385 N.C.—No. 2 Pages 328-401

RULES OF APPELLATE PROCEDURE; DISCIPLINE AND DISABILITY OF ATTORNEYS; CONTINUING LEGAL EDUCATION; LEGAL SPECIALIZATION; BOARD OF LAW EXAMINERS

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER 27, 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

CASES REPORTED

FILED 20 OCTOBER 2023

ORDERS

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

HEADNOTE INDEX

APPEAL AND ERROR

Scope of appeal—enforcement of development ordinance—violation determined in prior appeal—binding—In the second appeal arising from a town's enforcement of its development ordinance—by filing a lawsuit for a mandatory injunction, abatement order, and collection of civil penalties from developers of a residential subdivision (defendants) who continued to violate a requirement under the ordinance to maintain roads within the subdivision until the town accepted the roads for public maintenance—the Court of Appeals correctly determined that it was bound by a different panel's earlier decision in the same case that defendants were responsible for the roads. Moreover, the question of defendants' ongoing responsibility was not before the current panel because defendants had not raised the issue in their brief. **Town of Midland v. Harrell, 365.**

EVIDENCE

Other crimes, wrongs, or acts—prior sexual assaults of a child—similarity to charged sexual offenses against another child—In a prosecution for statutory rape and other sexual offenses inflicted upon an eleven-year-old girl, the trial court properly admitted testimony under Evidence Rule 404(b) of defendant's prior sexual assaults of a different, fourteen-year-old girl, where the prior assaults were sufficiently similar to the charged crimes in that (1) both girls were middle-school-aged children attending schools where defendant taught, (2) defendant used his position as a middle school teacher to gain access to both girls, (3) defendant exerted control over both girls during the assaults despite their protests and tears, (4) defendant either engaged in or tried to engage in vaginal intercourse with both girls, (5) each assault took place during school hours or during school-related activities, (6) defendant only removed his pants and underwear halfway during each assault, and (7) defendant threatened both girls after assaulting them. **State v. Pickens, 351.**

JURISDICTION

Standing—development enforcement action—town—compliance with state law and ordinance—A town had standing to file its lawsuit for a mandatory injunction, abatement order, and collection of civil penalties from developers of a residential subdivision (who continued to violate a requirement under the town's development ordinance to maintain roads within the subdivision until the town accepted the roads for public maintenance) and did not deprive the trial court of subject matter jurisdiction where, although the town council did not pass a resolution approving of the complaint until after the complaint was filed, the council's approval was not required. The town's action complied with N.C.G.S. § 160A-12, which authorizes a town to enforce its powers "as provided by ordinance or resolution of the town council," and with its development ordinance, which authorized the town's zoning administrator to refer violators to the town's attorney for the filing of a civil action. **Town of Midland v. Harrell, 365.**

SEARCH AND SEIZURE

Exclusionary rule—not mandatory—remand for determination of propriety—Where a warrantless automobile search violated the Fourth Amendment, the Supreme Court remanded the matter to the trial court for a determination of whether the evidence obtained from the search should be suppressed pursuant to the exclusionary rule. The Court noted that the exclusionary rule is not mandatory and that it should be applied only where the benefits of deterring police misconduct outweigh the societal costs of suppressing evidence of a defendant's guilt. **State v. Julius, 331.**

Warrantless search of vehicle—automobile accident—driver missing—search incident to lawful arrest—automobile exception—A search and subsequent seizure violated the Fourth Amendment where police officers: found a vehicle stuck in a ditch when they arrived at the scene of an automobile accident; were informed by defendant that she was the passenger and that a person named Kyle had been driving (she provided no other information about his identity); were informed by witnesses that the driver had fled on foot after stating that he had outstanding warrants; searched the vehicle for evidence of the driver's identity without first obtaining consent or a search warrant; found a bag, which defendant stated belonged to the driver, containing methamphetamine, scales, and two cell phones; and subsequently arrested defendant and searched her backpack, finding bags of a clear, crystalline substance, a pistol, a glass pipe, and a large amount of cash. The search was not justified by the search incident to lawful arrest exception to the warrant requirement because the driver had fled the scene and posed no threat of entering the vehicle, and there was no evidence that the vehicle contained evidence of the crime of hit-and-run that risked destruction by the driver if it were not immediately seized. Further, the fact that the driver could have been arrested later did not justify the search; finally, but for the unlawful search of the vehicle, the officers would not have had probable cause to search defendant's backpack and arrest her. As for the automobile exception, it did not apply where the vehicle was immobile due to being down in a ditch and partially submerged in water. Other exceptions to the warrant requirement lacked evidentiary support in the record. **State v. Julius, 331.**

SENTENCING

Presumption of regularity—consideration of improper factors—defendant's exercise of right to demand jury trial—After defendant was convicted of first-degree statutory rape and first-degree statutory sexual offense with a child, defendant's sentences were upheld on appeal where it could not be clearly inferred from the court's statements at sentencing that, in deciding to impose consecutive sentences, the court had improperly considered defendant's exercise of his constitutional right to demand a trial by jury; thus, the presumption of regularity afforded to sentences within statutory limits was not overcome in this case. Specifically, the court stated that "[the victims] didn't have a choice and you, [defendant], had a choice," but when viewed in context, the statement gave rise to two equally reasonable inferences: that the court was referring to defendant's choice to plead not guilty and to demand a jury trial, or that the court was referencing defendant's choice to commit egregious sexual crimes against children. **State v. Pickens, 351.**

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

BATSON v. COASTAL RES. COMM'N

[385 N.C. 328 (2023)]

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

No. 94A22

Filed 20 October 2023

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 282 N.C. App. 1 (2022), vacating an order entered on 23 September 2020 by Judge Charles H. Henry in Superior Court, Carteret County, and remanding the case. Heard in the Supreme Court on 20 September 2023.

I. Clark Wright Jr. for petitioner-appellees.

Joshua H. Stein, Attorney General, by Mary L. Lucasse, Special Deputy Attorney General, for respondent-appellant Coastal Resources Commission.

No brief for respondent-appellee North Carolina Department of Transportation.

PER CURIAM.

Justice DIETZ did not participate in the consideration or decision of this case. The remaining members of the Court are equally divided, with three members voting to affirm and three members voting to reverse the decision of the Court of Appeals. Accordingly, the decision of the Court of Appeals is left undisturbed and stands without precedential value. *See City of Charlotte v. Univ. Fin. Props., LLC*, 373 N.C. 325 (2020) (per curiam) (affirming by an equally divided vote a Court of Appeals decision without precedential value).

AFFIRMED.

McKNIGHT v. WAKEFIELD MISSIONARY BAPTIST CHURCH, INC.

[385 N.C. 329 (2023)]

CHARLOTTE McKNIGHT AND AUDREY FOSTER, IN THEIR OFFICIAL CAPACITY AS TRUSTEES FOR AND ON BEHALF OF WAKEFIELD MISSIONARY BAPTIST CHURCH, AN UNINCORPORATED ASSOCIATION, PLAINTIFFS

v.

WAKEFIELD MISSIONARY BAPTIST CHURCH, INC., BARBARA WILLIAMS, APRIL HIGH, ALTON HIGH, EKERE ETIM, ROSALIND ETIM, HOUSTON HINSON, NATALIE HARRIS, AND DARRYL HIGH, DEFENDANTS

WAKEFIELD MISSIONARY BAPTIST CHURCH, INC., COUNTERCLAIM PLAINTIFF

v.

CHARLOTTE McKNIGHT, AUDREY FOSTER, LEROY JEFFREYS AND JULIUS MONTAGUE, IN THEIR OFFICIAL CAPACITY AS TRUSTEES AND/OR OFFICERS FOR AND ON BEHALF OF WAKEFIELD MISSIONARY BAPTIST CHURCH, AN UNINCORPORATED ASSOCIATION, COUNTERCLAIM DEFENDANTS

No. 290A22

Filed 20 October 2023

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from an order and opinion on motions for summary judgment entered on 18 February 2022, a permanent injunction and final judgment entered on 2 June 2022, and an order for award of costs entered on 2 June 2022 by Judge Adam M. Conrad, 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(a). On 16 June 2023, the Supreme Court allowed in part and denied in part defendants' and counterclaim plaintiff's motion to dismiss the appeal, dismissing all issues arising from the 18 February 2022 order and opinion on motions for summary judgment. Heard in the Supreme Court on 20 September 2023.

Michael A. Jones for plaintiffs/counterclaim defendant-appellants.

Kitchen Law, PLLC, by S.C. Kitchen, for defendants/counterclaim plaintiff-appellees.

PER CURIAM.

AFFIRMED.[1]

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1. The permanent injunction and final judgment is available at https://appellate.nccourts.org/orders/2022-06-02_Permanent-Injunction-and-Final-Judgment.pdf. The order awarding costs is available at https://appellate.nccourts.org/orders/2022-06-02_Order-on-Motion-for-Award-of-Costs.pdf.

STATE OF NORTH CAROLINA
v.
ROGER ARTHUR, JR.

No. 393PA21

Filed 20 October 2023

On discretionary review pursuant to N.C.G.S. § 7A-31 of an unanimous, unpublished decision of the Court of Appeals, *State v. Arthur*, 863 S.E.2d 327, 2021 WL 4535680 (N.C. Ct. App. 2021), holding no error in judgments entered on 31 October 2019 by Judge Joshua W. Willey Jr. in Superior Court, New Hanover County. Heard in the Supreme Court on 19 September 2023.

Joshua H. Stein, Attorney General, by Heidi M. Williams, Assistant Attorney General, for the State-appellee.

Anne Bleyman for defendant-appellant.

PER CURIAM.

Having carefully considered the opinion of the Court of Appeals, the record and briefs, and the oral arguments before us, we conclude that defendant's petition for discretionary review was improvidently allowed by order on 17 August 2022.

DISCRETIONARY REVIEW IMPROVIDENTLY ALLOWED.

STATE v. JULIUS

[385 N.C. 331 (2023)]

STATE OF NORTH CAROLINA
v.
JOANNA KAYE JULIUS

No. 95A22

Filed 20 October 2023

1. Search and Seizure—warrantless search of vehicle—automobile accident—driver missing—search incident to lawful arrest—automobile exception

A search and subsequent seizure violated the Fourth Amendment where police officers: found a vehicle stuck in a ditch when they arrived at the scene of an automobile accident; were informed by defendant that she was the passenger and that a person named Kyle had been driving (she provided no other information about his identity); were informed by witnesses that the driver had fled on foot after stating that he had outstanding warrants; searched the vehicle for evidence of the driver's identity without first obtaining consent or a search warrant; found a bag, which defendant stated belonged to the driver, containing methamphetamine, scales, and two cell phones; and subsequently arrested defendant and searched her backpack, finding bags of a clear, crystalline substance, a pistol, a glass pipe, and a large amount of cash. The search was not justified by the search incident to lawful arrest exception to the warrant requirement because the driver had fled the scene and posed no threat of entering the vehicle, and there was no evidence that the vehicle contained evidence of the crime of hit-and-run that risked destruction by the driver if it were not immediately seized. Further, the fact that the driver could have been arrested later did not justify the search; finally, but for the unlawful search of the vehicle, the officers would not have had probable cause to search defendant's backpack and arrest her. As for the automobile exception, it did not apply where the vehicle was immobile due to being down in a ditch and partially submerged in water. Other exceptions to the warrant requirement lacked evidentiary support in the record.

2. Search and Seizure—exclusionary rule—not mandatory—remand for determination of propriety

Where a warrantless automobile search violated the Fourth Amendment, the Supreme Court remanded the matter to the trial court for a determination of whether the evidence obtained from the search should be suppressed pursuant to the exclusionary rule.

The Court noted that the exclusionary rule is not mandatory and that it should be applied only where the benefits of deterring police misconduct outweigh the societal costs of suppressing evidence of a defendant's guilt.

Chief Justice NEWBY concurring in part and dissenting in part.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 282 N.C. App. 189 (2022), finding no error after appeal from judgments and an order denying defendant's motion to suppress entered on 17 April 2019 by Judge J. Thomas Davis in Superior Court, McDowell County. Heard in the Supreme Court on 26 April 2023.

Joshua H. Stein, *Attorney General*, *by William Walton*, *Assistant Attorney General*, *for the State-appellee.*

Glenn Gerding, *Appellate Defender*, *by John F. Carella*, *Assistant Appellate Defender*, *for defendant-appellant.*

BERGER, Justice.

Following the denial of her motion to suppress, defendant was convicted of trafficking in methamphetamine, possession with intent to manufacture, sell, or deliver methamphetamine, and possession of methamphetamine. A divided panel of the Court of Appeals affirmed the trial court's denial of the motion to suppress and found no error in defendant's trial. Based upon a dissent in the Court of Appeals, the issues before this Court are (1) whether the search and subsequent seizure of contraband comports with the Fourth Amendment, and (2) if it does not, whether such evidence must be suppressed. For the reasons stated below, we reverse the decision of the Court of Appeals and remand this matter to the trial court.

I. Background

Based upon the trial court's unchallenged findings of fact and testimony at the suppression hearing, on 20 May 2018, Trooper Justin Sanders of the North Carolina State Highway Patrol and Deputy Jesse Hicks of the McDowell County Sheriff's Office were dispatched to the scene of an automobile accident in McDowell County. Trooper Sanders was advised prior to arrival that the driver had fled the scene. Upon

arrival, Trooper Sanders and Deputy Hicks observed a vehicle resting partially submerged in a ditch. Trooper Sanders and Deputy Hicks both testified that the vehicle could not have been driven out of the ditch and it ultimately had to be towed from the scene.

Defendant informed Trooper Sanders that she was a passenger in the vehicle, which was owned by her parents, but that someone she could only identify as Kyle had been driving. Witnesses confirmed that defendant was the passenger and that the driver fled on foot after stating that he could not remain at the scene because he had outstanding warrants against him.[1]

Defendant provided Trooper Sanders with her identification and told Trooper Sanders that she did not know whether Kyle left any form of identification in the vehicle. Based on the information received to that point, Trooper Sanders testified that he was conducting an investigation for a hit-and-run.

Without obtaining consent or a search warrant, Trooper Sanders searched the vehicle for evidence of Kyle's identity. Trooper Sanders testified that he was "looking for Kyle's driver[']s license or ID" because he "needed a last name [of the driver]" to potentially prepare a wreck report. Upon locating a green and black Nike bag in the front passenger floorboard, Trooper Sanders looked inside the bag and discovered a black box the size of an electric razor case which was large enough to contain a driver's license. Trooper Sanders opened the black box and found scales, two cell phones, and two clear bags containing more than forty grams of methamphetamine. Defendant stated that the bag belonged to Kyle.

Trooper Sanders was unable to locate an identification for Kyle, and the search of the vehicle did not produce any additional evidence relating to the hit-and-run or other criminal activity. Based upon descriptions of Kyle provided by the witnesses, Deputy Hicks was subsequently able to determine that the driver was William Kyle Lytle.

As a result of the discovery of the contraband during the search of the vehicle, defendant was arrested and a pink backpack in her

1. There is no information in the record concerning the charges set forth in the outstanding warrants. Deputy Hicks testified at the suppression hearing that "Chris Taylor" later confirmed that there were outstanding warrants for Kyle's arrest. The transcript from the hearing on the motion to suppress contains no additional information as to the identity or employment of Chris Taylor. A transcript of defendant's trial shows that Chris Taylor was a detective with the McDowell County Sheriff's Office. In addition, there was no evidence offered at the suppression hearing as to the offenses charged in the warrants.

possession was searched. Trooper Sanders located several plastic bags containing a clear crystalline substance, a pistol, a glass pipe, and $1,785 in cash in defendant's bag.

Defendant was subsequently indicted for trafficking methamphetamine by possession, trafficking methamphetamine by transportation, possession with intent to manufacture, sell, or deliver a Schedule II controlled substance, possession of methamphetamine, and possession of drug paraphernalia. Before trial, defendant moved to suppress the evidence discovered at the scene, arguing that the search violated the Fourth Amendment.

Based upon the findings of fact above, the trial court concluded as a matter of law that because Kyle fled the scene of the accident and the officers did not know his identity:

> 4. . . . It was reasonable for [Trooper] Sanders to conclude that the vehicle may contain evidence of the true identity of the driver, the cause of the collision, and/or the reason for the driver fleeing the scene, and he therefore had probable cause to search the vehicle for that evidence. Furthermore, Trooper Sanders had probable cause to arrest "Kyle" on suspicion that he had unserved orders for his arrest. As a result, Trooper . . . Sanders had legal authority to search the vehicle and every place within the vehicle where any form of identification for Kyle Lytle could be found. Trooper . . . Sanders' subsequent search of the black and green Nike bag and the black box inside it were therefore constitutional searches. [2]
>
> 5. The discovery of what appeared to be methamphetamine and drug paraphernalia inside of the black and green Nike bag found in the passenger floorboard provided Trooper Sanders and Deputy Hicks with probable cause to arrest the defendant and search her pink backpack. The defendant had recently been an occupant of the vehicle wherein the contraband was discovered, and moreover she had recently occupied the seat near which it was found. Therefore there

2. We note that defendant correctly asserted that conclusion of law #4 contains both findings of fact and conclusions of law. However, even if the challenged portions were supported by competent evidence, this finding would not change our analysis.

> existed a fair probability that the controlled substances discovered were in the defendant's custody, care, or control, and also that the pink backpack she retained might contain further controlled substances or other paraphernalia.

After the trial court denied the motion to suppress, defendant's case came on for trial on 15 April 2019. A McDowell County jury found defendant guilty of trafficking in methamphetamine by possession and possession of methamphetamine with intent to manufacture, sell, or deliver. On 17 April 2019, defendant pleaded guilty to possession of methamphetamine, and pursuant to an agreement with the State, the possession of drug paraphernalia charge was dismissed. The trial court imposed a seventy to ninety-three month active sentence for trafficking in methamphetamine and a probationary sentence for the remaining convictions. Defendant timely appealed.

At the Court of Appeals, defendant argued in part that the trial court erred in concluding that the warrantless search was supported by probable cause. Nevertheless, the majority affirmed the trial court's denial of defendant's motion to suppress and found no error in additional issues which are not before us in this appeal. *State v. Julius*, 282 N.C. App. 189, 194 (2022). In affirming the trial court's order, the majority relied primarily on the search incident to arrest exception to the warrant requirement. *Id.* at 192. The Court of Appeals also opined that the "[o]fficers had reasonable suspicion to search the vehicle" and that "the officers were justified in searching the wrecked vehicle to get it out of the ditch for an inventory [search] or for officer safety." *Id.* at 193. However, the opinion below only mentions these exceptions to the warrant requirement in a cursory fashion.

The dissent in the Court of Appeals disagreed with the majority's conclusion, reasoning that "the evidence and argument presented to the trial court did not establish probable cause for the warrantless search" of the vehicle and the search incident to arrest exception did not apply because Kyle was not arrested. *Id.* at 195, 197–98 (Inman, J., dissenting). Additionally, the dissent maintained that because "the vehicle was in a ditch and inoperable," the justification behind the automobile exception to the warrant requirement was nullified. *Id.* at 199. Reasoning that the theories of officer safety, inventory search, and search for other people did not apply, as the State did not produce evidence to support any justification for the warrantless search, the dissent concluded that all of the evidence should have been excluded because the search and arrest of defendant stemmed from the initial illegal vehicle search.

Defendant appealed based upon the dissent in the Court of Appeals pursuant to N.C.G.S. § 7A-30. See N.C.G.S. § 7A-30(2) (2021).

II. Standard of Review

We review a trial court's order on a motion to suppress to determine "whether the trial court's underlying findings of fact are supported by competent evidence and whether those factual findings in turn support the trial court's ultimate conclusions of law." *State v. Parisi*, 372 N.C. 639, 649 (2019) (cleaned up). "Findings of fact not challenged on appeal 'are deemed to be supported by competent evidence and are binding on appeal.' " *State v. Tripp*, 381 N.C. 617, 625 (2022) (quoting *State v. Biber*, 365 N.C. 162, 168 (2011)). The trial court's "[c]onclusions of law are reviewed de novo." *Biber*, 365 N.C. at 168.

III. Analysis

The Fourth Amendment declares that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV. "Searches conducted by governmental officials in the absence of a judicial warrant are presumptively unreasonable." *State v. Terrell*, 372 N.C. 657, 665 (2019) (cleaned up). However, because "the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

"When seeking to admit evidence discovered by way of a warrantless search in a criminal prosecution, the State bears the burden of establishing that the search falls under an exception to the warrant requirement." *Terrell*, 372 N.C. at 665 (cleaned up). It is "well established that the State bears the burden of proving the reasonableness of the warrantless search" and a court "cannot simply assume" that evidence exists when the State has not met its burden. *State v. Grady*, 372 N.C. 509, 543–44 (2019); *see also Doe v. Cooper*, 842 F.3d 833, 846 (4th Cir. 2016) ("[N]either anecdote, common sense, nor logic, in a vacuum, is sufficient to carry the State's burden of proof.").

Here, the Court of Appeals held that the search incident to arrest exception justified the warrantless search and merely noted without further explanation that the search still could have been justified as "an inventory [search] or for officer safety." *Julius*, 282 N.C. App. at 193. In contrast, the dissenting opinion stated that neither the search incident to arrest exception nor the automobile exception applied to the case at hand. *Id.* at 197–200 (Inman, J., dissenting in part and concurring in result only in part). We analyze these exceptions.

A. Search Incident to Lawful Arrest Exception

[1] When an individual is lawfully arrested, officers may search "the arrestee's person and the area within his immediate control" without first obtaining a warrant. *Arizona v. Gant*, 556 U.S. 332, 339 (2009) (cleaned up). This exception to the warrant requirement, known as a "search incident to a lawful arrest . . . derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Id.* at 338.

Likewise, law enforcement "may search a vehicle incident to a recent occupant's arrest," but "only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Id.* at 351. Vital to the proper application of this exception is the "possibility that an arrestee could reach into the area that law enforcement officers seek to search." *Id.* at 339. In fact, "[i]f there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Id.*

This Court has recognized that "a search may be made before an actual arrest and still be justified as a search incident to arrest[ ] if . . . the arrest is made contemporaneously with the search." *State v. Brooks*, 337 N.C. 132, 145 (1994) (citing *Rawlings v. Kentucky*, 448 U.S. 98 (1980)). However, we agree with the Court of Appeals' previous holding that a search incident to arrest needs a lawful arrest to be valid. *See State v. Fisher*, 141 N.C. App. 448, 456 (2000) ("Because defendant was never arrested, the search of his vehicle was not justified as a search incident to a lawful arrest.").

In this case, the Court of Appeals' reasoning was based upon the search incident to lawful arrest exception, as applied in *State v. Wooten*, 34 N.C. App. 85 (1977). *Julius*, 282 N.C. App. at 192. In *Wooten*, the Court of Appeals held that:

> [W]here a search of a suspect's person occurs before instead of after formal arrest, such search can be equally justified as 'incident to the arrest' provided probable cause to arrest existed prior to the search and it is clear that the evidence seized was in no way necessary to establish the probable cause.

34 N.C. App. at 89. The *Wooten* Court reasoned that there was "no value in a rule which invalidates the search merely because it precedes actual

arrest" and that a search incident to arrest is permissible due to "the need for immediate action to protect the arresting officer from the use of weapons and to prevent destruction of evidence of the crime." *Id.* at 89–90.

While the reasoning in *Wooten* was correct, although perhaps more akin to inevitable discovery, the Court of Appeals' application of *Wooten* in the opinion below was not. The Court of Appeals appears to have reasoned that because probable cause existed such that Kyle *could* have been arrested, the search incident to lawful arrest exception was applicable. *Julius*, 282 N.C. App. at 192–93. However, in light of well-established case law, this holding was erroneous.

First, the justifications supporting the search incident to lawful arrest exception did not exist because Kyle was not "within reaching distance" of the vehicle which Trooper Sanders sought to search because he had fled the scene and posed no threat of entering the vehicle. *See Gant*, 556 U.S. at 351. Additionally, the State presented no evidence that the vehicle contained evidence of the crime of hit-and-run which would risk destruction by Kyle if not immediately seized. Therefore, it is not only imprudent but contrary to precedent to extend the search incident to lawful arrest exception to a situation in which the potential arrestee has fled the scene and cannot reach the vehicle.

Further, this Court has stated that a search may occur prior to the arrest of an individual only if the arrest "is made contemporaneously with the search." *Brooks*, 337 N.C. at 145. On the record before us, Deputy Hicks testified that "if I'm not mistaken, [Detective Taylor] took out a warrant for Joanna Julius and William Kyle Lytle." However, the State presented no evidence at the suppression hearing that Kyle was ever arrested, let alone arrested contemporaneously with the search of the vehicle. The fact that an arrest could have been made at a later time is not enough; to justify this exception an arrest must occur.

Moreover, but for the unlawful search of the vehicle, officers would not have had probable cause to search defendant's backpack nor to arrest her. *See Smith v. Ohio*, 494 U.S. 541 (1990). Here, defendant was a mere bystander amongst the witnesses at the scene. There was no evidence presented at the suppression hearing that the interior of the vehicle was accessible to defendant or that there were any safety concerns for the officers. *See Gant*, 556 U.S. at 351. Therefore, relying on defendant's arrest to justify this exception is equally unavailing, as the exception first requires a lawful arrest.

Thus, the search incident to lawful arrest exception is inapplicable to the case at hand.

B. Automobile Exception

Both the dissent below and defendant on appeal contend that the search here cannot be justified by the automobile exception to the warrant requirement. Specifically, defendant argues that the automobile exception applies only to the extent "the nature of the automobile creates an exigency making a warrant, otherwise required by the Fourth Amendment, impracticable."

Under the automobile exception, law enforcement may search a vehicle without a warrant "[w]hen the[ ] justifications for the automobile exception come into play" and law enforcement has "probable cause to do so." *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018) (cleaned up). Essential to the existence and proper application of this exception are two basic principles: first, the "inherent mobility of motor vehicles," and second, the "decreased expectation of privacy" which an individual has in a motor vehicle due to the extensive regulations imposed on vehicles by the state. *State v. Isleib*, 319 N.C. 634, 637 (1987); *see also United States v. Ross*, 456 U.S. 798 (1982).

Mobility of the vehicle is a fundamental prerequisite to the application of the automobile exception. *See Collins*, 138 S. Ct. at 1669 ("The 'ready mobility' of vehicles served as the core justification for the automobile exception for many years."). This Court has opined that "the inherent mobility of the automobile is itself the exigency." *Isleib*, 319 N.C. at 639. Further, the Supreme Court of the United States has elaborated that it is "the ready mobility of the automobile" which distinguishes it from the higher degree of protection afforded to "stationary structures." *California v. Carney*, 471 U.S. 386, 390 (1985). It follows then that a valid application of the automobile exception requires that the vehicle must be in a condition in which ready use is possible.

In the present case, the testimony of the State's witnesses established that defendant's vehicle was immobile at the time of the search due to the accident, wholly negating the mobility requirement underlying the automobile exception.[3] The vehicle was "down in a ditch" and partially submerged in water, and both Trooper Sanders and Deputy Hicks testified that the vehicle could not have been driven from the scene. In fact, Deputy Hicks testified that he called a tow truck to remove the vehicle

3. Although not before us, we note that there may be a distinction between immobile and inoperable when reviewing automobile exception cases.

from the ditch. Thus, because the record demonstrates that the vehicle was immobile, an exigency did not exist and the automobile exception does not apply.

C. Other Exceptions to the Warrant Requirement

The Court of Appeals further suggested that the search of the vehicle may have been justified as "an inventory [search] or for officer safety," yet failed to elaborate on how these exceptions might be applicable given the State's evidence in the case. *Julius*, 282 N.C. App. at 193. For example, both Trooper Sanders and Deputy Hicks testified that their agencies had policies in place to inventory impounded vehicles, but there is no testimony that such a search was attempted or completed. In addition, even though a firearm was recovered, no testimony was elicited regarding officer safety concerns.

Although the evidence here aligns closely with several recognized exceptions to the warrant requirement, the State did not meet its burden because the evidence simply falls short in certain respects. Absent such evidence in the record demonstrating the existence of factors which would have justified the warrantless intrusion, the entry into the vehicle and subsequent search cannot be justified under Fourth Amendment jurisprudence.

D. Exclusionary Rule

[2] Defendant next argues that because the search violated the Fourth Amendment, the exclusionary rule requires suppression of the seized evidence.[4] We disagree that exclusion is mandated by the text of the Fourth Amendment or Supreme Court precedent.

Once a court determines that an illegal search has occurred, it must then analyze whether exclusion of the evidence seized is appropriate. *See Hudson v. Michigan*, 547 U.S. 586, 591 (2006). Although courts have often reflexively suppressed evidence obtained in violation of the United States Constitution, "the government[s'] use of evidence obtained in violation of the Fourth Amendment does not itself violate the Constitution." *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 362 (1998). In fact, "whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question of whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct." *Arizona v. Evans*, 514 U.S. 1, 10 (1995) (quoting *Illinois v. Gates*, 462 U.S. 213, 223 (1983)).

4. Defendant did not argue that the search violated the North Carolina Constitution.

There is no express provision in the United States Constitution that demands evidence obtained in violation of the Fourth Amendment be excluded. *See Davis v. United States*, 564 U.S. 229, 236 (2011). To the contrary, the exclusionary "rule is prudential rather than constitutionally mandated." *Pa. Bd. of Prob. & Parole*, 524 U.S. at 363. Importantly, the Supreme Court of the United States has "rejected indiscriminate application of the rule," because suppression of evidence should "always be[ ] our last resort, not our first impulse." *Hudson*, 547 U.S. at 591 (cleaned up).

"[T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence" by law enforcement. *Herring v. United States*, 555 U.S. 135, 144 (2009). The Supreme Court of the United States has emphasized that the exclusionary rule should only be applied in cases "where it results in appreciable deterrence" and where "the benefits of deterrence . . . outweigh the costs." *Id.* at 141 (cleaned up); *see also Hudson*, 547 U.S. at 591 ("[The exclusionary rule is] applicable only where its remedial objectives are thought most efficaciously served—that is, where its deterrence benefits outweigh its substantial social costs.").

In essence, this "cost-benefit analysis . . . [focuses on] the flagrancy of police misconduct," *Davis*, 564 U.S. at 238 (cleaned up), as "police conduct must be sufficiently deliberate that exclusion can meaningfully deter it[,]" *Herring*, 555 U.S. at 144. Application of the exclusionary rule where there is no "corresponding societal or constitutional gain" only serves to "punish the public by impeding the truth-finding function" of the courts, thus "diminish[ing] the integrity of the judicial branch." *State v. Carter*, 322 N.C. 709, 729–30 (Mitchell, J., dissenting). Ultimately, "unless evidence was obtained by sufficiently deliberate and sufficiently culpable police misconduct, '[r]esort to the massive remedy of suppressing evidence of guilt is unjustified.' " *State v. Burch*, 2021 WI 68, ¶ 21, 398 Wis. 2d 1, 961 N.W.2d 314 (alteration in original) (quoting *Hudson*, 547 U.S. at 599), *cert. denied*, 142 S. Ct. 811 (2022).

Here, the search for evidence violated the Fourth Amendment. However, because suppression is "our last resort, not our first impulse[,]" *Hudson*, 547 U.S. at 591, the question is whether the exclusionary rule is the proper remedy for this particular violation. The trial court never reached the issue of whether exclusion of the evidence was appropriate, and if so, whether any exceptions to the exclusionary rule would be applicable, because it concluded that a valid search occurred. We therefore reverse the Court of Appeals and remand to the trial court to determine if the evidence should be suppressed pursuant to the exclusionary rule.

REVERSED AND REMANDED.

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

Chief Justice NEWBY concurring in part and dissenting in part.

The Fourth Amendment protects against unreasonable searches and seizures. The touchstone of the analysis is reasonableness. Because the steps taken by the law enforcement officers were reasonable under all the circumstances, the search did not violate defendant's constitutional rights. The officer's warrantless search was based on probable cause that evidence needed to identify the driver of a car involved in the crime of a hit-and-run accident was located in the car. The search was justified by the exigent circumstances of immediately needing to identify the perpetrator of the crime who had told bystanders he was fleeing because he had outstanding warrants. Were I to conclude, however, that the search violated defendant's constitutional rights, I would agree with the majority's decision to remand the case to the trial court to determine whether exclusion of the evidence is appropriate. *See State v. Welch*, 316 N.C. 578, 587–89, 342 N.C. 789, 794–95 (1986) (concluding that the good faith exception was applicable and therefore "decline[d] to apply the exclusionary rule to [a] good-faith violation of the [F]ourth [A]mendment").

We glean the following facts from the trial court's uncontested oral and written findings. On 20 May 2018, Trooper Sanders and Deputy Hicks responded to a one-car accident and hit-and-run in McDowell County. Dispatch informed the officers that the driver reportedly fled the scene on foot. Upon arriving at the scene, the officers observed a silver Suzuki SUV partially submerged in a ditch, as well as property damage to the landscaping and premises at the accident scene. The officers began their investigation by speaking with defendant. Defendant, who was thirty-three years old at the time of the hit-and-run car accident, told Trooper Sanders that she was a passenger in the wrecked vehicle, which belonged to her parents. She said that she had allowed a person to drive the car, whom she knew only as Kyle, and that he fled on foot after the collision. Defendant, however, did not know Kyle's last name nor whether he had a driver's license or other forms of identification in the car. At this point, Trooper Sanders only knew the driver's alleged first name and did not have additional information to identify or locate the driver of the hit-and-run car accident.

The officers also spoke with two bystanders at the scene of the accident. The bystanders similarly identified the driver only as "Kyle" and described him with several physical characteristics. The bystanders informed the officers that the driver stated he had to leave the scene because he had multiple outstanding warrants for his arrest. The bystanders, however, also did not know Kyle's last name and could not provide additional information about the driver's identity or location.

Because defendant was uncertain as to whether the driver left identifying information in the car, Trooper Sanders subsequently searched it for anything that would help determine Kyle's identity. Upon entering the vehicle, Trooper Sanders discovered a black and green Nike bag in the front passenger seat of the vehicle. When asked, defendant stated the black and green Nike bag did not belong to her. He opened the bag looking for the driver's identification and saw a black box large enough to contain a driver's license. Upon opening the box, Trooper Sanders discovered two clear plastic bags containing a crystal-like substance that he believed to be methamphetamine. The black box also contained two cell phones and a set of scales. As a result of discovering the drugs and drug paraphernalia in the front passenger seat, the officers placed defendant in handcuffs and searched defendant's pink backpack located by her feet outside of the vehicle. The officers found several clear, plastic bags containing a crystal-like substance later confirmed to be methamphetamine, a pistol, a glass pipe, and cash inside the pink backpack. The officers notified defendant she was under arrest. Defendant was charged with trafficking methamphetamine by possession, trafficking methamphetamine by transportation, possession with intent to sell and deliver a Schedule II controlled substance, and possession of methamphetamine.

Arguing that the search of the vehicle and her pink backpack violated her constitutional rights, defendant filed a motion to suppress the evidence obtained as a result of the search. After a hearing on the motion, the trial court provided an oral ruling denying the motion to suppress and filed a written order on 17 April 2019 memorializing the oral ruling. As relevant to the vehicular search, the trial court determined in conclusion of law #4 that

> Trooper J.L. Sanders did not know . . . the true identity of the suspect, the cause of the collision, the extent of any damage caused by the collision, or the reason the alleged perpetrator had fled, if any. . . . It was reasonable for J.L. Sanders to conclude that the vehicle may contain evidence of the true identity of the driver, the cause of the collision, and/or the reason for the

> driver fleeing the scene, and he therefore had probable cause to search the vehicle for that evidence. Furthermore, Trooper Sanders had probable cause to arrest "Kyle" on suspicion that he had unserved orders for his arrest. As a result, Trooper J.L. Sanders had legal authority to search the vehicle and every place within the vehicle where any form of identification for Kyle Lytle could be found.

As relevant to the search of defendant's pink backpack, the trial court determined in conclusion of law #5 that

> [t]he discovery of what appeared to be methamphetamine and drug paraphernalia inside of the black and green Nike bag found in the passenger floorboard provided Trooper Sanders and Deputy Hicks with probable cause to arrest the defendant and search her pink backpack. The defendant had recently been an occupant of the vehicle wherein the contraband was discovered, and moreover she had recently occupied the seat near where it was found. Therefore there existed a fair probability that the controlled substances discovered were in the defendant's custody, care, or control, and also that the pink backpack she retained might contain further controlled substances or other paraphernalia.

At trial, defendant was found guilty of trafficking in methamphetamine by possession and possession of methamphetamine with the intent to manufacture, sell, or deliver. Defendant appealed.

On appeal, the Court of Appeals held the trial court properly denied defendant's motion to suppress. *State v. Julius*, 282 N.C. App. 189, 193, 869 S.E.2d 778, 782 (2022). The Court of Appeals explained that the officers "had reasonable suspicion to search the vehicle to verify" defendant's claims and "determine th[e] alleged driver's identity" because the driver's identification "may have reasonably been determined from looking inside the wrecked vehicle." *Id.* Additionally, according to the Court of Appeals, the officers were justified in searching the vehicle for an inventory or for officer safety. *Id.* As to the search of defendant's pink backpack, the Court of Appeals concluded that once the officers discovered the drugs and drug paraphernalia in the black and green Nike bag, the officers had probable cause to arrest defendant and were therefore justified in searching the pink backpack. *Id.* at 192–93, 869

S.E.2d at 781–82; *see State v. Wooten*, 34 N.C. App. 85, 89–90, 237 S.E.2d 301, 305 (1977).

The dissenting judge at the Court of Appeals, however, contended that the evidence "did not establish probable cause for the warrantless search" of the vehicle and that the officers were not justified in searching the vehicle without a warrant. *Julius*, 282 N.C. App. at 195, 869 S.E.2d at 783 (Inman, J., dissenting in part and concurring in result only in part). Accordingly, the dissenting judge would have held that "[b]ecause the probable cause to arrest [d]efendant and search her pink backpack arose only from the illegal search of the vehicle, the evidence seized from [d]efendant's backpack also should have been excluded . . . ." *Id.* at 199–200, 869 S.E.2d at 786. Defendant appealed to this Court based on the dissent in the Court of Appeals. *See* N.C.G.S. § 7A-30(2) (2021).

The issue here is whether the trial court erred in denying defendant's motion to suppress evidence found during a search of the vehicle and defendant's pink backpack. This Court reviews a motion to suppress to determine "whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law." *State v. Malone*, 373 N.C. 134, 145, 833 S.E.2d 779, 786 (2019) (quoting *State v. Biber*, 365 N.C. 162, 167–68, 712 S.E.2d 874, 878 (2011)). The trial court's findings of fact "are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *Id.* (quoting *State v. Saldierna*, 371 N.C. 407, 421, 817 S.E.2d 174, 183 (2018)). The trial court's conclusions of law are reviewed de novo.[1] *Biber*, 365 N.C. at 168, 712 S.E.2d at 878 (citing *State v. McCollum*, 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993)).

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by the government. U.S. Const. amend. IV. The Fourth Amendment prohibits only unreasonable searches. *State v. Hilton*, 378 N.C. 692, 700, 862 S.E.2d 806, 812 (2021). To be constitutionally compliant, generally an officer needs a warrant to search. The Supreme Court of the United States and this Court, however, have recognized exceptions to the warrant requirement where there is probable cause and exigent circumstances. *See Welch*, 316 N.C. at 585, 342 S.E.2d at 793 ("[A] search warrant must be procured . . . unless

1. On appeal, defendant challenges only the trial court's conclusion of law #4 as being unsupported by the evidence and contends conclusion of law #4 includes both findings of fact and conclusions of law. To the extent conclusion of law #4 includes findings of fact, there is substantial evidence to support the findings of fact. The conclusions of law are addressed further herein.

probable cause and exigent circumstances exist that would justify a warrantless search.").

" '[T]he exigencies of the situation' [may] make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment." *Kentucky v. King*, 563 U.S. 452, 460, 131 S. Ct. 1849, 1856 (2011) (third alternation in original) (quoting *Mincey v. Arizona*, 437 U.S. 385, 394, 98 S. Ct. 2408, 2414 (1978)). The exigent circumstances exception enables law enforcement officers to act quickly in order to handle "situations presenting a compelling need for [swift] official action and no time to secure a warrant." *Lange v. California*, 141 S. Ct. 2011, 2017 (2021) (internal quotations omitted). "Such exigencies [may] include the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence." *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2022) (citing *King*, 563 U.S. at 460, 131 S. Ct. at 1856); *see Brigham City v. Stuart*, 547 U.S. 398, 126 S. Ct. 1943 (2006) (preventing the destruction of evidence); *United States v. Santana*, 427 U.S. 38, 42, 43, 96 S. Ct. 2406, 2409, 2410 (1976) (engaging in hot pursuit of a fleeing suspect). "In those circumstances, the delay required to obtain a warrant would bring about 'some real immediate and serious consequences'—and so the absence of a warrant is excused." *Lange*, 141 S. Ct. at 2017 (quoting *Welsh v. Wisconsin*, 466 U.S. 740, 751, 104 S. Ct. 2091, 2098 (1984)).

"[W]e 'examin[e] the totality of the circumstances,' " including the location, nature, and purpose of the search, to determine whether a search based on exigent circumstances is reasonable within the meaning of the Fourth Amendment. *Samson v. California*, 547 U.S. 843, 848, 126 S. Ct. 2193, 2197 (2006) (second alteration in original) (quoting *United States v. Knights*, 534 U.S. 112, 118, 122 S. Ct. 587, 591 (2001)). "[T]he fact-specific nature of the reasonableness inquiry," *Ohio v. Robinette*, 519 U.S. 33, 39, 117 S. Ct. 417, 421 (1996), requires that we evaluate each case based on "the facts and circumstances of the particular case" from the perspective of an objective, reasonable officer, *Missouri v. McNeely*, 569 U.S. 141, 150–51, 158, 133 S. Ct. 1552, 1559–60, 1564 (2013) (recognizing that a "case-by-case approach is hardly unique within . . . Fourth Amendment jurisprudence"). We look at the circumstances through the eyes of an objectively reasonable officer, not the subjective views of a specific officer. *Ornelas v. United States*, 517 U.S. 690, 696, 116 S. Ct. 1657, 1661–62 (1996). Additionally, the location of the search is significant as individuals generally have a "decreased expectation of privacy" in automobiles. *State v. Isleib*, 319 N.C. 634, 637, 356 S.E.2d 573, 576 (1987).

In evaluating the reasonableness of a search, we examine whether the law enforcement officers acted with probable cause at each step of the investigation. The existence of probable cause is a "commonsense, practical question" that should be answered using a "totality-of-the-circumstances approach." *Illinois v. Gates*, 462 U.S. 213, 230, 103 S. Ct. 2317, 2328 (1983). Probable cause requires a "reasonable ground for suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty." *State v. Harris*, 279 N.C. 307, 311, 182 S.E.2d 364, 367 (1971) (quoting 5 Am. Jur. 2d *Arrests* § 44 (1962)). Probable cause to search exists when an objective officer would reasonably believe that a search would reveal information which would aid in the investigation. *United States v. Ross*, 456 U.S. 798, 824, 102 S. Ct. 2157, 2172 (1982). Thus, an objectively reasonable officer may search a vehicle without a warrant when the exigencies of the specific circumstances present a compelling need for swift official action, and the officer has "probable cause to believe that incriminating evidence will be found within." *Payton v. New York*, 445 U.S. 573, 587–88, 100 S. Ct. 1371, 1381 (1980). In conducting this inquiry, we are bound by the trial court's unchallenged findings of fact.

Here the steps taken by the law enforcement officers were reasonable under all of the objective circumstances, and each step of the officers' investigation was supported by probable cause. First, the officer's search of the vehicle for the driver's identification was reasonable and supported by probable cause. The trial court found that the officers responded to a vehicular accident in which dispatch informed them that the driver may have fled the scene. Upon arriving at the scene, the officers observed a vehicle partially submerged in a ditch and property damage to the surrounding premises. The officers then confirmed that there had been a hit-and-run and were told that defendant loaned her parents' car to an unknown person, identified only as "Kyle." Based on the objective circumstances, it was reasonable for the officers to seek to fully identify the unknown, fleeing suspect allegedly responsible for the hit-and-run car accident as a person's identity is relevant information regarding the criminal violation. The search was of a vehicle, to which there is less constitutional protection. Defendant informed the officers that she did not know if information to identify the driver remained in the car.

The officers learned only minimal identifying information from the bystanders and defendant. Specifically, the trial court found that the bystanders and defendant told the officers that the driver of the vehicle fled but provided the officers only with the driver's alleged first

name and several physical characteristics. The bystanders and defendant could not provide a complete physical description of the driver or provide the driver's last name. They could not tell the officers where the driver fled. In addition, and significantly, the officers learned that the unknown suspect fled the scene because he had multiple, active warrants for his arrest. The officers, however, did not know the nature of the driver's outstanding warrants. Accordingly, the officers could not assess the potential danger that the unknown suspect presented to the surrounding community. These circumstances presented a compelling need for the officers to act quickly in order to determine Kyle's true identity and assess the potential threat that he presented. The officers therefore had probable cause to arrest Kyle for the hit-and-run car accident and, if verified, the outstanding warrants.

Thus, the officers were presented with an unusual set of circumstances in which they had little information about the identity, location, and potential threat posed by the fleeing driver of the wrecked vehicle. Moreover, defendant did not know whether information to identify "Kyle" was located in the vehicle. Without additional information from the bystanders and defendant, it was reasonable for the officers to conclude that information existed in the vehicle that would identify "Kyle."[2] Therefore, because the officers developed probable cause to arrest Kyle for the hit-and-run car accident and the outstanding warrants, and because the officers had probable cause to believe evidence of Kyle's identity may reasonably be located in the car, the officers had probable cause to search the car for the alleged driver's identification.[3]

The totality of the circumstances reveals the exigencies justifying the officer's warrantless search of the car. First, the officers had probable cause to arrest Kyle as the hit-and-run driver. The officers also knew Kyle was in the neighborhood and learned that Kyle had outstanding warrants, but the officers did not know the nature of Kyle's active warrants. Furthermore, the officers had probable cause to believe that information to identify the driver remained in the car. Also, the location of

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2. The officers' ultimate identification of "Kyle" did not occur until after the officers had been at the scene for some time, attempted to learn the driver's full identity from the bystanders and defendant, and had already searched the car.

3. Not only did the officers have probable cause to search the car for information that would aid the officers in quickly identifying and locating the unknown suspect, but the evidence also indicates that defendant did not object when Trooper Sanders informed defendant that he was going to search the car for such information. Therefore, an objective officer may reasonably conclude that defendant impliedly consented to the search of the car.

the search was significant as a car has less protection from governmental intrusion than other places. If the officers left the car at the scene of the hit-and-run accident, it was reasonable to believe the driver's identifying information could be removed or destroyed. Thus, an objective officer would reasonably conclude that an immediate search was necessary to prevent the destruction of information that could lead to Kyle's identification. Given the exigencies, an immediate search of the vehicle could aid the officers in promptly identifying and locating the suspect and in quickly assessing any immediate threat that he posed to the community. Taken together, these facts created exigent circumstances justifying the officer's warrantless search of the car. *See Carpenter*, 138 S. Ct. at 2223 (noting three exigencies—the need to pursue a fleeing suspect, to protect individuals who are threatened with imminent harm, and to prevent the imminent destruction of evidence—that may justify a warrantless search).

Next, the officers acted reasonably and with probable cause in searching the black and green Nike bag.[4] Based on the probable cause to search the vehicle and the exigencies, Trooper Sanders located a black and green Nike bag in the front, passenger area of the vehicle while looking for the driver's identification. Trooper Sanders had probable cause to believe the Nike bag may contain information that would aid the officers in identifying the driver. As a result, Trooper Sanders searched the Nike bag, found a black box large enough to contain a driver's license in the bag, and upon opening the black box, discovered the illegal drugs and drug paraphernalia.

Finally, upon discovering the contraband in the Nike bag, the officers developed probable cause to arrest defendant for possession of the contraband in the car. Because the officers found the Nike bag in the passenger area where defendant was sitting, they had probable cause to believe defendant and Kyle were together involved with the drugs. Further, they had probable cause to believe defendant may be in possession of additional contraband. The officers therefore had probable cause to search defendant's pink backpack for additional contraband based on

4. "[I]n order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable." *Minnesota v. Carter*, 525 U.S. 83, 88, 119 S. Ct. 469, 472 (1998). Defendant testified that Kyle brought the black and green Nike bag to the car with him and that he placed it in the vehicle. Defendant explained that she did not touch or open the bag while it was in the car. Based on defendant's testimony, it appears defendant did not have a reasonable expectation of privacy in the Nike bag justifying her challenge to the search of the bag.

the discovery of the contraband in the vehicle. Any uncertainty as to the timing of defendant's arrest and search of the pink backpack—namely, whether the arrest occurred before or after the officers searched the pink backpack—is thus immaterial here because the officers developed probable cause to arrest defendant and search her pink backpack based on the contraband discovered in the vehicle. *See Wooten*, 34 N.C. App. at 89–90, 237 S.E.2d at 305 ("[W]here a search of a suspect's person occurs before instead of after formal arrest, such search can be equally justified as 'incident to the arrest' provided probable cause to arrest existed prior to the search and it is clear that the evidence seized was in no way necessary to establish the probable cause. . . . [W]e see no value in a rule which invalidates the search merely because it precedes actual arrest.").

The primary command of the Fourth Amendment is that law enforcement officers act reasonably. Because the officers here acted reasonably during each step of the search, defendant's constitutional rights were not violated. Nonetheless, were I to find that the search violated defendant's constitutional rights, I would agree with the majority's decision to remand to the trial court to determine whether exclusion of the evidence is appropriate and, if so, whether any exceptions to the exclusionary rule apply. Notably, since 1986, we have recognized the good faith exception is applicable to violations of the Fourth Amendment. *Welch*, 316 N.C. at 587–89, 342 N.C. at 794–95. Thus, I respectfully concur in part and dissent in part.

STATE v. PICKENS

[385 N.C. 351 (2023)]

STATE OF NORTH CAROLINA
v.
TROY LOGAN PICKENS

No. 276A22

Filed 20 October 2023

1. Evidence—other crimes, wrongs, or acts—prior sexual assaults of a child—similarity to charged sexual offenses against another child

In a prosecution for statutory rape and other sexual offenses inflicted upon an eleven-year-old girl, the trial court properly admitted testimony under Evidence Rule 404(b) of defendant's prior sexual assaults of a different, fourteen-year-old girl, where the prior assaults were sufficiently similar to the charged crimes in that (1) both girls were middle-school-aged children attending schools where defendant taught, (2) defendant used his position as a middle school teacher to gain access to both girls, (3) defendant exerted control over both girls during the assaults despite their protests and tears, (4) defendant either engaged in or tried to engage in vaginal intercourse with both girls, (5) each assault took place during school hours or during school-related activities, (6) defendant only removed his pants and underwear halfway during each assault, and (7) defendant threatened both girls after assaulting them.

2. Sentencing—presumption of regularity—consideration of improper factors—defendant's exercise of right to demand jury trial

After defendant was convicted of first-degree statutory rape and first-degree statutory sexual offense with a child, defendant's sentences were upheld on appeal where it could not be clearly inferred from the court's statements at sentencing that, in deciding to impose consecutive sentences, the court had improperly considered defendant's exercise of his constitutional right to demand a trial by jury; thus, the presumption of regularity afforded to sentences within statutory limits was not overcome in this case. Specifically, the court stated that "[the victims] didn't have a choice and you, [defendant], had a choice," but when viewed in context, the statement gave rise to two equally reasonable inferences: that the court was referring to defendant's choice to plead not guilty and to demand a jury trial, or that the court was referencing defendant's choice to commit egregious sexual crimes against children.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 284 N.C. App. 712 (2022), finding no error in part and vacating in part judgments entered on 1 November 2019 by Judge Carl R. Fox in Superior Court, Wake County, and remanding the case for resentencing. On 13 December 2022, the Supreme Court allowed the State's petition for discretionary review. Heard in the Supreme Court on 12 September 2023.

Joshua H. Stein, Attorney General, by Sherri Horner Lawrence, Special Deputy Attorney General, for the State-appellee.

Michael E. Casterline for defendant-appellant.

EARLS, Justice.

This case involves Troy Logan Pickens, a former chorus teacher at Durant Middle School, and his convictions for first-degree rape and first-degree statutory sexual offense with a child, Ellen,[1] a Durant Middle School student. While this trial involved defendant's assaults on Ellen, the first question before this Court is whether evidence of Pickens's alleged rape of another student, Kathleen,[2] was properly admitted at trial pursuant to Rule 404(b) of the North Carolina Rules of Evidence. N.C.G.S. § 8C-1, Rule 404(b) (2021). The second issue this Court must address is whether the trial court improperly considered Pickens's decision to exercise his constitutional right to a jury trial when it imposed consecutive sentences. We find that the trial court properly admitted Kathleen's Rule 404(b) testimony and that the trial court did not improperly consider Pickens's choice not to plead guilty and exercise his right to a jury trial in sentencing Pickens.

I. Procedural History

Pickens was indicted for one count of first-degree statutory rape of a child by an adult offender and two counts of first-degree statutory sexual offense with a child by an adult offender. These cases were tried during the 21 October 2019 criminal session of Superior Court, Wake County. Before the trial began, Pickens filed a motion in limine to exclude evidence of the offense involving Kathleen pursuant

1. This is a pseudonym used to protect the identity of the minor victim in this case.

2. This is a pseudonym used to protect the identity of the minor Rule 404(b) witness in this case.

to Rule 404(b) of the North Carolina Rules of Evidence. N.C.G.S. § 8C-1, Rule 404(b). This motion was denied, and the jury found Pickens guilty of all charges. Pickens was sentenced to three consecutive active sentences of 300 to 420 months in prison. Pickens entered notice of appeal.

On appeal, the Court of Appeals determined Kathleen's Rule 404(b) testimony had been properly admitted. *State v. Pickens*, 284 N.C. App. 712, 719 (2022). Judge Murphy dissented on this issue, *see id.* at 722–35 (Murphy, J., dissenting), and Pickens filed a Notice of Appeal with our Court on 2 September 2022. On the sentencing issue, the Court of Appeals found the trial court improperly considered Pickens's exercise of his constitutional right to a jury trial during sentencing. *Id.* at 722 (majority opinion). The State filed a petition for discretionary review on this issue, which our Court allowed on 13 December 2022.

II. Background

Ellen was born in 2004 and lived with her parents and brother in Raleigh, North Carolina. She enjoyed playing soccer, riding bikes with her family and friends, participating in gymnastics, and singing in the church choir. In 2012, when Ellen was eight years old and in the third grade, her teachers began noticing she had difficulty focusing in class. This prompted her parents to consult a neuropsychiatrist, Dr. Jordana Werner, who ultimately diagnosed Ellen with attention-deficit/hyperactivity disorder (ADHD), inattentive type, with features of anxiety. Ellen was prescribed methylphenidate, a form of liquid Ritalin, as treatment.

In October 2014, after Dr. Werner moved out of state, Ellen began seeing Katherine Myers, a psychiatric physician assistant (PA), every three months. PA Myers testified that during that time, Ellen experienced anxiety about beginning middle school, which manifested as physical symptoms in the form of stomachaches and headaches. And while Ellen preferred eating some types of foods over others, she "didn't have problems with the act of eating." To treat Ellen's anxiety, PA Myers prescribed an antidepressant, Lexapro, which is commonly used to treat anxiety and depression. According to PA Myers, Ellen appeared to be doing "very well" at her follow-up appointment in February 2015, as "[s]he was much less anxious[,] . . . was going to other people's houses[, and] . . . wasn't as scared." PA Myers's testimony regarding Ellen's subsequent follow-up appointment in June 2015 was similar, and PA Myers explained Ellen was adjusting to her medication well, without any reported side effects. Furthermore, while Ellen still had some anxiety about starting middle school, PA Myers did not consider this abnormal, and Ellen's anxiety subsided shortly after classes began.

In July 2015, at age eleven, Ellen began attending Durant Middle School. The school nurse administered Ellen's daily dose of Ritalin around 12:00 p.m. or 12:10 p.m., while other students were in class. This required Ellen to walk down the sixth-grade hallway alone. From 15 August 2015 to 14 September 2015, Pickens, a Durant Middle School chorus teacher, had a planning period from 12:15 p.m. to 1:00 p.m. This meant that Pickens was not teaching class around the time Ellen left her classroom and walked to the school nurse's office.

Soon after Ellen's anxiety about starting school subsided, her mother noticed a change in Ellen's behavior. Ellen began withdrawing from her neighborhood friends, her eating decreased, she stopped wanting to play outside, and she asked not to attend soccer practice. She began texting her mother around 11:30 a.m., just before she was scheduled to leave her classroom to receive her daily dose of Ritalin, asking that her mother pick her up from school. In her texts, Ellen would provide different reasons for wanting her mother to pick her up. She would say her "tummy hurts" or that she was "really tired." In addition to asking to leave school frequently, Ellen also pleaded with her mother, "Please don't make me go to school. Please don't make me go to school. I don't want to go to school."

Ellen testified that she first met Pickens in the sixth-grade hallway, approximately one to two months after school began, while she was on her way to receive or on the way back from receiving her Ritalin from the school nurse. There was no one else in the hallway at the time. Ellen stated that Pickens motioned to her with his hand, gesturing for her to "come over" to him. When Ellen asked what Pickens needed, he responded, "I need you to be quiet." Pickens then grabbed the back of Ellen's shirt and took her into the largest stall in the sixth-grade bathroom, where he sexually assaulted her. This incident lasted approximately five minutes. Ellen did not report this incident because Pickens had threatened to hurt her or her family if she told anyone. Because Ellen was afraid Pickens would "do it again," she did not want to return to school.

Ellen's next encounter with Pickens was "worse than the first time." He grabbed the back of her shirt and her ponytail and took her back into the same bathroom stall where he had assaulted her previously. This time he raped her. While the encounter lasted only "[a] couple minutes," Ellen testified that "it felt . . . like[ ] forever." She also testified that she cried during the assault. Ellen did not tell anyone what happened but asked her parents to keep her home from school.

Regarding Ellen's third encounter with Pickens, she reported that the "[s]ame first sequence" of events occurred and Pickens again raped

her. However, this time Pickens also asked Ellen to defecate in the toilet and pick up the feces. Ellen testified that she "didn't want to touch [the feces]" but complied because Pickens had threatened her and her family. Pickens took the feces from Ellen and put it in her mouth, which caused Ellen to gag repeatedly. The feces was then smeared on the wall of the bathroom stall. According to Ellen's testimony, Pickens assaulted her in a similar manner almost every other day when she left class to take her medication. Some of Pickens's assaults also involved forcing Ellen to perform fellatio.

Glenn Moss, the former head custodian at Durant Middle School, testified that in August or September 2015, he noticed feces was being smeared on the wall of the largest bathroom stall in the sixth-grade girl's bathroom. This was the same bathroom stall where Ellen reported Pickens's assaults took place. Moss reported the smeared feces to the school administration, and in September 2015, Nancy Allen, the Durant Middle School principal, questioned Ellen about the smeared feces. Ellen denied smearing the feces on the bathroom wall and began to cry. Principal Allen spoke with Ellen's parents and explained that Ellen must receive a mental health evaluation before returning to school.

Around this time, Ellen exhibited even more troubled behavior. As mentioned above, Ellen withdrew from her friends and refused to go to school. She also followed her mother everywhere, began sleeping with her mother each night, experienced flashbacks of her trauma, and began exhibiting disordered eating. As a result, Ellen experienced significant weight loss, so much so that her ribs and other bones were visible. Ellen was diagnosed with avoidant restrictive food intake disorder (ARFID), which involves a fear of eating, such as vomiting or choking, that is unrelated to weight gain. Ultimately, Ellen required inpatient psychiatric treatment, and due to her ARFID and resulting weight loss causing her to be below normal weight, it was necessary for her physicians to insert a feeding tube for proper nutrition.

In April 2017, Ellen disclosed to her mother that Pickens had hurt her. While she did not disclose the full extent of the sexual conduct Pickens forced her to engage in, she did disclose that Pickens had touched her inappropriately.

III. Standard of Review

This Court's review of whether Rule 404(b) evidence is properly admitted is a question of law and is reviewed de novo on appeal. *State v. Beckelheimer*, 366 N.C. 127, 130 (2012).

IV. Rule 404(b) of the North Carolina Rules of Evidence

[1] Under Rule 404(b) of the North Carolina Rules of Evidence, "[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.G.S. § 8C-1, Rule 404(a) (2021). There is a good reason for this. Namely, if a jury chooses to convict a defendant, then that conviction must be based on the evidence before the jury, not the jury's view of the defendant's character. In other words, a jury must convict a defendant because the State has met its burden to show that the defendant committed the alleged offense beyond a reasonable doubt, not because the jury believes the defendant may have committed similar crimes. *See* N.C.P.I.—Crim. 101.10 (Burden of Proof and Reasonable Doubt).

While evidence of a defendant's character is not admissible to prove he "acted in conformity therewith," N.C.G.S. § 8C-1, Rule 404(a), "[e]vidence of other crimes, wrongs, or acts . . . may, however, be admissible [to prove] motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident," N.C.G.S. § 8C-1, Rule 404(b). Thus, Rule 404(b) has been characterized as a rule of inclusion, and evidence of prior bad acts is admissible unless the only reason that the evidence is introduced is to show the defendant's propensity for committing a crime like the act charged. *State v. Coffey*, 326 N.C. 268, 278–79 (1990). However, "Rule 404(b) is still constrained by the requirements of similarity and temporal proximity." *Beckelheimer*, 366 N.C. at 131 (cleaned up). To be admissible, prior bad acts do not need to "rise to the level of the unique and bizarre" and instead will be considered sufficiently similar and admissible "if there are some unusual facts present in both crimes that would indicate that the same person committed them." *Id.* (cleaned up).

A. Kathleen's Rule 404(b) Testimony

At trial, Kathleen testified that she met Pickens when she was in seventh grade at Neal Middle School in Durham, North Carolina. Pickens was Kathleen's chorus teacher. One day, while Kathleen was leaving class Pickens put his hands on Kathleen's waist and touched her bottom. This occurred while other students were present, and it made Kathleen so uncomfortable that she ran out of the classroom.

When Kathleen was in eighth grade, Pickens asked Kathleen to participate in a singing and dancing performance called Evening of Entertainment, which was held at Riverside High School. When Kathleen declined to participate, Pickens called Kathleen's mother and received

her consent. The practices for this event were held at Riverside High School, and Pickens drove Kathleen to each practice.

Kathleen turned fourteen on 1 February 2015. The following day, Pickens drove Kathleen to practice but stopped at his apartment to change his clothes. Kathleen initially stated she would wait for Pickens in the car, but Pickens said she "should come up" and Kathleen complied. When Kathleen arrived in Pickens's apartment, she sat on the couch and watched the cartoon "Teen Titans Go!" while Pickens made sandwiches for himself and Kathleen. After eating the sandwich and putting the dishes in the sink, Pickens returned to the couch, sat down next to Kathleen, and began to touch her left thigh. Kathleen moved Pickens's hand and "asked him not to do that." However, Pickens continued to touch Kathleen's leg, pulled her up by her arm, and took her into his bedroom. Kathleen testified that while she tried to pull away from Pickens, she was 5'2" and 100 pounds at the time and was unable to get away from him. Pickens threw Kathleen onto his bed and forced her pants and underwear off completely. Pickens pulled his pants halfway down and vaginally raped Kathleen. During the rape, Kathleen reported crying and asking Pickens to stop and to move away from her. But Pickens refused to stop. Afterwards, Pickens apologized to Kathleen and threatened her, stating that if she told anyone, he would rape her again.

In 2016, when Kathleen was in tenth grade, she was asked to write about an incident that changed her life. There, for the first time, she described what Pickens had done to her. After reading the paper, Kathleen's teacher reported the incident, and Kathleen spoke with law enforcement about what had occurred.

B. Application of Rule 404(b) to Kathleen's Testimony

The State contends that Kathleen's Rule 404(b) testimony was offered for proper reasons: to prove Pickens's intent, motive, plan, and design to sexually assault middle school students from schools where he was a teacher. In support, the State shows that Pickens used his position as a teacher at Durant Middle School and Neal Middle School to gain access to both Ellen and Kathleen. Moreover, both of Pickens's victims were middle school students at a school where Pickens was employed. Ellen's and Kathleen's assaults also both happened during school-related activities or school hours. In Ellen's case, she was either on her way to receive medication from the school nurse or on her way back to class when the assaults occurred. For Kathleen, although Pickens's alleged rape of her occurred off the school campus and in Pickens's apartment, the State contends that Pickens committed the assault while acting in

his official capacity as a teacher as he was taking Kathleen to an after-school activity.

Furthermore, some of the assaults happened during school hours: namely, the sexual conduct Ellen described, which took place exclusively in the school bathroom, and Pickens's touching of Kathleen on her waist and bottom in the classroom. The State also notes that even though Pickens only engaged in vaginal intercourse with Kathleen, he attempted to do the same with Ellen but was unable to do so because of her small size. Only then did Pickens resort to anal intercourse and fellatio with Ellen.

According to the State, Pickens also asserted control over both Ellen and Kathleen through his position as a teacher. In Kathleen's case, (1) Pickens insisted she come up to his apartment despite Kathleen having stated she would wait in the car; (2) Pickens touched Kathleen's thigh even though she asked him to stop; (3) Pickens physically pulled Kathleen into his bedroom, threw her down on his bed, and raped her; (4) Pickens removed Kathleen's pants and underwear; and (5) Pickens continued to rape Kathleen despite her crying and asking him to stop. In Ellen's case, Pickens (1) physically pulled Ellen into the bathroom; (2) continued to sexually assault Ellen despite her tears; and (3) directed Ellen to remove her pants and underwear. Moreover, the State asserts that in both Ellen's and Kathleen's assaults, Pickens only removed his pants and underwear halfway down. Additionally, he threatened both girls after the assaults occurred. Accordingly, the State contends that Kathleen's Rule 404(b) testimony meets the required standard and was properly admitted.

In response, Pickens argues that Kathleen's Rule 404(b) testimony was not sufficiently similar to be admissible. Namely, that there were "no unusual [distinguishing] similarities" between Ellen's and Kathleen's accounts. Pickens focuses on the differences between the victims and disparities in the incidents, noting that while Ellen was eleven years old, Kathleen was significantly older at fourteen years old. The girls had different physical builds in that Ellen was shorter than Kathleen by at least four inches, weighed thirty-five pounds less than Kathleen, and had not reached puberty at the time of the assault. Pickens also argues that his relationship with Kathleen was different from his relationship with Ellen, namely that Pickens knew Kathleen well because she had been in his class for two years, but the same was not true of Ellen who only attended the school where Pickens worked.

Furthermore, Pickens contends that the sex acts in Kathleen's case were substantially different from those Ellen described. This is because

Kathleen's rape took place outside of school, in Pickens's apartment, and only involved vaginal intercourse. But Ellen's assault occurred on the school campus, in the girls' restroom, and included attempted vaginal intercourse, anal intercourse, and fellatio. Importantly, Pickens argues that there are no common facts between Ellen's and Kathleen's sexual assaults except for those common in any case involving a sex offense by an adult against a child, and those facts cannot meet the admissibility standard required under Rule 404(b).

Our Rule 404(b) standard does not require identical or even near-identical circumstances between the charged offense and the prior bad act for evidence of the prior bad act to be admissible. *Beckelheimer*, 366 N.C. at 132. Instead, Rule 404(b) requires that the incidents share "some unusual facts that go to a purpose other than propensity for the evidence to be admissible." *Id.* (cleaned up). Here, as the State points out, the evidence was admitted to show an intent, motive, plan, and design to assault middle school students. The unique facts common to both victims include that: (1) the girls were middle-school-aged children attending schools where defendant taught; (2) defendant used his position as a middle school teacher to gain access to both victims; (3) defendant exerted control over both victims during the assaults despite their protests, tears and resistance; (4) defendant engaged in vaginal intercourse or tried to engage in vaginal intercourse with both victims; (5) defendant committed the offenses during school hours or during school-related activities; (6) defendant only removed his pants and underwear halfway during both assaults; and (7) defendant threatened the girls after the assaults were completed.

In *Beckelheimer*, this Court explained that the correct analysis for the admissibility of Rule 404(b) evidence involves focusing on the similarities and not the differences between the two incidents. *Id.* at 131–32. The same is true here. Because the similarities in this case are sufficient to show "some unusual facts present in both crimes that would indicate that the same person committed them," *id.* at 131 (cleaned up), Kathleen's Rule 404(b) testimony was properly admitted. The trial court did not err in admitting this evidence and the Court of Appeals was correct in concluding the same. Accordingly, we affirm the Court of Appeals' decision regarding the admissibility of Kathleen's Rule 404(b) testimony.

V. Sentencing

A. Standard of Review

"The general rule is that a judgment is presumed to be valid and will not be disturbed absent a showing that the trial judge abused

his discretion." *State v. Bright*, 301 N.C. 243, 261 (1980). "A decision entrusted to a trial judge's discretion may be reversed only if it is manifestly unsupported by reason or so arbitrary that it could not have been a reasoned decision." *State v. Brown*, 314 N.C. 588, 595 (1985) (cleaned up).

B. Consideration of Improper Factors During Sentencing

[2] When a sentence imposed by the trial court is within statutory limits it is "presumed regular and valid." *State v. Boone*, 293 N.C. 702, 712 (1977). However, the presumption of regularity is overcome "[i]f the record discloses that the court considered [an] irrelevant and improper matter in determining the severity of the sentence." *Id.* (citing *State v. Swinney*, 271 N.C. 130 (1967)).

Under Article I, Section 24 of the North Carolina Constitution, "[n]o person shall be convicted of any crime but by unanimous verdict of a jury in open court."[3] N.C. Const. art. I, § 24. "No other right of the individual has been so zealously guarded over the years and so deeply embedded in our system of jurisprudence as an accused's right to a jury trial." *Boone*, 293 N.C. at 712. Accordingly, "[t]his right ought not to be denied or abridged nor should the attempt to exercise this right impose upon the defendant an additional penalty or enlargement of his sentence." *Id.*; *see also State v. Cannon*, 326 N.C. 37, 39 (1990) ("A criminal defendant may not be punished at sentencing for exercising this constitutional right to trial by jury."). Thus, "[w]here it can reasonably be inferred from the language of the trial judge that the sentence was imposed at least in part because defendant . . . insisted on a trial by jury, defendant's constitutional right to trial by jury has been abridged, and a new sentencing hearing must result." *Id.*

C. Background

The trial court made the following statement before sentencing Pickens:

> To say the facts of this case are egregious is putting it mildly. The facts of this case are among the worst I've ever seen, and I've seen a lot of cases, thousands as a prosecutor, thousands as a judge. One of the things that one has to understand — I was thinking about

3. This right may be waived through procedures prescribed by the General Assembly and with the consent of a trial judge in cases where the State is not seeking a death sentence in superior court. N.C. Const. art. I, § 24. Additionally, "[t]he General Assembly may . . . provide for other means of trial for misdemeanors, with the right of appeal for trial de novo." *Id.*

> this earlier — is that children the age of 11, unless they are really in an [un]usual environment, have no idea about sex acts. They just don't. I mean, I'm sure — I've seen girls who were pregnant at that age, but they shouldn't have been, but were raped. They weren't consensual acts.
>
> The Legislature did something several years ago when they enacted this structured sentencing that I totally agreed with and I advocated for for ten years before they did it, and that was to make — send a clear message that there was a difference between a violent crime and crimes against — and nonviolent crimes, crimes against property, because the effect is totally different. I mean, just seeing these children testify in this case was just evidence to anyone who opened their eyes who had listened to it as to how damaged these children were by their experience. I don't — given the number of women out here in the world, I don't understand why some people choose underage girls, but it's wrong. It's morally wrong. It's legally wrong, and there's no justification for it.
>
> It would be difficult for an adult to come in here and testify in front of God and the country about what those two girls came in here and testified about. It would be embarrassing. It would be embarrassing to testify about consensual sex in front of a jury or a bunch of strangers. And in truth, they get traumatized again by being here, but it's absolutely necessary when a defendant pleads not guilty. They didn't have a choice and you, Mr. Pickens, had a choice.

Following these remarks, the trial court sentenced Pickens to a minimum of 300 months and a maximum of 420 months for each of the three charges the jury found him guilty of. Each sentence was ordered to run consecutively.

On appeal, the Court of Appeals determined that the trial court's statements to Pickens revealed that it had improperly considered Pickens's exercise of his constitutional right to a jury trial when imposing Pickens's sentence. Namely, the Court of Appeals explained that while a trial court may use its discretion to impose consecutive sentences, in this case, there was a "clear inference that a greater sentence

was imposed because Defendant did not plead guilty." *Pickens*, 284 N.C. App. at 722.

D. Mr. Pickens's Sentencing

The language at issue is the trial court's statement during sentencing that: "They didn't have a choice and you, Mr. Pickens, had a choice." Mr. Pickens argues that it can be reasonably inferred that these words referred to his decision to plead not guilty and to exercise his right to a jury trial. However, the State argues that the trial court's statement was not related to Pickens's choice to proceed with a jury trial but instead referred to his choice to commit egregious sexual assaults on Ellen and Kathleen against their will. The State supports its argument by highlighting the context in which the court's statement was made. Namely, that before using these particular words, the trial court was discussing Pickens's choice to sexually assault Ellen and Kathleen. Thus, according to the State, it can be reasonably inferred that in making the statement at issue, the trial court was referring to Pickens's decision to assault Ellen and Kathleen and not Pickens's decision to exercise his right to a jury trial. It is frequently difficult to prove intent in this context. We must be vigilant to protect the right to a jury trial and ensure that individuals who choose to assert that right are not punished for doing so. *See Boone*, 293 N.C. at 712 (providing that the right to a jury trial "ought not to be denied or abridged nor should the attempt to exercise this right impose upon the defendant an additional penalty or enlargement of his sentence").

Nevertheless, our precedents in *Boone*, 293 N.C. 702; *State v. Langford*, 319 N.C. 340 (1987); and *Cannon*, 326 N.C. 37, provide some guidance. In *Boone*, we determined that the trial court had improperly used the defendant's choice not to plead guilty against the defendant during sentencing. 293 N.C. at 712. There, in open court, the trial court "indicated that [it] would be compelled to give the defendant an active sentence due to the fact that the defendant had pleaded not guilty." *Id.* Similarly, in *Cannon*, this Court found that the trial court had violated each defendant's right to a jury trial. 326 N.C. at 40. There, after being "advised that defendants demanded a jury trial, the trial judge told counsel in no uncertain terms that if defendants were convicted he would give them the maximum sentence." *Id.* at 38. However, this case is not like *Boone* or *Cannon*. The trial court in Pickens's case did not explicitly state that it was giving Pickens a harsher sentence because he chose to exercise his right to a jury trial. *See Boone*, 293 N.C. at 712; *Cannon*, 326 N.C. at 38.

The Court of Appeals has also addressed this issue more recently in *State v. Hueto*, 195 N.C. App. 67 (2009), and *State v. Haymond*, 203 N.C. App. 151 (2010). The facts in both cases illustrate that the entire context of a trial judge's statements must be examined when determining whether a reasonable inference can be made that the court had improperly considered the defendant's decision not to plead guilty when sentencing him. *See Hueto*, 195 N.C. App. at 74–78 (examining pre-trial and post-verdict statements by the trial court); *Haymond*, 203 N.C. App. at 169–71 (considering statements relating to sentencing made at several hearings in the case).

Pickens's case is also not analogous to *Hueto* or *Haymond* because those cases involved pretrial and posttrial statements that referenced the defendant's sentencing, which when taken together and in conjunction with the sentence the trial court imposed, created an inference that the defendant's choice to go to trial was considered during sentencing. *See Hueto*, 195 N.C. App. at 78; *Haymond*, 203 N.C. App. at 171. In this case, the only statement at issue occurred during sentencing, and the parties have not asked this Court to consider any other statements made by the trial court.

In *Langford*, this Court determined that the trial court's statements did not show an intent to penalize the defendant for exercising his right to a jury trial. 319 N.C. at 346. The defendant argued that the following statement by the trial court showed the court sentenced him to a consecutive sentence because he chose not to plead guilty: "I'm aware that I could have avoided this trial had I been willing at the outset of the trial to commit myself to concurrent sentences." *Id.* This Court noted that while the defendant pointed to this statement "in isolation," the whole record did not evidence that a harsher penalty was imposed based on the defendant's choice to exercise his right to a jury trial. *Id.* Moreover, while the trial court's statement may have been "an unnecessary statement," it referenced nothing more than a "historical fact." *Id.* This was because the record showed that the "defendant was forced to plead not guilty and to proceed to trial [because] . . . the prosecutor and trial court refused to agree in advance to a concurrent sentence." *Id.* Accordingly, there was no indication that the trial court would have made the sentence concurrent had the defendant pleaded guilty. *Id.* In essence, all the record showed was that the trial court's statements reflected its refusal to decide whether the defendant's sentence would be concurrent or consecutive until it heard the evidence presented at trial. *Id.*

Langford is particularly instructive and stands for the proposition that the statement at issue cannot be reviewed in isolation but instead

must be considered with the remainder of the record. 319 N.C. at 346. Pickens points out that the trial court discussed "the act of the trial itself" and the victims' need to testify at trial immediately before stating, "They didn't have a choice and you, Mr. Pickens, had a choice." He contends this context means it can be inferred that during sentencing the trial court improperly considered his choice to plead not guilty. However, when the trial court's statement is reviewed alongside other portions of that same discussion, an equally reasonable inference could be drawn that the court was not referring to Pickens's exercise of his right to a jury trial and instead was referring to the egregious nature of Pickens's crimes and his decision to commit those crimes.

With the ambiguous statement capable of multiple interpretations, the "presumption of regularity" is not overcome, *Boone*, 293 N.C. at 712, and we conclude the trial court did not violate Pickens's constitutional right to a jury trial when it imposed Pickens's sentence or when it imposed consecutive sentences on Pickens. *See Cannon*, 326 N.C. at 39. Thus, we affirm the Court of Appeals' holding that the Rule 404(b) evidence of Pickens's assault on Kathleen was properly admitted and reverse the Court of Appeals' decision to vacate Pickens's sentence, resulting in a reinstatement of the original sentence imposed by the trial court.

AFFIRMED IN PART AND REVERSED IN PART.

TOWN OF MIDLAND, A NORTH CAROLINA MUNICIPAL CORPORATION
v.
TONEY L. HARRELL AND T.L. HARRELL'S LAND DEVELOPMENT COMPANY, INC., A NORTH CAROLINA BUSINESS CORPORATION

No. 120A22

Filed 20 October 2023

1. Jurisdiction—standing—development enforcement action—town—compliance with state law and ordinance

A town had standing to file its lawsuit for a mandatory injunction, abatement order, and collection of civil penalties from developers of a residential subdivision (who continued to violate a requirement under the town's development ordinance to maintain roads within the subdivision until the town accepted the roads for public maintenance) and did not deprive the trial court of subject matter jurisdiction where, although the town council did not pass a resolution approving of the complaint until after the complaint was filed, the council's approval was not required. The town's action complied with N.C.G.S. § 160A-12, which authorizes a town to enforce its powers "as provided by ordinance or resolution of the town council," and with its development ordinance, which authorized the town's zoning administrator to refer violators to the town's attorney for the filing of a civil action.

2. Appeal and Error—scope of appeal—enforcement of development ordinance—violation determined in prior appeal—binding

In the second appeal arising from a town's enforcement of its development ordinance—by filing a lawsuit for a mandatory injunction, abatement order, and collection of civil penalties from developers of a residential subdivision (defendants) who continued to violate a requirement under the ordinance to maintain roads within the subdivision until the town accepted the roads for public maintenance—the Court of Appeals correctly determined that it was bound by a different panel's earlier decision in the same case that defendants were responsible for the roads. Moreover, the question of defendants' ongoing responsibility was not before the current panel because defendants had not raised the issue in their brief.

Appeal pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 282 N.C. App. 354 (2022), affirming in part and reversing in part orders entered on 17 August 2020 and 18 December

2020 by Judge Martin B. McGee in the Superior Court, Cabarrus County, and remanding the case. Heard in the Supreme Court on 14 March 2023.

Anthony Fox, Daniel Peterson, and Jasmine Little for plaintiff-appellee Town of Midland.

Scarbrough, Scarbrough & Trilling, PLLC, by James E. Scarbrough and John F. Scarbrough, for defendants-appellants Toney L. Harrell and T.L. Harrell's Land Development Company, Inc.

ALLEN, Justice.

The primary issue in this case is whether the Town of Midland satisfied certain procedural requirements of state law and its own ordinances in filing a lawsuit against defendant developers over their failure to repair the streets in a subdivision located within the Town's corporate limits. We hold that the Town complied with the relevant provisions, and we therefore affirm the judgment of the Court of Appeals.

I. Background

Defendants Toney L. Harrell and T.L. Harrell's Land Development Company are the developers of Bethel Glen, a residential subdivision located inside the corporate boundaries of the Town of Midland. In an earlier round of litigation, defendants challenged a notice of violation (NOV) issued by the Town's zoning administrator on 18 March 2014. *Harrell v. Midland Bd. of Adjustment* (*Midland I*), 251 N.C. App. 526, 2016 N.C. App. LEXIS, at *8–9 (2016) (unpublished). The NOV alleged that the subdivision's streets were "in a state of continuous deterioration" that could "pose a potential threat to public safety." According to the NOV, the poor condition of the streets violated the requirement in the Midland Development Ordinance (MDO) that developers "*maintain streets until acceptance by adoption of a resolution accepting the street(s) for public maintenance.*"

Defendants sought review by the Town's board of adjustment, which upheld the NOV. *Id.* at *9. After an appeal to the Superior Court, Cabarrus County, resulted in an order affirming the board's decision, defendants took their case to the Court of Appeals. *Id.* On 30 December 2016, the Court of Appeals issued its opinion in *Midland I*, affirming the trial court's order and concluding that, because the Town had never assumed responsibility for the subdivision's roads, defendants remained under a "continuing responsibility to maintain [those] roads." *Id.* at *17,

*21. On 8 June 2017, this Court denied defendants' petition for discretionary review. *Harrell v. Midland Bd. of Adjustment*, 369 N.C. 751, 800 S.E.2d 418 (2017).

While defendants' appeal in *Midland I* was pending at the Court of Appeals, the Town's zoning administrator issued civil citations to defendants on 14 October 2016, 10 December 2016, and 11 December 2016 imposing civil penalties of $100.00, $300.00, and $500.00, respectively. Each citation alleged that the roads in Bethel Glen remained in need of repair and stated that each day's continuing violation of the MDO constituted "a separate and distinct offense." Thereafter, the zoning administrator issued defendants a civil citation with a $500.00 civil penalty every day from 12 December 2016 until 16 January 2017.

On 17 January 2017, the zoning administrator sent defendants a demand letter informing them that they owed civil penalties totaling $18,900.00. The letter threatened defendants with litigation unless they paid the civil penalties and brought the subdivision's roads into compliance with the MDO within thirty days. Defendants took no action in response to the letter, and the zoning administrator issued additional citations.

On 22 June 2017, the Town filed suit against defendants in the Superior Court, Cabarrus County, seeking a mandatory injunction and an order of abatement requiring defendants to repair the subdivision's roads. The complaint further requested that the court order defendants to pay the Town a total of $97,400.00 in civil penalties, "plus interest, costs and attorneys' fees as allowed by law." In calculating defendants' civil penalties, the Town added to the $18,900.00 allegedly due as of 17 January 2017 further penalties of $500.00 per day for each day between 17 January 2017 and 22 June 2017, the filing date of the action. The parties subsequently filed motions for summary judgment. Before the trial court ruled on the motions, defendants filed a motion to dismiss the complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Rules of Civil Procedure. The motion to dismiss asserted that the trial court lacked subject matter jurisdiction because the Town Council had not voted to authorize the lawsuit against defendants. On 10 September 2019, the Town Council passed a resolution "retroactively approv[ing] and ratif[ying] the filing of the Complaint effective June 22, 2017."

In two orders dated 17 August 2020, the trial court denied defendants' summary judgment motion but granted the Town's summary judgment motion and entered a mandatory permanent injunction and an order of abatement that essentially directed defendants to bring the roads in the

Bethel Glen subdivision into compliance with standards promulgated by the North Carolina Department of Transportation. Defendants filed a notice of appeal to the Court of Appeals from those orders. They also filed a motion for relief with the trial court, again claiming that it lacked subject matter jurisdiction over the Town's complaint. The motion for relief further asserted that defendants were entitled to recover attorney's fees from the Town under N.C.G.S. § 6-21.7 because the Town had unlawfully continued to assess civil penalties while defendants' appeal in *Midland I* was pending.[1]

The trial court entered an order on 18 December 2020 denying the motion for relief and noting that the Town had agreed to dismiss all civil penalties assessed prior to this Court's 8 June 2017 denial of defendants' petition for discretionary review in *Midland I*. Defendants filed a notice of appeal from the trial court's order denying their motion for relief.

On 15 March 2022, a divided panel of the Court of Appeals affirmed "the trial court's entry of summary judgment in the Town's favor regarding civil penalties." *Town of Midland v. Harrell*, 282 N.C. App. 354, 370 (2022). The Court of Appeals majority rejected defendants' argument that the trial court lacked subject matter jurisdiction. Under the majority's reading of the MDO, the "Town Council was not required to adopt a resolution before the Town filed its complaint." *Id*. at 361–62.

The trial court's mandatory permanent injunction and abatement order did not survive appellate scrutiny, however. The Court of Appeals majority concluded that the order was not detailed enough to satisfy Rule 65(d) of the Rules of Civil Procedure, which requires "[e]very order granting an injunction . . . [to] be specific in terms" and to "describe in reasonable detail, and not by reference to the complaint or other document, the act or acts enjoined or restrained[.]" N.C. R. Civ. P. 65(d). The majority remanded the order to the trial court with instructions that it "make further findings of fact identifying the specific NCDOT standards that [defendants] ha[d] failed to meet and . . . provide a specific decree for repairs necessary to bring the roads into compliance." *Town of Midland*, 282 N.C. App. at 368.

Finally, the Court of Appeals majority reversed the trial court's denial of defendants' request for attorney's fees. The majority agreed

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1. In their motion for attorney's fees, defendants relied on the following language in N.C.G.S. § 6-21.7 (2020): "In any action in which a city or county is a party, upon a finding by the court that the city or county violated a statute or case law setting forth unambiguous limits on its authority, the court shall award reasonable attorneys' fees and costs to the party who successfully challenged the city's or county's action. . . ."

with defendants that state law did not allow the Town to impose civil penalties while defendants' appeal of the NOV was pending.[2] *Id.* at 369. Although the Town later dismissed the penalties unlawfully assessed during that period, its action did "not relieve the Town of its liability [under N.C.G.S. § 6-21.7] for [defendants'] attorney's fees incurred contesting those penalties." *Id.* at 370. The majority therefore remanded the matter so that the trial court could "determine and make appropriate findings regarding what attorney's fees [defendants] reasonably incurred in challenging the civil penalties imposed during the pendency of their first appeal." *Id.*

The dissenting judge at the Court of Appeals would have held that the Town lacked standing to file its complaint against defendants because the Town Council did not adopt its resolution authorizing the lawsuit before the complaint was filed. *Id.* at 371, 376–77 (Tyson, J., concurring in part and dissenting in part). In reaching this conclusion, the dissenting judge noted that "subject matter jurisdiction is determined by 'the state of affairs existing at the time it is invoked.' " *Id.* at 376 (quoting *Shearon Farms Townhome Owners Ass'n II v. Shearon Farms Dev., LLC*, 272 N.C. App. 643, 655 (2020), *disc. rev. denied*, 377 N.C. 566 (2021)).

The dissenting judge agreed with the majority that the mandatory permanent injunction and abatement order did not satisfy Rule 65(d) and that the Town was liable for attorney's fees. *Id.* at 377–78, 380. He argued, though, that the Court of Appeals should reconsider whether defendants remained responsible for the roads in the Bethel Glen

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2. In reaching this conclusion, the majority relied on the version of N.C.G.S. § 160A-388(b1)(6) in effect during the pendency of defendants' appeal in *Midland I*: "An appeal of a notice of violation or other enforcement order stays enforcement of the action appealed from unless the official who made the decision certifies to the board of adjustment after notice of appeal has been filed that because of the facts stated in an affidavit, a stay would cause imminent peril to life or property or because the violation is transitory in nature, a stay would seriously interfere with enforcement of the ordinance." N.C.G.S. § 160A-388(b1)(6) (2017). The General Assembly subsequently repealed and recodified the provision as N.C.G.S. § 160D-405(f): "An appeal of a notice of violation or other enforcement order stays enforcement of the action appealed from and accrual of any fines assessed . . . ." An Act to Clarify, Consolidate, and Reorganize the Land-Use Regulatory Laws of the State, S.L. 2019-111, § 2.4, 2019 N.C. Sess. Laws 424, 459 (Reg. Sess. 2020). This language was further amended by S.L. 2020-25, §10, 2020 N.C. Sess. Laws 152, 165 (2019) and S.L. 2022-62, §59(a), 2022 N.C. Sess. Laws. 72, 103–04 (Reg. Sess. 2022) and currently reads: "An appeal of a notice of violation or other enforcement order to the board of adjustment and any subsequent appeal in accordance with [N.C.]G.S. [§] 160D-1402 stays enforcement of the action appealed from and accrual of any fines assessed during the pendency of the appeal or during the pendency of any civil proceeding authorized by law or related appeal." N.C.G.S. § 160D-405(f) (2023).

subdivision. *See id.* at 379 ("The Town has collected *ad valorem* taxes from [defendants] and the property owners of Bethel Glen subdivision since bringing the subdivision into the Town's limits. The Town cannot now shirk its maintenance and repair obligations for normal wear and tear to the streets and shift them onto [defendants].").

On 19 April 2022, defendants filed a notice of appeal with this Court based on the dissent in the Court of Appeals. *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."). Because the dissenting judge agreed with the majority's decision to remand the mandatory permanent injunction and abatement order and the attorney's fees issue to the trial court, the only matters before us are (1) the trial court's subject matter jurisdiction over the Town's complaint and (2) defendants' continued responsibility for the roads in the Bethel Glen subdivision. *See* 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.").

II. Standard of Review

"Because standing is a question of law, we review the issue de novo." *Violette v. Town of Cornelius*, 283 N.C. App. 565, 569 (2022), *disc. rev. denied*, 384 N.C. 33 (2023). When reviewing a matter *de novo*, this Court "considers the matter anew and freely substitutes its own judgment" for that of the lower courts. *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647 (2003).

III. Analysis

In their principal brief to this Court, defendants contend that the trial court should have dismissed the Town's lawsuit for lack of standing. According to defendants, N.C.G.S. § 160A-12 required the Town Council to adopt a resolution authorizing the lawsuit *before* the Town filed the complaint against defendants. Defendants argue that, even if it were possible for the Town Council to delegate approval authority to the zoning administrator, the MDO contains no such delegation. They observe that the particular MDO provision under which the Town proceeded does not expressly authorize the zoning administrator to initiate civil actions. Defendants further argue that they should no longer bear responsibility for the roads in the Bethel Glen subdivision.

They allege that "the Town expressly agreed to take over maintenance of the roads once it had confirmation that the roads had been built to NCDOT standards [and t]he requested confirmation from NCDOT was provided to the Town in [a] district engineer's letter of April 25, 2006."

In arguing that it had standing to file suit against defendants, the Town points out that N.C.G.S. § 160A-12 allows a city council to act by ordinance *or* resolution. When viewed in context, the Town insists, the pertinent MDO provisions clearly did not require Town Council approval before the zoning administrator referred the matter of defendants' nonpayment of civil penalties to the Town's attorney for institution of a civil action. Additionally, because the Court of Appeals ruled in *Midland I* that defendants remained responsible for the roads in the Bethel Glen subdivision, the Town argues that defendants should be barred from raising that issue in this case.

A. The Town's Standing to File a Civil Action Against Defendants

[1] "Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter." *Am. Woodland Indus. v. Tolson*, 155 N.C. App. 624, 626 (2002). As we have explained elsewhere, "[t]he standing requirements articulated by this Court are not themselves mandated by the text of the North Carolina Constitution." *Cmty. Success Initiative v. Moore*, 384 N.C. 194, 206 (2023). Rather, "[t]his Court has developed standing requirements out of a 'prudential self-restraint' that respects the separation of powers by narrowing the circumstances in which the judiciary will second guess the actions of the legislative and executive branches." *Id.* at 206–07 (quoting *Comm. to Elect Dan Forest v. Emps. Pol. Action Comm.*, 376 N.C. 558, 599 (2021)).

If a plaintiff does not have standing to assert a claim for relief, the trial court lacks subject matter jurisdiction over the claim. *Willowmere Cmty. Ass'n, Inc. v. City of Charlotte*, 370 N.C. 553, 561 (2018). "[S]tanding is measured at the time the pleadings are filed." *Quesinberry v. Quesinberry*, 196 N.C. App. 118, 123 (2009). In other words, a plaintiff must have standing at the time of filing to have standing at all. Subsequent events cannot confer standing retroactively. *See Simeon v. Hardin*, 339 N.C. 358, 369 (1994) ("When standing is questioned, the proper inquiry is whether an actual controversy existed 'at the time the pleading . . . is filed.' " (quoting *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 584 (1986))); *Sharpe*, 317 N.C. at 585 ("[T]he basic rule [is] that 'the jurisdiction of a court depends upon the state of affairs existing at the time it is invoked.' " (quoting *In re Peoples*, 296 N.C. 109, 144 (1978))).

In arguing that the Town lacked standing to file its complaint, both the dissent in the Court of Appeals and defendants emphasize that the Town Council did not adopt a resolution authorizing the action until two years *after* the complaint was filed. *Town of Midland*, 282 N.C. App. at 377 (Tyson, J., concurring in part and dissenting in part). According to them, the Town's failure to obtain the Town Council's approval prior to filing deprived the trial court of subject matter jurisdiction over the complaint. We disagree.

"In North Carolina there is no legal distinction between a *city*, a *town*, or a *village*. Each is a *municipality* . . . ." David M. Lawrence, *An Overview of Local Government*, *in County and Municipal Government in North Carolina* 5 (2d ed. 2014). Municipalities are entirely creations of the General Assembly and have only those powers delegated to them by legislative enactments.[3] *King v. Town of Chapel Hill*, 367 N.C. 400, 404 (2014). Such legislative enactments can take the form of local acts or laws of statewide application.

Many of the statewide laws granting powers to municipalities reside in Chapter 160A (titled "Cities and Towns") of the General Statutes. *See*, *e.g.*, N.C.G.S. § 160A-174(a) (2021) ("A city may by ordinance define, prohibit, regulate, or abate acts, omissions, or conditions, detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the city, and may define and abate nuisances."). At the time of the events giving rise to this litigation, Chapter 160A included extensive provisions conferring an array of powers on municipalities over zoning and other land development matters. In 2019, the General Assembly enacted legislation recodifying those provisions as Chapter 160D (titled "Local Planning and Development Regulation"). *See* An Act to Clarify, Consolidate, and Reorganize the Land-Use Regulatory Laws of the State, S.L. 2019-111, 2019 N.C. Sess. Laws 424, 439–539, *as amended by* An Act to Complete the Consolidation of Land-Use Provisions into One Chapter of the General Statutes as Directed by S.L. 2019-111, as Recommended by the General Statutes Commission, S.L. 2020-25, 2019 N.C. Sess. Laws 152, 165 (Reg. Sess. 2020).

Chapter 160A likewise endows municipalities with substantial authority to enforce their ordinances through criminal or civil proceedings. In general, if the text of an ordinance so provides, a violation of

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3. To create a municipality, "[t]he General Assembly incorporates an area by enacting a local bill consisting of a charter for the new city [or town or village] and a description of the . . . initial boundaries [of the city, town, or village]." Frayda S. Bluestein, *Incorporation*, *Annexation*, *and City-County Consolidation*, *in County and Municipal Government in North Carolina* 16 (2d ed. 2014).

the ordinance constitutes a Class 3 misdemeanor. N.C.G.S. §§ 14-4(a), 160A-175(b) (2021). On the civil side, "[a]n ordinance may provide that violation [of its requirements] shall subject the offender to a civil penalty to be recovered by the [municipality] in a civil action in the nature of debt if the offender does not pay the penalty within a prescribed period of time." *Id.* § 160A-175(c). When an ordinance prohibits a condition on or use of real property, a municipality may respond to violations by asking the proper court to issue "a mandatory or prohibitory injunction and order of abatement commanding the defendant to correct the unlawful condition . . . or cease the unlawful use." *Id.* § 160A-175(e). Because an ordinance "may provide, when appropriate, that each day's continuing violation shall be a separate and distinct offense," an offender who refuses to correct a violation risks multiple criminal charges and mounting civil penalties. *Id.* § 160A-175(g).

Of particular importance to this case are the mechanisms by which municipalities may exercise the regulatory and enforcement powers bestowed on them by the General Assembly. According to N.C.G.S. § 160A-12, "[a]ll powers, functions, rights, privileges, and immunities of the corporation shall be exercised by the city council and carried into execution as provided by the charter or the general law." N.C.G.S. § 160A-12 (2023). When "[a] power, function, right, privilege, or immunity . . . is conferred or imposed by charter or general law without directions or restrictions as to how it is to be exercised or performed[, it] shall be carried into execution as provided by ordinance or resolution of the city council." *Id.*

In arguing that N.C.G.S. § 160A-12 required the Town Council to adopt a resolution approving the lawsuit against defendants, both the dissent in the Court of Appeals and defendants cite *State ex rel. City of Albemarle v. Nance*, 266 N.C. App. 353 (2019). There a private attorney claiming to represent the city filed a lawsuit against the defendants alleging that their hotel constituted a public nuisance under Chapter 19 of the General Statutes. *City of Albemarle*, 266 N.C. App. at 354. The trial court granted the defendants' motion to dismiss the lawsuit because the lawsuit had not been authorized by a vote of the city council. *Id.* at 355. A panel of the Court of Appeals unanimously affirmed. *Id.* at 360–62. The city's ordinances stated that "the Council" could employ outside legal counsel. *Id.* at 359. Reading this ordinance provision alongside N.C.G.S. § 160A-12, the Court of Appeals concluded that, "[i]n order to bring suit through outside counsel, the city council must adopt a resolution." *Id.* at 361. Inasmuch as "[t]he City failed to follow the requirements of the statutes and ordinances in effect or to provide evidence of outside counsel's

authority to file suit on its behalf . . . [t]he trial court properly concluded [that] it lacked subject matter jurisdiction to address the City's claims against the [defendants]." *Id.* at 362.

This Court is not bound by *City of Albemarle*, but we do not read that decision to hold that a municipality's elected governing board must always act by resolution to authorize a lawsuit. Section 160A-12 allows the board to act "by ordinance or resolution." (Emphasis added.) As the Court of Appeals majority in this case correctly remarked, the city lost in *City of Albemarle* because, "[*p*]*ursuant to its ordinances*, [the city council] was required to adopt a resolution to bring suit through outside counsel." *Town of Midland*, 282 N.C. App. at 362 (emphasis added). Hence, even if we assume that *City of Albemarle* was rightly decided, no resolution by the Town Council was needed to authorize the lawsuit in this case if the MDO allowed the Town to file suit against defendants without one. We must therefore turn our attention to the text of the MDO.

"The rules applicable to the construction of statutes are equally applicable to the construction of municipal ordinances." *Cogdell v. Taylor*, 264 N.C. 424, 428 (1965). Accordingly, when a court is called upon to interpret a municipal ordinance, "[t]he basic rule is to ascertain and effectuate the intention of the municipal legislative body." *George v. Town of Edenton*, 294 N.C. 679, 684 (1978). If the words of the ordinance "are plain and unambiguous, the court need look no further" in search of legislative intent. *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment*, 354 N.C. 298, 304 (2001). On the other hand, "if the language is unclear, judicial construction may be required." *Id.* Judicial construction typically involves examining the ordinance's other provisions or the text of related ordinances for evidence of what the ambiguous provision was intended to accomplish. *See George*, 294 N.C. at 684 ("We must therefore consider this section of the ordinance as a whole, and the provisions *in pari materia* must be construed together[.]" (citations omitted)).

Here the key MDO provision in dispute reads in pertinent part:

> If payment [of a civil penalty] is not received or equitable settlement reached within thirty (30) days after demand for payment is made, the matter *shall be referred* to legal counsel for institution of a civil action in the appropriate division of the General Courts of Justice for recovery of the civil penalty. Provided, however, if the civil penalty is not paid

> within the time prescribed, the *Planning, Zoning, & Subdivision Administrator* may have a criminal summons or warrant issued against the violator.

Town of Midland, N.C., Dev. Ordinance art. 23, § 23.7-6 (2021) [hereafter nonpayment provision] (first emphasis added).

The use of the passive voice in the first sentence of the nonpayment provision creates the need for judicial interpretation. The first sentence declares that at a certain point the matter of nonpayment "shall be referred" to legal counsel for the filing of a lawsuit, but the text does not expressly assign responsibility for making the referral. *Id.* Given this omission, we must look to other parts of the MDO for guidance as we attempt to identify which official, if any, the Town Council contemplated would make the referral.

When the nonpayment provision's first and second sentences are read together, they strongly imply that the duty of making the referral belongs to the zoning administrator. The second sentence endows the zoning administrator with discretion over whether to pursue criminal charges against offenders who fail to pay their civil penalties. This is significant authority that the Town Council cannot have granted lightly. Unquestionably, then, the Town Council had the zoning administrator in mind when it adopted the nonpayment provision.

Other sections in Article 23 (titled "Administration and Enforcement") of the MDO reinforce this view. Perhaps most tellingly, subsection 23.2-1 provides: "*Unless specifically set forth otherwise in this ordinance*, the Town of Midland [zoning administrator] shall be the Enforcement Officer *with the duty of administering and enforcing the provisions of this Ordinance*." *Id.* § 23.2-1 (emphases added). Consistent with this general assignment of responsibility, the zoning administrator's primary duties listed in subsection 23.2-2 include "enforc[ing] the provisions of [Article 23]" and "us[ing] the remedies provided in [Article 23] to gain compliance." *Id.* § 23.2-2(H), (J). The act of referring nonpayment of civil penalties to the Town's attorney for the institution of a civil action certainly qualifies as an attempt to enforce Article 23 and obtain compliance with its provisions. Since the nonpayment provision does not direct anyone else to make the referral mandated by its first sentence, the duty of making that referral lies by default with the zoning administrator.

In arguing to the contrary, defendants assert *expressio unius est exclusio alterius*, "*i.e.*, the expression of one thing is the exclusion of another." *Baker v. Martin*, 330 N.C. 331, 337 (1991). Under this canon of statutory construction, "when a statute lists the situations to which

it applies, it implies the exclusion of situations not contained in the list." *Evans v. Diaz*, 333 N.C. 774, 780 (1993). Defendants note that various provisions in Article 23 expressly invest the zoning administrator with specific enforcement powers and duties. *E.g.*, Town of Midland, N.C., Dev. Ordinance art. 23, §§ 23.6-3 (zoning administrator may deny permits), 23.6-4 (zoning administrator may condition permits), 23.6-5 (zoning administrator may issue stop work orders), 23.6-6 (zoning administrator may revoke permits), 23.7-5 (zoning administrator must make written demand for payment of civil penalty). Consequently, according to defendants, "[h]ad the Town Council desired to delegate its authority to institute civil actions in zoning matters, it could have easily done so in the same manner as the other tasks assigned to the Zoning Administrator."

Canons of construction are interpretive guides, not metaphysical absolutes. They should not be applied to reach outcomes plainly at odds with legislative intent. We disagree with defendants' application of *expressio unius est exclusio alterius* to the nonpayment provision, in part because, as we have already remarked, subsection 23.2-1 unambiguously charges the zoning administrator with administering and enforcing Article 23 except where Article 23 expressly assigns a particular task to someone else. *See, e.g.*, *id.* § 23.5-4 (board of adjustment to hear appeal from NOV within thirty-six days of receiving appeal in writing). Moreover, defendants ignore the fact that other sections in Article 23 also employ the passive voice. For instance, under subsection 23.7-2, if a person who has violated the MDO "fails to take corrective action within the prescribed period of time, a civil penalty *may be imposed* . . . in the form of a citation." *Id.* § 23.7-2 (emphasis added). Were we to adopt the same approach to subsection 23.7-2 that defendants urge for the nonpayment provision, we would have to conclude that the use of the passive voice in subsection 23.7-2 means that the zoning administrator is prohibited from imposing the civil penalties authorized therein, a thoroughly implausible interpretation.

In their reply brief to this Court, defendants quote N.C.G.S. § 160D-402, which the General Assembly enacted in 2019 as part of its recodification of the statutes governing local government regulation of land development. Although N.C.G.S. § 160D-402 did not become law until after the Town filed its lawsuit in 2017, defendants maintain that the statute should inform our analysis.

Section 160D-402 sets out a nonexclusive list of duties that may be assigned to employees charged with administering and enforcing a county or municipal development ordinance. These duties include

"recommending bringing judicial actions against actual or threatened violations." N.C.G.S. § 160D-402(b) (2021). According to defendants, "[b]y enacting N.C.G.S. § 160D-402, the General Assembly has expressed its intent that municipalities may only delegate to zoning administrators the authority to 'recommend bringing judicial actions.' The Town has never had the authority to delegate to its Zoning Administrator the power to unilaterally initiate judicial actions."

Accepting defendants' reading of N.C.G.S. § 160D-402 for the sake of argument, we perceive no grounds for holding that the Town lacked standing to sue defendants. The nonpayment provision does not endow the zoning administrator with "the power to unilaterally initiate" civil actions to recover unpaid civil penalties. Under its terms, the zoning administrator merely refers the matter to the Town's attorney. It is the nonpayment provision itself—not the zoning administrator—that requires the Town's attorney to file a complaint against the offender.

The MDO authorized the Town to file suit against defendants without first obtaining approval of the Town Council. There is no merit to defendants' argument that the Town lacked standing.

B. Responsibility for Road Maintenance in Bethel Glen

[2] As explained above, a different panel of the Court of Appeals concluded in *Midland I* that defendants remained responsible for maintaining the roads in the Bethel Glen subdivision inasmuch as the Town "had not taken [that] responsibility . . . from [defendants]." *Midland I*, 2016 N.C. App. LEXIS 1351, at *17. Here the dissenting judge at the Court of Appeals attempted to revive the issue of defendants' ongoing responsibility for the roads, and defendants in their primary brief to this Court argue that the Court of Appeals majority erred by continuing to impose that duty on them.

The Court of Appeals majority considered itself bound by the earlier panel's ruling, observing that the panel had based its decision "on the same record relied upon by our dissenting colleague." *Town of Midland*, 282 N.C. App. at 365.

> This Court previously upheld the Town's notice of violation against [defendants] and concluded [defendants] have an "ongoing obligation to maintain the subdivision streets pursuant to [Town] ordinance." *In re Harrell*, 251 N.C. App. 526, 2016 WL 7984233, at *5 (emphasis added). This Court's prior determination that [defendants], and not the Town, are obligated

> to maintain the subdivision roads until the Town has approved a petition by [defendants] to assume responsibility, is binding on our decision today. *See N.C. Nat'l Bank v. Va. Carolina Builders*, 307 N.C. 563, 567, 299 S.E.2d 629, 631-32 (1983) ("Once a panel of the Court of Appeals has decided a question in a given case that decision becomes the law of the case and governs other panels which may thereafter consider the case. Further, since the power of one panel of the Court of Appeals is equal to and coordinate with that of another, a succeeding panel of that court has no power to review the decision of another panel on the same question in the same case.").

Id. (third alteration in original).

We agree with the Court of Appeals majority that it was bound by *Midland I*. Nothing in the record indicates that the Town agreed to accept responsibility for the roads in the Bethel Glen subdivision after the panel in *Midland I* issued its decision in 2016. Furthermore, the question of defendants' ongoing responsibility for the roads was not properly before the Court of Appeals in this case because defendants did not argue it in their brief to that tribunal. *See* N.C. R. App. P. 28(a) ("The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.").

IV. Conclusion

The Town complied with state law and the MDO when it filed suit against defendants over their failure to maintain the roads in the Bethel Glen subdivision. The Court of Appeals majority rightly determined that it was bound by the prior decision of another panel holding defendants responsible for those roads. We therefore affirm the judgment of the Court of Appeals.

AFFIRMED.

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

ASKEW v. CITY OF KINSTON

[385 N.C. 379 (2023)]

JOSEPH ASKEW; CHARLIE GORDON WADE III; AND CURTIS WASHINGTON

v.

CITY OF KINSTON, A MUNICIPAL CORPORATION

From N.C. Court of Appeals
22-407

From Lenoir
19CVS525

No. 55A23

ORDER

Defendant's motion to dismiss plaintiffs' appeal is denied. This Court retains jurisdiction over this matter to address whether the Court of Appeals erred in requiring plaintiffs to exhaust administrative remedies prior to bringing direct constitutional claims under Article I, Section 19. The other issues raised in plaintiffs' notice of appeal that include arguments neither considered nor decided by the Court of Appeals are dismissed ex mero motu.

By order of the Court in Conference, this the 18th day of October 2023.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 20th day of October 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

HOKE COUNTY BOARD OF EDUCATION, ET AL., PLAINTIFFS

AND

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, PLAINTIFF-INTERVENOR

AND

RAFAEL PENN, ET AL., PLAINTIFF-INTERVENORS

V.

STATE OF NORTH CAROLINA AND THE STATE BOARD OF EDUCATION, DEFENDANTS

AND

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION, REALIGNED DEFENDANT

AND

PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE, AND TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, INTERVENOR-DEFENDANTS

FROM N.C. COURT OF APPEALS
22-86, 23-788

From Wake
95CVS1158

NO. 425A21-3

ORDER

On the petition for discretionary review prior to a determination by the Court of Appeals filed by intervenor-defendants on 20 September 2023, the Court hereby allows the petition solely on the question of whether the trial court lacked subject matter jurisdiction to enter its order of 17 April 2023. *See Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580 (1986) ("The question of subject matter jurisdiction may be raised at any time, even in the Supreme Court.").

By order of the Court in Conference, this the 18th day of October 2023.

/s/ Allen, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of October 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

Justice BERGER concurring.

The premise of the dissent is that this Court already "resolved the question of subject-matter jurisdiction in [*Hoke County III*]."[1] The dissent is wrong.

Take, for example, the question of standing. My dissenting colleague previously served as the lawyer for some of the parties in this case, known as the Penn Intervenors.[2] Those parties, in filings while my dissenting colleague was their counsel, requested to intervene in this matter. The lawsuit, at that point, focused on educational deficiencies in rural counties in the eastern part of our State. The Penn Intervenors sought intervention to "enforce their constitutional rights to a sound basic education" against the Charlotte-Mecklenburg School System. Core to their rationale for intervention was that every public school district faces its own unique educational challenges and groups of students or school districts in one area of our state are ill-suited to address the educational deficiencies in others.

This raises questions that our Court has not yet addressed: If public school students or local school boards who are not parties to this case believe the remedial order does not sufficiently address the educational

1. "Because the distinction is meaningful, we refer to *Hoke County Board of Education v. State* as *Hoke County*, not *Leandro* [ ]. See discussion at *Hoke County Board of Education v. State*, 367 N.C. 156, 158 n.2, 749 S.E.2d 451, 453 n.2 (2013)." *Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 386, 480 n.1 (Berger, J., dissenting) (2022).

2. To be clear, not a lawyer for those parties in some other case, but the lawyer for them *in this case*.

failure in their districts, are they bound by the remedial order? If so, how were their rights adjudicated without their presence in the suit—an elementary principle of jurisdictional law. *See Martin v. Wilkes*, 490 U.S. 755, 759 (1989) ("[T]he general rule" is "that a person cannot be deprived of his legal rights in a proceeding to which he is not a party."). Moreover, if they are not bound by the remedial order and may bring their own claims (as the Penn Intervenors did in this case with my dissenting colleague as their counsel), how did the trial court have jurisdiction to enter a judgment purportedly adjudicating their rights? *See id.*

There are many other unresolved issues of subject matter jurisdiction as well. How did so many crucial issues get ignored when many of these issues were addressed at length in the *Hoke County III* dissent? *See Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 386, 477–536 (2022). The Court never explained.

However, as my dissenting colleague acknowledges, this Court rushed to complete its earlier opinion in this incredibly complex, novel case (one that has spanned decades) so that it could be released in November of last year. The failure to resolve these jurisdictional questions is not the first oversight from this Court's rush to judgment in *Hoke County III*. As other filings have acknowledged, there is another pending appeal at this Court, involving the same parties and related issues.

My dissenting colleague laments that subject matter is now being addressed because it will cause various harms to judicial integrity and "snuff out legal finality." Once again, we endure ad nauseum these fanciful protestations. But it is black letter law that courts cannot ignore potential defects in subject matter jurisdiction. "Where there is no jurisdiction of the subject matter the whole proceeding is void ab initio and may be treated as a nullity anywhere, at any time, and for any purpose." *High v. Pearce*, 220 N.C. 266, 271 (1941). Even if we again failed to address jurisdictional concerns, these issues could be raised later in a collateral attack on the trial court's order, causing tremendous chaos if steps are already being taken to execute the novel relief in the remedial order. *See Pulley v. Pulley*, 255 N.C. 423, 429 (1961).

In sum, the Legislative-Intervenors argued various jurisdictional theories in their briefs and arguments to this Court that were left unresolved. This court is duty-bound to address any potential subject matter jurisdiction issues, even those that are not raised by the parties. *In re Sauls*, 270 N.C. 180, 187 (1967). However, in its rush to publish an opinion in the prior matter, the majority declined to address fundamental subject matter jurisdiction questions. To be sure, these issues were

raised, but the majority chose to ignore the bedrock legal principle that courts must examine jurisdiction to act. Even legal neophytes understand that subject matter jurisdiction can never be waived and can be raised at any time. *See Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580 (1986).

Because these crucial issues of subject matter jurisdiction cannot be waived and must be addressed by this Court, it is a sound exercise of this Court's constitutional role to take this case and permit the parties to brief the various issues including standing, joinder of necessary parties, adverseness, intervention, and jurisdiction of the trial court to provide the requested relief, all of which are necessary jurisdictional prerequisites to execution of the trial court's remedial order.

Justice DIETZ and Justice ALLEN join in this concurring opinion.

Justice EARLS dissenting.

Legislative-Intervenors' bypass petition should be denied because it is substantively hollow and procedurally improper. This Court resolved the question of subject-matter jurisdiction in *Leandro IV*. *See Hoke Cty. Bd. of Educ. v. State*, 382 N.C. 386 (2022) ("*Leandro IV*"). In that case—just 11-months old—the Legislative-Intervenors raised the same arguments they do in their bypass petition: That the trial court lacked jurisdiction to remedy constitutional deficiencies in public education. *See id.* at 469-70. We examined that claim and "unequivocally rejected" it. *See id.* at 469-71.

Legislative-Intervenors could have asked us to reconsider our ruling at that time. In fact, North Carolina's Rules of Appellate Procedure gave them a specific mechanism to do so. *See* N.C. R. App. P. 31(a). They did not. And now, they seek a belated "do over"—a result foreclosed by our procedural rules and long-standing practice. *See*, *e.g.*, *Davis v. S. Ry. Co.*, 176 N.C. 186 (1918) (denying request to reconsider an earlier decision because the "only method" to do so was a "petition to rehear" and defendant had not timely filed one); *accord Newton v. State Highway Com.*, 194 N.C. 303 (1927). In short, the majority grants an untimely petition to reopen a settled question. Because I think that action is unsound in principle and destabilizing in practice, I dissent.

Our decision in *Leandro IV* shows that the issue of jurisdiction is not new to this case. The Legislative-Intervenors previously have raised the same jurisdictional arguments they now seek to raise in their bypass

petition. *See Leandro IV*, 382 N.C. at 391, 469-70. There, as here, they disputed the trial court's authority to order a statewide remedy because, in their view, that court never found a statewide constitutional violation. *Id.* We found those assertions "untimely, distortive, and meritless." *Id.* at 391.

The trial court, we explained, focused on "one foundational question": Whether North Carolina was complying with its "constitutional mandate to provide all children with the opportunity to receive a sound basic education." *Id.* at 398. To answer it, the court spent "several years" immersed in "fact finding, research, and hearings" on public education across the State. *Id.* And that was *before* the court held a "fourteen-month trial" where it heard from "over forty witnesses," sifted through "thousands of pages of exhibits," and considered the parties' arguments. *Id.* Based on its exhaustive, years-long review, the court concluded that "there were at-risk students failing to achieve a sound basic education statewide." *Id.* at 398-99. It included those findings in its final judgment. *Id.* at 400-01.

Since the trial court found a statewide constitutional violation, we explained, it had subject-matter jurisdiction to order a statewide remedy. *Id.* at 391, 398-401 (pointing to the trial court's Second and Third Memorandums of Decision); *id.* at 405-08 (noting four trial court orders). But the Legisative-Intervenors ignored the trial court's sound analysis and solid conclusion. They instead argued before us—as they do now in their petition—that "there has never been a finding" of a constitutional violation "beyond Hoke County." *See id.* at 471. We rebuffed that argument. And we went further, decrying it as "a fundamental misunderstanding of the history of this case and the State's constitutional obligations." *Id.*; *see also id.* at 470 ("Based on an abundance of clear and convincing evidence, the trial court repeatedly concluded that the State's *Leandro* violation was not limited to Hoke County but was pervasive statewide. Time and time again, the trial court observed that the evidence indicated that in way too many school districts across the state, thousands of children in the public schools have failed to obtain, and are not now obtaining a sound basic education as defined by and required by the *Leandro* decisions." (cleaned up)). Our holding in *Leandro IV* is the "law of the case"—we should reject Legislative-Intervenors' efforts to relitigate it.

Although parties waive some arguments if they do not timely object, subject-matter jurisdiction may be raised at any time. *See Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580 (1986). As we have explained:

> When the record clearly shows that subject matter jurisdiction is lacking, the Court will take notice and dismiss the action *ex mero motu*. Every court necessarily has the inherent judicial power to inquire into, hear and determine questions of its own jurisdiction, whether of law or fact, the decision of which is necessary to determine the questions of its jurisdiction.

Id. (cleaned up). But the calculus is different where—as here—this Court has already reached and resolved the issue. In that case, a dissatisfied party may not simply cry "jurisdiction" to reopen the dispute. Instead, we may properly revisit our decisions when a "direct authority" or "material point was overlooked" in our analysis, or the case has meaningfully changed since we last heard it. *See Watson v. Dodd*, 72 N.C. 240 (1875). If, for instance, new evidence or intervening developments alter the nature of the dispute and our subject-matter jurisdiction over it, then we may properly reexamine that question. *See Devereux v. Devereux*, 81 N.C. 12, 17 (1879). But a "partial change in the personnel of the Court affords no reason for a departure from the rule." *Weisel v. Cobb*, 122 N.C. 67, 69 (1898) (rejecting petition for rehearing because "neither the record nor the briefs disclose anything relating to the only points now before us that was not apparently considered when the former judgment was rendered").

A different approach would sow chaos and snuff out legal finality. If parties can reopen a case by casting their disagreement in the language of "jurisdiction," then our courts will be nothing but revolving doors and our decisions nothing but paper tigers. This case shows the danger of that approach. In substance, "[n]othing has changed" since *Leandro IV*: The "legal issues are the same; the evidence is the same; and the controlling law is the same." *See Harper*, 384 N.C. at 5 (Earls, J., dissenting). We already grappled with and resolved the question of subject matter jurisdiction in this case—nothing imperils that decision or requires us to revisit it. But by alchemizing its disagreement with *Leandro IV* into a "jurisdictional" issue, the majority gives itself a tool to rewrite—and litigants to resist—our earlier decisions. In my view, that move is destabilizing and unmoored from precedent.[1]

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1. *See also Gainesville & Alachua Cty. Hosp. Ass'n v. Atl. C. Co.*, 157 N.C. 460, 461 (1911) (declining to overturn earlier decision because "[t]here is no practical difference between this case and the one we formerly heard"); *Weston v. John L. Roper Lumber Co.*, 168 N.C. 98 (1914) (finding "no reason to reverse our former judgment" because the "grounds of error assigned in the petition are substantially the same as those argued and passed upon on the former hearing" and "no new fact has been called to our attention,

Moreover, granting this petition creates an end-run around established appellate procedure. Legislative-Intervenors—like all litigants before this Court—are bound by our Rules of Appellate Procedure. If Legislative-Intervenors had proper grounds to ask this Court to reconsider its decision in *Leandro IV*, they had the same option as every other litigant: To seek a rehearing under N.C. R. App. P. 31(a).[2] They did not. And now they cannot, as their request would be nine months too late. *See* N.C. R. App. P. 27(c) (The "Court *may not* extend the time for… filing… a petition for rehearing") (emphasis added).

Instead, Legislative-Intervenors repackage their request to rehear *Leandro IV* as a petition for discretionary review prior to determination by the Court of Appeals. Their filing makes clear their true goal: Again and again, Legislative-Intervenors urge this Court to revisit and reverse *Leandro IV*'s ruling on subject-matter jurisdiction. *See* Petition at 41, 42, 45, 47. By granting the petition, the majority allows Legislative-Intervenors to improperly—and belatedly—relitigate our precedent.

Mere months ago, the majority declared a Rule 31 petition to be the sole mechanism to revisit "alleged errors of law" in a "recently issued opinion." *See Harper v. Hall*, 384 N.C. 1, 3 (2023). A "petition to rehear," the majority explained, is "the appropriate method of obtaining redress from errors committed by this Court." *Id.* Now, for the second time in this case, it allows a party that "failed to seek rehearing" to "do exactly that." *See Hoke Cnty. Bd. of Educ. v. State*, 384 N.C. 8, 11 (order allowing State Controller's motion to reinstate writ of prohibition) (Earls, J., dissenting). Our procedural rules—as well as basic principles of *stare decisis*—forbid a party from "request[ing] a 'do over' with a newly constituted Court" to "obtain a different result." *Id.* By charting a different course, the majority elevates political expedience over the even-handed application of the law.

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and no new case or authority cited, and no new position assumed"); *Strunks v. S. R. Co.*, 188 N.C. 567, 568 (1924) (noting that "a party who loses in this Court may not have the case reheard by a second or third appeal" because "[o]ur former decisions have become the law of the case so far as the questions then presented and decided are concerned").

2. Indeed, our rules set a high bar for rehearing by requiring that the litigants secure the certifications of two disinterested attorneys that the case merits rehearing: A petition for rehearing "shall be accompanied by a certificate of at least two attorneys who for periods of at least five years, respectively, shall have been members of the bar of this State and who have no interest in the subject of the action and have not been counsel for any party to the action, that they have carefully examined the appeal and the authorities cited in the decision, and that they consider the decision in error on points specifically and concisely identified." N.C. R. App. P. 31(a).

Equally disturbing is the majority's lopsided treatment of the parties here. In March 2023, the majority "reinstat[ed] the writ of prohibition, until this Court has an opportunity to address the remaining issues in this case." *See Hoke Cnty.*, 384 N.C. 8, 9. In effect, that move reversed *Leandro IV* by barring lower courts from ordering the State to comply with its constitutional duties. Mere hours after this Court's order, the Legislative-Intervenors filed a Renewed Conditional Petition for Writ of Certiorari. The other parties responded to that petition and urged this Court to deny it. They also sought to clarify the basis and scope of our decision to revive the writ of prohibition. To that end, some parties asked us to identify the "remaining issues in this case" and order briefing on them. *See Response of State of North Carolina*, dated 10 March 2023, at pp. 1, 3, 4.

Yet we did nothing. For months, this Court let those filings languish on our docket. But while the majority ignored those requests, it jumps at Legislative-Intervenors' wish to revisit *Leandro IV*. Although this Court is sworn to "administer justice without favoritism to anyone or to the State," *see* N.C.G.S. § 11-11 (2022), the majority's asymmetric treatment here is without justification.

And the Court's actions stretch beyond this case. As other jurists have explained, a court's legitimacy is "earned over time." *See Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2350 (Breyer, Sotomayor, and Kagan, JJ., dissenting). But it "can be destroyed much more quickly." *Id.* That is because our authority largely depends on the "public's willingness to respect and follow [our] decisions." *See Harper*, 384 N.C. at 7 (Earls, J., dissenting) (cleaned up). And the public's trust, in turn, hinges "on the fragile confidence that our jurisprudence will not change with the tide of each election." *Id.* When our decisions shift with the political headwinds, it "invite[s] the view that this institution is little different from the two political branches of the Government." *See Dobbs*, 142 S. Ct. at 2350 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (cleaned up).

That is especially true in "hotly contested cases" like this one. *Id.* at 2349. Beyond question, public education is an important issue that sparks strong beliefs. And when this Court rapidly reverses course on that topic, it "calls into question its commitment to legal principle." *Id.* It signals to North Carolinians "that their constitutional protections h[a]ng by a thread"—that "a new majority" can "by dint of numbers alone expunge their rights." *Id.* at 2350. It poisons the public's faith in us. *See Harper*, 384 N.C. at 6 (Earls, J., dissenting).

Make no mistake: By granting the Legislative-Intervenors' petition, the majority agrees to revisit *Leandro IV* and ignore what we said just 11 months ago. By doing so, it tells "the public that our decisions are fleeting." *See id.* at 7. Across every meaningful metric, we have already resolved this dispute: The "legal issues are the same; the evidence is the same; and the controlling law is the same." *Id.* at 5. The only real difference: The "political composition of the Court." *Id.* Yet again, the majority signals that "our precedent is only as enduring as the terms of the justices who sit on the bench." *Id.* at 7. And yet again, I dissent.

Justice RIGGS joins in this dissenting opinion.

STATE v. HINES

[385 N.C. 389 (2023)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 22-824
v.	
WILLIE RAY HINES	From Lenoir 14CRS51201

No. 214P23

ORDER

Defendant's petition for discretionary review is allowed for the limited purpose of vacating the decision of the Court of Appeals and remanding the matter to that court for consideration of defendant's arguments based on the existing trial court record.

By order of the Court in Conference, this the 18th day of October 2023.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 20th day of October 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

STATE v. JONES

[385 N.C. 390 (2023)]

STATE OF NORTH CAROLINA	From N.C. Court of Appeals 22-518
v.	
ERNEST PAUL JONES	From Columbus 19CRS478

No. 16A23

ORDER

Counsel for defendant informed the Court that defendant passed away on 9 September 2023 and moved to abate the action, dismiss the appeal, and vacate the trial court's judgment. In response, the State consented to abating the action and dismissing the appeal but argued that there was no need to vacate the trial court's judgment because "[t]he Court of Appeals' opinion effectively vacated the judgment . . ." Counsel for defendant then filed a conditional motion asking that if this Court did not vacate the trial court's judgment that it dissolve the temporary stay and writ of supersedeas.

In response, the Court takes the following actions: the action is abated and the appeal is dismissed. The Court of Appeals' opinion and the trial court's judgment in this matter are both vacated. Defendant's conditional motion to dissolve the temporary stay and writ of supersedeas is dismissed as moot.

By order of the Court in Conference, this the 3rd day of October 2023.

/s/ Riggs, J.
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 4th day of October 2023.

s/Grant E. Buckner

Grant E. Buckner
Clerk of the Supreme Court

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

20 OCTOBER 2023

3P23-2	State v. Joseph Edwards Teague, III	Def's Pro Se Motion to Reconsider Motion for Temporary Stay, Petition for Writ of Supersedeas, and PDR (COA21-10)	Dismissed **09/18/2023**
16A23	State v. Ernest Paul Jones	1. Def's Motion to Abate Appeal (COA22-518) 2. Def's Conditional Motion to Dissolve Temporary Stay and Writ of Supersedeas	1. Special Order **10/03/2023** 2. Special Order **10/03/2023**
18A14-3	State v. Paris Jujuan Todd	1. Def's Motion for Temporary Stay (COA22-680) 2. Def's Petition for Writ of Supersedeas 3. Def's Amended Motion for Temporary Stay 4. Def's Amended Petition for Writ of Supersedeas 5. Def's PDR Under N.C.G.S. § 7A-31 6. Def's Petition for Writ of Certiorari to Review Decision of the COA	1. Dismissed **10/10/2023** 2. Dismissed **10/10/2023** 3. 4. 5. 6. **Dietz, J., recused** **Riggs, J., recused**
55A23	Joseph Askew; Charlie Gordon Wade III; and Curtis Washington v. City of Kinston, a Municipal Corporation	1. Plts' (Joseph Askew and Curtis Washington) Notice of Appeal Based Upon a Constitutional Question (COA22-407) 2. Def's Motion to Dismiss Appeal	1. Special Order 2. Special Order
63P23	Azevedo v. Onslow County DSS	1. Petitioner's Motion for Temporary Stay (COA22-376) 2. Petitioner's PDR Under N.C.G.S. § 7A-31	1. Allowed **02/27/2023** Dissolved 2. Denied
66P23-2	Ed L. Harris v. North Carolina Department of Adult Correction	1. Plt's Pro Se Motion for Complaint 2. Plt's Pro Se Motion for Complaint	1. Dismissed 2. Dismissed
74P23	State v. Roland M. Petersen	Def's Pro Se Petition for Writ of Mandamus	Dismissed

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

20 OCTOBER 2023

79P23	James Chandler Abbott, et al. v. Michael C. Abernathy, et al.	1. Defs' (Rodney and Lynne Worthington) Motion for Temporary Stay (COA22-162) 2. Defs' (Rodney and Lynne Worthington) Petition for Writ of Supersedeas 3. Defs' (Rodney and Lynne Worthington) PDR Under N.C.G.S. § 7A-31	1. Allowed **03/16/2023** Dissolved 2. Denied 3. Denied
85P23	State v. Michael Lawrence Martin	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA22-428) 2. Def's PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Deem Notice of Appeal and PDR Timely Filed 4. Def's Petition in the Alternative for Writ of Certiorari to Review Decision of the COA 5. State's Motion to Dismiss Appeal	1. --- 2. Dismissed 3. Denied 4. Denied 5. Allowed
104P23-2	State v. Markus Odon McCormick	1. Def's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-690) 2. Def's Pro Se PDR Under N.C.G.S. § 7A-31 3. Def's Pro Se Motion for Appropriate Relief 4. Def's Pro Se Motion to Amend or Correct Record on Appeal 5. Def's Pro Se Motion to Compel Appellate Counsel to Surrender Complete Case File 6. Def's Pro Se Motion to Add Issues Presented in Appeal Involving Substantial Constitutional Questions 7. Def's Pro Se Petition for Writ of Habeas Corpus 8. Def's Pro Se Motion for Speedy Appeal 9. Def's Pro Se Motion to Dismiss Indictments on Grounds of Lack of Subject Matter Jurisdiction	1. 2. 3. 4. 5. 6. 7. Denied **09/26/2023** 8. 9.
108P23	D&B Marine, LLC, a Rhode Island Limited Liability Company v. AIG Property Casualty Company f/k/a Chartis Property Casualty Company	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA22-546) 2. Def's Motion to Admit John F. O'Connor Pro Hac Vice	1. Denied 2. Dismissed as moot **Allen, J., recused** **Riggs, J., recused**

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

20 OCTOBER 2023

109P01-3	State v. William Dawson	Def's Pro Se Petition for Writ of Mandamus	Denied **Riggs, J., recused**
114P23	State v. Johnny Ray Izard	Def's PDR Under N.C.G.S. § 7A-31 (COA22-312)	Denied
117P23	State v. Elijah Esatas Pacheco	Def's Pro Se Motion for Prayer for Review	Dismissed
131P23	State v. Torie Eugene Cuthbertson	Def's PDR Under N.C.G.S. § 7A-31 (COA22-92)	Denied
135P23	Katherine Aimee Brosnan v. George Geoffrey Cramer	Plt's PDR Under N.C.G.S. § 7A-31 (COA22-654)	Denied **Riggs, J., recused**
136P23	State v. Mitchell Deangelo Holmes	Def's PDR Under N.C.G.S. § 7A-31 (COA22-783)	Denied **Riggs, J., recused**
146P23	Timothy Omar Hankins, Sr. v. New Hanover County Clerk of Court District Court Division, et al.	1. Petitioner's Pro Se Motion for Dismissal 2. Petitioner's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
156P23	Raleigh G. Rogers v. Wells Fargo Bank, N.A.	1. Plt's Pro Se Notice of Appeal Based Upon a Constitutional Question (COA22-978) 2. Plt's Pro Se PDR Under N.C.G.S. § 7A-31 3. Def's Motion to Dismiss Appeal	1. — 2. Denied 3. Allowed **Riggs, J., recused**
157P23	Brian Lambeth v. Amanda Story	1. Def's Pro Se Motion for Review of Custody Order 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
159P23	State v. Carlton Craig Harris	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA22-728) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal 4. Def's Motion to Amend Notice of Appeal and PDR	1. — 2. Denied 3. Allowed 4. Allowed

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

20 OCTOBER 2023

163P23	Jasmine E. Golden v. Amazon	1. Plt's Pro Se Petition to Review Orders of Superior Court, Guilford County 2. Plt's Pro Se Petition to Move Civil Actions to Alamance County and Out of Jurisdiction of Guilford County Superior Court 3. Plt's Pro Se Motion for PDR 4. Plt's Pro Se Motion to Withdraw Petition to Move Civil Actions to Alamance County and Out of Jurisdiction of Guilford County Superior Court	1. Dismissed Outstanding Fees Waived 2. Withdrawn 3. Dismissed 4. Allowed
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** Dissolved 2. Dismissed as moot 3. Denied **Riggs, J., recused**
179P23	Jobel LLC, Jack Boots v. Jessica Godwin	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of the COA (COAP23-256) 2. Def's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
181P23	State v. Damian Lewis Furtch	Def's PDR Under N.C.G.S. § 7A-31 (COA22-643)	Denied
182P23	In the Matter of the Foreclosure of a Deed of Trust Executed by Ramon Almanzar Dated May 8, 2006 and Recorded in Book 11946, Page 2377, Wake County Registry, to W. Thurston Debnam, Jr., Trustee	Respondent's PDR Under N.C.G.S. § 7A-31 (COA22-911)	Denied
186P23-2	City of High Point v. Loving Care Cremations, LLC	Def's Pro Se Motion for Rehearing	Dismissed
188P23	James O. Bradley v. Gov. Roy Cooper, et al.	Petitioner's Pro Se Motion for PDR	Denied

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

20 OCTOBER 2023

189P23-2	State v. Travis Baxter	1. Def's Pro Se Motion for Temporary Stay 2. Def's Pro Se Petition for Writ of Supersedeas	1. Dismissed **09/11/2023** 2. Dismissed **09/11/2023**
196P23	Kienus Perez Boulware v. the University of North Carolina Board of Governors, ex rel. Winston-Salem State University Board of Trustees	Petitioner's PDR Under N.C.G.S. § 7A-31 (COA22-840)	Denied
198A22	Surgeon, et al. v. TKO Shelby, et al.	Plts' Motion to Amend Record on Appeal	Allowed **09/01/2023**
202P23	State v. Jerry Mitchell Banks	Def's PDR Under N.C.G.S. § 7A-31 (COA22-317)	Denied
202PA22	State v. Kenneth Louis Walker	Def's Motion to Postpone Oral Argument	Denied **10/11/2023**
204P23	Ganna Shepenyuk v. Youssef Abdelilah	1. Plt's Motion for Temporary Stay (COA22-702) 2. Plt's Petition for Writ of Supersedeas 3. Plt's PDR Under N.C.G.S. § 7A-31 4. Plt's Motion to Proceed *In Forma Pauperis* 5. Plt's Motion for Consideration of Blog Post	1. Denied **08/18/2023** 2. Denied 3. Denied 4. Allowed 5. Allowed
205P23-2	Travis Wayne Baxter v. North Carolina State Highway Patrol Troop F District V, et al.	1. Plt's Pro Se Motion for Temporary Stay (COA23-605) 2. Plt's Pro Se Petition for Writ of Supersedeas	1. Denied **09/11/2023** 2. Denied **09/11/2023**
206PA23	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. Dissolved **09/07/2023** 2. Allowed **09/07/2023** 3. Allowed **09/07/2023** **Riggs, J., recused**
206P21	Town of Apex v. Beverly L. Rubin	Plt's PDR Under N.C.G.S. § 7A-31 (COA20-305)	Allowed

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

20 OCTOBER 2023

207P23	State v. Dazis Davante Bonds	Def's PDR Under N.C.G.S. § 7A-31 (COA22-920)	Denied
209P23	State v. Travis Baxter	1. Def's Pro Se Motion for Appeal Involving Constitutional Question 2. Def's Pro Se Motion for Temporary Stay 3. Def's Pro Se Petition for Writ of Supersedeas	1. Dismissed *ex mero motu* 2. Dismissed **09/11/2023** 3. Dismissed **09/11/2023**
210P23	State v. William Kyle Lytle	Def's Pro Se PDR Under N.C.G.S. § 7A-31 (COA22-968)	Denied
211P23	Kenneth E. French v. Highland Paving Co. LLC, John W. McCauley (CEO), Albert O. McCauley (Partner), and Brian Raynor (Manager)	Plt's Pro Se Motion for PDR (COA22-1073)	Dismissed
213A23	State v. Ryan Pierre Brown	1. Def's Notice of Appeal Based Upon a Dissent (COA22-525) 2. Def's Motion to Withdraw Counsel and Appoint the Office of the Appellate Defender 3. Def's Amended Motion to Withdraw and Appoint the Office of the Appellate Defender 4. Def's Notice of Appeal Based Upon a Dissent	1. Withdrawn 2. Dismissed as moot **09/01/2023** 3. Allowed **09/01/2023** 4. --- **Riggs, J., recused**
214P23	State v. Willie Ray Hines	Def's PDR Under N.C.G.S. § 7A-31 (COA22-824)	Special Order
217P23	State v. Clyde Junior Meris	Def's Pro Se Motion for Appeal (COAP23-395)	Dismissed **09/01/2023**
223P23	Tyqashia Sellers v. United States	1. Plt's Pro Se Petition for Writ of Certiorari 2. Plt's Pro Se Motion to Proceed *In Forma Pauperis* 3. Plt's Pro Se Motion to Appoint Counsel	1. Denied 2. Allowed 3. Dismissed as moot

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224P23	State v. Darnell W. King	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Wake County 2. Def's Pro Se Motion to Proceed *In Forma Pauperis* 3. Def's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Allowed 3. Dismissed
226P23	State v. Oeun San	Def's PDR Under N.C.G.S. § 7A-31 (COA22-664)	Denied
227P23	Jasmine E. Golden v. North Carolina Agricultural and Technical State University	1. Plt's Pro Se Motion for PDR 2. Plt's Pro Se Motion to Appoint Counsel	1. Dismissed 2. Dismissed as moot
228P23	Jordan Mitchell v. Sheriff Danny Rogers/ DA John Stone	1. Plt's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Guilford County 2. Plt's Pro Se Motion to Appoint Counsel 3. Plt's Pro Se Motion for Subpoena	1. Dismissed 2. Dismissed as moot 3. Dismissed
230P23	James Opleton Bradley v. Douglas B. Sasser	1. Plt's Pro Se Motion for Appeal 2. Plt's Pro Se Motion to Proceed *In Forma Pauperis*	1. Dismissed 2. Allowed
232P23	Abbott, et al. v. Abernathy, et al.	1. Defs' (Rodney and Lynne Worthington) Motion for Temporary Stay 2. Defs' (Rodney and Lynne Worthington) Petition for Writ of Supersedeas 3. Defs' PDR Under N.C.G.S. § 7A-31	1. Allowed **09/15/2023** 2. 3.
234P23	State v. Elwood Jo Cephus	Def's Pro Se Motion for PDR (COA22-886)	Denied
235P23	Thurman Crofton Savage v. N.C. Department of Transportation	1. Petitioner's Motion for Temporary Stay (COA22-673) 2. Petitioner's Petition for Writ of Supersedeas 3. Petitioner's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/21/2023** 2. 3.

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238A23	State v. Pedro Isaias Calderon	1. State's Motion for Temporary Stay (COA22-822) 2. State's Petition for Writ of Supersedeas 3. Def's Motion to Withdraw Attorney of Record and Appoint the Appellate Defender 4. State's Notice of Appeal Based Upon a Dissent 5. State's PDR as to Additional Issues 6. Def's PDR Under N.C.G.S. § 7A-31	1. Allowed **09/20/2023** 2. Allowed **09/28/2023** 3. Allowed **09/25/2023** 4. 5. 6.
251P23	State v. Fredrick L. Canady	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Robeson 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 **Berger, J., recused**
254P23	In re A.E., A.E., B.E., C.E., K.E.	1. Respondents' Motion for Temporary Stay (COA23-28) 2. Respondents' PDR Under N.C.G.S. § 7A-31	1. Allowed **10/02/2023** 2. **Riggs, J., recused**
255P23	Jessica Robinson v. Whitne Robinson	1. Def's Pro Se Emergency Ex Parte Petition for Writ of Supersedeas (COAP23-627) 2. Def's Pro Se Motion for Stay of Execution	1. Denied **10/03/2023** 2. Denied **10/03/2023**
258P23	State v. Eric Wayne Wright	1. State's Motion for Temporary Stay (COA22-996) 2. State's Petition for Writ of Supersedeas	1. Allowed **10/04/2023** 2. **Riggs, J., recused**
266P18-4	State v. Charles Antonio Means	Def's Pro Se Petition for Writ of Mandamus	Denied
278PA21	State v. Fernando Alvarez	Def's Motion to Postpone Oral Argument	Allowed **09/13/2023** **Dietz, J., recused**

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281P06-14	Joseph E. Teague, Jr., P.E., C.M. v. N.C. Department of Transportation, J.E. Boyette, Secretary	1. Plt's Pro Se Motion for Appropriate Relief (COA05-522) 2. Plt's Pro Se Motion for Sanctions 3. Plt's Pro Se Motion to Rehear 4. Plt's Pro Se Motion to Consider Additional Evidence	1. Dismissed 2. Dismissed 3. Dismissed 4. Dismissed
358P22	State v. Darius Jamal Harris-Allen	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA22-87) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
376P22	State v. Raymond Woodley	1. Def's Notice of Appeal Based Upon a Constitutional Question (COA21-670) 2. Def's PDR Under N.C.G.S. § 7A-31 3. State's Motion to Dismiss Appeal	1. --- 2. Denied 3. Allowed
410P18-2	Town of Apex v. Beverly L. Rubin	1. Plt's PDR Under N.C.G.S. § 7A-31 (COA20-304) 2. Def's Conditional PDR N.C.G.S. § 7A-31	1. Allowed 2. Allowed
412P13-6	Henry Clifford Byrd, Sr. v. Superintendent John Sapper	1. Petitioner's Pro Se Motion for Complaint for Invidious Infliction of Racial Equity in the Enforcement of Constitutional Standards (COA17-288) 2. Petitioner's Pro Se Petition for Writ of Habeas Corpus	1. Dismissed **09/22/2023** 2. Denied **09/22/2023**
417P21-3	Kenneth Lewis Powell, Jr. v. N. Lorrin Freeman, District Attorney	Plt's Pro Se Motion for Complaint (COAP21-195)	Dismissed

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425A21-3	Hoke County Board of Education; et al., Plaintiffs and Charlotte-Mecklenburg Board of Education, Plaintiff-Intervenor and Rafael Penn, et al., Plaintiff-Intervenors v. State of North Carolina and the State Board of Education, Defendants and Charlotte-Mecklenburg Board of Education, Realigned Defendant and Philip E. Berger, in his official capacity as President Pro Tempore of the North Carolina Senate, and Timothy K. Moore, in His Official Capacity as Speaker of the North Carolina House of Representatives, Intervenor-Defendants	1. Legislative-Intervenors' PDR Prior to a Determination by the COA (COA23-788) 2. Plt-Intervenors' (Rafael Penn, et al.) Motion to Admit Maya Brodziak Pro Hac Vice 3. Plt-Intervenors' (Rafael Penn, et al.) Motion to Admit David Hinojosa Pro Hac Vice 4. Plt-Intervenors' (Rafael Penn, et al.) Motion to Admit Chavis Jones Pro Hac Vice 5. Plt-Intervenors' (Rafael Penn, et al.) Motion to Admit Michael Robotti Pro Hac Vice	1. Special Order 2. Allowed **10/09/2023** 3. Allowed **10/09/2023** 4. Allowed **10/09/2023** 5. Allowed **10/09/2023**
436PA13-5	Lake, et al. v. State Health Plan for Teachers and State Employees, et al.	Defs' Petition for Writ for Prohibition	Denied
438P09-5	Darron Jermaine Jones v. Benjamin Carver	Plt's Pro Se Petition for Writ of Habeas Corpus (COA08-1582)	Denied **09/01/2023**
479P11-3	State v. Charles O'Brien Teague	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Randolph 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
510A99-3	State v. Daniel Cummings, Jr.	Def's Petition for Writ of Certiorari to Review Order of Superior Court, Robeson County	Denied

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524P20-2	State v. William Charles Melton	1. Def's Pro Se Petition for Writ of Certiorari to Review Order of Superior Court, Jones 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 **Dietz, J., recused**
537P20-2	Joyce Williams, as Personal Representative of the Estate of Ruth Hedgecock-Jones v. Maryfield, Inc. d/b/a Pennybyrn at Maryfield	Plt's PDR Under N.C.G.S. § 7A-31 (COA22-785)	Denied **Berger, J., recused** **Dietz, J., recused**
554P07-4	State v. Percy Allen Williams, Jr.	Def's Pro Se Motion to Correct Judgment	Denied **Dietz, J., recused** **Riggs, J., recused**
580P05-30	In re David Lee Smith	1. Def's Pro Se Motion for Emergency Class-Action Application for Writ of Mandamus Nonviolent Prisoner Sentencing Consolidation (COA04-1033) 2. Def's Pro Se Alternative Motion for Emergency Demand for En Banc Rehearing of Pro Se Petition 3. Def's Pro Se Emergency Petition for Writ of Mandamus Causing Consolidation 4. Def's Pro Se Motion for Emergency En Banc Court Review of Mandamus Action	1. Denied 2. Dismissed 3. Denied 4. Denied **Riggs, J., recused**

ORDER AMENDING THE RULES OF APPELLATE PROCEDURE

Pursuant to Article IV, Section 13(2), of the Constitution of North Carolina, the Court hereby amends the North Carolina Rules of Appellate Procedure. This order affects Rules 15, 21, 22, 23, 28, 28.1 (new), and 31.

* * *

Rule 15. Discretionary Review on Certification by Supreme Court under N.C.G.S. § 7A-31

(a) **Petition of Party**. Either prior to or following determination by the Court of Appeals of an appeal docketed in that court, any party to the appeal may in writing petition the Supreme Court upon any grounds specified in N.C.G.S. § 7A-31 to certify the cause for discretionary review by the Supreme Court; except that a petition for discretionary review of an appeal from the Industrial Commission, the North Carolina State Bar, the Property Tax Commission, the Board of State Contract Appeals, or the Commissioner of Insurance may only be made following determination by the Court of Appeals; and except that no petition for discretionary review may be filed in any post-conviction proceeding under Article 89 of Chapter 15A of the General Statutes, or in valuation of exempt property under Chapter 1C of the General Statutes.

(b) **Petition of Party—Filing and Service**. A petition for review prior to determination by the Court of Appeals shall be filed with the clerk of the Supreme Court and served on all other parties within fifteen days after the appeal is docketed in the Court of Appeals. For cases that arise from the Industrial Commission, a copy of the petition shall be served on the Chair of the Industrial Commission. A petition for review following determination by the Court of Appeals shall be similarly filed and served within fifteen days after the mandate of the Court of Appeals has been issued to the trial tribunal. Such a petition may be contained in or filed with a notice of appeal of right, to be considered by the Supreme Court in the event the appeal is determined not to be of right, as provided in Rule 14(a). The running of the time for filing and serving a petition for review following determination by the Court of Appeals is terminated as to all parties by the filing by any party within such time of a petition for rehearing under Rule 31 of these rules, and the full time for filing and serving such a petition for review thereafter commences to run and is computed as to all parties from the date of entry by the Court of Appeals of an order denying the petition for rehearing. If a timely petition for review is filed by a party, any other party may file a petition for review within ten days after the first petition for review was filed.

(c) **Petition of Party—Content**. The petition shall designate the petitioner or petitioners and shall set forth plainly and concisely the factual and legal basis upon which it is asserted that grounds exist under N.C.G.S. § 7A-31 for discretionary review. The petition shall state each issue for which review is sought and shall be accompanied by a copy of the opinion of the Court of Appeals when filed after determination by that court. No supporting brief is required, but supporting authorities may be set forth briefly in the petition.

(d) **Response**. A response to the petition may be filed by any other party within ten days after service of the petition upon that party. No supporting brief is required, but supporting authorities may be set forth briefly in the response. If, in the event that the Supreme Court certifies the case for review, the respondent would seek to present issues in addition to those presented by the petitioner, those additional issues shall be stated in the response. A motion for extension of time is not permitted.

(e) **Certification by Supreme Court—How Determined and Ordered**.

(1) **On Petition of a Party**. The determination by the Supreme Court whether to certify for review upon petition of a party is made solely upon the petition ~~and,~~ any response thereto, and any briefs filed under Rule 28.1, and is made without oral argument.

(2) **On Initiative of the Court**. The determination by the Supreme Court whether to certify for review upon its own initiative pursuant to N.C.G.S. § 7A-31 is made without prior notice to the parties and without oral argument.

(3) **Orders; Filing and Service**. Any determination to certify for review and any determination not to certify made in response to a petition will be recorded by the Supreme Court in a written order. The clerk of the Supreme Court will forthwith enter such order, deliver a copy thereof to the clerk of the Court of Appeals, and mail copies to all parties. The cause is docketed in the Supreme Court upon entry of an order of certification by the clerk of the Supreme Court.

(f) **Record on Appeal**.

(1) **Composition**. The record on appeal filed in the Court of Appeals constitutes the record on appeal for review by the Supreme Court. However, the Supreme Court may note de novo any deficiencies in the record on appeal

and may take such action in respect thereto as it deems appropriate, including dismissal of the appeal.

(2) **Filing; Copies**. When an order of certification is filed with the clerk of the Court of Appeals, he or she will forthwith transmit the original record on appeal to the clerk of the Supreme Court. The clerk of the Supreme Court will procure or reproduce copies thereof for distribution as directed by the Court. If it is necessary to reproduce copies, the clerk may require a deposit by the petitioner to cover the costs thereof.

(g) **Filing and Service of Briefs**.

(1) **Cases Certified Before Determination by Court of Appeals**. When a case is certified for review by the Supreme Court before being determined by the Court of Appeals, the times allowed the parties by Rule 13 to file their respective briefs are not thereby extended. If a party has filed its brief in the Court of Appeals and served copies before the case is certified, the clerk of the Court of Appeals shall forthwith transmit to the clerk of the Supreme Court the original brief and any copies already reproduced for distribution, and if filing was timely in the Court of Appeals this constitutes timely filing in the Supreme Court. If a party has not filed its brief in the Court of Appeals and served copies before the case is certified, the party shall file its brief in the Supreme Court and serve copies within the time allowed and in the manner provided by Rule 13 for filing and serving in the Court of Appeals.

(2) **Cases Certified for Review of Court of Appeals Determination**s. When a case is certified for review by the Supreme Court of a determination made by the Court of Appeals, the appellant shall file a new brief prepared in conformity with Rule 28 in the Supreme Court and serve copies upon all other parties within thirty days after the case is docketed in the Supreme Court by entry of its order of certification. The appellee shall file a new brief in the Supreme Court and serve copies upon all other parties within thirty days after a copy of appellant's brief is served upon the appellee. An appellant may file and serve a reply brief as provided in Rule 28(h).

(3) **Copies**. The clerk of the Supreme Court will reproduce copies of the briefs for distribution as directed by the

Supreme Court. The clerk may require a deposit by any party to cover the costs of reproducing copies of its brief. In civil appeals **in forma pauperis** a party need not pay the deposit for reproducing copies.

(4) **Failure to File or Serve**. If an appellant fails to file and serve its brief within the time allowed by this Rule 15, the appeal may be dismissed on motion of an appellee or upon the Court's own initiative. If an appellee fails to file and serve its brief within the time allowed by this Rule 15, it may not be heard in oral argument except by permission of the Court.

(h) **Discretionary Review of Interlocutory Orders**. An interlocutory order by the Court of Appeals, including an order for a new trial or for further proceedings in the trial tribunal, will be certified for review by the Supreme Court only upon a determination by the Court that failure to certify would cause a delay in final adjudication which would probably result in substantial harm to a party.

(i) **Appellant, Appellee Defined**. As used in this Rule 15, the terms "appellant" and "appellee" have the following meanings:

(1) With respect to Supreme Court review prior to determination by the Court of Appeals, whether on petition of a party or on the Court's own initiative, "appellant" means a party who appealed from the trial tribunal; "appellee" means a party who did not appeal from the trial tribunal.

(2) With respect to Supreme Court review of a determination of the Court of Appeals, whether on petition of a party or on the Court's own initiative, "appellant" means the party aggrieved by the determination of the Court of Appeals; "appellee" means the opposing party; provided that, in its order of certification, the Supreme Court may designate either party an appellant or appellee for purposes of proceeding under this Rule 15.

* * *

Rule 21. Certiorari

(a) **Scope of the Writ**.

(1) **Review of the Judgments and Orders of Trial Tribunals**. The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit

review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.

(2) **Review of the Judgments and Orders of the Court of Appeals**. The writ of certiorari may be issued by the Supreme Court in appropriate circumstances to permit review of the decisions and orders of the Court of Appeals when the right to prosecute an appeal of right or to petition for discretionary review has been lost by failure to take timely action, or for review of orders of the Court of Appeals when no right of appeal exists.

(b) **Petition for Writ—to Which Appellate Court Addressed**. Application for the writ of certiorari shall be made by filing a petition therefor with the clerk of the court of the appellate division to which appeal of right might lie from a final judgment in the cause by the tribunal to which issuance of the writ is sought.

(c) **Petition for Writ—Filing and Service; Content**. The petition shall be filed without unreasonable delay and shall be accompanied by proof of service upon all other parties. For cases which arise from the Industrial Commission, a copy of the petition shall be served on the Chair of the Industrial Commission. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the reasons why the writ should issue; and certified copies of the judgment, order, or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk will docket the petition.

(d) **Response; Determination by Court**. Within ten days after service of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response, ~~and~~ any supporting items, and any briefs filed under Rule 28.1. Except as provided by Rule 28.1, no~~No~~ briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

(e) **Petition for Writ in Post-conviction Matters—to Which Appellate Court Addressed**. Petitions for writ of certiorari to review

orders of the trial court denying motions for appropriate relief upon grounds listed in N.C.G.S. § 15A-1415(b) by persons who have been convicted of murder in the first degree and sentenced to death shall be filed in the Supreme Court. In all other cases such petitions shall be filed in and determined by the Court of Appeals, and the Supreme Court will not entertain petitions for certiorari or petitions for further discretionary review in these cases. In the event the petitioner unreasonably delays in filing the petition or otherwise fails to comply with a rule of procedure, the petition shall be dismissed by the court. If the petition is without merit, it shall be denied by the court.

(f) **Petition for Writ in Post-conviction Matters—Death Penalty Cases**. A petition for writ of certiorari to review orders of the trial court on motions for appropriate relief in death penalty cases shall be filed in the Supreme Court within sixty days after delivery of the transcript of the hearing on the motion for appropriate relief to the petitioning party. The responding party shall file its response within thirty days of service of the petition.

* * *

Rule 22. Mandamus and Prohibition

(a) **Petition for Writ—to Which Appellate Court Addressed**. Applications for the writs of mandamus or prohibition directed to a judge, judges, commissioner, or commissioners shall be made by filing a petition therefor with the clerk of the court to which appeal of right might lie from a final judgment entered in the cause by the judge, judges, commissioner, or commissioners to whom issuance of the writ is sought.

(b) **Petition for Writ—Filing and Service; Content**. The petition shall be filed without unreasonable delay after the judicial action sought to be prohibited or compelled has been undertaken, or has occurred, or has been refused, and shall be accompanied by proof of service on the respondent judge, judges, commissioner, or commissioners and on all other parties to the action. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and certified copies of any order or opinion or parts of the record that may be essential to an understanding of the matters set forth in the petition. The petition shall be verified by counsel or the petitioner. Upon receipt of the prescribed docket fee, the clerk shall docket the petition.

(c) **Response; Determination by Court**. Within ten days after service of the petition the respondent or any party may file a response

thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response, ~~and~~ any supporting items, and any briefs filed under Rule 28.1. Except as provided by Rule 28.1, no~~N o~~ briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

* * *

Rule 23. Supersedeas

(a) **Pending Review of Trial Tribunal Judgments and Orders**.

(1) **Application—When Appropriate**. Application may be made to the appropriate appellate court for a writ of supersedeas to stay the execution or enforcement of any judgment, order, or other determination of a trial tribunal which is not automatically stayed by the taking of appeal when an appeal has been taken, or a petition for mandamus, prohibition, or certiorari has been filed to obtain review of the judgment, order, or other determination; and (1) a stay order or entry has been sought by the applicant by deposit of security or by motion in the trial tribunal and such order or entry has been denied or vacated by the trial tribunal, or (2) extraordinary circumstances make it impracticable to obtain a stay by deposit of security or by application to the trial tribunal for a stay order.

(2) **Application—How and to Which Appellate Court Made**. Application for the writ is by petition which shall in all cases, except those initially docketed in the Supreme Court, be first made to the Court of Appeals. Except when an appeal from a superior court is initially docketed in the Supreme Court, no petition will be entertained by the Supreme Court unless application has been made first to the Court of Appeals and denied by that court.

(b) **Pending Review by Supreme Court of Court of Appeals Decisions**. Application may be made in the first instance to the Supreme Court for a writ of supersedeas to stay the execution or enforcement of a judgment, order, or other determination mandated by the Court of Appeals when a notice of appeal of right or a petition for discretionary review has been or will be timely filed, or a petition for review by

certiorari, mandamus, or prohibition has been filed to obtain review of the decision of the Court of Appeals. No prior motion for a stay order need be made to the Court of Appeals.

(c) **Petition for Writ—Filing and Service; Content**. The petition shall be filed with the clerk of the court to which application is being made and shall be accompanied by proof of service upon all other parties. The petition shall be verified by counsel or the petitioner. Upon receipt of the required docket fee, the clerk will docket the petition.

For stays of the judgments of trial tribunals, the petition shall contain a statement that stay has been sought in the court to which issuance of the writ is sought and denied or vacated by that court, or shall contain facts showing that it was impracticable there to seek a stay. For stays of any judgment, the petition shall contain: (1) a statement of any facts necessary to an understanding of the basis upon which the writ is sought; and (2) a statement of reasons why the writ should issue in justice to the applicant. The petition may be accompanied by affidavits and by any certified portions of the record pertinent to its consideration. It may be included in a petition for discretionary review by the Supreme Court under N.C.G.S. § 7A-31, or in a petition to either appellate court for certiorari, mandamus, or prohibition.

(d) **Response; Determination by Court**. Within ten days after service of the petition any party may file a response thereto with supporting affidavits or certified portions of the record not filed with the petition. Filing shall be accompanied by proof of service upon all other parties. The court for good cause shown may shorten the time for filing a response. Determination will be made on the basis of the petition, the response, ~~and~~ any supporting items, and any briefs filed under Rule 28.1. Except as provided by Rule 28.1, no~~No~~ briefs or oral argument will be received or allowed unless ordered by the court upon its own initiative.

(e) **Temporary Stay**. Upon the filing of a petition for supersedeas, the applicant may apply, either within the petition or by a separate filing, for an order temporarily staying enforcement or execution of the judgment, order, or other determination pending decision by the court upon the petition for supersedeas. If application is made by a separate filing, it shall be filed and served in the manner provided for the petition for supersedeas in Rule 23(c). The court for good cause shown in such a petition for temporary stay may issue such an order ex parte. In capital cases, such stay, if granted, shall remain in effect until the period for filing a petition for certiorari in the United States Supreme Court has passed without a petition being filed, or until certiorari on a timely filed petition has been denied by that Court. At that time, the stay shall automatically dissolve.

* * *

Rule 28. Briefs—Function and Content

(a) **Function**. The function of all briefs required or permitted by these rules is to define clearly the issues presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned. Similarly, issues properly presented for review in the Court of Appeals, but not then stated in the notice of appeal or the petition accepted by the Supreme Court for review and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court, are deemed abandoned.

(b) **Content of Appellant's Brief**. An appellant's brief shall contain, under appropriate headings and in the form prescribed by Rule 26(g) and the appendixes to these rules, in the following order:

(1) A cover page, followed by a subject index and table of authorities as required by Rule 26(g).

(2) A statement of the issues presented for review. The proposed issues on appeal listed in the printed record shall not limit the scope of the issues that an appellant may argue in its brief.

(3) A concise statement of the procedural history of the case. This shall indicate the nature of the case and summarize the course of proceedings up to the taking of the appeal before the court.

(4) A statement of the grounds for appellate review. Such statement shall include citation of the statute or statutes permitting appellate review. When an appeal is based on Rule 54(b) of the Rules of Civil Procedure, the statement shall show that there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay. When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.

(5) A full and complete statement of the facts. This should be a non-argumentative summary of all material facts underlying the matter in controversy which are necessary to

understand all issues presented for review, supported by references to pages in the record on appeal.

(6) An argument, to contain the contentions of the appellant with respect to each issue presented. Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.

The argument shall contain a concise statement of the applicable standard(s) of review for each issue, which shall appear either at the beginning of the discussion of each issue or under a separate heading placed before the beginning of the discussion of all the issues.

The body of the argument and the statement of applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies. Evidence or other proceedings material to the issue may be narrated or quoted in the body of the argument, with appropriate reference to the record on appeal, the transcript of proceedings, or exhibits.

(7) A short conclusion stating the precise relief sought.

(8) Identification of counsel by signature, typed name, post office address, telephone number, State Bar number, and e-mail address.

(9) The proof of service required by Rule 26(d).

(10) Any appendix required or allowed by this Rule 28.

(c) **Content of Appellee's Brief; Presentation of Additional Issues.** An appellee's brief shall contain a subject index and table of authorities as required by Rule 26(g), an argument, a conclusion, identification of counsel, and proof of service in the form provided in Rule 28(b) for an appellant's brief, and any appendix required or allowed by this Rule 28. It does not need to contain a statement of the issues presented, procedural history of the case, grounds for appellate review, the facts, or the standard(s) of review, unless the appellee disagrees with the appellant's statements and desires to make a restatement or unless the appellee desires to present issues in addition to those stated by the appellant.

Without taking an appeal, an appellee may present issues on appeal based on any action or omission of the trial court that deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken. Without having taken appeal or listing proposed issues as permitted by Rule 10(c), an

appellee may also argue on appeal whether a new trial should be granted to the appellee rather than a judgment notwithstanding the verdict awarded to the appellant when the latter relief is sought on appeal by the appellant. If the appellee presents issues in addition to those stated by the appellant, the appellee's brief must contain a full, non-argumentative summary of all material facts necessary to understand the new issues supported by references to pages in the record on appeal, the transcript of proceedings, or the appendixes, as appropriate, as well as a statement of the applicable standard(s) of review for those additional issues.

An appellee may supplement the record with any materials pertinent to the issues presented on appeal, as provided in Rule 9(b)(5).

(d) **Appendixes to Briefs**. Whenever the transcript of proceedings is filed pursuant to Rule 9(c)(2), the parties must file portions of the transcript as appendixes to their briefs, if required by this Rule 28(d).

(1) **When Appendixes to Appellant's Brief Are Required.** Except as provided in Rule 28(d)(2), the appellant must reproduce as appendixes to its brief:

a. those portions of the transcript of proceedings which must be reproduced in order to understand any issue presented in the brief;

b. those portions of the transcript showing the pertinent questions and answers when an issue presented in the brief involves the admission or exclusion of evidence;

c. relevant portions of statutes, rules, or regulations, the study of which is required to determine issues presented in the brief;

d. relevant items from the Rule 11(c) or Rule 18(d)(3) supplement, the study of which are required to determine issues presented in the brief.

(2) **When Appendixes to Appellant's Brief Are Not Required.** Notwithstanding the requirements of Rule 28(d)(1), the appellant is not required to reproduce an appendix to its brief with respect to an issue presented:

a. whenever the portion of the transcript necessary to understand an issue presented in the brief is reproduced in the body of the brief;

b. to show the absence or insufficiency of evidence unless there are discrete portions of the transcript

where the subject matter of the alleged insufficiency of the evidence is located; or

c. to show the general nature of the evidence necessary to understand an issue presented in the brief if such evidence has been fully summarized as required by Rule 28(b)(4) and (5).

(3) **When Appendixes to Appellee's Brief Are Required**. An appellee must reproduce appendixes to its brief in the following circumstances:

a. Whenever the appellee believes that appellant's appendixes do not include portions of the transcript or items from the Rule 11(c) or Rule 18(d)(3) supplement that are required by Rule 28(d)(1), the appellee shall reproduce those portions of the transcript or supplement it believes to be necessary to understand the issue.

b. Whenever the appellee presents a new or additional issue in its brief as permitted by Rule 28(c), the appellee shall reproduce portions of the transcript or relevant items from the Rule 11(c) or Rule 18(d)(3) supplement as if it were the appellant with respect to each such new or additional issue.

(4) **Format of Appendixes**. The appendixes to the briefs of any party shall be in the format prescribed by Rule 26(g) and shall consist of copies of transcript pages that have been deemed necessary for inclusion in the appendix under this Rule 28(d). The pages of the appendix shall be consecutively numbered, and an index to the appendix shall be placed at its beginning.

(e) **References in Briefs to the Record on Appeal**. References in the briefs to parts of the printed record, transcripts, documents included in the record on appeal pursuant to Rule 9(d), or supplements shall be to the pages in such filings where those portions appear.

(f) **Joinder of Multiple Parties in Briefs**. Any number of appellants or appellees in a single cause or in causes consolidated for appeal may join in a single brief even though they are not formally joined on the appeal. Any party to any appeal may adopt by reference portions of the briefs of others.

(g) **Additional Authorities**. Additional authorities discovered by a party after filing its brief may be brought to the attention of the court by filing a memorandum thereof with the clerk of the court and serving

copies upon all other parties. The memorandum may not be used as a reply brief or for additional argument, but shall simply state the issue to which the additional authority applies and provide a full citation of the authority. Authorities not cited in the briefs or in such a memorandum may not be cited and discussed in oral argument.

(h) **Reply Briefs.** Within fourteen days after an appellee's brief has been served on an appellant, the appellant may file and serve a reply brief, subject to the length limitations set forth in Rule 28(j). Any reply brief which an appellant elects to file shall be limited to a concise rebuttal of arguments set out in the appellee's brief and shall not reiterate arguments set forth in the appellant's principal brief. Upon motion of the appellant, the Court may extend the length limitations on such a reply brief to permit the appellant to address new or additional issues presented for the first time in the appellee's brief. Otherwise, motions to extend reply brief length limitations or to extend the time to file a reply brief are disfavored.

(i) [Reserved]~~**Amicus Curiae Briefs**. An amicus curiae may file a brief with the permission of the appellate court in which the appeal is docketed.~~

~~(1) **Motion**. To obtain the court's permission to file a brief, amicus curiae shall file a motion with the court that states concisely the nature of amicus curiae's interest, the reasons why the brief is desirable, the issues of law to be addressed in the brief, and the position of amicus curiae on those issues.~~

~~(2) **Brief**. The motion must be accompanied by amicus curiae's brief. The amicus curiae brief shall contain, in a footnote on the first page, a statement that identifies any person or entity—other than amicus curiae, its members, or its counsel—who, directly or indirectly, either wrote the brief or contributed money for its preparation.~~

~~(3) **Time for Filing**. If the amicus curiae brief is in support of a party to the appeal, then amicus curiae shall file its motion and brief within the time allowed for filing that party's principal brief. If amicus curiae's brief does not support either party, then amicus curiae shall file its motion and proposed brief within the time allowed for filing appellee's principal brief.~~

~~(4) **Service on Parties**. When amicus curiae files its motion and brief, it must serve a copy of its motion and brief on all parties to the appeal.~~

~~(5) **Action by Court**. Unless the court orders otherwise, it will decide amicus curiae's motion without responses or argument. An amicus motion filed by an individual on his or her own behalf will be disfavored.~~

~~(6) **Reply Briefs**. A party to the appeal may file and serve a reply brief that responds to an amicus curiae brief no later than thirty days after having been served with the amicus curiae brief. A party's reply brief to an amicus curiae brief shall be limited to a concise rebuttal of arguments set out in the amicus curiae brief and shall not reiterate or rebut arguments set forth in the party's principal brief. The court will not accept a reply brief from an amicus curiae.~~

~~(7) **Oral Argument**. The court will allow a motion of an amicus curiae requesting permission to participate in oral argument only for extraordinary reasons.~~

(j) **Word-Count Limitations Applicable to Briefs Filed in the Court of Appeals**. ~~Each brief filed in the Court of Appeals, whether filed by an appellant, appellee, or amicus curiae, shall be set in font as set forth in Rule 26(g)(1) and described in Appendix B to these rules.~~ A principal brief filed in the Court of Appeals may contain no more than 8,750 words. A reply brief filed in the Court of Appeals may contain no more than 3,750 words. ~~An amicus curiae brief may contain no more than 3,750 words.~~

(1) **Portions of Brief Included in Word Count**. Footnotes and citations in the body of the brief must be included in the word count. Covers, captions, indexes, tables of authorities, certificates of service, certificates of compliance with this rule, counsel's signature block, and appendixes do not count against these word-count limits.

(2) **Certificate of Compliance**. Parties shall submit with the brief, immediately before the certificate of service, a certification, signed by counsel of record, or in the case of parties filing briefs pro se, by the party, that the brief contains no more than the number of words allowed by this rule. For purposes of this certification, counsel and parties may rely on word counts reported by word-processing software, as long as footnotes and citations are included in those word counts.

* * *

Rule 28.1. Amicus Curiae

(a) **Overview**. An amicus curiae may file a motion asking the court for permission to submit a brief about whether a petition should be allowed or about an issue on appeal. An amicus who has been permitted to submit a brief about an issue on appeal may also file a motion asking for permission to participate in oral argument. The court will not accept responses to the motions described in this rule.

(b) **Submitting an Amicus Brief.**

(1) **Motion and Brief Filed Contemporaneously**. An amicus curiae must file its motion and proposed brief contemporaneously as separate documents.

(2) **Content of Motion**. An amicus curiae's motion asking for permission to submit a brief must state the nature of the amicus's interest, the reasons why the brief would be beneficial to the court, the issues that are addressed in the brief, and the amicus's position on those issues.

(3) **Content of Brief**.

a. **Organization**. An amicus brief should be organized as follows: a cover page, a subject index and table of authorities under Rule 26(g)(2), a statement about the nature of the amicus curiae's interest, a list of the issues addressed in the brief, an argument, a conclusion stating the outcome sought, an identification of counsel under Rule 26(g)(3), and a proof of service under Rule 26(d).

b. **Argument**. An amicus curiae's argument should focus on the question before the court. Therefore, an amicus brief about a petition should address whether the grounds to allow the petition are satisfied, and an amicus brief about one or more of the issues on appeal should address those issues.

c. **Disclosure Footnote**. An amicus brief must contain a statement that either (i) identifies every person or entity (other than the amicus curiae, its members, or its counsel) who helped write the brief or who contributed money for its preparation, or (ii) specifies that there is no such person or entity. The statement must appear in a footnote on the first page of the amicus brief.

d. **Word-Count Limitation at the Court of Appeals**. An amicus brief filed in the Court

of Appeals may contain no more than 3,750 words. An amicus curiae must follow Rule 28(j)(1) to determine the portions of its brief that are included in the word count and must submit with the brief a certificate of compliance as described in Rule 28(j)(2).

(4) **Time for Filing**. If an amicus brief supports a party, then the amicus curiae must file its motion and proposed brief no later than seven days after that party's petition, response to a petition, or principal brief is filed. If an amicus brief does not support any party, then the amicus must file its motion and proposed brief no later than seven days after the response is filed when the amicus brief is about a petition and no later than seven days after the appellee brief is filed when the amicus brief is about an issue on appeal.

(5) **Service on Parties.** When an amicus curiae files its motion and proposed brief, it must serve a copy of both documents on the parties.

(6) **Reply Briefs of Parties**. A party may file a reply brief that is limited to a rebuttal of the arguments set out in the amicus brief. The reply brief must be filed no later than ten days after having been served with an amicus brief about a petition and no later than thirty days after having been served with an amicus brief about an issue on appeal. The court will not accept a reply brief from an amicus curiae.

(c) **Participating in Oral Argument.**

(1) **Standard.** The court will permit an amicus curiae to participate in oral argument only for good cause shown.

(2) **Content of Motion**. An amicus curiae's motion asking for permission to participate in oral argument must include:

a. a description of how the amicus curiae's participation would aid the court's decision-making process; and

b. a statement that indicates whether a party has agreed to yield time to the amicus curiae.

(3) **Time for Filing**. An amicus curiae must file its motion no later than seven days after the clerk sends notice that the appeal has been calendared for oral argument.

(4) **Service on Parties**. When an amicus curiae files its motion, it must serve a copy of the motion on the parties.

(d) **Identification of Amicus Curiae**. The title of an amicus motion and the title of an amicus brief shall identify the names of all individuals or legal entities joining the motion or brief. If there are so many amici that listing each name is not practical, then the amici may instead list a smaller number of names followed by "et al." in the title of the document and include a full list of the amici in an appendix. For the purpose of this rule, the phrase "individuals or legal entities" does not include assumed names, aliases, and unincorporated associations.

* * *

Rule 31. Petition for Rehearing

(a) **Time for Filing; Content**. A petition for rehearing may be filed in a civil action within fifteen days after the mandate of the court has been issued. The petition shall state with particularity the points of fact or law that, in the opinion of the petitioner, the court has overlooked or misapprehended and shall contain such argument in support of the petition as petitioner desires to present. It shall be accompanied by a certificate of at least two attorneys who for periods of at least five years, respectively, shall have been members of the bar of this State and who have no interest in the subject of the action and have not been counsel for any party to the action, that they have carefully examined the appeal and the authorities cited in the decision, and that they consider the decision in error on points specifically and concisely identified. Oral argument in support of the petition will not be permitted.

(b) **How Addressed; Filed**. A petition for rehearing shall be addressed to the court that issued the opinion sought to be reconsidered.

(c) **How Determined**. Within thirty days after the petition is filed, the court will either grant or deny the petition. A determination to grant or deny will be made solely upon the written petition; no written response will be received from the opposing party, no amicus briefs will be received, and no oral argument ~~by any party~~ will be heard. Determination by the court is final. The rehearing may be granted as to all or fewer than all points suggested in the petition. When the petition is denied, the clerk shall forthwith notify all parties.

(d) **Procedure When Granted**. Upon grant of the petition the clerk shall forthwith notify the parties that the petition has been granted. The case will be reconsidered solely upon the record on appeal, the petition to rehear, new briefs of both parties, and the oral argument if one has been ordered by the court. The briefs shall be addressed solely to

the points specified in the order granting the petition to rehear. The petitioner's brief shall be filed within thirty days after the case is certified for rehearing, and the opposing party's brief, within thirty days after petitioner's brief is served. Filing and service of the new briefs shall be in accordance with the requirements of Rule 13. No reply brief shall be received on rehearing. If the court has ordered oral argument, the clerk shall give notice of the time set therefor, which time shall be not less than thirty days after the filing of the petitioner's brief on rehearing.

(e) **Stay of Execution**. When a petition for rehearing is filed, the petitioner may obtain a stay of execution in the trial court to which the mandate of the appellate court has been issued. The procedure is as provided by Rule 8 of these rules for stays pending appeal.

(f) **Waiver by Appeal from Court of Appeals**. The timely filing of a notice of appeal from, or of a petition for discretionary review of, a determination of the Court of Appeals constitutes a waiver of any right thereafter to petition the Court of Appeals for rehearing as to such determination or, if a petition for rehearing has earlier been filed, an abandonment of such petition.

(g) **No Petition in Criminal Cases**. The courts will not entertain petitions for rehearing in criminal actions.

* * *

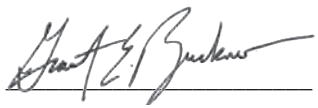
These amendments to the North Carolina Rules of Appellate Procedure become effective on 20 November 2023.

These amendments shall be published in the North Carolina Reports and posted on the rules web page of the Supreme Court of North Carolina.

Ordered by the Court in Conference, this the 18th day of October 2023.

For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 18th day of October 2023.



Grant E. Buckner
Clerk of the Supreme Court

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE DISCIPLINE AND DISABILITY OF ATTORNEYS

The following amendment to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 22, 2023.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01B, Section .0100, *Discipline and Disability of Attorneys*, be amended as shown in the following attachment:

ATTACHMENT 1: 27 N.C.A.C. 01B, Section .0100, Rule .0113, *Proceedings Before the Grievance Committee*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 22, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of September, 2023.

s/Alice Neece Mine
Alice Neece Mine, Secretary

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

This the 18th day of October, 2023.

s/Paul Newby
Paul Newby, Chief Justice

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

This the 18th day of October, 2023.

s/Riggs, J.
For the Court

SUBCHAPTER 1B DISCIPLINE AND DISABILITY RULES

SECTION .0100 DISCIPLINE AND DISABILITY OF ATTORNEYS

27 NCAC 01B .0113 PROCEEDINGS BEFORE THE GRIEVANCE COMMITTEE

(a) Probable Cause . . . .

. . .

(j) Letters of Warning

(1) . . . .

. . .

(3) Service of Process:

(A) If valid service upon the respondent has previously been accomplished by certified mail, personal service, publication, or acceptance of service by the respondent or the respondent's counsel, a copy of the letter of warning may be served upon the respondent by mailing a copy of the letter of warning to the respondent's last known address on file with the State Bar. Service shall be deemed complete upon deposit of the letter of warning in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(B) If valid service upon the respondent has not previously been accomplished by certified mail, personal service, publication, or acceptance of service by the respondent or the respondent's counsel, a copy of the letter of warning shall be served upon the respondent by certified mail or personal service. If diligent efforts to serve the respondent by certified mail and by personal service are unsuccessful, the letter of warning shall be served by mailing a copy of the letter of warning to the respondent's last known address on file with the State Bar. Service shall be deemed complete upon deposit of the letter of warning in a postpaid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service. ~~Within 15 days after service, the respondent may refuse the letter of warning and request a hearing before the commission~~

~~to determine whether the respondent violated the Rules of Professional Conduct. Such refusal and request will be in writing, addressed to the Grievance Committee, and served on the secretary by certified mail, return receipt requested. The refusal will state that the letter of warning is refused. If the respondent does not serve a refusal and request within 15 days after service upon the respondent of the letter of warning, the letter of warning will be deemed accepted by the respondent. An extension of time may be granted by the chairperson of the Grievance Committee for good cause shown.~~

(4) Within 15 days after service, the respondent may refuse the letter of warning and request a hearing before the commission to determine whether the respondent violated the Rules of Professional Conduct. Such refusal and request will be in writing, addressed to the Grievance Committee, and served on the secretary by certified mail, return receipt requested. The refusal will state that the letter of warning is refused. If the respondent does not serve a refusal and request within 15 days after service upon the respondent of the letter of warning, the letter of warning will be deemed accepted by the respondent. An extension of time may be granted by the chairperson of the Grievance Committee for good cause shown.

(~~4~~5) In cases in which the respondent refuses the letter of warning, the counsel will prepare and file a complaint against the respondent at the commission.

(k) Admonitions, Reprimands, and Censures

. . . .

. . . .

History Note: *Authority G.S. 84-23; 84-28;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court:
March 3, 1999; February 3, 2000; October 8, 2009;
March 27, 2019; September 25, 2020;
October 18, 2023.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 22, 2023.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01D, Section .1500, *Rules Governing the Administration of the Continuing Legal Education Program*, be amended as shown in the following attachments:

ATTACHMENT 2-A: 27 N.C.A.C. 01D, Section .1500, Rule .1517, *Exemptions*

ATTACHMENT 2-B: 27 N.C.A.C. 01D, Section .1500, Rule .1520, *Requirements for Program Approval*

ATTACHMENT 2-C: 27 N.C.A.C. 01D, Section .1500, Rule .1522, *Registered Sponsors*

ATTACHMENT 2-D: 27 N.C.A.C. 01D, Section .1500, Rule .1525, *Professionalism Requirement for New Members (PNA)*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 22, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of September, 2023.

s/Alice Neece Mine
Alice Neece Mine, Secretary

After examining the foregoing amendment to the Rules and Regulations of the North Carolina State Bar as adopted by the Council

of the North Carolina State Bar, it is my opinion that the same is not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 18th day of October, 2023.

s/Paul Newby
Paul Newby, Chief Justice

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

This the 18th day of October, 2023.

s/Riggs, J.
For the Court

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1517 EXEMPTIONS

(a) Notification of Board. To qualify for an exemption ~~for a particular calendar year~~, a member shall notify the ~~board~~Board of the exemption ~~in~~during the annual membership renewal process or in another manner as directed by the Board. ~~report for that calendar year sent to the member pursuant to Rule .1522 of this subchapter.~~ All active members who are exempt are encouraged to attend and participate in legal education programs.

(b) Government Officials and Members of Armed Forces. The governor, the lieutenant governor, and all members of the council of state, members of the United States Senate, members of the United States House of Representatives, members of the North Carolina General Assembly, full-time principal chiefs and vice-chiefs of any Indian tribe officially recognized by the United States or North Carolina state governments, and members of the United States Armed Forces on full-time active duty are exempt from the requirements of these rules for any calendar year in which they serve some portion thereof in such capacity.

(c) Judiciary and Clerks. Members of the state judiciary who are required by virtue of their judicial offices to take ~~an average of (twelve) 12 or more hours of~~ continuing judicial or other legal education ~~annually~~ and all members of the federal judiciary are exempt from the requirements of these rules for any calendar year in which they serve some portion thereof in such judicial capacities. Additionally, ~~A~~a full-time law clerk for a member of the federal or state judiciary is exempt from the requirements of these rules for any calendar year in which the clerk serves some portion thereof in such capacity.~~, provided, however, that~~

~~(1) the exemption shall not exceed two consecutive calendar years; and, further provided, that~~

~~(2) the clerkship begins within one year after the clerk graduates from law school or passes the bar examination for admission to the North Carolina State Bar whichever occurs later.~~

(d) Nonresidents. The Board may exempt an active member from the continuing legal education requirements if, for at least six consecutive

months immediately prior to requesting an exemption, (i) the member resides outside of North Carolina, (ii) the member does not practice law in North Carolina, and (iii) the member does not represent North Carolina clients on matters governed by North Carolina law. ~~Any active member residing outside of North Carolina who does not practice in North Carolina for at least six (6) consecutive months and does not represent North Carolina clients on matters governed by North Carolina law shall be exempt from the requirements of these rules.~~

(e) Law Teachers and General Assembly Employees. An exemption from the requirements of these rules shall be given to any active member who does not practice in North Carolina or represent North Carolina clients on matters governed by North Carolina law and who is:

(1) A full-time teacher at the School of Government ~~(formerly the Institute of Government)~~ of the University of North Carolina;

(2) A full-time teacher at a law school in North Carolina that is accredited by the American Bar Association; ~~or~~

(3) A full-time teacher of law-related courses at a graduate level professional school accredited by its respective professional accrediting agency~~.~~; or

(4) A full-time employee of the North Carolina General Assembly.

(f) Special Circumstances Exemptions. The ~~board~~Board may exempt an active member from the continuing legal education requirements for a period of not more than one year at a time upon a finding by the ~~board~~Board of special circumstances unique to that member constituting undue hardship or other reasonable basis for exemption.~~exemption, or for a longer period upon a finding of a permanent disability.~~

(g) Pro Hac Vice Admission. Nonresident ~~attorneys~~lawyers from other jurisdictions who are temporarily admitted to practice in a particular case or proceeding pursuant to the provisions of G.S. 84-4.1 shall not be subject to the requirements of these rules.

(h) Senior ~~Status~~ Exemption. The ~~board~~Board may exempt an active member from the continuing legal education requirements if

(1) the member is ~~sixty-five~~ 65 years of age or older; and

(2) the member does not render legal advice to or represent a client unless ~~the member associates with~~under the supervision of another active member who assumes responsibility for the advice or representation.

(i) Bar Examiners. Members of the North Carolina Board of Law Examiners are exempt from the requirements of these rules for any calendar year in which they serve some portion thereof in such capacity. ~~CLE Record During Exemption Period. During a calendar year in which the records of the board indicate that an active member is exempt from the requirements of these rules, the board shall not maintain a record of such member's attendance at accredited continuing legal education programs. Upon the termination of the member's exemption, the member may request carry over credit up to a maximum of twelve (12) credits for any accredited continuing legal education program attended during the calendar year immediately preceding the year of the termination of the exemption. Appropriate documentation of attendance at such programs will be required by the board.~~

~~(j) Permanent Disability. Attorneys who have a permanent disability that makes attendance at CLE programs inordinately difficult may file a request for a permanent substitute program in lieu of attendance and shall therein set out continuing legal education plans tailored to their specific interests and physical ability. The board shall review and approve or disapprove such plans on an individual basis and without delay.~~

(~~k~~j) Application for Substitute Compliance and Exemptions. Other requests for substitute compliance, partial waivers, and/or other exemptions for hardship or extenuating circumstances may be granted by the ~~board~~Board on an annual ~~yearly~~ basis upon written application of the ~~attorney~~ member.

~~(l) Bar Examiners. Credit is earned through service as a bar examiner of the North Carolina Board of Law Examiners. The board will award 12 hours of CLE credit for the preparation and grading of a bar examination by a member of the North Carolina Board of Law Examiners.~~

(k) Effect of Annual Exemption on CLE Requirements. Exemptions are granted on an annual basis and must be claimed each year. An exempt member's new reporting period will begin on March 1 of the year for which an exemption is not granted. No credit from prior years may be carried forward following an exemption.

(l) Exemptions from Professionalism Requirement for New Members.

(1) Licensed in Another Jurisdiction. A newly admitted member who is licensed by a United States jurisdiction other than North Carolina for five or more years prior to admission to practice in North Carolina is exempt from

the PNA program requirement and must notify the Board of the exemption during the annual membership renewal process or in another manner as directed by the Board.

(2) Inactive Status. A newly admitted member who is transferred to inactive status in the year of admission to the North Carolina State Bar is exempt from the PNA program requirement but, upon the entry of an order transferring the member back to active status, must complete the PNA program in the reporting period that the member is subject to the requirements set forth in Rule .1518(b) unless the member qualifies for another exemption in this rule.

(3) Other Rule .1517 Exemptions. A newly admitted active member who qualifies for an exemption under Rules .1517(a) through (i) of this subchapter shall be exempt from the PNA program requirement during the period of the Rule .1517 exemption. The member shall notify the Board of the exemption during the annual membership renewal process or in another manner as directed by the Board. The member must complete the PNA program in the reporting period the member no longer qualifies for the Rule .1517 exemption.

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: February 12, 1997; October 1, 2003; March 3, 2005; October 7, 2010; October 2, 2014; June 9, 2016; September 22, 2016; September 25, 2019; October 18, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1520 REQUIREMENTS FOR PROGRAM APPROVAL

(a) . . . .

(b) Program Application Deadlines and Fee Schedule.

(1) Program Application and Processing Fees. Program applications submitted by sponsors shall comply with the deadlines and Fee Schedule set by the Board and approved by the Council, including any additional processing fees for late or expedited applications.

(2) Free Programs. Sponsors offering programs without charge to all attendees, including non-members of any membership organization, shall pay a reduced application fee.

(3) Member Applications. Members may submit a program application for a previously unapproved out of state, in-person program after the program is completed, accompanied by a reduced application fee. On-demand program applications must be submitted by the program sponsor.

(4) On-Demand CLE Programs. Approved on-demand programs are valid for three years. During this initial three-year term, sponsors shall pay an annual renewal fee each year in the amount set by the Board. After the initial three-year term, programs may be ~~renewed~~ approved annually in a manner approved by the Board that includes a certification that the program content continues to meet the accreditation standards in Rule .1519 and the payment of a program ~~renewal~~ recertification fee.

(5) Repeat Programs. Sponsors seeking approval for a ~~repeat~~ program, or portion of a program, that was previously approved by the Board within the same CLE year (March 1 through the end of February) shall pay a reduced application fee.

(c) . . . .

. . . .

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: February 27, 2003; March 3, 2005; October 7, 2010; March 6, 2014; April 5, 2018; September 25, 2019; June 14, 2023; October 18, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D.1522 ~~Reserved~~ REGISTERED SPONSORS

(a) Registered Sponsor Status. Notwithstanding the requirements of Rule .1520(b), the following rules apply to registered sponsors:

(1) Presumptive Approval of Programs. Once an organization is approved as a registered sponsor, the continuing legal education programs sponsored by that organization are presumptively approved for credit; however, application must still be made to the board for approval of each program pursuant to Rule .1520(a). The Board will provide notice of its decision on CLE program approval requests pursuant to the schedule set by the Board and approved by the Council. A program will be deemed approved if the notice is not timely provided by the Board pursuant to the schedule. The registered sponsor may request reconsideration of an unfavorable accreditation decision by submitting a letter of appeal to the Board within 15 days of receipt of the notice of disapproval. The decision by the Board on an appeal is final.

(2) Professionalism for New Admittees (PNA) Programs. Registered sponsors shall be permitted to provide PNA programs approved pursuant to Rule .1525 of this subchapter.

(3) Other services provided by the Board. The CLE Board may, in its discretion, provide additional services and adjustments to registered sponsors, including but not limited to reduced program application fees, different application deadlines, and optional payment structures. However, all registered sponsors shall be treated uniformly.

(b) Eligibility Standards. The Board may, in its sole discretion, register a sponsor if it meets the following requirements:

(1) The sponsor shall submit an application in the manner directed by the Board;

(2) The application shall contain all information requested by the Board and include payment of an application fee in an amount set by the Board;

(3) The sponsor must have had at least 20 programs approved for credit in the year prior to applying for Registered Sponsor status; and

(4) The sponsor shall suitably demonstrate a history of consistent compliance with the rules of this subchapter.

(c) Annual Renewal. Registered Sponsors must renew their status annually in the time and manner directed by the Board, including the payment of an annual renewal fee in an amount set by the Board.

(d) Revocation of Registered Sponsor Status. The Board may, at any time and in its sole discretion, revoke the registration of a registered sponsor for failure to satisfy the requirements of this subchapter. A sponsor who has its status revoked may re-apply for Registered Sponsor Status pursuant to Paragraph (b) of this rule.

(e) Previously Registered Sponsors. A sponsor that was previously designated by the board as a registered sponsor prior to the effective date of this revised rule shall maintain its registered sponsor status for the duration of the CLE year in which this rule becomes effective but shall be required to renew its status annually subject to the revised eligibility requirements in Paragraph (b) of this rule.

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: March 7, 1996; March 6, 1997; February 3, 2000; March 3, 2005; September 25, 2019; June 14, 2023; October 18, 2023;
Rule transferred from 27 N.C. Admin. Code 1D .1524 on June 14, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1500 – RULES GOVERNING THE ADMINISTRATION OF THE CONTINUING LEGAL EDUCATION PROGRAM

27 NCAC 01D .1525 PROFESSIONALISM REQUIREMENT FOR NEW MEMBERS (PNA)

(a) Content and Accreditation. The State Bar PNA program shall consist of 12 hours of training in subjects designated by the State Bar including, but not limited to, professional responsibility, professionalism, and law office management. The chairs of the Ethics and Grievance Committees, in consultation with the chief counsel to those committees, shall annually establish the content of the program and shall publish any changes to the required content on or before January 1 of each year. PNA programs may only be provided by sponsors registered under Rule .1522 of this subchapter or judicial district bars specifically approved by the Board to offer PNA programs. To be approved as a PNA program, the program must satisfy the annual content requirements, and a sponsor must submit a detailed description of the program to the Board for approval. A sponsor may not advertise a PNA program until approved by the Board. PNA programs shall be specially designated by the Board and no program that is not so designated shall satisfy the PNA program requirement for new members.

(b) . . . .

. . . .

History Note: *Authority - Order of the North Carolina Supreme Court, October 7, 1987, 318 N.C. 711;*
Readopted Eff. December 8, 1994;
Amendments Approved by the Supreme Court: March 3, 1999; June 14, 2023; October 18, 2023.

AMENDMENT TO THE RULES AND REGULATIONS OF THE NORTH CAROLINA STATE BAR:

RULES GOVERNING THE SPECIALIZATION PROGRAM

The following amendments to the Rules and Regulations and the Certificate of Organization of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 22, 2023.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Rules and Regulations of the North Carolina State Bar as set forth in 27 N.C.A.C. 01D, Section .1700, *The Plan of Legal Specialization*, and Section .3400, *Certification Standards for the Child Welfare Specialty*, be amended as shown in the following attachments:

ATTACHMENT 3-A: 27 N.C.A.C. 01D, Section .1700, Rule .1723, *Revocation or Suspension of a Certification of a Specialist*

ATTACHMENT 3-B: 27 N.C.A.C. 01D, Section .1700, Rule .1725, *Areas of Specialty*

ATTACHMENT 3-C: **[NEW]** 27 N.C.A.C. 01D, Section .3400, Rule .3407, *Applicability of Other Requirements*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 22, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of September, 2023.

s/Alice Neece Mine
Alice Neece Mine, Secretary

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

This the 18th day of October, 2023.

s/Paul Newby
Paul Newby, Chief Justice

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

This the 18th day of October, 2023.

s/Riggs, J.
For the Court

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1700 THE PLAN OF LEGAL SPECIALIZATION

27 NCAC 01D .1723 REVOCATION OR SUSPENSION OF CERTIFICATION AS A SPECIALIST

(a) . . . .

(b) Discretionary Revocation or Suspension. The board may revoke its certification of a lawyer as a specialist if the specialty is terminated or may suspend or revoke such certification if it is determined, upon the board's own initiative or upon recommendation of the appropriate specialty committee and after hearing before the board as provided in Rule .1802 and Rule .1803, that

(1) . . . ;

. . .

(6) the lawyer certified as a specialist received ~~public~~ professional discipline from the North Carolina State Bar ~~on or after the effective date of this provision,~~ other than suspension or disbarment from practice and the board finds that the conduct for which the professional discipline was received reflects adversely on the specialization program and the lawyer's qualification as a specialist; ~~or~~

(7) the lawyer certified as a specialist ~~was sanctioned or~~ received ~~public~~ professional discipline ~~on or after the effective date of this provision~~ from any state or federal court or tribunal or, if the lawyer is licensed in another jurisdiction, from the regulatory authority of that jurisdiction in the United States, or the lawyer certified as a specialist was found to have engaged in misconduct by any state or federal court or tribunal, and the board finds that the conduct for which the sanctions or professional discipline was received reflects adversely on the specialization program and the lawyer's qualification as a specialist~~.~~; or

(8) the lawyer certified as a specialist was criminally convicted by any state or federal court and the board finds that the conduct underlying the conviction reflects adversely on the specialization program and the lawyer's qualification as a specialist.

(c) Report to Board. A lawyer certified as a specialist has a duty to inform the board promptly of any professional discipline received by the lawyer, any judicial finding of misconduct, any criminal conviction, or any fact or circumstance described in Rules .1723(a) and (b) above. The board may consider a lawyer's failure to promptly report in determining whether to suspend or revoke certification.

(d) . . . .

History Note: *Authority G.S. 84-23;*
Readopted Effective December 8, 1994;
Amendments Approved by the Supreme Court:
February 5, 2004; April 5, 2018; October 18, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .1700 THE PLAN OF LEGAL SPECIALIZATION

27 NCAC 01D .1725 AREAS OF SPECIALTY

There are hereby recognized the following specialties:

(1) . . . .

. . .

(5) criminal law

(a) federal ~~and state~~ criminal law

(b) state criminal law

(c) juvenile delinquency law

(6) . . . .

. . .

(14) child welfare law

History Note: *Authority G.S. 84-23;*
Readopted Effective December 8, 1994;
Amendments Approved by the Supreme Court: July 29, 1998; February 27, 2003; February 5, 2009; March 8, 2012; March 6, 2014; April 5, 2018; October 18, 2023.

SUBCHAPTER 01D – RULES OF THE STANDING COMMITTEES OF THE NORTH CAROLINA STATE BAR

SECTION .3400 – CERTIFICATION STANDARDS FOR THE CHILD WELFARE LAW SPECIALTY

27 NCAC 01D .3407 APPLICABILITY OF OTHER REQUIREMENTS

The specific standards set forth herein for certification of specialists in child welfare law are subject to any general requirement, standard, or procedure adopted by the board applicable to all applicants for certification or continued certification.

History Note: *Authority G.S. 84-23;*
Approved by the Supreme Court: October 18, 2023.

BOARD OF LAW EXAMINERS

AMENDMENT TO THE BOARD OF LAW EXAMINERS' RULES:

RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

The following amendment to the Board of Law Examiner's Rules Governing Admission to the Practice of Law in North Carolina was duly adopted by the Council of the North Carolina State Bar at its quarterly meeting on July 22, 2023.

BE IT RESOLVED by the Council of the North Carolina State Bar that the Board of Law Examiners' Rules Governing Admission to the Practice of Law as set forth in the Board of Law Examiners' Rules, Section .0500, *Requirements for Applicants*, be amended as shown in the following attachment:

ATTACHMENT 5: Rule .0503, *Requirements for Military Spouse Comity Applicants*

NORTH CAROLINA
WAKE COUNTY

I, Alice Neece Mine, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was duly adopted by the Council of the North Carolina State Bar at a regularly called meeting on July 22, 2023.

Given over my hand and the Seal of the North Carolina State Bar, this the 18th day of September, 2023.

s/Alice Neece Mine
Alice Neece Mine, Secretary

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

This the 18th day of October, 2023.

s/Paul Newby
Paul Newby, Chief Justice

On this date, the foregoing amendment to the Rules and Regulations of the North Carolina State Bar was entered upon the minutes of the Supreme Court. The amendment shall be published in the forthcoming

volume of the Advance Sheets as provided by the Act incorporating the North Carolina State Bar, and as otherwise directed by the Appellate Division Reporter.

This the 18th day of October, 2023.

s/Riggs, J.
For the Court

BOARD OF LAW EXAMINERS' RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW

SECTION .0500

RULE .0501 REQUIREMENTS FOR MILITARY SPOUSE COMITY APPLICANTS

A Military Spouse Comity Applicant, upon written application may, in the discretion of the Board, be granted a license to practice law in the State of North Carolina without written examination provided that:

(1) The applicant fulfills all of the requirements of Rule .0502, except that:

(a) in lieu of the requirements of paragraph (3) of Rule .0502, a Military Spouse Comity Applicant shall certify that said applicant has read the Rules of Professional Conduct promulgated by the North Carolina State Bar and shall prove to the satisfaction of the Board that the Military Spouse Comity Applicant is duly licensed to practice law in a state, or territory of the United States, or the District of Columbia, and that the Military Spouse Comity Applicant has been for at least four out of the last eight years immediately preceding the filing of this application with the Executive Director, actively and substantially engaged in the practice of law. Practice of law for the purposes of this rule shall be defined as it would be defined for any other comity applicant; and

(b) Paragraph (4) of Rule .0502 shall not apply to a Military Spouse Comity Applicant.

(2) Military Spouse Comity Applicant Defined. A Military Spouse Comity Applicant is any person who is

(a) An attorney at law duly admitted to practice in another state or territory of the United States, or the District of Columbia; and

(b) Identified by the Department of Defense (or, for the Coast Guard when it is not operating as a service in the Navy, by the Department of Homeland Security) as the spouse of a service member of the United States Uniformed Services; and

(c) Is residing or intends within the next six months to be residing, in North Carolina due to the service member's

military orders for a permanent change of station to the State of North Carolina.

(3) Procedure. In addition to the documentation required by paragraph (1) of Rule .0502, a Military Spouse Comity Applicant must file with the Board the following:

(a) A copy of the service member's military orders reflecting a permanent change of station to a military installation in North Carolina; and

(b) A military identification card which lists the Military Spouse Applicant as the spouse of the service member.

(4) Fee. ~~A Military Spouse Comity Applicant shall pay a fee of $1,500.00 in lieu of the fee required in paragraph (2) of Rule .0502. This fee shall be non-refundable.~~No application fee will be required for Military Spouse Comity Applicants.

History Note: *Amendments Approved by the Supreme Court: October 18, 2023.*

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