EARLS joins in this dissenting opinion.

Justice BERGER dissenting.

To the extent the order entered by the Court today suggests that settlement of a case reflexively renders matters of law or legal inference moot, I respectfully dissent.

Given the current procedural posture of this case, our rules require that the parties must obtain leave of the Court before dismissal will be allowed. N.C. R. App. P. 37(2). One rationale supporting this rule is the recognition that significant jurisprudential issues must be resolved.[1] "While the federal constitution limits the federal 'Judicial Power' to certain 'Cases' and 'Controversies.' U.S. Const. Art. III, § 2, our Constitution,

1. *See Harper v. Hall*, 383 N.C. 89 (2022), 113-14, *reh'g granted*, 384 N.C. 1 (2023), *and opinion withdrawn and superseded on other ground on reh'g*, 384 N.C. 292 (2023) (a party seeking "to dismiss their own appeal in order to avoid a ruling by this Court" was denied because "th[e] issue is of great significance to the jurisprudence of our state and is squarely and properly before this Court.").

in contrast, has no such case or controversy limitation to the 'judicial power.' " *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 591.

While we will not hear cases "merely to determine abstract propositions of law," *Roberts v. Madison County Realtors Assn.*, 344 N.C. 394, 399 (1996) (citations omitted), settlement on appeal does not necessarily render a case moot. *See also In re Peoples*, 296 N.C. 109, 147 (1978) (while the "usual response should be to dismiss the action" once it becomes moot, this Court also conceded that "the exclusion of moot questions from determination is not based on a lack of jurisdiction but rather represents a form of judicial restraint."). Thus, settlement alone does not deprive this Court of jurisdiction where there remains an unresolved matter of law. *See* N.C. Const. art. IV, § 12 ("The Supreme Court shall have jurisdiction to review upon appeal any decision of the courts below, upon any matter of law or legal inference."); and N.C.G.S. § 7A-26 (the Supreme Court has "jurisdiction to review upon appeal decisions of the several courts of the General Court of Justice and of administrative agencies, upon matters of law or legal inference[.]").

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

01 SEPTEMBER 2023

3P23	State v. Joseph Edwards Teague, III	1. Def's Motion for Temporary Stay (COA21-10) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **01/04/2023** Dissolved 2. Denied 3. Denied
12P23	State v. Titus Nafis Lee	Def's PDR Under N.C.G.S. § 7A-31 (COA21-665)	Denied **Dietz, J., recused**
13PA22	Wing v. Goldman Sachs Trust Company, et al.	1. Parties' Joint Motion to Dismiss Appeal 2. Parties' Joint Motion to Vacate the Trial Court's 23 October 2020 Order and the Court of Appeals' 7 December 2021 Opinion	1. Allowed 2. Allowed
15P23	State v. Charles Dunn	Def's PDR Under N.C.G.S. § 7A-31 (COA22-34)	Denied
22P23	State v. Brandon L. Griffin	1. Def's Pro Se Petition for Writ of Certiorari to Review Decision of the COA (COA22-502) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Denied 2. Allowed 3. Dismissed as moot **Dietz, J., recused**
28P18-2	State v. Eugene Matthews	Def's Pro Se Motion for Writ of Errors	Dismissed **Berger, J., recused**
31P23	Aleah High v. Wake Chapel Church, Inc. and Bishop John Jasper Wilkins, II	1. Def's (Bishop John Jasper Wilkins, II) PDR Under N.C.G.S. § 7A-31 (COA22-358) 2. Def's (Wake Chapel Church, Inc.) PDR Under N.C.G.S. § 7A-31 3. Plt's Conditional PDR Under N.C.G.S. § 7A-31 4. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Denied 2. Denied 3. Dismissed as moot 4. Dismissed as moot **Dietz, J., recused**

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01 SEPTEMBER 2023

33P23	Veronica Jane Dillree, by and through her General Guardian, Emily Tobias v. Harry Dillree and his Attorney-In-Fact, Lisa Wilcox	Plt's PDR Under N.C.G.S. § 7A-31 (COA22-423)	Denied
34P23	North Carolina, ex rel. Expert Discovery, LLC v. AT&T Corp., et al.	1. Plt's Notice of Appeal Based Upon a Constitutional Question (COA21-671) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
35PA21-2	In the Matter of A.J.L.H., C.A.L.W., M.J.L.H.	1. Petitioner and Guardian ad Litem's Motion for Temporary Stay (COA20-267-2) 2. Petitioner and Guardian ad Litem's Petition for Writ of Supersedeas 3. Petitioner and Guardian ad Litem's PDR Under N.C.G.S. § 7A-31 4. Petitioner and Guardian ad Litem's Motion to Amend PDR and Writ of Supersedeas 5. Petitioner and Guardian ad Litem's Motion to Dissolve Temporary Stay as to C.A.L.W. and A.J.L.H.	1. Allowed **08/23/2023** 2. Allowed as amended 3. Allowed as amended 4. Allowed 5. Allowed
37P23	Martin E. Rock v. City of Durham	1. Petitioner's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-235) 2. Petitioner's Pro Se PDR Under N.C.G.S. § 7A-31 3. Petitioner's Pro Se Motion for Leave to Amend Notice of Appeal and PDR	1. Dismissed *ex mero motu* 2. Denied 3. Allowed
39A22	State v. Robin Applewhite	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Cumberland County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed 3. Dismissed **Dietz, J., recused**

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01 SEPTEMBER 2023

44A23	State v. Joey Lamont Wilkins	1. Def's Notice of Appeal Based Upon a Dissent (COA22-339) 2. Def's PDR Under N.C.G.S. § 7A-31	1. --- 2. Denied **Dietz, J., recused**
53P23	Cox v. Sadovnikov	1. Def's Motion for Temporary Stay 2. Def's Petition for Writ of Supersedeas	1. Allowed **02/06/2023** Dissolved 2. Denied **Dietz, J., recused**
56P12-3	State v. Kareem Abdullah Kirk	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA21-531)	Denied
58P23	Hwang v. Cairns, et al.	1. Plt's Motion for Extension of Time to File PDR (COA22-31) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Conditional PDR Under N.C.G.S. § 7A-31	1. Denied **02/20/2023** 2. Special Order 3. Special Order
60P22	State v. Daniel Isiah Crew, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA20-721)	Denied **Dietz, J., recused**
64P23	State v. James Derek Gary	Def's PDR Under N.C.G.S. § 7A-31 (COA22-232)	Denied
65P22-4	State v. Donovan M. Williams	Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP22-243)	Denied
66P23	Ed L. Harris v. North Carolina Department of Adult Correction	1. Plt's Pro Se Motion to Accept Evidence for Claim 2. Plt's Pro Se Motion for Monetary Relief (TA-29518) 3. Plt's Pro Se Motion for Monetary Relief (TA-29476) 4. Plt's Pro Se Motion for Monetary Relief (TA-29398) 5. Plt's Pro Se Motion for Monetary Relief (TA-29518) 6. Plt's Pro Se Motion for Order to Show Cause for Preliminary Injunction and Temporary Restraining	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed 6. Dismissed

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

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70P23	Wall Recycling, LLC v. Wake County and TT&E Iron & Metal, Inc.	Def's (Wake County) PDR Under N.C.G.S. § 7A-31 (COA22-181)	Denied **Dietz, J., recused**
71P23	State v. Gary D. Gochie	Def's Pro Se Motion for Notice of Appeal (COAP22-453)	Dismissed
78P23	In the Matter of M.W. and M.W.	Respondent-Mother's PDR Under N.C.G.S. § 7A-31 (COA22-21)	Denied
84P23	Kathy Allen, Caveator v. Arthur Allen, Steve R. Allen, and Anthony A. Klish, Propounders	1. Caveator's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-276) 2. Caveator's Pro Se PDR Under N.C.G.S. § 7A-31 3. Caveator's Pro Se Motion for Extension of Time to File Brief 4. Caveator's Pro Se Motion to Supplement the Record 5. Caveator's Pro Se Motion for Extension of Time to File Brief 6. Caveator's Pro Se Motion for Immediate Arbitration 7. Caveator's Pro Se Motion for Entry of Default	1. Dismissed *ex mero motu* 2. Dismissed 3. Dismissed 4. Dismissed 5. Dismissed as moot 6. Dismissed 7. Dismissed
86P23	Doug Turpin and Nicole Turpin v. Charlotte Latin Schools, Inc., et al.	Plts' PDR Prior to Determination by the COA (COA23-252)	Denied
89P23-2	Jeanice Barcelo v. Roy T. Wijewickrama, Chief District Court Judge, Ashley Hornsby Welch, DA, Jason Arnold, Esq., Chief Asst. DA, Joseph Scoggins, Esq., Asst. DA	Petitioner's Pro Se Motion for Due Process and Definitive Statement Regarding Dismissal of Previous Petition	Dismissed
90P23	Randell L. Robinson v. Donna Gentry	Plt's Pro Se Motion for Notice of Appeal	Dismissed

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92P23	State v. Deon Patrick Bobbitt	1. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question 2. Def's Pro Se PDR Under N.C.G.S. § 7A-31 3. Def's Pro Se Motion to Amend and Certify for Discretionary Review	1. Dismissed *ex mero motu* 2. Denied 3. Denied
94A22	Batson, et al. v. Coastal Resources Commission, et al.	Petitioners' Motion to Reschedule Oral Argument	Special Order **06/21/2023** **Dietz, J., recused**
95P23	State v. Joshua Edward Brinklow	1. Def's Pro Se Motion for Appeal 2. Def's Pro Se Motion for Appropriate Relief	1. Dismissed 2. Dismissed
98P23	State v. Tiffany Adonnis Campbell	1. Def's Motion for Temporary Stay (COA22-634) 2. Def's Petition for Writ of Supersedeas 3. Def's PDR Under N.C.G.S. § 7A-31 4. Def's Motion that the Court Take Notice of Recently Decided Case in Assessing PDR	1. Allowed **04/11/2023** Dissolved 2. Denied 3. Denied 4. Allowed
100P23	State v. Adron Morris, Jr.	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA22-3) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
101P23	State v. James Thomas Christian, III	Def's PDR Under N.C.G.S. § 7A-31 (COA22-299)	Denied
107P23	State v. Alvin Nathanael Smith	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA22-307) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
109P17-8	In re Olander R. Bynum	Petitioner's Pro Se Petition for Writ of Mandamus	Dismissed
110P23	Oakridge 58 Investors v. Durhill LLC	Plt's PDR Under N.C.G.S. § 7A-31 (COA22-772)	Denied

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112P23	State v. Tyanna Shardae Morrison	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA22-644) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
115P23	State v. Antonio Purcell	Def's PDR Under N.C.G.S. § 7A-31 (COA22-600)	Denied
118A23	The Estate of Desmond Japrael Stephens, Larry F. Stephens, Administrator v. ADP TotalSource DE IV, Inc., Micron Precision, LLC d/b/a King Machine of North Carolina, and Kory J. Kachur	1. Defs' Notice of Appeal Based Upon a Dissent (COA22-372) 2. Plt's PDR Under N.C.G.S. § 7A-31 3. Defs' Motion to Withdraw Appeal	1. Withdrawn **07/17/2023** 2. Withdrawn **07/17/2023** 3. Allowed **07/17/2023**
120P23	State v. Richard Franklin Collins	Def's PDR Under N.C.G.S. § 7A-31 (COA22-488)	Denied
122P23	Melba Smith v. Troy Greenwald and Troy Greenwald Enterprises, LLC, d/b/a Beltone of the Triangle	Plt's PDR Under N.C.G.S. § 7A-31 (COA22-860)	Denied
123P23-2	State v. Tevin Q. Williams	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Mecklenburg County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed as moot
128P23	In the Matter of L.M. & L.E.	1. Respondent-Mother's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-608) 2. Respondent-Mother's Pro Se Notice of Appeal Based Upon a Constitutional Question 3. Respondent-Mother's Pro Se PDR Under N.C.G.S. § 7A-31 4. Respondent-Mother's Pro Se Notice of Appeal Based Upon a Dissent 5. Respondent-Mother's Pro Se Notice of Appeal Based Upon a Constitutional Question 6. Respondent-Mother's Pro Se PDR Under N.C.G.S. § 7A-31	1. Denied 2. Dismissed *ex mero motu* 3. Denied 4. Dismissed *ex mero motu* 5. Dismissed *ex mero motu* 6. Denied

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129P23	State v. William Dewayne Simmons	Def's PDR Under N.C.G.S. § 7A-31 (COA22-642)	Denied
131P16-28	State v. Somchai Noonsab	1. Def's Pro Se Motion to Suppress State's Evidence 2. Def's Pro Se Motion to Suppress State's Evidence	1. Dismissed 2. Dismissed
132P22	County of Mecklenburg, A Body Politic and Corporate v. Helen Barbara Ryan, Unknown Spouse of Helen Barbara Ryan, and City of Charlotte, Lienholder	Plt's Petition for Writ of Certiorari to Review Decision of the COA (COA21-205)	Denied **Dietz, J., recused**
133P23	State v. Landon Lee Meadows	1. Def's Pro Se Motion for PDR (COAP23-17) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
137P07-3	State v. Sherman Wall	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **08/07/2023**
138A23	State v. Joshua David Reber	1. State's Motion for Temporary Stay (COA22-130) 2. State's Petition for Writ of Supersedeas 3. State's Notice of Appeal Based Upon a Dissent	1. Allowed **06/02/2023** 2. Allowed **06/23/2023** 3. ---
139P23	Robert Brewer, Employee v. Rent-A-Center, Employer, Travelers Insurance Co. (Sedgwick Claims Services, Third-Party Administrator), Carrier	1. Defs' Motion for Temporary Stay (COA22-296) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31 4. Plt's Motion for Reconsideration of Temporary Stay 5. Plt's Conditional PDR Under N.C.G.S. § 7A-31	1. Allowed **06/08/2023** 2. 3. 4. Special Order **06/19/2023** 5.
141P23	State v. Christine Maria Chisholm	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-659)	Denied

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

01 SEPTEMBER 2023

142A23	In the Matter of K.C.	1. Petitioner's Motion for Temporary Stay (COA22-396) 2. Petitioner's Petition for Writ of Supersedeas 3. Petitioner's Notice of Appeal Based Upon a Dissent 4. Petitioner's PDR as to Additional Issues	1. Dismissed as moot **06/08/2023** 2. Allowed **06/08/2023** 3. --- 4. Allowed
143P23	State v. Robert Lee Lamb, Jr.	Def's PDR Under N.C.G.S. § 7A-31 (COA22-477)	Denied
144P23	Justin Marlow, as Administrator of the Estate of Michelle Marlow (Deceased) v. TCS Designs, Inc., Jobie G. Redmond, Jeff McKinney, and Eric Parker	1. Defs' PDR Under N.C.G.S. § 7A-31 (COA22-862) 2. North Carolina Association of Defense Attorneys' Conditional Motion for Leave to File Amicus Brief 3. North Carolina Association of Defense Attorneys' Motion for Extension of Time to File Amicus Brief	1. Denied 2. Dismissed as moot 3. Dismissed as moot
147P23	State v. Joshua McRavion	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-631)	Dismissed
148P23	State v. Terrance Brown	Def's PDR Under N.C.G.S. § 7A-31 (COA22-850)	Denied
149P23	State v. Cameron Clifton Smith	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County 2. Def's Pro Se Motion for Suppressed Evidence	1. Dismissed 2. Dismissed
151P23	Marlon Hubbard, Requester, v. Joanna Monell, No Issue Against	Petitioner's Petition for Writ of Certiorari to Review Order of District Court, Mecklenburg County	Denied
153A23	Carl E. Merrell, et al. v. James M. Smith, et al.	Plts' Motion to Consolidate Cases for Appeal	Allowed **06/22/2023**
155P23	Debra Cullen v. Logan Developers, Inc.	Def's PDR Under N.C.G.S. § 7A-31 (COA22-223)	Allowed

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161P23	Kathy R. Allen v. Arthur L. Allen, Anthony A. Klish, State Employees' Credit Union, Wake County Superior Court Guardian Ad Litem	1. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-601) 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 Brief 5. Plt's Pro Se Motion for Immediate Arbitration 6. Plt's Pro Se Motion for Entry of Default 7. Plt's Pro Se Motion for Extension of Time to File Brief	1. --- 2. Denied 3. Allowed 4. Dismissed as moot 5. Dismissed 6. Dismissed 7. Dismissed as moot
162P23	State v. Orientia James White	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-369)	Denied
164P23	State v. Kurt Anthony Storm	1. State's Motion for Temporary Stay (COA22-685) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **06/26/2023** 2. 3.
165P16-3	State v. Simaron Demetrius Hill	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **06/16/2023**
165P16-4	State v. Simaron Demetrius Hill	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **06/23/2023**
165P23	In re Drew Hartley v. State of North Carolina, et al., Sheriff of Onslow County	Petitioner's Pro Se Motion for PDR	Denied **06/28/2023**
166P23	Colell Steele v. North Carolina Department of Public Safety	1. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA23-77) 2. Plt's Pro Se Motion for Briefing and Argument 3. Plt's Pro Se Motion for Oral Argument in Person 4. Plt's Pro Se PDR Under N.C.G.S. § 7A-31	1. Dismissed *ex mero motu* 2. Dismissed as moot 3. Dismissed as moot 4. Denied
168P23	In the Matter of C.N., C.N., and C.N.	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **07/03/2023**

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169P23	State v. Christopher L. Minor	Def's Pro Se Motion to Dismiss	Dismissed
170P23	State v. Arsenio Dwayne Curtis	Def's PDR Under N.C.G.S. § 7A-31 (COA22-596)	Denied
172P23	State v. Bobby Dean Abee, III	Def's PDR Under N.C.G.S. § 7A-31 (COA22-832)	Denied
173P23	Southland National Insurance Corporation, et al. v. Lindberg, et al.	1. Defs' Motion for Temporary Stay (COA22-1049) 2. Defs' Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31 4. Universal Life Insurance Company's Conditional Motion for Leave to File Amicus Brief 5. Plts' Motion to Expedite Petition for Writ of Supersedeas and PDR	1. Allowed **07/13/2023** 2. 3. 4. 5.
174P23	State v. Davon Smith	Def's PDR Under N.C.G.S. § 7A-31 (COA22-719)	Denied
178P23	Jasmine Ivey v. Octavious Elmore	Def's Pro Se Motion for PDR (COAP23-252)	Denied
184P23	City Block Apartments, LLC d/b/a City Block Apartments v. Lance Brown	1. Def's Pro Se Motion for Temporary Stay 2. Def's Pro Se Petition for Writ of Supersedeas 3. Def's Pro Se Motion for Notice of Appeal	1. Denied **07/31/2023** 2. Denied **07/31/2023** 3. Dismissed **07/31/2023**
185P23	24 Hour Affordable Towing v. Forke Auctioneers; Brian Parks	1. Plt's Pro Se Motion for Discretionary Review 2. Plt's Pro Se Amended Motion for Discretionary Review	1. Dismissed as moot 2. Dismissed
186P23	City of High Point v. Loving Care Cremations, LLC	1. Def's Pro Se Emergency Petition for Writ of Mandamus and/or Prohibition 2. Def's Pro Se Motion for Emergency Stay of All Proceedings	1. Denied **08/02/2023** 2. Denied **08/02/2023**
189A22	Bottoms Towing & Recovery, LLC v. Circle of Seven, LLC	1. Respondent's Notice of Appeal Based Upon a Dissent (COA21-513) 2. Respondent's PDR as to Additional Issues 3. Respondent's Motion to Amend PDR	1. --- 2. Denied 3. Allowed
189P23	State v. Travis Baxter	Def's Pro Se Motion to Drop Charges	Dismissed

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191P23	State v. Wang Meng Moua	1. State's Motion for Temporary Stay (COA22-839) 2. State's Petition for Writ of Supersedeas 3. State's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/07/2023** 2. 3.
194A23	In the Matter of A.H.	1. Petitioner and Guardian ad Litem's Notice of Appeal Based Upon a Dissent 2. Petitioner and Guardian ad Litem's Motion for Temporary Stay 3. Petitioner and Guardian ad Litem's Petition for Writ of Supersedeas	1. --- 2. Dismissed as moot **08/09/2023** 3. Allowed **08/09/2023**
200P07-12	State v. Kenneth E. Robinson	Def's Pro Se Motion for Notice of Appeal	Dismissed
201P23	In the Matter of Z.A. and M.P.	1. Petitioner's Motion for Temporary Stay 2. Petitioner's Petition for Writ of Supersedeas 3. Petitioner's Petition for Writ of Certiorari to Review Order of District Court, Orange County 4. Guardian ad Litem's Petition for Writ of Certiorari to Review Order of the COA	1. Allowed **08/16/2023** 2. 3. 4.
204P23	Ganna Shepenyuk v. Youssef Abdelilah	1. Plt's Motion for Temporary Stay (COA22-702) 2. Plt's Petition for Writ of Supersedeas	1. Denied **08/18/2023** 2.
205P23	Travis Wayne Baxter v. North Carolina State Highway Patrol Troop F District V, et al.	Plt's Pro Se Motion for Relief	Dismissed
206P23	In the Matter of A.J., J.C., J.C.	1. Petitioner and Guardian ad Litem's Motion for Temporary Stay (COA22-522) 2. Petitioner and Guardian ad Litem's Petition for Writ of Supersedeas 3. Petitioner and Guardian ad Litem's PDR Under N.C.G.S. § 7A-31	1. Allowed **08/23/2023** 2. 3.

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208P23	Kalishwar Das v. State of North Carolina	1. Plt's Pro Se Motion for Stay of All Proceeding 2. Plt's Pro Se Petition for Writ of Mandamus 3. Plt's Pro Se Amended Motion for Stay of All Proceeding	1. Dismissed **08/25/2023** 2. Dismissed **08/25/2023** 3. Dismissed **08/25/2023** **Dietz, J., recused**
212P22-2	Davis v. NC Board of Governors, et al.	1. Plt's Pro Se Petition for Writ of Certiorari 2. Plt's Pro Se Motion for Certificate of Appealability 3. Plt's Pro Se Motion for Certificate of Appealability	1. Denied **12/13/2022** 2. Dismissed 3. Dismissed
219P22	State v. Charles Thomas Stacks	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA21-167) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed

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225P21-2	North State Deli, LLC d/b/a Lucky's Delicatessen, Mothers & Sons, LLC d/b/a Mothers & Sons Trattoria, Mateo Tapas, LLC d/b/a Mateo Bar De Tapas, Saint James Shellfish, LLC d/b/a Saint James Seafood, Calamari Enterprises, Inc. d/b/a Parizade, Bin 54, LLC d/b/a Bin 54, Arya, Inc. d/b/a City Kitchen and Village Burger, Grasshopper LLC d/b/a Nasher Cafe, Verde Cafe Incorporated d/b/a Local 22, Floga, Inc. d/b/a Kipos Greek Taverna, Kuzina, LLC d/b/a Golden Fleece, Vin Rouge, Inc. d/b/a Vin Rouge, Kipos Rose Garden Club LLC d/b/a Rosewater, and Gira Sole, Inc. d/b/a Farm Table and Gatehouse Tavern v. The Cincinnati Insurance Company; The Cincinnati Casualty Company; Morris Insurance Agency Inc.; and Does 1 Through 20, Inclusive	1. Plts' PDR Under N.C.G.S. § 7A-31 (COA21-293) 2. Plts' Motion to Amend PDR 3. Plts' Motion to Amend PDR	1. Allowed 2. Allowed 3. Allowed
230P21-3	State v. Jordan Nathaniel Mitchell	Def's Pro Se Motion to Review Case	Dismissed
240PA21-2	Executive Office Park of Durham Association, Inc. v. Rock	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA20-405-2)	Denied
247P16-9	State v. Jonathan Eugene Brunson	1. Def's Pro Se Motion for PDR (COAP21-420) 2. Def's Pro Se Motion for Amended PDR 3. Def's Pro Se Motion to Withdraw Amended Petition	1. Denied 2. --- 3. Allowed

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260P22	Singleton, et al. v. N.C. Department of Health and Human Services, et al.	1. Plts' Notice of Appeal Based Upon a Constitutional Question	1. ---
		2. Plts' PDR Under N.C.G.S. § 7A-31	2. Allowed
		3. John Locke Foundation and Coalition of North Carolina Physicians' Motion for Leave to File Amicus Brief in Support of Notice of Appeal Based Upon a Constitutional Question and PDR	3. Dismissed as moot
		4. Treasurer Dale R. Folwell, CPA's Motion for Leave to File Amicus Brief in Support of PDR	4. Dismissed as moot
		5. Certificate of Need Scholars' Motion for Leave to File Amicus Brief in Support of Notice of Appeal Based Upon a Constitutional Question and PDR	5. Dismissed as moot
		6. Defs' Motion to Dismiss Appeal	6. Allowed
		7. Plts' Motion to Admit Renee D. Flaherty Pro Hac Vice	7. Allowed
		8. Plts' Motion to Withdraw Benton Sawrey as Counsel	8. Allowed **12/21/2022**
		9. Amicus' Motion to Withdraw R. Daniel Gibson as Counsel	9. Allowed **12/21/2022**
		10. Plts' Motion to Amend the Notice of Appeal or, in the Alternative, PDR	10. Allowed
263P22-3	State v. David Anthony Harris	Def's Pro Se Petition for Writ of Habeas Corpus	Denied **07/12/2023**
263P22-4	David Anthony Harris v. Mary J. Wilson, Todd E. Ishee (Secretary of Prisons)	Petitioner's Pro Se Petition for Writ of Habeas Corpus	Denied **08/08/2023**
267P21	State v. Francisco Edgar Tirado	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA20-213)	1. Special Order
		2. Def's PDR Under N.C.G.S. § 7A-31	2. Special Order
		3. State's Motion to Dismiss Appeal	3. Special Order
		4. Def's Motion to Amend PDR	4. Special Order
272A14	State v. Jonathan Douglas Richardson	Def's Pro Se Motion to Preserve Defendant's Position	Dismissed

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278P22	State v. Randall Lee Joyner	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA21-83) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Amend Notice of Appeal and PDR	1. Dismissed *ex mero motu* 2. Denied 3. Allowed **Dietz, J., recused**
279PA22	Walker v. Wake County Sheriff's Department, et al.	Plt's Consent Motion to Dismiss Appeal	Special Order
292A22	In the Matter of H.B.	Respondent-Mother's Petition for Rehearing	Denied **06/19/2023**
302P22-2	State v. Dametri O. Dale	1. Def's Pro Se Emergency Petition for Writ of Certiorari to Review Order of the COA (COAP22-434) 2. Def's Pro Se Motion to Withdraw Previously Filed Petition	1. --- 2. Allowed
303P22	State v. Jonathan Adam Haywood	1. Def's Petition for Writ of Certiorari to Review Order of the COA (COAP22-106) 2. North Carolina Justice Center's Conditional Motion for Leave to File Amicus Brief	1. Dismissed 2. Dismissed as moot
311P22	In the Matter of B.W.C.	Juvenile's PDR Under N.C.G.S. § 7A-31 (COA22-124)	Denied
321P22	State v. Cheita Charles	Def's PDR Under N.C.G.S. § 7A-31 (COA21-792)	Denied
334P09-2	State v. Christopher N. Gooch	1. Def's Pro Se Motion for Notice of Appeal (COAP23-135) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Dismissed
342P22	State v. Dedric Michelle Mason	Def's PDR Under N.C.G.S. § 7A-31 (COA22-216)	Denied **Dietz, J., recused**
350P22	State v. Harold Lee Williams, Jr.	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-217)	Denied
353P21-5	State v. Travis Wayne Baxter	Def's Pro Se Motion for Default in Sheriff's Official Duty for Failing to Show Cause and Appear in Lincoln County Court	Dismissed
356P22	State v. Gerardo Ambriz	Def's PDR Under N.C.G.S. § 7A-31 (COA21-674)	Denied

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365P22-2	State v. Montavius A. Johnson	Def's Motion for Petition for Rehearing	Dismissed
377P20-5	State v. Andrew Ellis	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County 2. Def's Pro Se Motion for Appropriate Relief 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed 3. Dismissed as moot
379P22	Ricky Spoon Builders, Inc., Ricky Spoon, and Melissa K. Spoon v. EmGee, LLC	Plts' PDR Under N.C.G.S. § 7A-31 (COA22-391)	Denied
395P20-3	State v. Michael Anthony Sheridan	Def's Pro Se Motion for Discretionary Review	Denied
398PA21	Duke Energy Carolinas, LLC v. Kiser, et al.	Defs' (Sunset Keys, LLC, Michael L. Kiser, and Robin S. Kiser) Petition for Rehearing	Denied **06/20/2023**
417P21-2	State v. Kenneth Lewis Powell, Jr.	Def's Pro Se Motion to Dismiss	Dismissed
449P11-28	In re Charles Everette Hinton	Petitioner's Pro Se Motion for an Ex Parte Hearing and Proceeding for an Opportunity to be Heard	Dismissed
487P96-2	State v. Robert Louis Davis	Def's Pro Se Petition for Writ of Mandamus	Dismissed
516P09-2	Dennis Alexander Player v. David Cassidy, Warden of Caswell Correctional Center, and State of North Carolina	1. Petitioner's Pro Se Petition for Writ of Habeas Corpus 2. Petitioner's Pro Se Motion to Appoint Counsel	1. Denied **08/09/2023** 2. Dismissed as moot **08/09/2023**
580P05-29	In re David Lee Smith	1. Def's Pro Se Petition for Writ of Mandamus 2. Def's Pro Se Motion for Court En Banc Rehearing of Demand for Emergency Consolidation of Corona Victim Consecutive Sentences 3. Def's Pro Se Motion for Emergency Reconsideration En Banc 4. Def's Pro Se Emergency Petition for Writ of Mandamus	1. Denied 2. Dismissed 3. Dismissed 4. Denied

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		5. Def's Pro Se Emergency Petition for Writ of Mandamus	5. Denied
		6. Def's Pro Se Petition for Writ of Mandamus	6. Denied
		7. Def's Pro Se Motion for Emergency Demand for Writ of Mandamus to Consolidate Consecutive Sentences	7. Dismissed
		8. Def's Pro Se Petition for Writ of Mandamus	8. Denied
584P99-7	State v. Harry James Fowler	1. Def's Pro Se Motion for Supersedeas	1. Dismissed
		2. Def's Pro Se Motion for Stay	2. Dismissed
		3. Def's Pro Se Motion for Supersedeas	3. Dismissed
		4. Def's Pro Se Motion to Vacate Caldwell Superior Court Rulings	4. Dismissed

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